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Constitutional Law -- Inadmissibility of Illegally Obtained Evidence in State Criminal Proceedings

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restriction was out of step with the times.[26] Removal of the trustee designated by the testator will often be more of a subversion of his intent than altering the trust in other ways. And, as the principal case indicates, in some circumstances the appointment of substituted trustees might effectively destroy the main purpose of the trust.

If a state-supported college or university were to receive a bequest providing scholarships for "white" students only, the *Girard* case indicates clearly that the university, being an arm of the state, could not administer such a trust without violating the fourteenth amendment. If it be found that the testator intended primarily to benefit the university by his bequest and that the university refused to co-operate with a substituted trustee, the principal case seems to offer a workable and equitable solution. A college receiving a bequest establishing a trust restricted to a particular race or religion which it cannot legally or in good conscience administer, should not to be forced to choose between repudiating it altogether or accepting it as is, if it may do so at all. Ultimately the problem is resolved into a balancing of two interests thus brought into conflict: the interest of the college and the public in making the college's facilities available to qualified students without regard to race or religion, and the interest of the testator in the unfettered right to dispose of his property as he sees fit.[27] In most cases the former should outweigh the latter, for the advancement of learning and the protection of civil liberties would seem to be more worthy goals than blind respect for the supposed intent of the dead hand.

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Constitutional Law—Inadmissibility of Illegally Obtained Evidence in State Criminal Proceedings

In a recent decision[1] the United States Supreme Court held that

[26] See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard,* 66 YALE L.J. 979 (1957), and Notes cited in notes 13 and 17 *supra.*

[27] See note 21 *supra.*

[1] Mapp v. Ohio, 367 U.S. 643 (1961). (Justice Stewart concurred in result only.) Cleveland police officers, having information that a person wanted for questioning about some bombings was hiding out in defendant's home, broke into defendant's home, waving a piece of paper which they claimed was a warrant, and thoroughly searched the house. During this search they found the obscene materials, for the possession of which the defendant, Mrs. Dollree Mapp, was convicted under the provisions of OHIO REV. CODE § 2905.34 (Supp. 1961). On trial no search warrant was pro-

evidence obtained by illegal search and seizure by state law enforcement officers was inadmissible in a state criminal proceeding. In so holding the Court expressly overruled *Wolf v. Colorado*[2] which had definitively established the admissibility of such evidence.

For over fifty years controversy as to whether such evidence should be admitted has raged incessantly. The many inconsistencies to be found in the cases with respect to this issue are possibly attributable to the great difficulty in choosing between the two conflicting values involved: the right to privacy, and the ever-increasing need for effective law enforcement.[3]

At common law, any evidence that was competent and relevant was admissible.[4] The view that illegally obtained evidence should be excluded first arose in 1886 in *Boyd v. United States*.[5] In this case the Court struck down an act of Congress which provided that in a revenue case the defendant's failure to produce certain documents when ordered to do so would result in an irrebuttable presumption that the government's allegations were true. The Court concluded that the act was contrary to the fourth amendment and to the self-incrimination clause of the fifth amendment, although not literally within the prohibition of either.[6] Twenty-eight years later in *Weeks v. United States*[7] the Court formulated what is now known as the federal exclusionary rule.[8] The Court held that evidence seized from the petitioner's house by a United States Marshal acting without a warrant was inadmissible in federal courts. The government argued the common law rule and contended that the evidence was both competent and relevant. In rejecting this argument the Court stated that the right of citizens "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"[9] was a mere form of words if evidence gathered through

duced, nor was the failure to do so explained by the prosecution. It appeared that there never was a warrant.

[2] 338 U.S. 25 (1949).

[3] See generally Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950).

[4] 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).

[5] 116 U.S. 616 (1886).

[6] "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

[7] 232 U.S. 383 (1914).

[8] Now embodied in FED. R. CRIM. P. 41(e).

[9] U.S. CONST. amend. IV.

such illegal action by federal officers could be used against them.[10] The rule of the *Weeks* case has been followed unwaveringly in federal criminal prosecutions.[11]

In 1948, *Wolf v. Colorado*[12] presented a different problem to the Court: does the *Weeks* rule operate in a state trial so as to exclude evidence gained by an unreasonable search and seizure by state officers? The Court held that it did not. Justice Frankfurter, speaking for the majority, stated,

> The 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 society" and as such enforceable against the States through the Due Process Clause.[13]

The Court pointed out, however, that the means of enforcing the right were up to the several states. In his concurring opinion, Justice Black stated that the exclusionary rule "is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[14] Although attacked periodically, the *Wolf* rule has been affirmed in subsequent decisions.[15]

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[10] "If letters and documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such search and seizure is of no value, and, so far as those thus placed are concerned, might as well be striken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914).

[11] United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); Grau v. United States, 287 U.S. 124 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[12] 338 U.S. 25 (1949).

[13] *Id.* at 27-28.

[14] *Id.* at 39, 40.

[15] In Stefanelli v. Minard, 342 U.S. 17 (1951), the petitioner, relying on *Wolf* for the proposition that an illegal search and seizure by state officers violated the Due Process Clause of the fourteenth amendment, sought a federal injunction against the use in the state court of the seized evidence. The Court upheld the lower court's refusal to grant the injunction, pointing out that under *Wolf* the states can choose to admit or exclude such evidence, and expressing the Court's reluctance to interfere in state proceedings. Later by a five-to-four decision in Rea v. United States, 350 U.S. 214 (1956), the Court did enjoin a federal agent, who had seized evidence under an invalid warrant issued by a United States Commissioner, from turning it over to state officers for use in a state prosecution. The Court said, however, that it was not interfering with state matters, but merely was exercising its traditional

Justice Frankfurter, in *Lustig v. United States*,[16] decided the same day as *Wolf*, contributed to legal language the "silver platter doctrine." The Court affirmed the previously established rule that evidence seized by state officers could be turned over on a "silver platter" to federal agents for federal prosecution, and that such evidence would be admissible in federal courts. The *Weeks* rule would operate only if federal officers were in some way connected with the seizure.

The silver platter doctrine was adhered to until 1960, when it was overruled by *Rios v. United States*[17] and *Elkins v. United States*.[18] The Court there reasoned that the exclusion of state-seized evidence in federal court would promote federalism by avoiding conflicts between state and federal courts in those states which have adopted an exclusionary rule, and that no resulting conflict would occur in those states admitting such evidence. The Court declared that it was merely exercising supervisory power over federal court procedure and that the states could apply such sanctions against

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supervisory powers over federal law enforcement agencies. The rule of *Stefanelli* was approved during the past year in Pugach v. Dollinger, 365 U.S. 458 (1961).

In Schwartz v. Texas, 344 U.S. 199 (1952), the Court ruled that a state could use wiretap evidence. In so holding, the Court continued the doctrine of Goldman v. United States, 316 U.S. 129 (1942), that mechanical devices not connected to telephone wires are not covered by the Federal Communications Act, and affirmed the holding of Olmstead v. United States, 277 U.S. 438 (1928), that the fourth amendment does not apply to wiretapping. The constitutionality of a state statute which permitted the use of illegally obtained evidence was upheld in Salsburg v. Maryland, 346 U.S. 545 (1954).

In Rochin v. California, 342 U.S. 165 (1952), the Court reversed the defendant's conviction which had been secured by the use of illegal evidence. State sheriffs had forced their way into petitioner's room, and as they entered he put several morphine capsules into his mouth. The police jumped on him and tried to extract the capsules; unsuccessful, they handcuffed him and took him to a hospital where his stomach was pumped against his will. The Court felt that this brutal conduct shocked conscience, and warned that the states in their prosecutions must respect certain decencies of civilized conduct. Such outrageous conduct was held to violate the Due Process Clause. Later, however, the Court confined the *Rochin* decision to its facts by determining in Irvine v. California, 347 U.S. 128 (1954), that although the placing by police of a recording device in the defendant's bedroom and listening to his conversations for over a month was "outrageous" conduct, there had been no invasion of the defendant's physical person nor violence as in *Rochin*. (It is interesting to note that in both *Stefanelli* and *Irvine* the lone dissenter was Justice Douglas.)

[16] 338 U.S. 74 (1949).

[17] 364 U.S. 253 (1960).

[18] 364 U.S. 206 (1960) (five-to-four decision), discussed in Note, 39 N.C.L. REV. 193 (1961).

illegal seizures as they saw fit. But it was stated that the conduct of a state officer would be judged against fourth amendment standards. The evidence would be inadmissible if obtained by state officers "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment. . . ."[19] In a dictum the Court stated that such a standard is required because the federal rule of exclusion is not a mere rule of evidence, but rather a constitutional mandate which is part of the fourth amendment, and part of the "right to privacy" guaranteed by the fourteenth amendment. This declaration by the Court indicated their dissatisfaction with the double standard expressed in the *Wolf* decision.

Justice Frankfurter, dissenting, observed that even though the majority claimed that it was in no way interfering in state matters, by judging state officers' conduct by federal standards, their actions were in fact regulated in so far as federal prosecutions were concerned.

In *Mapp v. Ohio*[20] the Court affirmed the dictum of *Elkins*. In holding that the states could no longer admit illegally seized evidence, Justice Clark, author of the majority opinion, reached this result by reasoning: (1) that the federal exclusionary rule is of constitutional origin and is a part and parcel of the fourth amendment; (2) that in *Wolf* the underlying core of the fourth amendment, "the security of one's privacy against arbitrary intrusion by the police,"[21] was held to be applicable to the states through the Due Process Clause of the fourteenth amendment; and (3) that the exclusionary rule, therefore, logically and constitutionally, is enforceable against the states.

This syllogism does not seem to be altogether sound. In *Wolf* it was stated that the *Weeks* rule was not derived from the explicit requirements of the fourth amendment, but rather that it was an exercise by the Court of its supervisory power over the federal court system and that Congress might reject the rule and adopt other methods for enforcing the guarantees of the fourth amendment.

Even assuming that the rule is of constitutional origin, this decision is still difficult to justify. The Court has recognized and has constantly reiterated the fact that the fourteenth amendment does

[19] *Id.* at 223.
[20] 367 U.S. 643 (1961).
[21] Wolf v. Colorado, 338 U.S. 25, 27 (1949).

not carry the Bill of Rights as such to the states.[22] Justice Frankfurter, in *Adamson v. California*,[23] observed:

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments. . . .[24]

In this same case Justice Reed, pointing to the necessity of limiting federal action only by the Bill of Rights, wrote that this position is consistent with the doctrine of federalism, "by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."[25]

Since the fourth amendment does not literally apply to the states, the Court justified its decision by reasoning that the exclusionary rule is an integral and inseparable part of the "right to privacy" which reaches the states through the fourteenth amendment as an essential ingredient of the "concept of ordered liberty."

The "right to privacy" under the fourteenth amendment is a constitutional guarantee expressed in general terms. The fourth amendment on the other hand is a specific command which is accompanied by a large body of law defining it. The Due Process Clause of the fourteenth amendment is a flexible concept; it has been defined by a case by case process of inclusion and exclusion. The decision in *Mapp*, therefore, seemingly amounts to rejection of this flexible standard as far as the "right to privacy" is concerned and imposition of the Court's configurations of the fourth amendment upon the states via the Due Process Clause. Since the "right to privacy" is now to be construed by employing fourth amendment standards, the practical result is the same as if the Court had simply stated that the fourth amendment is carried *in toto* to the states by the fourteenth amendment.

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[22] Wolf v. Colorado, 338 U.S. 25, 26 (1949); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).

[23] 332 U.S. 46 (1947).

[24] *Id.* at 62 (concurring opinion).

[25] *Id.* at 53.

The majority also argued that their result was necessary because other methods of enforcing the right of privacy in the states have proved ineffectual, and the right is valueless without the exclusionary method of enforcing it. In so saying the Court contradicts itself and admits that the *Weeks* rule is a method of enforcing a constitutional right and is not itself such a right. Continuing this line of argument the Court indicated that the trend in the states since the *Weeks* case has been toward adoption of its rule. The rule may or may not be desirable; some authorities think it is illogical to the point of absurdity.[26] Even if the rule is a good one, this has no bearing on the constitutional question involved. A great majority of the states, either in their constitutions or statutes, have adopted the fifth amendment provision against self-incrimination, but as to those states that have provisions of lesser scope, the Court has consistently refused to require literal adoption of the fifth amendment just because it seems desirable.[27]

In an able dissent Justice Harlan pointed to the lack of traditional judicial restraint on the part of the majority. The Ohio statute under which the defendant was convicted seemed clearly unconstitutional in that it made criminal the mere knowing possession or control of obscene materials.[28] The petitioner, making no reference to *Wolf,* advocated only the striking down of this statute. The only mention of possible reconsideration of the *Wolf* case was in the concluding paragraph of the amicus curiae brief of the American Civil Liberties Union. Justice Harlan felt that such an important decision should not be made without benefit of full argument.

Good or bad the decision will give rise to many problems. The

[26] "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime and Flavius for contempt. But no! We shall let you *both,* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 WIGMORE, *op. cit. supra* note 4, § 2184, at 31 n.1. (Emphasis is by the author.)

[27] Cohen v. Hurley, 366 U.S. 117 (1961); Wyman v. De Gregory, 101 N.H. 171, 137 A.2d 512 (1957), *appeal dismissed,* 360 U.S. 717 (1959), *rehearing denied,* 361 U.S. 857 (1959); Twining v. New Jersey, 211 U.S. 78 (1908).

[28] The statute provides: "No person shall knowingly . . . have in his possession or under his control an obscene lewd, or lascivious book . . . ." OHIO REV. CODE § 2905.34 (Supp. 1961).

issue of admissibility of illegally state-seized evidence has appeared on the average of fifteen times per term during the past three Supreme Court terms alone; as a result the question of the retroactivity of *Mapp* will be of major concern in the twenty-four states that have no exclusionary rule, and in those states which have only partially adopted the rule.[29] North Carolina has adopted the *Weeks* rule,[30] but under *Elkins* and *Mapp,* in determining whether an officer's conduct was proper, apparently a federal standard will be applied.

Justice Black, concurring in the *Mapp* decision, reversed his previous position in *Wolf* where he stated that although he felt the fourth amendment was enforceable against the states, the exclusionary rule is a rule of evidence only. He justified his present position by seizing upon the *Boyd* case for the proposition that there is a close interrelation between the fourth and fifth amendments and that introducing illegal evidence is the same as compelling a person to testify against himself. Thus by applying both amendments to the states the exclusionary rule becomes constitutionally mandatory.

Justice Harlan indicated the fallacy of this argument. As recently as April 1961, in *Cohen v. Hurley,*[31] the Court once again rejected the position that the fifth amendment is a limitation on other than federal action. If the fifth amendment alone does not bind state action, it logically follows that the fourth and the fifth together similarly would not do so.

Justice Black's view that both the fourth and fifth amendments apply directly to the states would seem to go even farther than that of the majority, in that they attempted to justify the decision on the basis of the "right to privacy" under the fourteenth amendment. In effect, however, the majority closely approaches Justice Black's view because, as previously pointed out, it makes little difference whether it is said that the fourth amendment as such applies to the states, or that this "right to privacy" under the fourteenth amendment will be construed in the light of fourth amendment standards. The end result is the same.

[29] For a list of those states which had or had not adopted an exclusionary rule as of 1960, see Elkins v. United States, 364 U.S. 209, 224-25 (1960) (Appendix to Opinion of the Court, Table I).

[30] N.C. GEN. STAT. § 15-27 (1953); N.C. GEN. STAT. § 15-27.1 (Supp. 1959).

[31] 366 U.S. 117 (1961).

Having taken the first step in determining a state citizen's rights under the fourteenth amendment by employing one of the Bill of Rights as the standard, the Court, following this theory to its logical end, could ultimately make binding upon the states all of the provisions of the Bill of Rights. This could occur despite the fact that it has been consistently held that the right to indictment by a grand jury,[32] and the prohibitions against double jeopardy[33] and compulsory self-incrimination[34] under the fifth amendment apply only to federal prosecutions. Similarly under the sixth amendment the provisions for a speedy[35] and public trial by jury,[36] and the right to counsel[37] in criminal proceedings apply to federal courts only. Now that the decision in *Mapp* has opened the door to the enforcement of provisions of this genus against the states, it is not impossible, though admittedly unlikely in the immediate future, that federal standards ultimately will control criminal procedure in the states.

It is submitted that the Court's new policy of supervising state law enforcement is an unwise one. The great preponderance of the law enforcement burden lies with the several states. Each state may have peculiar crime problems. The people in those states make the laws that govern their police and their courts; they live under those laws. It is their constitutional right to make such laws, and they alone should determine what evidence should or should not be admissible. The Supreme Court of the United States should not legislate local public policy.

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[32] See Hurtado v. California, 110 U.S. 516 (1884); Martinez v. Southern Ute Tribe, 151 F. Supp. 476 (D.C. Colo. 1957), *aff'd*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958), *rehearing denied*, 357 U.S. 924 (1958).

[33] See Bartkus v. Illinois, 359 U.S. 121 (1959), *rehearing denied*, 360 U.S. 907 (1959); Palko v. Connecticut, 302 U.S. 319 (1937).

[34] See Cohen v. Hurley, 366 U.S. 117 (1961); United States *ex rel.* Rooney v. Ragen, 173 F.2d 668 (7th Cir. 1949), *cert. denied*, 337 U.S. 961 (1949); Twining v. New Jersey, 211 U.S. 78 (1908); Wyman v. De Gregory, 101 N.H. 171, 137 A.2d 512 (1957), *appeal dismissed*, 360 U.S. 717 (1959), *rehearing denied*, 361 U.S. 857 (1959).

[35] *Ex parte* Whistler, 65 F. Supp. 40 (E.D. Wis. 1945), *appeal dismissed*, 154 F.2d 500 (7th Cir. 1946), *cert. denied*, 327 U.S. 797 (1946), *rehearing denied*, 327 U.S. 819 (1948).

[36] New York Cent. R.R. v. White, 243 U.S. 188 (1917).

[37] Betts v. Brady, 316 U.S. 455 (1942).