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Police Liability for Invasion of Privacy

*Mildred Schad**

It is not the breaking of his 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. . . .¹

THE RIGHT TO PRIVACY is not specifically spelled out as such in the Constitution of the United States, but the Fourth Amendment does guarantee the right of a person to be secure in his "person, house, papers, and effects against unreasonable search and seizures. . . ." Inclusion of the Amendment was a rejection of the British *general warrants*.² These were blanket warrants that authorized the King's representative to invade a person's home and search for any evidence that might be incriminating.³ But, until 1961,⁴ the Supreme Court had felt that the founding fathers only wanted to restrict invasions by the federal government,⁵ not unreasonable searches and seizures by state governments.⁶ Evidence illegally seized by a federal officer was admissible in a state court, and evidence illegally seized by a state officer was admissible in a federal court.⁷ It was not until 1960 that this "silver platter" doctrine was invalidated.⁸ And then, in 1961, the Supreme Court decided *Mapp v. Ohio*⁹ and made the federal exclusionary rule of illegally seized evidence applicable to the states via due process in the Fourteenth Amendment.

No reasonable man would contend that there can be no valid invasion of privacy by police officers. But, just when do the rights of society accede to the privileges of the individual? The Supreme Court did not attempt to lay down a fixed formula in *Mapp*, but rather realized that it would be met with recurring questions of the reasonableness of a search.¹⁰ The Supreme Court further stated that findings of reasonableness should be determined in the first instance by the trial court

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¹ *Boyd v. U.S.*, 116 U.S. 616, 630 (1886).

² *Ibid.*

³ *Ibid.*

⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵ *Weeks v. U.S.*, 232 U.S. 383 (1914); *People v. Adams*, 276 N.Y. 351, 68 N.E. 636 (1903).

⁶ *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁷ *Elkins v. U.S.*, 363 U.S. 206 (1960).

⁸ *Ibid.*

⁹ *Supra* n. 4.

¹⁰ *Kerr v. California*, 374 U.S. 23 (1963).

and that they will be respected insofar as they are consistent with federal constitutional guarantees.¹¹

Certain guides as to the reasonableness of a search have been determined. A search, without a search warrant, is lawful if it is incident to a lawful arrest and if the essential element of a lawful arrest, probable cause,¹² exists.

The Pre-Mapp Remedy

Before *Mapp v. Ohio*,¹³ many states applied the exclusionary rule to evidence seized by an illegal search and seizure. The only remedy available in those states that rejected the exclusionary rule was a tort action for damages.¹⁴

The mere fact that a man is an officer gives him no greater right than a private citizen to break in upon the privacy of a home without a legal warrant. And, no amount of incriminating evidence will suffice in the stead of a legal warrant.¹⁵

If a warrant is illegal on its face, the officer executing it is personally liable for damages.¹⁶ If a search warrant is valid on its face and properly executed, no cause of action will lie, even though the alleged articles are not found.¹⁷ A police officer executing a warrant issued by the clerk of the police court, not by a judge with proper jurisdiction, was held personally liable for damages.¹⁸ Another court would not protect a police officer from the consequences of executing a search warrant procured through his own fraud and misdoing. The defendant filled in a search warrant that had been signed in blank by a judge.¹⁹ Courts will not protect officers who execute a legal search warrant in an unreasonable manner.²⁰ Reasonableness can only be determined by considering all of the circumstances, and the division between reasonableness and unreasonableness is by zone, rather than by definite line, within which reasonable men may differ. Thus, the court felt that a properly issued warrant to search for intoxicating liquors did not give police officers the right to tear out sections of walls using an axe and crowbar.

¹¹ *Ibid.*

¹² *Ibid.*, *Rios v. U.S.*, 364 U.S. 253 (1960); *Henry v. U.S.*, 361 U.S. 98 (1959); *People v. Stewart*, 232 Mich. 670, 206 N.W. 337 (1925); *Johnson v. U.S.*, 333 U.S. 10 (1948); *Weeks v. U.S.*, *supra* n. 5; *Golliher v. U.S.*, 362 F.2d 594 (8th Cir. 1966).

¹³ *Supra* n. 4.

¹⁴ *Wolf v. Colorado*, *supra* n. 6.

¹⁵ *McClurg v. Brenton*, 123 Iowa 368, 370, 98 N.W. 881, 883 (1904).

¹⁶ *Gruman v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200 (1814); *Banfill v. Byrd*, 122 Miss. 288, 84 So. 227 (1920).

¹⁷ 24 R.C.L. 699.

¹⁸ *Banfill v. Byrd*, *supra* n. 16.

¹⁹ *Bull v. Armstrong*, 48 So.2d 467 (Ala. 1950).

²⁰ *Buckley v. Beaulieu*, 104 Me. 56, 71 A. 70 (1908).

A police officer is liable civilly if he acts beyond the law, even if he is acting under his superior's orders to frisk anyone coming under police suspicion as part of a campaign to combat an increase in crimes involving deadly weapons.²¹

If a police officer enters the home of another, without a warrant, for the purpose of searching the home, and the occupant does not consent to the search, the officer is a trespasser and liable for damages. No amount of suspicion or incriminating evidence can justify such a search.²² And, after making a valid arrest, an officer does not have the right to return and forcibly enter a home without a warrant, even if he has actual knowledge that the goods sought are in the home.²³

An unreasonable search and seizure is a private wrong subject to a private redress, so if a police officer forcibly searches a person or compels him to submit to a search, then the police officer becomes a trespasser. In such a case, the state has no legal connection with the wrong and no agency in it.²⁴ If an arrest is illegal, then, the ensuing frisk leaves the police officer open to a suit for damages.²⁵ Also liable for damages are any persons who aid a police officer in the execution of an illegal search and seizure, even if they do not have any reason to believe that the officer is acting beyond the scope of his authority.²⁶

Jurisdictions differ as to the liability of persons who causes warrants to issue. The Supreme Court of Oregon has stated that anyone who maliciously or without probable cause induces a search warrant to issue is liable for damages for the search sustained.²⁷ The Supreme Court of Oklahoma, however, has said that the person requesting the warrant does not determine if probable cause exists. Rather, the magistrate makes this determination. Thus, even if the person who requests the warrant, executes the search, he is not liable if the warrant is not issued for probable cause.²⁸

Defenses

Consent is a complete defense of an illegal search and seizure,²⁹ but jurisdictions differ as to what constitutes consent. In *Fennemore v. Armstrong*,³⁰ the court stated that even if the occupant's reason for

²¹ *Mason v. Wrightson*, 205 Md. 481, 109 A.2d 128 (1954).

²² *Fennemore v. Armstrong*, 29 Del. 35, 96 A. 204 (1915).

²³ *Gamble v. Keyes*, 35 S.D. 644, 153 N.W. 888 (1915).

²⁴ *Ex parte City of Mobile*, 251 Ala. 539, 38 So.2d 330 (1949).

²⁵ *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952); *Mason v. Wrightson*, *supra* n. 21.

²⁶ *Cartwright v. Canode*, 138 S.W. 792 (Texas 1911).

²⁷ *Shaw v. Moon*, 117 Ore. 558, 245 P. 318 (1926); *Nally v. Richmond*, 105 Ore. 462, 209 P. 871 (1922).

²⁸ *Knisley v. Ham*, 39 Okl. 623, 136 P. 427 (1913).

²⁹ *Fennemore v. Armstrong*, *supra* n. 22.

³⁰ *Supra* n. 22.

consenting was that he believed the officer had a valid warrant, any action for trespass would be waived. Other jurisdictions have asserted that a citizen is not required to resist an officer in order to maintain an action against unlawful search and seizure. An officer armed with an illegal warrant cannot defend on the ground of consent unless it appears that the consent was freely given and that it was not given because of the officer's official authority or under color of process.³¹ It cannot be said that a person voluntarily consented to be searched where the person was not informed of her constitutional rights, was illegally detained by police, and saw her companions beaten for resisting arrest.³²

That a person was a thief, or did in fact have the stolen property in his possession, is no justification to an unlawful search.³³ And that police officers acted in good faith is not a defense to a civil action against them as they are judged by their conduct, not their motives.³⁴

Damages

Damages occasioned by a wilful wrong cannot always be measured by the consequent loss of money. The damage is often mental, not physical and, thus, must be assumed from such a wrong.³⁵ To prove damages resulting from an unlawful search and seizure, evidence tending to show humiliation, injury to feelings, and disgrace is admissible.³⁶ Exemplary damages may be awarded if malice can be shown.³⁷

Generally, however, a finding of exemplary damages must be predicated on a finding of actual damages. Exemplary damages are a form of punishment awarded by the jury in its discretion as a means of retaliating against a defendant for his anti-social behavior and to deter others from so acting in the future. Such damages do not constitute the basis for a cause of action, and some courts hold that if the jury assesses only a nominal sum, exemplary damages cannot be recovered. Other courts permit exemplary damages to be recovered even if the damages assessed are nominal, as they feel it is evident that the plaintiff has a valid cause of action.³⁸ The Court of Appeals of Maryland permitted the recovery of exemplary damages where the plaintiff could

³¹ *Banfill v. Byrd*, *supra* n. 16; *Bull v. Armstrong*, *supra* n. 19.

³² *State v. DeKoenigswarter*, 54 Del. 388, 177 A.2d 344 (1962).

³³ *McClurg v. Brenton*, *supra* n. 15.

³⁴ *Buckley v. Beaulieu*, *supra* n. 20.

³⁵ *Krehbiel v. Henkle*, 152 Iowa 604, 129 N.W. 945 (1911).

³⁶ *Shall v. Minneapolis St. P. & S.S.M. Ry. Co.*, 156 Wisc. 195, 145 N.W. 649 (1914).

³⁷ *Fennemore v. Armstrong*, *supra* n. 22; 24 R.C.L. 699; *Buckley v. Beaulieu*, *supra* n. 20; *Krehbiel v. Henkle*, *supra* n. 35.

³⁸ Note, *Necessity of Actual Damages For An Award of Exemplary Damages*, 17 Iowa L. Rev. 413, 1931-32.

show no actual damages other than the humiliation sustained by the unlawful search.³⁹

Courts also differ as to what evidence is admissible in mitigation of damages. In *McClurg v. Brenton*,⁴⁰ the court held that only such evidence as tends to show good faith and absence of malice is admissible. This evidence should be admissible to mitigate exemplary damages, not for the purpose of assessing actual or compensatory damages. Other jurisdictions feel that reasonable suspicion by the police officer will mitigate damages.⁴¹

In *Banfill v. Byrd*,⁴² for the purpose of mitigating damages, the court stated it would admit evidence showing the reputation of the plaintiff for bad character or the general reputation of her hotel as being an evil place. This evidence would be admissible on the theory that a person with a generally bad reputation has little to lose and is therefore entitled to little compensation.

In *Bucher v. Krause*⁴³ punitive damages were allowed even though no evidence of malice was introduced, as Illinois courts permit the assessment of punitive damages when a wrongful act is performed with reckless disregard for the rights of others.

Invasion of Privacy by Federal Agents

The federal government and its agents appear to be immune from a tort action for damages sustained by an illegal search and seizure. In *Bell v. Hood*,⁴⁴ the court stated that federal officers could not be sued as individuals because the Fourth Amendment only applies to the federal government and its agents. And, federal officers cannot be sued in their capacities as federal agents as the Federal Tort Claims Act prohibits suits arising from false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights. This immunity extends to all federal officers acting within the scope of their duties. However, the court did point out that where a federal agent exceeds his authority, he no longer represents the government and, thus, loses his immunity.

Value of the Tort Remedy

Civil action against a police officer as a remedy to an illegal search and seizure is ineffective. The jury sees before it a plaintiff who has either been convicted of a crime or who has been suspected of one

³⁹ *Mason v. Wrightson*, *supra* n. 21.

⁴⁰ *Supra* n. 15.

⁴¹ 24 R.C.L. 699.

⁴² *Supra* n. 16.

⁴³ *Supra* n. 25.

⁴⁴ 71 F.Supp. 813 (S.D. Cal. 1947).

versus a defendant whose major fault is over-zealousness.⁴⁵ Further, an unlawful breach of privacy is complete and irreparable when perpetrated. Restoring to the injured party that which was in his possession would at least partially restore him to his previous position.⁴⁶ But, if the injured party is convicted by the use of evidence that was unlawfully seized, how can a judgment for money damages even partially restore him to his previous position?

Also, the police officer is in an imminently better position to defend a suit than the plaintiff is to initiate it. Statutes generally provide that salaries of a civil servant cannot be garnished in the event of a civil suit, that a municipal officer may be reimbursed even though he has exceeded his authority or committed an illegal act, and that he may be defended without cost. But who helps the plaintiff?⁴⁷

The only remedy of real value to the plaintiff is the recognition of his constitutional right to be free from illegal searches and seizures. The realization of this right, culminating in *Mapp v. Ohio*,⁴⁸ developed gradually as the courts came to recognize the inadequacy of money damages as a remedy and the impotence of the tort cause of action as a deterrent.

In a recent case, the police sought to justify more than three hundred illegal searches in nineteen days by improperly issued warrants for the arrest of two men. In issuing an injunction to restrain the police officers from conducting unlawful searches, the U. S. Court of Appeals, Fourth Circuit, pointed out that the case at hand did not involve individual officers in isolated instances, but the whole police department as part of a plan.⁴⁹

It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constitution.⁵⁰

An action for damages for unlawful search and seizure is an illusory remedy.⁵¹ Even if a plaintiff is able to gain a substantial verdict, he must face the lack of the policeman's finances, which often makes the verdict useless as a municipality is not liable without its consent.

The threat of a suit for damages has not deterred police officers from executing illegal searches and seizures. The only effective deter-

⁴⁵ Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 Rutgers L. Rev. 526, 1956-57.

⁴⁶ *Eleuteri v. Richman*, 47 N. J. Super. 1, 135 A.2d 191 (1957).

⁴⁷ Note, *Judicial Control of Illegal Search and Seizure*, 58 Yale L. J. 144, 1948-49.

⁴⁸ *Supra* n. 4.

⁴⁹ *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966).

⁵⁰ Traynor, *Mapp v. Ohio at Large in the Fifty States*, 3 Duke L. J. 319, 322 (1962).

⁵¹ *Wolf v. Colorado*, *supra* n. 6.

rent is excluding the fruits of unlawful searches as evidence in the courtroom as it appears that only by making the breaking of a law fruitless, can we uphold the right to be free from illegal searches and seizures.

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.⁵²

⁵² *Id.* at 44.