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The Right of Privacy and Due Process of Law

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for obtaining satisfactory relief are extremely limited. Several major obstacles stand in his way. It may be noted, however, that despite the barriers of available courts, available forms of relief, and exhaustion of remedies, the seeds from which reform could grow are in existence. On the other hand, when we reach the obstacle created by a union-employer change or settlement of individual rights, a more difficult problem is presented. Here a cure to the present inequity would seem to involve a basic evaluation of the position which the individual should have in the whole collective bargaining structure. If the individual is to be completely subordinated, in order better to effectuate the collective system, let this be recognized. But if he is to be given effective and enforceable rights, then a legislative act would seem to be required in order to give some strength to these rights.

Jerome D. Adner

THE RIGHT OF PRIVACY AND DUE PROCESS OF LAW

AN HISTORICAL INTRODUCTION

The well-known maxim, "Every man's house is his castle," adequately describes that right of privacy which has long been held in the highest esteem by the citizen. It has been fashioned as a part of our Constitutional Law by the inclusion of the Fourth Amendment to the United States Constitution.¹

This Amendment was inserted to arrest a series of abuses of this cherished privacy by English officers acting under Parliamentary authority.² The colonists' loathing for the obnoxious writs of assistance has been frequently assigned as one of the flames which ignited the American Revolution. A controversy arose in Boston in 1761 over the use of these writs by British revenue officers. The writs empowered them, in their discretion, to search suspected places for smuggled goods. This James Otis thunderingly denounced as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that was ever found in an English lawbook." "Out of this controversy," said John Adams, "The child of independence was born!"³

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized."

2. E. g., 13 & 14 Car. 2, c. 11, § 5 (authorizing the issuance of writs of assistance).

3. A full account of this discussion will be found in 2 WORKS OF JOHN ADAMS 523-525. See also vol. 10 at 183 et seq. For a history of the English use of search warrants, see 2 HALE, PLEAS OF THE CROWN 113-114, 149-151; 2 HAWKINS, PLEAS OF THE CROWN 130, 133; 1 CHITTY, CRIMINAL LAW 64 et seq. (5th ed. 1847).

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IN THE FEDERAL COURTS

So bitter were our Founding Fathers' experiences with police search for papers and articles that it was once maintained that *no* search or seizure was valid.⁴ Although it may well have, the Amendment does not go that far. It condemns, not *all* searches and seizures, but only those such as are "unreasonable".⁵

What is an unreasonable search and seizure within the interdict of the Fourth Amendment has been the subject of a wealth of Supreme Court decisions. To abstract from them a consistent doctrine is an impossibility. The Court has never intended to supply a tidy formula for determining reasonableness; each determination has necessarily rested on its peculiar facts.⁶ Yet, the area is susceptible of a breakdown into categories where, if it were not for an added factor, the conduct of the law enforcement officials would be deemed unreasonable under the Amendment.

With a warrant

The Amendment contains both a permission and a prohibition. It condemns unreasonable searches and seizures, but continues to recite under what circumstances a warrant may issue. Since the permission should have the same Constitutional sanction as the prohibition enjoys, the former restricts the scope of the latter to the extent that a search instigated by virtue of a proper warrant, and confined within its bounds, can never be held unreasonable.⁷

Without a warrant: an early liberal approach

The Fourth Amendment, however, has never been construed to require that every search and seizure be affected under the authority of a warrant, although it was early urged in the judicial development of the criterion of reasonableness that the Amendment be construed liberally. *Boyd v. U. S.*⁸ was the first important expression on the law of search and seizure. The Court in the *Boyd* case strained to find that a compulsory production of a man's papers in court was a search within the meaning of the Fourth Amendment, and that *because* he was thereby forced to incriminate himself in violation of his privilege contained in the Fifth Amendment, it was an *unreasonable* search under the Fourth. There was no breaking of doors, no rummaging through a man's effects. Mr. Justice Bradley urged a strict adherence to

4. See dissent of Frankfurter, J., in *Davis v. U. S.*, 328 U. S. 582, 603 (1946).

5. *Carroll v. U. S.*, 267 U. S. 132, 147 (1925).

6. *Go-Bart Importing Co. v. U. S.*, 282 U. S. 344, 357 (1931).

7. *Gouled v. U. S.*, 255 U. S. 298, 308 (1921).

8. 116 U. S. 616 (1886).

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the rule that Constitutional provisions for the security of persons and property be liberally interpreted. "A close and literal construction deprives them of half of their efficacy, and leads to a gradual depreciation of the right . . ." ⁹ Mr. Justice Bradley continued to say that the essence of the offense is constituted by the invasion of one's right to privacy and security, and not necessarily by the entry into a man's home.

The Court often recurred to this underlying philosophy. Mr. Justice Sutherland warned that this right, so carefully embodied in the fundamental law, should not "be impaired by judicial sanction of equivocal methods, which, superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the Constitutional right."¹⁰ In *Gouled v. U. S.*¹¹ the Court pointed out that a search and seizure within the sense of the Fourth Amendment need not involve fear or coercion. It is committed, said Mr. Justice Clarke, when a government officer, "by stealth, through social acquaintance, or in the guise of a business call"¹² obtains entrance to one's home or office, and in the owner's absence, seizes his papers without his knowledge. A search and seizure were held bad in *Taylor v. U. S.*¹³ on the ground the agent had abundant opportunity to obtain a search warrant and "to proceed in an orderly way."¹⁴ The Court has often said that searches and seizures are to be condemned where made without a warrant, even if the same result may have been achieved in a lawful way,¹⁵ and that a search without a warrant is inexcusable where the opportunity to obtain one exists.¹⁶ Finally, no Court that looked to the words of the Amendment, rather than at its underlying purpose, would hold, as the Supreme Court did hold in *Ex Parte Jackson*¹⁷, that its protection extended to letters in the mails. The following areas, where a search and seizures are valid notwithstanding the lack of a warrant, testify to a radical departure from the earlier, more liberal, constructions.

Without a warrant: the search incident to a valid arrest

The right to search a *person* upon a lawful arrest was early settled in our law.¹⁸ The arresting officer may seize objects in his

9. *Id.* at 635.

10. *Byars v. U. S.*, 273 U. S. 28, 33 (1927).

11. *Supra* note 7.

12. *Id.* at 305.

13. 286 U. S. 1 (1932).

14. *Id.* at 6.

15. *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385 (1920).

16. *Carroll v. U. S.*, *supra* note 5.

17. 96 U. S. 727 (1878).

18. See 1 BISHOP, NEW CRIMINAL PROCEDURE 210 et seq. (4th ed. 1895).

“possession.”¹⁹ The purpose of the search is to discover things connected with the crime, such as its fruits, or the means by which it was committed, as well as that which could be used to effect an escape from custody.²⁰ However, authority to search the *premises* upon which the arrest has been made has been conferred only in recent years, initially to the room where the arrest was effected,²¹ and, finally, to include the entire premises under the “constructive possession” of the prisoner.²²

Mr. Justice Butler, speaking for a unanimous Court in *Marron v. U. S.*,²³ said:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

In *Harris v. U. S.*,²⁴ the Court sustained, by a five to four decision, as an incident to a lawful arrest, the seizure of incriminating papers, *unrelated* to the crime for which the arrest was made, and even though the officers were *unaware* when the search was initiated that such property was on the premises. Thus the decision achieves the incredible result of rendering the scope of search without warrant broader than that of a search with a warrant.

There is a broad rule that a search, illegal in its inception, cannot be legalized by what it brings to light. A search unlawfully taken is not made valid by the discovery of evidence of crime,²⁵ or by a confession made by the defendant after the search,²⁶ or by the arrest of the defendant after the search.²⁷ This would only prove that the officer guessed correctly, but the police should not be encouraged to engage in general searches on the chance that all will end well. Although unarticulated in the *Harris* decision, there lurks the implicit suggestion that even if the arrest were not valid (and so the search not justified when undertaken) the objects could nevertheless have been seized because their possession was a “continuing offense” committed in the “very presence of the officers.” This implication obviously departs from the consistent holdings to the effect that an uncon-

19. See cases cited in dissent of Frankfurter, J., in *Davis v. U. S.*, 328 U. S. 582, 611 (1946).

20. *Weeks v. U. S.*, 232 U. S. 383, 392 (1914).

21. *Agnello v. U. S.*, 269 U. S. 20 (1925).

22. *Harris v. U. S.*, 331 U. S. 145 (1947).

23. 275 U. S. 192, 196 (1927).

24. *Supra* note 22.

25. *Byars v. U. S.*, *supra* note 10; *Johnson v. U. S.*, 333 U. S. 10 (1948).

26. *In re Oryell*, 28 F. 2d 639, 649 (W. D. N. Y. 1928); *U. S. v. Setaro*, 37 F. 2d 134, 137 (D. C. Conn. 1930); *Nueslein v. D. C.*, 115 F. 2d 690, 691 (D. C. Cir. 1940).

27. *Taylor v. U. S.*, *supra* note 13.

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stitutional trespass does not gain legality *ab initio* from a later discovery of evidence.

The next year after the decision in the *Harris* case, the case of *Trupiano v. U. S.*²⁸ greatly circumscribed the practical effect of the former holding by a ruling that, even where a valid arrest has been made, a search without a warrant is not permissible if the circumstances make it feasible to procure a warrant in advance. The *Trupiano* decision was short-lived. Two years later, the Court in *Rabinowitz v. U. S.*²⁹ sustained an hour and a half search of an office as an incident of an arrest even though there was ample opportunity to secure a search warrant.

Before the *Harris* decision, the cases had left unanswered the question of exactly *how far* the right to search as an incident of a lawful arrest extended. It extends at least to the entire premises on which the arrest is made. Might it extend further? The notion of "constructive possession" relied upon in the *Harris* case may logically be stretched to justify the search of a man's home, *no matter where he is arrested.*³⁰

Without a warrant: the search of vehicles

The Court has recognized a necessary difference between the search of a dwelling house or a place of business and the search of a vehicle. An emergency doctrine—the quick removal of the vehicle out of the jurisdiction in which the warrant is sought, with the attendant possibility of the removal of goods from that vehicle—makes it impractical to secure a warrant in this area. In *U. S. v. Lee*,³¹ the Court applied this doctrine to a vessel seized on the high seas. Mr. Justice Brandeis found that the seizure was "lawful, as like a search and seizure of an automobile . . . on land is lawful."

The right to search a vehicle and seize its contents depends on the "probable cause" that the vehicle's contents offend against the law.³² Probable cause has been defined as "facts and circumstances such as to warrant a man of prudence and caution in be-

28. 334 U. S. 699 (1948).

29. 339 U. S. 56 (1950).

30. Then the principles of *Weeks v. U. S.*, *supra* note 20, *Silverthorne Lumber Co. v. U. S.*, *supra* note 15, and *Agnello v. U. S.*, *supra* note 21, will go by the board. In each of these cases where defendants were arrested in one place, their homes and offices in other places were searched contemporaneously. It could be said with equal logic that they were in "possession" of those other places.

31. 274 U. S. 559, 562 (1927). The Court in *Lee* did not clearly find a search on the high seas. The opinion, in referring to the searchlight that had been thrown on the vessel, stated: "[N]o search on the high seas is shown . . . [S]uch use of a searchlight is comparable to the use of a marine glass or a field glass" and is "not prohibited by the Constitution". *Id.* at 563.

32. *Carroll v. U. S.*, *supra* note 5; *Husty v. U. S.*, 282 U. S. 694 (1930).

lieving that an offense has been committed"³³ and thus it is not necessary that the officer "should have had before him legal evidence of the suspected illegal act."³⁴

In this area the seizing officer need not guess correctly to have the search and seizure held reasonable. If the facts as subsequently developed do not justify a judgment of condemnation or forfeiture of the goods, the officer may escape liability by a showing that he had probable cause for the seizure.³⁵ The contrary is equally true. The officer's guess, vindicated by the seizure of illegally possessed goods, does not exempt him from prosecution if in fact probable cause was lacking.³⁶ This is, again, part of the broader rule that a search, illegal in its inception, is not made valid by what it brings to light.

Without a warrant: the search for public records

The scope of the interaction between the Fourth Amendment and the Self-Incrimination Clause contained in the Fifth Amendment, as early enunciated in the *Boyd* case, has been greatly narrowed by the decision of *Shapiro v. U. S.*³⁷ There, by a bare majority, the Court held that the privilege against self-incrimination does not extend to books and records which an individual is *required by law to keep* to evidence his compliance with lawful regulations.

The *Shapiro* case extends the "public records" philosophy formulated in *Davis v. U. S.*³⁸ In that case officers went to the accused's gas station during business hours and demanded ration coupons covering aggregate amounts of sales. The evidence was conflicting at Davis's trial for possessing them unlawfully. The district court found that Davis had consented to the search and that no force or threats were used to persuade him. There was an abundance of evidence to the contrary. The Supreme Court held (5-3) that it could not say as a matter of law that the lower court's finding of fact was erroneous, and it affirmed the conviction.

The case distinguished between property to which the government is entitled to possession and property to which it is not. The case did not go so far as to say that officers, seeking to reclaim government property, may proceed subject to no restraints at all, or that officers may undertake a general search of a man's papers for the purpose of learning if he possesses such property.

33. *Carroll v. U. S.*, *supra* note 5 at 149.

34. *Husty v. U. S.*, *supra* note 32 at 701.

35. *Stacey v. Emery*, 97 U. S. 642 (1878); *Carroll v. U. S.*, *supra* note 5 at 155.

36. *Carroll v. U. S.*, *supra* note 5 at 156

37. 335 U. S. 1 (1948).

38. 328 U. S. 582 (1946).

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The Court pointed out that the "nature" of the property indicates, "that the officers did not exceed the permissible limits of persuasion in obtaining them."³⁹ The Court was not generous enough to specify just where these "permissible limits of persuasion" are to be drawn, though it is clear that these limits are not quite so narrow as where private papers are sought.

In the present era of increasing governmental regulation, the *Davis* case assumes a far-reaching significance. Mr. Justice Frankfurter points out:

If Congress, by the easy device of requiring a man to keep the private papers that he has customarily kept, can render such papers 'public' and non-privileged, there is little left to either the right of privacy or the Constitutional privilege.⁴⁰

Electronic snooping: no violation of right of privacy

In this area government resourcefulness and ingenuity in obtaining evidence has achieved a new pinnacle. In *Olmstead v. U. S.*,⁴¹ the Court held that wiretapping was not an unreasonable search and seizure under the Fourth Amendment. The vehement dissents of Mr. Justices Holmes, Brandeis, Stone and Butler have been partially vindicated by the enactment of section 605 of the Federal Communications Act of 1934.⁴² This section has been interpreted as placing a ban on the use in federal courts of evidence obtained through wiretapping,⁴³ or procured through the use of knowledge gained from such conversations,⁴⁴ and has been construed to apply to intrastate,⁴⁵ as well as interstate, messages.⁴⁶

Since wiretapping is not illegal Constitutionally, the legislative overruling of *Olmstead* has not impaired its reasoning. "The Amendment itself clearly shows," said Mr. Chief Justice Taft, speaking for the majority in that case, "that the search is to be of material things—the person, his house, his papers, or his effects." Thus the line was drawn between "tangible evidence"

39. *Id.* at 591.

40. Dissent in *Shapiro v. U. S.*, *supra* note 37 at 70.

41. 277 U. S. 438 (1928).

42. 48 STAT. 1103 (1934), 47 U. S. C. § 605 (1946).

43. *Nardone v. U. S.*, 302 U. S. 379 (1937).

44. *Nardone v. U. S.*, 308 U. S. 338 (1939). The second *Nardone* case applies the philosophy of *Silverthorne Lumber Co. v. U. S.*, *supra* note 15, to the use of evidence obtained by wiretapping. The Court in *Silverthorne* stated that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." *Id.* at 392.

45. *Weiss v. U. S.*, 308 U. S. 321 (1939).

46. It was held in *Schwartz v. Texas*, 344 U. S. 199 (1952), that Congress did not intend to impose a rule of evidence on the state courts; therefore § 605 does not exclude such evidence in state court proceedings.

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and "testimony only of voluntary conversations secretly overheard."⁴⁷

Following such reasoning was *Goldman v. U. S.*,⁴⁸ which held that the use of a detectaphone to listen to a conversation in an adjoining room was not within the purview of the Amendment. The piece de resistance of government inventiveness, however, was yet to come. It was displayed in the case of *On Lee v. U. S.*⁴⁹

One Chin Poy, variously denominated by the government and the defense as an "undercover agent" and "stool pigeon" for the Narcotics Bureau, entered the accused's place of business and engaged him in an incriminating conversation concerning On Lee's activities in the opium market. Chin Poy was, unbeknownst to On Lee, "wired for sound." He had a broadcasting set concealed in his clothing which transmitted the entire conversation to an agent stationed outside the store. This manner of obtaining evidence was held to fall without the protection of the Fourth Amendment.

Judge Frank raised the significant policy problem inherent in this series of decisions in his dissent when the *On Lee* case was in the Second Circuit Court of Appeals.⁵⁰ Since one cannot foretell the bounds of modern scientific discovery, what will be the effect of new detecting devices on the individual's cherished privacy? It is not too far-fetched to surmise that someday a home may be thoroughly searched *without an officer setting foot on the premises!*

Admissibility of evidence: the Weeks Doctrine

The Amendment itself does not contain a method by which the rights it secures may be enforced. The choice of a sanction to deter violations of the right to privacy has prompted one of the most bitter splits of opinion in the field of Constitutional Law. The "exclusionists" have urged that meaningful freedom from unreasonable searches and seizures may be achieved only by the exclusion of evidence secured in violation of the Amendment. The "inclusionists," championed by Dean Wigmore⁵¹ and Mr. Justice Cardozo,⁵² have contended with equal resolve that to exclude logi-

47. *Supra* note 41 at 464.

48. 316 U. S. 129 (1942).

49. 343 U. S. 747 (1952).

50. 193 F. 2d 306, 317 (2d Cir. 1951).

51. See 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940). It is interesting to note that Wigmore evaluates the expression of Chief Justice Carroll in *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860 (1920), as the best that can be said for the viewpoint of inadmissibility.

52. E. g., *People v. DeFore*, 242 N. Y. 13, 150 N. E. 585 (1926).

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cally relevant evidence is both unwise and ineffectual. In 1914, with the case of *Weeks v. U. S.*,⁵³ the exclusionists scored a victory in the Supreme Court.

The so-called *Weeks* Doctrine renders inadmissible in a federal court the fruits of the lawless search, irrespective of their relevancy under rules of evidence. In this very case that for the first time enunciated an exclusionary rule, the Court expressly stated that "the Fourth Amendment is not directed to individual misconduct of state officers. Its limitations reach the federal government and its agencies."⁵⁴ Thus despite the *Weeks* Doctrine, evidence obtained by a private person,⁵⁵ or by state officers,⁵⁶ is admissible in the federal courts, unless federal agents participated in the improper acquisition,⁵⁷ or, even having played no role, the arrest and search were made for an offense punishable only by Federal Law.⁵⁸

IN THE STATE COURTS

Admissibility of evidence: the Wolf Doctrine

Having before only obliquely touched upon the question,⁵⁹ the Supreme Court, in 1914, unequivocally declared that the Fourth Amendment did not restrain the states.⁶⁰ Thus, regardless of the possibility that the *Weeks* Doctrine possessed a Constitutional vitality, the states felt themselves free to reject it; most of them have.⁶¹

In its recent opportunity to reexamine the question whether the right of privacy is embraced within the generic terms of the Due Process Clause of the Fourteenth Amendment, the Court, in *Wolf v. Colorado*,⁶² reversed its position of long standing and held that it *was* effective against the states. Would this overturn the many state convictions secured by the use of such unconstitutional evidence? Not at all. Mr. Justice Frankfurter, speaking for the majority of the Court, did not regard the exclusion of evi-

53. 232 U. S. 383 (1914).

54. *Id.* at 398.

55. *Burdeau v. McDowell*, 256 U. S. 465 (1921).

56. *Byars v. U. S.*, 273 U. S. 28 (1927).

57. *Ibid.*

58. *Gambino v. U. S.*, 275 U. S. 310 (1927).

59. *Adams v. New York*, 192 U. S. 585 (1904); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 552 (1908); *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 348 (1909). The *Adams* case has notoriously defied analysis because of its confused reasoning. There seems to be an inescapable question of jurisdiction which the Court, apparently, intentionally ignored.

60. *National Safe Deposit Co. v. Stead*, 232 U. S. 58 (1914).

61. For a listing, see Table I (A) in the Appendix to the opinion of Frankfurter, J., in *Wolf v. Colorado*, 338 U. S. 25, 38 (1948).

62. *Ibid.*

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dence as vital to the right of privacy. He indicated that this right is not without other methods of protection, and assumed the alternatives to be equally effective.⁶³

It is a necessary prelude to explorations of the scope of the *Wolf* holding to restate some trite propositions. It is well settled, for instance, that the first eight Amendments—the Bill of Rights—are limitations on the exercise of federal power only.⁶⁴ To what extent comparable liberties are guaranteed the person as against state action rests upon the determination of the Supreme Court, as these liberties are decided to fall within or without the vague ambit of Fourteenth Amendment protection. Held to a relatively narrow context is the scope of the Privileges and Immunities Clause⁶⁵ and the Equal Protection Clause.⁶⁶ The great flurry of judicial activity revolves about the Due Process Clause.⁶⁷

The question of precisely what rights are to be embodied as incidents of due process has prompted much discourse and a contrariety of opinion. The Court had early rejected two absolutes. Mr. Justice Black has consistently viewed the Due Process Clause as comprehending the first eight Amendments.⁶⁸ That notation has been spurned time and time again.⁶⁹ At the other extreme,

63. Vinson, J., speaking in *Nueslein v. D. C.*, *supra* note 26 at 695, suggests that they are not:

If . . . admissible . . . where is the defendant's remedy for the inexcusable entry into his home? The causist answers—a civil action against the officers . . . Such remedy scarcely satisfies the non-belligerent, non-legal mind of a person whose security has already been violated and who stands convicted. To follow that procedure means delay, expense, unwanted publicity; it asks the individual to stake too much, and to take too great a chance, in the hope of compensating the interference to his privacy.

A criminal remedy is also possible, but it is likely to be too strict or too lax. If criminal actions are brought consistently against the enforcing officers, before long their diligence will be enervated. If no prosecutions are brought . . . it cannot be said that statutory criminal prosecutions afford a deterrent to the infringement of the Fourth Amendment.

64. *Barron v. Baltimore*, 7 Pet. 243 (1883); *U. S. v. Cruikshank*, 92 U. S. 542 (1876); *Feldman v. U. S.*, 322 U. S. 487, 490 (1944).

65. This Clause relates to the rights obviously belonging to United States citizens, *e. g.*, the right to pass freely from state to state, *Crandall v. Nevada*, 6 Wall. 35 (1867); to petition the government for a redress of grievances, *U. S. v. Cruikshank*, *supra* note 64; to vote for federal officers, *Ex parte Varbrough*, 110 U. S. 651 (1883); to enter the public lands, *U. S. v. Waddell*, 112 U. S. 76 (1884); and to inform the federal authorities of violations of the law, *In re Quarles*, 158 U. S. 532 (1895). See, also, *Twining v. New Jersey*, 211 U. S. 78, 97 (1908).

66. This Clause has been largely limited to questions of discrimination on account of race or color. *E. g.*, *Strauder v. West Virginia*, 100 U. S. 303 (1880); *Norris v. Alabama*, 294 U. S. 587 (1935); *Nixon v. Herndon*, 273 U. S. 536 (1927).

67. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

68. *E. g.*, dissent of Black, J., in *Adamson v. California*, 322 U. S. 46, 68 *et seq.* (1947).

69. *Brown v. Mississippi*, 297 U. S. 278 (1936); *Palko v. Connecticut*, 302 U. S. 310 (1937); *Adamson v. California*, *ibid.*

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Mr. Justice Roberts has posed a literal argument to show that the framers of the Bill of Rights had never intended that any of the guarantees therein catalogued be construed a part of due process of law.⁷⁰ He assumes that the authors of the early amendments did not wish to be tautological in their exposition of enumerated rights. Therefore, to embrace within the Due Process Clause of the Fifth Amendment any specific guarantee of the Bill of Rights would serve to render the protection so embraced superfluous. Since the Due Process Clauses of the Fifth and Fourteenth Amendments are held to possess an identical purview,⁷¹ the conclusion is dictated that *because* a guarantee is spelled out in the Bill of Rights it cannot be implied in due process. That this result is opposed to reason is evident. It was rejected a half-century ago.⁷²

In contrast with these two extremes, the present majority of the Court has been inclined to view the nature of due process, not as a static compendium of eternal truths, but as a living, and growing, principle. This generative approach was first suggested seventy-five years ago,⁷³ and the Court has, in the main, been faithful to maintain it. Mr. Justice Frankfurter is the most fervent, and perhaps also the most prolific, exponent of the view that the Due Process Clause reenacted none of the earlier Amendments: he conceives of a "gradual and empiric process of exclusion and inclusion" as the proper manner to determine the scope of the Clause.⁷⁴

The Court is not unmindful of the position it occupies in a dual form of government. As the Due Process Clause is thus construed, it "places in the Supreme Court an enormous power over the legislation of the states and the procedures of their courts . . ." ⁷⁵ The Court has therefore felt itself constrained to include within due process only the most basic rights. Mr. Justice Cardozo has twice phrased for the Court the necessary criterion: due process secures only that which is "so rooted in the traditions and conscience of our people so as to be ranked as fundamental" ⁷⁶ or "implicit in the concept of ordered liberty." ⁷⁷

70. ROBERTS, *THE COURT AND THE CONSTITUTION* 65 *et seq.* (1951). Reviewed, 1 *BFLD. L. REV.* 208 (1951).

71. "It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth." Frankfurter, J., concurring in *Adamson v. California*, *supra* note 68 at 66.

72. *Chicago, Burlington, & Quincy R. R. v. Chicago*, 166 U. S. 266 (1897).

73. *Davidson v. New Orleans*, 96 U. S. 97 (1878).

74. *Wolf v. Colorado*, *supra* note 61 at 27.

75. ROBERTS, *op. cit. supra* note 70 at 80.

76. *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

77. *Palko v. Connecticut*, *supra* note 69 at 325.

Accordingly, some of the specific guarantees of the Bill of Rights, deemed fundamental, constitute a part of due process of law;⁷⁸ other Amendments offer more than the minimal protection contemplated and they are excluded;⁷⁹ still others may be embodied only partially;⁸⁰ and, finally, due process may restrain states in a manner nowhere articulated in the first Eight Amendments.⁸¹

To argue that due process requires a state to exclude from its criminal trials evidence obtained by virtue of an unreasonable search and seizure, one must apparently affirm, not merely that such an exclusionary rule is the *most effective* way to deter violations of the right of privacy, but that it is the *only* effective way to do so. If due process concerns itself with but minimal safeguards, questions of "better practice" are quite not in point.

The Court in *Wolf* was faced with a pure policy choice. Elements of essential procedural unfairness or the hint of an inherent unreliability in the evidence should not have been properly considered in making that choice. The Court has been solicitous of the basic rights of the accused and is eager that he be secured a fair and impartial trial. There is a failure to observe that fundamental fairness where a trial is dominated by a mob,⁸² or where an impecunious defendant is denied right to counsel in a serious case,⁸³ or where his conviction results from testimony known by the prosecution to be perjured,⁸⁴ or from an involuntary

78. *E. g.*, freedom of speech and of the press (AMEND. I), *Stromberg v. California*, 283 U. S. 359, 368 (1931), *Near v. Minnesota*, 283 U. S. 697 (1931), *Grasjan v. American Press Co.*, 297 U. S. 233, 234 (1936); freedom of religion (AMEND. I), *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *West Virginia State Bd. of Education v. Barnett*, 319 U. S. 624 (1943); right of peaceable assembly (AMEND. I), *DeJonge v. Oregon*, 299 U. S. 353 (1937); right of privacy (AMEND. IV), *Wolf v. Colorado*, *supra* note 61, *Stefanelli v. Minard*, 342 U. S. 117, 119 (1951); prohibition against taking property without just compensation (AMEND. V), *Chicago, Burlington & Quincy R. R. v. Chicago*, *supra* note 72.

79. *E. g.*, Proceeding by indictment in a serious crime (AMEND. V), *Hurtado v. California*, 110 U. S. 516 (1884), *Gaines v. Washington*, 277 U. S. 81, 86 (1928); privilege against self-incrimination (AMEND. V), *Adamson v. California*, *supra* note 68; double jeopardy (AMEND. V), *Palko v. Connecticut*, *supra* note 69; Confrontation of witnesses in criminal cases (AMEND. VI), *West v. Louisiana*, 194 U. S. 258 (1904); jury trial in civil cases (AMEND. VII), *Frank v. Mangum*, 237 U. S. 309, 341 (1915), *Hawkins v. Bleakly*, 243 U. S. 210, 216 (1917).

80. *E. g.*, assistance of counsel (AMEND. VI) has been deemed an element of due process in some cases, *Powell v. Alabama*, 287 U. S. 45 (1932), *Gibbs v. Burke*, 337 U. S. 773 (1949); not in others, *Betts v. Brady*, 316 U. S. 455 (1942), *Butt v. Illinois*, 333 U. S. 640 (1948).

81. *E. g.*, coerced confessions, *Malinski v. New York*, 321 U. S. 401 (1945), *Watts v. Indiana*, 338 U. S. 49 (1949). Cf. *Stein v. New York*, 346 U. S. 156 (1953), as noted in 3 Bflo. L. Rev. 146 (1953).

82. *Moore v. Dempsey*, 261 U. S. 86 (1923).

83. *Johnson v. Zebst*, 304 U. S. 458 (1938).

84. *Mooney v. Holohan*, 294 U. S. 103 (1935).

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confession induced by coercion or assault.⁸⁵ However, the mere fact that an officer engaged in an illegal search and seizure to obtain the evidence, in no way restricts the court from rendering a fair and impartial judgment as to the defendant's guilt or innocence. Concededly, the reliability of the evidence so secured is never in issue on the basis of the manner in which it is secured, and so in this essential, the coerced confession decisions must be distinguished away.

Thus divorced from incidental considerations, the competing demands of two irreconcilable policies confronted the Court. On the one hand in the interest in privacy our history shows us was the paramount concern of the Amendment's framers. On the other is society's concern in bringing criminals to justice. Whether to exclude logically relevant evidence "is an issue as to which men with complete devotion to the protection of the right of privacy might give different answers."⁸⁶

Mr. Justice Black concurred in the result of the *Wolf* case expressly on the "plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment, but is a judicially created rule of evidence which Congress might negate."⁸⁷ He thus equates the *Weeks* Doctrine with the *McNabb* Rule. *McNabb v. U. S.*⁸⁸ excludes confessions obtained by the police where there has been a failure to take the prisoner before a committing magistrate within a reasonable time. The *McNabb* Rule, like the *Weeks* Doctrine, restrains the federal government only. But the *McNabb* case was not decided on Constitutional grounds; the result was reasoned from the supervisory power of the Supreme Court over federal criminal justice,⁸⁹ and intended to effectuate a *legislatively* expressed policy for a speedy preliminary hearing.

From the premises upon which Mr. Justice Black has so often insisted, it is not at all difficult to appreciate that for him the implication is "clear". If it is true that the Bill of Rights has been incorporated *in toto* within the Due Process Clause of the Fourteenth Amendment, and that the federal exclusionary rule has not been so incorporated, the latter must necessarily persist in the federal courts subject always to the possibility of a Con-

85. *Brown v. Mississippi*, *supra* note 69.

86. *Wolf v. Colorado*, *supra* note 61 at 28.

87. *Id.* at 39-40.

88. 318 U. S. 332 (1943).

89. The Court has early and often recognized its authority to formulate rules of evidence to be applied in federal criminal prosecutions. See *U. S. v. Palmer*, 3 Wheat. 610, 643-644 (1819); *Wolfe v. U. S.*, 291 U. S. 7 (1934). See, also, 1 WIGMORE, EVIDENCE 6 (3d ed. 1940).

gressional overriding. Nevertheless, if the Court wished to so find, there is the technical possibility that the *Weeks* Doctrine possesses a Constitutional significance. Mr. Justice Frankfurter should certainly not be held to have maintained in *Wolf* that the *Fourth Amendment* restrains the states. It was the *essence* of that Amendment—the right to privacy—that was deemed basic to a free society. The *Weeks* Doctrine could well be the aura of that essence, a residue representing the best sanction of the *Fourth Amendment*. Thus viewed, Congress could no more legislate it away, as it could the privilege against self-incrimination,⁹⁰ which, too, exists only to restrain the federal government.

Rochin and Irvine compared

When a state prosecution is predicated on the *Wolf* Doctrine, the case obviously presents no federal question as to the propriety of the admittance of illegally seized evidence, unless the behavior of the police may be characterized as constituting something *more* than a mere search and seizure. In *Rochin v. California*,⁹¹ the Supreme Court reversed a conviction for the illegal possession of narcotics, holding that the forcible extraction of morphine capsules from the accused's stomach by means of a stomach pump and emetics violated due process. The Court described the stomach pumping as "conduct that shocks the conscience," as a procedure "bound to offend even hardened sensibilities," as "methods too close to the rack and the screw," as acts which "offend the community's sense of fair play," and as "brutal conduct."⁹² The practical distinction between the *Wolf* and the *Rochin* cases is that the evidence was admissible, and the conviction affirmed in the former, and that the evidence was held inadmissible, and the conviction reversed in the latter. Since the right of privacy is an incident of due process, the conduct of the police in the *Wolf* case was as much violative of due process as the stomach pumping in the *Rochin* case. The real clue to the distinction lies in the difference in the *degree* of the conduct, and not in a difference in kind. If police conduct may be envisaged as plotted on a continuum of reprehensibility—every whit of it, from the most subtle to the most screaming, a violation of due process—it is not until five justices are sufficiently shocked that a conviction will be overturned. Confessedly, the area on that continuum in which the line of demarcation is to be redrawn in each case is hopelessly vague.

90. *Counselman v. Hitchcock*, 142 U. S. 547 (1892). Congress must provide an immunity coextensive with the privilege.

91. 342 U. S. 165 (1952); noted, 1 BFL. L. REV. 318 (1952).

92. *Id.* at 172-173.

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In *Irvine v. California*,⁹³ a majority of the Court expressed its disdain for the approach it so approbiously termed *ad hoc*. Where officers listened in relays to everything that was said in the defendant's house for a period of a month via a secret microphone installed in his bedroom, gaining surreptitious entry into the home with a key a locksmith had fashioned at their behest, to install and twice to relocate the microphone, Justice Jackson was indeed shocked. He stated the conduct "would be almost incredible if it were not admitted."⁹⁴ However, these facts were held inadequate to bring the case within the sway of the *Rochin* case. The distinction was made on the basis of the interest to be protected. "However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."⁹⁵ Thus the facts differ in *kind* and not merely in degree.

The *Irvine* case, under this suggested analysis, sets up a new absolute, namely, that even "incredible" behavior of the police will never vitiate a conviction where only the property, and not the person of the accused, has been invaded. The Justice denies that this result, intended to inject more certainty into the law in this amorphous area, will encourage a greater lawlessness on the part of the police. The policy arguments of *Wolf* to the contrary are resurrected and extended to embrace the length of the continuum.

The very heart of due process was the rejection of absolutes—the "antithesis of Procrustean rule." By the *Irvine* decision the Court has made a serious inroad into the essential concept of due process.

Conclusion

In a very practical sense, the area of search and seizure may be summarized in terms of admissibility of evidence. The federal courts exclude illegally seized evidence; the state courts may elect to receive it. Where the conduct of the police becomes so aggravated as to be "brutal" or "shocking" every court must exclude evidence, the result of that conduct; however it is suggested that the state courts need not do so where the conduct was not directed to the person of the defendant, but merely to his property.

Paul Gonson

93. 74 Sup. Ct. 381 (1954).

94. *Id.* at 383.

95. *Id.* at 383.