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The Privacy Interest of the Fourth Amendment--Does Mapp v. Ohio Protect It or Pillage It

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STUDENT NOTES

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"My object all sublime
I shall achieve in time—
To let the punishment fit the crime—
The punishment fit the crime;"

THE MIKADO by Gilbert & Sullivan

I. CHANGES IN CONSTITUTIONAL STANDARDS

In order to maximize the protection guaranteed by the fourth amendment, *Mapp v. Ohio*[1] must be overruled—but only under the proper circumstances.

If the punishment for a particular crime is perceived as much too severe or unjust, then the crime will be substantively changed by the courts, *i.e.,* less activity will be determined to fall within the criminal proscription or only flagrant violations will be recognized as the evil which the law was designed to prevent. The courts will avoid imposing the sentence of the offense by refusing to recognize that the action of the alleged offender was a crime. The truth of this assertion may be accepted by common sense or history. For example, in England during the 18th century there were more than two hundred capital offenses, most of them crimes against property. To avoid the imposition of the death penalty, courts and juries would find no violation by so altering the substance of the crime that no crime was recognized.[2]

The punishment for violating the fourth amendment is the exclusion of seized evidence in a court of law. Often, the corollary of this exclusion is freedom for a guilty criminal. Therefore, accepting the above proposition, if it can be demonstrated that this punishment—the exclusion of the evidence and resultant freedom for the guilty defendant—is perceived as unfair by the courts, then the fourth amendment rights will be substantively changed; *i.e.,* the privacy interest will be afforded less protection because less activity will be determined to be a violation of the fourth amendment. The

[1] 367 U.S. 643 (1961). The proper circumstances necessary to overrule *Mapp* will be discussed in part two of the Note.

[2] BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 754 (B. Gavit ed. 1941).

courts avoid excluding the evidence obtained by the search by refusing to recognize that the police action violated the fourth amendment. As less police activity is determined to be a violation, it must necessarily follow that the scope of the fourth amendment is also lessened. If the scope of the fourth amendment is narrowed, then the privacy interest is likewise narrowed because protection of privacy is the principal object of the fourth amendment.

A. Recognition of Substantive Changes by Writers and Courts

Although not specifically alluding to the privacy interest, some legal scholars have recognized the lessening of constitutional standards as a result of the exclusionary rule. Wigmore has suggested that the rule may have the possible "collateral perverse effect" of causing "the courts to reinterpret, to lower, constitutional standards in order to avoid suppressing essential evidence."[3] Though he admitted it was difficult to demonstrate, he felt that a tendency to soften constitutional standards could be inferred from decisions in several states.[4] Professor Barrett has asserted that "the exclusionary rule creates pressure upon the courts to weaken the rules governing probable cause to make an arrest . . . where an obviously guilty defendant is seeking to exclude from consideration at his trial clear physical evidence of his guilt."[5] He feels that determination of probable cause to arrest cannot escape being colored by the fact that evidence of guilt was found; yet the rules developed have equal application to innocent persons.[6] Professor Kitch sees the exclusionary rule as placing the courts in the business of police administration, and the "demands of administrative reasonableness have begun to make significant inroads on formerly rigid constitutional prohibitions."[7] He observes a tendency to modify the constitutional privilege from unwarranted police intrusions according to what can realistically be enforced by means of the exclusionary rule.[8]

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[3] 8 WIGMORE ON EVIDENCE § 2184, at 52 n.44 (McNaugton ed. 1961).

[4] *Id.* "A tendency . . . can be inferred from the decisions in California, Idaho, North Carolina, and Rhode Island [apparently broadening the concept of 'reasonable search'] and in Florida [narrowing the group of persons with standing to complain]."

[5] Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUP. CT. REV. 46, 55.

[6] *Id.*

[7] Kitch, *The Supreme Court's Code of Criminal Procedure,* 1969 SUP. CT. REV. 155, 158.

[8] *Id.* at 157-72.

The courts have recognized the unfairness of a rule which may result in freeing a guilty criminal. In *United States v. Frank,*[9] a federal district court in Pennsylvania stated that the fourth amendment was designed to protect the citizen from government oppression but not to afford a suspected criminal every possible opportunity to avoid detection. The Arizona Supreme Court[10] felt the fourth amendment should not assist a criminal in escaping penalty for his misdeeds, and remedies should recognize this principle. Judge Friendly sensed the inherent unfairness of the exclusionary rule which punishes an error in judgment formed instantaneously without the aid of the United States Reports.[11]

B. Empirical Data

Empirical data also demonstrates that the presence of the exclusionary rule has resulted in the dilution of substantive fourth amendment rights. Certain court decisions which have refused to find a fourth amendment violation have been clearly erroneous in terms of the purely abstract question of reasonableness of the search. Other decisions which have limited the scope of the rule have, in effect, condoned a privacy invasion in those areas not responsive to the rule. The courts have utilized reasonableness of a search, "standing" to object to a search, or exceptions to the warrant requirement to circumvent the exclusionary rule, but by so doing, have simultaneously contracted the interests guaranteed by the fourth amendment.

1. *Reasonableness of a Search*

Frequently, the courts, by upholding a warrantless search as reasonable, sanction an invasion of fourth amendment interests. The Fourth Circuit recognized that "some searches may be so eminently reasonable as not to fall under the interdict of the Fourth Amendment."[12] In a California case,[13] officers entered an apartment because they heard moans. Though no one was present, a search was conducted and seized evidence was admitted at trial. The noises that justified the search were actually pigeons cooing.

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[9] 151 F. Supp. 864 (W.D.C. Pa. 1957).

[10] State v. Berg, 259 P.2d 261, 76 Ariz. 96 (1953).

[11] Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CAL. L. REV. 929, 952 (1965).

[12] United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962). Defendant loaned his car to a friend who consented to a search. Upon visible examination, police found stolen radios. *Held*: search reasonable.

[13] People v. Roberts, 46 Cal. 2d. 379, 303 P.2d 721 (1956).

The Nevada Supreme Court upheld the action of police who, without a warrant, entered an apartment on the authority of the landlady to investigate a murder.[14] It felt a search and seizure with the landlord's permission was reasonable under certain circumstances. Yet the Supreme Court in *Chapman v. United States*[15] had rejected the contention that a landlord, since he might be permitted to enter the premises, could therefore authorize the police to conduct a search. The Court recognized such a search would leave the tenant's home secure only in the discretion of his landlord.[16]

2. *"Standing" to Object to a Search*

The "standing" limitation on the scope of the exclusionary rule is another means used by the courts to dilute the privacy interest. The exclusionary rule may be used only by a person who has "standing" to object to the unconstitutionality of a search. The primary requirement for "standing" is that the person be the one aggrieved by the search, *i.e.*, the one against whom the search is directed.[17] A person cannot employ the exclusionary rule if the evidence was obtained through an unlawful invasion of the rights of some other person, even though the evidence is being used to convict him of a crime.[18] This limitation on the scope of the exclusionary rule is inconsistent with the reasons for the rule and shows an unwillingness by the Court to extend the rule to its logical conclusion when this would encroach upon the public interest in having a verdict on the true facts.[19]

3. *Exceptions to the Warrant Requirement*[20]

Chief Justice Warren in *Terry v. Ohio* recognized the limits of the usefulness of the exclusionary rule,[21] holding a police "stop and frisk" constitutional when based on reasonable suspicion. The Chief Justice noted that:

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[14] Eisentrager v. State, 378 P.2d 526, 79 Nev. Rptr. 38 (1963).
[15] 365 U.S. 610 (1961).
[16] *Id.* at 617.
[17] Jones v. United States, 362 U.S. 257, 261 (1960).
[18] Alderman v. United States, 394 U.S. 165 (1969).
[19] *Id.* at 174-75.
[20] The exceptions include: search incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); consent by the proper party, Frazier v. Cupp, 394 U.S. 731 (1969); "stop and frisk," Terry v. Ohio, 392 U.S. 1 (1968) (officer may stop and "frisk," provided he has reasonable grounds to believe that the individual is armed and dangerous); "hot pursuit," Warden v. Hayden, 387 U.S. 294 (1967) (police may enter premises without a warrant when in "hot pursuit" of a suspect); emergency to prevent a loss of evidence, Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of a vehicle).
[21] 392 U.S. 1 (1968).

> It [the exclusionary rule] cannot properly be invoked to exclude the products of legitimate police investigative techniques on the grounds that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. . . . Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. . . . [A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.[22]

The Court in creating the *Terry* exception did not condone unwarranted invasions of privacy but only recognized the ineffectiveness of applying the exclusionary rule in this situation. However, by stating that the Court's sole technique of protecting the privacy interest is not "responsive," in essence the Court has condoned invasions of privacy. It is hollow verbiage to say the right still exists, but if that right is violated, the sole remedy will not apply. As the sole sanction of the right, the exclusionary rule cannot be removed in selected violations without removing the substance of the right.

In *Cooper v. California,*[23] the defendant was arrested after selling narcotics to an informer. His car, in which the transaction occurred, was impounded pursuant to California law. After a lapse of a week, a search was conducted which provided evidence subsequently used in his conviction.

Prior to *Cooper,* a warrantless search had never fallen within the "incidental to an arrest" exception to the warrant requirement unless the search was proximate to the arrest. The state of California conceded the search was not incidental to the arrest, but argued the search was reasonable because of a statute[24] which required officers to seize any vehicle connected with the violation of narcotics law and hold it for evidence until either released or forfeited to the state.

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[22] *Id.* at 13-15.

[23] 386 U.S. 58 (1967).

[24] CAL. HEALTH AND SAFETY CODE §§ 11610-11 (West 1964).

The California district court relied on *Preston v. United States*[25] to invalidate the search in *Cooper*.[26] The search in *Preston* had been invalidated because it was too remote from the time and place of the arrest.[27] The search in *Cooper* was even more remote than in *Preston*.[28] In upholding the search in *Cooper* and distinguishing the two cases, the United States Supreme Court recognized that lawful custody does not dispense with constitutional requirements, but "the reason for and the nature of the custody may constitutionally justify the search."[29] The Court felt it would be "unreasonable" to hold that police who had lawful custody for an extensive period of time could not, at least for their own protection, search the car.[30] What danger does an impounded car pose that would justify the police disregarding the warrant requirement of the fourth amendment? The impact of the decision seems to be the interpretation given it by lower courts that the requirements for searches incident to an arrest had been loosened.[31]

The right of a third party to consent to a search has been recognized in circumstances involving various relationships between the parties.[32] In each of these instances, the courts have found the search constitutional if the consenting party possessed control or lawful possession of the articles or the premises on which they were located.[33] The variances in court decisions rest in determination of the third party's authority to consent.

The California Supreme Court felt that the owners of premises could consent to a general search of the premises, but could not

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[25] 376 U.S. 364 (1964).

[26] People v. Cooper, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483 (1967). However, the conviction was affirmed because of the California harmless error rule.

[27] Preston v. United States, 376 U.S. 364, 368 (1964).

[28] The search in *Preston* was conducted on the same day the arrest was made, but after petitioner had been taken into custody and the car towed to a garage. The search in *Cooper* occurred a week after the arrest of the petitioner.

[29] 386 U.S. 58, 61 (1967).

[30] *Id.*

[31] *See* Davidson v. Boles, 266 F. Supp. 645 (N.D. W. Va. 1967); Draper v. Maryland, 265 F. Supp. 718 (D. Md. 1967).

[32] *See, e.g.*: Frazier v. Cupp, 394 U.S. 731 (1969) (joint users); United States v. Thompson, 421 F.2d 373 (5th Cir. 1970) (spouses); Wright v. United States, 389 F.2d 996 (8th Cir. 1968) (roommates); United States v. Stone, 401 F.2d 32 (7th Cir. 1968) (parents-children); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962) (bailor-bailee); United States v. Sferas, 210 F.2d 69 (7th Cir. 1954), *cert. denied,* 347 U.S. 935 (1954) (business partners).

[33] United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839, 845 (3d. cir. 1970) (dissenting opinion).

consent to the search of belongings which they knew were the property of a third person.[34] The court disallowed the third party consent even though such third party was technically in lawful possession of such belongings. In contrast, two different courts upheld the third party consent of a drycleaning proprietor to a police search of clothing in the proprietor's temporary possession.[35] Though in different settings, the cases are parallel: each consenting party owned the premises; the consenting parties possessed temporary lawful possession of the articles; each knew the article belonged to a third person.

Numerous courts have upheld a search where the landlord properly consented and another's property was in plain view.[36] As previously stated, *Chapman* rejected the landlord's authority to consent to a search, restating that constitutional rights are not based on the formal rules of property law.[37]

II. ALTERNATIVES

This analysis at the very least raises substantial questions as to whether the exclusionary rule is an effective sanction of fourth amendment rights. The obvious conclusion is that the rule does not protect the privacy interest but "steals" from it. Thus, to maximize the privacy interest, *Mapp* v. *Ohio* must be overruled if a proper case is before the Court which has suitable alternatives to replace the exclusionary rule. The case attempting to overrule *Mapp* must present an alternative which has proven successful in controlling local police conduct.

To prevent invasions of privacy by the state, the exclusionary rule must be changed because, as a punishment, the rule is viewed as too severe. However, *Mapp* is seen as the only punishment. Thus, if *Mapp* is overruled, there will be no punishment. This will be perceived as erasing the crime. Police will be given a license to ignore the fourth amendment because without a punishment, there can be no crime. Therefore, the Court should overrule *Mapp* only if

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[34] People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964).

[35] State v. Howe, 182 N.W.2d 658 (N.D. 1970); Clarke v. Neil, 427 F.2d 1322 (6th Cir. 1970).

[36] *See, e.g.*, Nelson v. California, 346 F.2d 73 (9th Cir. 1965); Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958).

[37] Chapman v. United States, 365 U.S. 610 (1961). The Court cited *Jones v. United States*, 362 U.S. 257 (1960), which rejected the subtle distinctions of property law as the basis of determination of constitutional rights.

satisfactory alternatives have been established. The case which will allow the Court to dispense with the exclusionary rule must contain an alternative method which has been successful in enforcing constitutional guarantees and controls over illegal searches and seizures.

Various methods have been suggested to control unlawful police conduct. A common-law tort action has been considered but felt not to be an effective control because of the unwillingness of juries to find substantial damages against police officers.[38] However, Professor Oaks feels an effective tort remedy is the solution.[39] He feels such a remedy would provide the real consequence necessary to give credibility to the guarantee whether the injured party was prosecuted or not.

Another possibility may be an outside review board with disciplinary powers. The apparent drawback seems to be the lack of enforcement power given civilian review boards now operating in other areas.[40] An untried alternative would have the courts citing offending officers for contempt of court.[41] Judge Friendly suggests that the Court follow Scotland's policy[42] which is to deny police the "fruits" only in flagrant violations.[43] Canada controls the action of police by use of a police disciplinary board and prosecution for misconduct by a tort action.[44]

Any of the above suggestions may be a plausible alternative, but a combination of two would give the individual greater assurance of being free from unreasonable searches and seizures. The Court, when presented with the opportunity, should abolish the exclusionary rule in favor of a tort remedy coupled with the exclusion of evidence in flagrant violations. With a tort remedy available, a person whose constitutional rights are invaded need not be prosecuted to have redress available. A tort remedy would insure the innocent

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[38] Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955).

[39] Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 756 (1970).

[40] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 200-04 (1960).

[41] Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 YALE L.J. 143 (1968).

[42] Lawries v. Muir, 1950 Just. Cas. 19. This country excludes flagrant or deliberate violations.

[43] Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CAL. L. REV. 929, 953 (1965).

[44] For a thorough examination of the Canadian system see Oaks, *supra* note 39, at 701-06.