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Constitutional Law -- Due Process -- Use of Illegally Obtained Evidence in State Courts

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Constitutional Law—Due Process—Use of Illegally Obtained Evidence in State Courts

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . .[1]

Fresh in the minds of the framers of the Fourth Amendment was the bitter controversy over issuance of "writs of assistance" in the colonies, prior to the American Revolutionary War. Promulgated by England, in an effort to restrain colonial trading with her enemies, these writs were general search warrants, bearing no particularized description of places, persons, or things to be searched or seized. Expressions of opposition to the writs perhaps achieved maximal intensity when James Otis declared that the writs were " 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed the liberty of every man in the hands of every petty officer."[2]

Almost two hundred years later, an incident occurred which could revive echoes of the impassioned sentiments of James Otis. Municipal police officers, suspecting that one Irvine was engaged in illegal horse-race bookmaking and related offenses, procured a locksmith to fashion a key that would fit the front door of Irvine's house, and used that key to gain entrance into Irvine's home while he and his wife were away. The officers then concealed a microphone in the hallway, bored a hole in the roof of the house, and strung connecting wires through the hole from the microphone to a listening post in a nearby garage. Officers were stationed in relays at the listening post for approximately thirty days. Twice during that time they re-entered the home to relocate the microphone, first into the bedroom of Irvine and his wife, and then into the bedroom closet. After obtaining evidence to their satisfaction, the officers, using the same key, re-entered Irvine's home and arrested him. During the arrest the officers made a search of the house, for which no warrant had been issued. Irvine's conviction for violating anti-

[1] U. S. CONST. AMEND. IV.

[2] Boyd v. United States, 116 U. S. 616, 625 (1886). "This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' " *Ibid.*

For more detailed historical discussions of the search and seizure clause, see: Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 ILL. L. REV. 303 (1925), in which it is stated, at p. 307: "Thus viewed historically the purpose of the search and seizure clause was to restrain the legalization of unreasonable searches and seizures;" and Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921).

gambling laws[3] was affirmed on appeal in California,[4] and again in the United States Supreme Court by a divided Court.[5]

The petitioner, Irvine, argued on appeal that the police officers' testimony admitted during the trial should have been excluded, on the basis that it was obtained by methods which violated the Fourteenth Amendment.[6] The Court held, however, that in a state prosecution for a state crime, the Fourteenth Amendment does not forbid admission of evidence so obtained.[7]

The manner in which the Court reached this holding does not, by its own choice, follow a logical sequence of reasoning. The Court admitted that " 'security of one's privacy against arbitrary intrusion by the police' is embodied in the concept of due process as found in the Fourteenth Amendment."[8] This is saying, in effect, that the protection of the Fourth Amendment (the right to be secure against unreasonable searches and seizures) is embodied in the concept of due process as found in the Fourteenth Amendment. Though the protections of the Fourth Amendment are not directly applicable to the states,[9] the protections of the Fourteenth Amendment are.[10] In federal courts, evidence obtained in violation of the Fourth Amendment is excluded.[11] Therefore, it would seem to follow that such evidence should also be excluded in state courts. The major premise and the minor premise are both present in the Court's reasoning, but it refuses to be bound by this strictly logical conclusion.

Thus, the primary question posed by the *Irvine* case is: Why will the Supreme Court not apply to the states a rule of evidence similar to that applied in the federal courts?

The Court has answered this question in *Wolf v. Colorado*[12] and

[3] CAL. PENAL CODE ANN. §§ 337a (1), (2), (3) and (4) (Deering, 1949).

[4] People v. Irvine, 113 Cal. App. 2d 460, 248 P. 2d 502 (1952).

[5] Irvine v. California, 72 Sup. Ct. 381 (1954). A 5-4 decision, Justice Jackson wrote the majority opinion, in which Chief Justice Warren and Justices Minton and Reed joined; Justice Clark wrote a concurring opinion; and, Justices Black, Douglas, and Frankfurter wrote dissenting opinions. Justice Burton joined in Justice Frankfurter's dissent; and Justice Douglas concurred with Justice Black's dissent.

[6] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. AMEND. XIV, § 1.

[7] For its holding in the *Irvine* case, the Court quoted verbatim the holding in Wolf v. Colorado, 338 U. S. 25 (1949): "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33. The principle of the *Wolf* case was restated also in Stefanelli v. Minard, 342 U. S. 117 (1951). See also Schwartz v. Texas, 344 U. S. 199 (1952).

[8] Irvine v. California, 74 Sup. Ct. 381, 383 (1954).

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

[10] U. S. CONST. AMEND. XIV.

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

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

again in the *Irvine* case. It is not denied that the right to be secure in one's privacy against arbitrary intrusion by police is a right to be protected.[13] This right is embodied in the Fourth Amendment and in the Due Process Clause.[14] However, in determining means of protecting the right, it becomes evident that exclusion of illegally obtained evidence is only one of several means,[15] and even though the Supreme Court has enforced this evidentiary rule in the federal courts, it is unwilling to condemn as falling below minimal standards of "due process of law" states' reliance on other means to protect the right.[16] For these reasons, therefore, the Court, in interpreting its role in supervising administration of criminal justice in state courts, has concluded that "due process of law" does not command the Court or the states to exclude illegally obtained evidence in state prosecutions for state crimes.

Four factors which have influenced the Court in this determination are: (1) the questionable validity of the evidentiary rule of exclusion; (2) the reluctance of states to adopt similar rules of evidence; (3) the questionable effectiveness of the rule as a deterrent against illegal searches and seizures; and (4) the historical interpretation of the Due Process Clause of the Fourteenth Amendment. Each of these factors will be discussed.

The questionable validity of the evidentiary rule of exclusion. Originating in *Boyd v. United States*[17] and *Weeks v. United States*,[18] the

[13] *Id.* at 27. Irvine v. California, 74 Sup. Ct. 381, 383 (1954).

[14] Wolf v. Colorado, 338 U. S. 25, 27-28 (1949).

[15] For example, the victim of an illegal search may have an action for damages in tort against the searching officer, the state may dismiss the offending officer or prosecute him in a criminal proceeding, and the federal government may prosecute the offending officer under Civil Rights Sections of the U. S. Criminal Code. In this respect, see: Appendix to Irvine v. California, 74 Sup. Ct. 381 (1954); Wolf v. Colorado, 338 U. S. 25, 30-32, note 1 (1949); 18 U. S. C. §§ 241 and 242 (1952).

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

[17] 116 U. S. 616 (1886). The rule had its inception in this case, wherein the Court declared that compulsory production of private books and papers is "compelling [the accused] to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634-635. The Court held therefore that the admission of the evidence was unconstitutional. *Id.* at 638.

Thus, the *Boyd* case upset the long established common law principle previously followed by the Supreme Court, that the "admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." VIII WIGMORE, EVIDENCE, § 2183, p. 5 (3d ed. 1940).

For discussions of the *Boyd* case, see: VIII WIGMORE, EVIDENCE, § 2184 (3d ed. 1940); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Ramsey, *Acquisiton of Evidence by Search and Seizure*, 47 MICH. L. REV. 1137 (1949).

[18] 232 U. S. 383 (1914). Though first stated in the *Boyd* case, the rule did not become finalized until the *Weeks* decision, for in 1904, eighteen years after the *Boyd* case, the Supreme Court returned to the old rule, when it held in Adams v. New York, 192 U. S. 585 (1904), that private papers were not rendered inadmissible though seized illegally. Ten years later, the *Weeks* case reaffirmed the doctrine stated in *Boyd*, by holding that, in a federal prosecution, where federal officers

federal rule briefly stated is: In a federal prosecution, the Fourth Amendment bars admission of evidence obtained through illegal search and seizure.[19]

Authorities have criticized this rule since its inception as being in direct conflict with a long established rule that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."[20] It is said that rather than exclude the evidence, other legal remedies should be sought for correction of illegal methods employed by police, since the question of the means by which the evidence was obtained is a collateral issue, having no bearing on the immediate question of the guilt or innocence of the accused.[21]

The rule has also been criticized on constitutional grounds, the main argument being that since the Fourth Amendment does not explicitly prohibit admission of evidence obtained in its violation, there is no justification in the argument that the rule is a mandate by implication.[22]

Many modifications of the rule have developed,[23] and though the Supreme Court has never expressly embraced opinions of critics, it has applied the rule with care and divided opinion.[24]

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have obtained private documents by illegal search and seizure, it is a violation of the constitutional rights of the defendant not to grant his pre-trial petition for return of the documents, and that to permit their being held and later admitted as evidence in the trial is prejudicial error.

For a criticism of the *Weeks* case, see VIII WIGMORE, EVIDENCE, § 2184 (3d ed. 1940).

[19] For discussions of the federal evidentiary rule of exclusion, see: VIII WIGMORE, EVIDENCE, §§ 2184 and 2184a (3d ed. 1940); Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 So. CALIF. L. REV. 60 (1941); Note, 50 COL. L. REV. 364 (1950); Comment, 42 MICH. L. REV. 679 (1944); Comment, 36 YALE L. J. 536 (1927).

[20] VIII WIGMORE, EVIDENCE, § 2183, p. 5 (3d ed. 1940).

[21] VIII *id.* § 2184 at p. 35.

[22] VIII *id.* at 35-40.

[23] The rule applies only to federal officers, and a federal prosecutor may make use of evidence seized illegally by a private detective, Burdeau v. McDowell, 256 U. S. 465 (1921), and by state officers. Feldman v. United States, 322 U. S. 487 (1944); Weeks v. United States, 232 U. S. 383 (1914). Lower federal courts have held that one objecting to the evidence must have a proprietary or possessory interest in the seized articles, Steeber v. United States, 198 F. 2d 615, 617 (10th Cir. 1952); Connolly v. Medalie, 58 F. 2d 629 (C. C. A. 2d, 1932); and the Supreme Court has gone as far as to exclude contraband evidence. United States v. Jeffers, 342 U. S. 48 (1951); Agnello v. United States, 269 U. S. 20 (1925). In addition, the pre-trial petition or motion for return of the seized articles, an attached condition in the *Weeks* holding, is no longer required in order for evidence to be excluded. *Ibid.;* Amos v. United States, 255 U. S. 313 (1921). Corporations cannot be compelled to produce originals of corporate records when an indictment is framed from copies of the original records made illegally by federal officers, Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920); however, a corporation can be compelled to produce for examination records whose maintenance is required by federal law. Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186 (1946). In noting these modifications, no attempt was made to be exhaustive. For a complete collection of state and federal cases, see VIII WIGMORE, EVIDENCE, §§ 2183 and 2184 (3d ed. 1940).

[24] For an analysis of search and seizure cases involving application of the federal

Reluctance of states to adopt similar rules of evidence. States have been most reluctant to formulate rules of evidence similar to that propounded in the *Weeks* case.[25] Only one state had formulated a similar rule prior to the *Weeks* decision, and that state later repudiated its prior formulation of the rule. Before the *Weeks* case had been decided, twenty-six states had expressly opposed such a rule, and today, approximately two-thirds of the states still reject it. The influence of this reluctance on the part of the states is evidenced by the words of Justice Frankfurter, in the *Wolf* case: "We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by way of . . . overriding the relevant rules of evidence."[26]

The questionable effectiveness of the rule.[27] There is no way of determining whether or not enforcement of the rule acts as a deterrent against illegal searches and seizures. Surely, many officers conduct

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evidentiary rule of exclusion, from 1914 to 1946, see Appendix to Harris v. United States, 331 U. S. 145 (1946).

Since 1946, the Court has applied the evidentiary rule in these search and seizure cases: Johnson v. United States, 333 U. S. 10 (1948) (seizure of narcotics); Trupiano v. United States, 334 U. S. 699 (1948) (seizure of illegal distillery); McDonald v. United States, 335 U. S. 451 (1948) (seizure of "numbers game" paraphernalia); United States v. Jeffers, 342 U. S. 48 (1951) (seizure of contraband narcotics).

Since 1946, the Court has refused to apply the evidentiary rule in these search and seizure cases: Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186 (1946) (corporation compelled to produce for examination records required by federal law to be maintained); Davis v. United States, 328 U. S. 582 (1946) (seizure of public documents); Brinegar v. United States, 338 U. S. 160 (1949) (search of automobile); United States v. Rabinowitz, 339 U. S. 56 (1950) (seizure of forged overprints on cancelled postage stamps); On Lee v. United States, 343 U. S. 747 (1952) (use of concealed chest microphone while engaging suspect in incriminating conversation).

For a discussion of early modifications of the evidentiary rule made by lower federal courts, see Comment, 36 YALE L. J. 536 (1927).

[25] For a complete analysis of the history of the evidentiary rule of exclusion among the states, see Appendix to Wolf v. Colorado, 338 U. S. 25 (1949). North Carolina is listed in this Appendix as rejecting the rule. At that time, N. C. GEN. STAT. § 15-27 (1943) read: "and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action." The North Carolina Supreme Court, in State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938), construed that portion of the statute as meaning that evidence obtained by illegal search without any warrant was still admissible. Therefore, in 1951, the North Carolina General Assembly added the following provision to the statute: "Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action." N. C. GEN. STAT. § 15-27 (1953). It seems, therefore, that North Carolina has statutorily adopted the evidentiary rule of exclusion. For discussion of the new provision, see: Note, 32 N. C. L. REV. 114 (1953); Note, 30 N. C. L. REV. 421 (1952); *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 396 (1951).

[26] Wolf v. Colorado, 338 U. S. 25, 31-32 (1949).

[27] For discussions of this factor influencing the Court, see: Irvine v. California, 74 Sup. Ct. 381, 385-386 (1954); *Id.* at 393-394 (dissenting opinion); Wolf v. Colorado, 338 U. S. 25, 41-46 (1949) (dissenting opinion).

investigations without knowledge of the illegality of their methods, and often, too, the question of illegality is for the courts to decide, for the law of search and seizure is not static. Posed also by the rule is the problem of whether or not it is wise to free one lawbreaker because he has been pursued by another. The complexity of this problem is attested to by the fact that the federal courts distinguish among the pursuing lawbreakers, to wit: evidence obtained illegally by private persons[28] or state officers[29] is admissible, whereas the same evidence is inadmissible if procured by a federal officer.[30] This latter practice strikes at the very core of arguments favoring the rule, for if the rule is really to serve as a protection of the constitutional right to be secure against illegal searches and seizures, why should the courts distinguish among persons obtaining the evidence? Furthermore, the only person protected by the rule is the lawbreaker, as it is impossible for the rule to reach the situation of the innocent victim of illegal searches and seizures.

That these and other evidences of the questionable effectiveness of the rule have influenced the reasoning of the Court is most apparent in both the *Irvine* and *Wolf* decisions, particularly in its condoning states' reliance on remedies other than an evidentiary rule of exclusion, in their efforts to protect constitutional rights.

The historical interpretation of the Due Process Clause. Embedded in the historical interpretation of the Due Process Clause are two basic propositions: (1) that fundamental to a federal system is the right of the states to determine the course of procedure to be followed by their courts in administering justice;[31] and (2) that the Bill of Rights (first eight Amendments) as such is not applicable to the states through the Fourteenth Amendment.[32] The states are not absolutely free, but they

[28] See note 23 *supra* [29] See note 23 *supra.* [30] See note 23 *supra.*

[31] Irvine v. California, 74 Sup. Ct. 381, 384 (1954); Rochin v. California, 342 U. S. 165, 168 (1952); Wolf v. Colorado, 338 U. S. 25 (1949); Adamson v. California, 332 U. S. 46, 52-53 (1947); Palko v. Connecticut, 302 U. S. 319 (1937); Twining v. New Jersey, 211 U. S. 78 (1908); Hurtado v. California, 110 U. S. 516 (1884); Davidson v. New Orleans, 96 U. S. 97 (1877).

[32] Wolf v. Colorado, 338 U. S. 25, 26 (1949); Adamson v. California, 332 U. S. 46 (1947); Betts v. Brady, 316 U. S. 455 (1942); Palko v. Connecticut, 302 U. S. 319 (1937); Twining v. New Jersey, 211 U. S. 78 (1908); Hurtado v. California, 110 U. S. 516 (1884); Barron v. Baltimore, 7 Pet. 243 (U. S. 1833).

Justice Black is a strong proponent of the argument that the Fourteenth Amendment was adopted for the purpose of making the Bill of Rights applicable to the states. For an extensive outline of the legislative history of the Fourteenth Amendment, see his dissenting opinion in Adamson v. California, 332 U. S. 46, 68 (1947) and Appendix thereto, in which he states: "In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." *Id.* at 74-75. For other discussions of this position, see: Twining v. New Jersey, 211 U. S. 78, 114 (1908) (dissenting opinion); Hurtado v. California, 110 U. S. 516, 538 (1884) (dissenting opinion); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 94 (1908).

may abridge any privilege or immunity not deemed inherent in national citizenship.[33] And the Supreme Court has been hesitant in delineating such privileges and immunities, preserving from state encroachment only those regarded as the life-blood of liberty and justice—those without which neither liberty nor justice would exist.[34] When the Court has ruled that constitutional rights have been abridged by states in denial of due process,[35] it has so ruled not because the rights may have been enumerated in the Bill of Rights, but because the rights have been interpreted to be implicit in the concept of "due process of law."[36]

Starting with a proposition that the Due Process Clause exacts from the states all that is "implicit in the concept of ordered liberty,"[37] the Court's method of interpreting the clause has been a "gradual process of inclusion and exclusion,"[38] predicated not upon a mechanical standard, but upon a philosophy of empiricism—judging each case as it is presented for decision in view of what has preceded it and what can be anticipated to follow it.[39]

Thus, the Due Process Clause has not been interpreted to demand of the states the same that the Constitution and Bill of Rights have been interpreted to demand of the federal government; but, rather, has been interpreted as a functional element in determining a proper balance between national and state power. Cognizant of this background, the present Court is naturally reluctant to enforce a judicially created federal rule of evidence upon the states.

The four factors discussed are steeped in over a century of judicial history, and their study is essential to an understanding of the conclusion reached by the Court in the *Irvine* case—that "due process of law" does not command exclusion of illegally obtained evidence in state prosecutions for state crimes.

Important in determining the significance of the *Irvine* case is a consideration of its relation to two preceding search-and-seizure cases arising from state courts, namely: *Rochin v. California*[40] and *Wolf v.*

[33] Adamson v. California, 332 U. S. 46, 52-53 (1947).
[34] Palko v. Connecticut, 302 U. S. 319, 326 (1937).
[35] Right of peaceable assembly—Herndon v. Lowry, 301 U. S. 242 (1937); freedom of speech—De Jonge v. Oregon, 299 U. S. 353 (1937); freedom of press—Grosjean v. American Press Co., 297 U. S. 233 (1936); freedom of religion—Hamilton v. Regents of University of California, 293 U. S. 245 (1934); right of accused to benefit of counsel—Powell v. Alabama, 287 U. S. 45 (1932).
[36] Twining v. New Jersey, 211 U. S. 78, 99 (1908).
[37] Palko v. Connecticut, 302 U. S. 319, 325 (1937).
[38] Davidson v. New Orleans, 96 U. S. 97, 104 (1877).
[39] Irvine v. California, 74 Sup. Ct. 381, 391 (1954) (dissenting opinion).
[40] 342 U. S. 165 (1952). Rochin was convicted for violating state laws forbidding possession of morphine. Three deputy sheriffs, having received information that Rochin was selling narcotics, entered Rochin's home and forced their way into his bedroom, where Rochin was sitting on a bed. Two capsules of morphine were lying on a table beside the bed; upon seeing the officers, Rochin swallowed the capsules. The officers jumped him and tried unavailingly to extract them. Rochin

Colorado.[41]

Each of the three cases, *Irvine, Rochin,* and *Wolf,* involved two fact situations relating to actions of police officers: (1) unlawful breaking and entering, and (2) illegal search and seizure. Additional in the *Rochin* case was the element of unlawful assault and battery upon the accused. Whereas the *Rochin* conviction was reversed, the *Irvine* and *Wolf* convictions were affirmed. Thus, the distinguishing feature among the three cases, which led to a decision in *Rochin* contrary to that in *Irvine* and *Wolf* was the element of coercion in the *Rochin* case—"coercion . . . applied by a physical assault . . . to compel submission to the use of a stomach pump."[42] The *Rochin* case held, not that the conviction should be reversed because the court below admitted evidence obtained by illegal search and seizure (the Court never discussed this aspect of the case), but rather that Rochin's conviction had "been obtained by methods that offend the Due Process Clause."[43] The *Irvine* and *Wolf* cases held, however, that the Due Process Clause (the actual language of the Court was "Fourteenth Amendment") does not forbid admission of illegally obtained evidence in state prosecutions for state crimes. Thus, in the three illegal search-and-seizure cases, the Court, under the Fourteenth Amendment, has reached the same result in *Irvine* and *Wolf* and a contrary result in *Rochin.*

An interesting statement in the *Irvine* case is: "We adere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions."[44] One page earlier in the same

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was handcuffed and taken to a hospital, where a doctor forced an emetic solution through a tube into his stomach, causing him to vomit. In the vomited matter were found the two capsules, which were admitted in evidence at Rochin's trial, over his objection. The Supreme Court reversed the conviction, holding that it was obtained by methods that offend the Due Process Clause.

In the present case, Irvine urged the Court to adopt the holding in the *Rochin* case. But the Court refused, on the ground that the *Irvine* case lacked the element of physical assault, found in the *Rochin* case. Irvine v. California, 74 Sup. Ct. 381, 383 (1954). For discussions of the *Rochin* case, see Note, 30 N. C. L. REV. 287 (1952), and Comment, 50 MICH. L. REV. 1367 (1952).

[41] 338 U. S. 25 (1949). Wolf, a doctor, was convicted of conspiring with others to commit abortions. A deputy sheriff and other police officers went to Wolf's office, searched his appointment book for names of patients, and interrogated these patients to obtain evidence sufficient to bring him to trial. Wolf objected to the admission of the books and testimony in evidence as a violation of his rights under the Fourteenth Amendment. The Supreme Court affirmed his conviction.

Petitioner Irvine argued that, although the Court had upheld Wolf's conviction, his conviction should be reversed, on the ground that the invasion of privacy was more offensive than that involved in the *Wolf* case. The gist of such an argument is this: Where a case involves invasion of privacy producing only mild shock, the Court should affirm the conviction; but where the invasion is more serious, the Court should reverse. In answer to this argument, the Court stated that the *Wolf* case and the *Irvine* case involved personal invasion of approximately the same degree, and refused to adopt that criterion for delineation. Irvine v. California, 74 Sup. Ct. 381, 383-384 (1954).

[42] *Id.* at 383. [43] Rochin v. California, 342 U. S. 165, 174 (1952).

[44] Irvine v. California, 74 Sup. Ct. 381, 384 (1954).

decision it is stated: "Although Rochin raised the search-and-seizure question, this Court studiously avoided it and never once mentioned the Wolf case. Obviously, it thought that illegal search and seizure alone did not call for reversal."[45] What distinctions are being made in deciding search-and-seizure cases, if not subjective?

That question is answered by the speculation that the Court is caught in obvious contradiction, for it appears that, despite its statements to the contrary, the Court has introduced subjective distinctions, as evidenced by the fact that degree of offensiveness of police misconduct would seem to be the only criterion upon which the three cases turned. If this be true, then the *Irvine* case indicates two conclusions as regards future illegal search-and-seizure cases: (1) if police misconduct involves physical assault or worse, the Court will follow the *Rochin* approach; whereas (2), if police misconduct involves less than physical assault, the Court will follow the *Irvine* and *Wolf* approach.[46] Perhaps the *Irvine* case indicates a trend back to the *Wolf* line of reasoning in all search-and-seizure cases, but this cannot be certain, for the Court did not overrule or even criticize *Rochin* in the *Irvine* case. Whether the Court admits it, a line appears to have been drawn, but it remains to be seen if the Court will follow it.

It seems that the Court has not satisfactorily determined its role in supervising administration of criminal justice in the states. It has not been successful in avoiding introduction of subjective distinctions into the illegal search-and-seizure cases, despite its claims to the contrary. State courts can know only two things: (1) that the Supreme Court will not reverse a conviction simply because illegally obtained evidence was admitted in a state prosecution for a state crime; and (2) that the Supreme Court probably will reverse a conviction parallelling the *Rochin*

[45] *Id.* at 383.

[46] This conclusion is substantiated by the views of the majority of the Court only (Chief Justice Warren and Justices Clark, Jackson, Minton and Reed). Justice Douglas, however, would reverse all convictions where constitutional rights have been violated, on the basis of his beliefs that the Bill of Rights should be a limitation upon the states through the Fourteenth Amendment, and that the federal evidentiary rule should be enforced upon the states. Justice Black agrees with Justice Douglas, except that he would not enforce the evidentiary rule upon the states (thus his dissent in *Irvine* on Fifth Amendment grounds, but his concurrence with the majority in *Wolf* where there were no Fifth Amendment overtones).

It could be said that Justice Frankfurter will reverse a conviction that offends his concept of "due process of law." (He wrote the majority opinion in *Rochin* and a dissent in *Irvine*, on the basis that the convictions had been obtained by methods which offend "due process of law.") Thus it is difficult to determine upon what basis he distinguishes the *Irvine* case from the *Wolf* case (he wrote the majority opinion in *Wolf*), for it was the opinion of the majority in *Irvine* that those two cases involved police misconduct offensive in the same respect, if not in the same degree. *Quaere:* Has Justice Frankfurter changed his position in cases paralleling *Wolf*? He answered negatively in *Irvine*, but his explanation did not satisfactorily dispose of the question. Justice Burton joined with Justice Frankfurter in all three cases.

case. The greatest difficulty presented by the cases, however, is in justifying the subjective distinctions to the citizens of the United States. Why is physical assault any more violative of "due process of law," *or* antithetical to a concept of ordered liberty, *or* shocking to the conscience, *or* offensive of canons of decency and fairness, *or* restrictive of fundamental principles of liberty and justice, *or* offensive to human dignity, *or* brutal, *than* surreptitiously breaking and entering a private home, installing a microphone in a bedroom, boring a hole through the roof, connecting the microphone with a receiver, and listening to private conversations for approximately thirty days? That question the Supreme Court has not answered.

In place of "writs of assistance," or general search warrants, today we frequently have no warrants at all. Certainly the liberty of every man is not "in the hands of every petty officer," but it could be said that the liberty of Irvine was in the hands of the California police. True, Irvine was a criminal. But he was also a citizen of the United States. At his trial, "due process of law" could not command exclusion of incriminating evidence obtained by an unscrupulous intrusion of his privacy.

It seems that distant echoes of the words of James Otis can still be heard.

J. THOMAS MANN

Constitutional Law—Special Privileges and Emoluments—Race Track Franchise

In *State v. Felton*[1] the accused consented to become the test defendant, was arrested on August 29, 1953, and tried on a bill of information alleging that he "did unlawfully and wilfully place wagers and bets on a game of chance, to-wit: dog races conducted by the Carolina-Virginia Racing Association, Inc."[2] Judge Hubbard allowed defendant's motion to quash the bill of information for that by reason of the Currituck Act of 1949,[3] the bill failed to charge the commission of any crime. In so doing, the judge held the Act constitutional. That Act provided for a County Racing Commission which was authorized to grant a franchise to a person for the purpose of racing horses, dogs, or both horses and dogs.[4] "Pari-Mutuel Machines or Appliances"[5] were permitted, provided the qualified voters of Currituck County ratified the

[1] 239 N. C. 575, 80 S. E. 2d 625 (1954).
[2] State v. Felton, 239 N. C. 575, 577, 80 S. E. 2d 625, 627 (1954).
[3] N. C. SESS. LAWS 1949, c. 541.
[4] N. C. SESS. LAWS 1949, c. 541, § 2.
[5] ". . . a pari-mutuel system is well recognized as a system having no other purpose that that of providing the facilities . . . for placing bets, . . . whereby participants bet on the outcome of the races." State v. Felton, 239 N. C. 575, 582, 80 S. E. 2d 625, 630 (1954).