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MAPP V. OHIO: AN ALL-AMERICAN MISTAKE

ROBERT EMMET BURNS*

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable.1

O.W. Holmes, Baldwin v. Missouri

By 1920, evidence gathered by law enforcement officials had become marked by arrests without warrants or probable cause, and searches in violation of state law. Confessions of guilt became, with increasing frequency, the product of beatings, tricks, deprivations or extensive delays in arraignment. Few of these cases ever reached state or federal review. Federal courts had similar problems in dealing with interstate crimes, such as prohibition.

It was in this atmosphere of the 1920’s and 1930’s that the United States Supreme Court, sitting in its capacity as chief appellate court and supervisor of the federal court, began to hear search and seizure cases under the fourth amendment, which had been, until then, applicable only to the federal courts.2

The fourth amendment, which provides as follows:
The right of the people to be secure in their persons, houses, papers, and effects,

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* Mr. Burns received his B.S. from the College of the Holy Cross, his LL.B. from the Yale University School of Law and his LL.M. from the New York University Law School. He is a member of the Bars of Illinois, New York and Massachusetts and in currently an Associate Professor of Law at DePaul University College of Law. He is the author of a forthcoming book entitled The Honorable Lie.

1. Baldwin v. Missouri, 281 U.S. 586, 595 (1929). This is a dissent by Mr. Justice Holmes to a Supreme Court decision overturning a Missouri tax assessment on due process grounds. He continued: "We ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." Id.

2. See note 32 infra.
against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized, was the basis for the “exclusionary rule” enunciated in *Weeks v. United States.* In *Weeks* the Supreme Court held that if evidence gathered by federal officials was obtained in violation of the fourth amendment or a rule of the Supreme Court defining reasonable methods, the “tainted” evidence would be inadmissible in federal courts. Admission of such evidence into a proceeding by a lawyer in a federal court would require automatic reversal. Reversal was to be automatic regardless of the probative value or weight of the untainted evidence.

The fourth amendment generally requires, as do similar clauses in all state constitutions, that a search by a law enforcement official of a person or place must be, in general, either “incidental” to a lawful arrest or pursuant to a valid search warrant. Methods of obtaining evidence, such as wire taps, exploratory or general searches, and seizures without arrest become subject to the exclusionary rule in federal courts. If a federal trial judge improperly admitted real evidence, reversal was required.

In 1949, thirty-one states rejected the exclusionary rule or the so-called *Weeks* doctrine. Sixteen states agreed with it. In the 1926 case of *People v. DeFore,* the Chief Justice of the New York Court of Appeals, Mr. Justice Cardozo, offered this evaluation of the exclusionary rule:

The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.

In *DeFore,* defendant had been arrested in the corridor of his board-

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3. U.S. Const. amend. IV. This amendment refers to real evidence—to things. The defendant’s gun, the victim’s clothing, the suspect’s fingerprints, the stolen merchandise are things. Real evidence, if relevant, is important in the adversary system of criminal justice.


5. See note 37 infra.


9. Id. at 24, 150 N.E. at 589.
ing house for stealing an overcoat, a misdemeanor, but convicted of possessing a weapon, a felony. An officer, without a warrant, searched defendant's room and discovered a blackjack which was introduced in evidence over defendant's objection. In rejecting the *Weeks* rule, Cardozo wrote: "The criminal is to go free because the constable has blundered."¹⁰

He warned that we should not subject society to these dangers until the legislature has spoken with a "clear voice." The last words of his opinion read:

As a last resort, the defendant invokes the Fourteenth Amendment and the requirement of "due process." The Fourteenth Amendment would not be violated, though the privilege against self-incrimination were abolished altogether. (Citation omitted). The like must be true of the immunity against search and seizure without warrant in so far as that immunity has relation to the use of evidence thereafter.¹¹

On June 17, 1949, the "voice" arrived, though not that of the legislature envisioned by Cardozo. The voice was not yet as loud as it was soon to become. On June 27, 1949, in *Wolf v. Colorado*,¹² the United States Supreme Court held that "due process of law," required by the fourteenth amendment, obliged state courts in the enforcement of their criminal law to respect the provisions of the fourth amendment, as from time to time the United States Supreme Court should, for all 50 states, view that fourth amendment. Frankfurter wrote the opinion. This, like other first incorporation endeavors, affirmed the state conviction. Though states must "respect the Fourth Amendment," due process did not require that a state exclude evidence which violated a federal court view of the fourth amendment or adopt the *Weeks* rule of exclusion and reversal for themselves. Frankfurter, a Federalist, wrote:

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 not by way of disciplinary measures but by overriding the relevant rules of evidence . . . . The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.¹³

And then:

We hold, therefore, that in a prosecution in a State court for a State crime the Four-

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10. *Id.* at 22, 150 N.E. at 587.
11. *Id.* at 25, 150 N.E. at 590.
teenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.  

Frankfurter was troubled by his decision in *Wolf v. Colorado*, which held that evidence obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law was admissible in a state court. Frankfurter, respectful of a dual court system, envisioned that the *Wolf* decision called for a "watered down version" of the federal fourth amendment in state courts. Due process only required state adherence to the fundamentals of the fourth amendment—the exclusionary rule was not one of those fundamentals. He wrote: "the security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the states through due process." The issue, as Frankfurter saw it, was not whether the federal fourth amendment was intended to be made applicable to the states, but was whether the fourth amendment was "adapted," "adopted," sipped or gulped.

The last thoughts of this concededly great justice represent, in some quarters anyway, a pathetic commentary on the subtle excellences of heritage and law at the hands of Law of the Land Review. He wrote:

Unlike the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e.g. *Hurtado v. California*, 110 U.S. 516; *Twining v. New Jersey*, 211 U.S. 78; *Brown v. Mississippi*, 297 U.S. 278; *Palko v. Connecticut*, 302 U.S. 319. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. *Adamson v. California*, 332 U.S. 46. The issue is closed.

That is what he thought. Though state courts would remain, and

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15. See Justice Frankfurter's appendices to *Wolf* for all leading pre-1949 state cases touching the *Weeks* doctrine.
16. "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 not by way of disciplinary measures but by overriding the relevant rules of evidence." *Supra* note 7, at 31-32.
17. *Supra* note 7, at 27.
local crime mushroom, the issue of federalism or the need for an independent flexible state judiciary was not to be closed or settled by *stare decisis*, Cardozo, Hughes, Frankfurter, Holmes or Brandeis. Twenty short constitutional years of "due process" would repudiate all. Every single Frankfurter decision cited was overruled by the Warren Court. For a constitutionally short ten years after the *Wolf* opinion the Supreme Court would not reverse state convictions obtained by evidence which in federal court might be inadmissible.

The *Wolf* state search and seizure test was whether the convictions had been obtained or brought about by methods which offended the Supreme Court's collective "sense of justice" or that "shocked the conscience of the court." In *Rochin v. California*, police used a stomach pump to extract some swallowed narcotics capsules. The state conviction was reversed. In *Breithaupt v. Abram*, the taking of a blood sample without a warrant did not offend fundamental fairness, or shock the conscience of the court. The High Court, from 1949 to 1961, practiced judicial restraint in the administration of due process amendment review of state convictions claimed to violate the fourth amendment as "adopted" in *Wolf*.

Would a "watered down" law of the land work? It was going to be difficult to keep *Wolf* wading. A Supreme Court justice, who hears in the morning, as an appellate judge, an appeal in a federal


20. In language that seemed to criticize their own current version of due process review, Mr. Justice Frankfurter attempted to justify it. "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process." *Rochin v. California*, 342 U.S. 165, 170 (1952). Those "considerations that are fused in the whole nature of our judicial process" appear to be less restraining at second glance. Justice Douglas believed that "if the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person . . . ." *Breithaupt v. Abram*, 352 U.S. 432, 444 (1957). However, a majority did not agree; thus the collective conscience of the nation appears to rest in but five men.


case based on a version of the fourth amendment which requires automatic reversal, is going to chaff a little when, in the afternoon, he hears an appeal from a state conviction based on the same facts, and must affirm unless the state methods used shocked its conscience or offended fundamental justice. It must have been especially difficult when one and the same identically phrased *fundamental* fourth amendment was involved in both appeals. Small wonder it is that the antagonists in the great battle over incorporation, Justices Black and Frankfurter, would each claim that the other's opposite position was intolerable for exactly the same reason. Black, concurring in *Rochin*, but favoring incorporation, wrote:

The majority emphasize that these statements do not refer to their own consciences or to their sense of justice and decency. For we are told that "we may not draw on our merely personal and private notions"...23

If the Due Process Clause does vest this court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on disinterested inquiry pursued in the spirit of science, on a balanced order of facts."24

I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgement of freedom of speech and press have strengthened this conclusion.25

Frankfurter, dissenting in *Elkins v. United States*, but opposed to incorporation, wrote:

The divisions in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amendment and the shifting views of members in the Court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn. See, for example, the varying views of the Court as a whole, and of individual members, regarding the "reasonableness" under the Fourth Amendment of searches without warrants incident to arrests.

What the Court now decides is that these variegated judgments, these fluctuating and uncertain views of what constitutes an "unreasonable search" under the Fourth Amendment in conduct by federal officials are to determine whether what is done by state police, wholly beyond federal supervision, violates the Due Process Clause.26

23. *Supra* note 21, at 175 (Black, J., concurring).
24. *Supra* note 21, at 176.
25. *Supra* note 21, at 177.
Were they both right? Due process review was arbitrary if it incorporated the fourth and arbitrary if it did not. Maybe the fourteenth was not intended to give the Supreme Court ultimate power over the states.\(^2\)

In *Elkins*, wire tap evidence obtained by Oregon State Police was admitted in a federal district court prosecution. Wire tap evidence had been held inadmissible in the federal court and subject to the *Weeks* exclusionary rule when obtained by federal officials. Since, however, the federal officials did not participate in the search and illegality and the evidence was relevant, it was admitted at trial and the defendant was convicted. The Supreme Court reversed. In a 5 to 4 decision it held that the federal exclusionary rule should have been applied even though the rationale for the rule was to punish or deter federal offenders and the offenders in *Elkins* were state officials beyond the control of a federal court.\(^2\)

Once the use of the “tainted” evidence became separated from the user it would be a constitutional mini-step to require all states to adopt the federal exclusionary rule. Frankfurter could see the handwriting on the wall. It was June, 1960. He wrote:

> The underlying assumption on which the exclusionary rule of *Weeks* rests is that barring evidence illegally secured will have an inhibiting, one hopes a civilizing, influence upon law officers. With due respect, it is fanciful to assume that law-enforcing authorities of States which do not have an exclusionary rule will to any significant degree be influenced by the potential exclusion in federal prosecutions of evidence secured by them when state prosecutions, which surely are their preoccupation, remain free to use the evidence. At any rate, what warrant is there for the federal courts to assume the same supervisory control over state officials as they have assumed over federal officers, even if that control could be effective? And the exertion of controlling pressures upon the police is admittedly the only justification for any exclusionary rule.\(^2\)

In May, 1957, three Cleveland police officers arrived at the residence of Miss Dolores Mapp, apparently for a search. When she demanded a search warrant, a paper was shown her which Miss Mapp grabbed and shoved down her bosom. It was retrieved in an ungentlemanly fashion by one of the officers who then searched her apartment and discovered obscene material. Miss Mapp was indicted and convicted in an Ohio court for having in her possession lewd

\(^{27}\) See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. (1949).

\(^{28}\) Supra note 26.

\(^{29}\) Supra note 26, at 241 (emphasis added).
books. There was considerable doubt in the trial record whether there ever was any warrant for the search of her home. On appeal from the conviction to the Supreme Court, the federal exclusionary rule was applied. It became a part of the fourth amendment, binding on the states under the due process clause of the fourteenth amendment. The effect of *Mapp v. Ohio* was to give the Supreme Court the constitutional power and duty to define, on a selected case basis, what was "reasonable" under the fourth amendment for every single state and federal trial court in the nation.

Justice Harlan, in a dissent joined by Frankfurter and Whittaker, wrote bitterly:

> Five members of this Court have simply "reached out" to overrule *Wolf*. I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the Court's present action amounts to a summary reversal of *Wolf*, without argument.

Why did the Supreme Court decide to make uniform for all courts

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31. *Id.*
32. In 1890 the Supreme Court first employed the due process clause of the fourteenth amendment to overrule state-established railroad rates. *Chicago Ry. v. Minnesota*, 134 U.S. 418 (1890). The same clause was used to prevent: a state from establishing a maximum work week, *Lochner v. New York*, 198 U.S. 45 (1905); from outlawing "yellow dog" contracts, whereby an employer, as a condition of employment, bound employees not to join or remain a member of a union, *Coppage v. Kansas*, 236 U.S. 1 (1915); and Congress from prohibiting child labor, *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Seventy years after regulating reasonable railroad rates, the Court was regulating reasonable police conduct. Although it may be argued today that the Supreme Court represents the mainstream of community conscience, and therefore that its legislative activities should pass unquestioned, it should be clear to those other than the antagonists of contemporary decisions that yesterday's due process review represented different values. Perhaps with a change in the personnel of the Court, as has been true in the past, antagonist will become protagonist.
33. *Supra* note 30, at 674.
34. *Supra* note 30, at 677.
the exclusionary rule? More importantly, why did the Court assume the onerous task of defining what was reasonable under the fourth amendment for every hamlet in the United States? Was it because state courts have failed to control police methods in obtaining convictions? Perhaps it was the enervation of role diffusion or the day-night review exercise called for by the *Wolf* decision. Maybe it was the damnedness of the phrase "due process," that inviting lure that had seduced more than one Supreme Court with the fragrances of perfect reason. Was it the briefs, oral arguments, or the grace and excellence of Rowland Watts, amicus curiae representing the American Civil Liberties Union? Surely the Supreme Court had not in forty-five years of search for ideal federal law enforcement standards found consensus in their own constitutional courts.

Could the exclusionary rule work when it required, at bare minimum, clear distinct rule concensus which had been notably absent in the Court's own prior opinion on federal court matters? A nine man rule of reason almost seems destined for vagueness, especially when each justice has a legal and moral right to write concurring or dissenting opinions (and thus to be remembered that way).

35. *Supra* note 32.


37. This is quite an impossible subject upon which to work a universal fifty-state standard promulgated by the opinions of nine justices. Enforcement of the fourth amendment standard requires the answer to a number of complex questions: Was the evidence taken incident to an arrest? Was there an "arrest?" When is stopping an arrest? Was an arrest made pursuant to a "valid" warrant? Was there "probable cause" for a "valid" arrest without a warrant? Which came first, the "search" or the arrest? Was the evidence a result of "hot pursuit?" Was it seized in "plain view?" Is it "mere evidence?" Was there consent to the search? Is the evidence the "fruit" of an illegal search? Has the complainant "standing to object?" In every case the question must be asked whether the evidence of defendant's guilt was obtained properly. Was the search of defendant's car, home, room, trunk, person, "unreasonable?" Let no one doubt the complexity of the area. *See LaFave, Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth,* 1966
deed, the very legal processes of adversary brief and oral argument before the Supreme Court demand from all lawyers on each side a positive touch for his honor’s published thoughts written on another day for a different case but so very apropos of defendant’s or people’s plight in the appeal before the Court.

Even so, by 1960 some of the academia, who appreciate distinctions even more than do practicing attorneys, become nonplussed by the failure of the Supreme Court to articulate clearly what was and was not, in federal court, a “reasonable search” under the fourth amendment. Thus wrote Professor Waite of the Michigan Law School in 1962:

From this welter of individual opinions no standards, no principles, have evolved; no tests by which the propriety of a police action can be determined. Except in obvious situations no officer can be sure in advance whether the criminal he arrests will be convicted, or he himself be condemned and the criminal released.38

All this was before Mapp v. Ohio took the High Court to open sea; when the exclusionary rule became applicable to all the states, making state standards identical to those in federal courts.

Most states have tried to follow and apply the Supreme Court’s legislative rules of reason in the search and seizure areas. Here, for instance, are the facts in Hadley v. State,39 a 1968 Indiana Supreme Court decision on appeal from a theft conviction obtained through the admission in evidence of a typewriter allegedly stolen and subsequently seized by police:

The evidence thus presented indicates that three men were seen about the oil plant from which a typewriter, later introduced in evidence over Appellant’s objections, had been removed; ... several police officers promptly arrived at the scene; some of the officers were informed that these three men were seen leaving the plant with a typewriter and had sought refuge in a nearby residence, which is the home of the parents of two of the men involved who were emancipated.40

Three judges form the majority opinion:

It is not always necessary to have a warrant of arrest to make a lawful arrest. The record herein suggests to us that the officers of the law were conducting an investigation of a reported burglary, almost immediately following the perpetration of such felony, in fact, while efforts were being made by the Appellant to ‘get away’


38. Waite, supra note 36, at 1058.
40. Id. at 892.
and to hide in the home where he was found and where he had been seen to enter. It is a fair conclusion, we think, that the officers were fairly hot on the trail and we find nothing unlawful about the arrest under the circumstances here presented and certainly the trial jury had the right to so find.\footnote{41}

The two dissenting judges said that the search was illegal, citing 175 federal and Indiana decisions.\footnote{42} The middle-middle judges, who concur with the majority result, cited 200 United States Supreme Court decisions in an attempt to "clarify the area," pausing to state:

\footnote{43} At the outset, it should be stated that the wide variance of opinion, as expressed in the majority, concurring and dissenting opinions, may by large measure stem from this Court's efforts to stay abreast with the rapidly changing, and to say the least, chaotic . . . dimensions of this field of law.

And where does all this leave Officer Friendly in Gary? Is it all a game? Why must the Supreme Court continue a futile quest for uniform principles in fifty states when such are simply impossible? Suppose, for instance, in \textit{Hadley v. State}, the officers searched for two hours for a rapist, and defendant demanded a search warrant, but no one was home and the police were in short supply on the day in question. It should surprise no one that five years after \textit{Mapp} a 124 page, 805 footnote law review article should appear, entitled \textit{Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth}.\footnote{45} How could it? An impossible task is bound to be frustrating. Arrest and search are based on appearances of the moment in unique spatial and temporal circumstances. One cannot provide nouns, rules, absolutes, and "is" direction for a "to be" process. Especially is this so when performing a \textit{post hoc} judicial review in a stated controversy over disputed happenings. The visibility level of a Supreme Court in review of real evidence admitted in state trials is a bit constrained.

The \textit{Miller} murder case is instructive on the point.\footnote{46} Miller was tried and convicted of the murder of an eight-year old girl by evidence which included a pair of undershorts which the state contended were stained with blood. Seven years later, after a federal habeas corpus hearing and subsequent appeal, the High Court handed down

\begin{itemize}
\item \textit{Supra} note 39, at 892.
\item \textit{Supra} note 39, at 901-11.
\item \textit{Supra} note 39, at 895.
\item \textit{Supra} note 39.
\item LaFave, \textit{supra} note 37.
\item Miller v. Pate, 386 U.S. 1 (1966).
\end{itemize}
an opinion stating the prosecutors "deliberately misrepresented the truth" in contending that a pair of undershorts found within a mile of the murder were stained with blood. The Supreme Court opinion said that the garment was stained, not with blood but with brown paint. The prosecutors knew this. The Court freed Miller. Following sensational publicity associated with the Supreme Court's holding, a special committee of the Illinois State Bar Association commenced an investigation of the matter to determine whether the prosecutors should be disbarred or disciplined. Nine months and a three thousand page record search followed.

It became apparent to the Committee early in its investigation that the United States Supreme Court had misapprehended the facts of the case. At the trial, which took place in 1956, the state chemist testified that there were bloodstains on the shorts in question. Prior to the trial, the prosecutors had been given a laboratory report from the Illinois State Bureau of Criminal Identification and Investigation, which disclosed that the shorts did, in fact, contain blood. The state chemist further testified at the trial that the blood on the shorts was type "A" which was the same type as that of the victim.

The Committee found no reason to doubt that there was blood on the shorts. Accordingly, the Committee found that there was no basis for the view of the United States Supreme Court that the prosecution had been guilty of a misrepresentation when it asserted as a fact that the shorts contained blood.

The Committee concluded that the decision of the United States Supreme Court was based entirely upon a portion of the testimony which had been given at the habeas corpus hearing in the United States District Court of Chicago. The Supreme Court rejected the testimony given at the original trial eleven years earlier, and ignored the testimony of the state chemist who again testified at the habeas corpus proceedings that there was blood on the shorts.

The Bar Association committee went on to state that, in addition to the blood, there was paint on the shorts which, in the opinion of the committee, had some tendency to corroborate Miller's confession that he left them in the area.

One must remember that the appellate advocate who writes, in brief, the statement of the facts for the High Court is usually seeking constitutional vindication, release, re-trial, or settlement. The final decision is bound to be influenced by captive versions of the facts times nine. This alone could account for the over fifty per cent concurring and dissenting written opinion rate in the fourth amendment.

47. Id. at 6.
49. Id. at 956.
What would you do as Supreme Court Justice with the following situation:

Tom Jones was convicted of operating a still to make moonshine liquor. The still was discovered after deputies went to the home of the petitioner's grandmother who, when told by the officers that they had a warrant, let them in. The issue is simple: Was consent given for the search which made it reasonable under the fourth amendment?

One view of the facts is:

Four of them came. I was busy about my work and they walked into the house and one of them walked up and said 'I have a search warrant to search your house' and I walked out and told them to come in . . . . He just come on in and said he had a warrant to search the house and he didn't read it to me or nothing. So, I just told him to come on in and go ahead and search and I went on about my work. I wasn't concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant. He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. I just seen them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn't tell me anything, just picked it up like that. They didn't tell me nothing about my grandson.

Another view is:

He did tell me he had a search warrant. I don't know if Sheriff Stockard was with him. I was not paying much attention. I told Mr. Stockard (after he had come up on the porch) to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search and it was all my own free will. Nobody forced me at all.

Should the defendant's conviction be reversed in order to prevent, deter, or discourage police impropriety or unreasonableness in obtaining this kind of consent? Was there a consent in fact? Could reasonable men differ in the answer to the questions?

Add some data or ingredients: (A) There was a valid search warrant, but the officers did not have it with them; (B) there was a dispute in the records on point (A); (C) there was eye witness testimony of two witnesses who saw defendant making whiskey (This other evidence was sufficient to convict beyond a reasonable

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51. The preceding fact situations were taken from the opinion of the Court in Bumper v. North Carolina, 391 U.S. 543 (1968), written by Mr. Justice Stewart, and from the dissenting opinion of Mr. Justice Black.
1969] MAPP V. OHIO: AN ALL AMERICAN MISTAKE 93

doubt).

Have things changed any? Could reasonable men differ? Now keep all of the facts, including (A), (B) and (C), but substitute a rape for a bottle. The real affair is *Bumper v. North Carolina*. Justice Black's dissent stated:

The victims were a young man and his girl friend. At trial both testified in detail to the following: They were parked shortly after dusk on a country road not far from where the petitioner Bumper lived. Bumper approached the car, stuck a rifle barrel up to the window and ordered the girl to get out of the car, indicating that if she refused he would shoot her. Both got out of the car and Bumper ordered the girl to undress, stating that 'I want a white girl's p . . . .' When the girl adamantly refused, Bumper pointed the rifle at the young man, and the girl, understanding that she must submit or her boy friend would be killed, followed Bumper's orders. Bumper then forced the young man into the rear seat of the car, requiring him to stay down on the floor, while Bumper raped the girl on the back of the car. A short time after this, Bumper forced the couple to drive to another spot. Here he made them get out of the car and walk down a dirt road into some bushes. At this time Bumper told the couple he was going to kill them, and when they pleaded with him to let them go, he replied, "I can't do it; you will go to the cops." The couple then suggested that if Bumper would tie them up and blindfold them that he could get away with no problem. This Bumper did, tying each to a separate tree. But he did not leave. Instead he raped the girl again while she was tied to the tree. After this, Bumper went over to the young man and felt his chest, asking him where his heart was and if he was scared. He then coolly proceeded to shoot the young man where he thought his heart was. The girl, tied to the tree and blindfolded, heard the shot, and a moment later herself was shot through the left breast close to her heart. Bumper then took the car and drove away, obviously believing he had killed the young couple. They were able to free themselves, however, and with much difficulty made their way to a nearby house where the owner got them to a hospital. The time during which the couple was held captive was approximately an hour and a half. During that time they clearly got to know who their assailant was. Both got a plain view of Bumper right at the beginning of their ordeal when they opened the car doors and saw his face in the light coming from the inside of the car. Moreover, the undisputed evidence in the record shows that the night of the attack was a bright moonlit night. Both testified positively at trial that it was Bumper. Also there was substantial corroborating evidence outside of that relating to the rifle. Here we have the clear and convincing testimony of the two victims, whose characters were in no way impeached or challenged. The only witnesses at the trial were state witnesses (the two victims plus medical and police testimony), and none of their testimony was refuted or denied in any way. Thus, this is a case where every word of evidence introduced at trial pointed to guilt, and there was no challenge to the truthfulness of the State's evidence, nor to the character of any of its witnesses. Yet even with all this, the Court persists in reversing the case, thus requiring the State to hold a new trial if it wishes to punish Bumper for his crimes.58

52. 391 U.S. 543 (1968).
53. Supra note 52, at 558-60.
Mr. Justice White dissented.\textsuperscript{54} He thought that the case should be remanded to determine at the North Carolina trial level whether there was a warrant. He said that he would reverse unless the error was harmless. The majority must have hated to reverse \textit{Bumper v. North Carolina}. They had to. Now here lies a story. In criminal trials, only trial errors which are substantial, important, prejudicial and harmful to defendants are supposed to warrant the reversal of convictions. If, for instance, illegal evidence is wrongfully admitted but there was other untainted legal evidence sufficient to convict, the illegal error should be "harmless," hence no reversal.

The Supreme Court "kicker" is this. A constitutional error must be both harmful and substantial to require reversal, or else the deterrent effect which is the \textit{raison d'etre} or rationale for the exclusionary rule will not be served. But, the Supreme Court, having adopted a policy of punishing human turpitude or error by reversing convictions, was and still is troubled by the truth that defendants convicted beyond a reasonable doubt, by legal and untainted evidence, \textit{ought not} to have their convictions reversed when the error in factum terms was but harmless. The Court should vindicate the premises of the adversary system.

Here is an example of the Supreme Court's quest to serve in state courts both masters: In \textit{Griffin v. California},\textsuperscript{55} decided in 1965, it was held by a 5 to 4 vote that it was unconstitutional for the prosecution to comment on the failure of the defendant to take the stand on his own behalf and testify at his trial. However, California state prosecutors, after the decision, continued to comment to the jury on the defendant's invocation of his right not to testify. The California appeal court continued to affirm convictions on grounds that comment on failure to testify was harmless error. Then in the \textit{Chapman v. California}\textsuperscript{56} case the Supreme Court, 5 to 4, reversed every state's harmless error rules by providing that no violation of a few hundred constitutional rights, including rights under specific rules of reason of the fourth amendment would be considered harmless unless proved harmless beyond a reasonable doubt by the state. Even so, the logic of the \textit{Mapp} rule requires an automatic reversal every time a Supreme

\textsuperscript{54} \textit{Supra} note 52, at 561.
\textsuperscript{55} 380 U.S. 609 (1965).
Court rule is violated, irrespective of other evidence of guilt. Otherwise the offending officer will not be properly chastised, disciplined or deterred.

In search and seizure cases the Supreme Court rides two horses which gallop in opposite directions. Concern for the integrity of the adversary system animates a feeling that constitutional errors not tainting or affecting other independent evidence of guilt ought not to occasion reversals and release or retrials. This is the policy of "harmless error" never expressly repudiated. The other stallion rides this way: if police are to be effectively disciplined or encouraged, the High Court must hold violations of rights to "civilized" procedures never harmless. Violations of procedural rights must then occasion reversal, irrespective of actual guilt.

The automatic reversal rule for constitutional error provides strong incentives to appeal for single constitutional error warrants automatic reversal and a chance for a plea or settlement with the prosecutor the second time. Constitutional errors by police, judge and even defendant's lawyer theoretically must in logic, vitiate a conviction, irrespective of actual guilt.

California's Judicial Council's 1969 report to the Governor attributes their "startling" appeal rate (1969-70) from .09 per cent to 20 per cent and their persistent docket delay despite double the number of new appeal judges to "frivolous" appeals. If by "frivolous" one means all violations of constitutional rights which do not affect guilt or innocence of the offense charged, then of course invasion of all fourth amendment search and seizure rights appeals, which affect not one iota the probative worth of the real evidence seized unfairly, are "frivolous." On the other hand, if the Court is to properly discipline police, the appeal courts must never hold the admission of unfairly seized real evidence to be harmless.

But does the Mapp rule work at all? From all appearances the police are unconcerned with most of their own department regulations, much less with divided Supreme Court opinions offering police consolation or rebuke depending upon whom you are reading. It is an eminently fair question to ask whether local police, well aware of calendar turnover and voluntary guilty pleas in urban centers, are

57. BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA (1966).
in fact deterred or encouraged to be fairer than otherwise. If capital punishment does not deter an offender because it will not happen, why should court exclusion of evidence or appellate reversal of trial decisions deter police when ninety per cent of the time there will be no trial?

In urban areas Mapp has, for plain people, a quantum settlement value payable in a reduced charge or sentence. When police confront injustice and persuade defendant to plead guilty, they will bring with them all of the real evidence irrespective of violations of Supreme Court decisions.58

Mapp, in a few categories of crimes such as narcotics possession, may have elevated police perjury to standard form dimensions.

Spend a few hours in the New York City Criminal Court these days and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground whereupon the policeman arrested him.

The judge has no reason to disbelieve this “dropsy” testimony in any particular case. Naturally, he must decide each case on its own evidence, without regard to the testimony in other cases. Surely, though, not in every case was the defendant rash enough or unlucky enough to drop his narcotics at the feet of a policeman. It follows that at least in some of these cases the police are lying.

Why? Policemen believe themselves to be fighting a two-front war against criminals in the street and against “liberal” rules of law in the court. All’s fair in this war, including perjury, to subvert those “liberal” rules that might free defendants who “ought” to be jailed.59

The obfuscation is highlighted by two decisions in 1960; for the prosecutor there was Rabinowitz60 (People’s handbook) and for the defendant Chapman61 (Defendant’s handbook). Each case stood

58. Even with the less persuasive illegal testimonial evidence, ponder the significance of this probably accurate state of affairs in that area: “The existence or threatened use of a coerced confession may not itself render the guilty plea involuntary. A defendant who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and to plead guilty—whether because of ‘his own knowledge of his guilt and a desire to take his medicine.’ Doran v. Wilson, 369 F.2d 505, 507 (9th Cir. 1966); because ‘he also knows that other admissible evidence will establish his guilt overwhelmingly.’ White v. Pipersack, 352 F.2d 470, 472 (4th Cir. 1965); because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty.” United States v. McMann, 408 F.2d 48, 53 (2d Cir. 1969) (emphasis added).
for opposite alternatives, and neither was overruled.

In Rabinowitz the defendant was indicted for passing and concealing forged postage stamps. The United States Supreme Court affirmed his conviction which was based on evidence obtained by the police pursuant to an arrest, but without a search warrant. In Chapman federal officers smelled whiskey odors emanating from defendant's apartment. The police summoned the landlord who let the police enter. An illegal still was seized and admitted into evidence at the trial. The police could have gotten a search warrant, but an officer testified he "never got one on Sunday." The court reversed the liquor law conviction because the evidence was based on an illegal search and seizure without a warrant.

And where is the Court twenty years later? What has changed? In Chimel v. California,62 decided on June 23, 1969, petitioner was convicted of burglary of a coin shop. The evidence included some coins which were found after a search of defendant's home. The officers had arrived at defendant's apartment with an arrest warrant in connection with the burglary of a coin shop. Two minutes after police entered the apartment, defendant arrived home and was served with the warrant. Officers asked and were refused permission to "look around." Forty-five minutes later the officers found coins in defendant's bedroom. The coins were seized, admitted in evidence and the defendant convicted. He appealed to the California Supreme Court which affirmed. On appeal to the United States Supreme Court the Justices decided that these facts were a good vehicle to clarify the area. They reversed his conviction.

The opinion is but another rendition of an old dance performed after Mapp by an additional fifty states and a few thousand more judges. Let us call it legal rhythm to the tune of "One More Time." Start with observation that the Chimel case raises "basic" questions.

years now the field has been muddy, but today the Court makes it a quagmire. It fashions a novel rule, supporting it with an old theory long since overruled. If Rabinowitz is no longer law the Court should say so. It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. It turns the wellsprings of democracy—law and order—into a slough of frustration. It turns crime detection into a game of cops and robbers. We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility." Id. at 622-23.

concerning the permissible scope under the fourth amendment of a search incident to a lawful arrest. Now clarify with appropriate quotes from yesterday's uniform rules:63

Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by the Court in 1914 as dictum in *Weeks v. United States*, 232 U.S. 383. ...64

The statement made no reference to any right to search the place where an arrest occurs, but was limited to a right to search the "person." Eleven years later the case of *Carroll v. United States*, 267 U.S. 132 brought the following embellishment of the *Weeks* statement.65

Still, that assertion too was far from a claim that the "place" where one is arrested may be searched so long as the arrest is valid. Without explanation, however, the principle emerged in expanded form a few months later in *Agnello v. United States*, 269 U.S. 20—although still by way of dictum.66

That the *Marron* opinion did not mean all that it seemed to say became evident, however, a few years later in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, and *United States v. Lefkowitz*, 285 U.S. 452. In each of those cases the opinion of the Court was written by Mr. Justice Butler, the author of the opinion in *Marron*.67

The limiting views expressed in *Go-Bart* and *Lefkowitz* were thrown to the winds, however, in *Harris v. United States*, 331 U.S. 145, decided in 1947.68

Only a year after *Harris*, however, the pendulum swung again. In *Trupiano v. United States*, 334 U.S. 699, agents raided the site of an illicit distillery, saw one of several conspirators operating the still, and arrested him, contemporaneously "seiz-(ing) the illicit distillery." *Id.* at 702. The Court held that the arrest and others made subsequently had been valid, but that the unexplained failure of the agents to procure a search warrant—in spite of the fact that they had had more than enough time before the raid to do so—rendered the search unlawful.69

In 1950, two years after *Trupiano*, came *United States v. Rabinowitz*, 339 U.S. 56, the decision upon which California primarily relies in the case now before us.70

Even limited to its own facts the *Rabinowitz* decision was, as we have seen, hardly founded on an unimpeachable line of authority. As Mr. Justice Frankfurter commented in dissent in the case, the "hint" contained in *Weeks* was, without persuasive justification, "loosely turned into dictum and finally elevated to a decision." 339 U.S. at 75. And the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court.71

Now the Court dance continues with side together, side together—the Founding Fathers Shuffle:

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63. See *id.* at 753.
64. *Supra* note 62, at 755.
67. *Supra* note 62, at 763-64.
68. *Supra* note 62, at 766.
70. *Supra* note 62, at 768.
71. *Supra* note 62, at 774.
Nor is the rationale by which the State seeks here to sustain the search of the petitioner's house supported by a reasoned view of the background and purpose of the Fourth Amendment. Mr. Justice Frankfurter wisely pointed out in his Rabinowitz dissent that the Amendment's proscription of "unreasonable search and seizures" must be read in light of "the history that gave rise to the words"—a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution . . ." 339 U.S. at 69.72

And to things as they are:

This is the principle that underlays our decision in Preston v. United States, 376 U.S. 364. In that case three men had been arrested in a parked car, which had later been towed to a garage and searched by police. We held the search to have been unlawful under the Fourth Amendment, despite the contention that it had been incidental to a valid arrest. Our reasoning was straightforward.78

Now the expressed enervation to it all:

It would be possible, of course, to draw a line between Rabinowitz and Harris on the one hand, and this case on the other. For Rabinowitz involved a single room, and Harris a four room apartment, while in the case before us an entire house was searched. But such a distinction would be highly artificial.74

But then this need to rectify the injustices of other uniform opinions on the subject:

The petitioner correctly points out that one result of decisions such as Rabinowitz and Harris is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.75

And then one last time, that comfortable universal, the clear, tidy formula and the easy-to-follow wooden absolute which will solve all:

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.76

And tomorrow: lawyers will grab phrases from the majority, the concurring and the two dissenting opinions, particularly Justice

72. Supra note 62, at 760-61. How inappropriate to quote Frankfurter, an untired enemy of gross incorporation of the fourth amendment. For a deathbed article written by Frankfurter rejecting the incorporation of the Bill of Rights into the fourteenth amendment, see Frankfurter, Memorandum on "Incorporation of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746 (1965).

73. Supra note 62, at 763-64.
74. Supra note 62, at 766.
75. Supra note 62, at 767.
76. Supra note 62, at 768.
Black's dissent, to array before this or another five bodies on a show cause, due process, constitutional basis to explain why this final constitutional word should be distinguished, overruled or ignored. Then that case will read:

But on this (our) (that) case no warrant should (be) (have been) required, for here there was a distinct possibility that the defendant's sister-in-law would remove or hide the evidence while officers were in the process of obtaining a search warrant. As Mr. Justice White said in a dissent joined by Mr. Justice Black in *Chimel v. State of California*, 395 U.S. 752, at 774: "This case provides a good illustration of my point that it is unreasonable to require police to leave the scene of an arrest in order to obtain a search warrant when they already have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant."77

Enough is enough. These processes would not deter or enlighten a policeman in Gary with a Ph.D. who was going to law school at night. It is time for the Court to abandon their quest for a fourteenth amendment due process constitutional common law of search and seizure.

It seems ironic, but except for due process, judge-made law or the common law whose beauty was its flexibility and capacity to grow and adapt to changing times through court decisions, was both before and after the passage of the fourteenth amendment the exclusive domain of state courts and not federal judges. The United States Supreme Court is not a common law court. There is no common law constitution.

Once before, without constitutional or statutory authority, (i.e., Judiciary Act of 1789) federal courts attempted to compete with state law and judges by the creation of a federal common law, a process Mr. Justice Holmes referred to as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."78

It is time to localize search and seizure and state fourth amendment enforcement. This amendment's more visible state problems deserve a whisper of Supreme Court realism.

It is time for an agonizing reappraisal of the *Mapp* decision. There should be returned to the states the options denied them by an in-

77. *Supra* note 62, at 774.
corporated fourth amendment exclusion rule. And why no re-appraisal? Mr. Justice Douglas once observed “happily all Constitutional questions are always open.”79 A due process *Mapp* review would seem overdue.