THE START OF A REVOLUTION: *MAPP V. OHIO* AND THE WARREN COURT'S FOURTH AMENDMENT CASE THAT ALMOST WASN'T

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For those of us who teach constitutional criminal procedure, it is remarkable to think that almost three generations of lawyers have grown to maturity since Earl Warren received his commission as Chief Justice of the United States, and five decades have elapsed since he relinquished the duties of that office.[1] Following his retirement, legal historians and Supreme Court scholars sought to define and evaluate the "Warren Court" and its legacy.[2] These efforts have produced a wide range of conflicting views: some believe the Court did too much, others believe it fell short of doing enough.[3] This divergence of opinion exists mainly because the Warren Court dealt with legal issues that were

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1. *See, e.g.*, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 249 (1968). Dean Pye notes that during his fifteen-year tenure as Chief Justice, Warren instituted fundamental changes in criminal procedure, both earning the moniker of the "Warren Court" and a "criminal law revolution" at the same time. *Id.*

2. *See, e.g.*, MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953–1969 (2005). Belknap offers one of the most thorough historical studies of Justice Warren and the Warren Court, recounting that Justice Warren's appointment to replace Justice Fred Vinson, who had just suddenly died from a heart attack, marked a moment that Justice Warren referred to as "the most awesome and the loneliest day of [his] public career." *Id.* at 1. Other excellent histories of Chief Justice Warren and his legacy can be found in ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE (2006); JAMES F. SIMON, EISENHOWER V. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES (2018); and EARL WARREN, THE MEMOIRS OF EARL WARREN (1977).

3. Arthur J. Goldberg, *The Warren Court and Its Critics*, 20 SANTA CLARA L. REV. 831, 832–83 (1980). Professor Goldberg notes that while decisions supporting protections under the Bill of Rights are easily supported by the press and everyday citizens, mostly because those rights directly affect them, the same cannot be said for the support of rights of defendants in criminal cases. As such, the Warren Court's decisions that "sought to eliminate the invidious effects of poverty on individuals' constitutional rights when facing the administration of justice" were the cases most vocally criticized. *Id. See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964); and, of course, the subject of this article, Mapp v. Ohio, 367 U.S. 643 (1961).

basic to American democracy, evoking controversy and passion whenever raised.

The many decisions of the Warren Court may be categorized as a jurisprudence of individual integrity within the increasing constrictions of a corporate society: the constitutional guarantees of equality of opportunity between races[4] and voters,[5] the expansion of rights of criminal defendants;[6] and the fundamental right to privacy.[7] In addressing itself to this theme, the Warren Court rounded out a cycle of constitutional change that has ranged over three decades and completed a revolution in national history, which began in the crises of the New Deal and moved forward logically and inexorably to the present.[8]

As interesting as these interpretations are, in the realm of criminal law it was perhaps not until 1961 and the decision of *Mapp v. Ohio*[9] that the majority of the bench began to consistently reflect the positions one would consider today as distinctive of his legacy. In *Mapp*, the Court overruled *Wolf v. Colorado*[10] and held that state courts had to automatically exclude illegally seized evidence as a matter of federal constitutional law, bringing the Fourth Amendment in line with those at the state level.[11] This ruling is generally regarded as having launched the "Warren Court Revolution" in constitutional criminal procedure.[12]

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4. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). For an excellent history of *Brown*, see ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION (2003).

5. Besides upholding the Voting Rights Act of 1965, the Warren Court also reversed precedent by agreeing to hear voting reapportionment cases. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 558 (1964), where the Warren Court wrote the opinion espousing what is known today as the one person, one vote rule.

6. *Supra* note 3. Missing from that note is the famous decision in Miranda v. Arizona, 384 U.S. 436, 478–79 (1966), which requires the police to give a warning regarding Fifth Amendment protections against self-incrimination in criminal cases (known today as the "Miranda Warning"), that proved to be the Warren Court's most controversial criminal procedure case.

7. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965), which struck down a Connecticut statute that prohibited the dissemination of birth control information. In declaring the right of privacy in *Griswold*, the Warren Court laid the groundwork for what would eventually become one of the most politically charged and contested Supreme Court decisions of all time: Roe v. Wade, 410 U.S. 113 (1973).

8. *See generally* BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 3–25 (1957); WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932–1968 (1970); Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199.

9. 367 U.S. 643 (1961).

10. 338 U.S. 25 (1949).

11. *Mapp*, 367 U.S. at 651.

12. *See, e.g.*, Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 12 (1988) (observing that in the field of criminal procedure, "the

I. MAPP *BEGAN AS AN OBSCENITY CASE?*

Any reading of the briefs in the *Mapp* case or observation of its oral argument before the Supreme Court would lead one to believe that *Mapp* was not a case intending to challenge *Wolf*, or even about the violations of search and seizure under the Fourth Amendment. Rather, it was a case about obscenity. The principal issue, as noted by both sides, was whether an Ohio statute criminalizing the possession or control of obscene material, under which Dollree Mapp was convicted and sentenced to prison, violated the First and Fourteenth Amendments.[13] Thus, while *Mapp* is the most famous search and seizure case in the Warren Court's history,[14] it should also be considered the most back-door case on the Fourth Amendment: namely because a Fourth Amendment issue was not initially presented.

When the Warren Court granted review in *Gideon v. Wainwright*,[15] the famous right to counsel case, it asked the lawyers to discuss whether the Court's holding in *Betts v. Brady*[16] should be

real Warren Court" emerged with the decision in *Mapp*). Some might argue that the Warren Court's revolution in criminal procedure commenced with Griffin v. Illinois, 351 U.S. 12, 18–19 (1956), establishing an indigent criminal defendant's right to free transcript on appeal, at least under certain circumstances. *Griffin* did foreshadow some of the cases handed down later by the Warren Court, but "it was only some years after its decision that a majority of the Court consistently took positions now regarded as characteristic of the Warren Court." Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Case*s, 4 U. ILL. L.F. 518, 519 n.4 (1975).

13. For the most historically accurate depiction of the arguments and issues in the case as the attorneys understood them, listen to the oral argument in the case as captured on Oyez. *See, e.g.*, Oral Argument, Mapp v. Ohio, 367 U.S. 643 (1961) (No. 236) (transcript and audio excerpt available at https://apps.oyez.org/player/#/warren7/oral_argument_audio/14657).

14. *See, e.g.*, Jack E. Call, *The United States Supreme Court and the Fourth Amendment: Evolution from Warren to Post-Warren Perspectives*, 25 CRIM. JUST. REV. 93, 94 (2000) (describing *Mapp v. Ohio* as "the most important Warren Court decision interpreting the Fourth Amendment" and "one of the most controversial Warren Court decisions dealing with the rights of the criminally accused"); Matt Schudel, *Dollree Mapp, Figure in Landmark Supreme Court Decision in 1961, Dies at 91*, WASH. POST, Dec. 13, 2014, https://www.washingtonpost.com/national/dollree-mapp-figure-in-landmark-supreme-court-decision-in-1961-dies-at-91/2014/12/13/e5dec098-82f6-11e4-81fd-8c4814dfa9d7_story.html (describing *Mapp v. Ohio* as "recognized as one of the signature achievements of the Warren Court" and including a quote stating "'[i]t's had more influence on the Fourth Amendment than any other Supreme Court decision'"); Yale Kamisar, Opinion, *"*Mapp v. Ohio*" 50 Years Later: Critics of the Exclusionary Rule Bewail Its Heavy Costs. But the Fourth Amendment Itself Imposes These Costs*, NAT'L L.J. (ONLINE) (June 13, 2011) (describing *Mapp v. Ohio* as "the most famous search-and-seizure case ever decided by the U.S. Supreme Court").

15. 372 U.S. 335, 342 (1963). Decided unanimously by the Warren Court, *Gideon* held that it was consistent with the Constitution to require state courts to appoint attorneys for defendants who could not afford to retain counsel on their own. It is generally understood to provide the language in the *Miranda* warning about counsel being provided if the defendant cannot afford one.

16. 316 U.S. 455 (1942).

reconsidered.[17] Similarly, when the Warren Court granted review in *Miranda v. Arizona*,[18] many expected the Court to address the uncertainty and confusion generated by *Escobedo v. Illinois*,[19] decided just two years earlier, and to provide a monumental decision in police interrogation cases—which it did.[20] However, *Mapp* was not preceded by any advance publicity or discussion of cases on the Fourth Amendment, meaning that the decision was likely a surprise to everyone: particularly Ms. Mapp and her lawyer.

As the Court stated during oral argument,[21] Ms. Mapp's brief failed to make any mention of *Wolf v. Colorado*, the precedent which *Mapp* would eventually overrule.[22] Further, when asked by one of the Justices

17. *Gideon*, 372 U.S. at 338. Under *Betts*, an indigent defendant charged with a serious non-capital offense such as armed robbery had to represent himself unless there were special circumstances. 316 U.S. at 463–64, 473. This became known as the "special circumstances" rule, intended to address those instances in which the defendant might be mentally deficient or the case is unusually complicated.

18. 384 U.S. 436, 445 (1966). *Miranda* was actually an opinion in four cases: *Miranda v. Arizona*, *California v. Stewart*, *Vignera v. New York*, and *Westover v. United States*. In *Miranda*, the Court considered the constitutionality of a number of instances, in which defendants were questioned "while in custody or otherwise deprived of [their] freedom of action in any significant way." In *Vignera v. New York*, the petitioner was questioned by police, made oral admissions, and signed an inculpatory statement all without being notified of his right to counsel. Similarly, in *Westover v. United States*, the petitioner was arrested by the FBI, interrogated, and made to sign statements without being notified of his right to counsel. Lastly, in *California v. Stewart*, local police held and interrogated the defendant for five days without notification of his right to counsel. In all these cases, suspects were questioned by police officers, detectives, or prosecuting attorneys in rooms that cut them off from the outside world. In none of the cases were suspects given warnings of their rights at the outset of their interrogation. For a complete description of the *Miranda* companion cases, *see, e.g.*, *Facts and Case Summary*—Miranda v. Arizona, UNITED STATES COURTS, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-miranda-v-arizona (last visited Mar. 12, 2020).

19. 378 U.S. 478 (1964). For a complete summary of the wide disagreement over the meaning of *Escobedo*—and over what it ought to mean—see YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 161–62 (1980).

20. *Miranda*, 384 U.S. at 436.

21. *See* 55 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1164 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS]. It should be noted that the ACLU, which filed an amicus brief, did ask the Court to "re-examine" *Wolf*. But it only devoted one paragraph of its twenty-one page brief to the issue. *See id.* at 1154. So scant was the mention of *Wolf*, that one commentator described the ACLU's paragraph as a "sort of an 'oh and by the way'" mention. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 196 (2000).

22. At one point in his brief, Ms. Mapp's lawyer did attempt to bring the case within the doctrine of Rochin v. California, 342 U.S. 165, 166 (1952), the infamous "stomach pumping" case. He argued that the police action in *Mapp*, like the police behavior in *Rochin*, was "conduct that shocks the conscience." *See* LANDMARK BRIEFS AND ARGUMENTS, *supra* note 21, at 1103. Responding to a direct question during oral argument, Ms. Mapp's lawyer did say he thought the case "comes within the doctrine of the *Rochin* case," but when asked to specify "[w]hat particular facts" brought it within *Rochin*, he could only reply, "I can't say definitely . . . I'm very sorry, but I don't have all of the facts in the case, just the conclusion that I came to on that." *Id.* at 1200.

whether "you're asking us to overrule *Wolf* against *Colorado*,"[23] Ms. Mapp's lawyer replied, "No, I don't believe we are."[24]

So, what happened in *Mapp*? The facts are as follows:[25] on May 20, 1957, the police were investigating an early morning bombing that had taken place in Cleveland, Ohio, in the home of twenty-five-year-old Donald "the Kid" King, who was "known to local police as a 'clearinghouse operator' who ran an illegal gambling business."[26] Most people today know Donald King as the famous boxing promoter, Don King.[27] King telephoned the Cleveland Police Department and informed them that he suspected a group of individuals involved in Cleveland's "numbers game" were responsible for the bombing, which was in retaliation to his resistance to a shakedown.[28]

Later, an anonymous tip informed the police that if they searched the home of Dollree Mapp, they would find one of the men connected to the bombing, as well as a large amount of paraphernalia and material associated with an illegal gambling operation.[29] In response, the police, without any warrant, went to Dollree Mapp's home and attempted to enter. But she refused to let the police enter unless a search warrant was produced.[30] The police regrouped and came back a few hours later with reinforcements (meaning three more police officers).[31] By this time, Mapp had already called her attorney, who told her to wait until he arrived to let the police in.

However, upon their return the police again requested entrance but were denied. So they walked around to the back of her home and forcibly entered through a side door.[32] Mapp confronted them and demanded to see a warrant. The police said they had a warrant and produced a piece of paper. However, the paper was completely blank—meaning they did not have a warrant. But Mapp did not acquiesce. She

23. *Id.* at 1165. The Justice who asked this question is not identified, but it is believed to be Justice Frankfurter, the author of the majority opinion in *Wolf*.

24. *Id.* at 1166. Troubled by his colleague's answer to the question, Bernard Berkman, the ACLU lawyer who followed Ms. Mapp's lawyer to the podium, told the Court at the outset he was asking the Court to "re-examine" *Wolf*. *See id.* at 1170.

25. For an excellent description of the facts, *see generally* CAROLYN N. LONG, *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES (2006).

26. *Id.* at 5.

27. *See generally Don King (Boxing Promoter)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Don_King_(boxing_promoter) (last updated Nov. 22, 2019).

28. LONG, *supra* note 25, at 5.

29. *Id.* at 5–6.

30. *Id.* at 6.

31. *Id.* at 7.

32. *Id.*

reached out and snatched the piece of paper from the officer's hand and stuffed it in her bosom.[33] The police then wrestled her to the ground, stuffed their hands down her shirt to retrieve the bogus "non-warrant," and arrested her for resisting a lawful command by an officer: to surrender to the warrant. Next, they searched her home, without a warrant, and found what the Court described as "lewd and lascivious books, pictures and photographs," or simply porn, in her possession, which was a violation of Ohio's obscenity statute.[34]

Mapp was then arrested and eventually tried and convicted.[35] A warrant was produced at her trial.[36] She appealed her conviction,[37] which was affirmed by the Ohio courts.[38] After this decision, she appealed to the United States Supreme Court.[39]

Mapp's petition for writ of certiorari was a mere eight pages long. In fact, "only a single page and several sentences" argued why the Court should review the decision. In the petition were three major arguments:

> (1) the Ohio obscenity statute violated the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution; (2) Mapp's sentence constituted cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution; and (3) the police conduct violated the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution.[40]

II. THE COURT DEBATES

To some degree, luck favored Dollree Mapp. The case caught the eye of almost all the Justices of the Court. For the most part, they were

33. Mapp v. Ohio, 367 U.S. 643, 644 (1961).

34. *Id.* at 643–45.

35. Harvey Gee, *The Story of* Mapp v. Ohio, 8 J.L. SOC'Y 121, 127–28 (2007) (citing *Mapp*, 367 U.S. at 668–69).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (citing Brief of Appellant on the Merits, *Mapp v. Ohio*, 367 U.S. 643 (1961) (No. 236). As oral arguments reveal, however, the Court in *Mapp* would initially discuss the First Amendment implications under the obscenity statute. *See* Bernard A. Berkman, Oral Argument: *Mapp v. Ohio*, 367 U.S. 643 (1961) (No. 236) (transcript and audio excerpt available at https://apps.oyez.org/player/#/warren7/oral_argument_audio/14657). In other words, while *Mapp* began as a First Amendment case about the unconstitutionality of the obscenity statute, the majority ultimately brushed the First Amendment issue aside and decided the case on Fourth Amendment grounds.

interested because they believed the Ohio obscenity statute violated the First and Fourteenth Amendments to the Constitution.[41] However, the issue on which the case was decided—that Mapp's Due Process rights were violated because her conviction was based on evidence illegally obtained—"was negligible in the Court memoranda."[42] But historical interpretation reveals that the Supreme Court ruling in *Mapp* "provok[ed] a spirited public debate over the exclusionary rule, and not freedom of speech or expression."[43]

Writing for six of the nine members of the Court, Justice Tom C. Clark held that evidence obtained by an unconstitutional search was inadmissible.[44] The Court determined that the exclusionary rule, as part of both the Fourth and Fourteenth Amendments, is consistent with the Constitution, and the consistency made common sense.

The Court perceived the inconsistency that existed between the state and federal level:

> Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.[45]

The majority closed its opinion with a distinct rationale:

> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled, and, to the courts,

41. *Id.* at 131.
42. *Id.*
43. *Id.*
44. *Mapp*, 367 U.S. at 643.
45. *Id.* at 657.

> that judicial integrity so necessary in the true administration of justice.[46]

Accordingly, the Court overruled its earlier decision in *Wolf v. Colorado*, maintaining that the right of exclusion automatically applies at the state level to the same degree and manner as in federal cases.[47]

III. THE AFTERMATH: CONFLICT, CONSENSUS, AND MAPP *POST-WARREN*

To be clear, law enforcement officials' reaction to the ruling in *Mapp* might well be the best evidence of why it was so important. Many law enforcement officials reacted as if the Fourth Amendment or its state constitutional counterpart had just been adopted.

In New York, for example, Police Commissioner Michael Murphy likened the decision to a "tidal wave[ ]" and an "earthquake[ ]."[48] According to Commissioner Murphy,

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as [*Mapp*]. . . . [Decisions such as *Mapp*] create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.[49]

Not everyone agreed, however, with Murphy's distressed outlook. Some law enforcement officials, particularly state prosecutors, thought *Mapp* to be the right decision. Down the road in Philadelphia, a young assistant district attorney (and future U.S. Senator), Arlen Specter, made it clear that in his state, tort remedies, criminal prosecutions, and internal police discipline each had little to no effect. He announced that *Mapp* had "revolutionized" police practice and prosecution procedures in the many states that had long been admitting illegally seized

46. *Id.* at 660.
47. *Id.*
48. *See, e.g.*, Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).
49. *Id.*

evidence.[50] One Pennsylvania judge, however, disagreed. He "was so surprised by the *Mapp* holding that he said it applied only to Ohio as far as he was concerned until the Pennsylvania appellate courts told him otherwise."[51]

In Minnesota, a young Attorney General, and future Vice President of the United States, Walter Mondale, defended the *Mapp* ruling to a group of distressed Minnesota officers. He not only reminded them that the Fourth Amendment in both the United States and Minnesota's Constitutions contained identical language, but he made it clear that *Mapp* did not alter one word of either constitution. According to Mondale:

> [*Mapp*] does not reduce police powers one iota. It only reduces potential *abuses* of power. The adoption of the so-called "exclusionary rule" does not affect authorized police practices in any way. What was a legal arrest before, still is. What was a reasonable search before still is.[52]

What Mondale believed was that if the police feared that the evidence they were obtaining would be subject to exclusion, they must have already been mindful that the alternative remedies provided by *Wolf* previously existed and they were not being applied. In other words, they must have known they were violating the guarantee against unreasonable search and seizure all along.[53]

IV. CONCLUSION

Concurring in *Mapp*, Justice Douglas commented that the overruled *Wolf* decision had evoked "a storm of constitutional controversy which only today finds its end," but he could not have been more wrong.[54] The Warren Court's controversial decision in *Mapp* would become the subject of scrutinized deterrence rationales[55] and

50. Arlen Specter, Mapp v. Ohio*: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4, 4 (1962).

51. *Id.* at 4–5.

52. Walter Mondale, *The Problem of Search and Seizure*, 19 BENCH & B. MINN., Feb. 1962, at 15, 16 (emphasis in original).

53. *Id.*

54. 367 U.S. at 670.

55. *See, e.g.*, United States. v. Calandra, 414 U.S. 338 (1974). *Calandra* was the most important exclusionary rule of the 1970s. It ruled that grand jury witnesses may not refuse to answer questions on the ground that the questions were based on fruits of an unlawful search. However, it did not treat the exclusionary rule with the same constitutional respect *Mapp* had.

cost-benefit analysis[56] aimed at narrowing its power to regulate law enforcement. While the Warren Court fired its shot across the bow aimed at extending greater protections under the Fourth Amendment, the return fire by critics aimed at *Mapp*'s efficacy, validity, and the constitutional rationale of the very concept of exclusion itself. Thus, whether one sees the Warren Court's decision in *Mapp* as a positive step in the right direction, or the reason for a more conservative approach to police disenfranchisement in safety and protection, it is without dispute that *Mapp v. Ohio* was then, and forever remains to be, the start of the revolution in criminal procedure.

56. *See*, *e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984). *Leon* introduced the cost-benefit approach to the exclusionary rule and adopted the so-called Good Faith exception to the power of exclusion so previously afforded under *Mapp*.