MAPP v. OHIO AND EXCLUSION OF EVIDENCE ILLEGALLY OBTAINED BY PRIVATE PARTIES*

AN important constitutional decision often has an impact upon the course of the law in subsequent cases that do not rise to constitutional dimensions. Unless the basis for a constitutional decision is clearly understood, however, its inapplicability to slightly different factual situations may not be readily perceived, for apparent similarities may tend to obscure more fundamental differences. The recent Supreme Court decision in *Mapp v. Ohio* [1] and the decision of the New York courts in *Sackler v. Sackler* [2] provide an apt illustration. *Mapp* held that the admission of evidence obtained by state police officers in a manner proscribed by the fourth and fourteenth amendments constituted a denial of due process of law.[3] The lower court and the dissenting members of the appellate court in *Sackler* found that the rationale of *Mapp* warranted a new common law rule precluding the admission of evidence unlawfully seized by a private litigant in a civil suit.[4] To test the validity of this conclusion, an examination of the *Mapp* decision and its application to the unlawful seizure of evidence by private parties for civil litigation is necessary.

It is received common law tradition that the manner of obtaining evidence is not cause for its suppression in a civil or criminal proceeding.[5] This common law doctrine admitting illegally obtained evidence rests on the proposition that evidentiary rules should not be manipulated to further policies that are unrelated to the probity or truth-value of the evidence.[6] Nevertheless, when it was felt necessary to effectuate an important extrinsic policy and the policy to be furthered would be nullified if the evidence were heard in court, the common law provided for exclusion of probative evidence.[7] For example, such policies as the preservation of the confidential relationship between hus-

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*Sackler v. Sackler, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct.), *rev'd*, 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (1962).

1. 367 U.S. 643 (1961).

2. 33 Misc. 2d 600, 224 N.Y.S. 2d 790 (Sup. Ct.), *rev'd*, 16 App. Div. 2d 423, 229 N.Y.S. 2d 61 (1962).

3. 367 U.S. 643, 655 (1961).

4. 33 Misc. 2d 600, 602, 224 N.Y.S. 2d 790, 792, *rev'd*, 16 App. Div. 2d 423, 427, 229 N.Y.S. 2d 61, 65, 66 (1962).

5. Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841); 4 JONES, EVIDENCE § 868 (5th ed. 1958); MCCORMICK, EVIDENCE § 137 (1954); 8 WIGMORE, EVIDENCE § 2183, at 7 (McNaughton rev. 1961) [hereinafter cited as Wigmore].

6. Elkins v. United States, 364 U.S. 206, 234 (1960) (dissenting opinion of Mr. Justice Frankfurter); Funk v. United States, 290 U.S. 371, 381 (1933), 1 JONES, EVIDENCE IN CIVIL CASES § 1 (4th ed. 1938); 8 WIGMORE § 2175, at 3. See also 1 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 2 (1827). But see THAYER, EVIDENCE AT THE COMMON LAW 264 (1898).

7. 8 WIGMORE §§ 2175, 2251.

band and wife,[8] or attorney and client,[9] or the preservation of state secrets [10] have long been deemed to be of sufficient importance to warrant impairing the efficacy of the fact finding process. But this reasoning was not extended to unconstitutionally or illegally seized evidence, either because the objective of deterrence was not deemed to be of such importance as to warrant exclusion or because punishment for socially undesirable behavior was not regarded as one of the objectives of the law of evidence.[11]

Standing in marked contrast to this common law tradition is the constitutional doctrine excluding evidence obtained in violation of the Constitution from criminal trials. The rule originated in *Boyd v. United States* [12] and *Weeks v. United States*,[13] where it was applied to federal officers violating the fourth amendment. *Mapp v. Ohio*, reversing a prior decision,[14] extended the exclusionary rule to unconstitutionally obtained evidence sought to be introduced in a state criminal trial. After the decisions in *Weeks* and *Boyd*, but before *Mapp*, the Court in *Burdeau v. McDowell* [15] refused to exclude evi-

8. McCormick, Evidence § 82 (1954); Model Code of Evidence rule 215, comment *a* (1942).

9. See McCormick, Evidence § 91 (1954); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implication for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1236-37 (1962). See generally 8 Wigmore § 2291, at 545.

10. See, *e.g.*, Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E.D. Pa. 1912); 8 Wigmore § 2367. In some states confidential communications between physician and patient are also immune. See McCormick, Evidence § 101-08 (1954).

11. See State v. Owens, 302 Mo. 348, 376-77, 259 S.W. 100, 108 (1924). But it was also believed that in criminal cases, excluding illegally obtained evidence would provide an inadequate remedy for defendants who were innocent or whose guilt could be proven without the illegally obtained evidence, and an inappropriate remedy for guilty defendants permitted to escape punishment. Furthermore, it would fail to protect society from criminals left at large. See, *e.g.*, People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926). See also Comment, *Judicial Control of Illegal Search and Seizure*, 58 Yale L.J. 144 (1948).

12. 116 U.S. 616 (1886). The Court, resting on the fourth and fifth amendments, invalidated a statute authorizing courts to compel the defendant in a forfeiture proceeding to produce papers specifically requested by the Government, at the cost of having the allegations as to such papers taken as admitted. The admission of evidence so procured was found to render the trial in which it occurred an "unconstitutional proceeding."

13. 232 U.S. 383 (1914). *Weeks* firmly established and generalized the rule, holding that the defendant in any federal criminal proceeding could have evidence excluded by making a pre-trial motion for the return of property unconstitutionally seized by federal officers. Where possession is the basis for conviction in federal court, the motion to suppress unconstitutionally secured evidence can be made by the defendant even if he had no property or possessory interest in the evidence and thus was not a victim of the unconstitutional taking. Jones v. United States, 362 U.S. 257 (1960). Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), held copies or knowledge obtained from original documents illegally seized by federal agents may not be used to support a federal criminal indictment.

14. Wolf v. Colorado, 338 U.S. 25 (1949). The *Wolf* Court had found that the right to be secure against arbitrary police invasions is the "core" of the fourth amendment and is essential to the liberty protected by the due process clause of the fourteenth amendment. Nevertheless the state's conviction was sustained in *Wolf* because the exclusionary rule was not considered part of the fourth amendment.

15. 256 U.S. 465 (1921).

dence unlawfully obtained by a private person from a federal criminal prosecution, reasoning that a private person is not bound by the federal Constitution, and since federal officers had not participated in the seizure, there was no violation of the fourth amendment requiring exclusion.[16] In so holding the Court apparently heeded the fact that the exclusionary rule is bottomed on remedying a constitutional violation and thus is inapplicable where the seizure of the evidence does not constitute such a violation.[17]

Sackler may be distinguished from *Burdeau* on the ground that the public's interest in criminal prosecutions was the gravamen of the decision in the latter case.[18] Thus, the trial judge in *Sackler* found that where a private person seeks to further his own civil claims by the submission of unlawfully, albeit not unconstitutionally, obtained evidence, exclusion is justified.[19] The *Sackler* case arose when a husband seeking evidence of adultery in a suit for divorce entered the apartment of his wife, from whom he was legally separated, and photographed her and her alleged paramour in compromising circumstances.[20]

16. *Id.* at 475.

17. But see text accompanying notes 45 & 46 *infra*. Probably the only constitutional ground upon which a state or federal court could be required to exclude such evidence in a private civil suit is that suggested by Shelley v. Kramer, 334 U.S. 1 (1948). Judicial acceptance of evidence privately obtained by means which are constitutionally forbidden to police might arguably be considered governmental action in violation of the fourth or fourteenth amendments. *Shelley* held that a state court's injunction enforcing a private covenant designed to discriminate against Negroes in the sale of certain real estate was state action denying equal protection. *Id.* at 20. But neither post-*Shelley* Supreme Court action nor policy considerations support a contention that the "state action" concept should be applied to all judicial conduct which tends to encourage private behavior in which a state could not constitutionally engage. See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1108-20 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959). In Black v. Cutter Laboratories, 351 U.S. 292 (1956), the Supreme Court found that the action of California's highest court sustaining an employer's discharge of an employee for membership in the Communist Party presented no federal question, although the dissent argued that affirmance of the California opinion sanctioned "a flagrant violation of the first amendment." *Id.* at 304. Since the Constitution is not a mandate to private individuals, it would not seem to require that a court regulate private conduct by granting a plaintiff relief solely on the ground that what the defendant had done could not constitutionally be done by government. Even though a court's refusal to interfere with a defendant's accomplished result may encourage private "misconduct" as much as its enforcement of a plaintiff's attempt to accomplish such a result, only the latter would seem to constitute state action.

18. See Judge Brenner's reasoning in Sackler v. Sackler, 33 Misc. 2d 600, 602, 224 N.Y.S. 2d 790, 794 (1962). Judge Brenner also stated that *Elkins v. United States* appeared to have overruled *Burdeau*. *Id.* at 603, 224 N.Y.S. 2d at 793. In United States v. Elkins, 364 U.S. 206 (1960), the Court held that evidence seized by state officers in a manner which, if seized by federal officers, would have violated the fourth amendment, must be excluded in a federal criminal proceeding. But, despite the dictum of Williams v. United States, 282 F.2d 940, 941 (6th Cir. 1960), *Elkins* cannot be viewed as overruling *Burdeau* when read in light of Wolf v. Colorado, 338 U.S. 25 (1949), which made it clear that state police were constitutionally restricted by at least the core of the fourth amendment; *Burdeau* held that private persons could not violate the Constitution.

19. 33 Misc. 2d 600, 605, 224 N.Y.S. 2d 790, 795 (1962).

20. *Id.* at 604, 224 N.Y.S. 2d at 794.

On a pre-trial motion by Mrs. Sackler, the trial court ordered the evidence suppressed, holding that Mr. Sackler's uninvited entry was "unreasonable" within the meaning of the New York Civil Rights Law prohibiting unreasonable searches and seizures.[21] The statutory prohibition is identical with that of the fourth amendment,[22] but has been judicially construed to apply to private individuals as well as public officials.[23] The trial court relied heavily on *Mapp v. Ohio,* concluding that although the decision in that case did not require the exclusion of this evidence, its rationale could reasonably be extended to suppress evidence illegally seized by private citizens in civil suits.[24] The trial judge reasoned that since the Supreme Court had decreed that the sacrifice of some criminal prosecutions was not too great a price to pay for protection of constitutional rights, the sacrifice by an individual plaintiff of a civil cause of action could reasonably be imposed to protect "the very same rights" arising under the Civil Rights Law.[25] He also noted that the few civil and criminal sanctions available against trespassers in New York state were likely to be as ineffective against an outraged husband as the sanctions available in *Mapp* were against police misconduct.[26] The majority of the appellate division rejected these arguments, holding that *Mapp* did not support exclusion of evidence gathered by private persons, for "none of the reasons given by the courts for excluding [illegally obtained evidence] in criminal trials . . . applied to civil causes."[27] Two dissenting judges, however, saw no

21. *Id.* at 604-05, 224 N.Y.S.2d at 794. Mr. Sackler made his early morning raid on his wife's apartment with some friends who became witnesses to the circumstances found there and whose testimony the defendant sought to suppress. The court found that Mr. Sackler's entry was not made to prevent a crime or perform a citizen's arrest and was therefore "unreasonable . . . regardless of the illegality of such entry. It is the planned, deliberate raid and search accomplished through an uninvited entry that makes the search unreasonable and the fruits thereof should therefore be unacceptable in a court of law." *Id.* at 605, 225 N.Y.S. 2d at 795.

22. N.Y. CIVIL RIGHTS LAW § 8:

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

23. Sackler v. Sackler, 33 Misc. 2d 600, 603, 224 N.Y.S. 2d 790, 793, citing dictum of Justice (then Judge) Cardozo in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 588 *cert. denied,* 270 U.S. 657 (1926).

24. Sackler v. Sackler, 33 Misc. 2d 600, 601-02, 224 N.Y.S. 2d 790, 791-92 (1962).

25. *Id.* at 602, 224 N.Y.S. 2d at 792. The equation of the right to be free from private invasion of privacy with the right to be free from governmental invasions of privacy was repeated by Judge Hopkins in his dissent from the Appellate Division's reversal of Judge Brenner's decision. 16 App. Div. 423, 429, 229 N.Y.S. 2d 61, 67.

26. *Id.* at 605, 224 N.Y.S. 2d at 795. The only state court precedent which Judge Brenner found persuasive was Lebel v. Swincicki, 354 Mich. 427, 93 N.W. 2d 281 (1958), in which testimony based on a blood sample taken from the unconscious defendant was excluded from a wrongful death action because the taking was deemed a violation of defendant's right to be secure in his person which is protected by the Michigan Constitution, art. 2, § 10.

27. 16 App. Div. 2d at 426, 229 N.Y.S. 2d at 64. The Appellate Division distinguished the *Lebel* case from *Sackler* by the fact that the former involved a physical violation of the person while the latter involved the violation of property rights. *Id.* at 427, 229 N.Y.S. 2d at 65.

grounds for distinction between the civil and criminal processes justifying the existence of different rules.[28] These opinions do not deal with the problem of whether an exclusionary rule for private misconduct could be justified without invoking the rationale of the federal rule. They seek, instead, to determine whether or not the rationale used in *Mapp v. Ohio* supports an exclusionary rule in private civil cases.

Mapp does not purport to decide whether admission of unconstitutionally obtained evidence in a *civil* proceeding would also constitute a denial of due process of law. Nor has the question been clearly resolved by other federal cases. Some early cases in which the exclusionary rule was applied suggested that its basis was not solely a fourth amendment right to be free from unreasonable searches and seizures, but rather a right to be free from compulsory self-incrimination arising out of the "intimate relationship" between the fourth and fifth amendments.[29] As Mr. Justice Bradley stated in *Boyd*, the case in which the exclusionary rule was first formulated:

> [The two amendments] throw light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[30]

28. *Id.* at 427, 229 N.Y.S. 2d at 65 (Christ, J., dissenting); *id.* at 427, 229 N.Y.S. 2d at 66 (Hopkins, J., dissenting). Judge Hopkins implied that the fourth amendment regulates individual action as well as government action. *Id.* at 431-32, 229 N.Y.S. 2d at 69-70.

29. Boyd v. United States, 116 U.S. 616, 633 (1886).

30. *Ibid.* Relying on this theme, several cases have used the fifth amendment to "throw light" on the meaning of the fourth amendment, and in so doing have limited the fourth amendment's protection to the right of privacy. The first step was taken in Frank v. Maryland, 359 U.S. 360 (1959), where the Supreme Court upheld a fine imposed on a homeowner for refusing to admit a health inspector. Citing the eighteenth century case of Entick v. Carrington, 19 Howell's State Trials 1029 (1765), Mr. Justice Frankfurter, writing for the majority, stressed the parallel historical development of the fourth and fifth to show that the fourth amendment had developed largely to protect people from police searches for evidence to be used in criminal trials. 359 U.S. at 365. Thus a search without a warrant was not an unreasonable search if made pursuant to a civil inspection ordinance because no warrant was required. *Id.* at 373. Mr. Justice Douglas, in his dissenting opinion, strongly criticized this narrow reading of the fourth amendment as based on inaccurate historical analysis. *Id.* at 376. The consequence of the *Frank* analysis can be seen in United States v. Abel, 362 U.S. 217 (1960), where officers of the Immigration and Naturalization Service, in pursuance of an administrative arrest preliminary to deportation, searched Abel's hotel room and found items which were presented in evidence at his later criminal trial for conspiracy to commit espionage. The Court upheld the use of the evidence, arguing that deportation proceedings, which are noncriminal, did not require stringent application of criminal procedural safeguards. *Id.* at 230-31. Since the deportation arrest was pursuant to an administrative warrant, it was "lawful"; therefore the Court could hold that the items in question "were seized as a consequence of wholly lawful conduct." 362 U.S. at 240. The anomalous result of using the criminal-civil distinction in this case is to obliterate a protection traditionally part of the fourth amendment.

Because the self incrimination provision was thought, at one time, to be available only in criminal cases,[31] some courts limited the exclusionary remedy to proceedings which could be considered criminal or quasi-criminal in nature.[32] Difficulties in applying the rule according to a civil-criminal dichotomy arose from the problem inherent in making a meaningful distinction between these two categories. Thus, for example, the Supreme Court has held that "the exclusion of evidence obtained by an unlawful search and seizure stands on a different ground" from an unconstitutional seizure of goods to be forfeited,[33] because the latter merely brings the res within the jurisdiction of the court where the government's right to the goods may be determined, while the former is used to determine that right.[34] From this distinction, several courts have developed a rule admitting unconstitutionally obtained goods to be forfeited, but excluding evidence unconstitutionally seized, asserting, as did the Court in *Boyd*, that a forfeiture is sufficiently criminal in nature to require the full protection of the fifth amendment, including the privilege against self-incrimination.[35] If the exclusionary rule were based on the "intimate relationship" between the fourth and fifth amendments, its application today would not depend on the kind of proceeding—civil or criminal—in which it was invoked, since the self-incrimination privilege may now be claimed by any party or witness in a civil, criminal, or even administrative proceeding.[36] Rather its application

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31. See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 13-14, 195-196 (1931).

32. See, *e.g.*, Bowles v. Beatrice Creamery Co., 56 F. Supp. 805 (D. Wyo. 1944) (excluded evidence obtained by federal officers in violation of the constitution from a treble damage action under the Emergency Price Control Act). Camden County Beverage Co. v. Blair, 46 F.2d 648, 650 (D.N.J. 1930) (court denied a bill in equity to restrain use of evidence allegedly illegally seized by federal and state officers from use in investigation of plaintiff's "worthiness" to hold a permit under the National Prohibition Act, on grounds that the fourth and fifth amendments were intended to give protection against criminal prosecutions and that they could not be invoked in the civil proceeding pending). United States v. Lee Hee, 53 F. 2d 681 (W.D.N.Y. 1931) (dictum to the effect that even if illegally procured, a voluntary confession is admissible in deportation proceedings despite the fact that it would not be in a criminal proceeding).

33. Dodge v. United States, 272 U.S. 530, 532 (1926).

34. United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926).

35. See, *e.g.*, Rogers v. United States, 97 F.2d 691 (1st Cir. 1938); United States v. $4,171.00, 200 F. Supp. 28, 30 (N.D. Ill. 1961); United States v. One 1960 Lincoln Two-Door Hard-Top, 195 F. Supp. 205 (D. Mass. 1961) (evidence seized contrary to fourth amendment excluded from forfeiture proceeding, while the car similarly obtained was allowed to support the proceeding). See also United States v. Physic, 175 F. 2d 338 (2d Cir. 1949) (evidence illegally obtained excluded with no mention of a constitutional violation having been found); But see United States v. Plymouth Coupe 1941, 182 F.2d 180 (3d Cir. 1950) (car seized unconstitutionally by federal officers held to preclude forfeiture proceeding); United States v. One 1956 Ford Two-Door Sedan, 185 F. Supp. 76 (E.D. Ky. 1960) (evidence seized illegally by federal officers admitted, along with the car to be forfeited, on grounds that the federal rule excluding such evidnce applied in criminal cases only).

36. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). This has been recognized by several courts who have refused to make a distinction between the application of the exclusionary rule according to the civil or criminal nature of the proceeding in which it is in-

would depend upon whether the evidence sought to be excluded could be considered incriminating, *i.e.*, could reasonably be said to lead to a criminal prosecution.[37] Under this rationale of the federal exclusionary rule, the fact that exclusion was sought in *Sackler* in a civil divorce proceeding would not be determinative since the evidence sought to be excluded could well lead to a subsequent criminal prosecution for adultery.[38] However, the fifth amendment rationale has not often been mentioned by the Supreme Court in its development of the federal rule since the time of the *Boyd* case.[39] Thus it is not likly that the rules governing the application of the privilege against self-incrimination continue to determine the circumstances in which the exclusionary rule may be invoked.

The gravamen of the decision in *Mapp* seems to be a recognition that exclusion is an essential fourth amendment remedy without which the constitutional right of privacy would be nugatory.[40] Thus the majority opinion emphasized the increasing recognition among jurists of the inadequacies of other deterrents against unreasonable police searches,[41] concluding that it had become constitutionally necessary that the exclusionary doctrine be "insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case," (the right against arbitrary searches by state officials.)[42] If the function of exclusion is deterrence of unreasonable searches and seizures, rather than the grant of a procedural safeguard for assuring a fair trial, the nature of the proceeding in which the evidence is introduced would not seem to be relevant. Therefore, it would seem that *Mapp* extends to civil as well as criminal proceedings.

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voked. In City of Chicago v. Lord, 3 Ill. App. 2d 410, 415, 122 N.E. 2d 439, 443, *aff'd*, 7 Ill. 2d 422, 122 N.E. 2d 438 (1954), the Illinois Supreme Court recognized that unless a motion to suppress may be made in the first proceeding—civil or criminal—in which the evidence unlawfully obtained is to be used, the constitutional protections would be rendered meaningless. The court then applied Illinois' exclusionary rule in civil proceeding to enforce a city ordinance. Similarly in Brown v. Glick Bros. Lumber Co., 52 F. Supp. 913 (S.D. Cal. 1943), *rev'd on other grounds sub nom.* Bowles v. Glick Bros. Lumber Co., 146 F.2d 566 (9th Cir. 1945), *cert. denied*, 325 U.S. 877 (1944), the federal district court granted a motion to suppress evidence illegally obtained by agents of the Office of Price Administration and submitted in a civil treble damage action under the Emergency Price Control Act.

37. Brown v. Walker, 161 U.S. 591 (1896).

38. N.Y. PENAL LAW §§ 100, 101. Section 102 of the New York Penal Law provides for punishment by imprisonment for not more than six months and/or a fine up to two hundred and fifty dollars.

39. For example note its absence in the majority opinions in Week v. United States, 232 U.S. 383 (1914), Elkins v. United States, 364 U.S. 206 (1960), and Wolf v. Colorado, 338 U.S. 25 (1949). However, this reasoning was explicitly cited by Mr. Justice Black in his concurring opinion in *Mapp* as a justification for abandoning his position in *Wolf* that the constitutional prohibition of unreasonable searches did not necessarily require exclusion of the evidence. 367 U.S. 643, 661-62 (1960).

40. 367 U.S. 643, 655-56 (1960).

41. *Id.* at 651-53.

42. *Id.* at 656.

Rationalized as a deterrent,[43] application of the exclusionary rule should be related to the kind of conduct it is intended to prevent. Judge Brenner, the trial judge in *Sackler,* apparently thought that the Supreme Court's engrafting of an exclusionary rule on the constitutional prohibition against unreasonable public searches and seizures provided support for engrafting an exclusionary rule on any prohibition of unreasonable searches and seizures.[44] But the factor requiring the exclusionary rule does not seem to have been simply a violation of a prohibition against unreasonable searches; rather it was the fact that the misbehavior of government officials constituted an essential part of such violations, whether statutory or constitutional.[45] For instance, in *McNabb v. United States,* the Supreme Court explicitly exercised its power to promulgate rules of criminal procedure, rather than its power to enforce the Constitution, to exclude a confession obtained by federal police who disregarded a congressional statute requiring the accused to be formally arraigned within a certain time.[46] Although the New York statute covers both public and private misbehavior, the remedies required to deter the police misconduct prohibited by the New York Civil Rights statute need not necessarily be attached to prevent private misconduct simply because it falls under the same statute.

Unless privacy is considered some kind of absolute solitude of the individual, police and private invasions of privacy cannot be viewed as violations of the "very same right."[47] The Jeffersonian ideal of limited government and more recent abhorrence of totalitarianism have led to zealously guarded limitations on the power of the state to interfere with the individual. Traditionally this has meant the right of an individual to be free from intrusions by public

43. See the reasoning of the Court in Elkins v. United States, 364 U.S. 206, 217 (1960).

44. This distinction is borne out in a series of cases before the National Labor Relations Board. In the Matter of Hoosier Cardinal Corp., 67 N.L.R.B. 49 (1946) (excluding evidence allegedly obtained unconstitutionally by board agents); In the Matter of Andrew Jergens Co., 27 N.L.R.B. 521 (1940) (admitting evidence allegedly obtained illegally by agents of the union); Air Line Pilots Assoc., 97 N.L.R.B. 929 n.1 (1951) (admitting privately seized evidence).

45. 318 U.S. 332 (1942).

46. *Id.* at 341. For another example of evidentiary exclusion based on statutory rather than constitutional rights, see FED. R. CRIM. P. 41(e) giving a right to return of evidence illegally seized by federal officers. In addition § 605 of the Federal Communications Act 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), makes it a federal crime to divulge or publicize information obtained by wiretaps); in Nardone v. United States, 302 U.S. 379 (1937), the Court held § 605 required exclusion in federal criminal trials of evidence obtained by wiretapping, in effect overruling Olmstead v. United States, 277 U.S. 438 (1928), in which wiretap evidence obtained by federal officers contrary to a state statute but not unconstitutionally was held admissible in a federal criminal trial. But in Schwartz v. Texas, 344 U.S. 199 (1952), evidence obtained by state officials from a wiretap violating § 605 of the Federal Communications Act was held admissible in a state criminal proceeding. See generally MAGUIRE, EVIDENCE OF GUILT (1959); Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure,* 1961 U. Ill. L. F. 78.

47. Judges Brenner, Christ and Hopkins have so viewed the right of privacy in Sackler v. Sackler, 33 Misc. 2d 600, 602, 224 N.Y.S. 2d 790, 792; 16 App. Div. 2d 423, 431, 229 N.Y.S. 2d 61, 69 (1962).

officials. The impact of an invasion by the state is heightened by the public contempt aroused by the spectacle of government attempting to enforce certain rights by violating others.[48] In the words of Mr. Justice Brandeis,

> If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.[49]

The seriousness of this misconduct is indicated by the belief that when unchecked, unconstitutional searches are not an occasional but a regular police practice.[50] It seems doubtful, even in the crowded conditions of twentieth century life, that the right to be free of private invasions, such as Mr. Sackler's, is as great a concern to society as the right to live beyond the arbitrary reach of the state.

It may be however, that New York's application of its "unreasonable search and seizure statute" to private individuals as well as public officials represents that state's recognition of a right of absolute solitude and its refusal to differentiate between public and private invasions of privacy. But before resort to such an extreme measure as exclusion of evidence to deter such invasions, it should be shown that less costly methods are inadequate. While criminal statutes penalizing unauthorized entries into private homes apply to police officers as well as to private citizens,[51] it is widely recognized that police are rarely prosecuted under such statutes.[52] The victims of unconstitutional police behavior will seldom press criminal charges.[53] The fear of subsequent police harassment may be a discouraging factor, especially if the victim is not tried and imprisoned; if he is imprisoned, the procedural difficulties involved in pressing charges make a suit almost impossible.[54] Since prosecutors may have participated directly or indirectly in the wrong and generally have an interest in obtaining the cooperation and good will of the police, they are likely to be tolerant of overzealous and even malicious law enforcement.[55] Furthermore, a jury may sympathize with, and be unwilling to sanction, policemen who it feels were guilty of little more than an excess of fervor. This is especially true if, as is

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48. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, 912 (1955); State v. Owens, 302 Mo. 348, 376, 259 S.W. 100, 108 (1924). *But see* Herrscher v. State Bar of Cal., 4 Cal. 2d 399, 412, 49 P. 2d 832, 838 (1935).

49. Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion of Mr. Justice Brandeis).

50. See Specter, *Mapp v. Ohio: Pandora's Problems For the Prosecutor* 111 U. PA. L. REV. 4-6 (1962). Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319 (1962).

51. See the state statutes listed in Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961). In addition there are criminal statutes explicitly prohibiting police misconduct. See, *e.g.,* 62 Stat. 803 (1948), 18 U.S.C. 2236 (1958).

52. Mapp v. Ohio, 367 U.S. 643, 652 (1961). See also People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493, 494 (1955) (dealing with the analogous situation of illegal arrests).

53. MAGUIRE, EVIDENCE OF GUILT § 502 (1959).

54. Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493, 507-08 (1955).

55. *Id.* at 494-95.

often the case, the officer presents a favorable image in contrast to the blackguardly suspect.[56] At the same time, it is not likely that civil damage suits by the victims of official misconduct [57] provide much of a deterrent against police misconduct. Aside from the presence of the same factors which inhibit victims of police wrongs from pressing criminal charges, the nearly judgment-proof status of policemen renders it unlikely that a significant recovery will result.[58]

While the same factors which make ordinary criminal and civil deterrents against police trespasses ineffective do not operate in the case of private intrusions,[59] other inhibiting factors may be present in the latter case; presumably, if the deterrents presently available were completely effective, cases like *Sackler* would not arise. Private trespassers may believe the prosecutor will consider their infraction too minor to merit the institution of a criminal action or they may calculate the gains from a civil suit to be more than the criminal penalty imposed for breaking and entering. Similarly, a private trespasser might hope to escape civil liability in excess of the sum he hopes to win because actual damages of the trespass and search for which the victim can claim compensation are usually insignificant,[60] and punitive damages may be avoided by "justi-

56. *Id.* at 500.

57. Wolf v. Colorado, 388 U.S. 25, 42-44 (1949) (dissenting opinion of Justice Murphy); Foote, *supra* note 53. Comment, *Judicial Control of Illegal Search & Seizure*, 58 YALE L.J. 144, 151 (1948). *But cf.* Monroe v. Pope, 365 U.S. 167 (1961). For a discussion of the deterrent function of punitive damage awards see 2 HARPER & JAMES, TORTS § 25.1 (1956); MCCORMICK, DAMAGES § 77 (1935); PROSSER, TORTS § 2, at 9 (2d ed. 1955). See generally Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

58. Foote, *supra* note 53, at 499.

59. The prosecutor would not be dissuaded from bringing an action by virtue of an identification of interests with the law-breaker and the victim should have little reluctance to press charges unless there is reason to fear private harassment. In addition, tort suits against private law breakers seem more likely to result in substantial awards than those against police. Compensatory awards for the physical damages and perhaps mental suffering which resulted from the tortious method of obtaining evidence could be supplemented by punitive damages which are imposed upon deliberate wrongdoers for the purpose of punishing them and deterring others from committing similar wrongs.

For a discussion of damages awarded for mental distress as a result of invasions of privacy see, *e.g.*, Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); *Developments in the Law, Damages—1935-1947*, 61 HARV. L. REV. 113, 139 (1947). See generally 2 HARPER & JAMES, TORTS §§ 9.1, 9.5-.7 (1956); MCCORMICK, DAMAGES § 77, at 276-77 (1935). While punitive damages set by juries provide a more flexible tool than the exclusionary rule whereby part of the community is allowed to weigh the circumstances of each case and allot its sanctions accordingly, this remedy has often been criticized for providing too loose a standard and for being subject to many abuses. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1179-80 (1930); Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419 (1908). Punitive damages have been found particularly necessary in cases where the tort-feasor gains more from his tort than the amount of compensation to the plaintiff. Morris, *supra* at 1185. Yet, in the situation where evidence is seized in the commission of a tort the gain is obtained through the subsequent law suit and no cases have been found in which the amount of a lost law suit were requested or awarded as proximately caused damages of a tort.

60. While actual damages from a trespass will always support a cause of action for punitive damages, the majority view is that a suit for nominal damages will also suffice. MCCORMICK, DAMAGES § 83 (1935).

fying" the search in the eyes of the jury by reference to the wrong for which the evidence was sought. Although available sanctions for private trespasses may not be wholly adequate to deter non-official invasions of privacy, since the penalties imposed are not sufficient to remove the incentive to secure evidence in all cases, nevertheless these sanctions seem more effective than those available against police invasions of privacy.

In both cases the exclusionary rule operates as a wholly effective deterrent against intrusions made to seize evidence because, by excluding the evidence from court, the rule deprives the intruder of the benefit he had hoped to gain —a chance of victory in his lawsuit.[61] The effect is that the magnitude of the penalty exacted by the rule is equated with the issue being tried, rather than the seriousness of the wrong committed by the party who seized the evidence.

Applying such a varying penalty to the state may not be disturbing, since the high standards imposed on official conduct often lead to procedural rules—especially in criminal cases—in which certain kinds of misbehavior deprive society of an opportunity for an otherwise warranted conviction regardless of the seriousness of the offense charged.[62] Emphasis on the necessity of proper behavior by police and the necessity of strict adherence to fair procedures in the criminal law afford a reasonable basis for a judgment that prevention of police misbehavior is more important than any given conviction; this basis seems lacking where private intrusions or individual civil suits are involved. Furthermore, where a penalty has a direct effect on an individual,[63] which is not the case where society as a whole pays for "the constable's bungle,"[64] the importance of meting out fair treatment should counsel against the imposition of varying penalties for the same offense.

Although the considerations underlying the federal exclusionary rule do not appear to warrant its extension to cases of evidence unlawfully seized by private persons and submitted in civil or criminal suits, the question of whether an exclusionary rule to govern such cases is justified, independent of the rationale of the federal exclusionary rule, remains.[65] The formulation of an

61. It must be admitted, however, that an exclusionary rule would only deter future private searches made by persons intending to find evidence and would not deter illegal entries or searches in which evidence useful in a civil suit is found unwittingly. For an appraisal of the deterrent effect of a state's adoption of the exclusionary rule, see Note, 9 STAN. L. REV. 515 (1957); Barrett, *Exclusion of Evidence Obtained by Illegal Search: A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 588-92 (1955).

62. See, *e.g.*, McNabb v. United States, 318 U.S. 332 (1947).

63. The exclusion of evidence has long been viewed as an addition to legislatively prescribed penalties for individual misconduct. Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897).

64. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926). See also Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144 (1948).

65. In the past, courts have independently developed procedural rules regulating a tortious party's chances for successful litigation. The "clean hands" doctrine, applied by equity courts, deprives the plaintiff of his alleged cause of action if he has obtained his

exclusionary remedy to further the policies of the New York Civil Rights Act may be objected to on the grounds that it is not a judicial function to add remedies to those provided by the legislature for violations of statutory prescriptions. But courts have long awarded civil remedies to individuals who fall within the class of persons intended to be protected by such prescriptions.[66] Thus, for example, violations of traffic laws have been found to be evidence of negligence or per se negligence in tort actions.[67] Similarly the anti-fraud provisions of the SEC statutes, which vest sole powers of enforcement in the Commission, have been found to warrant relief to investors injured by violations of these provisions.[68] Therefore it would seem the argument premised on the maxim *expressio unius exclusio alterius* is as unpersuasive in the case of remedies for violations of the New York Civil Rights Act as it is in these other

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"right" by inequitable means. See 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed. 1941). However, courts have placed "reasonable limitations" on the clean hands doctrine by requiring that the plaintiff's hands be "clean" only in connection with the transaction upon which his cause of action is based. See, *e.g.*, Junkersfeld v. Bank of Manhattan Co., 250 App. Div. 646, 295 N.Y. Supp. 62 (1937). Similarly, the doctrine of equitable estoppel requires that the wrongdoing plaintiff forfeit his cause of action only if his wrong is misrepresentation, knowingly made, upon which the defendant significantly relied to his detriment. Gregg v. Von Phul, 68 U.S. (8 Wall.) 274 (1863). In keeping with the "clean hands" rationale, where a plaintiff fraudulently lures a defendant into a jurisdiction, the courts of that jurisdiction often dismiss the plaintiff's claim. See, *e.g.*, Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937); Dunlap & Co. v. Cody, 31 Iowa 260 (1871); Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539 (1902). In criminal cases, however, where the state has forcibly brought the defendant within its borders, the courts have recognized their power of jurisdiction, thus arriving at an opposite result from that achieved by the Weeks and McNabb rulings. See, *e.g.*, Ker v. Illinois, 119 U.S. 436 (1886) (rejecting plea based on noncompliance with extradition treaty and violation of U.S. Constitution); Mahon v. Justice, 127 U.S. 700 (1888) (rejecting plea based on extradition clause of the U.S. Constitution); Frisbie v. Collins, 342 U.S. 519 (1952 (rejecting plea based on violation of Federal Kidnapping Act). See Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953). These holdings can be criticized for their failure to use the court's power of denial to deter police kidnappings as it has been used to deter unreasonable searches and seizures. However, the rationale employed to justify the court's asserting its jurisdiction over an illegally seized res in forfeiture proceedings may be applicable here. See *supra* note 35 and accompanying text.

66. See, *e.g.*, Couch v. Steel, 3 E. & B. 402, 118 Eng. Rpt. 1193 (Q.B. 1854).

67. Although most statutes proscribing standards of conduct do not mention tort damages, courts in the past have implied a provision for civil liability and today the majority of courts find a party's violation of a criminal statute negligence per se and the minority regard such a violation as evidence of negligence to be weighed by the jury. Thus courts have fashioned penalties which are imposed in the course of civil litigation for violations of statutes which provide no civil remedies, See generally 2 HARPER & JAMES, TORTS § 17.6 (1956); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933).

68. See, *e.g.*, Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 (2d Cir. 1951); Fratt v. Robinson, 203 F.2d 627, 631-33 (9th Cir. 1953); and see 2 LOSS, SECURITIES REGULATIONS 938 (2d ed. 1961), 3 *id.* at 1763-71. See also Baird v. Franklin, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944) (Clark, J., dissenting).

situations. For the assumption in these other cases, that the legislature when proscribing particular penalties rarely is aware of the question of private remedies and therefore expresses no intent as to the inclusion or preclusion of such remedies, would seem to be equally tenable in deciding whether to grant private remedies under the New York Civil Rights Act. But precedent for this judicial function does not necessarily warrant an exclusionary rule for violation of this Act.[69]

The question of whether the exclusionary remedy should be prescribed by the courts would seem to depend on the policy behind the Civil Rights Act, the availibility of other remedies, and the impact of this particular form of remedy on other legislative policies, such as those embodied in the New York divorce laws. As construed by the New York courts, the New York Civil Rights Act represents a legislative determination that invasions of privacy, whether by police officials or private citizens, are equally reprehensible. This policy would, of course, be furthered by the exclusion of evidence obtained through a violation of the statute, just as the policy of traffic laws or the SEC anti-fraud provisions is effectuated by private damage suits. But the particular form of the remedy here—exclusion rather than monetary damages—involves other considerations absent from the SEC and ordinary tort cases. In granting monetary relief in the latter cases, the objective of compensation of the person suffering injury from the violation of statutes determines the amount of damages recovered in such actions.[70] Thus the amount of damages awarded

69. Admittedly, some rationalizations for the common law doctrine admitting illegally secured evidence such as the avoidance of delay in trying the main issue, and the requirement of formal complaints of all issues to be tried may not be persuasive in the light of modern procedural reforms, especially discovery and counter claim. Liberal methods of discovery are provided by Rule 34 of the Federal Rules of Civil Procedure which states that upon a showing of good cause and notice to the other parties, any party to a pending action may seek a court order requiring any other party to produce documents and tangible evidence or to permit inspection of the same or of physical premises and property within his control. The showing of good causes requires an affirmative showing that the thing sought will aid the moving party in the preparation of his case, but it need not be shown that it would be admissible evidence at trial. 4 MOORE, FEDERAL PRACTICE §§ 34.08, 34.11 (2d ed. 1960). These broad discovery devices have been adopted by some states in their rules of civil procedure and their availability would seem to greatly weaken any justification for illegally obtaining evidence. When evidence could be obtained through legal means, its exclusion from a civil suit followed by voluntary non-suit without prejudice would not result in the loss of a chance to win the law suit which would otherwise result from exclusion. Because courts are no longer adverse to trying more than one issue in a single proceeding (see FED. R. CIV. P. 13b), even though they arise from separate sets of facts, the defendant trespass-victim might enter a permissive counter claim in the same action for which evidence was illegally sought if he felt that the circumstances might render the jury particularly favorable to him. If not, the defendant-victim could request the court to use its discretion under Rule 42(b) [FED. R. CIV. P. 42(b)] and allow him to assert his claim in a separate trial. If at this trial, evidence of the outcome of the former suit were to be considered prejudicial by the court, the defendant might avoid jury bias in obtaining compensation for the trespass.

70. See, *e.g.*, Hawkins v. Merrill Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W.D. Ark. 1949); Appel v. Levine, 85 F. Supp. 240 (S.D.N.Y. 1948); cases cited in note 68 *supra*. In the case of tort actions for statutory violations recoveries are not limited to

is determined by the quantum of injury suffered by the victim. Where the remedy takes the form of exclusion, however, the purpose of compensation does not seem to be present, for it is difficult to characterize possible victory or defeat in a lawsuit resulting from the unlawfully obtained evidence as the injury suffered by the victim of the illegal search.[71] Moreover, the severity of the penalty imposed on the person seeking to introduce the evidence depends upon the amount at stake in the lawsuit in which exclusion would forfeit the plaintiff's cause of action or defendant's otherwise valid defense. Thus the primary objection to this result is that it represents a sanction that does not vary either with the offensiveness of the conduct or with the amount of injury suffered by the person the statutory prohibition against unreasonable searches seeks to protect. Finally, unlike private relief utilized to supplement criminal or other statutory remedies, the exclusionary rule, because it increases problems of proof at trial, may have the effect of thwarting other legislative policies. In New York, for example, exclusion might indeed have such an effect on the policy embodied in the divorce laws, which permit a divorce only on the ground of adultery.[72] Where there are alternative remedies, which vary in magnitude according to the undesirability of the offending behavior or the damage caused and which do not obstruct the attainment of other legislative policies, employment of a penalty with such an arbitrary impact as that of a common law exclusionary rule seems unwarranted.

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compensatory damages if a case for punitive damages can be made out, but in theory at least, this additional recovery is determined by the reprehensibility of the offender's conduct and the amount of penalty necessary to deter such conduct. See note 58 *supra*.

71. Since the law suit is instituted to "right" a previous wrong which may or may not have taken place in fact, recovery in that suit may not legally be said to result from the introduction of evidence which attests to the factual existence of the wrong, although admission of the evidence may be a factual "but for" cause of recovery.

72. N.Y. Civ. P. Act. § 1147. See also N.Y. Dom. Rel. Law § 7 & 7a.

Moreover, by compounding the problems of proof inherent in these cases, the effect of the exclusionary rule in the *Sackler* situation would probably be to render extremely difficult, if not to preclude, a great many divorce suits in New York.