FIRST DRAFT TO BLACK, J.

4/22/61

SUPREME COURT OF THE UNITED STATES

No. 236.--October Term, 1960.

Dollree Mapp, etc.,	)	
	)	
Appellant,	)	On Appeal from the
	)	Supreme Court of Ohio.
v.	)	
	)	
Ohio.	)	

[April , 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

As officially stated in the syllabus to the opinion supporting the judgment of the Supreme Court of Ohio in this case, brought here by appeal,[1/] the court ~~here~~ found that appellant's conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home. . . ." 170 Ohio St. 427, 166 N.E. 2d. 387. It is said that although ~~according to decisions of this Court~~ the search violated the Fourth Amendment, the use of the unconstitutionally seized evidence at trial is not constitutionally prohibited, citing Wolf v. Colorado, 338 U.S. 25 (1949). ~~In that case~~ There this Court did indeed hold, after reviewing the attending circumstances, "that in a prosecution in a state court for a state crime the Fourteenth

Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. The present case once again presents for our consideration the recurring question of whether it is now timely to review that holding.

I.

In the dozen years since Wolf was decided, there has occurred a series of events which undercut the continued vitality of the considerations which found expression in its basic reasoning. There it had been found that "The contrariety of views of the states" on the adoption of the exclusionary rule of Weeks was "particularly impressive." The Court said that it could not "brush aside the experience of the states which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overruling the relevant rules of evidence." At pp. 31-32. As a consequence, the Court held that although the core of the Fourth Amendment was enforceable against the states through the ~~Fourteenth~~ Fourteenth Amendment, due process of law did not then require the states to adopt the exclusionary rule of Weeks. Now, however, the scales are weighted in favor

of the Weeks doctrine. Of the 37 states passing on the Weeks exclusionary rule since the Wolf decision, 21 have either adopted or adhered to the rule. While in 1949 almost two-thirds of the states were opposed to the rule, now 57% of those passing upon it approve. Thus, while 66% admitted the evidence in 1949, only 48% presently adhere to that rule. See Elkins v. United States, 364 U.S. 206 (1960), Appendix pp. 224-232. Significantly, among those now following the rule is California which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." People v. Cahan, 44 Cal. 2d 434, 282 P2d 905, 911 (1955).

The second basis elaborated in Wolf in support of its doctrine is that "other means of protection" can be afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by statistics from the City of Chicago where thousands of illegal searches and seizures by police officers occur each year.[2/] Still only three cases from

2. We have a law review article that points up that some 7-8 thousand unlawful seizures made there each year.

that state have come to our attention since Wolf
~~been only ___ cases in Illinois Courts, and only one case [Monroe~~
~~v. Pape, 365 U.S. 167] has come to this Court~~ in which private
remedies ~~have been~~ were pursued in an effort to redress such invasions
of privacy.* 3/ The obvious futility of any longer seeking to relegate
the Fourth Amendment to the protection of other remedies was
anticipated by Mr. Justice Frankfurter, dissenting in Harris v.
United States, 331 U.S. 145, 156 (1947): "Freedom of speech, of
the press, of religion easily summon powerful support against en-
croachment. The prohibition against seizure is normally invoked
by those accused of crime, and criminals have few friends;" and
by Mr. Justice Jackson, dissenting in Brinegar v. United States,
338 U.S. 160, 181 (1949): "Courts can protect the innocent against
such invasions only indirectly and through the medium of excluding
evidence obtained against those who frequently are guilty."

It is hopelessly impractical to consider formulation of an
effectual body of public opinion ~~into~~ as a remedy practicably available to
those who suffer unconstitutional invasions of their privacy. They
are in large measure criminal defendants, and more unlikely

3/ Monroe v. Pape, 365 US 167 (1961), Jennings v. Nestos, 217 F 2d 153 (C.A. 7th Cir. 1954), and Bucher v. Krause, 200 Fed 576 (C.A. 7th Cir. 1952).

*We are getting statistics on N. Y. and Chicago.

organizers of an effective and respectable public opinion would be difficult to find, for "~~A~~ [a] rule protective of law abiding citizens is not apt to flourish where its advocates are usually criminal." Draper v. United States, 358 U.S. 307, 314 (1959) (dissenting opinion).

Not long after the Wolf decision, in Irvine v. California, 347 U.S. 128 (1954), this Court indicated that the States had not yet had "adequate opportunity to adopt or reject the doctrine" of Weeks since "~~N~~ [n] ever until June 1949 did this Court hold the basic search and seizure prohibition in any way applicable to the states under the Fourteenth Amendment." At p. 134. Only last Term in Elkins the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement in Wolf "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the Weeks case. ~~(~~At p. 213.~~)~~ At the same time, as the Court pointed out, "the underlying constitutional doctrine which Wolf established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" undermined the "foundation upon which

the admissibility of state seized evidence in a federal trial originally rested. . . ."[1] This "constitutional doctrine of Wolf," the Court added, "operated to undermine the logical foundation of the Weeks admissibility rule. . . ."[2] The Court, therefore, held that Weeks and Wolf together rendered inadmissible in a federal trial all evidence obtained by an unconstitutional search and seizure regardless of its source. Thus was eliminated one basic criticism of the federal rule as characterized by Mr. Justice (then Judge) Cardozo that "The Federal rule as it stands is either too strict or too lax." People v. Defore, 242 N. Y. 13, 22 (1926).

Among the more than a score of cases since Wolf, this Court has corrected the logical faults mentioned in Irvine* as reason enough then to further postpone evaluation of the need for constitutionally documenting application of the Weeks rule to the states. For, as of that time this Court had not "seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong," 347 U.S. at p. 136, but only last year that objection was devitalized by our decision in Elkins. Similarly, as of the

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*The Court said: "To impose upon them (the States) the hazards of federal reversal for non-compliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified." At p. 134.

Irvine decision, the limits on availability of the remedy of exclusion required "some proprietary or possessory interest in that which was unlawfully searched or seized," at p. 136, whereas today, in light of Jones v. United States, 362 U.S. 257 (1960), all that is required is that the person asserting the right to exclusion have been "legitimately on the premises." At p. 267. Not long after Irvine, and as a consequence of further delaying application of the Weeks rule to the States, we were obliged through the use of disciplinary power to require injunctive action against federal agents in order to prevent state judicial use of evidence previously found unlawfully seized and not admissible in a federal court. Rea v. United States, 350 U.S. 214 (1956). But even that use of our supervisory power is often ineffective, Wilson v. Schnettler, 365 U.S. 585 (1961), and points up the more the hazards present in the recognition of a double standard in the enforcement of Fourth Amendment rights.

II.

In fact, the only remaining basic incongruity now facing us is the double standard that this Court tolerates permits in enforcement of the Amendment. A federal prosecutor may make no use of evidence unconstitutionally seized, but a state's attorney operating under the enforceable prohibitions of the same Amendment, may. Thus the state, by admitting evidence unlawfully seized, indirectly, but nonetheless actually, serves to encourage disobedience to the federal Constitution which it is bound to uphold. Moreover, as was said in Elkins, "the very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." At p. 221. Yet the double standard now recognized hardly puts such a thesis into practice. In non-exclusionary states, federal officers, being human, are thus invited to, and do, as our cases indicate, step across the street to the state's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence is then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search were inadmissible in both state and federal

courts, this inducement to evasion would be eliminated. Federal-state cooperation in the solution of crime under constitutional standards would be promoted, if only by joint recognition of a then mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." Miller v. United States, 357 U.S. 301, 313 (1958). Barring shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. Cf. Byars v. United States, 273 U.S. 28 (1927); Anderson v. United States, 318 U.S. 350 (1943).

There are those who say, as did Mr. Justice (then Judge) Cardozo, that under such a doctrine "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. at 21, 150 N.E. at 587. In some cases this will undoubtedly be the result, but "The Amendment's protection [can be] . . . made effective

for everyone only by upholding it when invoked by the worst of men." Abel v. United States, 362 U.S. 217, 248 (1960) (dissenting opinion). And more importantly, as was said in Elkins, "There is another consideration -- the imperative of judicial integrity." The criminal goes free, if he must, but it is under the law. Even Titus has rights.

To say that a government should be able to use unconstitutionally seized evidence by its agents because there is no fundamental prohibition against its use of evidence seized unlawfully by private persons, is to ignore the experience of ages. What can destroy a government more quickly than its failure to observe its own laws, or worse, its desregard of the charter of its own existence? As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 277 U.S. 438, 469 (1928): "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every-man to become a law unto himself; it invites anarchy."

Seventy-five years ago, this Court in Boyd v. United States, 116 U.S. 616, 630 (1886), held that the doctrines of the Fourth Amendment

> "apply to all invasions, on the part of the government and its employees, of the sanctity of a man's home and the privacies

of life. It is not the breaking of the doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."

If that be truly the case, does it adequately safeguard the "indefeasible right of personal security" to relegate the individual who suffers its invasion to a suit for damages for the "breaking of doors"? Less than thirty years later, in Weeks v. United States, supra, the Court stated explicitly that

> "[T]he Fourth Amendment . . . put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints . . . and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." At p. 383.

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to

be secure against such searches and seizures is of no value, and, so far as those placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At pp. 391-393.

This Court has ever since required of federal law enforcers a strict adherence to this approach to the Fourth Amendment. More than a mere rule of evidence, the mandate of the Weeks case is a clear, specific, and ~~constitutionally~~ required "judicial implication" of a safeguard without insistence upon which the Fourth Amendment is reduced to "a form of words." Holmes, J., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). It means, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts. . . ." Weeks v. United States, supra, at 392.

be secure against such searches and seizures is of no value, and, so far as those placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At pp. 391-393.

This Court has ever since required of federal law enforcement officers a strict adherence to this approach to the Fourth Amendment. As was pointed out in Wolf, the freedom from unreasonable searches and seizures is "implicit in the concept of ordered liberty," i.e., without which a free society could not exist. If the Fourth Amendment is not to be reduced to "a form of words," Mr. Justice Holmes in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), it must be enforced. Since no other methods of sanction have been at all successful, the remedy of exclusion must be available by "judicial implication." A "conviction by means of unlaw seizures . . . should find no sanction in the judgments of the courts . . . ." Weeks v. United States, supra, at 392.

In 1949 the Court was of the opinion that the sanction of exclusion of evidence unconstitutionally seized was not then necessary to meet the "minimal standards assured by the Due Process Clause." 338 U.S. at p. 27. But as we have pointed out, conditions and circumstances have changed and

> "[B]asic rights do not become petrified as of any one time. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing, as it does, a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights." Wolf v. Colorado, supra, at p. 27.

What has occurred in the course of maturation of the Wolf doctrine makes unnecessary our further hesitation "to treat this remedy as an essential ingredient of the right." Ibid. If as of Irvine the time was not yet ripe, the reasons for that judgment are neither so plausible nor so persuasive today. It is time to go beyond Wolf, to make a further "advance in . . . standards of what is deemed reasonable and right," to recognize as necessary to the proper administration of justice by dual sovereigns that there be a single standard under which the fundamental right of the Fourth Amendment be enforced.

We know of no restraints being placed upon the enforcement of any other basic right. The right to privacy, "second to none in the Bill of Rights," Harris v. United States, supra, at 157 (dissenting opinion), would stand in marked contrast to all other rights "basic to a free society." This Court has not hesitated to enforce as strictly against the states as it does against the federal government the right of free speech and of a free press, the right to a fair trial, including, as it does, the right not to be convicted by use of a coerced confession, however "logically relevant" it be, and without regard to its reliability. Cf. Rogers v. Richmond, 365 U.S. 534 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to whether quantitatively "the incidence of such conduct by the police" would justify a state court in choosing some "deterrent remedy" other than total exclusion.

Our cases show that the honest and real enjoyment of such rights is wholly determined by the aggregate strength of the available remedies and enforcement devices which an individual and his

community are able to muster in their defense. In not one has the Court exhibited such a high degree of judicial self-abnegation as would be involved in our further hesitation to take a step made necessary by Wolf and promised by Irvine. In violations of what other right do we abide unfettered judicial employment of the fruits of official lawlessness? In none, save those of the "core of the Fourth Amendment." The ignoble short-cut to conviction left open to the state tends in itself to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized as was done in Wolf that the right is nothing less than constitutional in origin, we can no longer abstain from drawing upon the same source for its safeguard. No longer can we permit it to be revocable at the whim of every policeman who, in the name of law enforcement itself, chooses to suspend its enjoyment.

Reversed.