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Nicholas H. Magill

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TOWARD A MORE LIBERAL CONSTRUCTION OF THE FOURTH AMENDMENT

NICHOLAS H. MAGILL*

The Fourth Amendment to the Constitution of the United States provides:

> 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.

The Fifth Amendment to the Constitution of the United States provides in part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The law of searches and seizures is the product of the interplay of these two constitutional provisions. Both amendments relate to the personal security of the citizen. The former protects his privacy and preserves inviolate his right to be let alone; the latter protects the individual against compulsory production of evidence to be used against him. They almost imperceptibly blend and mutually throw light upon each other.[1]

The purpose of this article is to inquire into the federal exclusionary rule concerning evidence obtained in violation of the Fourth Amendment. The rule is simple. Such evidence is inadmissible. But the application of the rule to a given factual situation is fraught with difficulty and uncertainty in determining whether, under the particular circumstances, the evidence was obtained in violation of the Fourth Amendment.

THE GENESIS AND DEVELOPMENT OF THE RULE

In 1886, the Supreme Court of the United States held that the Fifth Amendment protected every person from incrimination by the use of evidence obtained through a search and seizure made in violation of his rights under the Fourth Amendment.[2] Not until 1914, however, did the Court lay down the rule excluding evidence obtained in violation of the Fourth Amendment, and permit the victim of an unreasonable search to suppress the evidence so obtained.[3]

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* Student at the University of Denver College of Law.

[1] Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Davis v. United States, 328 U.S. 582 (1946).

[2] Boyd v. United States, 116 U.S. 616 (1886).

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

Since then, the rule has been frequently invoked. In most cases it has been rigidly adhered to whenever the circumstances justified its application. Of course, where the evidence sought to be suppressed was obtained under the sanction of a valid search warrant, the rule has no application. But the presence or absence of a valid search warrant is not the sole criterion to determine the legality of a search or seizure. During the period from 1914-1946, which for convenience will be called the formative period, special circumstances were found to justify the admission of evidence, although obtained in a search conducted without a search warrant. Some of these extenuating circumstances were recognized in the pronouncements of the Court which gave birth to the rule.

As an incident to a lawful arrest, the Court had upheld searches of premises within the immediate control of the person arrested.[4] It was well settled that there could be a seizure of articles and papers found on the person arrested. Arresting officers were also permitted to seize the fruits and evidence of crime which were in plain sight and in their immediate and discernible presence.[5] General exploratory searches as an incident to a lawful arrest, however, had been emphatically denounced as unconstitutional.[6]

It was early held that a federal prosecutor might make such use as he pleased of documents or other information acquired from a trespasser if persons other than federal officers had committed the trespass.[7] If a federal officer had a hand in the illegal search, the evidence must be excluded; but evidence secured by state officers and turned over to a federal prosecutor was admissible in a federal proscution.[8] Passive co-operation, as well as active participation, by federal officers in an illegal search must result in the exclusion of the evidence.[9]

Another variation of the rule is that evidence obtained in violation of one person's constitutional rights does not render such evidence inadmissible against another person.[10] In order to complain of an unlawful search and seizure, one must claim ownership in or a right to possession of the premises searched or in the property seized.[11]

While the Court has held that offices, as well as homes, were within the protection of the Fourth Amendment,[12] a distinction

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[4] Angello v. United States, 269 U.S. 20 (1925); Marron v. United States, 275 U.S. 192 (1927).

[5] Weeks v. United States, 232 U.S. 383 (1914); Agnello v. United States, 209 U.S. 20 (1925).

[6] Go-Bart Importing Co. v. United States, 282 U.S. 482 (1931); United States v. Leftkowitz, 285 U. S. 452 (1932).

[7] Burdeau v. McDowell, 256 U.S. 465 (1921).

[8] Byars v. United States, 273 U.S. 28 (1927).

[9] Gambino v. United States, 275 U.S. 310 (1927).

[10] Holt v. United States, 42 F. 2d 103 (C.C.A. 6th 1930); Kelley v. United States, 61 F. 2d 843 (C.C.A. 8th 1932); Lewis v. United States, 92 F. 2d 952 (C.C.A. 10th 1937); See Agnello v. United States, 269 U.S. 20, 35 (1925); But Cf. McDonald v. United States, 69 S. Ct. 191 (1948).

[11] Cases cited note 10, supra; O'Kelley v. United States, 149 F. 2d 381 (App. D.C. 1945), cert. denied 326 U.S. 724 (1945); Grainger v. United States, 158 F. 2d 236 (C.C.A. 4th 1946).

[12] Gouled v. United States, 255 U.S. 298 (1921).

has been made between a search and seizure in a house and a search and seizure in the fields.[13] The Court has upheld the search of a moving vehicle without a warrant where the officers had probable cause to believe it was being used to violate the National Prohibition Act.[14] On the basis of this pronouncement, lower federal courts have held that officers may stop and search a vehicle without a warrant where they have probable cause to believe it is being used to commit a crime, if it would not be reasonably practicable to secure a warrant.[15] The requirement that a warrant must be obtained whenever reasonably practicable has been repeatedly emphasized by the courts.[16]

Thus, in 1946, the rule enunciated in the *Weeks* case emerged from its formative period clothed with the interpretive pronouncements of the federal courts. For the most part the rule had been liberally applied in favor of the citizen; the courts scrupulously guarding his right to be let alone.

THE CONCEPT OF "REASONABLE SEARCH" EXPANDED

1. *Davis v. United States*

In 1946, beginning with the case of *Davis v. United States*,[17] continuing through *Zap v. United States*,[18] and culminating in mid-1947 with *Harris v. United States*,[19] the Supreme Court, in holding the federal exclusionary rule inapplicable, constructively expanded the concept of "reasonable search", and extended the legitimate scope of a search incidental to a lawful arrest.

In the *Davis* case, investigators for the Office of Price Administration, without a warrant of any kind, arrested the defendant after the investigators had procured an illegal purchase of gasoline from a service station, a corporation, operated and managed by the defendant. The arrest was for the misdemeanors of selling gasoline over ceiling price and without obtaining ration coupons therefor.[20] The investigators, suspecting that the defendant had an illegal supply of ration coupons, demanded access to the latter's office, the repository of the coupons. At first the defendant refused to unlock the door; whereupon, he was told that he would have to unlock it. Noticing one of the investigators shining a flashlight

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[13] Hester v. United States, 265 U.S. 57 (1924).

[14] Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1931).

[15] Morgan v. United States, 159 F. 2d 85 (C.C.A. 10th 1947); Cannon v. United States, 158 F. 2d 952 (C.C.A. 5th 1946), cert. denied 330 U.S. 839 (1947), rehearing denied, 431 U.S. 863 (1947); United States v. One 1941 Oldsmobile Sedan, 158 F. 2d 818 (C.C.A. 10th 1946). But cf. Hart v. United States, 162 F. 2d 74 (C.C.A. 10th 1947).

[16] Carroll v. United States, 267 U.S. 132 (1925); Taylor v. United States, 286 U.S. 1 (1932); Hart v. United States, 162 F. 2d 74 (C.C.A. 10th 1947).

[17] 328 U.S. 582 (1946).

[18] 328 U. S. 624 (1946).

[19] 331 U.S. 145 (1947).

[20] 54 Stat. 676, as amended, 55 Stat. 236, 56 Stat. 177, 50 U.S.C. App. §633 (Supp. IV).

beam through a rear window, and apparently attempting to raise the window, the defendant submitted to the officers' demands. The defendant obtained from his office an envelope containing ration coupons, which he surrendered to the officers. The coupons were found to be in excess of the lawful number which defendant was permitted to have in his possession. He was subsequently indicted and convicted, not for the misdemeanors for which he was initially arrested, but for the illegal possession of the coupons, another misdemeanor.[21]

The Supreme Court affirmed the conviction. Although the Court felt that the seizure was reasonable as an incident to a lawful arrest, the decision rested mainly on another ground. Relying on *Wilson v. United States*, [22] the Court held that the defendant, being a custodian of the ration coupons which were government property, was not protected against the production of the incriminating coupons. Emphasizing a distinction between public and private papers, the Court said that the strict test of consent, designed to protect an accused against production of incriminating documents, has no application where public papers are sought. Since the coupons were obtained from a place of business, at a reasonable hour, in response to a demand of authority rightly made,[23] the defendant's constitutional rights had not been violated.

Mr. Justice Frankfurter, joined by the late Mr. Justice Murphy, dissenting, pointed out that *Wilson v. United States*, invoked by the Court, was not in point. The *Wilson* case dealt, not with an unreasonable search under the Fourth Amendment, but with the question of self-incrimination under the Fifth Amendment, in which it was held that the immunity against self-incrimination did not extend to a corporation, even though the evidence tended to incriminate an individual officer of the corporation. The *Wilson* case dealt with the distinction between public and private papers concerning testimonial compulsion, not search and seizure. Merely because there may be a duty to make public documents available for litigation in response to lawful process does not mean that police officers may forcibly or coercively obtain them. The right to be let alone, except under judicial compulsion, is precisely what the Fourth Amendment meant to express and safeguard.

The authorization of search warrants, under the circumstances of this case, was withheld by Congressional Act.[24] Hence, the search and seizure would not be legal had they been conducted under a magistrate's warrant. Mr. Justice Frankfurter, on the basis of this reasoning, thought that the Court's holding the search

[21] Note 20, supra.
[22] 221 U.S. 361 (1911).
[23] The right to inspect books and make investigations is reserved to the government by virtue of the Act cited, Note 20, supra.
[24] The Espionage Act limits the issuance of search warrants to those cases in which the property sought was stolen or embezzled, used to commit a felony, or to illegally aid a foreign nation. 40 Stat. 217, 228, 18 U.S.C.A. §612.

in this case legal was tantamount to holding that a search which could not be justified under a warrant was lawful without a warrant.

The paramount factor in the opinion of the Court was that the officers, pursuant to Congressional authority, had the right to demand inspection of defendant's coupons and conduct an examination relative thereto.[25] It was in this connection that the distinction between public and private papers was made. In applying the doctrine of the *Wilson* case, it would seem, at first blush, that the Court did not clearly distinguish between self-incrimination under the Fifth Amendment and unreasonable search and seizure under the Fourth Amendment. Being an officer of a corporation, the defendant could not have refused to produce the coupons in response to a subpoena *duces tecum*. But it seems a tremendous hurdle from this to the conclusion that the defendant could not object to the seizure of the coupons without judicial process. Be that as it may, does not the case illustrate the interplay of the Fourth and Fifth Amendments?[26]

2. *Zap v. United States*

A case decided by the Court at approximately the same time as the *Davis* case, also involving the right of federal agents to inspect books pursuant to Congressional authority, is *Zap v. United States*.[27] In this case, the defendant was convicted of presenting false claims against the United States, a felony.[28] The defendant, an aeronautical engineer, had a contract with the Navy Department to perform experimental work on aircraft and to carry out test flights to determine the success of his experiments. The test flights were to be paid for on a cost-plus-a-fixed-fee basis. He estimated the cost at four thousand dollars, but made arrangements, however, for the tests at twenty-five hundred dollars. The defendant induced the test pilot to indorse a blank check on the pretense that the check was needed for his records. The defendant, through his auditor and clerks, then caused the check to be filled in for four thousand dollars and deposited in his account. The check was entered in the books as payment to the test pilot, although in fact the pilot had received only twenty-five hundred dollars. In presenting his claims to the government, the /defendant represented the cost of the tests at four thousand dollars. Pursuant to Congressional authority and the contract, the United States had the right to inspect and audit the books and records of contractors such as the defendant.[29] During the course of an audit, federal officials

[25] Note 23, supra.
[26] Note 1, supra.
[27] Note 18, supra.
[28] Criminal Code, §35(A), 18 U.S.C.A. §80.
[29] 44 Stat. 787, 10 U.S.C. §310(1) and 56 Stat. 185, 50 U.S.C. App. §643 (Supp. IV).

discovered the check. Under defective process, the federal officers seized the check. On the basis of this evidence the defendant was convicted.

The Supreme Court affirmed the conviction, holding that the check, having been obtained during the course of lawful examination of the defendant's books, was legally seized irrespective of the defective warrant for its seizure.

Mr. Justice Frankfurter, joined by the late Mr. Justice Murphy and Mr. Justice Rutledge, dissenting, pointed out that, although the search be lawful, it does not necessarily follow that the seizure is lawful. The dissent found support in previous rulings of the Court that "the requirement that warrants shall particularly describe the things to be seized . . . prevents the seizure of one thing under a warrant describing another." [30] If a search with a warrant does not permit seizure of articles other than those specified, statutory and contractual authority merely to search cannot be considered sufficient to grant that power.

3. *Harris v. United States*

Both the *Davis* and *Zap* cases were 4-3 decisions. They were decided soon after the passing of Mr. Chief Justice Stone and at the time Mr. Justice Jackson was in Nuremberg. The three Justices dissenting in these cases also dissented in *Harris v. United States*,[31] where they were joined by Justice Jackson.

In the *Harris* case, federal agents, acting under the authority of an arrest warrant charging violation of the Mail Fraud Statute [32] and the National Stolen Property Act,[33] gained access to the defendant's apartment. After placing the defendant under arrest, the agents conducted a search of his four-room apartment. The search was made for the purpose of finding cancelled checks believed to have been stolen by the defendant and used to perpetrate a forgery. After a meticulous, five-hour search, the agents discovered in a bedroom bureau drawer an envelope marked "George Harris, Personal papers." Therein the agents found Selective Service Classification Cards and Registration Certificates. Harris was convicted, not for the crimes for which he was initially arrested, but for the unlawful possession, concealment and alteration of the classification cards and certificates,[34] his motion to suppress the evidence having been overruled.

The Supreme Court sustained the admission of the evidence on the ground that the search and seizure, although concededly without the authority of a search warrant, were incidental to a lawful arrest. Confronted with their earlier decisions in which

[30] Marron v. United States, 275 U.S. 192, 196 (1927).
[31] Note 19, supra.
[32] 35 Stat. 1130, 1131, 18 U.S.C. §338.
[33] 53 Stat. 1178, 1179, 18 U.S.C. §418 et seq.
[34] 54 Stat. 885, 894-895, 50 U.S.C. App. §311; and 35 Stat. 1098, 18 U.S.C. §101.

general exploratory searches had been denounced,[35] the Court found it necessary to distinguish the *Harris* case. The Court based its distinction on the ground that the agents in the *Harris* case had conducted the search for the purpose of discovering the instrumentalities by which the crimes charged in the arrest warrant had been committed, which the agents had reason to believe were in the defendant's apartment. Hence, the Court reasoned, the entry upon the premises being authorized and the search which followed being valid, there is nothing in the Fourth Amendment which prohibits the seizure of government property, the possession of which is a crime, discovered in the course of the search, even though the officers were not aware that such property was on the premises when the search was initiated. The draft cards, being government property, were illegally in the custody of the defendant, and in so retaining them, Harris was guilty of a "continuing offense" against the laws of the United States. A crime was being committed in the very presence of the agents conducting the search.

Mr. Justice Frankfurter, dissenting in the *Harris* case, based his dissent largely on the ground that even if the agents had a warrant to search for cancelled checks, they could not seize other items discovered in the process.[36] Repeating his dissenting statements from the *Zap* case, he again emphasized that even if the search was reasonable it did not follow that the seizure was lawful. He was of the opinion, however, that the search was illegal at its inception and so could not retrospectively gain legality by what was uncovered. The Justice further seized upon the fact that there was ample opportunity for the officers to have secured authority from a magistrate to conduct the search, and later authority to have seized the unexpected articles discovered in the search.

While the *Harris* case has made definite inroads on the protection afforded by the Fourth Amendment, later cases, as will be seen, have confined it strictly to its facts. In the later case of *Trupiano v. United States*,[37] after distinguishing its facts from those in the *Harris* case, the Court stated that it was confining itself to the precise facts of the case under consideration, "leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used whenever reasonably practicable,"[38] Whether the Court, if confronted with similar facts, would overrule the *Harris* case is, of course, speculative. The words of the Court in the *Trupiano* case, however, seem not without significance. Whether the decision in the *Harris* case is sound or not, it does mark the high-water point beyond which the Court has

[35] Note 6, supra.

[36] Cf. Fed. Rules Crim. Procedure, 41(e) (1946), 18 U.S.C.A. (Supp. 1948), following section 687, which provides that the evidence can be suppressed on the ground that "the property seized is not that described in the warrant."

[37] 334 U.S. 699 (1948).

[38] 334 U.S. at 709.

since refused to go. More than that, the *Harris* case is a conspicuous turning point in the trend of decisions in the field of search and seizure.

A RETURN TO LIBERALITY

1. *Johnson v. United States*

Beginning with the case of *Johnson v. United States*,[39] in December, 1947, and continuing through *Lustig v. United States*,[40] in June, 1949, the Court appears to have returned to a policy of applying the Fourth Amendment more liberally in favor of the citizen. The *Johnson* case was the first to be decided in which those Justices who had dissented in the *Davis, Zap* and *Harris* cases began to constitute the majority of the Court, having been joined by Mr. Justice Douglas. While the *Johnson* case deals mainly with the illegality of an arrest made without a warrant, rather than with the scope of a search and seizure as an incident to a lawful arrest, it tends to illustrate the Court's return to a policy of vigilantly guarding the citizens' right to be let alone.

In the *Johnson* case, federal narcotics agents, acting upon information that unknown persons were smoking opium in a certain hotel, were there conducting an investigation. Recognizing the odor of burning opium apparently emanating from the defendant's room, the agents, without a warrant, demanded entry to the room under color of office. They had not known the occupant of the room, until after identifying themselves, they were admitted by the defendant. Placing the defendant under arrest, the agents then conducted a search of her room, which revealed incriminating opium and smoking apparatus. The defendant was subsequently convicted for violations of the federal narcotics laws.[41]

The Supreme Court reversed the conviction. In holding that it was unlawful to arrest the defendant and search her living quarters without the sanction of a warrant, the Court stated that no exceptional circumstances appeared to justify the search without a warrant. The Fourth Amendment, the Court held, requires that those inferences which reasonable men draw from evidence must be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the "often competitive enterprise of ferreting out crime."[42] The Court also stated that there was not probable cause to arrest the defendant until the officers had entered her room and found her to be the sole occupant. In such case, the Government was obliged to justify the

[39] 333 U.S. 10 (1947).
[40] 69 S. Ct. 1372 (1949).
[41] 26 U.S.C. §2553(a); and 21 U.S.C. §174.
[42] 333 U.S. at 14.

arrest by the search and at the same time justify the search by the arrest. This, the Court said, will not do.

One of the most criticized parts of the Court's opinion in *Harris v. United States* [43] was the implication that a search could be justified by the nature of what was turned up during such search. It would seem that any such implication was repudiated in the *Johnson* case, the Court stating:

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[44]

2. *McDonald v. United States*

A recent case somewhat similar in its facts to the *Johnson* case, although involving the rule that in order to complain of an unreasonable search and seizure one must have a property interest in the premises searched or the articles seized, is *McDonald v. United States*.[45]

In the *McDonald* case, police officers in the District of Columbia, believing that an illegal lottery was in process in a room rented by the accused, gained access to the rooming house by entering a window leading into the landlady's room. They had neither an arrest nor a search warrant. After illegally gaining entrance to the building, one of the officers, looking through the transom of accused's room, saw the tenant and another person in the room, as well as numbers slips, money and adding machines. The officers entered the room, placed the occupants under arrest and seized the lottery paraphernalia. On the basis of this evidence, both the tenant and his guest were convicted of carrying on an illegal lottery.[46]

The conviction was reversed by the Supreme Court in an opinion written by Mr. Justice Douglas. The Court held, with regard to the tenant, that the evidence should have been excluded and the property returned to him, on the ground that the search and seizure were made without a warrant and no compelling reasons appeared to justify the non-procurement of a warrant. Assuming, without deciding, that none of the guest's constitutional rights had been violated, the Court, nevertheless, felt obliged to reverse the guest's conviction, because the convictions of both the tenant and the guest were based on the same physical evidence which the Court held should have been returned to the tenant in response

[43] Note 19, supra.
[44] 333 U.S. at 14.
[45] 69 S. Ct. 191 (1948).
[46] 22 D.C. Code, §§ 1501, 2, 5 (1940).

to his motion for suppression and return. The admission of the evidence against the guest was necessarily prejudiced to the rights of the tenant.

3. *Di Re v. United States*

Because of the similarity in facts between the *McDonald* and *Johnson* cases, the chronological arrangement of the cases herein was interrupted for the purpose of facilitating comparison between these two cases. In the interim, the case of *United States v. Di Re,*[47] which further illustrates the Court's trend toward a more liberal application of the Fourth Amendment, was decided.

In the *Di Re* case, an investigator for the Office of Price Administration had received information that his informer had arranged to purchase ration coupons from one Buttitta. The investigator and a local police officer trailed Buttitta's car to the appointed place. There they found the informer sitting in the back seat of the car holding two ration coupons, which he said he had obtained from Buttitta. The coupons were counterfeit. The investigator had not known that Di Re, who was sitting in the front seat with Buttitta, was to be present at the rendezvous. Nor was he pointed out by the informer as being a participant in the illegal transaction. Di Re, along with the others, was taken into custody and "frisked". He was found to have two gasoline ration coupons in his pockets. He was then booked and thoroughly searched, at which time additional coupons were found in an envelope between his shirt and underwear. Di Re was subsequently convicted of knowingly possessing counterfeit gasoline ration coupons, a misdemeanor.[48]

The Supreme Court, in reversing the conviction, rejected the Government's contention that the search of Di Re was justifiable either as an incident to a lawful arrest or as an incident to a search of a vehicle believed to be carrying contraband.

Under the applicable law, an arrest without a warrant, to be valid, must be for a misdemeanor committed in the arresting officer's presence; or, if for a felony, the officer must have reasonable cause to believe that the suspect had committed a felony.

The defendant was arrested for a misdemeanor. But no misdemeanor had been committed by Di Re in the officer's presence. Admittedly, at the time of the arrest, the officer had no information implicating Di Re and no information pointing to his possession of the coupons. His mere presence in the car, the Court held, did not permit the inference that he was then committing a misdemeanor. Hence, the arrest itself was unlawful.

On appeal, the Government attempted to justify the arrest on the ground that probable cause existed for believing that Di Re

[47] 332 U.S. 581 (1948).
[48] Section 301 of the Second War Powers Act, 1942, 50 U.S.C. App. §638 (Supp. V, 1946).

had committed the felony of conspiracy under Section 37 of the Criminal Code.[49] It was also asserted that probable cause existed for believing the defendant guilty of possessing a known counterfeit writing with the intent to utter it as true for the purpose of defrauding the United States, a felony under Section 28 of the Criminal Code.[50]

The Court, assuming *arguendo,* that an arrest without a warrant on a charge not committed at the time may later be justified if the arresting officer's knowledge gave probable cause to believe any felony in the statute books had been committed, held that the circumstances at the time of this arrest afforded no reason to believe that Di Re had committed any felony. If the presence of Di Re in the automobile did not authorize an inference of bare participation in the sale of the coupons, *a fortiori,* it could not support an inference of felony where knowledge and intent are elements of the offense.

In reply to the Government's second defense of the search, that it was justified as an incident to the search of a vehicle reasonably believed to be carrying contraband, the Court held that, assuming reasonable ground to search the car existed, this did not confer an additional right to search the occupants. The right to search a car without a warrant confers no greater latitude to search occupants than a search with a warrant would permit. Had the officer been armed with a warrant to search the car, he would have no authority to search the persons found therein. The defendant's mere presence in the car did not cause him to lose immunities from search of his person to which he would otherwise be entitled. In this respect, it will be remembered that the Fourth Amendment requires a warrant "particularly describing the place to be searched, and the persons or things to be seized."

4. *Trupiano v. United States*

The rule that a search warrant may be dispensed with under certain circumstances where it is not reasonably practicable to secure one is only applicable when there has been a lawful arrest. The converse of this rule is also true. An interesting case on this point is *Trupiano v. United States,*[51] in which the Court held that, notwithstanding the existence of a lawful arrest, the officers could not seize contraband which was in plain sight where they had ample opportunity and it was reasonably practicable for them to have secured a warrant.

In the *Trupiano* case, federal agents had received information that the defendant planned to build and operate a still. One of the agents succeeded in obtaining employment with the defendant and,

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[49] 18 U.S.C. §88.
[50] 18 U.S.C. §72.
[51] Note 37, supra.

over a period of three months, aided him in erecting the still. This agent was in possession of a two-way radio set, and consequently, kept the head office informed of the progress being made. At the opportune time, while the defendant was in the act of operating the still, federal agents moved in and arrested him. After placing him under arrest, certain contraband material was seized, although the officers had not a search warrant.

The Supreme Court held that the arrest was valid since made for a crime committed in the presence of the officers; but the search and seizure were held invalid because of the abundance of time in which the officers could have secured a search warrant. Recognizing the well-established rule that arresting officers may look around at the time of the arrest and seize those items of contraband which are in plain sight, the Court held that it did not apply where it was reasonably practicable for the officers to secure a warrant. Quoting from *Johnson v. United States,*[52] the Court said:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement.[53]

5. *Lustig v. United States*

One of the latest cases in the field of search and seizure is *Lustig v. United States,*[54] decided in late June, 1949. The case deals not so much with the scope of a search and seizure, but rather involves the rule that, unless federal officials have participated or cooperated in an illegal search, the fruits of such illegal search are admissible as evidence in a federal prosecution.[55] The case is an excellent illustration of what constitutes participation by a federal officer in an illegal search, and serves further to illustrate the Court's liberal application of the federal exclusionary rule of evidence.

In the *Lustig* case, a federal secret service agent received information indicating a violation in a hotel room of a counterfeiting statute, made a preliminary investigation, and conveyed to local police his suspicion and the fact that he was "confident that something was going on" in the room. Thereafter, the local police secured warrants for the arrest of the defendants, occupants of the room, charging the violation of a local ordinance requiring "known criminals" to register with the local police within a cer-

[52] 333 U.S. 10, 15 (1948).
[53] 334 U.S. at 706 (1948).
[54] 69 S. Ct. 1372 (1949).
[55] Cases cited notes 7, 8 & 9, supra.

tain period after arrival in town. The local police, unaccompanied by the federal agent, proceeded to the hotel, and upon finding the defendants absent, entered and searched their room. Only after this search revealed counterfeiting paraphernalia was the federal agent summoned to the hotel. The federal agent examined the evidence uncovered by the local police in their search of the room and in a subsequent search of defendants who were arrested upon returning to the room; however, he did not participate in the actual searches. The evidence so uncovered was eventually turned over to federal authorities for use in prosecuting the defendants on counterfeiting charges.

The defendants were convicted. The District Court admitted the evidence after concluding that the illegal search had been conducted entirely by state or local officers, independent of any participation, connivance or arrangement on the part of the federal agent to have an illegal search made.

The Supreme Court reversed the conviction, in a 5-4 decision. Recognizing their earlier pronouncements of the rule that evidence obtained as a result of an illegal search made by other than federal officers is admissible in a federal prosecution, the Court held that the federal agent had participated in this search and seizure. It was pointed out that a search is a functional, not merely physical process; that it is not completed until the illicitly obtained articles have been effectively appropriated from the premises. The federal agent, having joined the searchers and examined the evidence, had participated in its appropriation. To distinguish between parties who participate from the beginning of a search and those who participate by joining in the search before it has run its course, the Court said, would be to draw too fine a line in the application of the Fourth Amendment.

Holding as they did, that the federal agent had participated in the search, the Court found it unnecessary to consider the result had the search been conducted entirely by local officers and the evidence turned over to federal authorities for use in a federal prosecution. The Court's earlier pronouncements on this question would seem to have set the question at rest, as it has been frequently held or stated that evidence received as a result of an illegal search conducted solely by local officers is admissible in a federal prosecution.[56] But in a concurring opinion by the late Mr. Justice Murphy, joined by Mr. Justice Douglas and Mr. Justice Rutledge, their position on the reserved question seems clear. The important consideration to them is the presence of an illegal search; whether local or federal officers participated should be of no consequence.

CONCLUSIONS AND ACCEPTIBILITY OF RULE

The question of the admissibility of evidence in a state court which has been illegally obtained by local officers is not properly

[56] Cases cited notes 7, 8 & 9, supra.

within the scope of this article. Suffice to say that the state courts are free to accept or reject the federal exclusionary rule.[57] This was set at rest in *Wolf v. People of Colorado,*[58] decided by the Court the same day as the *Lustig* case. It was there held that the federal exclusionary rule is not a command of the Fourth Amendment, but is a judicially created rule of evidence, and does not impose its sanction upon the States through the Due Process Clause of the Fourteenth Amendment.

Although the federal exclusionary rule is not a command of the Fourth Amendment, is it not essential to the enforcement of the commands of the Fourth Amendment? Is there any alternative means of protecting the citizen from unreasonable searches and seizures? It has been frequently stated that the victim of an unreasonable search may find his redress in a civil action for trespass against the violator. Just as frequently, it has been asserted that the violator is amenable to criminal prosecution. In form, these are the alternatives. In substance, they are illusory.

The fallacies in these so-called alternatives are forcefully exposed by the late Mr. Justice Murphy in his dissenting opinion in *Wolf v. People of Colorado.*[59] There, it is pointed out that the nominal damages usually recoverable in an action for simple trespass is no deterrent to an officer who envisions a salary increase for "cracking the case." There, it is pointed out that the futility of expecting a district attorney to prosecute himself or his associates for violations of the Fourth Amendment during a raid which he, himself, or his associates had ordered is only too well known.

It must, of course, be recognized that the exclusionary rule sometimes delays the apprehension and prosecution of criminals. Sometimes it prevents their conviction, although they are manifestly guilty of the crime charged. But it must also be remembered that innocent citizens may be, and are, the victims of the trespass.

Apropos of this conclusion is the admonition expressed by Mr. Justice Frankfurter in his dissenting opinion in *Davis v. United States:*[60]

> It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

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[57] At the present time, the federal exclusionary rule has been accepted in seventeen states, rejected in thirty, and undecided in one. Accepted: Fla., Idaho, Ill., Ind., Iowa, Ky., Mich., Miss., Mo., Mont., Okla., S. D., Tenn., Wash., W. Va., Wis., and Wyo. Rejected: Ala., Ariz., Ark., Cal., Colo., Conn, Del., Ga., Kans., La., Me., Md., Mass., Minn., Neb., Nev., N. H., N. J., N. M., N. Y., N. C., N. D., Ohio, Ore., Pa., S. C., Tex., Utah, Vt., and Va. Undecided: R. I. Wolf v. People People of Colorado, 69 S. Ct. at 1367, App., Table I, to Court's opinion.

[58] 69 S. Ct. 1359 (1949).

[59] 69 S. Ct. at 1369, 1370.

[60] 328 U.S. at 597.