Volume 7 | Issue 1 Article 7

1961

Constitutional Law - Search and Seizure - Evidence Obtained by Unreasonable Search and Seizure Is Constitutionally Inadmissible in State Criminal Prosecutions

John B. Lieberman III

principle, the federal court's foremost consideration should be the adequate protection of federally created rights. The fact that the remedy sought is essentially involved with matters of state law does not lead to the conclusion that federal courts should not administer such relief.[26] The federal courts have rejected such a contention in many cases involving federal statutes and have not hesitated to invalidate consummated corporate transactions, although questions of state law were intimately concerned.[27] In construing the jurisdiction of the federal court so narrowly, the court, in the instant case, has created a very real danger that a federal right will be left dangling without a proper remedy — certainly, without a uniform remedy.

Thomas A. Hogan

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—EVIDENCE OBTAINED BY UNREASONABLE SEARCH AND SEIZURE IS CONSTITUTIONALLY INADMISSIBLE IN STATE CRIMINAL PROSECUTIONS.

Mapp v. Ohio (U.S. 1961).

Cleveland police officers forcibly entered the home of appellant and during their search allegedly obscene materials were discovered. These materials were used as evidence at appellant's trial which resulted in her conviction for knowingly having had them in her possession.[1] No attempt was made by the state to prove the existence of a warrant either at the trial or at the hearing on a preliminary motion to suppress. The

26. The court, in the present case, placed peculiar stress upon Mr. Justice Cardozo's opinion in Gully v. First National Bank, 299 U.S. 109, 117-18, 57 S. Ct. 96, 100 (1936). There, the defendant bank had assumed the liabilities of an insolvent national bank and then had refused to pay the taxes which the national bank owed to the state. It was claimed that, since a federal statute permitted the states to tax national banks, the case was properly within the federal courts. Mr. Justice Cardozo, speaking for a majority of the court, pointed out that the tax in question was one imposed by the state, with the federal government merely consenting. He reasoned that what was essentially involved was the breach of a contract right; the question of the federal statute was merely collateral. The present court tries to analogize from this decision, claiming that, since the remedy which plaintiff begged involved state corporate law (as the right in the Gully case was founded upon state law), the federal court should disclaim jurisdiction here, also. However, at best, the analogy is transparent. There is all the difference in the world between the source of a right and the source of a remedy. The source of a right determines what court will enforce it; but it has never before been held that the source of a remedy establishes what court should administer it.

27. *E.g.*, Schine Chain Theatre, Inc. v. U.S., 334 U.S. 110, 128, 68 S. Ct. 947, 957 (1948), which was concerned with the Sherman Anti-Trust Act; U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 171-72, 68 S. Ct. 915, 936 (1948), which also dealt with the Sherman Anti-Trust Act; Subin v. Goldsmith, 224 F.2d 753, 761-62 (2d Cir. 1955), which involved the Securities Exchange Act of 1934.

1. OHIO REV. CODE ANN. § 2905.34 (Baldwin 1960).

Supreme Court of Ohio affirmed the conviction since Ohio has no law prohibiting the use of evidence obtained by illegal search and seizure, at least where the evidence is not taken from the person by the use of brutal force.[2] On appeal, the Supreme Court of the United States, with three justices dissenting, reversed, overruled *Wolf v. Colorado*,[3] and *held* that the due process clause of the fourteenth amendment prohibits a state criminal court from admitting evidence obtained through unreasonable search and seizure. *Mapp v. Ohio*, 81 S. Ct. 1684 (1961).

In 1886, the United States Supreme Court recognized that it is unconstitutional to admit in a federal court evidence obtained through unreasonable search and seizure.[4] The constitutional basis relied upon by the Court was the interrelationship of the fourth and fifth amendments, for, as the Court stated,[5] the unreasonable searches and seizures condemned by the fourth amendment are usually made for the purpose of compelling a person in a criminal case to be in effect a witness against himself in violation of the fifth amendment. It was not until 1914, in *Weeks v. United States*,[6] that the Court held for the first time that, in a federal prosecution, the fourth amendment alone bars the use of evidence obtained through unreasonable search and seizure by federal officers. The fifth amendment was not relied upon. The Court was careful to point out that the fourth amendment is only applicable to the federal government and its agents and provides no protection against the misconduct of state officers who are not acting under any claim of federal authority.[7] Most states continued to follow the common law rule that relevant evidence is admissible in criminal prosecutions regardless of the means by which it was obtained and the argument in favor of such a rule commanded impressive support.[8] Even the Supreme Court of the United States seemed to be swayed by the general rejection of its exclusionary rule, for in 1927, in *Byars v. United States*,[9] it proclaimed that federal courts may make use of evidence improperly seized by state officers who are acting entirely on their own account. This was the so called "silver platter" doctrine.[10]

Although the first eight amendments to the Constitution limit only the action of the federal government,[11] certain of these limitations have been held to be binding upon the states through the due process clause of the fourteenth amendment. This clause exacts from the states all that is

2. State v. Mapp, 170 Ohio St. 427, 166 N.E. 2d 387 (1960).
3. 338 U.S. 25, 69 S. Ct. 1359 (1949).
4. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886).
5. *Id.* at 633, 34 S. Ct. at 534.
6. 232 U.S. 383, 34 S. Ct. 341 (1914).
7. *Id.* at 398, 34 S. Ct. at 346.
8. *E.g.*, People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
9. 273 U.S. 28, 47 S. Ct. 248 (1927). The conviction here was reversed since a federal agent participated in the search. As in *Weeks*, exclusion was based on constitutional grounds.
10. The term "silver platter" actually came from a later Supreme Court decision, Lustig v. United States, 338 U.S. 74, 69 S. Ct. 1372 (1949).
11. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

"implicit in the concept of ordered liberty."[12] In 1949, the Court was finally faced with the problem whether certain immunities contained in the fourth amendment are enforceable against the states through the due process clause. Mr. Justice Frankfurter, writing for the Court in the *Wolf* case, stated that although the *"core"* of the fourth amendment, the right to be free from arbitrary intrusions by the police; is "implicit in the concept of ordered liberty," and therefore applicable to the states through the due process clause, the exclusionary remedy is not a basic ingredient of that right, and thus not applicable to state criminal proceedings.[13] The fact that most of the English speaking world did not regard the exclusionary rule as vital to the protection of the right of privacy and the belief that there were other means of protection, such as tort and criminal actions against the offending police officers, were the determining factors upon which the Court based its ruling. Attempts were subsequently made to have a federal court intervene in state criminal proceedings to enjoin the use of illegally obtained evidence on the basis of the Civil Rights Act,[14] but in *Stefanelli v. Minard,*[15] the Court held that federal courts should refuse such intervention. However, in 1956, it was held that a federal court should intervene to enjoin a federal officer from testifying in a state criminal proceeding concerning evidence obtained by him by means of an invalid search warrant.[16]

The extreme methods adopted by some state officers in their zeal to bring offenders to justice finally compelled the Supreme Court to draw a line. In *Rochin v. California,*[17] a case involving elements of search and seizure as well as violence to the person of the defendant, the Court held inadmissible under the due process clause evidence obtained by "conduct that shocks the conscience"[18] and offends "the community's sense of fair play and decency."[19] *Rochin* was not a pure search and seizure case; the decision clearly was based on the totality of the police officers' conduct. It raised the possibility, however, that evidence unlawfully seized might be excluded if the methods of search and seizure were so obnoxious

12. Palko v. Connecticut, 302 U.S. 319, 324, 58 S. Ct. 149, 151 (1937). Among the examples cited by the Court are: freedom of speech, press and religion; right of peaceable assembly; and right of one accused to the benefit of counsel.

13. Wolf v. Colorado, 338 U.S. 25, 27-28, 69 S. Ct. 1359, 1361 (1949). However the *Weeks* rule was reaffirmed as to federal prosecutions on constitutional grounds. Mr. Justice Black's concurring opinion, however, referred to the rule as one of evidence.

14. 42 U.S.C. § 1983 (1958).

15. 342 U.S. 117, 72 S. Ct. 118 (1951).

16. Rea v. United States, 350 U.S. 214, 76 S. Ct. 292 (1956). The basis for this decision was the Court's supervisory power over federal law enforcement officers. *But see* Wilson v. Schnettler, 365 U.S. 381, 81 S. Ct. 632 (1961), for the limitations of this rule.

17. 342 U.S. 165, 72 S. Ct. 205, (1952). Defendant swallowed narcotic capsules as the police unlawfully broke into and entered his room. A stomach pump was used to extract the evidence after physical force failed.

18. *Id.* at 172, 72 S. Ct. at 209.

19. *Id.* at 173, 72 S. Ct. at 210.

as to outrage the community's conscience and "sense of justice."[20] This interpretation was largely negated, by the subsequent case of *Irvine v. California,*[21] which seemed to confine the *Rochin* doctrine to cases involving physical violence and brutality. The plurality of opinions in *Irvine* pointed up just how undefined were the boundaries of the *Rochin* test, and just how divided was the Court on its application. The net effect of *Rochin* and *Irvine,* therefore, was to introduce yet another area of ambiguity and uncertainty into the law of search and seizure.

The Court in the *Irvine* case refused to overrule the *Wolf* doctrine before the states had an adequate opportunity to consider the rule, and it noted[22] that in the light of the facts before the Court the states might wish to reconsider their evidentiary rules. Significantly, California, in the following year adopted the exclusionary rule as a "judicially declared rule of evidence".[23] Then in 1960, in *Elkins v. United States,*[24] the "silver platter" doctrine was overturned when the Court declared that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's right of privacy under the fourth amendment is not admissible over the defendant's timely objection in a federal criminal trial. Finally, the Supreme Court has now closed "the only courtroom door remaining open to evidence secured by official lawlessness. . . ."[25] Mr. Justice Clark, speaking for the majority, stated that when *Wolf* admitted that the right to be free from unreasonable search and seizure was applicable against the states through the due process clause, it was inconsistent when it denied to that right the most important constitutional protection, the exclusion of the illegally seized evidence. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[26]

Mr. Justice Harlan's dissent argues that the Court, in overruling *Wolf,* has disregarded the doctrine of *stare decisis.* Basic to this doctrine is the idea that a decision is authority solely upon the points decided and the facts in the particular case. But differing factual situations dictate differing results and when this is so, as here, the doctrine is not being ignored. Indeed, the rationale of *Wolf*[27] was that due process is a living principle and the rights protected by it do not become petrified as of any one time. It is the

20. *Id.* at 173, 72 S. Ct. at 210 quoting Brown v. Mississippi, 279 U.S. 278, 285-86, 56 S. Ct. 461, 464-65.

21. 347 U.S. 128, 74 S. Ct. 381 (1954). Police unlawfully entered defendant's home three different times to move a microphone into a strategic position. Police testified at the trial concerning incriminating statements heard over the device.

22. *Id.* at 134, 74 S. Ct. at 384.

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

24. 364 U.S. 206, 80 S. Ct. 1437 (1960). Departing from *Weeks,* as to the basis of the rule, the Court said, "What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, . . ." *Id.* at 216, 80 S. Ct. at 1443.

25. Mapp v. Ohio, 81 S. Ct. 1684, 1691 (1961).

26. *Id.* at 1692.

27. Ironically, Mr. Justice Frankfurter, who joined the dissent in the instant case wrote the opinion of the Court in *Wolf.*

nature of a free society to progress in its standards of what is considered reasonable and right. With this in mind, the Court has re-examined the factual considerations upon which *Wolf* was based, found them no longer controlling,[28] and has now concluded that exclusion is required by the fourteenth amendment since it is essential to the protection of the right of privacy.

The instant decision has laid to rest the controversy as to whether the exclusionary rule is a rule of evidence or a constitutional imperative. According to the explicit language of *Weeks*, the rule is of constitutional origin,[29] but later opinions have contained strong intimations to the contrary.[30] The present decision has brought the exclusionary rule back into the realm of constitutional requirement and this is so with respect to both federal and state courts. Therefore it would seem that *Elkins* is no longer authority for the proposition that exclusion of illegally seized evidence in federal prosecutions is based on the Court's supervisory power. The fourth amendment requires such exclusion. Also, states which have excluded illegally seized evidence on the basis of their judicially declared rules of evidence, and even those which have not, are required to do so now by the fourteenth amendment. In addition to resolving this uncertainty, the instant decision has also effectively eliminated the problem of *Rochin* and *Irvine*. The latter case recognized that there are varying degrees of unreasonableness involved in the state search and seizure cases, but permitted the admission of evidence by state courts no matter how obnoxious the obtaining means were, as long as it was short of coercion. Now, if the evidence is seized unlawfully the state must exclude it.[31] A uniform standard is thus placed on both federal and state courts and this seems to be a healthy solution, not only because it puts an end to needless conflict but also because the problem has been resolved in favor of individual liberty and freedom.

Very closely related to the problem of illegally seized evidence is that of wiretap evidence and its use in criminal proceedings. It was recently urged that *Pugach v. Dollinger*,[32] which held that a federal court should not enjoin a state officer from divulging wiretap evidence in a state criminal trial, even though the introduction of such evidence would constitute a violation of a federal criminal statute pertaining to wiretapping,[33]

28. *Supra* note 25, at 1690-91.

29. Weeks v. United States, 232 U.S. 383, 398, 34 S. Ct. 341, 346 (1914).

30. Wolf v. Colorado, *supra* note 13, at 39, 69 S. Ct. at 1367 (concurring opinion); Elkins v. United States, 364 U.S. 206, 216, 80 S. Ct. 1437, 1443 (1960).

31. In determining whether a state search and seizure is unreasonable, it is not entirely clear what standards are to be applied. Elkins, contrary to *Wolf*, suggested that the test is to be the fourth amendment, *but see* Ohio v. Price, 364 U.S. 263, 80 S. Ct. 1463 (1960), where a municipal ordinance was upheld as valid, even though it required home owners to give housing inspectors access to their dwellings without a warrant.

32. 277 F. 2d 739 (2d Cir.), *aff'd*, 365 U.S. 458, 81 S. Ct. 650 (1961).

33. 47 U.S.C. § 605 (1958). ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any

be reconsidered in the light of the instant decision. The United States Court of Appeals for the Second Circuit rejected this contention and adhered to the *Pugach* rule.[34] Although wiretapping is not considered a search and seizure,[35] it seems that it could be a federal crime to introduce such evidence in either a state or federal court since this amounts to a divulgence of the contents of the intercepted communication. State laws continue to sanction the use of wiretap evidence and, just as with evidence obtained through unreasonable search and seizure, attempts by state criminal defendants to get federal injunctive relief have been fruitless. *Pugach* shows the understandable reluctance of the Court to abandon this policy which is based on a desire not to disrupt state criminal trials.[36] What the outcome will be where the relief is sought after conviction is another problem. Just as with unlawfully seized evidence, the federal courts have excluded wiretap evidence.[37] And as in *Wolf*, in 1952, in *Schwartz v. Texas*,[38] the Court refused to overturn a state criminal conviction obtained by the use of wiretap evidence and thus by illegal means. The Court refused to extend by implication the meaning of the federal statute so as to invalidate the state laws which render the evidence admissible in their own courts.[39] Now that the Court has applied the exclusionary rule to state criminal proceedings, the only barrier remaining to the overruling of *Schwartz* on constitutional grounds is the *Olmstead* doctrine that wiretapping does not constitute search and seizure. This barrier is at its lowest now, for the Court recently ruled that the slightest physical penetration of an electronic device through the wall of defendant's home, so-called electronic eavesdropping, constitutes search and seizure.[40] To say the invasion is a "search and seizure" only where there is a physical penetration, however infinitesimal, is to overemphasize the instrumentality at the expense of the right involved. Indeed, the Court recognized this long ago in *Boyd v. United States* when it stated that there need not be an actual entry upon the premises for there to be an unreasonable search and seizure.[41] Whether the intimacies of the home are revealed by the eavesdropping of a physically present officer or his equipment, or by the

34. Williams v. Ball, 294 F.2d 94 (2nd Cir. 1961).

35. Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564 (1928).

36. In Stefanelli v. Minard, 342 U.S. 117, 123, 72 S. Ct. 118, 121-22 (1951), the Court noted, "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law — with its far-flung and undefined range — would invite a flanking movement against the system of state courts by resort to the federal forum, with review if need be to this Court, to determine the issue." See also Wilson v. Schnettler, 365 U.S. 381, 81 S. Ct. 632 (1961).

37. Nardone v. United States, 302 U.S. 379, 58 S. Ct. 275 (1937); Benanti v. United States, 355 U.S. 96, 78 S. Ct. 155 (1957).

38. 344 U.S. 199. 73 S. Ct. 232 (1952).

39. This particular rationale was discarded in *Benanti*, *supra* note 37, at 105-06, 78 S. Ct. at 160, when the Court said that it was not the intention of Congress to allow state legislation which would contradict the express prohibition of the federal statute, *supra* note 33.

40. Silverman v. United States, 81 S. Ct. 679 (1961).

41. *Supra* note 4, at 630.