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"A Most Deplorable Paradox": Admitting Illegally Obtained Evidence in Georgia--Past, Present, and Future

Donald E. Wilkes Jr.
University of Georgia School of Law

"A MOST DEPLORABLE PARADOX": ADMITTING ILLEGALLY OBTAINED EVIDENCE IN GEORGIA—PAST, PRESENT, AND FUTURE

*Donald E. Wilkes, Jr.**

*We hear and read much of the lawlessness of the people. One of the most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant legal discharge of all their duties, but it utterly repudiates the doctrine that these important duties can not be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal, "the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free government.***

I. INTRODUCTION

From 1914 until 1960 objections to admitting illegally obtained evidence[1] in a criminal trial[2] were considered at one time or

* Associate Professor of Law, University of Georgia School of Law. B.A., J.D., University of Florida, 1965, 1969.

** Underwood v. State, 13 Ga. App. 206, 213, 78 S.E. 1103, 1107 (1913).

[1] For purposes of this Article, illegally obtained evidence refers to evidence acquired as a result of search and seizure practices that violate constitutional restrictions on the exercise of governmental power.

In the United States evidence may be illegally obtained because the search and seizure violated constitutional provisions protecting against (1) unreasonable search and seizure, (2) compulsory self-incrimination, or (3) a denial of due process of law. Where it has been seized in violation of the Bill of Rights or the fourteenth amendment, the evidence is illegally obtained under federal law. Where it has been seized in violation of equivalent state constitutional provisions, the evidence is illegally obtained under state law.

Because the question has been entertained so infrequently by the Georgia courts, this Article does not discuss the use of evidence seized in violation of the Georgia constitutional provision protecting against denials of due process. Nor does the Article deal with the use of evidence seized in violation of federal or state statutory provisions protecting privacy.

[2] This Article deals only with the admissibility of illegally obtained evidence of guilt in a criminal case, where such evidence, when tendered by the prosecution, usually takes the form

another in the appellate courts of all fifty states.[3] By 1960 illegally obtained evidence was, under state law, generally admissible in twenty-four states and generally inadmissible in the other twenty-six.[4] When *Mapp v. Ohio*[5] was decided in 1961, holding that evidence obtained in violation of the fourth amendment was not admissible in state criminal trials,[6] it was widely assumed that the final word had been uttered on the subject.[7] However, recent decisions of the Supreme Court of the United States, whose philosophy of the Bill of Rights has been altered drastically as a consequence of appointments to the Court made since 1969, indicate that *Mapp* may soon be wholly or partly overruled.[8] This creates the possibility that state courts again may have to decide whether, under state law, illegally obtained evidence is admissible. The time is therefore ripe for a comprehensive examination of the admissibility of such evidence in a Georgia criminal[9] trial.

This Article explores the admissibility of illegally obtained evidence in Georgia criminal cases prior to 1961 and during the post-*Mapp* era and endeavors to assess the future admissibility of illegally seized evidence in Georgia under both federal and state law.

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of either (1) the actual articles seized, or (2) testimony concerning the discoveries made in consequence of a given search. For purposes of this Article, no distinction is to be made between illegally obtained evidence offered as substantive proof of criminal guilt and illegally obtained evidence offered for impeachment purposes.

[3] Cases are collected in Annot., 84 A.L.R.2d 959 (1962); Annot., 50 A.L.R.2d 531 (1956); Annot., 150 A.L.R. 566 (1944); Annot., 134 A.L.R. 819 (1941); Annot., 88 A.L.R. 348 (1934); Annot., 52 A.L.R. 477 (1928); Annot., 41 A.L.R. 1145 (1926); Annot., 32 A.L.R. 408 (1924); Annot., 24 A.L.R. 1408 (1923).

[4] Elkins v. United States, 364 U.S. 206, 224-32 (1960).

[5] 367 U.S. 643 (1961).

[6] *See* notes 92-97 and accompanying text *infra*.

[7] *See, e.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of* Mapp v. Ohio, 13 CASE W. RES. L. REV. 56 (1961); Specter, Mapp v. Ohio: *Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

[8] *See* notes 142-50 and accompanying text *infra*.

[9] In the past the Georgia courts have wavered on the issue of whether an adjudication of guilt of a municipal offense is a criminal conviction. *See* Wilkes, *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part I)*, 8 GA. L. REV. 313, 319 n.23 (1974). It would appear that since 1969 municipal offenses are not crimes. *Id.* For purposes of this Article, a municipal offense is regarded as a crime.

II. The Admissibility of Illegally Obtained Evidence in Georgia Criminal Trials Prior to 1961

A. *Federal Law*

In 1914 the Supreme Court of the United States held in *Weeks v. United States*[10] that the fourth amendment prohibited the use in a criminal trial of evidence obtained by methods violative of the amendment. In the 1920's the Court also indicated that evidence obtained in violation of the fourth amendment was inadmissible in a criminal case because of the self-incrimination clause of the fifth amendment.[11] These decisions did not affect the admissibility of illegally seized evidence in the state courts, however, since prior to the 1960's neither the fourth amendment nor the fifth amendment privilege against self-incrimination applied to exclude evidence in state, as opposed to federal, actions.[12] Moreover, in 1949 the Court held in *Wolf v. Colorado*[13] that the due process clause of the fourteenth amendment did not prohibit state courts from using evidence which, had it been proffered in a federal court, would have been excludable as having been obtained in violation of the fourth amendment.

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[10] 232 U.S. 383 (1914). *See also* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[11] *See, e.g.*, Gambino v. United States, 275 U.S. 310 (1927); Marron v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921). *See also* Boyd v. United States, 116 U.S. 616 (1886).

The Court continued to adhere to the position that unreasonably seized evidence was excludable under both the fourth and fifth amendments until 1947. *See, e.g.*, Harris v. United States, 331 U.S. 145 (1947); Zap v. United States, 328 U.S. 624 (1946); Davis v. United States, 328 U.S. 582 (1946); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). Thereafter, the Court abandoned the view that the fifth amendment privilege against self-incrimination required exclusion of evidence obtained in violation of the fourth amendment. *See, e.g.*, Henry v. United States, 361 U.S. 98 (1959); Jones v. United States, 357 U.S. 493 (1958); United States v. Jeffers, 342 U.S. 48 (1951); Brinegar v. United States, 338 U.S. 160 (1949); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 581 (1948). *But see* Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961) (Black, J., concurring).

[12] The fourth amendment was held not to extend to state actions in Wolf v. Colorado, 338 U.S. 25 (1949); *See also* Weeks v. United States, 232 U.S. 383 (1914). The *Wolf* case was overruled to the extent that it held the fourth amendment inapplicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

The federal privilege against self-incrimination was held not to extend to the states in Adamson v. California, 332 U.S. 46 (1947), and Twining v. New Jersey, 211 U.S. 78 (1908). *See also* Palko v. Connecticut, 302 U.S. 319 (1937). *Adamson* and *Twining* were overruled by Malloy v. Hogan, 378 U.S. 1 (1964). *See also* Griffin v. California, 380 U.S. 609 (1965).

[13] 338 U.S. 25 (1949).

The first federal limitation on the admission of illegally seized evidence in state criminal trials was formulated in *Rochin v. California*[14] in 1952. The defendant in that case had been convicted in a California court of possessing two morphine capsules, which police had seized by pumping the defendant's stomach against his will.[15] Offended by the brutish methods used to obtain the capsules, the Court reversed the conviction, announcing that the due process clause of the fourteenth amendment barred state courts from entering convictions based on evidence seized by methods shocking to the conscience because of physical brutality to the person of the accused.[16]

Although evidence seized by outrageous physical violence was, under *Rochin,* inadmissible in the Georgia courts beginning in 1952, there are no reported cases in which a Georgia court excluded evidence of crime on the grounds that it had been obtained in violation of the *Rochin* case. In only one reported case was such a claim even advanced. The defendant in *Jones v. State*[17] had been convicted of operating a lottery. At her trial she objected to the introduction of a chewing gum wrapper on which gambling notations had been made, claiming that the manner by which police obtained the wrapper violated the due process standard laid down in *Rochin.* The wrapper had been seized by vice squad officers who had stopped defendant in her automobile and, noticing that her speech was peculiar, directed the defendant to open her mouth and then removed the wrapper from her tongue while she tried to push it back further

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[14] 342 U.S. 165 (1952).

[15] The Court described the facts as follows:

> Having "some information that [the defendant] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed the deputies spied two capsules. When asked "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" induced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Id. at 166.

[16] *Id.* at 172-74.

[17] 90 Ga. App. 761, 84 S.E.2d 124 (1954).

into her mouth with her teeth. The Georgia court of appeals affirmed the trial court's overruling of the objection to the evidence on the grounds that there had been no denial of due process because the defendant had not been coerced when the seizure was made.[18] While the result reached by the court seems eminently correct, the reasoning is unpersuasive. The court should have concluded not that the evidence was admissible because there had been no coercion but that *Rochin* was inapplicable because the seizure, despite its coercive nature, had not involved the infliction of shocking physical violence on the defendant.

In 1956 the Supreme Court devised a second limitation on the admission of illegally seized evidence in state criminal cases. In *Rea v. United States*[19] the defendant, indicted on a federal narcotics charge, made a successful motion to suppress drugs seized by a federal narcotics agent in violation of the fourth amendment. After the federal indictment was dismissed, the agent who had seized the evidence instituted drug possession charges against the defendant in the court system of a state where illegally obtained evidence was admissible. Thereafter, the defendant filed an application in the federal court which had granted the suppression motion, seeking to prevent the evidence previously suppressed from being used in the trial now pending in state court. The federal court denied the application, and the court of appeals affirmed.[20] The United States Supreme Court reversed, holding that a federal court has the supervisory power to prevent federal law enforcement agents from transferring to state officials for use in a state criminal case evidence seized by the agents in violation of the fourth amendment.[21]

There are no reported cases in which a defendant charged with a crime in a Georgia court sought relief in a federal court under *Rea* to prevent the use of evidence seized in violation of the fourth amendment by federal officials.[22]

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[18] *Id.* at 762, 84 S.E.2d at 125.

[19] 350 U.S. 214 (1956).

[20] Rea v. United States, 218 F.2d 237 (10th Cir. 1954).

[21] Rea v. United States, 350 U.S. 214, 216-18 (1956). In 1961 the Court indicated that its *Rea* holding did not extend to instances in which the federal agent turned over the illegally seized evidence to officials of a state where unreasonably seized evidence was inadmissible under state law. Wilson v. Schnettler, 365 U.S. 381 (1961).

[22] In one case a person charged with a crime in a Georgia state court filed a civil rights action in a federal district court to enjoin state officials from using evidence they allegedly had seized in the course of an unreasonable search and seizure not involving physical brutality. Relief was denied on the authority of Stefanelli v. Minard, 342 U.S. 117 (1951), which

In summary, there were no federal restrictions prior to 1952 on the use in Georgia courts of evidence seized in violation of the Federal Constitution. By 1956 illegally obtained evidence was inadmissible under federal law in a Georgia criminal trial under limited circumstances. Where the evidence had been seized by physical brutality to the person of the defendant the evidence would be excluded on proper objection in the Georgia trial court. Where the evidence had been obtained by federal officials in violation of the fourth amendment, although there was no federal right to require a Georgia court to reject the evidence, a defendant could, through a federal court action, prevent the federal officials from turning over the evidence to Georgia officials.

B. *Georgia Law*

In order to understand the degree to which illegally obtained evidence was, under Georgia law, admissible in a criminal case before 1961, it is necessary to divide the pre-1961 era into three periods. During the first period, which ended in 1906, the Georgia supreme court established that evidence was admissible when it had been seized in violation of state constitutional guarantees against unreasonable search and seizure but inadmissible when it had been seized in violation of the privilege against compulsory self-incrimination protected by the state constitution.[23] During the sec-

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had held that a federal court should not issue injunctive relief preventing a state court from using evidence illegally obtained by state officials. *See* Atterberry v. Fortson, 230 F.2d 604 (5th Cir. 1956), *aff'g* 137 F. Supp. 674 (S.D. Ga. 1955).

[23] In this Article "Georgia constitutional provision forbidding unreasonable search and seizure" or a similar expression refers in cases decided before 1945 to GA. CONST. art. 1, § 16 (1877), and in cases decided since then to GA. CONST. art. 1, § 16, GA. CODE ANN. § 2-116 (1973). Both provisions are worded identically:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized.

Similarly, "Georgia constitutional provision forbidding compulsory self-incrimination" or similar phraseology refers in cases decided prior to 1945 to GA. CONST. art. 1, § 6 (1877), and in cases decided since 1945 to GA. CONST. art. 1, § 6, GA. CODE ANN. § 2-106 (1973). These two provisions are also identical: "No person shall be compelled to give testimony tending in any manner to incriminate himself."

In March 1976 the Georgia General Assembly passed a resolution proposing a new state constitution. 1976 Ga. Laws 1198. The new constitution was ratified by the electorate and became effective on January 1, 1977. *Id.* at 1348-49. The new constitution contains a provision prohibiting unreasonable search and seizure which is identical to the search and seizure provisions of the state constitutions of 1877 and 1945. *See* GA. CONST. art. 1, § 10 (effective January 1, 1977). The new constitution also includes a provision forbidding compulsory self-

ond period, which lasted from 1907 until 1916, the supreme court did not decide any search and seizure cases because its jurisdiction had been limited. The recently-created Georgia court of appeals paid lip service to the earlier decisions of the supreme court but in practice departed from those precedents by enlarging the number of circumstances under which a seizure of evidence would be deemed inconsistent with the self-incrimination privilege. Finally, during the third period, lasting from 1916 until 1961, the principles of admissibility established prior to 1907 were reaffirmed and both the supreme court and the court of appeals stoutly adhered to them.

1. *Prior to 1907.*—The admissibility of evidence obtained in violation of the Georgia constitutional provision prohibiting unreasonable search and seizure was first considered in *Williams v. State*.[24] The defendant stood convicted of keeping open a tippling house on a Sunday. She had been prosecuted after two detectives, without a search warrant or any other lawful authority, entered her house, searched her and the premises, and seized marked money from her person and a jug of blackberry wine and three bottles partially filled with liquor from the house. The trial court overruled her claim that the detectives' testimony, together with the articles seized, ought to be excluded because it was based on search and seizure practices that violated the state constitutional prohibition of unreasonable searches and seizures. The supreme court, in a unanimous opinion by Presiding Justice Samuel Lumpkin, acknowledged that the seizures had been illegal, characterizing such searches as "unlawful, unreasonable and outrageous . . . [and] obnoxious to our fundamental law."[25] Recognizing that "[t]he citizen's right to immunity from such outrages" was "so sacred as to demand constitutional preservation," the court felt it would be "eminently proper" for the General Assembly to enact legislation to deter illegal police searches by punishing offending officers.[26] The court held, however, that the state guarantees against unreasonable search and seizure did not require the exclusion of illegally obtained evidence, although it recognized that the General Assembly could, if it so desired, enact legislation excluding the use of such evidence

incrimination which is a duplicate of the self-incrimination provisions of the 1877 and 1945 constitutions. *See* GA. CONST. art. 1, § 13 (effective January 1, 1977).

[24] 100 Ga. 511, 28 S.E. 624 (1897).

[25] *Id.* at 525, 28 S.E. at 629.

[26] *Id.*

as a means of preserving the constitutional protection. The court said:

> We know of no law in Georgia which renders inadmissible in evidence the fruits of an illegal and wrongful search and seizure; nor are we aware of any statute from which it could be logically gathered that the admission of such evidence violates any recognized principle of public policy. Whether or not prohibiting the courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination.[27]

Although some of the logic underlying the result reached in *Williams* may have been flawed,[28] the case resolved the issue of whether, in a criminal trial, the state constitutional guarantee against unreasonable searches and seizures required suppression of evidence obtained in violation of that provision. But *Williams* did not purport to deal with the admissibility of evidence alleged to have been seized in violation of other state constitutional rights. Just two years later, in *Evans v. State,*[29] the Georgia supreme court was asked to decide whether under some circumstances evidence acquired by a search and seizure would be excluded from a criminal proceeding in order to protect the accused's state privilege against self-incrimination.

The defendant in *Evans* had been walking down the street concealing a pistol inside the pocket of his coat when two policemen stopped him on the suspicion that he was carrying a hidden gun and by force compelled him to draw the weapon from his pocket. The officers then seized the pistol and arrested him. The supreme court reversed the defendant's conviction for carrying a concealed weapon, holding that the testimony of one of the arresting officers about the incident, on which the conviction was based, violated the

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[27] *Id.* at 521, 28 S.E. at 627-28.

[28] *See, e.g.*, Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 21 n.52 (1925) (criticizing the assumption in *Williams* that a police officer who searches or seizes in an unreasonable manner acts not in behalf of the state but solely as a private person); 62 U. PA. L. REV. 721, 723-24 (1914) (disputing the *Williams* view that constitutional guarantees against unreasonable searches and seizures have as their principal purpose the invalidation of legislative enactments that purport to authorize unreasonable searches or seizures).

[29] 106 Ga. 519, 32 S.E. 659 (1899).

defendant's state constitutional privilege against self-incrimination. Justice Andrew Cobb's opinion for a unanimous court distinguished the *Williams* case on the grounds that in *Williams* the defendant had not been forced to hand over incriminating evidence on her person; the evidence had been removed from the defendant's person by the detectives who searched her.[30] Thus, the issue of whether the use of evidence obtained by an illegal search and seizure could compel a defendant to incriminate himself was not before the court in *Williams,* the court reasoned.[31]

Instead, the court decided that *Day v. State,*[32] decided nearly twenty years before *Williams,* was the controlling precedent.[33] In *Day* the court had construed the Georgia self-incrimination provision to prohibit not only compelling a defendant to incriminate himself communicatively but also compelling a defendant to perform a noncommunicative but nevertheless incriminating act of commission.[34] By forcing the defendant in *Evans* to hand them the

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[30] *Id.* at 522, 32 S.E. at 660.

[31] *Id.*

[32] 63 Ga. 667 (1879).

[33] 106 Ga. at 520-21, 32 S.E. at 659.

[34] In *Day* the "evidence mainly relied on for conviction," 63 Ga. at 668, consisted of testimony by a prosecution witness (evidently a policeman) to the effect that the defendant, while under arrest, by physical force and against his will had been made to place his foot in a track left near the scene of the crime. According to the witness, the defendant's foot fit the track. The defendant claimed that admission of the testimony violated his state constitutional privilege against self-incrimination.

The question presented in *Day* posed significant problems of constitutional interpretation. Should the privilege against self-incrimination be construed (as it traditionally has been) to protect only against compelling a defendant in a criminal case to incriminate himself communicatively? Or should the privilege be extended to prevent a defendant from being compelled to incriminate himself in noncommunicative ways, such as by being required to perform an incriminating act? Could the latter view of the privilege be squared with the language of the state constitutional provision, which prohibited compulsion "to give testimony"? Unfortunately, however, the *Day* court did not discuss the issues of constitutional interpretation involved. The court simply adopted an expansive interpretation of the privilege against self-incrimination:

> By the constitution of this state "no person shall be compelled to give testimony tending in any manner to incriminate himself." Nor can one, by force, compel another, against his consent, to put his foot in a shoe-track for the purpose of using it as evidence against him on the criminal side of the court, the more especially when the person using such force has no lawful warrant or authority for doing so.

Id. at 669. Two years later, in Blackwell v. State, 67 Ga. 76 (1881), the Georgia supreme court again dealt with the issue of whether the self-incrimination privilege protected a criminal defendant from being forced to perform a noncommunicative but nonetheless incriminating act. The defendant had been convicted of a crime which circumstantial evidence indicated had been committed by a one-legged man. During the trial the judge had directed the defendant to stand up so that a prosecution witness and the jury could observe the extent of

gun, the court said, the police had compelled him to perform an incriminating act, which, under *Day,* violated his privilege against self-incrimination.[35]

Between 1899, when *Evans* was decided, and 1906, when the Georgia supreme court decided its last search and seizure case for a decade, the holdings in *Williams* and *Evans* were harmonized, reaffirmed, and clarified in four cases, two of which involved searches of persons incident to their arrest[36] and two of which involved the search of premises.[37] In the last of these cases, *Duren v. City of Thomasville,*[38] the court compared and contrasted the holdings in *Williams* and *Evans* in these words:

> [T]here is a vast difference between searching the premises of one suspected of crime and seizing any evidence of guilt, and compelling the person under suspicion to himself produce the evidence upon which he could be convicted. The criterion, is *who* furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence, it is inadmissible. *Evans v. State* . . . . But if his person or belongings are searched by another, although without a vestige of authority, the evidence thus discovered may be used against him. *Williams v. State* . . . .[39]

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the amputation of his right leg. Citing *Day* and two cases from other states but without any analysis of the issue, the court reversed the conviction. A headnote to the case explained: "A defendant in a criminal case cannot be required to give evidence against himself, either by acts or words." *Id.* In 1882 the court again reaffirmed the *Day* holding. Franklin v. State, 69 Ga. 36 (1882). *But cf.* Myers v. State, 97 Ga. 76, 25 S.E. 252 (1895); Woolfolk v. State, 81 Ga. 551, 8 S.E. 724 (1889); Drake v. State, 75 Ga. 413 (1885).

[35] The court stated that

> [i]t will thus be seen that in the case cited [*Day*] the constitutional provision was construed to apply to cases other than those in which the accused was forced to give evidence against himself either in court or pursuant to an order of court. In the present case neither the officer who testified nor the officer who assisted in the arrest had any warrant for the accused, nor was any arrest made until after the accused was forced to give up his pistol. The only fair interpretation that can be given to the evidence objected to is that the accused was compelled against his consent to put his hand in his pocket and surrender his pistol to the officers, and thus disclose that he was guilty of a violation of law. Viewing the case in this light, we think it is controlled by the decision in the *Day* case, and that the court erred in admitting the evidence objected to.

106 Ga. at 521, 32 S.E. at 659.

[36] Springer v. State, 121 Ga. 155, 48 S.E. 907 (1904); Dozier v. State, 107 Ga. 708, 33 S.E. 418 (1899).

[37] Duren v. City of Thomasville, 125 Ga. 1, 53 S.E. 814 (1906); Jackson v. State, 118 Ga. 780, 45 S.E. 604 (1903).

[38] 125 Ga. 1, 53 S.E. 814 (1906).

[39] *Id.* at 2, 53 S.E. at 814. In a fifth case, Sanders v. State, 113 Ga. 267, 38 S.E. 841 (1901),

By 1906, therefore, the Georgia supreme court had developed an unambiguous body of case law resolving questions relating to the admissibility of evidence illegally obtained under Georgia law. Evidence acquired by illegally searching premises was admissible under both the constitutional provision forbidding unreasonable searches and seizures and the provision guaranteeing the self-incrimination privilege. Evidence illegally seized by searching a person who was not himself compelled to perform an affirmative act aiding the authorities was also admissible under both provisions. However, if the illegal search and seizure took the form of compelling the person to perform some affirmative act which aided the authorities in obtaining the evidence, use of the illegally seized evidence, although permissible under the search and seizure provision, was prohibited by the privilege against self-incrimination.

2. *1907-1916.*—For nearly a decade after 1907 the Georgia supreme court did not decide any cases raising the issue of whether illegally obtained evidence should have been admitted in a criminal trial. All appeals involving the issue were handled by the newly-created Georgia court of appeals.[40] Interestingly, during this period the court of appeals, without ever acknowledging any change in the law, repeatedly held inadmissible illegally seized evidence which was clearly admissible under the supreme court's pre-1907 decisions. This is not to say that the court of appeals totally disregarded the prior decisions of the supreme court. The court of appeals agreed that evidence seized during a search of a place was admissible under both the search and seizure and self-incrimination provisions, and in numerous cases it upheld the introduction of evidence illegally obtained through a search of the defendant's home[41] or place of business.[42] Where the views of the two courts parted was in connection with searches of persons. The court of appeals agreed that the self-incrimination privilege operated to exclude evidence seized by

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the court held, without discussing *Evans*, that a letter given by a prisoner to a jailor for mailing, who instead opened it and turned it over to prosecution authorities, was admissible under *Williams*.

[40] *See* text accompanying notes 65-68 *infra*.

[41] *See, e.g.*, Young v. State, 12 Ga. App. 86, 76 S.E. 753 (1912); Rogers v. State, 4 Ga. App. 691, 62 S.E. 96 (1908); Tooke v. State, 4 Ga. App. 495, 61 S.E. 917 (1908); Smith v. State, 3 Ga. App. 326, 59 S.E. 934 (1907). *See also* Leatherman v. State, 11 Ga. App. 756, 76 S.E. 102 (1912).

[42] *See, e.g.*, Lunceford v. State, 17 Ga. App. 415, 87 S.E. 151 (1915); Heimer v. State, 16 Ga. App. 588, 85 S.E. 821 (1915); Herndon v. State, 10 Ga. App. 118, 72 S.E. 930 (1911); Cohen v. State, 7 Ga. App. 5, 65 S.E. 1096 (1909). The court also agreed that evidence seized by deception was admissible. *See, e.g.*, McAllister v. State, 17 Ga. App. 159, 86 S.E. 412 (1915).

compelling the defendant to perform an act aiding the authorities in obtaining the evidence.[43] Without admitting that it was departing from supreme court holdings, however, the court of appeals also found that the defendant had been forced to incriminate himself whenever the search and seizure was pursuant to an illegal arrest. Stated differently, the court of appeals held that defendants who were not required to perform any affirmative act but only to submit passively to a seizure pursuant to an illegal arrest had nevertheless been compelled to incriminate themselves, and evidence so obtained was inadmissible.[44]

In *Hammock v. State,*[45] the appeals court's first decision involving the use of illegally seized evidence, the testimony of a deputy sheriff, who acknowledged arresting the defendant illegally, searching him, and seizing a concealed pistol from his person, was admitted over defendant's objection that the use of such evidence violated the Georgia constitutional provision guaranteeing the privilege against self-incrimination. Since there was no indication that the defendant had been forced to hand over the weapon, the question presented was whether evidence of guilt was inadmissible solely because it had been secured by a search of the defendant which as the product of an illegal arrest was itself illegal. The court of appeals took note of the supreme court decisions on the introduction of illegally obtained evidence and summarized the pre-1907 law on the subject as follows:

> Under the constitution, persons are protected against unlawful searches and seizures, and also against being compelled to give testimony tending in any manner to incriminate themselves. A violation of the former right does not necessarily render evidence, incidentally disclosed thereby, inadmissible; a violation of the latter right does. When the act in question is a concurrent violation of both rights, the person is nonetheless to be protected.[46]

This interpretative summary was reasonably accurate. Under the supreme court's decisions, seized evidence was never inadmissible

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[43] *See, e.g.,* Davis v. State, 4 Ga. App. 318, 61 S.E. 404 (1908).

[44] Moreover, the court of appeals agreed that under earlier decisions of the supreme court such as *Day,* evidence which the defendant had been forced to disclose was inadmissible even though there had been no search and seizure. Aiken v. State, 16 Ga. App. 848, 86 S.E. 1076 (1913).

[45] 1 Ga. App. 126, 58 S.E. 66 (1907).

[46] 1 Ga. App. at 127, 58 S.E. at 66-67.

solely because it had been secured in violation of the right not to be subject to unreasonable searches and seizures but was always inadmissible when it had been secured in violation of the self-incrimination privilege. But when the court applied these principles to the use of evidence seized from a person illegally arrested, it concluded in effect that use of any evidence seized pursuant to an illegal search of defendant's person violated the privilege against self-incrimination:

> If we were untrammeled by some of these decisions [of the supreme court], our own views of the sacred character of these constitutional rights of the private citizen might induce us to extend the rule further than we do. After giving recognition to the limitations imposed by the precedents, we hold, that when a person is subjected to an illegal arrest accompanied by an unlawful search of his person, whereby he is involuntarily compelled to disclose evidence of a crime, which in the absence of his volition being destroyed he would not otherwise have disclosed, the evidence so obtained shall not be received against him on the prosecution for crime. Nothing in this ruling conflicts with the decisions cited above.[47]

The court thereupon reversed the conviction because the arrest resulting in the seizure of evidence was plainly illegal.[48]

The court's assertion that its decision did not conflict with prior decisions of the supreme court was, of course, clearly incorrect. Under the earlier decisions, it is true, a search and seizure might violate the self-incrimination privilege. But a search and seizure could not involve self-incrimination unless the defendant had been compelled to perform some affirmative act which aided the authorities in seizing the evidence, as opposed to doing nothing while the authorities seized it themselves. Judged by the precedents, therefore, the court of appeals' holding was erroneous to the extent that it defined compulsory self-incrimination to include a seizure of evidence from an illegally arrested person who was not forced somehow to cooperate affirmatively in the seizure. Judged by logic, however, the court's decision was not without foundation. Can there be, logically speaking, any substantial difference between forcing a person to hand over incriminating evidence and illegally seizing him and compelling him to submit to a search which produces the same evidence? As the court cogently observed:

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[47] *Id.*, 58 S.E. at 67.

[48] *Id.* at 128, 58 S.E. at 67.

> To say, in a case such as this, that the officer furnishes the testimony, and that the defendant therefore has not been compelled to give evidence tending to incriminate himself, can be justified only by skimming the surface and neglecting to consider the penetralia of the transaction.[49]

In *Hughes v. State*,[50] another concealed weapons case decided in the first year of the court's existence, the court of appeals again reversed a conviction based on evidence obtained by a search of the defendant's person while he was under illegal arrest, holding the use of such evidence to be a violation of his self-incrimination privilege.[51] The court used reasoning similar to that employed in *Hammock*; but in addition it attempted to distinguish *Williams* by arguing that in that case the illegal search had revealed only incriminating circumstances, whereas the illegal search in this case had uncovered all that was required to convict.[52] It will be remembered that although *Williams* did involve a search of a person (as well as of the premises), it did not involve questions of self-incrimination. Thus, it is not clear why the court felt obliged to make this distinction.

The *Hammock* and *Hughes* cases established the principle in the court of appeals that the privilege against self-incrimination prohibited the use of evidence taken from the defendant's person pursuant to an illegal arrest even though his only act was submission to the illegal search. Not surprisingly, therefore, until 1916 when the supreme court clearly reaffirmed its pre-1907 decisions the court of appeals repeatedly held that evidence must be suppressed in a criminal case when it had been seized pursuant to an illegal warrantless arrest[53] or an arrest under an illegal warrant.[54] The requirement that the seizure be pursuant to an illegal arrest did not mean that the *Hammock-Hughes* rule extended to every conceivable seizure connected with an illegal arrest. For purposes of the rule, a seizure was pursuant to an illegal arrest only if it appeared that the seizure had occurred solely because the illegally arrested person, by

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[49] *Id.*

[50] 2 Ga. App. 29, 58 S.E. 390 (1907).

[51] *Id.* at 32-36, 58 S.E. at 391-93.

[52] *Id.* at 36, 58 S.E. at 393.

[53] *See, e.g.*, Holloway v. State, 16 Ga. App. 143, 84 S.E. 590 (1915); Brown v. State, 15 Ga. App. 484, 83 S.E. 890 (1914); Scott v. State, 14 Ga. App. 806, 82 S.E. 376 (1914); Underwood v. State, 13 Ga. App. 206, 78 S.E. 1103 (1913); Jackson v. State, 7 Ga. App. 414, 66 S.E. 982 (1910); Glover v. State, 4 Ga. App. 455, 61 S.E. 862 (1908).

[54] *See, e.g.*, Sherman v. State, 2 Ga. App. 686, 58 S.E. 1122 (1907).

virtue of the arrest, lacked the capacity to prevent disclosure of the evidence. Thus, the *Hammock-Hughes* rule did not operate to exclude evidence seized from an illegally arrested person who, after the arrest, freely consented to the search.[55] Nor did it render inadmissible evidence inadvertently disclosed in the course of resisting the illegal arrest.[56] Moreover, *Hammock* and *Hughes* did not require suppression of evidence seized pursuant to an illegal arrest in cases in which the defendant had either failed to object to introduction of the evidence[57] or had failed to object properly,[58] or in which admission of the evidence amounted to harmless error.[59]

The remarkable refusal of the court of appeals, over a period of nearly ten years, to admit illegally seized evidence otherwise admissible under earlier decisions of Georgia's highest court provokes two queries. First, why did the court expand the self-incrimination privilege beyond the limits previously established by the supreme court in search and seizure cases? Second, why did the supreme court not reaffirm its prior holdings and thereby terminate the *Hammock-Hughes* rule until 1916?

The answer to the first question is to be found in the differing attitudes of the two courts in regard to the role of the court system in protecting civil liberties in search and seizure cases. The supreme court was inclined in search and seizure cases to overlook illegal government practices and to focus narrowly on the factual guilt of the defendant whose rights had been denied.[60] Until 1916, however, the court of appeals was less myopic. Repeatedly the court voiced the belief that a free society is more threatened by government officials who exceed the fundamental restrictions on their power set forth in the constitution than by private citizens who transgress the ordinary penal laws.[61] Repeatedly the court expressed the belief that

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[55] *See, e.g.*, Cooper v. State, 14 Ga. App. 464, 81 S.E. 364 (1914); Weatherington v. State, 13 Ga. App. 408, 79 S.E. 240 (1913); Byrd v. State, 10 Ga. App. 214, 73 S.E. 34 (1911). *See also* Warren v. State, 6 Ga. App. 18, 64 S.E. 111 (1909).

[56] *See, e.g.*, Croy v. State, 4 Ga. App. 456, 61 S.E. 848 (1908). *See also* Wright v. State, 9 Ga. App. 266, 70 S.E. 1126 (1911); Brookins v. State, 7 Ga. App. 204, 66 S.E. 398 (1909).

[57] *See, e.g.*, Banister v. State, 11 Ga. App. 15, 74 S.E. 444 (1912); Williams v. State, 7 Ga. App. 33, 65 S.E. 1097 (1909); Davis v. State, 4 Ga. App. 318, 61 S.E. 404 (1908).

[58] *See, e.g.*, Butler v. State, 14 Ga. App. 446, 81 S.E. 370 (1914); Jones v. State, 4 Ga. App. 741, 62 S.E. 482 (1908).

[59] *See, e.g.*, Stephens v. State, 16 Ga. App. 144, 84 S.E. 560 (1915); Akridge v. City of Atlanta, 12 Ga. App. 252, 77 S.E. 101 (1913).

[60] *See, e.g.*, Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897).

[61] *See, e.g.*, Hughes v. State, 2 Ga. App. 29, 58 S.E. 390 (1907). *See also* Walker v. City Council of Dawson, 7 Ga. App. 417, 66 S.E. 984 (1910).

judges would abdicate their responsibilities if they gave rubber-stamp approval to criminal convictions founded on the use of evidence seized in an unconstitutional manner.[62] In *Underwood v. State,*[63] Benjamin Harvey Hill, Jr., the first chief judge of the court of appeals and an ardent defender of the rights of the individual, delivered an eloquent opinion epitomizing the court of appeals' view that courts must not permit the state to punish criminally persons against whom evidence was gathered by agents of government exercising powers forbidden to them by a bill of rights.

> The two provisions of the [Georgia] constitution [protecting against unreasonable searches and seizures and compulsory self-incrimination] which we have been discussing appear in the fundamental law of every State of this Union, as well as in the Federal constitution. They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away from safe-keeping in the casket of the constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless gifts of a free government. We hear and read much of the lawlessness of the people. One of the most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant legal discharge of all their duties, but it utterly repudiates the doctrine that these important duties can not be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal, "the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free

[62] *See, e.g.*, Hammock v. State, 1 Ga. App. 126, 58 S.E. 66 (1907).
[63] 13 Ga. App. 206, 78 S.E. 1103 (1913).

> government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant. Suspicion is no substitute for a legal warrant, and the badge of authority is the emblem of law and order, and gives no right to the wearer to arrest without warrant, imprison without authority, and torture without mercy. Any compulsory discovery of self-incriminating evidence is abhorrent to a proper sense of justice and is intolerable to American manhood. . . . These arbitrary methods of discovering crime are subversive of the fundamental principles of law, destructive of the indefeasible rights of personal liberty, personal security, and private property, and place at the mercy of every petty official and conscienceless criminal the life, liberty, and reputation of the citizen. . . . Therefore courts of justice will not approve such methods to discover crime, and the law, seeking pure and impartial sources of evidence, will refuse to admit compulsory confessions of guilt, and condemns as dangerous, untrustworthy, and without probative value testimony against others obtained by the use of physical torture or mental coercion.[64]

The answer to the second question, why the supreme court did not terminate the *Hammock-Hughes* rule until 1916, is to be found in the limited criminal jurisdiction of the supreme court during this period. From 1907, when the court of appeals was created by a constitutional amendment, passed the year before in the state legislature,[65] until late 1916, when the judicial article of the Georgia Constitution of 1877 was again amended,[66] the supreme court had jurisdiction in only two types of criminal cases: convictions for capi-

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[64] *Id.* at 213-14, 78 S.E. at 1106. Of all the cases applying the *Hughes-Hammock* rule, *Underwood* unquestionably was the most dramatic in its facts. The chief of police and a number of policemen went to the defendant's place of business without a warrant and illegally began searching for intoxicating liquors. While the search was going on the defendant closed and locked his iron safe, provoking the suspicion of the chief of police, who ordered the defendant to open the safe. When the defendant refused to do so, he was arrested and taken to the police barracks. There he was ordered to give up his keys to the safe. When he refused, several of the policemen seized him and forcibly took the keys from his pocket. Thereafter the policemen went to the defendant's place of business, opened the safe, and found whiskey which they seized. Based on this evidence, the defendant was convicted of keeping intoxicants in his place of business. The court of appeals reversed the conviction on the ground that under these circumstances the seizure of the evidence from the illegally arrested defendant constituted compulsory self-incrimination. *Id.* at 214, 78 S.E. at 1107.

[65] 1906 Ga. Laws 24, (amending GA. CONST. art. 6, §§ 1, 2 (1877)).

[66] 1910 Ga. Laws 19, (amending GA. CONST. art. 6, § 2 (1877)).

tal felonies entered in the superior courts and cases certified to the supreme court by the court of appeals.[67] During the period from 1907 until 1916 the supreme court did not review any capital cases raising the issue of the admission of illegally seized evidence,[68] and the court of appeals declined to certify any criminal cases involving the issue. As a consequence, the supreme court was unable to restate its pre-1907 holdings until early 1916, when two new members of the court of appeals, repudiating their prior acceptance of *Hammock* and *Hughes,* certified to the supreme court two cases presenting issues of the admissibility of evidence seized pursuant to an illegal arrest.

3. *1916-1961.*—In late 1914 only one of the judges of the court of appeals who had participated in the *Hammock* and *Hughes* decisions, Chief Judge Richard B. Russell, Sr., was still on the bench. The other two members of the court, Peyton L. Wade and Nash R. Broyles, were recent appointees. Judge Wade and Judge Broyles accepted *Hammock* and *Hughes* at first,[69] but both soon changed their minds. Judge Broyles first indicated that he had reconsidered the *Hammock-Hughes* rule in *Heimer v. State,*[70] decided in mid-1915. There Chief Judge Russell wrote an opinion concurred in by Judge Wade which affirmed a conviction under a liquor prohibition act while simultaneously approving in a dictum the *Hammock-Hughes* rule. Judge Broyles, concurring specially, announced that

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[67] The 1916 amendment enlarged the supreme court's criminal jurisdiction to include (1) cases of conviction for capital felony, (2) cases certified by the court of appeals, and (3) cases brought up from the court of appeals on writ of certiorari. *Id.*

It is worthy of note that for over fifty years following ratification of the 1916 amendment the supreme court remained legally incapable of reviewing court of appeals decisions that were favorable to criminal defendants. During this time the common law rule that the prosecution cannot appeal a criminal judgment or order was in full effect in Georgia. *See, e.g.,* City of Atlanta v. Stallings, 198 Ga. 510, 32 S.E.2d 256 (1944); City of Dacula v. Allen, 103 Ga. App. 600, 120 S.E.2d 311 (1961). This meant, among other things, that the state could not seek certiorari in the supreme court to set aside any court of appeals criminal judgment, including one determining that the defendant had been denied a constitutional or other right. *See* State v. B'Gos, 175 Ga. 627, 165 S.E. 566 (1932).

In 1973 the Georgia General Assembly finally enacted a statute authorizing the state, by appeal or writ of certiorari, to seek review of criminal decisions under certain circumstances. GA. CODE ANN. § 6-1001a (1975). Under the provisions of the statute the state now may request the supreme court, by writ of certiorari, to re-examine a court of appeals decision reversing a criminal conviction because the defendant's rights were violated. *Id.*

[68] However, in one case not involving a search and seizure the court followed the *Day* holding that forcing a criminal defendant to perform a noncommunicative but incriminating act of commission violates the self-incrimination privilege. Elder v. State, 143 Ga. 363, 85 S.E. 97 (1915).

[69] Brown v. State, 15 Ga. App. 484, 83 S.E. 890 (1914); Cooper v. State, 14 Ga. App. 464, 81 S.E. 364 (1914).

[70] 16 Ga. App. 588, 85 S.E. 821 (1915).

he was now of the view that the self-incrimination privilege did not bar the introduction of seized evidence merely because it was taken from the person of one illegally arrested.[71] Judge Wade changed his mind shortly thereafter. This became apparent when *Calhoun v. State*[72] and *Smith v. State*[73] were docketed in the court of appeals. In each of these cases a defendant convicted of carrying a concealed weapon sought to set aside the judgment on the grounds that the weapon had been taken from him while he was illegally arrested. Because Chief Judge Russell thought that such a claim was proper, whereas Judge Wade and Judge Broyles "considered that this question had already been definitely settled [in favor of admissibility] by numerous decisions of the Supreme Court,"[74] it was decided by "the majority of the court . . . in view of the apparent conflict" between prior supreme court cases and the *Hammock-Hughes* line of cases "to certify the question [of the admissibility of evidence seized pursuant to an illegal arrest] to the Supreme Court, so that it might be definitely and decisively settled by a specific and authoritative ruling from the highest judicatory of the state."[75]

In *Calhoun v. State*,[76] its first decision on the use of illegally obtained evidence in ten years, the Georgia supreme court unequivocally reaffirmed the body of law it had developed prior to 1907, stating that "[t]he ruling in the case of *Williams v. State* . . . does not conflict with that of *Evans v. State* . . . as is clearly pointed out in *Duren v. Thomasville.*"[77] The court held that the state constitutional protections against unreasonable searches and seizures did not require exclusion of illegally seized evidence. Furthermore, the

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[71] Judge Broyles said:

> I join in the affirmance of the judgment in this case, but I can not agree with the assumption in the first headnote, that the admission of evidence obtained by an illegal search and seizure of a defendant's person is compelling him to give evidence tending to criminate himself. Neither can I agree that there is, or should be, any distinction between the sacredness of the constitutional inhibitions against an illegal search and seizure of one's person and an unlawful invasion and illegal search of his premises. Both of these rights are equally inviolable, and in my opinion, neither of them, directly or indirectly, prevents the admission of material evidence in a criminal case, although obtained through an illegal search and seizure by an individual, whether a private citizen or an officer of the law.

Id. at 589, 85 S.E. at 822 (Broyles, J., concurring).

[72] 17 Ga. App. 705, 88 S.E. 586 (1916).

[73] 17 Ga. App. 693, 88 S.E. 42 (1916).

[74] Smith v. State, 17 Ga. App. 693, 694, 88 S.E. 42 (1916).

[75] *Id.*

[76] 144 Ga. 679, 87 S.E. 893 (1916).

[77] *Id.*

state constitutional privilege against self-incrimination was held not to automatically require the exclusion of evidence seized from a defendant's person incident to an illegal arrest. Evidence taken from the defendant's person was inadmissible under the privilege only if the defendant had been compelled to perform some affirmative act which aided authorities in obtaining the evidence.[78]

On remand, the court of appeals affirmed the convictions, observing that "[t]he effect of this decision [by the supreme court in *Calhoun*] is, of course, practically to set aside all previous rulings of this court on the subject."[79] In both cases Chief Judge Russell concurred specially because he was "legally compelled to do so under the decision of the Supreme Court."[80]

As the court of appeals recognized, the Georgia supreme court *Calhoun* decision abolished the *Hammock-Hughes* rule. Moreover, by restoring vitality to *Williams, Calhoun* settled in favor of admissibility any doubts that *Hammock* and *Hughes* might have created as to whether evidence could ever be inadmissible solely because it had been obtained by unreasonable searches and seizures. For the next thirty-five years the Georgia courts steadfastly adhered to the position that in a criminal case evidence was admissible even though it had been acquired from the defendant's person,[81] home,[82] place of business,[83] or automobile[84] by methods violative of state

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[78] *Id.*

[79] Smith v. State, 17 Ga. App. 693, 698, 88 S.E. 42, 44 (1916).

[80] *Id.* (Russell, C. J., concurring). *See also* Calhoun v. State, 17 Ga. App. 705, 706, 88 S.E. 586, 587 (1916).

[81] *See, e.g.*, Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943); Groce v. State, 148 Ga. 520, 97 S.E. 525 (1918); Hysler v. State, 148 Ga. 409, 96 S.E. 884 (1918); Carr v. State, 83 Ga. App. 678, 64 S.E.2d 190 (1951); Polite v. State, 80 Ga. App. 835, 57 S.E.2d 631 (1950); Flagg v. State, 65 Ga. App. 791, 16 S.E.2d 516 (1941); Murphy v. State, 64 Ga. App. 690, 13 S.E.2d 870 (1941); Shefton v. State, 44 Ga. App. 303, 161 S.E. 281 (1931); Shepherd v. State, 36 Ga. App. 583, 137 S.E. 639 (1927); Buffington v. State, 33 Ga. App. 162, 125 S.E. 723 (1924), *cert. denied*, 267 U.S. 606 (1925); Pullen v. State, 30 Ga. App. 24, 116 S.E. 871 (1923).

[82] *See, e.g.*, Lester v. State, 155 Ga. 882, 118 S.E. 674 (1923); Sideh v. State, 91 Ga. App. 387, 85 S.E.2d 610 (1955); Clemons v. State, 84 Ga. App. 551, 66 S.E.2d 156 (1951); Winston v. State, 79 Ga. App. 711, 54 S.E.2d 354 (1949); Hicks v. State, 35 Ga. App. 503, 133 S.E. 642 (1926); Cook v. State, 33 Ga. App. 571, 127 S.E. 156 (1925); Edwards v. State, 28 Ga. App. 473, 112 S.E. 169 (1922). *See also* Martin v. State, 148 Ga. 406, 96 S.E. 882 (1918).

[83] *See, e.g.*, Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622 (1951); Huff v. State, 82 Ga. App. 545, 61 S.E.2d 787 (1950); Jones v. State, 21 Ga. App. 22, 93 S.E. 514 (1917).

[84] *See, e.g.*, Atterberry v. State, 212 Ga. 778, 95 S.E.2d 787 (1956); McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5 (1940), *cert. denied*, 312 U.S. 695 (1941); Kennemer v. State, 154 Ga. 139, 113 S.E. 551 (1922); Hunter v. State, 81 Ga. App. 797, 60 S.E.2d 187 (1950); Bentley v. State, 70 Ga. App. 490, 28 S.E.2d 660 (1944); Manners v. State, 64 Ga. App. 332, 13 S.E.2d 89 (1941); Wooten v. State, 47 Ga. App. 301, 170 S.E. 392 (1933).

constitutional protections against unreasonable searches and seizures. On occasion, however, Georgia judges voiced doubts about the wisdom of the *Williams* rule and subsequent supreme court cases following *Calhoun.*[85] In *Winston v. State,*[86] for example, Johnson Murphy Claggett Townsend, a member of the court of appeals from 1947 until 1961, wrote in a tone of civil libertarianism reminiscent of opinions handed down by the court of appeals during the *Hammock-Hughes* era:

> Speaking for the writer only, the decisions of our Supreme Court making admissible evidence obtained through the criminal acts of peace officers, amounting to an unlawful, unwarranted, unreasonable . . . and reprehensible violation of [the state constitutional provision regarding unreasonable search and seizure] present a most deplorable paradox. These decisions have had the effect of making but an empty shell of what was intended by the framers . . . to be the living seed of freedom. . . .
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> The foregoing decisions of our Supreme Court, coupled with the law not in conflict therewith, say in effect to the peace officers of this State, "You shall not make an unreasonable search and seizure of the home of a citizen, because his home is his castle. The breaking down of his door is a trespass for which you are responsible both civilly and criminally. An unlawful search and seizure by you amounts to a violation of the most sacred rights given under our organic law. However, if you do make such a search, bring the evidence you thus obtained into a court of justice, and it will be given the same consideration as evidence honorably obtained."
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> This does not make of our peace officers the servants and trustees contemplated in the first provision of our Constitution, nor does it confine our courts to this category. It affords a poor protection to the citizen from the outlawry of his public servants. . . .
>
> The rule as enunciated in this State, making evidence obtained in violation of the search-and-seizure clause of the [Georgia constitution] admissible, creates an injustice for which the citizen has no adequate remedy. . . . [T]he remedies of civil and criminal prosecution against the offender are wholly inadequate. The citizen's only adequate remedy is the

[85] *See* Jackson v. State, 156 Ga. 647, 119 S.E. 525 (1923) (Russell, C.J., concurring).
[86] 79 Ga. App. 711, 54 S.E.2d 354 (1949).

> use of force in the protection of the sanctity of his threshold. This leads to trouble, expense, court action, and other extremes which the average citizen of this State hesitates to invite, even for the protection of his most sacred civil rights.[87]

Like its earlier decision in *Williams,* the supreme court's decision in *Calhoun* left open the possibility that seized evidence might be suppressed if it had been secured in violation of the Georgia constitutional privilege against self-incrimination. For two reasons, however, it was doubtful as a practical matter that the self-incrimination provision would provide more than an illusion of protection. First, since police officials could use evidence of guilt that they themselves seized during an illegal search of the defendant's person, it was unlikely that they would find it necessary to compel the defendant to engage in any affirmative act to aid them. Second, throughout the period from 1916 until 1961 the supreme court took a highly restrictive view of the nature of compulsion, refusing to acknowledge that compulsion could exist in the absence of either physical coercion or threats of bodily harm. In several cases the court declined to find a violation of the privilege despite clear indications that an arrested defendant had been intimidated into handing over incriminating evidence.[88] As the court of appeals stated:

> It is . . . well settled by the Georgia Supreme Court decisions that the element of coercion must be absolutely established. A request, command, or order to surrender that which will incriminate, where acceded to without "the utmost resistance"—even under circumstances where overpowering force is present and it is obvious that resistance would be futile—is treated as a "voluntary confession," and the evidence so handed over is admissible.[89]

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[87] *Id.* at 714-15, 54 S.E.2d at 356. *See also* Goodwin v. Allen, 89 Ga. App. 187, 78 S.E.2d 804 (1953).

Judge Townsend reiterated in an article his opposition to admitting evidence obtained in violation of constitutional guarantees against unreasonable search and seizure. Townsend, *Should The Law Suffer Itself To Become An Enemy To Its Own Reign?,* 12 GA. B.J. 139 (1949). Judge Townsend died on October 6, 1961, a little more than three months after the *Mapp* decision forbade state criminal courts from admitting evidence obtained in violation of the fourth amendment.

[88] *See, e.g.,* Wright v. State, 210 Ga. 212, 78 S.E.2d 494 (1953); Shepherd v. State, 203 Ga. 635, 47 S.E.2d 860 (1948); Johns v. State, 180 Ga. 187, 178 S.E. 707 (1935); Hill v. State, 161 Ga. 188, 129 S.E. 647 (1925). *See also* Thomas v. State, 213 Ga. 237, 98 S.E.2d 548 (1957).

[89] Grant v. State, 88 Ga. App. 745, 747, 77 S.E.2d 748, 750 (1953).

It is hardly surprising, therefore, that *Grant v. State*[90] is the sole post-*Calhoun* case in which illegally seized evidence was held inadmissible under the self-incrimination privilege. In *Grant* the defendant was sitting in his parked car counting money and lottery tickets when a policeman approached. The defendant unwillingly handed over the tickets at the policeman's command, which was backed up by the placing of the officer's hand on his service revolver. The court of appeals reversed the conviction because of the introduction in the trial court of the lottery tickets.

> We are not unmindful that, even though one is not under arrest, the officer may by force, by an unlawful search and an unlawful seizure, procure from a suspect evidence of the guilt of a crime, and the State may introduce evidence and the jury may convict upon it, but such an illegal act in obtaining such evidence is quite a different thing from the officer compelling the defendant to produce it. The former does not constitute a violation of the constitutional rights of the defendant, under the many decisions of our court; but the method of forcing the defendant to produce this evidence violates his constitutional rights, in that it compels him to produce evidence to incriminate himself.[91]

III. The Admissibility of Illegally Obtained Evidence in Georgia Criminal Trials Since 1961

A. *Federal Law*

In *Mapp v. Ohio,*[92] decided on June 19, 1961, the Supreme Court of the United States partly overruled *Wolf v. Colorado*[93] and announced that under the fourteenth amendment due process clause the fourth amendment applied to the states to the same extent that it applied to the federal government.[94] Because, as the part of *Wolf*

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[90] 85 Ga. App. 610, 69 S.E.2d 889 (1952). *See also* Buffington v. State, 33 Ga. App. 162, 125 S.E. 723 (1924), *cert. denied*, 67 U.S. 606 (1925).

[91] 85 Ga. App. at 613-14, 69 S.E.2d at 892.

[92] 367 U.S. 643 (1961).

[93] 338 U.S. 25 (1949). *See* text accompanying note 13 *supra*. The Court's holding in *Wolf* did not challenge the proposition that the fourth amendment prohibited the admission of evidence seized in violation of the amendment. According to *Wolf*, such evidence was admissible in state criminal courts because only the right to privacy at the core of the fourth amendment— and not the fourth amendment itself—was applicable to the states through the due process clause of the fourteenth amendment.

[94] Under *Mapp* the clause limited state action in the same way, to all intents and purposes, that it would have been limited if the fourth amendment had been ratified with language

not overruled had acknowledged, the exclusionary rule fashioned in *Weeks v. United States*[95] was part of the fourth amendment, the Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[96] The Court therefore reversed the Ohio obscenity conviction of the defendant who had been sentenced to serve between one and seven years in prison for possessing "four little pamphlets, a couple of photographs and a little pencil doodle"[97] which policemen had seized from her home in a flagrantly illegal manner.

The *Mapp* decision sounded the death knell for Georgia's practice of admitting, except in the most limited of circumstances, illegally obtained evidence. Several years elapsed, however, before both the supreme court and the court of appeals were called upon to announce their full acceptance of *Mapp*.

In 1962 the Georgia court of appeals decided its first two cases in which a defendant raised a claim under *Mapp*. In both cases the judgment of conviction was affirmed when the court found no violation of the fourth amendment.[98] In April 1963, without mentioning *Mapp*, the court reversed a criminal conviction because of the admission of evidence acquired by an unreasonable search and seizure.[99] In November 1963, the court again set aside a conviction for the same reason, this time specifically citing *Mapp*.[100] Neither of the reversals mentioned *Williams, Calhoun*, or other prior Georgia cases authorizing the use of such evidence. Three months later, in February 1964, the court carefully compared the holding in *Mapp* with the line of prior decisions of the Georgia supreme court commencing with the 1897 *Williams* case and concluded that the broad principle of admissibility promulgated in *Williams* must yield to federal requirements of exclusion.[101] By early 1964, therefore, the *Mapp* decision had been fully accepted by the Georgia court of appeals. In subsequent cases the court, under the mandate of *Mapp*, reversed a number of criminal convictions based upon evidence ob-

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explicitly binding the states to its contents. Thus, under *Mapp* it can be said that the fourth amendment applies to the states.

[95] 232 U.S. 383 (1914). *See* text accompanying note 10 *supra*.

[96] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[97] *Id.* at 668 (Douglas, J., concurring).

[98] Bryant v. State, 106 Ga. App. 642, 127 S.E.2d 826 (1962); Phelps v. State, 106 Ga. App. 132, 126 S.E.2d 429 (1962).

[99] Brown v. State, 107 Ga. App. 672, 131 S.E.2d 146 (1963).

[100] Dennis v. State, 108 Ga. App. 646, 134 S.E.2d 519 (1963).

[101] Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

tained in violation of the fourth amendment.[102]

The Georgia supreme court heard its first case involving a claim under *Mapp* in January 1964.[103] Although the court recognized the importance of *Mapp*,[104] it decided the case on a factual determination that no unreasonable search and seizure had occurred. In September 1965, the court for the first time reversed a judgment based on evidence seized in violation of the fourth amendment. The court stated: "By the recent decision of the Supreme Court of the United States in Mapp v. Ohio . . . a rule which had long existed in this State and many other jurisdictions was overturned. Instead a new rule was established, that *'all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a *state* court.' "[105] The judgment set aside was not criminal, however, but a civil judgment granting injunctive relief to abate a public nuisance. In April 1966 the court upheld a criminal conviction based on evidence adjudged lawfully seized but observed: "The Supreme Court of the United States in Mapp v. Ohio . . . held that evidence obtained as a result of an illegal search and seizure is not admissible in either State or Federal courts. . . . This court is of course bound by that ruling."[106] By early 1966, therefore, the Georgia supreme court had explicitly accepted the decision in *Mapp*. Interestingly, however, subsequent decisions of the supreme court have not once resulted in the exclusion, in a criminal case, of evidence alleged to have been procured by an illegal search and seizure.[107] In every case raising the issue on direct review since 1961 the court has held that the evidence for which suppression was sought was admissible generally because the evidence had been obtained legally[108] or because the defendant lacked standing to object.[109]

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[102] *See, e.g.*, Lowery v. State, 135 Ga. App. 423, 218 S.E.2d 132 (1975); Marshall v. State, 130 Ga. App. 572, 203 S.E.2d 885 (1974); Bell v. State, 128 Ga. App. 426, 196 S.E.2d 894 (1973); Latten v. State, 127 Ga. App. 75, 192 S.E.2d 562 (1972); Windsor v. State, 122 Ga. App. 767, 178 S.E.2d 751 (1970); Fowler v. State, 121 Ga. App. 22, 172 S.E.2d 447 (1970); Burns v. State, 119 Ga. App. 678, 168 S.E.2d 786 (1969).

[103] Paige v. State, 219 Ga. 569, 134 S.E.2d 793 (1964).

[104] The court noted, albeit somewhat overbroadly: "Under the ruling in the Mapp case no state court can deny to a defendant rights guaranteed by the United States Constitution." *Id.* at 572, 134 S.E.2d at 796.

[105] Carson v. State, 221 Ga. 299, 303, 144 S.E.2d 384, 386 (1965).

[106] Cash v. State, 222 Ga. 55, 58, 148 S.E.2d 420, 423 (1966).

[107] In several cases, however, the court held that federal statutory provisions on electronic surveillance required suppression of seized evidence of criminal guilt. Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); Cross v. State, 225 Ga. 760, 171 S.E.2d 507 (1969).

[108] *See, e.g.*, Hobbs v. State, 235 Ga. 8, 218 S.E.2d 769 (1975); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975); State v. Swift, 232 Ga. 535, 207 S.E.2d 459 (1974); Guest v. State,

Under federal law, therefore, evidence obtained in violation of the fourth amendment has been inadmissible in a Georgia criminal trial since the *Mapp* decision in 1961. Because neither *Rochin* nor *Rea* has been overruled, federal law also bars the introduction of evidence seized in violation of the holdings in those cases. *Mapp*, however, which forbids the use of all evidence acquired by unreasonable searches and seizures, including evidence seized by means shocking to the conscience as well as evidence seized by federal law enforcement agents in violation of the fourth amendment, has drained *Rochin* and *Rea* of whatever practical significance they may have had. Since *Mapp* there have been no reported cases in which Georgia criminal defendants attempted to invoke the protections furnished by *Rochin* or *Rea*.

B. *Georgia Law*

By making compliance with the fourth amendment a prerequisite for the introduction of seized evidence, "the *Mapp* decision burst like a bombshell upon all states of this country."[110] The twenty-six states in which illegally obtained evidence was already generally inadmissible under state law were forced to reassess their standards for determining whether a search was legal in light of the newly applicable fourth amendment requirements.[111] The effects of the decision were greater in the twenty-four states, including Georgia, where illegally obtained evidence was not generally inadmissible in 1961.[112] In these states *Mapp* compelled a reevaluation not only of the substantive law of search and seizure but also of the procedural machinery by which search and seizure claims were raised.

In 1961 Georgia had no established procedure for objecting to the admission of illegally obtained evidence before trial.[113] Any objection to the introduction of evidence had to be made orally when the evidence was tendered at trial, and a defendant who instead only

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230 Ga. 569, 198 S.E.2d 158 (1973); Hood v. State, 229 Ga. 435, 192 S.E.2d 154, (1972); DePalma v. State, 228 Ga. 272, 185 S.E.2d 53 (1971); Mitchell v. State, 226 Ga. 450, 175 S.E.2d 545 (1970); Alexander v. State, 225 Ga. 358, 168 S.E.2d 315 (1969); Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967).

[109] *See, e.g.*, Brisbane v. State, 233 Ga. 339, 211 S.E.2d 294 (1974); Dixon v. State, 231 Ga. 33, 200 S.E.2d 138 (1973); Grantling v. State, 229 Ga. 746, 194 S.E.2d 405 (1972); Dutton v. State, 228 Ga. 850, 188 S.E.2d 794 (1972); Marsh v. State, 223 Ga. 590, 157 S.E.2d 273 (1967).

[110] Sparks, *Search and Seizure*, 1 GA. ST. B.J. 427, 429 (1965).

[111] *See, e.g.*, Allen, *supra* note 7, at 40-41.

[112] *See, e.g., id.* at 40; Day & Berkman, *supra* note 7, at 73-75.

[113] Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973); Wilson v. State, 126 Ga. App. 145, 190 S.E.2d 128 (1972); Green v. State, 110 Ga. App. 346, 138 S.E.2d 589 (1964).

sought exclusion of evidence under *Mapp* by means of pretrial motion without objecting at trial was deemed to have waived his objections to the evidence.[114] This requirement that illegally obtained evidence be objected to only during the course of the trial became awkward and burdensome as *Mapp* precipitated a large increase in the number of Georgia criminal defendants raising search and seizure claims. In too many criminal trials the procedural requirement caused jury confusion and prolongation of the proceedings because when the prosecution offered the seized evidence an objection by the defendant required the trial judge to interrupt the trial of the issues and conduct a separate hearing into the legality of the search and seizure.[115]

In order to alleviate the problems resulting from the inability of the Georgia courts to rule on the admissibility of evidence prior to trial,[116] the Georgia General Assembly enacted section 13 of the Georgia Search and Seizure Act of 1966.[117] In addition to creating new procedures for objecting to the introduction of illegally seized evidence, section 13, as the Georgia supreme court has recognized,[118] granted Georgia criminal defendants a statutory right to exclude illegally obtained evidence under some circumstances. The section provides, in pertinent part:

> A defendant aggrieved by an unlawful search and seizure may move the court . . . to suppress as evidence anything so obtained . . . .
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> The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion, and the burden of proving that the search and seizure were lawful shall be on the

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[114] *See, e.g.*, Brannen v. State, 117 Ga. App. 69, 159 S.E.2d 476 (1967); Tanner v. State, 114 Ga. App. 35, 150 S.E.2d 189 (1966); Green v. State, 110 Ga. App. 346, 138 S.E.2d 589 (1964); Jackson v. State, 108 Ga. App. 529, 133 S.E.2d 436 (1963).

[115] *See* 24 GA. B.J. 129, 131 (1961).

[116] *See* Green, *Evidence*, 18 MERCER L. REV. 95, 97 (1966). *See also* Sparks, *supra* note 110, at 432-33.

[117] GA. CODE ANN. § 27-313 (1972). The other sections of the statute provided entirely new procedures for the issuance of search warrants and the execution of searches with or without a warrant. *Id.* §§ 27-301 to -312, -314 (1972).

[118] State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975); Thacker v. State, 226 Ga. 170, 173 S.E.2d 186 (1970).

> State. If the motion is granted the property . . . shall not be admissible in evidence against the movant in any trial.[119]

On its face section 13 confers a broad right of suppression. The wording of the section is unencumbered by restrictive phraseology and appears to grant a right to suppress all evidence illegally obtained without regard to whether the illegality was due to a violation of the fourth amendment, the due process clause of the fourteenth amendment, or the provisions of the Georgia constitution prohibiting unreasonable searches and seizures and guaranteeing the self-incrimination privilege. Nonetheless, application of section 13 did not result in a right of suppression as extensive as the section's language would indicate. The right of exclusion granted by the section has been held to extend only to the seized items themselves, not to testimony concerning the discoveries made in consequence of the search.[120] Furthermore, in May 1975, in *State v. Young,*[121] the Georgia supreme court, approving the logic and using some of the language of recent decisions of the Supreme Court of the United States eroding the holding in *Mapp,*[122] construed section 13 to apply only to searches and seizures carried out by Georgia policemen, not those carried out by non-law-enforcement government agents or employees. Section 13 has been held, however, to assure the right

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[119] GA. CODE ANN. § 27-313(a), (b) (1972). Although it was enacted for the purpose of facilitating resolution of search and seizure claims prior to trial, the wording of section 13 does not specify when the suppression motion is to be made. The Georgia court of appeals, however, has construed the section to mean that for purposes of direct appellate review a failure to file the motion until after the trial has begun constitutes a waiver of any objection to the admission of the evidence unless, of course, the defendant was unaware of the existence of grounds for making the motion. Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973). However, the Georgia supreme court has held that a criminal conviction alleged to be defective because of the introduction of illegally seized evidence may be attacked collaterally in a habeas corpus petition despite the unexcused failure of the prisoner to file a timely motion to suppress the evidence in the sentencing court. *See, e.g.*, Morgan v. Kiff, 230 Ga. 277, 196 S.E.2d 445 (1973). *See generally* Wilkes, *supra* note 9, (*Part II*), 9 GA. L. REV. 13, 68-69 (1974).

Section 13 is not the first provision for the exclusion of unreasonably seized evidence to be approved by the Georgia General Assembly. In 1955 a bill requiring suppression of such evidence in all criminal cases was passed in both houses of the legislature by overwhelming majorities but was later vetoed by the governor of Georgia. *See* 23 GA. B.J. 383, 387-88 (1961).

[120] Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973). *See also* Baker v. State, 230 Ga. 741, 199 S.E.2d 252 (1973); Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

[121] 234 Ga. 488, 216 S.E.2d 586 (1975).

[122] In *Young* the court cited United States v. Calandra, 414 U.S. 338 (1974); Note, *United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*, 1 HASTINGS CONST. L.Q. 179, 212 (1974). 234 Ga. at 489-91, 216 S.E.2d at 589-90.

to exclusion of evidence seized in violation of the fourth amendment,[123] which is not surprising since the purpose of the section was to facilitate the implementation of *Mapp* in Georgia.[124] The section also allows the suppression of evidence seized in violation of the state self-incrimination privilege.[125] But there are no cases holding that section 13 confers a right to exclude evidence seized in violation of the due process clause of the fourteenth amendment or of the unreasonable search and seizure provision of the state constitution, and, in light of the section's legislative purpose, the absence of such cases may in the future provide the basis for an argument that section 13 does not apply to evidence seized in a shocking manner or evidence seized in contravention of the state guarantee against unreasonable searches and seizures.

On several occasions after 1961, both the Georgia supreme court[126] and the court of appeals[127] reaffirmed allegiance to the principle that the self-incrimination privilege in the Georgia constitution forbids compulsion of a defendant to perform an affirmative incriminating act. Therefore, after 1961, evidence continued in theory to be inadmissible in a Georgia criminal case when, in violation of the 1899 *Evans* case, it had been acquired by a search and seizure which could be said to have compelled the defendant to produce the evidence. But no cases have excluded illegally seized evidence on self-incrimination grounds. Even where a defendant contended that a court-ordered operation to remove a bullet from his body would violate his self-incrimination privilege under the Georgia constitution, the supreme court held that seizure of the bullet did not infringe the defendant's privilege because physicians would remove the bullet and the defendant would "not [be] forced to himself remove it."[128]

IV. The Future Admissibility of Illegally Obtained Evidence in Georgia Criminal Trials

A. *Federal Law*

When he campaigned for president in 1968, Richard Nixon skill-

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[123] *See, e.g.*, Thomas v. State, 118 Ga. App. 359, 163 S.E.2d 850 (1968); Gilmore v. State, 117 Ga. App. 67, 159 S.E.2d 474 (1967).

[124] *See* notes 116-17 and accompanying text *supra*.

[125] Hawkins v. State, 117 Ga. App. 70, 159 S.E.2d 440 (1967).

[126] *See, e.g.*, Dennis v. State, 226 Ga. 341, 175 S.E.2d 17 (1970); Hackney v. State, 223 Ga. 802, 158 S.E.2d 239 (1967); Aldrich v. State, 220 Ga. 132, 137 S.E.2d 463 (1964).

[127] *See, e.g.*, Sark v. State, 118 Ga. App. 529, 164 S.E.2d 266 (1968).

[128] Creamer v. State, 229 Ga. 511, 518, 192 S.E.2d 350, 354 (1972).

fully exploited the issue of law and order.[129] Aware of growing public concern about street crimes, Nixon blamed the crime problem on permissive decisions by the Supreme Court of the United States headed by Earl Warren and promised, if elected, to appoint to the Court justices who would "strictly" — that is, narrowly — construe the rights of offenders against the criminal laws.[130] Whatever other promises he subsequently broke to the American people,[131] Nixon kept his pledge to "appoint to the Supreme Court individuals who would resist Warren Court trends in criminal procedure."[132] His first appointment to the Court, Chief Justice Warren E. Burger, had spent the previous thirteen years (from 1956 until 1969) on the United States Court of Appeals for the District of Columbia where he wrote numerous opinions "minimizing the rights of the criminally accused and maximizing the prosecutorial position,"[133] often in dissent. Burger had devoted much of his free time to making speeches, some of which attacked the wisdom of Warren Court decisions in the field of criminal procedure[134] and others of which expressed indignant disagreement with fundamental features of this country's accusatorial system of criminal justice.[135] Subsequently Nixon appointed three more justices to the Supreme Court, all of whom appear to have been selected principally because they had exhibited a lack of enthusiasm for Warren Court decisions expanding the rights of criminal suspects.[136]

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[129] Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure 1956-1969*, 60 CORNELL L. REV. 743, 743-45 (1975); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249, 250 (1971).

For the transcript of one of Nixon's law and order television commercials, see J. MCGINNIS, THE SELLING OF THE PRESIDENT 1968, 263-65 (1968).

[130] Stephens, *supra* note 129, at 250.

[131] *See* HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 339, 93d Cong., 2d Sess. (1974).

[132] Lamb, *supra* note 129, at 744.

[133] L. LEVY, AGAINST THE LAW, THE NIXON COURT AND CRIMINAL JUSTICE 17 (1974). For a careful examination of Chief Justice Burger's criminal procedure opinions while he served on the court of appeals, see Lamb, *supra* note 129.

[134] *See, e.g.*, Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

[135] Burger, *Paradoxes in the Administration of Criminal Justice*, 58 J. CRIM. L.C. & P.S. 428 (1967); Comment, *Chief Justice Burger: Whither Now the Supreme Court?*, 15 S.D.L. REV. 41 (1970).

[136] *See* L. LEVY, *supra* note 129, at 45-47; *Hearings on Nominations of William H. Rehnquist and Lewis F. Powell, Jr., Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972).

In late 1975 President Ford appointed John Paul Stevens to the Court, replacing the ailing William O. Douglas. An examination of his record during the 1975 term demonstrates that

As a result of Nixon's appointments, the Supreme Court—now the Burger Court—has slowly but inexorably retreated from an activist role in defending civil liberties in criminal proceedings.[137] Nowhere has this retreat been more manifest than in the field of search and seizure law.[138] Repeatedly the Burger Court has interpreted the Constitution's limitations on governmental power to search and seize in a manner quite favorable to police and prosecutorial officials.[139] More important, the Court has also announced its intention to modify the degree to which evidence illegally obtained under federal law is inadmissible in state criminal trials,[140] although it is not yet clear just how extensive that "modification" will be.[141]

It may well be that Burger Court decisions "restructuring . . . the theoretical underpinnings of the fourth amendment exclusionary rule made binding on the states in *Mapp v. Ohio*,"[142] indicate an intent by the Burger Court to eventually overrule the decision entirely. Although the Warren Court in *Mapp* held that the right to exclude illegally obtained evidence there extended to the states is "an essential part of the right to privacy"[143] guaranteed under the fourth amendment, the Burger Court decided in *United States v. Calandra*[144] that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional

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Justice Stevens, like the Nixon appointees, generally favors the restriction of the rights of criminal suspects. *See, e.g.*, South Dakota v. Opperman, 96 S. Ct. 3092 (1976); Andresen v. Maryland, 96 S. Ct. 2737 (1976); United States v. Miller, 96 S. Ct. 1619 (1976). *But see* Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976) (Stevens, J., dissenting).

[137] *See, e.g.*, L. LEVY, *supra* note 133.

[138] *See, e.g., id.* at 61-138.

[139] *See, e.g.*, South Dakota v. Opperman, 96 S. Ct. 3092 (1976); Andresen v. Maryland, 96 S. Ct. 2737 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973); Adams v. Williams, 407 U.S. 143 (1972); United States v. Harris, 403 U.S. 573 (1971). *See also* Stone v. Powell, 96 S. Ct. 3037 (1976).

[140] *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037 (1976); United States v. Janis, 96 S. Ct. 3021 (1976); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Calandra, 414 U.S. 338 (1974).

[141] Evidence seized by shocking physical violence will likely remain inadmissible under the due process clause of the fourteenth amendment. The Burger Court has not questioned the validity of the *Rochin* decision, and on at least one occasion has explicitly approved it. United States v. Robinson, 414 U.S. 218 (1973). But *Rea* probably will not survive the destruction of *Mapp*.

[142] Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

[143] Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[144] 414 U.S. 338 (1974).

right of the party aggrieved."[145] Moreover, in *Stone v. Powell*,[146] the Burger Court, claiming that postconviction relief proceedings do not deter police illegality, held that *Mapp* claims could not be raised in a state prisoner's federal habeas corpus petition, even though it is established that the denial of any right guaranteed by the Constitution is cognizable in a federal habeas proceeding instituted by a person in state custody.[147] It is difficult to understand why the Burger Court would go to the trouble of separating the *Mapp* fourth amendment exclusionary rule from the fourth amendment itself and defining the rule solely in deterrence terms unless the Court intends ultimately to overrule *Mapp* on the ground that the rule is not shown by evidence to deter violations of the fourth amendment.[148]

There is, on the other hand, reason to believe that instead of completely overruling the *Mapp* decision the Burger Court may simply reinterpret the decision to require suppression of some but far from all evidence seized illegally.[149] Several Burger Court decisions indicate that the Court is on the verge of declaring that under *Mapp* criminal evidence is inadmissible if it is obtained by "flagrantly" or "deliberately" violating the fourth amendment but not if the violation is merely "technical" or is committed in "good faith."[150]

It therefore seems likely that *Mapp* will either be formally overruled or altered in such a way that its scope will be severely restricted. If *Mapp* is overruled, the fourth amendment will no longer offer any protection against the use in state criminal proceedings of evidence obtained by means of illegal searches and seizures. If *Mapp* is altered but not overruled, evidence seized in violation of the fourth amendment will most likely be admissible if the constitutional violation is deemed insubstantial. In either event, it appears likely that the admissibility of illegally obtained evidence will once again be primarily a matter of state law.

B. *Georgia Law*

Currently evidence seized in violation of the fourth amendment

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[145] *Id.* at 348.

[146] 96 S. Ct. 3037 (1976).

[147] Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

[148] *See, e.g.*, Note, *United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*, 1 HASTINGS CONST. L.Q. 179 (1974).

[149] *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037 (1976); United States v. Janis, 96 S. Ct. 3021 (1976); United States v. Peltier, 422 U.S. 531 (1975).

[150] *See id.*

by police officials, together with items seized by violating the state constitutional privilege against self-incrimination, is inadmissible in a Georgia criminal trial under section 13 of the Georgia Search and Seizure Act of 1966.[151] Quite apart from section 13, criminal

[151] GA. CODE ANN. § 27-313(a),(b) (1972). *See* notes 120-25 and accompanying text *supra*. Whether the admissibility of evidence under section 13 will be changed depends primarily on developments in the Georgia General Assembly and secondarily on future judicial interpretations of the section.

In the General Assembly four developments are possible in regard to section 13. First, the Georgia legislature may repeal the section altogether. Should this happen, there would no longer be any explicit statutory obstacle to admitting illegally obtained evidence in a Georgia criminal court. Second, the legislature may decline to disturb the 1966 Act, in which case seized evidence now inadmissible under section 13 will remain inadmissible unless, of course, the Georgia judiciary revises its interpretation of the section. Third, the legislature may extend the application of the section beyond the limits placed on it by judicial construction. Section 13 could be amended by the insertion of language specifying that evidence seized illegally under the fourth amendment is inadmissible even if the seizure was not by a policeman and even if the evidence consists of testimony concerning the articles seized rather than the articles themselves. The section also could be amended specifically to require exclusion of all evidence seized by shocking violence and all evidence seized in a manner inconsistent with the provision of the state constitution regarding unreasonable search and seizure. Fourth, section 13 may be amended to constrict its potential reach. There is little reason for believing that state-based self-incrimination claims will be excluded from operation of the section. However, the legislature could exclude fourth amendment claims from the section, which would negate the purpose for which the section was enacted in the first place and, for practical purposes, would be equivalent to repeal of the entire section. The legislature may, on the other hand, choose to amend section 13 to provide that evidence seized in violation of the fourth amendment would be inadmissible in Georgia only to the extent that it is inadmissible under federal law.

Which of these four possible developments will probably occur? Given the appeal of law and order rhetoric and the clout wielded in the General Assembly by Georgia police and prosecutorial authorities, the third development — expansion of section 13 — is highly improbable under almost any circumstances. The probable occurrence of any of the other three developments depends on whether, as predicted above in this Article, the Burger Court overrules or limits the *Mapp* holding that all evidence seized in violation of the fourth amendment is inadmissible in state courts and also on whether the Georgia supreme court decides to overrule *Williams* and hold illegally seized evidence inadmissible under the state constitution.

If (contrary to the prediction) *Mapp* is neither overruled nor limited (except in the sense that fourth amendment warrant and probable cause requirements are relaxed), it is probable that the second development will occur and section 13 will retain its present wording. If *Mapp* is formally overturned, it is probable that the first development will occur and the section will be repealed unless, prior to legislative action, the Georgia supreme court should decide that evidence seized in an illegal manner is, independently of federal law, inadmissible under the Georgia constitution. There would, after all, be no need for statutory machinery to facilitate the processing of objections to the admissibility of evidence illegally obtained under the fourth amendment once such objections lose their legal validity. Finally, if *Mapp* is limited but not overruled, it is probable that, unless the Georgia supreme court repudiates *Williams* under state law, the fourth development will take place, and a narrowing amendment to section 13 will permit exclusion of evidence illegally obtained under federal law only when the evidence is liable to suppression under the terms of the fourth amendment itself.

evidence continues to be inadmissible in Georgia under *Evans* when the methods used to seize it violate the state constitution's incrimination privilege.[152] It is uncertain, however, whether evidence obtained by an unreasonable search and seizure will continue, under state constitutional law, to be admissible in a criminal case. Although it is unlikely that the state constitution will be amended explicitly to require either suppression or admission of unreasonably seized evidence, a recent decision of the Georgia supreme court, *State v. Young,*[153] indicates that the court may be nearly evenly divided on whether to construe the provision of the state constitution prohibiting unreasonable search and seizure to require exclusion of evidence seized by violating the provision.

The defendant in *Young* was a seventeen-year-old public high school student convicted of marijuana possession. The marijuana had been seized by his high school principal who, witnessing furtive gestures and believing suspicious activity was afoot, called the defendant and two other students to his office and directed them to empty their pockets. After the court of appeals reversed the judgment of conviction on the grounds that the drug had been seized in violation of the fourth amendment,[154] the Georgia supreme court granted the state's certiorari petition and reinstated the conviction.[155]

The majority opinion, written by Justice Robert Hall and representing the views of four members of the court, advanced two alternative grounds in support of the decision to reverse the court of appeals. First, neither the fourth amendment exclusionary rule[156] nor section 13 of the 1966 Search and Seizure Act[157] was deemed to

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Such an amendment would guarantee that section 13's scope would always correspond exactly to fourth amendment requirements. It would eliminate the possibility that evidence illegally obtained under the fourth amendment but admissible in federal court might nevertheless be inadmissible in Georgia under section 13.

[152] *See* notes 126-28 and accompanying text *supra.*

[153] 234 Ga. 488, 216 S.E.2d 586 (1975).

[154] Young v. State, 132 Ga. App. 790, 209 S.E.2d 96 (1974). At the trial court level the defendant failed to raise the issue of the admissibility of the marijuana under the state constitutional privilege against self-incrimination. If the defendant had raised this issue there, presumably unsuccessfully, it is possible that the court of appeals would have set aside the conviction on the ground that the contraband evidence was excludable under *Evans* as the product of a compelled act of commission by the defendant.

[155] State v. Young, 234 Ga. 488, 498, 216 S.E.2d 586, 594 (1975). The supreme court's grant of certiorari was founded on a 1973 statute authorizing prosecutorial appeals in some criminal cases. *See* GA. CODE ANN. § 6-1001a (1975); note 67 *supra.*

[156] *Id.* at 489-90, 493-4, 216 S.E.2d at 589, 591.

[157] *Id.* at 492, 216 S.E.2d at 590.

apply to searches and seizures made by state officials other than law enforcement officers.[158] In holding that the *Mapp* exclusionary rule extended only to police searches, the majority opinion ignored language to the contrary in *Mapp*[159] and relied on the proposition that the fourth amendment and its "associated exclusionary rule . . . are not co-extensive" because the "Fourth Amendment requires only state action; the [exclusionary rule] requires state law enforcement action."[160] The court's separation of the fourth amendment from the exclusionary rule was the result of the majority's approval of Burger Court decisions downgrading the rule. As Justice Hall noted, "[t]he tide is turning, we think properly, away from the exclusionary rule."[161] The court offered no explanation for its conclusion that section 13 applied solely to police searches. Presumably the court sought to obviate the possibility that the section would furnish broader protections than the fourth amendment as interpreted by the court.

As an alternative ground for reinstating the conviction, the court held that the search had in fact been reasonable, and so there had been no fourth amendment violation. According to the court, the fourth amendment permits public school officials not involved in law enforcement to conduct searches and seizures on less than probable cause "subject only to the most minimal restraints necessary

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[158] *Contra,* State v. Mora, 307 So. 2d 317 (La.), *vacated,* 423 U.S. 809 (1975), *aff'd on rehearing,* 330 So. 2d 900 (1976).

[159] *See* note 143 and accompanying text *supra.*

[160] 234 Ga. at 490, 216 S.E.2d at 589.

[161] *Id.* at 494, 216 S.E.2d at 591. The court also said:

> There is nothing sacrosanct about the exclusionary rule; it is not embedded in the constitution and it is not a personal constitutional right: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." [*United States v. Calandra,*] 414 U.S. [at] 348. The Supreme Court has as much as suggested that the rule might be abandoned altogether if statistics should bear out the suspicion that in its primary, and perhaps sole, purpose of deterring future police misconduct, it is ineffective.

Id. at 491, 216 S.E.2d at 589-90. It is not too critical to say that the decision in *Young* was reached by judges who operated under the erroneous premise that youthful students may be convicted on the basis of illegally obtained evidence because, after all, they have a theoretical right to sue the person who illegally seized the evidence. *Compare* Monroe v. Pape, 365 U.S. 167 (1961) *with* Pierson v. Ray, 386 U.S. 547 (1967). *See generally* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 360 (1974); Dellinger, *Of Rights and Remedies: The Constitution As A Sword,* 85 HARV. L. REV. 1532 (1972); Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965); Comment, *The Tort Alternative to the Exclusionary Rule in Search and Seizure,* 63 J. CRIM. L.C. & P.S. 256 (1972); note 187 *infra.*

to insure that students are not whimsically stripped of their personal privacy and subjected to petty tyranny."[162] In this case the search was based on reasonable suspicion generated by furtive activity by the three students. The search was therefore deemed to be reasonable under the fourth amendment.[163]

Justice William B. Gunter filed a vigorous, well-reasoned dissenting opinion.[164] He argued that the court of appeals' judgment should be affirmed under federal law because (1) the actions of public school officials are fully subject to the restrictions of the fourth amendment;[165] (2) the fourth amendment exclusionary rule is, under *Mapp*, a constitutional requirement rather than something distinguishable from the amendment;[166] and (3) since students are not second-class citizens, they cannot, under the amendment, be searched on less than probable cause.[167] He also argued that the judgment of the court of appeals should be affirmed under Georgia law because, properly construed, the right to suppression granted by section 13 applies to illegal searches by "all agents of the State, whether they be peace officers, school officials, or municipal fire or public health inspectors."[168]

The *Young* decision demonstrates that, although four of the justices of the Georgia supreme court are satisfied with the logic of Burger Court holdings attenuating *Mapp*, at least one and possibly three justices are not. Assuming that the three justices who withheld full approval from the majority opinion intended thereby implicitly to commend the exclusion of illegally seized evidence, *Young* arguably indicates that the Georgia supreme court at present might split almost evenly on whether to overrule *Williams* and its progeny and hold inadmissible evidence acquired by violating the state constitutional provision that forbids unreasonable searches and seizures. A change of mind by one justice or a vacancy on the court might well

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[162] *Id.* at 496, 216 S.E.2d at 593.

[163] *Id.* at 498, 216 S.E.2d at 594. Justice Conley Ingram concurred in the majority opinion except to the extent that it purported to analyze the legal foundations of the fourth amendment exclusionary rule. *Id.* Justice Robert H. Jordan concurred in the judgment restoring the conviction "but not necessarily in all that is said in the [majority] opinion." *Id.* at 499, 216 S.E.2d at 594. Justice Jordan believed that restoration of the conviction was proper because a fourth amendment standard of "reasonable suspicion" rather than "probable cause" should govern school searches not involving law enforcement personnel. *Id.*

[164] *Id.* at 499-512, 216 S.E.2d at 594-601 (Gunter, J., dissenting).

[165] *Id.* at 499-501, 216 S.E. 2d at 594-95 (Gunter, J., dissenting).

[166] *Id.* at 501-06, 216 S.E.2d at 595-98 (Gunter, J., dissenting).

[167] *Id.* at 507-12, 216 S.E.2d at 599-601 (Gunter, J., dissenting).

[168] *Id.* at 507, 216 S.E.2d at 598 (Gunter, J., dissenting).

determine the fate of *Williams*. It is therefore not possible to predict what the near future holds for the admissibility, under the unreasonable search and seizure provision of the state constitution, of evidence obtained in violation of that provision.

C. *A Call For A State Exclusionary Rule*

The Georgia supreme court eventually will be presented with a case involving a defendant who, aggrieved by an unreasonable search and seizure but denied relief under federal law because of the Burger Court relaxation of fourth amendment protections, has timely moved the trial court to suppress evidence of his guilt on the ground that the evidence is inadmissible under the search and seizure provision of the Georgia constitution. When such a case does arise, how should it be decided? Should the court reaffirm *Williams?* Should it modify *Williams* to require exclusion of some but not all evidence acquired in violation of the search and seizure provision? Should it overturn *Williams* and direct suppression of all unreasonably seized evidence? Prudent consideration of the matter leads to the conclusion that the court ought to overrule *Williams* and formulate a state exclusionary rule similar to the one extended to the states in *Mapp*. Before proceeding to explain this conclusion, however, it would be appropriate to address briefly two arguments frequently raised in opposition to any rule forbidding the introduction of evidence obtained by methods that violate constitutional protections against unreasonable search and seizure.

First, the view that excluding illegally obtained evidence imposes unacceptable "societal costs" by interfering with effective law enforcement[169] is mistaken. A rule for excluding evidence seized unreasonably cannot be said to hamper effective law enforcement except "upon the assumption that effective law enforcement requires police misconduct in the form of invasion of individual rights of privacy."[170] This is because an exclusionary rule obstructs law enforcement "only to the extent that police officials have themselves engaged in unlawful conduct"[171] by seizing evidence in a manner prohibited by a constitutional provision. It may be that undesirable

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[169] *See, e.g.*, Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 24-26 (1975); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-41 (1974).

[170] Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 NW. U.L. REV. 1, 19 (1950).

[171] *Id.*

"costs" accrue when reliable evidence of criminality is suppressed as a result of an unrealistic or hypertechnical interpretation of search and seizure guarantees.[172] The cause of these "costs," however, is not the exclusionary rule—which is compatible with broad as well as narrow interpretations of the scope of police search and seizure powers[173]—but rather the overly generous construction given the substantive right to be free from unreasonable search and seizure.[174]

Second, it is not true that the exclusion of illegally obtained evidence necessarily means that "[t]he criminal is to go free because the constable has blundered."[175] A defendant against whom evidence has been obtained illegally can still be convicted on the basis of evidence obtained legally.[176] Even if illegally obtained evidence is used at trial, an appellate court will not reverse if admission of the evidence was, under the circumstances, harmless error.[177] A rule excluding illegally obtained evidence therefore operates to free the factually guilty only when the government is unable, without violating the fundamental law of the land, to secure enough evidence to prove the defendant guilty beyond a reasonable doubt. Although trustworthy statistics are hard to find, it seems doubtful that many guilty persons escape because of the suppression of illegally obtained evidence.[178] At any rate, it is inevitable that some offenders will avoid conviction in any criminal justice system which, out of respect for human rights, places restraints on the power of police

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[172] *See, e.g.*, Kaplan, *supra* note 169, at 1036; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

[173] *See, e.g.*, Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961).

[174] *See, e.g.*, Allen, *supra* note 170, at 19. *See also* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 754 (1970).

[175] People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[176] Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1146 n.228 (1959).

[177] There are no decisions of the Supreme Court of the United States holding the admission of evidence seized in violation of the fourth amendment to have been harmless error. *Cf.* Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). However, the lower federal courts repeatedly have found the admission of such evidence to have amounted to harmless error. *See, e.g.*, Reed v. Wolff, 511 F.2d 1369 (8th Cir. 1975). The Georgia supreme court has held that the use of evidence illegally obtained under the fourth amendment may be harmless error under some circumstances. Nealey v. State, 233 Ga. 326, 211 S.E.2d 286 (1974).

[178] *See* Kaplan, *supra* note 169, at 1034 (1974); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740, 773-75 (1974).

officials to gather evidence against those who violate the penal laws. Permitting factually guilty persons to escape punishment because the evidence needed to prove their guilt was obtained illegally is thus simply part of the price that any society must pay if it wishes to be free.[179]

There are three independently sufficient reasons why the Georgia supreme court should recede from *Williams* and interpret the Georgia constitutional provision barring unreasonable search and seizure to require suppression of all criminal evidence obtained by methods impermissible under the provision. Although the reasons traditionally have been offered in justification of the fourth amendment exclusionary rule which the Warren Court extended to state action in 1961,[180] they apply with equal force to state exclusionary rules.

The first reason involves deterrence of police illegality. It would be absurd, of course, to expect an exclusionary rule to deter all illegal search and seizure practices, especially those conducted solely for harrassment purposes.[181] But common sense suggests that an exclusionary rule will operate to deter police officers from illegally searching and seizing in those cases in which a conviction is sought and compliance with constitutional requirements practically assures that the criminal will not be acquitted.[182] Unfortunately, the low visibility of the bulk of police search and seizure activities, together with the methodological difficulties inherent in evaluating the meager data gathered so far, have made it hard for students of police behavior conclusively either to confirm or disprove the deterrent effect of exclusionary rules.[183] Some studies discover no deterrent effect.[184] Other and more trustworthy investigations demonstrate that excluding illegally obtained evidence does tend, in general, to discourage invasions of the right against unreasonable search and seizure.[185] In any event, existing empirical demonstra-

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[179] *Cf.* Allen, *supra* note 170, at 34; Traynor, *supra* note 7, at 322.

[180] *See, e.g.*, Coe, *supra* note 169 at 14-18; Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 277 (1974).

[181] *See* Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 54-55.

[182] For empirical evidence tending to confirm this common sense notion see J. SKOLNICK, JUSTICE WITHOUT TRIAL 155-63 (1966).

[183] *See, e.g.*, Oaks, *supra* note 174, at 706-09.

[184] *See, e.g.*, Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973). *But see* Critique, *supra* note 178.

[185] *See, e.g.*, Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974).

tions of the deterrence value of excluding unreasonably obtained evidence,[186] together with the total inadequacy of other legal instruments for restraining police illegalities, warrant the adoption of a Georgia state constitutional exclusionary rule.

Second, the Georgia courts should renounce the *Williams* rule of admissibility and exclude all illegally obtained evidence in order to maintain respect for the integrity and purity of a judiciary bound by oath and obligated by fundamental principles of justice to punish for criminality persons who were detected and tried in accordance with constitutional restrictions of the exercise of governmental power, but no others. It has been argued cogently that any court which rejects this reason of judicial integrity and fails "to preserve its unblemished character by comprehensively protecting a defendant's [search and seizure] rights"[188] will ultimately pave the way for both disrespect for law and the growth of tyrannical governmental practices.[189] The judicial integrity rationale, moreover, considers judges to be moral creatures; it regards as shamelessly immoral the claim that, in order to punish citizens who violate statutory or common law provisions defining criminal behavior, executive officials may violate constitutional provisions fixing basic limitations on the power of government.[190] The Georgia court system should heed the words of Justice Brandeis, who in his famous dissenting opinion in *Olmstead v. United States,*[191] defended the judicial integrity reason as follows:

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[186] *But see* United States v. Janis, 96 S. Ct. 3021, 3030-32 (1976).

[187] *See, e.g.,* J. CAMPBELL, J. SAHID, & D. STANG, LAW AND ORDER RECONSIDERED, REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 390-436 (1970). *See generally* United States v. Janis, 96 S. Ct. 3021, 3030 n.21 (1976).

[188] Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129, 1147 (1973).

[189] It has also been argued, on the other hand, that the exclusion of illegally obtained evidence fosters disrespect for the rule of law because the public opposes the release of factually guilty criminals. *See* Kaplan, *supra* note 178, at 1035-36; *contra,* Schrock & Welsh, *supra* note 180, at 267-68 n.55, 377-78. But should the government be permitted to introduce evidence of guilt obtained in an illegal fashion merely because the public thirsts for retribution? Would it not be preferable that, instead of catering to this desire for vengeance at any price, public opinion be educated concerning the implications of allowing the government to violate the charter of its existence in order to convict the guilty?

[190] *See* Schrock & Welsh, *supra* note 180, at 367-72, which suggests that the conception of the judicial integrity rationale as resting on the courts' supervisory power, primarily with a view to future parties on an instrumentalist approach, is a misplaced view of integrity as a moral concept. Rather, the judicial integrity argument is seen as the equivalent of a personal due process right to the exclusion of illegally seized evidence.

[191] 277 U.S. 438 (1928).

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[192]

The third reason for overruling *Williams* stems from the justifiability of construing a constitutional provision guaranteeing the right to be free from unreasonable search and seizure to confer a personal right not to be convicted for crime on the basis of evidence seized by violating the provision. There are several explanations why it is necessary and appropriate to infer such a right.[193] Perhaps the most powerful is that failure to infer the privilege is inconsistent with a basic tenet of American constitutionalism. Lying at the base of the system of government established by the United States Constitution and the fifty state constitutions is the fundamental political principle that persons acting under color of law may not, whether

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[192] *Id.* at 485 (Brandeis, J., dissenting).

[193] *See* Schrock & Welsh, *supra* note 180. That article formulates a fourth amendment exclusionary theory based in part on a notion of an evidentiary transaction.

> Judicial use is conceptually inseparable from evidentiary seizure because evidentiary seizures under color of law make no sense without an expectation of judicial use—make no more sense than an evidence-gathering law enforcement officer isolated from a court, or a criminal court cut off from evidence-gathering law enforcement officers. The concept of evidence—the conceptual setting of any constitutional guarantee pertaining to evidence—compels attention to the whole transaction, to use as well as acquisition. Or, in other words, fragmentation of the transaction is as arbitrary as fragmentation of the government. The fourth amendment fragments neither the transaction nor the government. Its meaning is that when any part of the government participates in an evidentiary transaction which involves an unreasonable search and seizure it commits a constitutional wrong. And for any part of the government to commit a wrong denominated as such by the fourth amendment is not just to do wrong in the abstract, but to violate a person's constitutional right. In particular, the court which admits unreasonably seized evidence participates in an unconstitutional evidentiary transaction and violates the defendant's fourth amendment exclusionary right.

Id. at 302.

by legislative enactment or executive action, exercise powers denied the government by written constitution.[194] The principle derives from reason itself, for a constitutional form of government cannot subsist if governmental officials are not bound by constitutional limitations on their powers. When applied to the administration of criminal justice, this principle means that the government may not procure the conviction of a criminal offender by exerting a power that is constitutionally forbidden.[195]

Embodying the value judgment that it is better that some criminals escape than that the government adopt practices typical of tyrannical regimes, a constitutional prohibition on unreasonable search and seizure deprives the government of authority to enforce the criminal laws by unreasonable methods. Such a provision, in other words, strips the government of the power to enter criminal convictions to the extent that unreasonably seized evidence is necessary to support the conviction. Thus, in order to adhere to the basic premise that the government may not utilize constitutionally forbidden powers to convict criminal offenders, it is necessary to interpret a constitutional provision on unreasonable search and seizure to grant the right not to be convicted on the basis of evidence obtained in violation of the provision.[196]

This analysis demonstrates that a Georgia supreme court decision interpreting the state constitutional provision barring unreasonable searches and seizures to confer the personal right to avoid conviction based on evidence acquired by violating the provision can be justified on the ground that the decision is consistent with the principle of limited government that underlies the system of government established by the Georgia constitution. If the Georgia court does overrule the *Williams* decision for this reason, it will not be the first court to recognize that the inference of the right not to be convicted on unreasonably seized evidence from the right not to be subjected to unreasonable search and seizure is essential in order to remain true to the fundamentals of constitutional government.[197]

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[194] *See, e.g.*, Hamilton, *The Federalist No. 78*, in 1 THE FEDERALIST 538 (H. Dawson ed. 1863).

[195] *See* Allen, *supra* note 170, at 20; Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 751-52 (1966).

[196] This Article makes no effort to deal with or resolve the related but distinguishable issues of whether an illegal arrest ought to be a defense to a criminal charge or whether the government ought to be required to return to the criminal possessor all illegally obtained evidence, including contraband or stolen property. *See* Schrock & Welsh, *supra* note 180, at 362-64 n.276.

[197] In several cases decided before 1969, the Supreme Court of the United States acknowl-

edged the basic necessity for making the inference in the context of federal law. In Weeks v. United States, 232 U.S. 383, 393 (1914), the Court announced:

> If letters and private documents can [unreasonably] be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those 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 punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Moreover, in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), the Court expressed the view that permitting use of illegally seized evidence "reduces the Fourth Amendment to a form of words." And more recently, in the *Mapp* case, the Court stated that, without a right to exclusion, the federal protection against unreasonable searches and seizures would be "valueless and undeserving of mention in a perpetual charter of human liberties." 367 U.S. at 655. *Cf.* Atz v. Andrews, 84 Fla. 43, 94 So. 329 (1922).

Within the near future a state court decision fashioning an exclusionary rule similar to the one in *Mapp* will have theoretical but not practical importance unless the Georgia courts construe the state search and seizure provisions in a way which, in comparison with the fourth amendment interpretation of the Burger Court, is more likely to result in labeling the search and seizure as in fact illegal. *See* text accompanying notes 137-39 *supra*.

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