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Criminal Law Enforcement and a Free Society

Frank D. Day

CRIMINAL LAW ENFORCEMENT AND A FREE SOCIETY

FRANK D. DAY

Frank D. Day has been Professor of Police Administration, School of Police Administration and Public Safety, Michigan State University, East Lansing, since 1956. Professor Day served for over 20 years as a member of the New York City Police Department retiring in the rank of lieutenant. He is a graduate in law and from 1953 to 1956 served on the staff of the Southern Police Institute. He is an Associate Editor of this Journal and co-author of *Introduction to Law Enforcement* (Thomas 1962).—EDITOR.

FREEDOM UNBOUNDED

For want of a nail the shoe was lost; for want of a shoe the horse was lost; and, for want of "reasonable" arrest laws a case was lost. This happens every day, not in a single case but in many cases, in which serious violations of criminal laws are involved. They stand as mute witnesses to the fact that many vicious criminals are turned loose on technicalities to continue on the morrow with their depredations against society.

A decision handed down by the New York Court of Appeals in *People* v. *Meyer*, 11 N.Y. 2d 162, 182 N.E. 2d 103, decided April 5, 1962, is noteworthy in this respect. The defendant was arrested for robbery. Immediately after his arrest he was taken before a magistrate. The magistrate informed the accused of all of his rights, including his right to counsel. The accused, at this time, requested none. He was thereafter taken downtown by a detective. While on the way, he said to the detective, *not* in response to any question: "Assuming I am the fellow: what do you think I could get if I did admit it? Can you work out some sort of a deal?" This took place only minutes after he had been fully advised of his rights, before he was indicted, and his statement was *unsolicited* and *voluntarily* made. Nevertheless, the Court of Appeals held that such statement was inadmissible. Many conscientious persons who are concerned directly in the administration of criminal justice pause to ask: "What is the rationale of such a decision?" Similarly, many decisions that result in the release of known criminals due to unrealistic interpretations of arrest laws, especially as to what constitutes reasonable cause to arrest, evoke a like query.[1]

[1] For example see *Rios* v. *United States*, 364 U.S. 253, 80 S.Ct. 1431 (1960); *Henry* v. *United States*, 361 U.S. 98, 80 S.Ct. 168 (1959); and, *Miller* v. *United States*, 357 U.S. 301, 78 S.Ct. 1190 (1958).

It is archaic arrest laws, however, that must share much of the burden for the imbalance that exists today that gives to criminals more protection than is provided law-abiding citizens. Basically, the same arrest laws, spawned around the middle of the twelfth century in the setting of a simple agrarian society when the mace and crossbow were in style, define today the authority of peace officers and private persons to arrest. Modern law enforcement, therefore, is handicapped in its attempt to discharge effectively its twin mission—to prevent crime and protect society—when it stands armed with arrest laws that have changed hardly at all since their gestation. This is the great dilemma that faces not only law enforcement but, in the final analysis, society as well if it is to endure.

DISRESPECT FOR LAW AND AUTHORITY

History tells us, concludes Oxford Historian, Charles Reith, in his study, THE BLIND EYE OF HISTORY, that every nation that has failed to enforce its rules has perished.[2] Consequently, the law enforcement services in this country and the laws under which they must discharge their tasks, should be of great concern to all Americans.

The evidence indicates, however, that far too often, their concern is apathetic at best and, in general, non-existent. It is not uncommon to read news stories of acts of "MOBOCRACY"; that is, incidents of people virtually waging open warfare against police officers lawfully engaged in carrying out their sworn duties. The Honorable Gerald S. Levin, Presiding Judge of the Criminal Division of the Superior Court in San Francisco, at a meeting of the Criminal Law Section of the American Bar Association in San Francisco, August 6, 1962, said:

> Recently I sat through the trial of a case where an individual was arrested for the offense

[2] London, England: Faber and Faber Ltd., 1952.

of burglary. The testimony indicated that the defendant seized the gun of the policeman and pointed it at him. He was disarmed by another policeman at the scene. During this altercation a gathering crowd booed the police and applauded the individual, although they had no knowledge of the reason for the arrest.

The same thing has occurred at athletic contests. Frequently policemen who are endeavoring to perform their duties are ridiculed and assaulted by members of the public. This attitude of the public was referred to recently by J. Edgar Hoover writing about two officers who, when making an arrest, were mobbed and beaten by bystanders: "While the officers were being beaten, not one citizen could or would muster the courage to assist them or even to call for additional help so the men could be properly defended."

Illustrative are the headlines which appeared in the San Francisco newspapers on June 25 and June 26, 1962, which read "Young Toughs Attack Cops" and "Defiant Jeers and Violence Greet the Law Today". The editorial in the last-mentioned paper said, ". . . courts must be stern as well as understanding".

Numerous incidents of disrespect for law and authority, marked by acts of violence against peace officers while engaged in carrying out their sworn duties in a lawful manner, are documented in the Uniform Crime Reports of the F.B.I. and in many of the annual reports of police departments.

Greater respect for law and authority can be promoted by giving law enforcers the authority they need to enforce the criminal laws. To withhold it can lead only, in certain situations, to the continuance of questionable practices on the part of some peace officers. They feel that the community also has rights. They see a need for more of a balance between the rights of the individual on one side and the right of the community to be secure against fear of injury to person or property on the other. They contend that modernizing current arrest laws can help to achieve that. People, in general, will have greater respect for law and authority when laws help law enforcers to discharge their duties according to law.

Attitudes of Law Enforcement Officers

Generally speaking, professional-minded peace officers are mindful of the fact that they face a compelling obligation to know and follow the law. They recognize, moreover, their duty to obey the law when enforcing the law, and they are anxious to do so. Many obstacles confront them, however. Many roadblocks, in their eyes, are essential safeguards to a free society. With them they have no quarrel. For officers, by large, are staunch believers in, and defenders of, their federal and state constitutions. The very nature of their day-to-day work tends to promote that outlook. They learn at first-hand, on the public streets and in dark alleys, how people feel when they are deprived of their liberty.

An assumption can be made, furthermore, that most peace officers feel strongly about the need to maintain a strong and independent judiciary. An independent judiciary, to them, is one of the major differences that distinguishes a free society from the slave state. That does not preclude the right to disagree, however, with some of the decisions reached by appellate courts.

They take exception, as do many judges (evidenced by many decisions that swing on the philosophy of a single judge) to some of the highly technical interpretations that are made, for example, in the very troublesome area of arrest, search, and seizure. In the past 23 years the Supreme Court of the United States has handed down 21 opinions in which arrest, search, and seizure have been the main issues. In only 1 case did the court agree unanimously. The case, *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960), logically could be excluded as it involved a petty arrest for loitering and disorderly conduct. (The 21 cases are collected as part of Appendix A.)

Undoubtedly, some officers, either willfully or through lack of knowledge, abuse their authority at times. Self-respecting peace officers believe that excessive abuse of authority on the part of their fellow officers, generally, cannot be condoned. Nevertheless, at the same time, they do ask for sufficient authority, consistent with promoting the general aims of a free society, to make their communities safer places for all people. They recognize the truth of what Dr. Samuel Johnson said some 200 years ago: "The danger of unbounded liberty and the danger of bounding it have produced a problem in the science of government which human understanding seems hitherto unable to solve." This has even more meaning today as totalitarianism stalks the face of the earth. The pendulum swings dangerously in the direction of unbounded liberty which is as bad as tyranny and is often the forerunner to the mailed fist.

EVOLUTION OF THE FOURTH AMENDMENT

One writer who has given much thought to the problem said:

> (I)n applying the Fourth Amendment the Court has unintentionally created a situation in which concern with protecting the rights of those charged with crime has resulted in extending greater protection to property interests than to personal liberty. Current interpretations of the amendment, in fact, appear to weaken the protection of the personal liberty of the average law-abiding citizen—even to accord his interest in privacy and property markedly less protection than is accorded to similar interests of persons suspected of crime.[3]

In this explosive age, if a peace officer is to carry out his duties even fairly effectively, a realistic balance must be established between the security of the individual and the security of society. In an article in 1961 in the NEW YORK LAW JOURNAL, Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, declared: "The law-abiding citizen and the public are entitled to deeper sympathy on the part of our judges." And, he might have added, on the part of many of our legislators. For it is their task to shape the criminal law to fulfill its basic purpose of protecting society.

Both law makers and judges, in general, traditionally, tended to follow that philosophy for many years before and after this country was founded. When the Bill of Rights was added to the Constitution of the United States in 1791, the Fourth Amendement was viewed by its framers and the people of their time as a limitation that would achieve a reasonable balance in safeguarding personal liberties on the one hand and protecting society on the other. Professor Barrett makes the point and makes it well:

> When Pitt denounced the cider tax and James Otis spoke out against writs of assistance and Patrick Henry opposed adoption of the Constitution without a Bill of Rights, they were primarily interested in protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions. . . .[4]

Between 1607 and 1914, for 307 years, American courts construed the Amendment in that context. In all judicial proceedings real evidence was admissible that was trustworthy and relevant. The courts were concerned with the innocence or the guilt of a person accused of a crime and in their search for truth accepted such evidence and refused to halt a proceeding to inquire into the methods that were used to secure it. That is the rule, substantially, in all the English-speaking countries of the British Commonwealth. That is the rule in most, perhaps, all, other nations of the world.

Yet developments in the United States, especially within the past two decades, ". . . suggest that under the modern Fourth Amendment there has been a startling reversal of position. Those types of governmental invasions of privacy most likely to involve the law-abiding person are subjected to the least restraint, those directed against persons suspected of crime, to the greatest."[5]

In 1914 in the *Weeks* case, however, (*Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341) the logic underlying the "trustworthy-relevant" rule was brushed aside. The Supreme Court of the United States crystallized a state court decision as the federal exclusionary rule of evidence. Thereafter in federal courts, regardless of the trustworthiness and relevancy of real evidence, timely motion being made, it was rejected if the evidence had been obtained by means of an "unreasonable" search and seizure. It is noteworthy, *indeed a paradox*, that the rule to this day is inapplicable to civil actions wherein, at times, the stakes are quite high.

Various states subsequently embraced the rule, in whole or in part, either by statute or judicial decree, with the result that when *Elkins* (*Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437) was decided June 27, 1960, some twenty-odd states were numbered as followers of the exclusionary doctrine of the *Weeks* case. The trend reached its zenith, quite unexpectedly, when on June 19, 1961, the Supreme Court of the United States, in *Dollree Mapp* v. *State of Ohio*, 367 U.S. 643, 81 S.Ct. 1648, in a 6–3 opinion to reverse *Mapp*'s conviction but 5–4 on the following point, held that though the exclusionary rule is "judicially implied," it is nevertheless a "Constitutionally required" safeguard and applicable to the states through the Fourteenth Amendemnt. Thus, by a majority of one vote the authority of the legislatures of 50 states, according to the views of many people, has been diluted in regard to the administration of state criminal laws. (A Petitition for Rehearing in *Mapp* v. *Ohio* was denied by the Supreme Court of the United States on October 9, 1961. The Petition

[3] EDWARD L. BARRETT, JR., "Personal Rights, Property Rights and the Fourth Amendment," THE SUPREME COURT REVIEW (Chicago: Copyright 1960 by The University of Chicago Press), p. 49.

[4] *Ibid.*, p. 71.

[5] *Ibid.*, p. 71–2.

gives the views of the prosecutor, who was caught in the middle, as well as some illuminating historical background of the "exclusionary rule." The editors of THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE published the Petition in its entirety in the November-December 1961 issue, pp. 439–444.)

Mr. Justice Harlan in his dissent in *Mapp* said: "In overruling the *Wolf* case (*Wolf* v. *Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 1949) the court in my opinion has forgotten the sense of judicial restraint which, with due regard to stare decisis, is one element that should enter into deciding whether a past decision of the court should be overruled. Apart from that, I also believe that the *Wolf* rule represents sounder constitutional doctrine than the new rule which now replaces it."

Mr. Justice Clark, in speaking for the majority in Mapp, summed up another view in asserting that "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine 'the criminal is to go free because the constable has blundered.' . . . In some cases this will undoubtedly be the result. But, as was said in *Elkins*, 'there is another consideration —the imperative of judicial integrity.' . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own law, or worse, its disregard of the charter of its own existence . . . Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the court, that judicial integrity so necessary in the true administration of justice."

ENFORCEMENT AND THE EXCLUSIONARY RULE

Law enforcement officers, for the most part, realize that decisions of the Court, based upon current interpretations of the Constitution, are the law of the land and that the mandates should be obeyed scrupulously. Compliance, at times, as in the *Mapp* case, poses difficult problems for police administrators. Many of them like Los Angeles Chief of Police William H. Parker, an attorney, and for more than 35 years a police officer, consistently point out how crime control is affected when the scales of justice become weighted too heavily in favor of the small segment of society that persists in living beyond the law.

"There are two distinct fallacies," he declares "in the present judicial emphasis upon court supervision of police. The freeing of an obviously guilty criminal in those cases where the ex post facto determination of the court brands the evidence proffered by the prosecution as the fruits of an unreasonable search is predicated on the theory that the police must not be allowed to profit by reason of an improper act. This attitude exemplifies the 'cops and robbers' contest to which law enforcement has been relegated. It is the guilty criminal who profits when he is given his freedom on a technicality, and it is the innocent victims of his future crimes who lose. The criminal prosecution pits the people of the state, and not the police, in opposition to the criminal. I fail to see how the guilty criminal freed constitutes a personal loss to the police officer who has merely attempted to bring a criminal to justice. The other inconsistency is the failure of the courts to apply the exclusionary rule in civil cases. If the constitutional guarantees are in balance, the litigant in a civil case should be entitled to the same protection from the court on constitutional matters that are afforded the defendant in a criminal action. Yet the defendant in a petty gambling case is entitled to oppose the introduction of the evidence against him on the grounds of unreasonable search or illegal seizure while the defendant in a civil action, who may be a wife and mother fighting for her marriage and custody of her children, has no right to the exclusion of illegally seized evidence. This double standard is difficult for me to understand . . . It appears that society is guilty of a fraud upon itself."[6]

Federal and state judicial decisions of the past 23 years, wherein arrest, search and seizure have been in issue in criminal proceedings, bring out sharply the narrow construction that many courts tend to apply as to facts that constitute reasonable grounds. The meaning of the term has changed like a cancerous growth which, today, penetrates deeply into the sinews of law enforcement. The courts refuse, quite understandably, to define the term in a definitive fashion.

In most cases decided by the Supreme Court of the United States in that period when the legality of an arrest or the reasonableness of a search and seizure were before the Court, the issue has been resolved by a divided Court. "Probable cause" or "reasonable grounds to believe" stands, then, in the vanguard as a perennial problem to effective law enforcement. Many arrests and searches and seizures that have been declared illegal, with that

[6] W. H. PARKER, "Discipline v. Destruction," in an address before the Los Angeles Rotary Club, September 1, 1961.

mystical term as the yardstick of measurement, have provoked many questions and much argument inside and outside the ranks of law enforcement. What is far too often overlooked, or forgotten completely, is the fact that *it is one thing to arrest on reasonable grounds and quite another to prove a charge in court—beyond a reasonable doubt.* This, too, *is a paradox* that deserves a great deal more thought than it receives.

The Fourth Amendment Rehabilitated

Peace officers would like to see a more "hard-nosed" interpretation given to facts that are sufficient to constitute reasonable grounds to make an arrest and to search and seize physical objects. They do not stand alone as many members of the legal profession are of like mind. Many law-abiding citizens feel the same way. What might have been reasonable, they say, to constitute "reasonable grounds to believe" in a simple agrarian society, is very unreasonable now. They ask that the courts look at the facts that lead to an arrest, or a search and seizure, at the time, the place, and under the circumstances, as seen by an arresting officer in the light of his specialized training and experience.

Now is the time to reappraise, not only that enigma, but various other problems that confront a modern law-enforcement agency in enforcing criminal laws. "Law must be stable, and yet cannot stand still," Mr. Justice Cardozo reminds us. "In order to know what . . . law is, we must," said Mr. Justice Holmes, "know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage."

With those views as a framework of reference it appears that: (1) people, in general, forget that law enforcement is fundamentally their responsibility; (2) people, in general, are apathetic to the needs of law enforcement; (3) judges, too often, fail to take into consideration the total atmosphere that makes up an arrest or a search and seizure; and, (4) legislators, too often, forget that obsolete criminal laws fail to keep pace with the needs of a changing society.

Such omissions should be matters of great concern to all persons who are concerned seriously with the future of a free society. Of infinitely great importance to any government are the means that it uses to secure observance of its laws. If laws are not observed, the most perfect laws that the wit of man can devise are useless and government is impotent. Its powers are always proportionate to the degree of success or failure of its means of securing law-observance.

It is essential, therefore, to see clearly that something must be done in this country to secure better law-observance. There must be laws and the laws must be enforced. If American-law enforcement fails in the contest to secure better law-observance and pressure results in the adoption of a highly centralized police system, (at either the federal or state level) the people will lose not only their police but their democracy and their liberty. If law enforcement survives as the people's protector all else that people cherish will be saved. (This does not mean, however, that liaison and staff relationships should be discontinued.)

Different measures could be initiated or extended that would tend to promote better law-observance. However, for the purpose of this article, only very broad strokes will be used to fill in a rather large picture. Of immediate concern, it can be suggested, to maintain law enforcement as a strong protective service in a free society, are four major goals:

1. *COMMUNITY EDUCATION.* This is a program long overdue that merits high priority. People must be aroused to their responsibilities to keep their communities good places in which to live. Organizations like the American Civil Liberties Union, National Council of Christians and Jews, and the National Lawyers Guild (to name a few) whose objectives embrace community education, should spearhead educational programs at the community level to enlighten people about criminal laws and emphasize the citizens' duty to actively support their law enforcement agencies.
2. *PUBLIC APATHY.* This is an infection that is a painful affliction to law enforcement. It is a trait that often characterizes the attitudes of public officials and educators toward the selection and training of prospective and practicing law enforcement personnel and in the quality of the leadership assigned to direct law enforcement operations. They need to become better informed about law enforcement and accept the fact that law enforcement, in one form or another, is an essential arm of government and then insist that its personnel measure up to the tasks to be performed.
3. *ARREST LAWS.* The archaic arrest laws of a past century that now regulate the enforce-

ment activities of federal, and most state law enforcement officers, should be revised. Contemporary arrest laws are inadequate in an age of moon shots, cobalt bombs, and telstars, to deal effectively with the criminal who utilizes the most recent advances of science for his own nefarious purposes.

4. *THE EXCLUSIONARY RULE.* This judicially created rule of evidence now "constitutionally required" represents a formidable opponent, in its present form, to effective law enforcement. The prime architects of the rule could be persuaded, perhaps, to remove or to temper its impact, if state governments would take action to keep the threat of unreasonable searches and seizures properly bounded. Maybe this could be done by providing as a safeguard a "new kind of civil action, or better, a summary type of proceeding, for a substantial money judgment in favor of the wronged individual, whether innocent or guilty, and AGAINST THE POLITICAL SUBDIVISION whose enforcement officers violated that person's rights." It is submitted that such legislation would be a strong incentive to move poliictical subdivisions to provide competent law enforcement services as well as to take a greater interest in their activities.

CONCLUSION

In sum, then, all of us must be ever more mindful that "To be free", in Lord Acton's words, "a people must understand freedom is not the power of doing what we like but the right of being able to do what we ought."

It is a good bargain.

APPENDIX A

Part I

The Supreme Court of the United States since the October 1949 term to March 1, 1963, decided 21 cases wherein an arrest or a search and seizure were directly in issue. The opinions are listed hereunder, beginning with the most recent case, going back to *United States* v. *Rabinowitz*, decided February 20, 1950.

		OPINION
1.	*Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).	5–4
2.	*Lanza* v. *New York*, 370 U.S. 139, 82 S.Ct. 1218 (1962).	6–3
3.	*Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).	6–3
4.	*Wilson* v. *Schnettler*, 365 U.S. 381, 81 S.Ct. 623 (1961).	7–2
5.	*Chapman* v. *Unitea States*, 365 U.S. 610, 81 S.Ct. 776 (1961).	8–1
6.	*Rios* v. *United States*, 364 U.S. 253, 80 S.Ct. 1431 (1960).	5–4
7.	*Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437 (1960).	5–4
8.	*Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725 (1960).	8–1
9.	*Abel* v. *United States*, 362 U.S. 217, 80 S.Ct. 683 (1960).	5–4
10.	*Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960).	9–0
11.	*Henry* v. *United States*, 361 U.S. 98, 80 S.Ct. 168 (1959).	7–2
12.	*Frank* v. *Maryland*, 359 U.S. 360, 79 S.Ct. 804 (1959).	5–4
13.	*Draper* v. *United States*, 358 U.S. 307, 79 S.Ct. 329 (1959).	7–1
14.	*Jones* v. *United States*, 357 U.S. 493, 78 S.Ct. 1253 (1958).	7–2
15.	*Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245 (1958).	6–3
16.	*Miller* v. *United States*, 357 U.S. 301, 78 S.Ct. 1190 (1958).	6–3
17.	*Kremen* v. *United States*, 353 U.S. 346, 77 S.Ct. 828 (1957).	6–2
18.	*Rea* v. *United States*, 350 U.S. 214, 76 S.Ct. 292 (1956).	5–4
19.	*Salsburg* v. *Maryland*, 346 U.S. 545, 74 S.Ct. 280 (1954).	7–1
20.	*United States* v. *Jeffers*, 342 U.S. 48, 72 S.Ct. 93 (1951).	6–2
21.	*United States* v. *Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430 (1950).	6–2

Part II

In the same period, January 1, 1950 to March 1, 1963, the Court decided 15 cases that involved, only incidentally, an arrest or a search and seizure. The decisions involved one or the other of the topics in relation to some issue like excessive bail; taking an accused before a magistrate; equitable relief; wiretapping (using the term broadly); and, self-incrimination.

		OPINION
1.	*Silverman* v. *United States*, 365 U.S. 505, 81 S.Ct. 365 (1960).	9–0
2.	*McPhaul* v. *United States*, 364 U.S. 372, 81 S.Ct. 138 (1960).	5–4
3.	*Ohio ex. rel. Eaton* v. *Price*, 364 U.S. 263, 80 SCt. 1463 (1960).	4–4
4.	*Mallory* v. *United States*, 354 U.S. 499, 77 S.Ct. 1356 (1957).	9–0
5.	*Carroll* v. *United States*, 354 U.S. 448, 77 S.Ct. 1332 (1957).	9–0
6.	*Watkins* v. *United States*, 354 U.S. 178, 77 S.Ct. 1173 (1957).	6–1
7.	*Steinberg* v. *United States*, 76 S.Ct. 822 (1956).	9–0
8.	*Irvine* v. *California*, 347 U.S. 128, 74 S.Ct. 381 (1954).	5–4
9.	*Schwartz* v. *Texas*, 344 U.S. 199, 73 S.Ct. 232 (1952).	8–1
10.	*Stroble* v. *California*, 343 U.S. 181, 72 S.Ct. 599 (1952).	6–3
11.	*Carlson* v. *Landon*, 342 U.S. 524, 72 S.Ct. 525 (1952).	5–4
12.	*Butterfield* v. *Zydok*, 342 U.S. 524, 72 S.Ct. 525 (1952).	5–4
13.	*Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205 (1951).	8–0
14.	*Stefanelli* v. *Minard*, 342 U.S. 114, 72 S.Ct. 117 (1951).	7–1
15.	*Carignan* v. *United States*, 342 U.S. 36, 72 S.Ct. 97 (1951).	8–0