Utilization of Rules of Evidence in Federal Courts To Supervise Conduct of Federal Law Enforcement Officers

Edward P. Lyons, Jr.
UTILIZATION OF RULES OF EVIDENCE IN FEDERAL COURTS TO SUPERVISE CONDUCT OF FEDERAL LAW ENFORCEMENT OFFICERS

EDWARD P. LYONS, JR.*

It was an axiom of the common law of evidence that, "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." The legal rationale for this principle was that an objection to the introduction of evidence raised only questions of competency, relevancy or materiality, and that courts should not be diverted from the main issues of the case by the necessity of determining the legality of the means by which evidence had been obtained. In its application to criminal trials, the rule was buttressed by strong considerations of public policy, for it was thought that the exclusion of illegally obtained evidence would unreasonably hinder the punishment of criminals. This view was reconciled with the principle that law enforcement officers are to be held accountable for their illegal acts, by the theory that their punishment would come through a separate criminal or civil action at the instance of the individual injured, while the current of criminal justice flowed on unimpeded. The universal respect in which this common law precept was held is evidenced by the fact that, until comparatively recent years, it stood unblemished by qualifications or exceptions, a phenomenon all too rare among legal principles.

In view of the public policy served by the application of this principle to criminal prosecutions, it was thought that it was most impregnable in the criminal field. However, since the beginning of the present century, the Supreme Court of the United States, motivated by countervailing considerations of policy, has seen fit to encroach upon

*Member of the Memphis, Tennessee, Bar; formerly editor of the WASHINGTON AND LEE LAW REVIEW.

8 Wigmore, Evidence (3d ed. 1940) 5.
9 For a discussion of the common law rule, see 8 Wigmore, Evidence (3d ed. 1940) § 2183.
the common law rule by appending major exceptions thereto. These rules, applying only to criminal trials, render inadmissible in any federal court evidence which was obtained by federal officers by means of certain interdicted practices. As yet, departures from the orthodox principle have been limited in scope. However, recent opinions suggest that these already established exceptions may be indicative of a new judicial doctrine, which could substantially obliterate the common law rule in federal criminal trials. Since the nature and progress of this doctrine has been determined by the uncertain criterion of public policy, an inquiry into its origin and development is prerequisite to an appreciation of its present status and future implications.

The seeds of legal heresy were sown in 1886, by the much maligned Supreme Court case of Boyd v. United States. The classic significance of this case lay, not in its holding, but in the novel theory advanced in its support. In the Boyd opinion, the Court evolved an unique dialectic which required conjunctive application of the Fourth and Fifth Amendments. Since the Fifth Amendment prohibition against compulsory self-incrimination had long been interpreted to exclude evidence having such a tendency, this theory provided legal justification for exclusion of evidence obtained by violations of the Fourth Amendment, which contains no such exclusionary mandate.

116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746 (1886).
4In the Boyd case, defendant questioned the validity of a federal statute which authorized a federal judge to order the production of a party's private papers and records in court. The Supreme Court held the statute unconstitutional insofar as it applied to criminal or quasi-criminal proceedings, and declared that the trial court had committed reversible error by admitting evidence through compliance therewith.

It is now generally recognized that this result was proper in view of the Fifth Amendment guarantee against compulsory self-incrimination. See 8 Wigmore, Evidence (3d ed. 1940) § 2264.

First, the Court established, by means of historical references, that the guarantee against unreasonable searches and seizures in the Fourth Amendment was so related to the guarantee against compulsory self-incrimination in the Fifth Amendment, as to make the two clauses mutually explanatory.

It then decided that a court order compelling the production of private papers was in effect a search and seizure, and that, insofar as such a procedure was utilized in criminal trials, it was for a purpose prohibited by the Fifth Amendment—i.e., self-incrimination.

From this the Court reasoned that, in view of the historical affinity of the two Amendments, a search and seizure for a purpose violative of the Fifth Amendment amounted to an "unreasonable" search and seizure within the meaning of the Fourth Amendment. Hence, that the statute providing for such a procedure was unconstitutional under both the Fourth and Fifth Amendments, and that evidence so obtained must be excluded under the Fifth Amendment.
In 1914, despite its repudiation by the intervening Adams case, the Boyd opinion was seized upon by the Supreme Court as a precedent, and its implications converted into law. In Weeks v. United States, property belonging to defendant had been seized during his absence by federal officers acting without a warrant. Before trial, defendant made a motion for the return of all this property, relying on the protection of the Fourth and Fifth Amendments. As to property to be introduced in evidence at the trial, this motion was denied, and he appealed to the Supreme Court on this ground. The Court limited the Adams decision to its facts, ruled that the warrantless search and seizure here involved was "unreasonable" within the meaning of the Fourth Amendment, and, citing the Boyd case, held that defendant's motion should have been granted. Thus, under the Weeks holding, property obtained by means of a warrantless search and seizure is not only inadmissable in evidence against the defendant, but must be returned to him, provided he makes a pre-trial motion to this effect.

The philosophy underlying the Weeks decision is more significant than the reasoning induced by that philosophy. The Court felt that vital constitutional guarantees had been violated by federal law enforcement officers, and that it was the duty of the Court to implement these guarantees by refusing to be a party to their violation. The "misguided sentimentalism" of which the Court has been accused, is apparent in its opinion: "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 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to pun-

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6Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575 (1904). Defendant alleged that during a search and seizure under warrant, certain papers not covered by the warrant had been seized. He contended that, under the due process clause of the Fourteenth Amendment, he was entitled to protection against state action comparable to his protection against federal action under the Fourth and Fifth Amendments. Hence, that, in view of the Supreme Court's interpretation of the Fourth and Fifth Amendments in the Boyd case, these papers were improperly admitted in evidence. On appeal, the Supreme Court expressed reluctance to detract from the authority of the Boyd opinion, but ignored its holding by refusing to consider the constitutional question. Rather, it based its affirmance squarely on the common law rule that, "In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained." 192 U. S. 585, 588, 24 S. Ct. 372, 374, 48 L. ed. 575, 579 (1904).


8See 8 Wigmore, Evidence (3d ed. 1940) § 2184.
ishment, 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." In short, the Supreme Court weighed the individual rights guaranteed by the Fourth Amendment against the social benefits to be derived from unhindered criminal prosecutions, and concluded that the former were worthy of the greater solicitude.

Such was the origin of the Supreme Court's first encroachment on the common law rule that the means used in obtaining evidence do not affect its admissibility. By its Weeks decision the Court established a significant exception to this rule, and espoused the hitherto heretical principle of enforcing constitutional directives by means of a judicially established rule of evidence.

The limitations of the Weeks rule should be emphasized. It purports to be no more than a rule of evidence which renders inadmissible any evidence obtained by means of a warrantless search and seizure. Since its purpose was to implement the Fourth Amendment, its application is limited to federal courts, and to evidence obtained by federal officers. Of the several protections in the Fourth Amendment, the rule effectuates only the search and seizure provision. Hence, refinement of the Weeks rule has come about through a line of cases considering what specific acts constitute an "unreasonable" search and seizure.

While the Weeks decision went no further than the search and seizure clause of the Fourth Amendment, the implications of the opinion were limitless, and it was inevitable that defendants would seek to extend its principle. It is the purpose of the writer to trace the
persistent, though violently opposed, extension of the exclusionary sanction ordained by the Weeks case to its present scope, and to point out his basis for believing that further extensions of the principle are to be expected.

Extension of the Weeks rule could come about in two ways: by a liberal interpretation of the Fourth Amendment which would broaden the scope of its protection, or by a frank overstepping of constitutional bounds in order to apply the exclusionary principle to evidence obtained by methods merely violative of statutory prohibitions. In 1928, however, the majority opinion in the Supreme Court case of Olmstead v. United States,14 undertook to block both of these avenues of extension. In this case federal agents had obtained a great mass of evidence proving violation of the National Prohibition Act by means of tapping telephone wires leading from defendants' residences and office. The defendants contended that wire tapping amounted to an unreasonable search and seizure within the meaning of the Fourth Amendment, and that evidence so obtained should have been excluded under the Weeks rule. This contention was rejected by the Supreme Court on the grounds that the wording of the Amendment limited its scope to a search and seizure of tangible things, and that it should not be judicially extended to cover conduct clearly beyond the contemplation of its framers.

An incidental fact in the Olmstead case was the existence of a state statute making wire tapping a misdemeanor, which the federal agents had violated by obtaining evidence in such a manner. Though the effect of this statute was a point not within the terms of the certiorari order, the Court went out of its way to make it clear that the violation of a statute could have no effect on the admissibility of evidence obtained thereby. Chief Justice Taft, speaking for the Court left no doubt as to his determination to maintain the limitations of the Weeks case. He pointed out that, "The Weeks case, announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the Weeks case. [citation omitted] But those who do, treat it as an exception to the general common law rule and required by constitutional limitations." "Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude

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Thus, the majority opinion sought to delineate the permissible bounds of the *Weeks* rule, and to preclude its extension: first, by restricting its application to evidence obtained in violation of the search and seizure clause of the Fourth Amendment, and second, by limiting the scope of this clause to seizures of tangible things.

The *Olmstead* case was, however, a 5 to 4 decision, and the tone of the dissenting opinions revealed a philosophy which would have extended the exclusionary rule to any case wherein offered evidence had been obtained by means which were unconstitutional, illegal, or even unethical. Justices Holmes and Brandeis were the spokesmen for this view, arguing that, independently of constitutional considerations, any evidence obtained by unlawful means should be inadmissible.

The *Olmstead* case thus stands as a pivotal decision in the development of the exclusionary principle now under consideration. The majority stood firm in its basic adherence to the common law rule that illegality in obtaining evidence does not affect its admissibility, while according grudging recognition to the *Weeks* rule as a limited exception not to be extended, and justified only by the exigency of a constitutional mandate. On the other hand, the dissenters, discarding as too restricted the tenuous dialectic of the *Boyd* case, frankly advocated replacement of the common law rule of evidence by a rule of policy which would exclude all evidence obtained by illegal means. Which view would prevail remained to be seen.

That Congressional sentiment disapproved the view of the *Olmstead* majority, at least insofar as wire tapping was concerned, was indicated by Section 605 of the Federal Communications Act of 1934. In the

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16The dissenters were Justices Holmes, Brandeis, Butler and Stone.
Holmes doubted the applicability of the Fourth Amendment to wire tapping, but was of the opinion that the evidence should nevertheless have been excluded, because it had been procured by a method illegal under the state statute.
Brandeis registered an eloquent and exhaustive dissent in which he contended that the Fourth Amendment did cover wire tapping, but that, even if it did not, the government should be denied the benefit of evidence obtained by its agents through criminal acts. He supported this contention by the theory that the government, by making use of such evidence, ratified the criminality of its officers, hence, that the doctrine of clean hands should be invoked against the government insofar as it relied on such evidence to establish its case.
Stone concurred in the opinions of Holmes and Brandeis, while Butler felt that the Fourth Amendment should be construed to cover wire tapping, but refused to consider the collateral question as to the effect of the state statute.
first *Nardone* case, the Supreme Court interpreted this section as a Congressional prohibition against admission of evidence obtained by wire tapping, thus nullifying the holding of the *Olmstead* case. However, the *Nardone* decision purported only to apply the section of the Communications Act which directed that evidence so obtained should be excluded. As yet, no case had gone as far as to implement a *statute* by means of a judicially established rule of evidence.

In the opinion of some, such a case appeared in 1943, when the Supreme Court handed down its controversial decision in *McNabb v. United States*. The court reviewed the convictions of members of the McNabb clan for the murder of a federal revenue officer. After their arrest by federal officers, the defendants had not been taken before a committing magistrate, but had been held incommunicado for periods ranging from four to fourteen hours before arraignment. During this period they were subjected to intermittent questioning, but no significant evidence of physical mistreatment, or threats thereof, appeared. Confessions obtained during this detention constituted the crucial evidence against the defendants, without which their convictions could not stand. Objections to the admission of these confessions had been made and overruled at the trial.

In its opinion reversing the convictions, the Court expressly excluded the necessity of deciding the case on constitutional grounds. Rather, the decision was based entirely on its power to promulgate rules of evidence for federal practice. The Congressional Acts requiring prompt commitment of prisoners were cited, and the confessions held inadmissible, because, "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers .... Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal court would stultify the policy which Congress

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authorized by the sender shall intercept any communication and divulge or publish the... purport, ... of such intercepted communication to any person."


has enacted into law.” Thus, the McNabb decision, for the first time, declared evidence inadmissable because it had been obtained by means violative of a statute. Thereby, the Supreme Court had made its second encroachment on the common law rule.

The rule of the McNabb case seems explicit enough from the opinion. However, a number of federal judges and writers were apparently unwilling to conclude that the Supreme Court really meant what it had said. Consequently, the McNabb rule passed through a period of conflicting interpretations. The opinion seemed to say that confessions obtained during detention in violation of the arraignment statutes must be excluded. Yet, since the Court had dwelt upon the circumstances and length of the detention in the McNabb case, there were grounds for another interpretation. It could be regarded as actually holding that confessions obtained after prolonged detention tended to be involuntary, and would be excluded when it appeared that such was the case. Such an interpretation would have constituted the McNabb rule merely an extension of the long established principle that involuntary confessions are inadmissable because unreliable. Thus, the test for admissibility of confessions would have remained freedom from coercion, and not legality of conduct of the officers who obtained them. Under such an interpretation the McNabb rule would, at most, have raised a presumption of coercion from the fact of illegal detention. At its weakest, it would have made the violation of the commitment statutes merely one factor to be considered in determining whether a confession had been coerced. Whether the McNabb case was to be a precedent-breaking decision of infinite implication, or merely a variation of an established rule of evidence depended on which interpretation prevailed.

In 1945, the Supreme Court, in United States v. Mitchell, handed down its first interpretation of the McNabb decision. The opinion seemed to confirm the “test for coercion” interpretation, and to cast doubt on the propriety of interpreting the decision as a sanction for enforcement of commitment statutes. In this case, the defendant had voluntarily confessed almost immediately after his arrest. Thereafter, he had been held for eight days before being arraigned before a magistrate. His conviction was reversed by the Court of Appeals solely on

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&18 U. S. 332, 344-5, 63 S. Ct. 608, 615, 87 L. ed. 819, 826, (1943). \text{ [italics supplied]} \\
&\text{On the same day that the McNabb decision was handed down, the Court in Anderson v. United States, 318 U. S. 350, 63 S. Ct. 599, 87 L. ed. 829 (1943), made a similar ruling in regard to a confession obtained by federal officers during detention in violation of a state commitment statute.} \\
\end{align*}\]
the grounds that a confession made under such circumstances was inadmissible under the McNabb decision. The Supreme Court reversed the lower court, and ruled that the McNabb holding was inapplicable to the facts of the Mitchell case.

The actual holding of the Mitchell case did not preclude either interpretation of the McNabb rule, for it could be regarded as merely limiting application of the rule to confessions obtained during the actual period of illegal detention. However, the opinion went further than this. It stated that the decisive features of the McNabb case were the "inexcusable detention" coupled with "continuous questioning for many hours under psychological pressure." Such language implied that the McNabb rule was applicable only where other facts indicative of coercion were present, and hence, that freedom from coercion remained the basic criterion of admissibility. This impression was strengthened by the Court's concluding remarks: "Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct."

After the appearance of such dicta in the Mitchell opinion, it seemed that the Supreme Court itself viewed the McNabb decision as having made the violation of the commitment statutes merely a factor to be considered in determining the voluntariness of a confession. The next Supreme Court ruling involving the McNabb rule did nothing to dispel this impression. In United States v. Bayer, the defendant had made a confession before commitment, but this confession was not offered in evidence. Six months later, after proper arraignment and while under no illegal restraint, the defendant made a second confession confirming the admissions of the prior one. The government based its case on this second confession. The Supreme Court held the McNabb rule inapplicable to the second confession, and reversed the Circuit Court of Appeals ruling which had excluded it on that ground.

Here again, from the holding on the facts, the view which the Court took of the rationale behind the McNabb rule is not clear. The second confession might have been admissible either because it was not obtained during the period of illegal detention, or because there was

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no evidence that it was not voluntarily made. However, if the McNabb rule may be avoided by persuading the accused to make, after commitment, a voluntary confession substantially identical to the inadmissible one, it seems that the defendant in effect has the power to waive his rights under the commitment statute. Yet, if the Supreme Court actually intended the McNabb rule to be a means of punishing federal officers for violation of a public law, the defendant should have no such right to waiver, and the confirming confession should also be inadmissible. Thus, even after the McNabb case had been considered by the Supreme Court in two decisions, its rule was still uncertain.

Such was the doubtful status of the McNabb rule when the recent case of Upshaw v. United States came before the Supreme Court. Both the holding and the opinion of this case affirm the interpretation of the McNabb rule as a sanction for enforcement of the commitment statute, and this in such clear and unmistakeable terms as to preclude any other version of the rule. In the Upshaw case, the defendant had been held and questioned by federal officers for 30 hours before arraignment, for the admitted reason that until the end of that period they did not have sufficient evidence to cause a magistrate to hold him. During the course of this pre-commitment questioning, confessions were obtained upon which the government's case depended. Relying on the McNabb rule, defendant objected to the introduction of his confessions in evidence. The trial court overruled defendant's objection on the ground that he had not been unreasonably detained under the circumstances. On appeal to the Circuit Court of Appeals, the government prosecutor admitted that the confessions had been obtained in violation of the commitment rule, and should be excluded. However, the court rejected this admission and affirmed the trial court's ruling.

The Circuit Court of Appeals affirmed the District Court on the express ground that the McNabb rule did not constitute a statutory sanction, but merely provided that illegal detention was a practice which, in conjunction with other factors, might amount to coercion. This position was made quite clear: "If it be granted that detaining

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28Since the date of the McNabb decision, the commitment statutes therein cited, (see note 20, supra) had been superseded by Rule 5 (a) of the Federal Rules of Criminal Procedure, New Title 18 U. S. C. A. § 687 (1946).
Rule 5(a) provides that, "An officer making an arrest...shall take the arrested person without unnecessary delay..." before the nearest committing officer. [italics supplied] Thus, the District Court thought that under the new commitment statute the McNabb rule was not here involved.
him all day Friday was illegal, nevertheless the disclosure he made, not being the fruit of the illegal detention, was relevant and admissible. Being relevant, it could be excluded, as the Supreme Court said of Mitchell's confession, 'only as a punitive measure against unrelated wrongdoing by the police.' We cannot exclude an admissible confession, and so discharge a confessed criminal, 'as an indirect mode of disciplining misconduct.' "31 The court concluded that, "The Supreme Court has never held, as far as we are able to ascertain, that illegal detention of a prisoner, without additional and aggravating circumstances, invalidates a confession which was not induced by it. In fact, the Mitchell opinion indicates to the contrary...."32

The Supreme Court, in a succinct opinion, reversed the Circuit Court of Appeals both as to its holding and its interpretation of the McNabb case. It pointed out the mistake of the lower court in thinking that, "... the McNabb case did no more than extend the meaning of 'involuntary' confessions to include psychological coercion as well as that brought about by physical brutality.... The court also laid stress on the fact that the petitioner's detention unlike McNabb's, 'was not aggravated by continuous questioning for many hours by numerous officers.' " "We hold that this case falls squarely within the McNabb ruling and is not taken out of it by what was decided in the Mitchell case."33

In the Upshaw opinion the Court limited the Mitchell case to its holding on the facts—"that Mitchell's subsequent illegal detention did not render inadmissible his prior confessions." Then, apparently endeavoring to clear up all confusion concerning the McNabb decision, the Court recognized that it had considered the circumstances of the detention in that case, but explained that, "This was done to show that the record left no doubt that the McNabbs were not promptly taken before a judicial officer as the law required,....."34 Lest there be any further doubt, the Court reiterated that, "The McNabb confessions were thus held inadmissible because the McNabbs were questioned while held 'in plain disregard of the duty enjoined by Congress upon Federal law officers' promptly to take them before a judicial officer."35

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33 335 U. S. 410, 412, 69 S. Ct. 170, 171, 93 L. ed. 129, 131 (1948). Justice Reed registered a strong dissenting opinion which epitomizes the arguments of those who oppose the McNabb rule. The Chief Justice, and Justices Jackson and Burton joined in this opinion.
After the *Upshaw* decision there can be no doubt that a majority of the present Supreme Court intends to apply the *McNabb* case according to the original import of its opinion. That is, the fact that a confession was obtained by federal officers while acting contrary to the commitment rule, will be an independent ground for its exclusion. In addition to determining whether the confession was voluntarily made, a federal court must now also determine whether, at the time it was made, the defendant was being held illegally.

Thus, as the law now stands, the defendant in a federal criminal trial has available to him two judge-made exceptions to the common law rule of evidence. Under the *Weeks* decision he may demand the exclusion and return of evidence acquired by means of a search and seizure violative of his rights under the Fourth Amendment. Under the *McNabb* decision he may demand the exclusion of any confession obtained from him during detention violative of the commitment statute.

The opinion in the *Upshaw* case reveals the willingness of the present Supreme Court to apply the exclusionary sanction of the *Weeks* case to the enforcement of at least one statutory directive. An opinion handed down on the same day as the *Upshaw* case gives grounds for speculation as to whether the Court might not be inclined to extend the sanction to cover other illegal acts by federal officers. In *McDonald v. United States,*36 the Supreme Court reviewed the convictions of co-defendants McDonald and Washington for carrying on a numbers game in the District of Columbia. The police had long suspected McDonald of this offense, and on the day of his arrest three policemen had surrounded the boarding house in which he lived. Hearing a noise inside the house which sounded like an adding machine, one officer raised the window of the landlady's room and climbed through. He then admitted the others by unlocking the door of the house. The officers, without either an arrest or search warrant, then searched the house, and, upon looking over the transom of McDonald's room, saw both defendants in the act of adding up the day's receipts, surrounded by policy slips and money. They were thereupon arrested, and the money, policy slips and adding machines seized. McDonald, relying on the *Weeks* rule, based his appeal upon the refusal of the trial court to exclude this evidence and return it to him upon motion.

The Supreme Court, purporting to apply the *Weeks* rule, held that this evidence should have been excluded and returned as McDonald contended, and reversed the convictions of both defendants. The Court was of the opinion that such conduct by federal officers could be justi-

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fied only by an emergency which risked the escape of the suspects, and found no such extenuation present in this case.

The Court apparently found no difficulty in applying the *Weeks* rule to such facts. Upon analysis, however, it is difficult to discover any search which violated the rights of either defendant under the Fourth Amendment. Nor, in fact, does the principal opinion make any effort to show in what respect the officers' acts were unconstitutional as to defendants. However, the concurring opinion of Justice Jackson, in which he undertook to explain wherein this means of obtaining evidence was objectionable, casts considerable light on the philosophy underlying the decision. He admits that McDonald would have had no grounds of complaint had the police been lawfully admitted by the landlady or another boarder, and had thereafter discovered the crime by looking over the transom. However, Justice Jackson suggests that McDonald had a "constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry." In fact, it is implicit throughout his opinion that the evi-

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The view of the dissent, 335 U. S. 451, 461, 69 S. Ct. 191, 196, 93 L. ed. 144, 150 (1948), that there was no such search, seems sound. If official conduct such as was involved in the McDonald case enables a defendant to invoke the Weeks rule, then one or more supposedly well established qualifications of the rule seem overruled thereby.

(1) If the objectionable feature was the unlawful entry and search of other parts of the boarding house, in regard to which McDonald had no right of privacy, then the case would hold that evidence is inadmissible when obtained in violation of the rights of third parties. This result would overrule numerous federal lower court cases which held the Weeks rule applicable only to evidence obtained in violation of the defendant's rights, as well as the rationale of the Supreme Court case of *Goldstein v. United States*, 316 U. S. 114, 62 S. Ct. 1000, 86 L. ed. 1312 (1942), which was based on express approval of these cases.

(2) If looking over the transom of McDonald's room constituted the unconstitutional search and seizure of information, then the Olmstead limitation of the Fourth Amendment to searches and seizures of tangible things seems repudiated. See note 14, supra.

(3) If, as the opinion of the Court suggests, the discovery and seizure of the money, policy slips and adding machine constituted the objectionable search and seizure, then the essential qualification which precludes application of the Weeks rule to visible evidence seized upon a lawful arrest, must be deemed abrogated. On this qualification, see 8 Wigmore, Evidence (3d ed. 1940) § 2184a(3), and cases cited. (The warrantless arrest in the McDonald case was lawful, since the officers had discovered defendants in the act of committing the offense.)


The constitutional derivation of this broad right on the part of mere roomers is not indicated.
idence was inadmissible for the sole reason that the police committed
the felony of breaking and entering while obtaining it. As Justice
Jackson stated it: "Having forced an entry without either a search
warrant or an arrest warrant to justify it, the felonious character of their
entry, it seems to me, followed every step of their journey inside the
house and tainted its fruits with illegality." His policy motivation
is apparent in his concluding statement: "I am the less reluctant to
reach this conclusion because the method of enforcing the law ex-
emplified by this search is one which not only violates legal rights of
defendant but is certain to involve the police in grave troubles if con-
tinued... I have no reluctance in condemning as unconstitutional
a method of law enforcement so reckless and so fraught with danger
and discredit to the law enforcement agencies themselves." A clearer
indication of a sentiment toward punishing law enforcement officers
for any misconduct by excluding evidence obtained thereby, is difficult
to conceive.

It may be that the McDonald case will have little precedent-value
beyond its facts. Its significance lies rather in its indication of an in-
clination on the part of a majority of the Supreme Court to extend the
exclusionary principle of the Weeks case, and perhaps to apply it to
exclude evidence obtained by any illegal conduct. It seems to make
little difference whether this extension takes the form of a very broad
interpretation of constitutional protections, as Justice Jackson suggests,
or whether it is to be based on frank acceptance of the principle that
evidence illegally obtained is subject to exclusion. If the McDonald

36This view is particularly apparent in Justice Jackson's contention as to co-
defendant Washington's right. Since Washington was merely a guest on the premises,
clearly his constitutional protection against search and seizure had not been violated.
The principal opinion recognized this distinction, and based its reversal of Wash-
ington's conviction on the theory that, had the evidence been properly returned
to McDonald, it would not have been available against Washington. Jackson argued
that Washington had an independent right to demand exclusion on his own behalf,
since, as to him, the evidence was the "fruit" of felonious official conduct.
As for the other Justices supporting the McDonald decision, Justice Frank-
furter concurred in Justice Jackson's opinion while Justice Rutledge revealed a
willingness to forego constitutional consideration, and to exclude any evidence il-
legally obtained.

The philosophy of the other two majority Justices, Black and Douglas, cannot
be ascertained from the opinion. However, their mere participation in the McDonald
decision indicates their readiness to liberalize the application of the Weeks rule.
See note 38, supra.

The latter is the "Holmes-Brandeis" view expressed in the Olmstead dissent.
See note 16, supra.
case is an accurate reflection of Supreme Court sentiment, then future federal criminal trials may come to involve a collateral trial of the conduct of federal officers in gathering proffered evidence. It is clear that, as to conduct within the scope of the Weeks and McNabb rules, such a situation already exists.

It is difficult to relinquish this topic without expressing some opinion as to the propriety of utilizing a rule of evidence for such purposes. Since the appearance of the Weeks case, this question has been the subject of heated controversy, with most writers condemning such a perversion of the function of a rule of evidence. Needless to say, law enforcement officers themselves have been vociferous in their criticism of the doctrine.

The most weighty objection to such a principle is that dwelt upon by Wigmore, that society suffers by the release of a criminal, while the officer at fault suffers no more than his disappointment at the loss of a conviction. In short, it is argued that the rule provides an ineffective means of disciplining police officers, at the expense of serious social detriment. It is contended that, instead of excluding evidence illegally obtained, effective restraint of over-zealous officers should take the form of more certain disciplinary action than that which they risk under the present system of collateral proceedings at the instance of the individual aggrieved. Wigmore advocates as a solution that the officer at fault be cited for contempt by the court in which his illegally obtained evidence is introduced.

It appears to the writer, however, that the critics of the principle, in emphasizing its failure to punish police officers effectively, are criticizing it for failure to achieve a result which should not be its proper function.

When convicting evidence is excluded, two individuals are affected thereby. One is the police officer, who may be subject to censure by his

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"For writers opposing the principle, see 8 Wigmore, Evidence (3d ed. 1940) § 2184; Waite, Police Regulation by Rules of Evidence (1944) 42 Mich L. Rev. 679; Harno, Evidence Obtained by Illegal Search and Seizure (1925) 19 Ill. L. Rev. 303; Knox, Self Incrimination (1925) 74 U. of Pa. L. Rev. 139; Fraenkel, Concerning Searches and Seizures (1921) 34 Harv. L. Rev. 361.

For writers favoring the principle, see Atkinson, Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures (1925) 25 Col. L. Rev. 11; Chafee, The Progress of the Law, 1919-1922 (1922) 35 Harv. L. Rev. 673, 694.

Law enforcement agencies were instrumental in causing the deletion of proposed Rule 5(b) from the final draft of the Federal Rules of Criminal Procedure. See note 29, supra. As proposed, Rule 5(b) would have codified the McNabb rule.

"Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." See 8 Wigmore, Evidence (3d ed. 1940) 40.
superiors, and who loses whatever benefit he might have derived from a conviction. Admittedly, such a penalty is an unsatisfactory means of disciplining the officer, comparable to slapping his wrist. Especially is this true if, as is frequently the case, his superiors commend, rather than censure, his excess of zeal. However, also directly affected is the defendant, who, being shielded from the consequences of official violation of his rights, is undoubtedly accorded direct and highly effective protection of those rights. Constitutional and congressional mandates impose a duty upon the law enforcement officer, but they concurrently establish a right in favor of the accused. While the exclusion of illegally obtained evidence may be an inadequate means of enforcing such a mandate against the officer, no more effective means is conceivable by which to enforce it in favor of the defendant. The efficacy of this evidential sanction as a means of effectuating individual rights accounts for its origin and vitality, though it is admitted that in its application courts have not adhered consistently to this purpose. However, when the application of this sanction is tempered by a recognition of its proper function, its critics have no tenable grounds on which to belittle its effectiveness.

But what can be said in justification of the social detriment incident to the release of guilty defendants, convictable only by means of illegally obtained evidence? Fundamentally, the answer to this question lies in a weighing of individual rights against the social benefits to be derived from unhindered prosecutions, and in deciding which should prevail in this instance. This decision, in turn, will be determined by the nature of each individual's experience and social philosophy. However, it is undeniable that consistency to certain fundamental and highly revered tenets of our political system demands the enduring of the social detriment risked by the exclusion of evidence obtained through official violation of individual rights. If it be accepted that the acts of law enforcement are not to be excepted from the recognized right of all citizens to judicial protection against unlawful conduct, and if it be accepted that a citizen is not to be deprived of his rights by mere indictment, then such a risk seems a feature properly imposed upon our society by the nature of its institutions.

Legal technicians, while recognizing the propriety of implementing individual rights, may condemn as inappropriate the utilization of a rule of evidence to achieve this result. Admittedly, such a practice does pervert the natural function of a rule of evidence. Yet, that such a departure is justifiable and quite appropriate in this instance is arguable, for even the veil of legal dogma cannot hide the patent hypocrisy of a
court's mouthing solemn reverence for the inviolability of individual rights, while simultaneously convicting a citizen on the basis of evidence obtained through contemptuous disregard of those rights. It is small comfort to one so convicted, or to any other citizen, to be assured that the highhanded official risks, and may incur, punishment of doubtful severity. Rather, it would seem that a rule excluding such evidence is a highly appropriate means of rectifying the wrong.

At first glance, it might well appear "misguided sentimentality" to advocate such tender solicitude on the part of courts for the rights of a criminal. It has so been argued.\textsuperscript{47} This contention is met by pointing out that, if the accused is not deemed guilty until proven so, it would appear to be the height of inconsistency to expedite such proof on the assumption that he is guilty. Rather, the sanctity with which we endow our individual liberties would seem ample justification for the social inconvenience of obtaining convictions without the use of evidence obtained by the desecration of those liberties. To allow the government the benefit of evidence obtained in violation of the accused's recognized rights is, in practical effect, to grant the government license to violate these rights, provided it can induce its agents to risk the penalty. Such a result is antipathetic to both the letter and the spirit of our political precepts.

Thus, it is submitted that, as a means of implementing the rights of the defendant, rather than as a means of disciplining the agents of the government, the principle of excluding illegally obtained evidence is not indefensible. This view necessarily implies that the principle should be limited in its application to the scope necessary to protect such rights, and should be neither regarded nor utilized as a means of punishment of police officers. Thereby, the exclusionary sanction would be confined within the bounds of its justification, and a rational line of demarcation would be available beyond which a court need not pursue its collateral inquiry.

Specifically, such a refinement of purpose, while preserving the beneficial aspects of the principle, would have the desirable effect of precluding its application to disassociated wrongdoing such as the breaking and entry in the McDonald case. Furthermore, it is noteworthy that this distinction would seem to offer a sound basis for reconciling the Mitchell\textsuperscript{48} and Bayer\textsuperscript{49} cases with the McNabb\textsuperscript{60} and Upshaw\textsuperscript{51} decis-

\textsuperscript{47}See 8 Wigmore, Evidence (3d ed. 1940) 31.
\textsuperscript{48}322 U. S. 65, 64 S. Ct. 896, 88 L. ed. 1140 (1944).
\textsuperscript{49}331 U. S. 532, 67 S. Ct. 1394, 91 L. ed. 1654 (1947).
\textsuperscript{50}318 U. S. 332, 63 S. Ct. 608, 87 L. ed. 819 (1943).
\textsuperscript{51}335 U. S. 410, 69 S. Ct. 170, 93 L. ed. 129 (1948).
ions, though no such distinction was expressly drawn by any of these opinions. If the goal of punishing police officers is discarded for that of protecting the rights of the accused, the Supreme Court was entirely consistent with the original McNabb rule in holding in the Mitchell case that subsequent unlawful detention did not retroactively render the confession inadmissible. For, under these facts, the proffered confession had not been obtained in violation of defendant's rights, since, at the time the confession was made he had no right to arraignment under the statute. Likewise, the Bayer decision, holding, in effect, that the accused could waive the McNabb rule by making, after proper commitment, a second confession in confirmation of the inadmissible one, would be a consistent application of the rule in view of the suggested distinction. For, if the only purpose of the McNabb rule is to protect the rights of the accused it would follow that, as in any other instance, the accused should have the power to waive his rights. Just where, and by what criterion, the Supreme Court will actually draw the line in the application of its exclusionary sanction, remains to be seen. However, the tenor of the McDonald and Upshaw opinions indicates that the possibilities of the principle have yet to be fully explored. Therefore, it is to be expected that future decisions will bring an even broader segment of official conduct under the surveillance of federal courts, as an incident to the Court's power, and apparent inclination, to utilize federal rules of evidence to supervise the ethics of federal law enforcement.

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52 In the Mitchell case the confession was made almost immediately after arrest.