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MR. JUSTICE RUTLEDGE AND THE FOURTH AMENDMENT*

FOWER V. HARPER**

To the men who founded this nation the idea that "a man's house is his castle" was no mere figure of speech. One of the many just causes of complaint by the colonists and one largely responsible for the Fourth Amendment protection against unreasonable searches and seizures, was the practice of British courts to issue the notorious "writs of assistance." These writs enabled the Kings' customs officers to go ransacking at large through homes and warehouses on fishing expeditions for contraband. Smuggling during colonial days was costing the royal treasury large sums and the ruthless writ was a catchall device to meet it.

As early as 1886 in Boyd v. United States¹ Justice Bradley pointed out the close relationship between the Fourth Amendment and the provision against self-incrimination of the Fifth. The seizure or compulsory production of a citizen's private papers to be used against him is the equivalent of compelling him to be a witness against himself. In the course of his opinion the Justice took occasion to go into the history of the Fourth Amendment. He quoted James Otis of Massachusetts that this writ of assistance was "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book." The liberty of the citizens was placed in "the hands of every petty officer."

The occasion was a court argument in the Boston Town House in 1761 between a representative of the crown on the one hand and Otis and Oxenbridge Thatcher on the other. An authentic account was prepared by John Adams who was present at the argument.² Otis went on to point out that "not more than one instance can be found of it in all our law-books; and that was in the zenith of arbitrary power, viz. in the reign of Charles 2, when Star-Chamber powers were pushed to extremity by some ignorant clerk of the Exchequer."³ Adams stated that the one precedent of issuing general warrants in the time of Charles 2 was by Chief Justice Scroggs, for which he was afterwards impeached by the House of Commons.⁴

In view of their bitter experiences with these general writs giving

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* This article will constitute a chapter in a forthcoming book on Justice Rutledge and the Bill of Rights.

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1. 116 U.S. 616 (1886).
2. 2 ADAMS, JOHN ADAMS WORKS 521-23, as reprinted in 1761-1772 Mass. (Quincy) 469 (App.).
3. Id. at 472.
4. Ibid.
officers blanket authority, it is understandable that the framers of the
Bill of Rights took care in the Fourth Amendment to prohibit such outrages in the future by the national government. There were not only to be no "unreasonable searches and seizures" but magistrates were forbidden to issue warrants except upon "probable cause" and the warrant must particularly describe "the place to be searched and the person or things to be seized." There was to be no more random housebreaking.

Justice Frankfurter in a recent dissenting opinion\(^5\) pointed out that the Fourth Amendment was modeled after the similar provision in the Massachusetts Constitution of 1780 which also required probable cause under oath before a warrant would issue and that the warrant be "accompanied with a special designation of the persons or objects of search, arrest or seizure." "It is significant," the opinion continued,

that the constitution of every State contains a clause like that of the Fourth Amendment and often in its precise wording. Nor are these constitutional provisions historic survivals . . . . It tells volumes that, in 1938, New York, not content with statutory protection, put the safeguard into its constitution. If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.\(^6\)

As a general proposition, no search is reasonable unless made pursuant to the authority of a warrant or as incident to a lawful arrest. Peace officers may on occasion break and enter a building without a warrant for the purpose of arresting a suspected felon. If the circumstances justify the arrest, documents or other articles thought to be connected with the crime may be seized as incident to the arrest. But the extent of such a search has been defined only in general and often inconsistent terms by the Supreme Court. The officer is not limited to articles in plain sight or on the person of the prisoner but, on the other hand, he is not authorized to search a house from attic to cellar. The limits are somewhere between, but a policeman's or lawyer's guess is about as good as a Supreme Court Justice's.

In the much cited case of United States v. Rabinowitz,\(^7\) decided a year after Rutledge's death, the Court upheld a search and seizure as "incident" to a lawful arrest under the following circumstances. Federal officers had sufficient information to constitute "probable cause," that is reasonable grounds, to think that the accused was engaged in traffic

\(^5\) Harris v. United States, 331 U.S. 145, 155 (1947) (dissenting opinion).
\(^6\) Id. at 160-61.
\(^7\) 339 U.S. 56 (1950).
in forged postage stamps. They obtained a warrant for his arrest but no search warrant was issued. When they arrested him in his place of business, they searched his desk, safe and file cabinets and seized over five hundred forged stamps. In finding the search "reasonable," the Court pointed out a number of factors bearing on the issue. It was "incident" to a lawful arrest, the place searched was not a home but a business room to which the public was invited, the room was small and under the complete control of the person arrested, the search did not extend beyond the premises used for unlawful purposes, and the possession of forged stamps itself was a crime just as it is a crime knowingly to possess burglar's tools or counterfeit money.

Justices Frankfurter and Jackson dissented sharply. The search, they thought, was unlawful since it was practical for the officers to have obtained a search warrant either at the time of the issuance of the warrant for arrest or, for that matter, thereafter. This had been the rule laid down by the Court less than two years before and was now overruled. The two Justices pointed to the origin of the exception that a search may be "reasonable" when made as "incident" to a lawful arrest. Its basic roots lie in necessity, they declared.

What is necessity? Why is a search of the arrested person permitted? For two reasons: first, in order to protect the arresting officers and to deprive the prisoner of potential means of escape, and secondly, to avoid destruction of evidence by the arrested person. [Citations omitted.] From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control. What a farce it makes of the whole Fourth Amendment to say that because for many legal purposes everything in a man's house is under his control; therefore, his house—his rooms—may be searched.

They also pointed out that the lawfulness of the search of a motor vehicle is likewise "rooted in necessity" because of the impracticability of securing a warrant.

It is clear, however, aside from the extent of the search allowable as incident to an arrest, that the arresting officer must have an arrest warrant or, if it is impracticable to obtain one, he must have "probable cause" to make the arrest. This means by the common law rule that the crime must have been committed in his presence or he must have reasonable grounds to believe that the arrested person has committed a felony. And such cause must exist before the arrest—not afterwards, as a result of the search. As Justice Jackson remarked: "It will not do

10. Id. at 73.
for the Government to justify the search by the arrest and the arrest by the search."  

And even if officers have "probable cause" for entering and making an arrest without warrants, they may not force an entry, if the suspect is in the house, without first giving notice of their authority and purpose in demanding admission. Justice Brennan recently quoted from an early seventeenth century English opinion.

In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.  

(Justice Brennan's emphasis.)

The occasion for the reference was a case in which officers had knocked on the door and when the householder opened it on an attached chain and asked what they wanted, one of the officers put his hand inside the door, ripped off the chain and entered. The Supreme Court held the ensuing search unlawful. An exception to the requirement, of course, is where it is obvious that the householder knows what the officers are there for. They are not required to go through a futile ritual.

One of the last cases in which Justice Rutledge participated was Wolf v. Colorado.  

His dissenting views here are noteworthy for several reasons, not the least of which is their complete vindication in an epoch-making case twelve years after his death. The Wolf case involved the use of illegally obtained evidence in a criminal trial in a state court. In 1913, the Court had held in Weeks v. United States that evidence obtained in violation of the search and seizure provision of the Fourth Amendment could not be used in a criminal trial in a federal court. The accused had been convicted of using the mails in connection with a lottery. The opinion was by Mr. Justice Day, in the course of which he wrote:

The tendencies of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after submitting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which

people of all conditions have a right to appeal for the main-
tenance of such fundamental rights.15

It should be noted that Justice Day echoed Justice Bradley in the Boyd case, by linking "unlawful seizures" (the Fourth Amendment) with "enforced confessions" (the Fifth), a position which was later to be re-echoed by Justices Clark and Black in a 1961 case.16

In Wolf, a physician had been convicted of abortion in the state courts of Colorado. The police had entered his office without a warrant and without his consent. They obtained from his records the names of patients who were subsequently used as witnesses against him. The Court held that there was a distinction between the constitutional pro-
vision against search and seizure and the exclusionary rule of evidence as applied in Weeks. The former was applicable to the states by the Fourteenth Amendment, guaranteeing due process of law; the latter was not so applicable. The states were free to adopt different rules of admissibility of evidence.

Mr. Justice Frankfurter wrote for the Court as follows:

The security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the states through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely upon the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of Eng-
lish speaking people.

Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police intrusion into privacy, it would run counter to the guaranty of the Fourth Amend-
ment. But the ways of enforcing such a basic right raises questions of a different order.17

He then held that the fruits of such an unconstitutional breaking, entry and seizure may be used in state criminal courts to convict the victim of such unconstitutional procedure.

Thus, Justice Frankfurter, to quote a figure of speech used by him in another case,18 appeared to have marched the King's men up the hill, turned them around, and then marched them down again. For purposes

15. Id. at 392.
of the practical business of law enforcement, he ended up exactly where he started. For whatever value it had, he tabulated the states which had voluntarily followed the *Weeks* doctrine and those which had not. "As of today," he wrote, "31 states reject the *Weeks* doctrine, 16 states are in agreement with it."\(^{19}\) That was in 1949. In an appendix to his 1960 opinion in *Elkins v. United States*,\(^ {20}\) Justice Stewart listed 28 states which at that time, as a matter of local law, excluded evidence obtained in violation of the federal Constitution.

Justices Douglas, Murphy and Rutledge dissented, but Black, curiously enough, concurred in a short opinion which added little or nothing to support the Court's decision. Rutledge's notes taken at the conference indicate Black's first reaction was to reverse Wolf's conviction. He later expressed doubt but finally supported the majority. Justice Murphy pointed out the inadequacy of the common law relief afforded the victims of police lawlessness. Many states disallow punitive damages in a tort action for trespass in the absence of malice. "If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar." That an action for damages against an offending police officer is not effective to protect the citizen's constitutional right to privacy under the Fourth Amendment has been repeatedly demonstrated. Murphy also thought that questions of due process of law should not be determined by taking a poll of the practices in the various states.

Rutledge's dissent was gentle but penetrating.

> [O]ne should not reject a piecemeal wisdom, merely because it hobbles toward the truth with backward glances. Accordingly, although I think that all "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," [citing *Adamson v. California*, 332 U.S. 46, dissenting opinion] I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment "to be implicit in the concept of ordered liberty" and thus, through the Fourteenth Amendment . . . valid as against the states. [He thereupon rejected] the Court's simultaneous qualification that the mandate embodied in the Fourth Amendment, although binding on the states, does not carry with it the one sanction . . . failure to observe which means that "the protection of the Fourth Amendment . . . might as well be stricken from the Constitution." [Citing *Weeks v. United States*.] For I agree with my brother Murphy's demonstration that the Amendment without the sanction is a dead letter.\(^ {21}\)

For Rutledge, the necessary implication of the Amendment was to forbid

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21. Wolf, *supra* note 17, at 47.
the use of evidence so obtained against him "in any criminal proceeding involving the victim of the unconstitutional search." It was compounding the original wrong and unworthy of civilized government, whether federal or state. "Compliance with the Bill of Rights betokens more than lip service." He believed with Holmes that the use of evidence obtained in violation of those constitutional mandates "reduces the Fourteenth Amendment to a form of words."  

Less than three years later, Justice Frankfurter, writing for the Court in another sensational case, reversed a conviction by the California courts of an accused charged with selling narcotics. State officers had entered the home of the suspect and forced their way into the bedroom occupied by himself and his wife. When they questioned the petitioner about two capsules lying on a bedside table, he grabbed them, put them in his mouth and swallowed them. After an attempt to extract the capsules by force, the police took the petitioner to a hospital where an emetic was forced into his stomach over his protests. He vomited the two capsules, which were found to contain morphine, and which were used in evidence against him.

This was too much for Frankfurter to stomach.

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensitivities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

But the case turned on the Fourteenth Amendment as such, not on the Fourteenth Amendment as incorporating the Fourth. Justices Black and Douglas concurred on the basis of the self-incriminating clause of the Fifth Amendment as incorporated under the Fourteenth. "I think," wrote Black, "a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science."

Justice Frankfurter, dissenting, also found a violation of due process as such in another California case in which police had had a key made to fit the door of the suspect's house, entered it, and installed a secret microphone in the bedroom of the accused and his wife. He did not, however, make any departure from his position in the Wolf case with respect to Fourth Amendment sanctions. He thought the per-

24. Id. at 172.
formance of the law enforcement officers here so “repulsive” as to violate the canons of decency prescribed by “due process.” Perhaps as much as any other case, this case tends to support Justice Black’s skepticism of a principle so general that it permits opposite conclusions by such eminently wise and humane Justices as Jackson, who wrote for the majority in upholding the conviction, and Frankfurter, eloquent in dissent.

Further confusion was added in 1957 when the Court upheld a conviction in a criminal case in which evidence of intoxication of a truck driver was admitted. The police had instructed a physician to take a blood test by use of a hypodermic needle while the accused was unconscious after a traffic accident. A majority of the Court was able to distinguish the case from the stomach pumping situation. Chief Justice Warren, Justices Black and Douglas dissented.26

The complete vindication of Rutledge’s Wolf dissent came in 1961, when on the last day of the term the Court handed down its decision in Mapp v. Ohio.27 Mr. Justice Clark, in reversing the Ohio Supreme Court, wrote a devastating opinion for the Court, Justices Black and Douglas concurring in separate opinions and Mr. Justice Harlan, with whom Justices Frankfurter and Whittaker joined, dissenting.

The facts in Mapp were indeed shocking. Three Cleveland police officers had information that a suspect, wanted for questioning in connection with a recent bombing, was hiding in a house in which the Mapp woman lived with a daughter by a former marriage. They also suspected that some “policy paraphernalia” was concealed there. The officers went to the house, knocked on the door and demanded entrance. Miss Mapp, after telephoning her attorney, refused to admit them without a warrant. Later, a half dozen officers arrived and broke through one of the doors. When the householder asked for a warrant, an officer waved before her some kind of paper which she immediately grabbed and concealed in her bosom. As stated by Justice Clark in his opinion, “[a] struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been ‘belligerent’ in resisting their official rescue of the ‘warrant’ from her person.” After some further “roughing up,” Miss Mapp, in handcuffs, was forcibly taken upstairs to her bedroom where the officers searched a chest of drawers, a closet and somesuitcases. They then went through the rest of the house including the basement. In the course of this widespread search, they found the materials for which she was subsequently prosecuted and convicted for having in her possession. The materials seized had nothing to do with the “bombing” or the “policy paraphernalia.” Miss Mapp was convicted of having in her possession obscene literature. No valid search warrant had been issued.

In the course of his opinion, Justice Clark again referred to the close connection between the Fourth and Fifth Amendments, which he described as running "almost into each other." He reviewed developments subsequent to Wolf. He then held that the Fourth Amendment right of privacy was equally enforceable against the states by the same sanction of exclusion as against the federal government.

"Moreover," continued Clark,

our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforcement provisions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. . . . In non-exclusionary states, federal officers, being human, were . . . invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence.28

Inasmuch as Justice Clark had himself been a law enforcement officer, albeit at the highest level, many lawyers and others were surprised at his forthright position in connection with search and seizure. But as Professor Allen has pointed out, although the Justice had from time to time displayed a sympathetic attitude toward the problems of police and prosecutors, he was not a member of the Court when the Wolf case was decided and, in fact, had actually stated his disapproval of the decision in that case. "Clearly, Mr. Justice Clark meant what he said."29

Only a year before the Mapp case, the Court in Elkins v. United States,30 over the protest of four Justices, outlawed the rule that federal prosecutors could avail themselves of evidence illegally seized by state officers operating entirely on their own account. Theretofore, although federal officers were prohibited from conducting illegal raids and seizures, the fruits of such lawlessness by state officials could be handed to them "on a silver platter."

Justice Stewart, writing for the Court, admitted an awareness on its part that the Wolf decision, refusing to apply the exclusionary rule to state prosecutions, "operated to undermine the logical foundation of the Weeks case which applied the exclusionary rule to federal prosecutions."

28. Id. at 657.
To the victim, he said, "it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." He summarized the considerations of "reason and experience" calling for the rejection of evidence illegally seized by state agents and turned over to federal authorities. "But," he continued, "there is another consideration—the imperative of judicial integrity," quoting from Holmes, thirty-odd years before in a wire-tapping case, that "no distinction can be taken between the Government as prosecutor and the Government as judge." Justice Stewart also made a pointed argument on the effect of the old rule on the principle of federalism. By admitting evidence in federal criminal courts illegally seized by police officers in states which excluded such evidence, the national Government frustrates state policy "in a particularly inappropriate and ironic way." It serves to defeat the state's effort to assure obedience to the federal Constitution.

Five years earlier in 1956, a method was formulated to prevent federal officials from stepping "across the street" to hand over evidence which they had illegally seized, to state agents "on a silver platter." This was accomplished by the use of an injunction against a federal agent which prohibited him from turning over to state prosecutors evidence which he had obtained in an invalid search. The order also enjoined him from testifying in the state court. In other words, before 1956, state and federal agents "cooperated" to their mutual satisfaction in successfully violating the constitutional rights of citizens suspected of criminal offenses.

Nevertheless, a number of states had still accepted such evidence obtained by their own officers. The New York Constitution, as Justice Frankfurter has pointed out, contains a provision identical with the Fourth Amendment and a statute repeats the same language. Apparently the people wanted to be "secure in their persons, houses, papers and effects." But New York courts, until Mapp, rejected the exclusionary rule. In a case in which a plain clothes man obtained a key to a hotel room from the clerk and, without a warrant, conducted a search, a judge at Special Sessions complained indignant: "The case at bar is merely a mild example of how the liberties of New Yorkers are destroyed by the police and the courts. The rule of evidence subordinates the courts to the lawlessness of the police." 

Mr. Justice Black, in his concurring opinion in the Mapp case, relied heavily on the Boyd case, wherein the Court decreed that it was unable to perceive that the seizure of a man's private books and papers to be used in evidence against him was substantially different from compelling him to be a witness against himself. He had not accepted this doctrine in

31. Id. at 214-15.
Wolf, in which he wrote a brief concurring opinion. He did, however, in Mapp. "It was upon this ground," he wrote,

that Mr. Justice Rutledge largely relied in his dissenting opinion in the Wolf case and, although I rejected the argument at that time, its force has for me, at least, become compelling with the more thorough understanding of the problem brought on by recent cases.85

He then referred to the two California cases discussed earlier and pointed out the confusion which had resulted therefrom. "Finally today we clear up that uncertain period."

In his lengthy Mapp dissent, Justice Harlan, with whom Justices Frankfurter and Whittaker concurred, relied upon "judicial restraint" and stare decisis. He concluded with the ominous statement that "our voice becomes only a voice of power, not of reason." Justice Douglas, concurring with the majority, declared that in his opinion, the Wolf case, supporting a double standard for law enforcement officers, could hardly be called the voice of reason. It led to "working arrangements" between federal and state authorities and, in many ways, reduced the administration of justice to "shabby business."

Associate Justice Roger Traynor of the Supreme Court of California has discussed some of the problems created for the fifty states by the Mapp decision. Justice Traynor himself had undergone a change of view as to the conflicting policies involved in the issue. He had written the opinion for his court in 1942 rejecting the exclusionary rule as a matter of state law.86 After the Wolf case held that states were free to accept or reject it as a rule of evidence, the California Law Review commented adversely:

The decision makes it plain that the federal law of search and seizure is not to be applied to the states in its entirety but is to be classified into (1) constitutional rules and (2) federal rules of "procedure" or "evidence" such as the exclusionary rule. Only the constitutional rules bind the states. However, if the exclusionary rule is the only effective means of enforcing the guarantee, the Court has proclaimed an illusory right.87

The article then examined the situation in California and concluded that "it seems clear that present protection is insufficient to secure respect for the right." In 1955, after what Justice Traynor called his "education in the biokinetics of law enforcement agencies," he wrote an opinion for his court which reversed the earlier case, and established the rule in

California that evidence obtained in violation of constitutional rights of the accused may not be used against him. In his opinion excluding the tainted evidence, the judge explained:

We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result the courts under the old rule have been constantly required to participate in, and, in effect condone the lawless activities of law enforcement officers.

Traynor further explained his thinking: Excluding vital evidence of guilt would mean, in Judge Cardozo's words, that "the criminal is to go free because the constable has blundered." But as illegally obtained evidence was offered by enforcement authorities in case after case, almost as a routine procedure, Traynor's misgivings grew. "It was," he wrote in a 1962 article,

one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state Constitution.

Under the rule of Mapp, as Justice Clark conceded, "The criminal goes free, if he must." He then added pointedly, "but it is the law that sets him free." Under the non-exclusionary rule, the criminal goes to prison, but it is the lawlessness of the police that sends him there.

There is no doubt, however, that in striking at the nasty problem of police lawlessness in various states, the Supreme Court has created other problems. Justice Traynor has summed up some of them.

There is no bill of particulars as to what constitutes lawful arrest or reasonable search incident to lawful arrest. Silence rings the large question of how much sweep there can be to a search. We will have to find out what constitutes probable cause for arrest and probable cause for a warrant. We will have to find out what it is that makes a search or seizure unreasonable. And now that the erstwhile rule of evidence is transfigured as constitutional doctrine, now that it has emerged from the wings to the mise en scène of the Fourth Amendment, what will become of its unsettled relations with the Fifth Amendment, which has not yet so bodily advanced as the Fourth from the wings of the Fourteenth Amendment? To call but a partial roll

39. Id. at 445, 282 P.2d at 911-12.
of the myriad questions is to seize how spare is the rule of Mapp and to understand how wide must be our search for the clues to its orderly evolution. We will come upon enduring answers only if we first come to some understanding of the nature and scope of the right to privacy that the Fourth Amendment protects. Such understanding will take time, but it is not impossible to achieve.\(^{42}\)

One of the most serious issues raised by the Mapp decision is that of retroactivity. Will it "open wide the prison gates?" There are hundreds, yes, thousands of inmates of prisons throughout the states whose convictions were brought about by unconstitutionally obtained evidence, or at least against whom illegally obtained evidence was admitted. Most, no doubt, are guilty. Some undoubtedly would have been convicted by properly admissible evidence. In many situations it would be impossible to establish the "unreasonable" character of the "search and seizure" if for no other reason than because the record will fail to disclose the necessary facts. Defense counsel could well have thought it futile to raise the point under the prevailing rule of admissibility.

Nevertheless, there is a serious matter here. Are these prisoners, at whose trials evidence obtained by violation of the law of the land was used, now unconstitutionally detained?\(^{43}\) The California Supreme Court, after reversing itself, did indeed apply its rule retroactively to cases which had been tried before the decision but with appeals still pending. However, it declined to open the Pandora's Box for prisoners of longer standing. This distinction was legally feasible since at the time the only change in the California law was one of procedure. Mapp had not yet been decided. Although prisoners had been erroneously convicted because the judge made a mistaken ruling on a question of the law of evidence, the convictions were not void and thus subject to collateral attack, years thereafter. The situation now is quite different. Prisoners were not only convicted erroneously, but perhaps, unconstitutionally. It is a plausible argument that their convictions were void and that they are unconstitutionally imprisoned.

The New York Court of Appeals has also applied the Mapp rule retroactively to appeals pending at the time of the decision.\(^{44}\) When it is so retroactively applied, no insoluble questions arise as to the "unreasonableness" of the search. If the record does not disclose sufficient facts for the appellate court to pass final judgment, the case can be remanded to the lower court and retried. This is what happened in the New York case. The record which reached the highest New York Court indicated that the search was unconstitutional unless there was "probable

\(^{42}\) Id. at 320.
cause” to believe that criminal activities were occurring on the premises searched. “Of course,” the court said,

when this case was tried, the People were not required to prove that the police had probable cause to arrest defendant. . . . It may well be that at the time of the entry the officers had probable cause which would have justified their making an arrest.46

The Supreme Court of New Jersey handled a similar case in the same way.46

Pre-Mapp convictions with an appeal still pending thus presented only a relatively small number of cases. Retroactive application to cases in which final judgments have been rendered, perhaps many years before, is quite a different matter.47 In 1956, the Supreme Court held that indigent persons convicted in state courts are constitutionally entitled to a transcript of the record furnished by the state to enable them to appeal to a higher court if such appeals are available under state law. The Fourteenth Amendment required as much. Two years later the Supreme Court applied the rule to the case of a prisoner who had been convicted of murder in the state courts of Washington some twenty-odd years before. He was indigent and had requested a free copy of the transcript of the record at his trial to enable him to appeal. It was denied. The Court held this to be a denial of his constitutional rights.48

But the situation here is somewhat different and may be distinguished. Again to quote Justice Traynor of the California court,

[U]nlike the denial of the right to counsel, the knowing use of perjured testimony or suppression of evidence, the use of an involuntary confession, or . . . the denial of an opportunity to present a defense, the use of illegally seized evidence carries with it no risk of convicting an innocent person. The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement.49

Several state cases have declined to apply the Mapp rule retroactively as to cases in which final decisions had been rendered prior to Mapp and the issue of the validity of the search had not been raised in the original proceedings.60 On the other hand, a federal Court of Appeals has held that

45. Id. at 374, 179 N.E.2d at 482, 223 N.Y.S.2d at 467.
47. For further discussion, see Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962).
where the prisoner in his pre-Mapp trial did raise the issue, the Mapp rule could not be the basis for attacking the decision because of the doctrine of res judicata, i.e., the matter has been decided. Obviously this is an unsatisfactory state of affairs which the Supreme Court must soon clear up.

Another matter to be settled arises with respect to the phrase "persons, houses, papers, and effects." Just what is included? In Lanza v. New York, the Supreme Court purported to hold that "house" may include a business office, store, hotel room, apartment, automobile or occupied taxicab but not a public jail or cell or room therein. In that case a man named Lanza was convicted of contempt for refusing to answer questions put to him by a state legislative committee. He claimed immunity from punishment because the basis for questions asked him was a transcript of an electronically intercepted conversation between him and his brother in a room in a jail where the latter was imprisoned at the time. The talk had been recorded surreptitiously by state officials and a copy thereof turned over to the committee. Justice Stewart, writing for the Court, declared: "For the reasons which follow, we hold that this constitutional claim is not valid, and we accordingly affirm the judgment before us." Justices Frankfurter and White took no part in the decision while the Chief Justice and Justices Black and Douglas dissented.

The "reasons which follow" were set forth briefly. First, the opinion conceded "as well settled that the fourteenth amendment gives to the people like protection against the conduct of the officials of any state" as the fourth gives against officials of the federal government. It also declared that "there can be no doubt that secret electronic eavesdropping" under certain circumstances, may amount to an unreasonable search and seizure. But the notion that a jail is the equivalent of a man's "house," the Court thought, was "at best a novel argument." In any event, the Court declared that "to hold that the petitioner could not constitutionally be convicted for refusing to answer such [pertinent] questions simply because they related to a conversation which had been unlawfully overheard by other state officials would . . . be a completely unprecedented step."

Curiously enough, the opinion then proceeds to declare that the "ultimate disposition of this case, however, does not demand consideration of whether such a step might ever be constitutionally required" because two of the questions asked and to which answers were refused were in no way related to the intercepted conversation. There was thus an adequate ground for affirming the state court which in no way involved a federal issue under the Constitution.

52. 370 U.S. 139 (1962).
53. Id. at 145.
But the Court’s long practice has been, as Justice Frankfurter has put it, to decide constitutional questions “last” and not at all, if there are other adequate grounds for decision. The departure into this “exercise in futility” drew strong objections from the dissenters. Justice Brennan expressed his views as follows:

I must protest the Court’s gratuitous exposition of several grave constitutional issues confessedly not before us for decision in the case. The tenor of the Court’s wholly unnecessary comments is sufficiently ominous to justify the strongest emphasis that of the abbreviated Court of seven who participate in the decision, fewer than five will even intimate views that the constitutional protections against invasions of privacy do not operate for the benefit of persons—whether inmates or visitors—inside a jail, or that the petitioner lacks standing to challenge secret electronic interception of his conversations because he has not a sufficient possessory interest in the premises, or that the Fourth Amendment cannot be applied to protect against testimonial compulsion imposed solely as a result of an unconstitutional search or seizure.54

In this “brief” sentence, Justice Brennan was far more sharply critical of his brother Stewart for unnecessarily discussing constitutional issues than was Justice Black in an earlier case which attracted considerable journalistic attention.55 However, not a line of news print or editorial comment has been found on Brennan’s opinion. Perhaps it is no longer news that Supreme Court Justices are not only justified but are obligated to point up what they regard as error in their colleagues’ opinions. As the Chief Justice set forth in his memorandum opinion in the Lanza case, “these expressions of dicta are in a form which can only lead to misunderstanding and confusion in future cases.” He went on to say that such dicta, “when written into our decisions, have an unfortunate way of turning up in digests and decisions of lower courts . . . .”56 As if to underscore what the Chief Justice thus wrote, headnote 3 in the Supreme Court Reporter, reporting the case under the West Publishing Company’s key number—“Searches and Seizures, Key 7(10)”—is as follows: “Public jail is not equivalent of a ‘house,’ within Fourth Amendment protection, or place where he can claim constitutional immunity from search or seizure of his person, papers, or effects. U.S.C.A. Const. Amend. 4.”57

The lawyer or judge in a hurried search for authority could plausibly conclude from this that the Court had held the Fourth Amendment did not protect a prisoner in jail against eavesdropping. If he should so

54. Id. at 150.
56. Note 52 supra at 148.
cite the case in his brief or opinion, he would be in error; if he were sufficiently careful to read the opinion, he would be disappointed and exasperated at the waste of his time.

It would appear that Justice Harlan, who was one of the majority of four, also recognized as mere dicta the entire constitutional discussion and wanted to make sure that his vote would not be misunderstood. It will be remembered that he was a dissenter in the Mapp case. He did not believe that the Fourteenth Amendment afforded the same protection against state governments as the Fourth does against the national government. This he reiterated in Lanza. Thus, his concurring opinion:

I do not understand anything in the Court's opinion to suggest either that the fourteenth amendment "incorporates" the provisions of the fourth, or that the "liberty" assured by the fourteenth amendment is, with respect to "privacy," necessarily coextensive with the protections afforded by the fourth. On that premise, I join the Court's opinion.68

The actual decision in the Mapp case is with respect to evidence obtained by a violation of the Fourth Amendment prohibition of unreasonable search and seizure. What are its implications for the use of evidence obtained illegally but not unconstitutionally? Evidence obtained by wire-tapping presents such a case. Wire-tapping is not unconstitutional,69 but it is forbidden by an Act of Congress. Evidence obtained thereby, either by state or federal officers, may not be used in criminal trials in the federal courts,60 but the Court held in 1952 that it could be admitted in state criminal trials if it was admissible under state rules of evidence. It has been suggested that the Mapp case may indicate the end of this practice as well, not because the constitutional rights of the accused have been violated but because Congress has extended to him this statutory protection which, under the supremacy clause of the Constitution, should prevail over state law.61

Although most commentators approve the adoption of the exclusionary rule, in all fairness, it should be noted that the opposite view has had its champions, on the merits, among the greatest of legal scholars. There were some who considered the doctrine of the Weeks case "heretical" and "sentimental." "The doctrine of Weeks v. United States," noted Professor Wigmore in his great work on Evidence,

"also exemplifies a trait of our Anglo-American judiciary peculiar to the mechanical and unnatural type of justice. The natural way to do justice here would be to enforce the healthy

58. 370 U.S. 139, 147 (1962).
principle of the Fourth Amendment directly, i.e., by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal. But the proposed indirect and unnatural method is as follows:

Wigmore then ironically described the exclusionary rule in his classic words to Titus and Flavius, quoted by Justice Stewart in his “silver platter” opinion:

“Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus’ conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.”

Just as it is generally thought that the admission of illegally seized evidence encourages lawlessness on the part of police, it is also assumed that the exclusionary rule tends to deter, although the empirical evidence is inconclusive on the latter point. Indeed, it is not conclusive on either point but such evidence as there is certainly supports the first proposition.

An extended study of police behavior in Philadelphia when evidence obtained by unconstitutional means was admissible in state criminal trials revealed a wide gap between the law of arrest and search on the one hand and police practice on the other. After presentation of various patterns of police action and specific cases of law violation, two conclusions emerged: “(1) the police in Philadelphia are in many cases arresting without sufficient information, and (2) even when they do have the information required by law for a legal arrest, it has often been gained by illegal means, notably the illegal search.” It was further observed by the investigators:

The amount of illegality discovered is perhaps startling in view of the facts that chiefly formal arrests were studied, which generally are far more commendable than the informal types, and that the bulk of information gathered was derived from police sources, which probably present police practice in its most favorable light.

62. 8 Wigmore, Evidence § 2184a, n.1 (McNaughton ed. rev. 1961).
This study was financed by an annual grant for studies in Law Enforcement and Individual Liberty, provided by Jacob Kossman of the Philadelphia Bar, in memory of Justice Rutledge.65

Perhaps Justice Traynor's observations,66 as an appellate judge with many years experience, are enough to convince most persons that police lawlessness was greatly encouraged by the non-exclusionary rule. Justice Jackson's remarks in a recent case67 tend to confirm Traynor's experience. "Only occasional and more flagrant abuses," he wrote,

come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts know nothing, and about which we never hear.

As pointed out by Barth,68 the victims are frequently in no position to make resistance. They usually are poor and ignorant, sometimes without counsel. If they do complain it is unlikely to carry much weight. "Trial courts are often not disposed to scrutinize police methods with much severity so long as they are persuaded of a defendant's guilt." They are unwilling to let the criminal go free merely "because the constable blundered."

Many state officials and some others are apprehensive of the effects of the exclusionary rule on law enforcement. They fear that the police will be handicapped. And so they will. They are now required to act within constitutional limits or their efforts will be altogether futile. However, the arguments as to the actual effects of the exclusionary rule have probably been exaggerated. Professor Allen has summed it up in a thoughtful article, as follows:

That the Mapp decision will produce both immediate and long-range consequences of considerable importance seems very likely. An effort to catalogue all the possible results of the case would constitute a highly speculative enterprise indeed. One statement can be made with reasonable confidence, however: The decision in Mapp does not spell disaster for American law enforcement at the state and local levels. Nothing in previous

66. See text accompanying note 41 supra.
experience suggests that the presence or absence of the exclusionary rule is the factor crucial to the effectiveness of the criminal law.\textsuperscript{69}

He might have added that the Federal Bureau of Investigation and other agents of the national government have lived with the exclusionary rule for fifty years without noticeable impairment of their effectiveness.

Here, as in other problems of democracy, there is no doubt that what is needed is a more efficient and effective education in the principles under which this Nation was brought into being and under which it will survive only if it adheres thereto. Unfortunately, the evidence accumulates that the American people are losing contact with their beginnings.

In an address before the American Bar Association in Chicago recently, Justice Brennan referred to the apparent failure of many Americans, especially the young generation, to understand the value and importance of their constitutional liberties. He referred to a recent study made at Purdue University of high school students. More than a third of those polled, for example, did not object to third degree methods used by police. The Justice believed that public understanding is essential to assure official observance of individual rights. "As the power of Government expands," he is reported to have said, "so the opportunities for official abuse of that power multiply. If those who wield the power are not sensitive to the guarantees of individual liberty, the likelihood of official lawlessness cannot help but increase."\textsuperscript{70}

\textsuperscript{69} Allen, \textit{Federalism and the Fourteenth Amendment: A Requiem for Wolf}, in \textit{The Supreme Court Review}, 1, 40 (Kurland ed. 1962).

\textsuperscript{70} New York Times, Tuesday, Aug. 13th, 1963.