

## Illegal Search and Seizure in Ohio

There has been much controversy over the constitutional protection against arbitrary police searches and seizures.<sup>1</sup> Fear of the invasion of domiciliary and personal integrity has resulted in agitation for a more meaningful implementation of the constitutional guaranty through universal adoption of the federal rule prohibiting the use of evidence obtained by unreasonable search and seizure in criminal proceedings. Others have belittled this fear and opposed adoption of the exclusionary rule, arguing that it affords undue protection to the individual as against the community. The purpose of this comment is to examine alternative protections against unreasonable searches and seizures with particular emphasis on the Ohio situation, the various contentions of both groups, the question of whether there is an actual need for adoption of the exclusionary rule in Ohio and what the results of such adoption would be.

Only brief notice need be taken of the development of the exclusionary rule because of the overabundance of good legal commentaries upon this history.<sup>2</sup> The common law rule was that the admissibility of evidence, otherwise competent, is not affected by the illegality of the means by which it is procured.<sup>3</sup> The federal rule had its beginning in *Boyd v. United States*<sup>4</sup> and although the status of the rule was questionable after *Adams v. New York*,<sup>5</sup> *Weeks v. United States*<sup>6</sup> finally established the exception to the common law rule in federal courts that evidence obtained by official unreasonable search and seizure will not be admitted in evidence with certain limitations.<sup>7</sup> In 1951, the exclusionary rule was

---

<sup>1</sup> This problem is closely related to similar difficulties presented by illegal arrests and imprisonments, confessions secured by duress, the persecution of minorities under color of law in some states and generally the whole problem of police lawlessness. On the general problem, see Hall, *Police and Law in a Democratic Society*, 28 *IND. L. J.* 133 (1953); HOPKINS, *OUR LAWLESS POLICE* (1931); *Lawlessness in Law Enforcement*, 11 *NAT. COMM. ON LAW OBSERVATION AND ENFORCEMENT* (1931).

<sup>2</sup> Best discussions of federal cases may be found in: 45 *ILL. L. REV.* 1 (1950), 58 *YALE L. J.* 144 (1948), 33 *IOWA L. REV.* 472 (1948), 14 *SO. CAL. L. REV.* 359 (1941), 15 *SO. CAL. L. REV.* 60 (1941), 42 *MICH. L. REV.* 147 (1943), 47 *MICH. L. REV.* 1137 (1949), and 50 *COL. L. REV.* 364 (1950).

<sup>3</sup> I GREENLEAF, *EVIDENCE* § 254a (12th ed. 1896); 5 JONES, *EVIDENCE* §2075n3 and § 2076n6 (2nd. ed. 1926); 8 WIGMORE, *EVIDENCE* § 2183 (3rd. ed. 1940).

<sup>4</sup> 116 U.S. 616 (1886).

<sup>5</sup> 192 U.S. 585 (1904) affirming 176 N.Y. 351, 68 N.E. 636, 63 L.R.A. 406 (1903).

<sup>6</sup> 232 U.S. 383 (1914).

<sup>7</sup> Discussion of these limitations, *infra*.

incorporated into the Federal Rules of Criminal Procedure.<sup>8</sup>

Most state courts have not followed the federal rule.<sup>9</sup> This protection against unreasonable searches and seizures is not read into the Fourteenth Amendment and therefore admission of evidence obtained by unreasonable search and seizure in a state court for a state offense will not be reversed by a federal court<sup>10</sup> nor will a federal court enjoin the use of such evidence in a state court.<sup>11</sup> The reason for these holdings is because other remedies are deemed sufficient even though the protection against unreasonable search and seizure is regarded as a basic right. In Ohio, after a stormy and somewhat indecisive period of years,<sup>12</sup> *State v. Lindway*<sup>13</sup> at last decided that all evidence is admissible even though it was obtained by unreasonable search and seizure.

#### OTHER REMEDIES AND DETERRENTS.

Of primary consideration in determining whether the exclusionary rule is essential to adequate protection of the constitutional freedom from illegal searches and seizures is the question of whether there are other sufficient remedies to the victim or deterrents to the police.

It is frequently urged that the victim has an adequate protection in the suit in tort for damages. There is no action against judicial or quasi-judicial officers for mistakes made while honestly exercising the functions of their office within their jurisdiction.<sup>14</sup> A municipality is not liable in damages for injuries resulting from torts of its police officers on the theory of respondeat superior<sup>15</sup> un-

---

<sup>8</sup> FED. RULES CRIM. PROC. 41 (e), 18 U. S. C. (1951).

<sup>9</sup> 16 states have adopted the federal rule and 31 states have refused to follow the federal rule. Appendix, Table I, *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>10</sup> *Wolf v. Colorado*, *supra*, note 9.

<sup>11</sup> *Stefanelli v. Minard*, 342 U.S. 117 (1951).

<sup>12</sup> For complete discussion of the Ohio cases, see 3 OHIO ST. L. J. 73 (1936); *Rudd, Present Significance of Constitutional Guaranty Against Unreasonable Search and Seizure*, 18 CIN. L. REV. 387 (1949).

<sup>13</sup> 131 Ohio St. 166, 2 N.E. 2d 255 (1936). Cases following *State v. Lindway* have interpreted it to mean full rejection of the federal rule. *Rudd, supra*, note 11, at 399.

<sup>14</sup> *Bender v. Addams*, 28 Ohio App. 75, 162 N.E. 604 (1928) where respondeat superior was held not applicable against a prohibition commissioner when inspector made an illegal search. See *Stewart v. Southard*, 17 Ohio 402 (1884).

<sup>15</sup> 28 O. JUR. § 605; 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.69 (3rd ed. 1950). Compare liability of the municipality for negligence of police in traffic accidents, OHIO GEN. CODE § 3714-1; *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922), overruling *Fowler v. Cleveland*, 100 Ohio St. 158, 126 N.E. 72, 9 A.L.R. 131 (1919). The federal government is not liable under the Federal Tort Claims Act for illegal search and seizure made by federal officer. *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal. 1947).

less there is ratification which is not easily established.<sup>16</sup> The officer's illegal search is a trespass and makes him liable for at least nominal damages.<sup>17</sup> Thus the police officer is, in nearly all cases, the only defendant who would be liable and then the damages are usually nominal.<sup>18</sup> Circumstances of reasonable belief that evidence of crime is harbored within the house are admissible in evidence in mitigation of damages.<sup>19</sup> The biggest problem involved in the tort action against the officer is the matter of collection. With the exception of certain sheriffs and police captains in Chicago and Miami mentioned in the Kefauver Report, police are not distinguished by their personal wealth. A police officer's salary is not subject to garnishment or attachment<sup>20</sup> in most states, but is subject to garnishment in Ohio.<sup>21</sup> Some jurisdictions require their officers to be bonded, but it is frequently difficult to obtain a judgment against the bonding company when there is an illegal act by the officer.<sup>22</sup> Even if the judgment is paid by the officer, the deterrent effect may be slight since the officer is frequently defended without cost.<sup>23</sup> The municipal corporation has the power to reimburse the officer when he incurs a loss in discharge of his official duty.<sup>24</sup>

A further possibility is a criminal action against the offending officer, but this is a rare occurrence. It is hard to imagine a prosecuting attorney instituting such an action against his own officer. Defendants in such cases are rarely convicted.<sup>25</sup>

Disciplinary action by the police department itself could be an effective deterrent, but in absence of some drastic result of the illegal search and seizure such as possible loss of the conviction,

---

<sup>16</sup> Mere authorization of attorney to defend the officer is not ratification by the municipality. *Savage v. District of Columbia*, 52 A.2d 120 (D.C. Muni. App. 1947).

<sup>17</sup> *Dougherty v. Gilbert*, Tappan 38 (1816); *State v. Lindway*, 131 Ohio St. 166, 172, 2 N.E.2d 255, 258 (1936). OHIO GEN. CODE § 6212-27 codified this rule, but even though it was repealed in 1933, the rule still remains.

<sup>18</sup> In *Dougherty v. Gilbert*, *supra* note 17, a verdict for 10 cents was given, but in *Bender v. Addams*, *supra* note 14, the jury returned a verdict for \$25,000.

<sup>19</sup> *Simpson v. McCaffrey*, 13 Ohio 509 (1844).

<sup>20</sup> 17 McQUILLIN, *supra* note 15, § 49.86.

<sup>21</sup> OHIO GEN. CODE § 11760. See *Uricich v. Kolesar*, 132 Ohio St. 115, 5 N.E. 2d 335 (1937) affirming 7 N.E. 2d 413, 54 Ohio App. 309 (1937).

<sup>22</sup> Some jurisdictions hold the act *colore officii* when the officer commits an illegal search and the bonding company is not liable. Hall, *Law of Arrest in Relation to Contemporary Social Problems*, 3 CHIC. L. REV. 345, 349-52 (1936). Officer and surety held liable for officer's assault and illegal search in *Almond v. Rubenstein*, 25 Ohio N.P. N.S. 101 (1923). There is also some question as to whether a private person is a beneficiary who can sue on the bond.

<sup>23</sup> CORNELIUS, SEARCH AND SEIZURE, 45 (2nd. ed. 1930).

<sup>24</sup> 6 McQUILLIN, *supra* note 15, § 17.137.

<sup>25</sup> For fuller discussion of the inadequacy of the criminal action against the offending officer, see *Rudd*, *supra* note 12, at 389.

this protective device also seems inadequate. In Columbus, from 1922 through 1941, there were only 192 cases of departmental discipline brought for misconduct of all types and mild penalties were invoked in even the most flagrant cases.<sup>26</sup>

Of course an individual is privileged to resist the illegal search and seizure, but the inadequacy of this possibility is clear. Most people would rather permit the search than resist an officer of the law even assuming they knew when a search was illegal and what degree of force might be used. Failure to use physical resistance does not constitute waiver or consent.<sup>27</sup>

Injunctive relief is another theoretical possibility,<sup>28</sup> but the search is over before an injunction to prevent the search can be obtained. It is not a police custom to give advance notice of a raid. An injunction by a state court to restrain use of evidence obtained by illegal search and seizure in another court is a further possibility. Even if the maxim that equity will not enjoin a criminal prosecution is sidestepped, it would seem unlikely that an "admission" state would allow such an injunction.

The victim of the illegal search may reacquire the articles seized in restitution unless the articles are tainted with illegality, such as bombs or narcotics, but restitution will not be granted until the government has finished their use of the articles in evidence.<sup>29</sup>

It has been suggested that officers violating instructions of search warrants or attempting to introduce evidence illegally obtained should be convicted of contempt of court.<sup>30</sup> There has been little acceptance of this suggestion probably since it would deter officers from the use of search warrants.<sup>31</sup>

The effect of public opinion cannot be ignored. It is clear that an aroused public could bring substantial pressure to bear upon elected officials and thus effectuate a reduction in the number of illegal searches and seizures. Unfortunately, however, these events rarely hit the public eye as invasions of the constitution. When the victim is guilty or of a particularly unsavory character, the news-

---

<sup>26</sup> COLUMBUS POLICE STUDY 1941-2, by Citizens Research, Inc., pp. 19-20 (mimeographed report in Ohio State Law Library). The study also indicated that two-thirds of the force that had seen much service had never been disciplined and the writer indicated that this seemed too good to be true.

<sup>27</sup> *State v. Lindway*, *supra* note 16; *Bender v. Addams*, *supra* note 13.

<sup>28</sup> Public officers cannot be enjoined from performing their official duties unless the act threatened by them would be without authority or in violation of law. *Cincinnati v. Wegehoff*, 119 Ohio St. 136, 162 N.E. 389 (1928).

<sup>29</sup> *Grant*, *Constitutional Basis of the Rule Forbidding the Use of Illegally Obtained Evidence*, 15 So. CAL. L. REV. 60 (1941).

<sup>30</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2184.

<sup>31</sup> 58 YALE L. J. 144, at 162. This suggestion has been adopted in one state, however. See MICH. STAT. ANN., § 27.511 (1938), COMP. LAWS 1948, § 605.1.

paper emphasizes the end rather than the means used to secure the conviction. When the victim is innocent, which is too frequently the case, the police drop the matter and no publicity results unless the victim happens to be influential.<sup>32</sup>

Thus, it appears that there is no really effective device available other than the exclusionary rule which would provide protection against police lawlessness. Practical unavailability of these other remedies is a principal argument in favor of adoption of the exclusionary rule.

#### CONTENTIONS.

On first impression, the rule seems to be in perfect accord with the search and seizure language of the state and national constitutions.<sup>33</sup> The exclusionary rule in federal courts formerly was based on a fusion of the Fourth and Fifth Amendments,<sup>34</sup> but now the rule is considered by the U. S. Supreme Court to be solely a result of the Fourth Amendment or a "McNabb" type rule.<sup>35</sup> The rule is not considered so basic as to be a part of due process of law.<sup>36</sup> In spite of the appearance of accord with the constitution, the federal rule has had many critics.

The theoretical arguments for the "admissibility" group are presented by the late Dean Wigmore. He said that the "judge should not investigate and punish all of the offenses which incidentally cross the path of the litigation."<sup>37</sup> He argued that the procedural safeguard of pleading is lacking. In federal court, however, a motion to suppress must be filed before trial,<sup>38</sup> and an answer is filed, so the issue-raising and notice giving functions of pleading are satisfied by the pre-trial motion and answer. Confusion of the jury is also mentioned as a disadvantage of the federal rule, but this is impossible as the issue is determined before a jury is impaneled. The argument that the exclusionary rule distorts the rules of evidence seems to have little weight. If the reason for this ob-

---

<sup>32</sup> In *Bender v. Addams*, *supra* note 14, the victim happened to be a prominent citizen and a state senator. Through an error, the search was made and nothing was found. The substantial verdict in the case, *supra* note 18, is explainable on basis of the plaintiff's influential position and jury prejudice against prohibition.

<sup>33</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV; OHIO CONST. ART. I, § 14.

<sup>34</sup> See Corwin, 29 MICH. L. REV. 1, 191 (1930).

<sup>35</sup> See Grant, *supra* note 28, at 60.

<sup>36</sup> Wolf v. Colorado, *supra* note 9.

<sup>37</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2183.

<sup>38</sup> Weeks v. United States, *supra* note 6.

jection is that it is an exception to the general rule,<sup>39</sup> many other rules of evidence, such as the hearsay exceptions, should be abolished on the same principle. This latter argument, obviously, should have little effect.

Dean Wigmore characterizes the foundation of the federal rule as "misguided sentimentality."<sup>40</sup> One of the principal causes of the American Revolution was the arbitrary use of the Writs of Assistance which resulted in continued and outrageous violation of colonial homes.<sup>41</sup> The intention of the drafters of the Fourth Amendment was to put such practices at an end. Can the results of this American heritage be justifiably called "misguided sentimentality"?

The principal practical objection to the federal rule seems to be that it allows criminals to go free when they would otherwise be convicted.<sup>42</sup> Everyone would agree that this is not a desirable result, but does this result necessarily follow from an adoption of this rule? In essence the rule is merely a requirement that a search warrant be procured whenever practicable before a search is undertaken. It is not difficult to obtain a search warrant in Ohio provided there is probable cause for belief that a violation of law exists.<sup>43</sup> Justice Douglas has said, in speaking of the purpose of requiring a search warrant, that, "This is not done to shield criminals nor to make the home a safe haven for illegal activities. It is done so that an objective mind might weigh the need to invade that privacy in order to enforce the law."<sup>44</sup> Few critics argue that the requirements for a search warrant should be abolished or liberalized, but many apparently feel they should be complied with only when the officer has the inclination. Thus the exclusionary rule has resulted in a meaningful constitutional guaranty and yet has not

---

<sup>39</sup> See statement of common law rule, *supra*.

<sup>40</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2184.

<sup>41</sup> James Otis described the Writs of Assistance as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that was ever found in an English law book" because they placed "the liberty of every man in the hands of every petty officer." February 1761, Boston. *Boyd v United States*, *supra* note 4, 625.

<sup>42</sup> Judge Cardoza said in *People v Defore*, 242 N.Y. 13, 17; 150 N.E. 585, 588 (1926), "The pettiest peace officer would have it in his power, through over-zeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious."

<sup>43</sup> The affidavit is the preliminary step in obtaining a search warrant. OHIO GEN. CODE § 13430-3 provides that the affidavit must particularly describe the place to be searched and what is to be seized, the offense must be substantially alleged, and the facts must be set forth upon which such belief is based. The affidavit is then taken to a judge or magistrate within the jurisdiction who will issue the warrant if he is satisfied there is probable cause. OHIO GEN. CODE §§ 13430-1 and 2. For more detailed treatment, see 36 O. JUR. 445 *et seq.*; 3 OHIO ST. L.J. 329 (1937).

<sup>44</sup> *McDonald v. United States* 335 U.S. 451 (1947).

allowed the criminal to escape. It is clear that in order to have any degree of justice, the constitution must protect everyone—the guilty as well as the innocent.

Proponents of the exclusionary rule advance protection of the right of privacy and meaningful implementation of the constitutional guarantee as positive reasons for the rule. Justice Rutledge has said "The version of the Fourth Amendment today held applicable to the states hardly rises to the dignity of a form of words; at best it is a pale and frayed carbon copy of the original. . ."<sup>45</sup> Although the value of the protections provided for by constitution should be above argument, there seems to be a need to justify these protections. Judge Levine believes that "These constitutional safeguards are necessary not only because of the experience of past ages, but also because of our nowadays recent experiences. The abuse of this legal process called the search warrant has become so frequent as to almost render the individual the prey of avarice and of private gain. We must of course enforce the law, but such enforcement must be accomplished by legal means. Every person, no matter how humble, is protected against trespass and invasion of his private property."<sup>46</sup> Constitutional provisions should be taken as "the supreme law of the land" and given real content. As was pointed out previously, the exclusionary rule is the only really effective device available to give these constitutional provisions real content.

#### THE NEED FOR ADEQUATE PROTECTION.

From the very nature of the subject matter, it can be seen that it would be difficult, if not impossible, to amass any statistical data on the frequency of illegal searches and seizures, but nevertheless, there is abundant testimonial evidence of frequent abuse in "admissionist" states.<sup>47</sup> In New York, Judge Frank Oliver has recently said that, "The police do not bother about getting warrants. They all know the rules of evidence, so laugh at the constitution. . ."<sup>48</sup>

In an effort to determine what the actual situation is in Ohio, a study was attempted similar to that mentioned in Justice Murphy's dissent in *Wolf v. Colorado*.<sup>49</sup> Inquiries were directed to the chiefs of police of the eight Ohio cities with population over 100,000 asking what instruction was given, both in recruit and in-service

---

<sup>45</sup> Dissent in *Wolf v. United States*, *supra* note 9.

<sup>46</sup> *Antoszewski v. State* 21 Ohio L. Abst. 345, 349; 31 N.E.2d 881, 884 (C. P. Cuyahoga Cty. 1936).

<sup>47</sup> N.Y. Times, February 28, 1949; Senator Dunning in 1 N.Y.S. CONSTITUTIONAL CONVENTION REVISED RECORD 365 (1938); CORNELIUS, *op. cit. supra*, note 22; LASSON, THE FOURTH AMENDMENT 106 (1937); Judge Levine, *supra* in *Antoszewski* case.

<sup>48</sup> *People v. Reilly*, 105 N.Y.S.2d 845 (1951).

<sup>49</sup> *Supra*, note 9.

classes, to police officers in regard to the law of search and seizure. No reply was received from Dayton and Canton. It might be safely assumed that these cities give little or no instruction to their officers on search and seizure other than to inform them that Ohio adopts the position that illegality of procurement has no effect on admissibility in court. It is easy to see how such instruction might be omitted or ignored since there is no practical difference in Ohio in whether the search is legal or illegal.

Toledo, Columbus, Akron, Cleveland, Cincinnati and Youngstown indicated that some attention was given to instruction on search and seizure. In Toledo, recruit police officers are given a minimum of four months training and subsequent annual in-service training. In the Toledo recruit training program, a total of 625 hours of instruction are given in all fields of which only 4 hours are devoted to the law of search and seizure. In Cleveland, recruits are given a 13 week course including 180 hours of Criminal Law. No indication of how much time is devoted to search and seizure in Cleveland, Columbus, Youngstown, Cincinnati, and Akron was given. Instruction in the training schools of the responding cities is given by executive officers, prosecuting attorneys, or judges. The Ohio General Code is the principal text used in the responding cities although Columbus officers are also given a detailed pamphlet on the law of arrest and search. The Ohio State reports are used in some cities and Cincinnati noticed that the *Lindway* case "always arouses great interest" in the classes.

Thus in Ohio, there is some instruction on the law of search and seizure in most large cities, but it is not emphasized to any real degree. It may be inferred from these letters that other subjects are given greater weight. It is submitted that the importance of the law of search and seizure in police training programs would be greatly expanded if Ohio adopted the exclusionary rule.

In contrast to the situation in Ohio, Justice Murphy found that generally states following the federal rule gave their officers extensive training in the rules of search and seizure. He found that in some of these "exclusionist" states, officers were informed of current court decisions, special volumes on search and seizure were used as a basis for extended instruction and there was heavy emphasis on the subject. The Justice said, "The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy."

#### CONSEQUENCES OF ADOPTION OF THE EXCLUSIONARY RULE IN OHIO.

At present, a committee of the Ohio Bar Association is considering a recommendation to the legislature that the exclusionary rule be adopted by statute. A straight-forward adoption of the federal rule in Ohio would not mean that all evidence obtained by illegal



search and seizure would not be admitted in evidence since there are several limitations on the federal rule.<sup>50</sup> The basis for these limitations on the rule seems to be best explained on the "counterclaim in tort" theory rather than on a principle of constitutional right or on a policy basis.<sup>51</sup> If the federal rule was adopted in Ohio, these limitations would probably apply. Evidence unlawfully obtained by federal agents or private parties would not be within the rule and would be admissible<sup>52</sup> provided there was no collusion with state officials<sup>53</sup> and a state official did not participate.<sup>54</sup> A motion to suppress such evidence would be necessary before trial or there would be waiver of the right to exclusion<sup>55</sup> unless the defendant was not aware of the existence of the evidence or its seizure.<sup>56</sup> The accused must have some proprietary interest in the premises searched or the objects seized to provide standing to object to the admission of the evidence.<sup>57</sup> Evidence obtained by actual consent would be admissible, but the reality of this consent is usually difficult to establish.<sup>58</sup> Whether Ohio would adopt all of these limitations upon the exclusionary rule would depend on how complete a protection was desired. Certainly several of the limitations resemble those incident to a tort counterclaim and do not seem appropriate to enforcement of a constitutional right.

---

<sup>50</sup> But not all of the states adopting the exclusionary rule have adopted all of the limitations placed thereon by federal courts. See 134 A.L.R. 820, 88 A.L.R. 348, 52 A.L.R. 477, 41 A.L.R. 1145, 32 A.L.R. 408, 24 A.L.R. 1408.

<sup>51</sup> See 58 YALE L.J. 144 (1948) where commentator argues that most of the limitations should be removed since exclusion should be a constitutional right.

<sup>52</sup> The following federal cases apply this limitation when the evidence is unlawfully obtained by state officials or third parties: *Burdeau v McDowell*, 256 U.S. 465 (1926); *Feldman v. United States*, 322 U.S. 487 (1944); *Byars v. United States*, 273 U.S. 28 (1926).

<sup>53</sup> *Gambino v. United States*, 275 U.S. 310 (1927) applies this restriction on the limitation in federal courts.

<sup>54</sup> In federal courts, as long as the federal agent was in the search before the object was completely accomplished, he participated and the evidence must be suppressed. *Lustig v. United States*, 338 U.S. 74 (1948).

<sup>55</sup> *Weeks v. United States*, *supra* note 6, applies this limitation in federal courts.

<sup>56</sup> *Agnello v. United States*, 269 U.S. 20 (1945) applies this restriction on the limitation in federal courts.

<sup>57</sup> Evidence admissible in federal court when taken from apartment not owned or inhabited by defendant even though he leased it along with co-defendant, *Ingram v. United States*, 113 F.2d 966 (9th Cir. 1940); *but cf. McDonald v. United States*, 335 U.S. 451 (1948) where evidence taken from apartment leased by accused held inadmissible. In federal court, there is a proprietary interest in sealed matters in the mail. *Ex Parte Jackson*, 96 U.S. 727 (1877).

<sup>58</sup> *Amos v. United States*, 255 U.S. 313 (1920) is a comparable federal case. *State v. Lindway*, *supra* note 13.

In addition, the federal constitution does not protect against seizure of all evidence. Evidence obtained by wiretapping has been held admissible since intangible when there was no physical entry on the premises of the accused<sup>59</sup> although a federal statute subsequently made this procedure illegal<sup>60</sup> and such evidence is now inadmissible.<sup>61</sup> By analogy, it would seem that Ohio would need a special statute in order to make such evidence inadmissible even though the exclusionary rule was adopted. A seizure of public property is not a violation of the constitution.<sup>62</sup> Evidence obtained as a result of a search incident to lawful arrest is admissible provided the officers do not go beyond the permissible area of search.<sup>63</sup> The judicial conception of this area has not been constant. Objects of evidentiary value only, are not properly seizable under a search warrant but paradoxically are subject to seizure when uncovered as a result of a search incident to a valid arrest.<sup>64</sup>

In absence of judicial action, it is the writer's opinion that a statute should be passed by the legislature. A phraseology similar to that adopted in the Federal Rules of Criminal Procedure is a possibility.<sup>65</sup> One objection to this sort of a statute is the possibility of judicial nullification by an unsympathetic court through statutory interpretation. A more specific statute might be drafted as follows:

Evidence obtained by an unlawful search and seizure

---

<sup>59</sup> *Olmstead v. United States*, 277 U.S. 438 (1927).

<sup>60</sup> 47 U.S.C. § 605 (1946).

<sup>61</sup> *Nardone v. United States*, 302 U.S. 379 (1937), 308 U.S. 338 (1939).

<sup>62</sup> *Davis v. United States*, 328 U.S. 582 (1945).

<sup>63</sup> *Agnello v. United States*, 269 U.S. 20 (1945); *Harris v. United States*, 331 U.S. 145 (1947); *Tropiano v. United States*, 334 U.S. 699 (1947); *Rabinowitz v. United States*, 339 U.S. 56 (1949).

<sup>64</sup> *Gouled v. United States*, 255 U.S. 298 (1920). Basis for this rule is discussed in 20 *CHL. L.REV.* 319 (1953).

<sup>65</sup> Rule 41 (e) of the *FED. RULES OF CRIM. PROC.* provides "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

of the person or property of an accused will be suppressed by the trial court provided:

1. Such search was conducted or participated in by a state agent or agents, or conducted and participated in by private parties in collusion with state agents, and
2. The accused makes timely motion to suppress before trial. If the accused has no knowledge of the existence of such evidence such a motion may be made at the time of trial.

#### SUMMARY.

We have seen that it would be advisable for Ohio to adopt the "exclusionary" rule prohibiting the introduction of evidence obtained by unlawful search and seizure. Other remedies and deterrents are demonstrably inadequate. Our examination of policy considerations and contentions of both groups indicated that the "exclusionary" rule should be adopted. There is a need for adequate protection of the right of privacy from unlawful searches and seizures. Finally we have seen what would result from an adoption of the "exclusionary" rule in Ohio and how it might be adopted.

*John Marshall Adams*