Duke Law Journal

VOLUME 1962 SUMMER NUMBER 3

MAPP V. OHIO AT LARGE IN THE FIFTY STATES†

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OF ALL THE two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall, the question of admissibility remains a haunting one. The evidence may be of the greatest relevance. If its admission serves to condone lawless law enforcement, however, it opens the way to government intrusion on the privacy of law-abiding people. The dilemma has long troubled lawyers, though it is ironically remote from those ignorant of the long reach of official power and hence most vulnerable to it. Their preoccupation is with the immediate threat of private lawlessness, particularly so in our time when it grows apace. The understandably impatient law-abiders, who approve official retribution without restraint against wrongdoers, do not visualize themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history.

The Supreme Court of the United States has been consistently mindful of the long-range dangers of police lawlessness in searches and seizures since its definitive adoption in 1914 of the rule excluding evidence therefrom in federal courts.[1] Though there has not been like consistency in the judicial articulation of what constitutes such lawlessness, able critiques of the now abundant cases are at the service of the courts for constructive development of rules at once flexible and consistent.[2] The 1961 decision in *Mapp v. Ohio*[3] extending the exclu-

† Delivered as an address at Duke University School of Law, March 1962.

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[1] Weeks v. United States, 232 U.S. 383 (1914).

[2] See MAGUIRE, EVIDENCE OF GUILT 167-226 (1959); Allen, *Federalism and The Fourth Amendment: A Requiem For Wolf*, 1961 SUP. CT. REV. 1; Barrett, *Personal Rights, Property Rights, and The Fourth Amendment*, 1960 SUP. CT. REV. 46; Broeder,

sionary rule to state courts affords a starting point for active and intelligent cooperation between federal and state courts. The unresolved questions that attend the exclusionary rule can serve as catalysts of law that could foster harmonious relations among federal and state governments in their common responsibility of balancing individual freedom against governmental regulation and restraint.

It bears emphasis at the outset that the exclusionary rule now to be uniformly observed in state courts is not implemented with specifications such as attend a Uniform Act. There is no mandate in the *Mapp* opinion that as the states henceforth abide by the exclusionary rule, they must also abide by its various interpretations in the federal courts, interpretations freighted with orthodox property and tort concepts. There is no identification of who has standing to invoke the rule. There are no directives for or against retroactivity.

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 permissible investigation before 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 boldly advanced as the fourth from the wings of the fourteenth amendment? To call but a partial roll 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.

The Decline and Fall of Wolf v. Colorado, 41 NEB. L. REV. 185 (1961); Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 U.C.L.A.L. REV. 1 (1961); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959). This illustrative list may indicate to the interested how rich a literature awaits them. Among the most recent additions is a comprehensive and illuminating comment, *Search and Seizure in The Supreme Court: Shadows on The Fourth Amendment*, 28 U. CHI. L. REV. 664 (1961).

[8] 367 U.S. 643 (1961).

At least the unresolved problems about the borderline between lawful and unlawful police conduct in search and seizure are now out in the open. Some have criticized the exclusionary rule as if it had engendered the problems. In fact it has tardily excavated them from the oubliettes where lie the stifled problems of the law. So long as illegally obtained evidence remained admissible in many states there was little motivation for full-scale inquiry. The exclusionary rule of *Mapp* provides that motivation, even though it cannot of itself work any immediate transformation in the neglected congeries of inchoate concepts regarding the legality of police conduct.

As some twenty-five states now make up for lost time and begin their education in the biokinetics of law enforcement agencies, it may be useful to bear witness to my own education regarding such problems. In 1942 I wrote an opinion rejecting the exclusionary rule[4] and in 1955 the opinion that established it in California.[5] The education that leads a judge to overrule himself and his subsequent education in developing the new rule may serve as a relevant introduction to the responsibilities now incumbent upon all state courts in sequence of *Mapp v. Ohio*.

In 1942 clear academic postulates were as yet unclouded by long judicial experience. Fugitive misgivings about admitting illegally obtained evidence gave way to the overwhelming relevance of the evidence. True, one was not insensitive to the forward-looking logic that envisaged a guilty defendant as a prototype victim of unlawful police intrusion. Still I was able to decide, though in decidedly negative tenor, that:

> It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process so long as it is fair and impartial. . . . The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.[6]

If that was hardly a ringing endorsement of illegally obtained evidence, it was all that was needed as a ticket of admission.

My misgivings about its admissibility grew as I observed that time after time it was being offered and admitted as a routine procedure.

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[4] People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942).
[5] People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
[6] People v. Gonzales, 20 Cal. 2d 165, 170, 171, 124 P.2d 44, 47 (1942).

It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity? It was 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.

Ah, but surely the guilty should still not go free? However grave the question, it seemed improperly directed at the exclusionary rule. The hard answer is in the United States Constitution as well as in state constitutions. They make it clear that the guilty would go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them. It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine.

It was the cumulative effect of such routine that led us at last in the case of *People v. Cahan* to reject illegally obtained evidence. It had become all too obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way. We summed up the sorry experience that led us to conclude that the exclusionary rule was now imperative:

> 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 that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.[7]

The *Cahan* decision had one immediate salutary effect. Public ignorance and indifference now gave way to lively public discussion on the problem of what constitutes lawful police conduct. The realization struck many for the first time that the conduct of police in searches, seizures, arrests, and investigations could be crucially relevant in criminal prosecutions. In the midst of partisan hues and cries more than

[7] People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955).

one thoughtful observer came to realize how passive the average law-abiding citizen must have been and how emotional he had now become about constitutional guarantees that concern him as significantly as they concern the most sordid criminal.

Our court had not long to wait for the test cases that would compel clarification of the exclusionary rule. At the same time they would sound out whether the rule, set up as a deterrent to lawless police action, was proving itself a realistic influence without facilitating the exoneration of crime. Some hundred cases arrived in the wake of *Cahan*. Now that we look back on them with perspective, we find them a reasonably orderly constellation. Unquestionably the police now have a clearer idea than before of the restraints upon them. At the same time they are bound to have a clearer idea of the large authority they may still invoke in law enforcement.[8] It is significant that in the seven-year period of the exclusionary rule in California, marked by long overdue clarification of standards of reasonableness in law enforcement, there has been substantial abatement of the fear that the rule would frustrate law enforcement. It has become increasingly clear that acceleration of crime in our state, as in others, cannot be explained by simplistic reference to the presence or absence of the exclusionary rule.

By 1961, roughly half of the states had adopted the exclusionary rule, with local variations. There was no uniformity of interpretation, however, and less than consistency in either the federal or state gloss of the rule. There emanated from the federal cases a sensitivity to federal-state relations that goes far to explain the willingness of the United States Supreme Court to afford the states ample time and latitude to determine how to enforce the right it had announced in *Wolf v. Colorado*[9] in 1949. However guarded the Court was about state remedies, it left no doubt that the right was of constitutional dimension, for

> Security of one's privacy against arbitrary intrusion by the police—which is at 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.[10]

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[8] See Draper, *The Cahan Case and Probable Cause*, 34 CALIF. ST. B.J. 251 (1959); *Two Years with the Cahan Rule*, STAN. L. REV. 515 (1957); Comment, *The Cahan Case: The Exclusionary Rule, and the Law of Search, Seizure, and Arrest in California*, 3 U.C.L.A.L. REV. 55 (1955).

[9] 338 U.S. 25 (1949); see Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

[10] 338 U.S. 25, 27-28 (1949).

It was quickly apparent that this otherwise eloquent declaration went limp on the key word *enforceable.* In many states there had not yet loomed any effective remedies to attend the right that loomed so large. Wearing its rich constitutional cloak, it went begging for recognition. Alone of the princely rights it often went begging in vain. It became a classic right without a remedy. In California six years elapsed between *Wolf v. Colorado* and *People v. Cahan,* and all during that time we were painfully aware of the right begging in our midst. We remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule. Accordingly we were proceeding with caution before responding to the message in *Wolf v. Colorado,* to the long and short of the handwriting on the distant wall. We needed no more than *Irvine v. California*[11] to read the handwriting on our own wall. In the interim between *Irvine v. California* and *People v. Cahan* it became all too clear in our state that there was no recourse but to the exclusionary rule. In the interim between *Irvine v. California* and *Mapp v. Ohio* a like reflection of nation-wide import must also have been developing in the Supreme Court of the United States. Its decision in *Irvine* had intimated a hope that in time the many states still uncommitted to the exclusionary rule would reconsider their evidentiary rules in the light of the *Wolf* doctrine that the fourth amendment is enforceable against the states through the fourteenth. The indifferent response must have been disheartening to a Court that had expressed its reluctance to invoke federal power to upset state convictions based on unconstitutionally obtained evidence.

The many states that failed even to re-examine their evidentiary rules merely postponed the day of reckoning. They had clear warning in *Irvine* that if they defaulted and there were no demonstrably effective deterrents to unreasonable searches and seizures in lieu of the exclusionary rule, the Supreme Court might yet decide that they had not complied with "minimal standards" of due process.[12] When in 1961 it so decided in *Mapp v. Ohio* and made the exclusionary rule mandatory in all states, it could hardly have taken anyone by surprise. For all their distracting, discordantly nay-saying chimes, the hours had been successively striking that the zero hour was coming.

[11] 347 U.S. 128 (1954).

[12] Wolf v. Colorado, 338 U.S. 25, 31 (1949).

It may be helpful at this juncture to speculate why it was so long in coming, so that we can anticipate the problems ahead. *Mapp* amplified the *Wolf* declaration that the fourteenth amendment incorporated the core of the fourth, the constitutional right to be secure against unreasonable searches and seizures; henceforth that right would be interpreted as attended by the exclusionary rule in state as well as in federal courts. It is not enough to say, however, that *Mapp* thus simply extended one more constitutional standard of due process to state courts, comparable to others that transcend the orthodox requirements of a fair trial. The intriguing question is why this standard came so much later than the others, when so vital a constitutional right was in issue.

The Supreme Court had long since moved to protect rights of no greater importance. Notably, it had long since compelled the exclusion of involuntary confessions.[13] The constant basis for exclusion proved to be other than untrustworthiness of confessions resulting from coercion, however crude or subtle;[14] such confessions could at times be highly trustworthy. The constant basis for exclusion proved to be other than the prejudicial effect of coerced confessions; there was at times other incriminating evidence so overwhelming as to rule out any probability that the admission of the confession contributed to the conviction.[15] There remains a constant basis for exclusion in the demonstrated necessity of deterring invasions of a constitutional right, undeterred by lesser means, with a remedy of constitutional magnitude.[16] Such a basis appears equally rational whether one envisages the constitutional invasion as beginning with the extraction of the confession[17] or with the use of the confession at the trial.[18]

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[13] Brown v. Mississippi, 297 U.S. 278 (1936).

[14] Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); Watts v. Indiana, 338 U.S. 49, 50 (1949).

[15] See Rogers v. Richmond, *supra* note 14; Stroble v. California, 343 U.S. 181, 189-90 (1952); Malinski v. New York, 324 U.S. 401, 404 (1945). Query whether the admission of unconstitutionally seized evidence is necessarily prejudicial. See Zap v. United States, 328 U.S. 624, 630 (1946); People v. Tarantino, 45 Cal. 2d 590, 598, 290 P.2d 505, 511 (1955).

[16] See People v. Cahan, 44 Cal. 2d 434, 441-42, 282 P.2d 905, 910 (1955).

[17] Williams v. United States, 341 U.S. 97, 101 (1951).

[18] The dissent in *Mapp* takes the view instead that the basis for exclusion of involuntary confessions is not the deterrence of lawless police action but a concept of fair trial encompassing the right to such exclusion and hence that such exclusion is a constitutional mandate. Accepting the view that the basis for the exclusion of evidence obtained by unreasonable search or seizure is the deterrence of lawless police action, it does not recognize such exclusion as a coustitutional mandate. The failure to envisage the two situations as analogous may be attributable first to the large assumption that fair trial

There are strong parallels between the unconstitutionally obtained evidence of involuntary confessions and the unconstitutionally obtained evidence of unreasonable searches and seizures. The more one reflects on how serious a turn either sort of unconstitutional invasion can take, the more superficial it seems to view the first as the more heinous. There is no scale of decorum according to setting in the rampages of the lawless. So much at last *Mapp* recognized, when it invoked as a constant basis for its newly stated exclusionary rule the demonstrated necessity of thus deterring invasions of a constitutional right, just as it had in the confession cases.

The lag in recognizing the kinship between involuntary confessions and unreasonable searches and seizures may be explained by the relatively small strain on federal-state relations in local law enforcement. tively limited volume of cases involving the first, and hence their rela- Accordingly, rules have developed of reasonable consistency and of nation-wide application to govern the exclusion of involuntary confessions. In contrast, the problem of what constitutes unreasonable search and seizure is omnipresent and of endless variety. It encompasses police conduct in every stage of police activity from investigation through arrest up to trial and in every kind of situation from the safe and commonplace to the dangerous and extraordinary. It is the problem of government personified, wearing a badge of authority, reaching all sorts of people where they live. It is the problem of protecting the law-abiding from the lawless and even the lawless from one another. Most important of all, it is the problem of protecting the law-abiding and even the lawless from excesses of official power. And as always in the law it is a problem of degree, of what is reasonable or unreasonable under all the circumstances.

So polymorphous a problem was bound to present unusual risks to federal-state relations. Strains might ensue from shortsighted or clumsy solutions. Nevertheless there is cause to regret the long lapse between *Wolf v. Colorado* and *Mapp v. Ohio* during which the federal exclusionary rule went its meandering way, more state exclusionary rules sprang up and went their meandering ways as did pre-existing ones,

requires exclusion of involuntary confessions however trustworthy or free of prejudicial effect, by relation back to lawless police action, and then to a failure to maintain the same standard of fair trial and make the same relation back as to evidence obtained from an unreasonable search and seizure. The import of such reasoning is plain. Lawless police action in extracting involuntary confessions, even though it may involve no more than skillful psychiatric questioning, is bad; but lawless police action in searches and seizures, however unrestrained, is not so bad. 367 U.S. at 672-86.

and a loyal opposition of states continued to admit the evidence, and no questions asked.

For more than a decade, *Wolf's* right without a remedy frustrated the possibilities of litigation in the Supreme Court that could have given more than spectral illumination of the right. In consequence no case law developed at the highest level to yield guiding standards for determining what searches and seizures would be subject to condemnation under the fourteenth amendment. The most we learned was to be newly skeptical of the old adage that half a wolf is better than none.

Even in states most jealous of their prerogatives, most on guard against federal interference, the growing overlap of state and federal police problems must have brought home the inevitability of a constitutional remedy to complement the constitutional right against unreasonable searches and seizures. There was increasing restiveness over the uncertainties engendered by the lack of a nationwide exclusionary rule.

Any state that adopted its own exclusionary rule soon learned that the day-to-day responsibility of policing the police involves close and continual examination of local police practices in the context of local community problems and local statutes. In the main such a responsibility can hardly be shifted from state courts conversant with the local scene to the United States Supreme Court, particularly since the latter would be in no position to take on so onerous a burden.

By way of conveying what such a burden would be, I need only refer to what it has been in my own state and, with adjustments for local variations, you can multiply it by fifty. In California alone hundreds of search and seizure cases have come before the appellate courts since the state adopted the exclusionary rule in 1955, and they have compelled detailed articulation of what is reasonable and what is unreasonable. The procession of cases continues, though in diminishing force, just as the procession continues in any other field of the law where the issue of reasonableness turns on a novel combination of facts. There is little chance that the United States Supreme Court would be willing and able to receive fifty such processions marching through its doors, calling upon it to give the details that make up the rules that govern the officials who search and seize.

The Court may well decide to leave to the state courts substantial latitude in the development of local rules. Local problems of law enforcement are of a quite different order from federal problems. From

petty crime to major crime, they present many more unpredictable variations. They include many more situations of what might be called garden varieties of civil disobedience. They are problems much more likely to call for emergency action. They are also much more likely to have direct impact on the community. They are more likely to present the dilemma that compels balancing the very present evil of freeing the guilty against the evil threat that condonation of lawless police action bodes for the right to privacy of the law-abiding.

The state courts are well situated to develop local precedents flexible enough to allow for the innocuousness of an occasional unwitting technical infraction, flexible enough to take account of the cumulatively evil effect of deliberate infractions, flexible enough to serve in a variety of situations from routine inspections to police emergencies. It is reasonable to assume that there will be appropriate local rules even though they may not be symmetric with the federal ones. To displace them mechanically would be to invite impairment of federal-state relations to little purpose. Local rules can serve well as an immediate deterrent to lawless action. They will have constitutional sanction, for whatever action is illegal is perforce unreasonable. From whichever way one looks at the problem, from the city hall to the nation's capital, it thus seems reasonable to suppose that it will lie with the state courts to take the initiative in giving meaning to *Mapp*.

Nevertheless the United States Supreme Court still confronts a special new responsibility of its own. Sooner or later it must establish ground rules of unreasonableness to counter whatever local pressures there might be to spare the evidence that would spoil the exclusionary rule. Its responsibility thus to exercise a restraining influence looms as a heavy one. It is no mean task to formulate farsighted constitutional standards of what is unreasonable that lend themselves readily to nation-wide application.

Such basic minimum standards will operate to deter unreasonable searches and seizures and to bar legislation that would sanction the admission of evidence obtained therefrom.[19] Every state would respect a decision that condemned specific conduct as unreasonable and hence outside constitutional bounds. It is this significant much, and no more, that Mr. Justice Clark's majority opinion in *Mapp* appears to connote. He anticipates that "Federal-state cooperation in the solution of crime

[19] See MD. ANN. CODE art. 35, § 5 (1957); MICH. CONST. art. II, § 10 (1908) as amended in 1936 and 1952; S.D. CODE § 1102 (1935).

under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."[20]

The preoccupation is with federal-state harmony on fundamentals, with uniformity on what is unreasonable under the fourth amendment now that it is encompassed in the fourteenth. There is no suggestion that the highest court would go beyond the responsibility it now has to formulate standards of what is unreasonable. There is no suggestion that it would articulate for the states the countless details of what is reasonable. Nor is there any suggestion that it would demand from the states a martinet uniformity of rules within the zone of reasonableness. To borrow in this context the words of Mr. Justice Clark: "There is no war between the Constitution and common sense."[21]

Even were they a well-developed nucleus, federal rules differentiating the unreasonable from the reasonable in the searches and seizures of federal officials might prove inappropriate on the local scene. It would be all the more inappropriate to apply indiscriminately to the local scene the present confusing federal rules, many of which are underdeveloped or over-refined. It is idle to seek in the conglomeration a pattern of consistent interpretation of the fourth amendment. It is not just that the cases are conflicting. They are turbid with the wash of the fourth amendment itself, of statutes specifying the authority of federal officers,[22] of local statutes governing their authority to arrest,[23] of the Supreme Court's monitorship of the federal administration of criminal justice.[24] Who can tell with certainty why a search or seizure was held unreasonable? Who knows whether it was deemed in violation of the Constitution or of lesser law or of both? Where is the lead that state courts can follow?

However obscure the bases on which they rest, federal rules have been declared applicable to the conduct of state officers in obtaining evidence that they have made available for federal prosecutions.[25] This extension of the federal rules has met with forceful criticism.[26] Perhaps

[20] Mapp v. Ohio, 367 U.S. 643, 658 (1961).

[21] *Id.* at 657.

[22] See Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, *supra* note 2, at 705-06 n.216.

[23] United States v. Di Re, 332 U.S. 581, 589 (1948).

[24] FED. R. CRIM. P. 3, 4, 26, 41; 18 U.S.C. §§ 3406-452 (App. 1958).

[25] Elkins v. United States, 364 U.S. 206, 224 (1960).

[26] See dissenting opinion of Mr. Justice Frankfurter in Elkins v. United States, *supra* note 25, at 245; Grant, *supra* note 2, at 20, 43.

there will be no automatic extension of all federal rules to state prosecutions in the wake of *Mapp*. There is no substitute for close evaluation of the local context to determine what is unreasonable. It is idle to suppose that reference to existing federal rules would do the trick. There is more to the trick than routine incantation and more to the rules than deserve application.

Take for example the federal rule that attaches puzzling status symbols of admissibility to evidence obtained in the course of a legal search and seizure either under a warrant or incident to a valid arrest.[27] The evidence is admissible if it is contraband, not simply because of its evidentiary value but apparently also because the defendant has no right to own it.[28] The evidence is admissible if it is stolen goods, not simply because of its evidentiary value but apparently also because the defendant is not the rightful owner. One might begin to think that admissibility is controlled by property concepts, but at this juncture night falls. The evidence is also admissible when the defendant has the right to own it and is the rightful owner, not simply because of its evidentiary value but also because it was an instrument or a fruit of the wrongdoing[29] or a record that the defendant was required by law to keep.[30] Thus several tails wag in the dog of evidentiary value.

Dog it is when it has no tail, for the cases declare that the evidence is not admissible when it is of "evidentiary value only." This ground for excluding the evidence comes as something of a shock. There are explanations in the dark that the *ratio decidendi* flows somehow from the fourth amendment to render the erstwhile legal search and seizure illegal and also from the fifth amendment to render the evidence inadmissible, even though there was no compulsion on the defendant to produce it and hence no implied admission on his part that could be interpreted as self-incrimination.[31] The plot has only begun to thicken. The real thick of the thing is in the disputation as to what is "evidentiary

[27] Gouled v. United States, 255 U.S. 298, 310 (1921); see Abel v. United States, 362 U.S. 217, 234-35 (1960).

[28] Harris v. United States, 331 U.S. 145, 154-55 (1947).

[29] Abel v. United States, 362 U.S. 217, 238 (1960); Marron v. United States, 275 U.S. 192, 199 (1927).

[30] Zap v. United States, 328 U.S. 624, 626-27 (1946); Davis v. United States, 328 U.S. 582, 593 (1946).

[31] See MAGUIRE, EVIDENCE OF GUILT 23 (1959); Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 700 (1951); Comment, *Search and Seizure in the Supreme Court: Shadows on The Fourth Amendment*, *supra* note 2, at 695-96.

value only." Does the evidence have the vulgar status of "evidentiary value only" or has it been sublimated by additives or does it qualify as a specialty such as a fruit? The apple and the arrow may be admissible, and also the bow; but the quiver, is it no more than an *only*?

Should any state court in its right mind risk losing it in the pursuit of learning whatever the total message is of a federal rule of such elaborate obfuscation? Is it not possible to undertake orderly development of local rules consistent with both common sense and the Constitution?[32]

In my state the penal code provides that a search warrant may issue for the search and seizure of any evidence "which tends to show a felony has been committed, or tends to show that a particular person has committed a felony."[33] The statute in effect rejects the federal rule barring search for evidence "of evidentiary value only." It nevertheless seems well within the Constitution, given the preliminary requisite of probable cause for making the search. Even apart from the statute, it might well be consistent with the Constitution to make a comparable search incident to a valid arrest, subject of course to whatever conditions might be necessary to guard against unreasonableness. Suppose for example that there falls on the ears of police a cry of "Don't shoot!" and then what sounds like a shot, then the fall of a body. The police enter the suspected house and find a corpse with a bullet wound. They search for and find the gun. The circumstances make it reasonable for them to continue their search, regardless of whether it is incidental to the arrest of the eventual defendant or whether he has already made his escape. Surely there would be no constitutional condition that they could seize only the gun that was the instrument of the crime and that they must keep their distance from other evidence that would be "of evidentiary value only" on matters of such high relevance as motive, premeditation, provocation, self-defense, or the identity of the killer.

If states are given freedom from entangling alliances with confusing federal rules that have no clear constitutional basis, their responsibility is the greater to look to the Constitution in the development of their local rules. Only by so doing can they dissipate prevalent misgivings that the exclusionary rule cannot live up to its purpose in view of the pressures to circumvent it by way of make-believe that excessive searches

[32] See Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953).

[33] CAL. PEN. CODE § 1524(4).

and seizures are reasonable.[34] It should be possible to develop with clarity as well as constitutional nicety rules that will operate realistically without frustrating either the exclusionary rule or law enforcement. *Mapp v. Ohio* provides an opportune occasion to take stock of present inconsistencies in the law of search and seizure the better to understand just what it is that the amendment protects.

Eloquent declarations of the past have condemned unreasonable searches and seizures as invasions of the four walls that constitute a man's castle. However clearly such declarations have sounded the fourth amendment's concern with a man's right to privacy, their emphasis on the castle has not merely restricted the right to property connotations but has deadened inquiry into what constitutes the right in a modern context. The emphasis on the castle has taken some strangely literal turns. The unwelcome king could not literally insinuate himself or a mechanical extension of himself through the door or the window or any other opening.[35] He was free to post himself anywhere outside, however, and to receive the evidence that came through all too thin walls, with mechanical eyes and ears as well as his own.[36] As a trespasser the king stood condemned, but as an eavesdropper he was tolerated, however unwelcome his intrusion within radius of the eaves.[37]

There has been no lack of signs that the right to privacy transcends property connotations and that even in a property sense it needs redefinition. For lack of live reinterpretation, however, confusion in the application of the fourth amendment has mounted so greatly that it has more than once been despairingly noted in divergent opinions emanating from the Supreme Court itself.

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[34] See Barrett, *supra* note 2, at 54-55, 66; Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78, 118; Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259, 312 (1950); Way, *Increasing Scope of Search Incidental to Arrest*, 1959 WASH. U.L.Q. 261, 275, 277.

[35] Irvine v. California, 347 U.S. 128, 132 (1954).

[36] Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928). See DASH, THE EAVESDROPPERS (1959).

[37] The distinction may be doomed by Silverman v. United States, 365 U.S. 505, 512 (1961): "[D]ecision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." The court added guardedly, "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." *Ibid.*

Confusion enough has resulted from over-refined preoccupation with trespass to property instead of with invasion of the right to privacy itself. There has been still more muddle in the law of search and seizure as a result of the underdeveloped correlation between searches and seizures under a warrant not incident to a valid arrest and searches and seizures without a warrant incident to a valid arrest.[38] In the latter situation the police are not required to call upon a magistrate in advance for a judicial determination of probable cause. Once they have made an arrest and obtained the evidence, their very success may serve as a retroactive makeweight for probable cause and thus tilt the scales for a judicial finding of such cause. Moreover, searches and seizures without a warrant, though always subject to the requirement of reasonableness, are not under the constraint of specifications "particularly describing the place to be searched and the persons or things to be seized." We can better appreciate the need for correlation once we perceive that a limited search and seizure under a warrant may culminate in a valid arrest and that further search and seizure beyond the warrant specifications may then be legitimated as incident to the valid arrest.[39] In other words, the police may have a shorter reach if they are armed with a warrant than if they are not. Understandably they may prefer to go unarmed.

So patent a discrepancy suggests how great is the need for a review of warrant requirements to determine whether they are unrealistically rigid in relation to the alternative of warrantless searches and seizures. Such a review would logically entail a converse inquiry, whether the sanctions of warrantless searches and seizures incident to a valid arrest are unduly lax.

Searching inquiry might also reveal a need for correlation of alternatives beyond these two. It might be possible, for example, to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there

[38] *Compare* Chapman v. United States, 365 U.S. 610 (1961) *and* Jones v. United States, 357 U.S. 493 (1958) *and* Kremen v. United States, 353 U.S. 346 (1957) *and* Jeffers v. United States, 342 U.S. 48 (1951) *and* McDonald v. United States, 335 U.S. 451 (1948) *and* Trupiano v. United States, 334 U.S. 699 (1948) *and* Johnson v. United States, 333 U.S. 10 (1948) *with* Abel v. United States, 362 U.S. 217 (1960) *and* Frank v. Maryland, 359 U.S. 360 (1959) *and* United States v. Rabinowitz, 339 U.S. 56 (1950).

[39] Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927); *cf.* United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well. If questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of their personal liberty and reputation.[40] If it revealed probable cause, it would do no more than open the way to a valid arrest. It would then not be possible for a guilty defendant to magnify slight detention for questioning, based on probable cause to question, into an arrest lacking the validity that proceeds from a higher level of probability, probable cause to arrest.

If I refer again to local examples, it is only for the advantage of speaking from direct experience. We have had to rule in our state on the validity of an arrest in several cases in which officers on night patrol have observed automobiles or pedestrians in questionable situations that arguably fell short of probable cause for arrest. We have upheld the authority of officers not only to question but also to make a subsequent arrest on the basis of probable cause that developed in the course of the questioning.[41] When questioning prompts flight or obvious attempts to conceal or dispose of something, such action in sequence of the initial suspicious circumstances constitutes probable cause for arrest. It would seem highly unrealistic to hold such an arrest invalid on the ground that arrest actually coincided with the initial police questioning and that the then suspicious circumstances fell short of probable cause for arrest. Such technicality would invite the circumvention of building up suspicious circumstances to probable cause for arrest, and the eventual consequence might be lower standards of arrest.[42] Surely there is a middle ground between the excesses of questioning on mere suspicion and of invalidating an arrest that followed upon questioning on suspicion reasonably generated by the immediate circumstances.

If we keep in mind that the *raison d'être* of the exclusionary rule is the deterrence of lawless law enforcement, we can guard against confusion in the attendant rules we develop. At the outset we can rule out spurious reasons for exclusion. The objective of exclusion is cer-

[40] See Barrett, *supra* note 2, at 65-66.

[41] People v. Duncan, 51 Cal. 2d 523, 346 P.2d 521 (1959); People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956); People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); *cf.* Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

[42] See Barrett, *supra* note 2, at 69-70.

tainly not to afford criminals a right to escape prosecution. At most the exclusionary rule will afford them a fortuitous escape when there is no way of obtaining evidence against them constitutionally. The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward.

The emphasis in our state on the deterrence of lawless law enforcement has given direction to our rules. As a result we have departed from long-entrenched federal rules on standing to object to illegally obtained evidence.[43] Those rules have rested on property concepts, with an admixture of tort concepts. Standing to object has depended on whether the defendant could show that he had a property interest in the premises searched or the evidence seized. The exclusionary rule ordinarily operated when such an interest existed, but otherwise failed to operate. This limitation may well have lessened its deterrent effect. Not until the *Jones* case in 1960 was standing to object accorded to "anyone legitimately on premises where a search occurs."[44]

Whatever advance the decision makes from orthodox concepts, it indicates a continuing tendency to focus on a relation between the defendant and the property involved. Such a focus to ferret out some violated right of the defendant suggests, though perhaps unintentionally, that the objective of the exclusionary rule is to make amends to the defendant. What should be of primary concern is not the grievances of selected guilty defendants such as land-owners or the gentry of invitees, but the grievousness of official lawlessness.

That has been the primary concern in my state since we adopted the exclusionary rule in 1955. The defendant's standing to object does not depend on his showing that the evidence was illegally obtained in violation of some right of his, substantial or tenuous. He need only show that the state obtained the evidence illegally, whether in violation of his rights or those of third parties, which is to say that he must show that the state obtained the evidence in the course of a search and seizure that was unreasonable.[45]

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[43] See cases collected in Jones v. United States, 362 U.S. 257, 262-66 (1960).

[44] 362 U.S. at 267.

[45] This rule focuses inquiry on the reasonableness of the officer's conduct rather than on whose rights may have been violated. We pointed out that "if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of

A court need no more be misled by inappropriate concepts of tort than of property. What matters primarily is not whether official conduct involved a tort to the defendant, but whether it was unreasonable in the constitutional sense. Thus, suppose that an officer arrested the defendant without probable cause and incident to the arrest made a search that established the defendant's guilt. His guilt might deprive him of an action for false arrest,[46] but it has not obliterated the unreasonableness of the arrest. An arrest without probable cause cannot be retroactively justified by what it turns up.[47]

Hence even in the absence of any tort to the defendant the exclusionary rule should operate if it is to serve its purpose of deterring unreasonable official conduct. The fortuitous absence of any tort to the defendant should no more operate to make the evidence admissible than should the fortuitous absence of any property interest that may be attributable to the defendant.

The prosecution also would stand to realize some gain if we freed the exclusionary rule from wooden association with tort and property concepts. With those concepts in the background, the focus would be on the reasonableness of the official conduct in the context of all the circumstances. It might be adjudged reasonable even if it involved a tort to the defendant or an invasion of some property interest of his. The evidence would then be admissible because it had been obtained without violation of the constitutional prohibition against unreasonable searches and seizures.

Suppose for example that the police respond to a telephone call from the operator of a rooming house who asks them to come and get narcotics that she has just discovered in her basement. They are unaware, as she may also be, that she had no right to enter the basement, which was rented to the defendant. The prevailing local view of privilege in the law of torts would determine whether or not the

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others by the use of evidence illegally obtained against them." People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 857 (1955).

[46] See RESTATEMENT, TORTS § 119, comment *g* (1934).

[47] Johnson v. United States, 333 U.S. 10, 16-17 (1948); United States v. Di Re, 332 U.S. 581, 595 (1948). To hold otherwise "would defeat the purpose of the constitutional provisions prohibiting unreasonable searches and seizures and destroy the efficacy of the exclusionary rule in many felony prosecutions. Officers would be free to arrest and search anyone, however innocent, in the hope that the search would justify the arrest." People v. Brown, 45 Cal. 2d 640, 644, 290 P.2d 528, 530 (1955). The exclusionary rule "would fail of its purpose, if in the only area of its effective operation it could be defeated because the arresting officer guessed correctly in making an arrest." *Id.* at 644-45, 290 P.2d at 531.

police committed a civil trespass when they entered the basement and seized the narcotics. Once it is determined that their conduct is not unreasonable in the circumstances, it is not rendered unreasonable in the event that it is deemed to have involved a civil trespass. We have said as much in a California case.[48]

We turn now to questions of procedure. Here too it seems timely to note that federal rules should not necessarily be controlling in state courts, since there may be alternatives of equal or superior merit in the local context. In my state we have departed in the main from the federal rule that the defendant who challenges the admissibility of the evidence must ordinarily do so before trial, via a special motion to suppress.[49] In one situation our procedure is analogous. If the defendant fails before trial to challenge a search warrant valid on its face, in accord with prescribed statutory procedure, he cannot challenge it at the trial.[50] Apart from this special situation, however, we view a challenge to evidence allegedly resulting from unreasonable search or seizure as we normally view other challenges to admissibility.[51]

The defendant "makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification."[52] For the purpose of determining whether the defendant should stand trial, the prosecution may meet this burden by producing evidence to show that

[48] "In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' (Mr. Justice Stone in McGuire v. United States, 273 U.S. 95, 99 [47 S.Ct. 259, 71 L.Ed. 556]), and when as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority." People v. Gorg, 45 Cal. 2d 776, 783, 291 P.2d 469, 473 (1955). Compare Chapman v. United States, 365 U.S. 610 (1961); People v. Roberts, 47 Cal. 2d 374, 377, 303 P.2d 721, 722 (1956).

[49] See cases collected in People v. Berger, 44 Cal. 2d 459, 462-64, 282 P.2d 509, 510-12 (1955).

[50] See People v. Keener, 55 Cal. 2d 714, 719-20, 361 P.2d 587, 589-90 (1961).

[51] People v. Berger, 44 Cal. 2d 459, 464, 282 P.2d 509, 512 (1955). Of course, if the prosecution is by information rather than indictment the defendant may be able to establish at the preliminary hearing that the prosecution rests entirely on such evidence and thus secure a dismissal forthwith. When the prosecution is by indictment, however, he has no way of challenging the evidence while it is before the grand jury.

[52] Badillo v. Superior Court, 46 Cal. 2d 269, 272, 294 P.2d 23, 25 (1956).

the police had reasonable cause to make an arrest and search without a warrant or that their action was otherwise justified. When the issue is raised at the trial itself, both sides may present evidence bearing on the legality of the police action. On the basis of all of the evidence the trial court must determine whether the challenged evidence resulted from unreasonable search or seizure. As with the usual challenge to the admissibility of evidence, the decision is made by the trial judge. The decision is subject to review on appeal, but it will stand if it is supported by substantial evidence.

Once the trial judge has ruled on admissibility he does not in our state open the door to reconsideration of that issue by the jury. There is no parallel with the special procedure in many states, including California, regarding involuntary confessions whereby the trial court may initially admit the confession and then instruct the jury to disregard it if they find it was not voluntary.[53]

We come now to a cluster of problems on the retroactive application of the *Mapp* case. The reversal of defendant's conviction in that case, itself a retroactive application of the newly announced exclusionary rule, is in keeping with the usual practice when there is nothing to indicate that retroactivity would entail undue hardship on those who may have relied on law now displaced. They cannot plead reasonable reliance, let alone hardship, who may have relied on the now displaced law in violating the Constitution.

The retroactive application of *Mapp* confirms the similar application we made of the exclusionary rule when we established it in California. If experience is at least one of the best teachers, it may be helpful to draw on it for the cases subsequent to the adoption of our rule to illustrate how various can be the problems that attend retroactivity.

There were appeals in which the record did not clearly establish that the search or seizure was unreasonable. Even if it might appear so on the face of the record, there was always the possibility that the

[53] "The rule of the confession cases is justified by the fact that the jury must necessarily be informed of the circumstances surrounding the confession properly to evaluate it. The probative value of evidence obtained by search or seizure, however, does not depend on whether the search was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue. Moreover, the legality of a search or seizure will frequently depend on whether the officer had reasonable cause to make an arrest, and since such cause is not limited to evidence that would be admissible at the trial on the issue of guilt . . . , evidence that was otherwise inadmissible and prejudicial would frequently be presented to them if the jury were required to pass on the legality of the search or seizure." People v. Gorg, 45 Cal. 2d 776, 781, 291 P.2d 469, 472 (1955).

prosecution could have justified it as reasonable, but regarded it as unnecessary to do so when there was no bar to the admission of the evidence in any event under existing law. For the same reason defense counsel might well have deemed it useless to object to the admission of the evidence or to lay a foundation for its exclusion. Since we have no procedure for taking additional evidence on appeal in criminal cases we had to decide such cases on the records before us. There was a risk of penalizing defendants for failing to take steps to exclude the evidence. There was also a risk of undoing a legitimate conviction merely on the contention of the defendant that the evidence admitted had ensued from an unreasonable search or seizure. We found a middle ground for decision. The defendant could raise the issue of admissibility for the first time on appeal, if his case had been tried before adoption of the exclusionary rule and if there was substantial evidence in the record of unreasonable search or seizure.[54] If the record was silent on the question, we presumed that the police acted reasonably.[55]

There were other problems of retroactivity. What of the situation where the judgment of conviction had become final before the adoption of the exclusionary rule? We found guidance in the reasoning of the *Cahan* case that the exclusionary rule was no more than a judicially created rule of evidence. Accordingly such a judgment was not subject to collateral attack.

In such manner we weathered the period of adjustment that follows any overthrow of a familiar rule of law. By 1961, six years after we deposed our traditional rule, we were in some measure prepared for the advent of *Mapp v. Ohio*. Still, it has given our local revolution a new twist. The exclusionary rule of 1961 that now binds all the states is no mere rule of evidence, but part and parcel of the Constitution. It took time to deliver it to its destiny, but there is no longer any question that it has arrived. The great question now is how the fifty states will pay it their respects in view of the Supreme Court's affirmation in *Mapp*, accompanying the overruling of *Wolf*, that the long-standing federal exclusionary rule has been constitutionally required since its recognition in *Weeks v. United States*.[56]

Specifically, are final judgments of conviction in state courts open to collateral attack now that the use of unconstitutionally obtained evidence at trial amounts to a violation of the Constitution? At least one

[54] People v. Kitchens, 46 Cal. 2d 260, 262-63, 294 P.2d 17, 19 (1956).
[55] People v. Ferrara, 46 Cal. 2d 265, 268-69, 294 P.2d 21, 23 (1956).
[56] 232 U.S. 383 (1914).

thing is clear, in state and federal courts alike. Whatever the possibilities that judgments of conviction can continue to withstand collateral attack, they can no longer do so on the ground that the use of the challenged evidence violates no more than a rule of evidence.

Are there alternatives? The question is suggested by a significant footnote in the majority opinion in *Mapp*: "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. . . ."[57]

In California courts, as in the federal courts, final judgments of conviction may be collaterally attacked by habeas corpus or other post-conviction procedures if they have ensued from violations of certain constitutional rights, provided of course that ordinary remedies have been exhausted, were not available, or were excusably lost.[58] We find in the pertinent cases strong reasons to justify so drastic a remedy as collateral attack to vindicate the particular constitutional rights involved. It would be superficial to assume, however, that invariably there are such reasons. I have come to the view, set forth in a recent concurring opinion,[59] that there are no such reasons to justify collateral attack as a method of vindicating a defendant's now-recognized constitutional right to the exclusion of evidence against him resulting from an unreasonable search or seizure.

The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of convicting the innocent. Such a risk attends any conviction ensuing from the witting use of perjured testimony,[60] the suppression of evidence,[61] an involuntary confession,[62] the denial of an opportunity to present a defense,[63] and the

[57] Mapp v. Ohio, 367 U.S. 643, 659 n.9 (1961).

[58] Waley v. Johnston, 316 U.S. 101 (1942); Bowen v. Johnston, 306 U.S. 19 (1939); Johnson v. Zerbst, 304 U.S. 458 (1938); *In re* Dixon, 41 Cal. 2d 756, 264 P.2d 513 (1953).

[59] *In re* Harris, 56 Cal. 2d 898, 899, 366 P.2d 305, 306 (1961).

[60] Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935).

[61] People v. Carter, 48 Cal. 2d 737, 747, 312 P.2d 665, 671 (1957).

[62] See Lyons v. Oklahoma, 322 U.S. 596, 605 (1944); 3 WIGMORE, EVIDENCE §§ 822-56 (3d ed. 1940).

[63] See concurring opinions of Justice Frankfurter (361 U.S. 160, 167) and Justice Harlan (361 U.S. 169, 172) in Smith v. California, 361 U.S. 147 (1959); *In re* Harris, 56 Cal. 2d 898, 899, 366 P.2d 305, 306 (1961); *cf.*, Sunal v. Large, 332 U.S. 174, 181-82 (1947) where collateral attack was denied on the ground that the remedy by appeal had not been exhausted. See also Hill v. United States, 368 U.S. 424, 428-29 (1962).

denial of the right to counsel.[64] A comparable risk arises upon a failure to provide an indigent defendant with a trial transcript necessary to perfect his appeal.[65]

The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search or seizure is that he is clearly guilty. It is not the purpose of the exclusionary rule to protect the guilty. Its purpose of deterring lawless law enforcement will be amply served in any state from now on by affording defendants an orderly procedure for challenging the admissibility of the evidence at or before trial and on appeal.

Deterrence would be served but little more and at exorbitant cost by affording the weapon of collateral attack to those defendants who were convicted before the adoption of any exclusionary rule and hence had no way of challenging the admissibility of the evidence. To begin with, their cases are history, and they should not now be given the power to rewrite it. To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. There is a world of difference between a timely objection to evidence on the basis of the exclusionary rule and the uprooting of final judgments.

Consider the opportunities for collateral attack that would open up whenever the Supreme Court extended the scope of the exclusionary rule. Consider what untoward use of collateral attack there might be, for example, in the wake of the recent expansion of the exclusionary rule to bar in federal trials evidence resulting from unreasonable searches and seizures by state officers. Or consider a like sequence to the recent liberalization of the rules on standing to challenge the evidence. There might well be a quarrel between the Constitution and common sense if each such change served to invite fresh attacks on final judgments. Every judgment would be vulnerable that had been affirmed on appeal under the pre-existing rule.

It is not without significance that before the advent of *Mapp* the lower federal courts consistently held that the issue of admissibility cannot be revived by collateral attack.[66] There is all the more reason

[64] Powell v. Alabama, 287 U.S. 45 (1932).

[65] Eskridge v. Washington, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

[66] United States v. Zavada, 291 F.2d 189, 191 (6th Cir. 1961); Alexander v. United States, 290 F.2d 252, 254 (5th Cir. 1961); Jones v. Attorney General of the United States, 278 F.2d 699, 701 (8th Cir. 1960); Plummer v. United States, 260 F.2d 729, 730 (D.C. Cir. 1958); Wilkins v. United States, 258 F.2d 416 (D.C.

for such a view since *Mapp*. Common sense reminds us that expansions of the exclusionary rule should not serve to revive an issue of admissibility that has no bearing on the issue of guilt. There is no comparable reopening available to the prosecution in the event of contractions, given the rules against double jeopardy.

The more one reflects on the questions posed by *Mapp v. Ohio*, the more ramifications they present. This inquiry has been no more than a partial reconnaissance by one who has been over similar ground in his own jurisdiction and can bring that experience to the task for whatever it is worth. The reflections I have set forth cover only a few of the possible questions. They may nevertheless serve to suggest that state courts be wary of a mechanical acceptance of federal rules, and at the same time that they be alert to fulfill their own responsibilities for constructive development of the exclusionary rule. Such development would be in keeping with the symbiotic relation between the federal government and the states.

We leave still unanswered some of the large questions posed at the outset. We have still to construct adequate definitions as to what constitutes lawful arrest or reasonable search incident to an arrest. We have still to clarify what it is that makes a search or seizure unreasonable. We have a job of correlation to do between arrest or search with a warrant and arrest or search without. We have yet to settle the relations between the fourth amendment and the fifth within the context of the fourteenth. Even if outer space permitted, there is no time here for questions of such magnitude.

Nor can we fathom in one easy lesson the significance of the fourth amendment beyond the realm of the police. It may be of the greatest relevance in non-criminal cases involving civil regulation.[67] It may be of the greatest relevance in the growing domain of military regulation. But those are two other stories, and they would be long in the telling.

One reflection remains, however, by way of a postscript to the text, as to the public response to fourth amendment problems that the exclusionary rule arouses. We must be prepared for ill-informed and emotional debate. Lawyers can do much to clear the air of baseless fears

Cir. 1958); United States v. Scales, 249 F.2d 368, 370 (7th Cir. 1957); Barber v. United States, 197 F.2d 815 (10th Cir. 1952); Fowler v. Hunter, 164 F.2d 669, 669-70 (10th Cir. 1947); Fowler v. Gill, 156 F.2d 565, 566 (D.C. Cir. 1946); Graham v. Squier, 132 F.2d 681, 684-85 (9th Cir. 1942); Price v. Johnston, 125 F.2d 806, 811 (9th Cir. 1942); Taylor v. Hudspeth, 113 F.2d 825, 826 (10th Cir. 1940).

[67] See Ohio *ex rel* Eaton v. Price, 364 U.S. 263 (1960); Frank v. Maryland, 359 U.S. 360 (1959).

and to inform the public of the real problems awaiting solution. They can enlist support for the recruitment and retention of police well qualified for the many heavy responsibilities of law enforcement. They can bring home to others that such enforcement calls not only for skilled and intelligent officers of the law but also for a community of people who themselves show respect for the law in their everyday conduct. It is upon high police standards and community respect for the law and its officers that effective law enforcement basically depends. Given these, the courts will have a favorable environment for the orderly development of the exclusionary rule. Absent these, few would dare predict the consequences of *Mapp v. Ohio* at large in the fifty states.