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EVIDENCE-POLICE REGULATION BY RULES OF EVIDENCE

John Barker Waite
University of Michigan Law School

COMMENTS

EVIDENCE—POLICE REGULATION BY RULES OF EVIDENCE

I

"The judicial rules of Evidence," said their great expounder, "were never meant to be an indirect process of punishment."[1] Yet twice the Supreme Court has promulgated new rules of evidence for precisely that purpose. The rule that evidence is inadmissible, regardless of its relevance and materiality, if it was obtained by unreasonable search was first suggested by Justice Bradley, who wrote the majority opinion in *Boyd v. United States* in 1886.[2] The other rule was voiced in 1943 by Justice Frankfurter, writing the majority opinion in *McNabb v. United States*.[3] And each rule demonstrates the inherent evil of judicial legislation which is based upon incomplete information and is formulated without realization of its probable effects.

[1] 4 WIGMORE, EVIDENCE, 2d ed., § 2183 (1923).

[2] 116 U.S. 616, 6 S. Ct. 524 (1886).

[3] 318 U.S. 332, 63 S. Ct. 608 (1943).

In the *McNabb* case it appeared that some of the defendents had been arrested, on a charge of murder, at about two o'clock on a Thursday morning and taken to a detention room in the local federal building where they were kept, with nothing to sit on, until five in the afternoon. Then they were removed to the local jail. They were not brought before a committing magistrate until some time on Saturday. In the meantime they were repeatedly interrogated by federal officers at considerable length. Various incriminating admissions and a confession thus elicited were used as evidence against them. This the Supreme Court held to constitute error, and reversed the conviction because of it.

The Court expressly refrained from a finding that the questioning by the officers had amounted to "compulsion" to answer, in violation of the constitutional privilege. Neither did the Court consider that the admissions were properly excludable under any existing rule of evidence. "Quite apart from the Constitution," says the opinion; the evidence was inadmissible merely because "in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them." It was their duty to take the defendants "immediately" after arrest before the nearest United States commissioner, or other committing officer. There was a "plain disregard of this duty." Hence the opinion concludes—whether logically, or by non-sequitur —"a conviction resting upon evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law."

Justice Reed dissented, saying, "If these confessions are otherwise voluntary, civilized standards, in my opinion, are not advanced by setting aside these judgments because of acts of omission which are not shown to have tended toward coercing the admissions."[4]

The majority opinion was either carelessly vague, or it purposely left open a wide area of interpretative application. It uses the phrases "a plain disregard" of the duty enjoined by Congress; evidence obtained "in such violation" of legal rights; and evidence secured through "such a flagrant disregard" of the proper procedures. This might indicate that the rule was not intended as an absolute preclusion of confessions obtained while the officers were in dereliction of duty, but only when they were in "such," similarly gross, and "flagrant" dereliction. But except for these occasional and seemingly casual phrasings, there is nothing in the opinion to limit its application. Followed as it stands, it sets up an exclusionary rule of evidence far wider in its scope than the preclusion of evidence obtained by unreasonable search. Indeed it ex-

[4] Id. at pp. 341, 345 and 349.

tends further than the exclusion unsuccessfully advocated by Justices Holmes and Brandeis a generation ago in *Olmstead v. United States*, that "apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act."[5] The *McNabb* decision, logically applied, precludes use of evidence obtained by police officers while acting in dereliction of duty, whether criminally or not.

Thus the decision, either broadly or narrowly interpreted, propounds once again the wisdom of a judicial policy which turns known criminals loose upon society as a means of punishing the police.

2

Both the rule of the *McNabb* decision and the earlier rule excluding relevant evidence obtained by "unreasonable" search represent free judicial choice of policy. The latter rule, proposed in the *Boyd* case, adopted in *Weeks v. United States* in 1914,[6] found no acceptance by state courts and was virtually disregarded in the lower federal courts until the advent of prohibition.[7] But as one of prohibition's manifold social effects, the rule of exclusion thereafter found widespread and enthusiastic adoption by state judges, and a renaissance in the federal courts.

Ostensibly the rule is based upon a judicial assumption that the constitutional prohibition of unreasonable search itself makes the evidence so procured inadmissible; the Constitution itself is asserted as setting up a rule of evidence. But the fallacy of that assumption, the necessary, even if unrealized, insincerity of the assertion, is evident from the flatly contradictory, but equally sincere opinion of those same courts prior to prohibition. It is essentially a rule of policy, chosen by a score of state courts when new conditions urged its wisdom, and rejected by another score of other state courts despite similar constitutional provisions.[8]

"The Constitution of this state," said the Iowa court, "is identical in its language with the Fourth Amendment to the Federal Constitution.... The constitutional provision is a sacred right and one which the courts will rigidly enforce; but that does not mean that the State, in the prosecution of crime, cannot use any proper evidence available to it, without stopping to conduct an independent inquiry in the criminal

[5] 277 U.S. 438 at 469-470, 48 S. Ct. 564 (1927).

[6] 232 U.S. 383, 34 S. Ct. 341 (1914).

[7] The few federal decisions which followed the rule of exclusion, and the numerous state decisions which repudiated it are collected in 4 WIGMORE, EVIDENCE, 2d ed., § 2183, n. ff. (1923).

[8] The lineup of states on this choice is noted, Atkinson, "Prohibition and the Doctrine of the Weeks Case," 23 MICH. L. REV. 748 (1925).

proceeding as to how that evidence was obtained. Great public interests are involved in the due and efficient prosecution of crime. The vital question is whether or not the evidence is competent and relevant to the issue on trial."[9]

New York's Judge Cardozo also expressed emphatically the conclusion that the state Civil Rights Law could not be interpreted as making inadmissible evidence obtained by its violation. That the method of obtaining the evidence in the particular case was a trespass, an unreasonable search, he conceded. "The officer might have been resisted, or sued for damages, or even prosecuted for oppression." But of the usability of the evidence he says, "We find nothing in the statute (Civil Rights Law, 8) whereby official trespasses and private ones are differentiated in respect of the legal consequences to follow them. All that the statute does is to place the two on an equality. In times gone by, officialdom had arrogated to itself a privilege of indiscriminate inquisition. The statute declares that the privilege shall not exist. Thereafter, all alike, whenever search is unreasonable, must answer to the law. For the high intruder and the low, the consequences become the same. Evidence is not excluded because the private litigant who offers it has gathered it by lawless force. By the same token, the State, when prosecuting an offender against the peace and order of society, incurs no heavier liability....

"The truth indeed is that the statute says nothing about consequences. It does no more than deny a privilege. Denying this, it stops. Intrusion without privilege has certain liabilities and penalties. The statute does not assume to alter or increase them. No scrutiny of its text can ever evoke additional consequences by a mere process of construction."[10]

3

As a rule of policy, what is the policy; unless it be that of Wigmore's sardonic rhetoric? "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This

[9] State v. Tonn, 195 Iowa 94 at 103 and 106, 191 N.W. 530 (1923).

[10] People v. Defoe, 242 N.Y. 13 at 21 and 23, 150 N.E. 585 (1926).

The federal Constitution, too, prohibits unreasonable search by private persons as well as by government agents. If pretense that the constitutional provision itself sets up a rule of evidence were sound, it would exclude evidence so obtained by either private persons or officers. But the Supreme Court has interpreted it as not excluding evidence resulting from unreasonable search by private persons. Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574 (1921). The pretense of exclusion as a constitutional requirement rather than as a choice of policy is criticized; Harno, "Evidence Obtained by Illegal Search and Seizure," 19 ILL. L. REV. 303 (1925).

is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. 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."[11]

In one of the earliest state cases to adopt the federal rule, Chief Justice Carrol expresses the policy thus: "In other words will courts authorize and encourage public officers to violate the law and close their eyes to methods that must inevitably bring the law into disrepute in order that an accused may be found guilty? Will a high court of the state say in effect to one of its officers that the Constitution of the state prohibits a search of the premises of a person without a search warrant, but if you can obtain evidence against the accused by so doing you may go to his premises, break open the doors of his house and search it in his absence, or over his protest if present, and this court will permit the evidence so secured to go to the jury to secure his conviction? It seems to us that a practice like this would do infinitely more harm than good in the administration of justice."[12]

The tenor, indeed, of every decision precluding use of the evidence clearly evinces a judicial purpose of enforcing respect for the constitutional provision by rendering futile whatever is done in disregard of it.

4

Has this judicial policy of making rules of evidence for the purpose of regulating police practices really prevented "infinite harm" in the administration of justice? Or has it in truth itself produced serious harm? Did the judges choose their policy wisely?

When the New York court of appeals declined to follow the policy of excluding evidence obtained by unreasonable search, it pointed out that it would have followed it, if at all, only because of some demonstrated wisdom in the policy. "But," said the court, "adequate revelation of [the wisdom of] such a policy is hard to see.... The pettiest police officer would have it in his power through overzeal or indiscre-

[11] 4 WIGMORE, EVIDENCE, 2d ed., § 2184, p. 639 (1923).

In Owens v. State, 133 Miss. 753 at 757, 98 So. 233 (1923), where the rule of exclusion was sustained by an evenly divided court, counsel for the defendant argued frankly that such a rule "will have much effect in 'sobering' these officials [circuit courts and prosecuting officers] from the effect of the mania which possesses the masses at the present time against person charged with violation of the prohibition laws."

"Will this Court by sustaining the judgment below [admitting the evidence] sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands." Brandeis, J., in Olmstead v. United States, 277 U.S. 438 at 483, 48 S. Ct. 564 (1927).

[12] Youman v. Commonwealth, 189 Ky. 152 at 166, 224 S.W. 860 (1920).

tion to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money, or the implements of forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied. We may not subject society to these dangers until the Legislature has spoken with a clearer voice."[13]

On the other hand, Mr. Justice Holmes' belief that there is a wise public policy in exclusion of the evidence brought him to the point of discarding any pretence that the Constitution compels exclusion, and of advocating that, entirely aside from constitutional restrictions, any evidence obtained unlawfully, whether by search or otherwise, be excluded. "I think," he said, "that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestions of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[14]

This judicial disagreement over the practical value, the social good, of one policy or the other, is not buttressed with data by the advocates of either policy. Like so distressingly much of judicial law-making, it seems to be predicated not upon research, not even upon careful evaluation of known data, but wholly upon the predilections of the particular judges who have assumed that power to choose between competing notions. It is not the choice of a scientist, not even of a social scientist; it is at best the empirical reaction of individuals whose knowledge of realities varies greatly. By no other, less condemnatory, theory can the disparity of belief and divergence of judicial opinion be explained. Until the excitements of prohibition the federal rule of exclusion stands

[13] People v. Defore, 242 N.Y. 13 at 23 and 24, 150 N.E. 585 (1926).
[14] Olmstead v. United States, 277 U.S. 438 at 469-470, 48 S. Ct. 564 (1927).

by itself in an isolation almost of obsolescence. Under the influence of prohibition problems, a score of state courts adopt the federal rule, another score repudiate it. A vigorous minority in each state strongly protests whichever rule is adopted. On the federal bench itself Holmes, Brandeis, Butler and Stone take emphatic issue with Taft, Van Devanter, McReynolds, Sutherland and Sanford.[15]

Yet not one of these judicial statesman, choosing policies, making law for the governance of society, asks for information of the realities upon which to predicate his choice. No one would question the intelligence of a Holmes. But what knowledge of realities, of the practical necessities of social protection through law enforcement, does even a Holmes possess—after four decades in the ivory towered cloisters of an appellate bench? Had so radical a rule of evidence been promulgated by Congress or a state legislature, without even pretence of committee study of facts or a request for information, its method of production would have been cursed by the police, castigated by the press and condemned by the general public.

5

What little knowledge is in fact available, the few data that have been dug from the coverage of unsupported but reiterated opinion, persuasively support Cardozo's grave fear of social danger from the exclusion rule. The policy of exclusion was designated and adopted to the end of fostering proper police conduct through discouragement of what is improper. If overzeal is made futile, so the assumption runs, overzeal even for effective enforcement will diminish and cease. If lawless efforts are encouraged by success in the conviction of guilty criminals, they will flourish and increase. It is a logical enough theory, impregnable in the library. But in the light of eventualities it appears to have been dim-visioned theory spectacled in rose.

Not one shred of evidence has been discovered to indicate that the police of Ohio and New York, where use of evidence is permitted, are worse behaved than the police of Michigan and Illinois, where it is excluded. But to the contrary, there is ample and persuasive evidence that the rule of exclusion, academically designed for improvement of police methods, has in practical application conduced to serious police misbehavior. If it did not actually beget the "tip-over raid," it nurtured that vicious practice to its evil florescence.

During the later years of prohibition the writer participated as a spectator in numerous police raids on blind pigs. At one such place, with the appearance of the police, most of the hooch disappeared down a toilet bowl and bathtub outlet, though enough remained in bottles and

[15] Id.

in the customers' glasses to prove unlawful operation beyond peradventure. But police sledges swung on bathtub, toilet bowl, bar, chairs and tables; even the walls were damaged. So general was the destruction that the spectator protested. Replied the sergeant in charge: "How the hell do you expect us to put this bird out of business unless we smash him out?"

"Take him into court and let the court put him out."

"You know damn well that if we take him into court they will throw out the evidence and let him go. We've got no warrant."

"Why didn't you get a warrant?"

"No magistrate will issue a warrant on the preliminary dope we can get."

On that point the situation was interesting. The place was a shabby small house in a district of small shabby houses. The patrolmen on the beat had observed the number of men and occasional women coming and going from this particular house. Taxis, too, were far more frequent than either the house or the neighborhood would explain. This information, passed on to the prohibition enforcement division, spoke clearly enough to their ears. But, rightly or wrongly, it spoke less persuasively to magistrates charged with responsibility for issuing warrants. For the police to "make a buy" in such places was singularly difficult—difficult enough to satisfy the writer, without going into long explanation here, that as a means of obtaining warrants it was impracticable. The net consequence was a police alternative of "harassing" some piggers out of business, or of letting more of them operate. When asked why they chose the first, the police answered that the press was already bedeviling them intolerably for alleged inefficiency in closing the joints.

Eventually the tip-over procedure miscarried; an incompetently led squad smashed property whose owner was in a position to protest, and the procedure became public knowledge. The officers involved in the particular raid were punished. But the commissioner of police frankly admitted that he had given orders to his men to smash the bars and fixtures of blind pigs and saloons. Some days later the mayor directed revocation of that order, whereupon this illuminating editorial appeared in a local paper:

"Well, my buddies, the expected has happened, even though the boys were beginning to despair during the last few weeks. What I refer to is opening up of the old town, the polishing up of the glasses, and the twisting of the spigots? [The revocation of the order] has unscrewed the municipal lid, which was clamped down hard by Police Commissioner Wilcox in the dark days following the Buckley killing. It is responsible for the taking of the bartenders' aprons down from the shelf. It has effectively tied the hands of the Detroit police depart-

ment, so far as enforcement of the prohibition laws is concerned, by causing the abolition of the so-called 'tip-over' raids on blind pigs. . . . Whatever we may think of that method of enforcing laws, it was effective. . . . The raids themselves sufficed to put fear into the hearts of the wet proprietors and probably did more than anything else to increase the town's aridity."[16]

No "smash and grab" procedure, no lawless police practice, however effective, is commendable; perhaps never excusable. But these particular ones, ironically enough, were the actual, evil product of judge-made rules logically, but untutoredly, designed to decrease unlawful police activity. So far as the writer can ascertain no similar practice flourished in the neighboring Ohio city of Toledo, where the rule of exclusion did not obtain and conviction in the courts was practicable.[17]

6

But these were not the only evils resulting from the judge-made rule of exclusion. Though matured in liquor cases, it could not, of course, be confined to them. The Illinois court early reversed a conviction for receiving stolen property because the defendant's premises had been searched without a warrant.[18] Michigan courts quickly applied the rule to evidence of carrying concealed weapons. Here it well nigh blocked the machinery of social protection. During a period when robbery and armed assault were rife in Detroit, the writer was struck by the number of obviously guilty gun-toters—a felony in Michigan, punishable by five years imprisonment—who were picked up by the police and promptly released to go their threatening ways. Through the courtesy of Commissioner James Watkins he was enabled to study the reasons for these releases. Without going into detail here, suffice it to say that during one year 1,347 robberies with arms were reported, 237 persons were prosecuted for the felony of carrying concealed weapons and only 134 were convicted.

In nine of the failures to convict, the accused had jumped bail; in other cases the weapon had been found on the floor of an automobile, without evidence as to which of the occupants had possessed it; three defendants were sent to insane asylums; a razor was held not to be a concealed weapon. But in forty-one instances at least the prosecution had been dismissed because the trial judge held the arrest unlawful—because made on suspicion only—the consequent search "unreasonable," and the evidence thereby procured inadmissible. In a large number of

[16] Detroit Saturday Night, Nov. 22, 1930.

[17] At least not until relatively recently, when the hegira of gamblers from city to county, and their protests at unfair treatment by the municipal police, suggest that Toledo may be emulating the earlier Detroit example.

[18] People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923).

other instances arrests did not even reach the stage of accusation; the offenders were discharged by order of the superintendent because it was obvious, from experience, that the courts would not permit use of the evidence. All told, it is safe to say that at least one-fourth of all the guilty gun-toters discovered and arrested during that year escaped any penalty, not because they were innocent, but solely because of the judge-made rule that evidence of their guilt could not be used.[19] So intolerable was the evil that the people of Michigan amended their constitution to end it.

No one appears to have investigated the number of liquor law violators and other criminals released for similar reasons; nor have similar releases in other cities been compiled. The total number, however, must run into appallingly high figures.

Thus the judicial rule of evidentiary inadmissibility, as it operated in reality, defeated its own purposes. As a practical matter, it fostered, rather than diminished, lawless police practices. And because of it, the "few criminals" whom Justice Holmes thought might escape justice if his even more exclusionary proposal were adopted, have become in fact thousands—liquor law violators, dope peddlers, carriers of concealed weapons, receivers of stolen property, swindlers, thieves, robbers and burglars.

7

The rule of the *McNabb* case was promulgated too recently for its practical effect to be yet demonstrated. But its probabilities are not undiscernable. In the subsequent case of *United States v. Klee*[20] it appeared that the defendant had been brought before a United States commissioner within two hours after arrest. In the meantime he had freely admitted his guilt. After that confession, but before trial, the *McNabb* decision was made public. Klee's attorneys thereupon raised objection to the use of his confession in evidence and rested the objection on the *McNabb* rule. Judge Schwellenbach finally decided to admit the evidence because so short a period had elapsed between arrest and "arraignment" before the commissioner. But he was disturbed by

[19] The details of this investigation are discussed, Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933).

It is interesting to note that though the exclusion rule prevented sequestration from social freedom of the dangerous individuals, its component proposition that tangible evidence obtained by unreasonable search must be returned was successfully ignored by the police. Though the offenders were released, they were released without their weapons. The adoption of the exclusion rule in Michigan resulted from the insistance of a minor politician that unlawfully possessed, and not lawfully possessable, liquor be returned to him—a motion granted by court order. People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919). But apparently none of these unlawful weapon carriers thought wise to ask a court order for the return of their weapons.

[20] (D.C. Wash. 1943) 50 F. Supp. 679.

the *McNabb* opinion sufficiently to make a seven page explanation as to how his case escaped its effect. Had the delay in the *Klee* case been two days instead of two hours he would have felt, obviously, that the absolutely uncoerced and voluntary confession could not be used. Any period longer than two hours but less than two days would have produced uncertainty, controversy, delay and belated justice at best, evasion of justice frequently.

The danger has already been protested by officials responsible for effective law enforcement. The rule of the *McNabb* case was tentatively incorporated into the proposed Federal Rules of Criminal Procedure recently submitted for consideration by the Bar. Section A of proposed Rule 5 required that any officer who makes an arrest "shall without unnecessary delay take the person arrested before the nearest available commissioner or other officer empowered to commit persons charged with offenses. . . ." This was merely restatement of the already existing law. But section B of the rule went further and incorporated the substance of the *McNabb* decision, saying: "No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule."

The response to the proposal, when it appeared in the form of admitted rule-making, instead of the cryptic legislation of judicial decision, was prompt and vigorous. Federal judges, discussing the problem at their conferences, pointed out that the rule would penalize an offending officer not at all; would merely throw upon society a risk of ineffective enforcement. Some recognized the *McNabb* decision as law, but deprecated its crystallization into an acknowledged rule; others questioned the force of the decision itself; all disapproved the rule as proposed. Federal district attorneys were even more critical; one expressed the sentiments of others thus: "Rule 5(b) is an attempt to petrify into a rule the unfortunate decision contained in *United States v. McNabb*. The *McNabb* decision was judicial legislation and not interpretation. The common law was and is that contained in the dissenting opinion. The law should remain as it was before the *McNabb* decision. The undersigned feels that the court in that decision and the Rules Committee had a high theoretical purpose, but lost sight of crime statistics and a realistic appreciation of crime detection. . . ."

As a spokesman of crime detection officials, J. Edgar Hoover, Director of the Federal Bureau of Investigation, protested that the rule, "would handicap law enforcement, would be contrary to public interest, and would serve only the criminal whose advantages seem to be paramount to the public welfare in the suggested procedural requirement." Continuing, he said:

"3. The requirements set forth in the two sections of the proposed Rule 5, in many instances, would serve to defeat the ends of justice. Modern criminals seldom operate alone and this is particularly true with regard to the more serious violations of kidnaping, bank robbery and other similar crimes of violence. Immediate arraignment of the first member of a criminal gang who is arrested, with the resultant public record and publicity, would frustrate plans of enforcement officers to apprehend the other individuals and conspirators involved. The result would be a vast additional expenditure of money and the very definite possibility of an increase in the number of law enforcement officers killed by criminals. The situation becomes more aggravated in cases involving spy rings and sabotage gangs. The immediate arraignment of the first spy arrested would jeopardize the entire investigation and cause the other conspirators to flee and would further jeopardize the Nation's security. Expediency rather than immediacy should be a determining factor in deciding how soon in the public interest an individual taken into custody should be arraigned. Examples of such cases where a literal interpretation under the proposed rule would not be in the public interest are cited as follows:

"(f) *The Kidnaping of Edward George Bremer, St. Paul, Minnesota, January 17, 1934.* The use of expediency as a measuring rod in determining the time of arraignment played a very vital part in smashing the Barker-Karpis gang which was responsible for the Bremer kidnaping and numerous other flagrant violations of our laws. In two raids conducted in Chicago on January 8, 1935, Special Agents of the FBI took into custody, among others, Arthur "Doc" Barker and William Bryan Bolton. These two individuals were taken immediately to the Chicago Office of the FBI and held until arraignment was expedient.

"Bolton gladly cooperated with the FBI, furnishing the location of the Bremer hideout, intimate details of the kidnaping and also the location of other members of the Barker-Karpis gang in Florida. A map was also found in Barker's apartment which gave helpful information on the Florida angle.

"As a result of the policy followed with respect to Barker and Bolton, Special Agents were able to locate the hideout of Ma Barker and her son Fred, near Ocala, Florida. Both were slain on January 16, 1935, when they resisted arrest. Bolton was removed to St. Paul on January 20. "Doc" Barker had been delivered to the United States Marshall at St. Paul two days before. An indictment against some members of the ring had been returned on May 4, 1934, but on January 22, 1935, a superseding indictment was returned.

"(g) *Robbery of St. Charles National Bank, St. Charles, Illi-*

nois, January 31, 1936. Four men, armed with revolvers and shotguns, entered the above bank during the early morning hours, bound and gagged the employees and forced them to lie on the floor, and escaped with loot totaling $14,148.60. After widespread investigation by Special Agents of the FBI in Illinois and neighboring states, one Philip Dimenza was identified as one of the perpetrators of this crime. He was located at his home in Chicago and taken into custody at 2:30 P.M. on February 12, 1936. Under a literal interpretation of the word "immediately," Dimenza would have been arraigned just as soon as possible on the afternoon of his arrest. Instead, however, as a matter of expediency, he was taken to the Chicago office of the FBI where he voluntarily remained for a time in the custody of Special Agents. He readily admitted his participation in the bank robbery, named his associates and furnished other pertinent information.

"Special Agents and police were stationed at Dimenza's home, and at approximately 11:00 A.M., February 13, 1936, Fred Hansen, another of the bank robbers, called and was taken into custody. At 1:00 P.M. on the same date two others implicated were arrested at the home, while at 7:00 P.M. still another bank robber put in his appearance and was taken into custody. A few days after the arrests, and before arraignment, the arsenal of the gang consisting of some sixteen fancy weapons was located.

"An authorized complaint was filed against the bank robbers on February 18, 1936, and preliminary hearings given those arrested. It is obvious that an immediate arraignment of Dimenza would have frustrated completely the early arrests of the others involved.

"All United States attorneys with whom this proposed rule has been discussed by representatives of the FBI are opposed to its adoption."[21]

8

Here, then, we have two attempts of the judiciary to control police conduct by the indirection of rules of evidence judicially made for that purpose. One rule has not only failed lamentably of its purpose, but has created seriously evil consequences of its own. The other rule gives

[21] From a letter of Mr. Hoover to the Secretary of the Committee by which the proposed rule was drafted, and quoted here with Mr. Hoover's permission to the present writer. The letter itself contains several other cases where the McNabb rule, if adhered to, might have prevented incarceration of extremely dangerous criminals; e.g. "The Kansas City Massacre," "The Eight German Saboteurs," "The Ludwig Case," "The Kidnapers of Charles Sherman Ross, 1937."

Since Mr. Hoover's letter, the National Sheriffs' Association has protested the rule as "resulting in other miscarriages of justice," and a bill to repudiate it has been introduced in Congress. Ass. Press dispatch, Nov. 22, 1943.

The objectionable provision was omitted from the Rules as eventually submitted to the Supreme Court.

promise of harm, without compensating hope of benefit. Each rule is perfect exemplification of Justice Brandeis' comment that "knowledge is essential to understanding; and understanding should precede judging."[22]

Control of police activity by direct action has been called impracticable and its impracticality has been asserted as justification for indirection.[23] Whether that be offered as a real reason, or merely a good reason, is immaterial; in either event its persuasiveness depends wholly upon the truth of its premise. And at best that premise is dubious, unsupported by producible data. To assume the ineffectiveness of direct action by suit against an overzealous officer merely from the absence of such suits in appellate court reports is unjustifiable; the relation of appeals to suits begun depends too largely upon the nature of the action; these may be so simple and successful as to provoke no appeal. That no guilty gun-carrier has ever brought suit for damages may be conceded; he would find small sympathy before a jury. Should criminal prosecution ever be instituted against the officer who "unlawfully" arrests an actually guilty felon, it is likely that no jury would convict and few appellate courts would affirm if the jury did convict. As for unlawful arrest of innocent persons, the writer has seen overzealous policemen sweating copiously in fear of results and has known judgments rendered against them. If suits are not begun, it is far more likely that no real damage was suffered than that suit would be unsuccessful.

Moreover it should not be forgotten that civil action by the individual injured is not the only alternative for enforcing observance of official obligations and limitations. An unlawful arrest or search of the person may, and usually would, constitute also a criminal assault. An inexcusable delay in taking the arrested person before a magistrate as required by statute would surely be subject to the sanctions of malfeasance in office. It is doubtful that police officers, sheriffs, or marshals could be dealt with directly by the courts for contempt of court in their unlawful, or recalcitrant activities. But certainly they could be subjected, as a practicable matter, to proceedings instituted by court prosecutors or district attorneys. And those latter officials would not be indifferent to insistance by the judiciary that unlawful police activities be so dealt with.

Were judges half so astute in the instigation and judicial support of

[22] Burns Baking Co. v. Bryan, 264 U.S. 504 at 520, 44 S. Ct. 412 (1924).

One might add another remark of Brandeis, quoted without reference in 27 J. AM. JUD. SOC. 117 (1943) that "The intellectual tends to breadth of view; the practical to that realization of limitations which are essential to the wise conduct of life."

[23] e.g., Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 COL. L. REV. 11 at 22 (1925), "However it may have been formerly, it is every day observation that neither [civil suit nor criminal prosecution] is adequate at present."

direct proceedings against offending police officers as they are ready with the easier indirection of releasing criminals, they would far more satisfactorily enforce respect for constitutions—and would preserve the public safety as well.

But in any event, conceding that the greater effectiveness of direct action is unprovable by available evidence (chiefly because it has not been tried), nevertheless the indirect process of rebuking policemen by turning criminals loose upon the public has proved itself to be both ineffective and dangerous. A reversion by the courts from the certain harmfulness of their indirect methods to the possibly uncertain advantages of reliance upon direct methods could not fail to profit society.

Unfortunately the rule excluding evidence obtained by unreasonable search has been so often reiterated as to make judicial admission that it was an unwise choice of policy almost inconceivable. Yet the effects of even this rule can be ameliorated by judicial alteration in the connotation of "unreasonable." The irrational assertion of *Agnello v. United States* that "the search of a private dwelling without a warrant is in itself unseasonable,"[24] might well be modified by the logic of *Carroll v. United States*[25] that when a warrant cannot be obtained without risking disappearance of the evidence, search without a warrant may be reasonable. In a score of other applications, the rule of exclusion, without need for repudiation, could be modified to suit both the realities of social safety and the practical preservation of individual liberty.[26]

The potential evils of that other judge-made rule, so recently promulgated and not yet firmly established by repetition, could easily be dissipated by reconsideration and frank repudiation—a procedure for which the court has shown itself to be great enough in the recent decisions of *Murdock v. Pennsylvania*[27] and *West Virginia State Board of Education v. Barnette*.[28]

*John Barker Waite**

[24] 269 U.S. 20 at 32, 46 S. Ct. 4 (1925).

[25] 267 U.S. 132, 45 S. Ct. 280 (1925).

[26] The essential significance of "unreasonable" as now used by the courts is discussed, Waite, "Searches and Seizures—The Criterion of Reasonableness," 42 MICH. L. REV. 147 (1943). The wisdom of holding an arrest to be reasonable when the arrested person is in truth guilty of felony and should have been arrested is discussed, Waite "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933).

[27] 318 U.S. 748, 63 S. Ct. 870 (1943), reversing Jones v. Opelika, 316 U. S. 584, 62 S. Ct. 1312 (1942).

[28] 319 U.S. 624, 63 S. Ct. 1178 (1943, reversing Minersville School District v. Gobitis, 310 U. S. 586, 60 S. Ct. 110 (1940).

As other precedents for reversal of an unwise decision after discovering additional information, see United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1940), reversing Hammer v. Dagenhart, 247 U.S. 251, 38 S. Ct. 529 (1917); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578 (1936), reversing Adkins v. Childrens Hospital, 261 U.S. 525, 53 S. Ct. 394 (1922).

* Professor of Law, University of Michigan.—*Ed.*