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UNCONSTITUTIONAL SEARCH AND SEIZURE AND THE MYTH OF HARMLESS ERROR

*Gordon R. Thompson**

Introduction

Among the powers with which state appellate courts are invested is the discretion to decide the harmless or prejudicial nature of a trial error. This cherished power is essential to a manageable system of judicial review, since probably every trial court official commits error from time to time. In apparent recognition of this human foible, our federal constitution guarantees a fair trial, not a perfect one.¹ Indeed, a perfect trial seldom occurs. Accordingly, appellate courts are instructed to affirm unless the alleged error resulted in a miscarriage of justice or prejudiced the defendant's substantial rights. Sometimes that command is imbedded in state constitutions;² more frequently it is found in the statutes.³

In a proper setting there is no sensible objection to the rule of harmless error, which saves the time, expense, and effort of retrial without impeding justice. The rule's proper use, however, is a delicate and perplexing matter. Perhaps it is the most difficult of appellate functions.⁴ The variety of error

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1 U.S. CONST. amend. VI.

2 *E.g.*, ARIZ. CONST. art. 6, § 27; CAL. CONST. art. VI, § 4½; ORE. CONST. art. VII, § 3.

3 *E.g.*, CONN. GEN. STAT. ANN. § 52-265 (1960); IDAHO CODE ANN. § 19-2819 (1947); LA. REV. STAT. § 15:557 (1950); NEB. REV. STAT. ch. 29, § 29.2308 (reissue 1964); NEV. REV. STAT. § 169.110 (1963); UTAH CODE ANN. § 77-42-1 (1953); WIS. STAT. ANN. § 274.37 (1958). Federal courts have the same power. 28 U.S.C. § 2111 (1964); FED. R. CRIM. P. 52(a).

4 Karl N. Llewellyn writes of discretion in these words:

To be *right* discretion, to be lawful exercise of discretion . . . , the action so far as it affects any man or group adversely must be undertaken with a feeling, explicit or implicit, or willingness, or readiness, to do the like again, if, as, and when a like case may arise. LLEWELLYN, *THE COMMON LAW TRADITION* 217 (1960).

seems endless, and its impact upon the trial's result almost impossible to evaluate with confidence. Broad guides dictated for the exercise of discretion in criminal cases involving nonconstitutional error include: (1) the gravity of the crime charged; (2) whether the evidence of guilt is plain or somewhat obscure and in dispute; (3) the quantity of error; (4) the character of error.

When the error is of constitutional dimension, however, weightier considerations attend an evaluation of its significance. Since such an error can never qualify as a mere technical mistake or be cast aside as insignificant, the discretionary power of a state appellate court is necessarily restricted, if not altogether obliterated. Indeed, one commentator reads the dictum of Mr. Justice Rutledge in *Kotteakos v. United States*⁵ to indicate that, regardless of influence upon the verdict, the violation of a constitutional right cannot constitute harmless error.⁶ In *Kotteakos*, which involved the commission of non-constitutional error in considering evidence at variance with the indictment, Justice Rutledge wrote:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.⁷

Although *Kotteakos* was a federal trial, the statement by Justice Rutledge would appear to be likewise applicable under the fourteenth amendment to state trials.

The hint of *Kotteakos* has not yet matured with respect to a violation of the fourth amendment prohibition against unreasonable searches and seizures resulting in trial evidence. In *Fahy v. Connecticut*,⁸ a majority of the United States Supreme Court declined an invitation to decide whether a violation of that constitutional right is subject to the "normal rules" of harmless error. Because the Court avoided that issue, some state appellate courts continue to apply the rule to the erroneous reception of unconstitutional search and seizure evidence.⁹ The Court did, however, enunciate a standard for assessing the significance of the error upon the outcome of the case. Chief Justice Warren wrote:

We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence

5 328 U.S. 750 (1946).

6 *Comment*, 64 COLUM. L. REV. 367, 369 (1964).

7 328 U.S. 750, 764-65 (1946).

8 375 U.S. 85 (1963).

[I]t is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of "harmless error" under the federal standard of what constitutes harmless error. *Id.* at 86.

See also *Henry v. Mississippi*, 379 U.S. 443, 449 (1965).

9 *In re Shipp*, 62 Cal. 2d 547, 399 P.2d 571, 43 Cal. Rptr. 3 (1965); *People v. Parham*, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963); *People v. Thomsen*, 239 Cal. App. 2d 78, 48 Cal. Rptr. 455 (Dist. Ct. App. 1965); *People v. Cooper*, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483 (Dist. Ct. App. 1965); *Dean v. Fogliani*, 81 Nev. 541, 407 P.2d 580 (1965); *Pulaski v. State*, 24 Wis. 2d 450, 129 N.W.2d 204 (1964).

complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.¹⁰

The purpose of this article is to explore whether a state harmless error rule should apply in such a case and to suggest that, in any event, the "reasonable possibility" restriction of *Fahy* renders harmless error a myth, a concept existing only in imagination and not in reality.

Federal Supervision of State Criminal Procedure

An appropriate beginning for this exploration requires the frank acknowledgment and graceful acceptance by state courts that federal supervision of state criminal justice is a judicial fact of life. Unfortunately, such acknowledgment and acceptance have not been freely given. State judges particularly sensitive to the "intrusion" of federal authority¹¹ ignore the existence of federal supervision, which has been exercised throughout the republic's long history.¹² The expansion of that supervision in recent years through the incorporation of many procedural safeguards of the Bill of Rights into the fourteenth amendment¹³ has served to heighten the sensitivity of some state justices, eliciting an unwarranted reaction.¹⁴ Mr. Justice Frankfurter placed the matter in proper focus in *Brown v. Allen*,¹⁵ when he wrote:

Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts had denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has

10 *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). The interpretation of CAL. CONST. art. VI, § 4½, however, is that reversal is justified only when it is "reasonably probable" that the error affected the trial's result. *E.g.*, *People v. Hines*, 61 Cal. 2d 164, 390 P.2d 398, 37 Cal. Rptr. 622 (1964); *People v. Bevins*, 54 Cal. 2d 71, 351 P.2d 776, 4 Cal. Rptr. 504 (1960); *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956); *People v. Von Blum*, 236 Cal. App. 2d, 737, 47 Cal. Rptr. 679 (Super. Ct. App. Div. 1966) (*per curiam*).

11 Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 439 (1961).

The state judges have expressed particular disfavor for a federal remedy for state prisoners which authorizes a single *nisi prius* federal judge to set aside state convictions affirmed by the highest state court. Citing *Resolution of the Conference of Chief Justices, Hearing on H.R. 5649*, 84th Cong., 1st Sess. 32 (1955).

12 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85, providing for direct review by the Supreme Court of state decisions that turn on a question arising under the federal constitution; Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385, providing for review of state convictions by federal habeas corpus. As to habeas corpus, see *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Leyra v. Denno*, 347 U.S. 556 (1954); *Brown v. Allen*, 344 U.S. 443 (1953); *Caffrey, The Impact of the Townsend and Noia Cases on Federal District Judges*, 33 F.R.D. 446 (1964).

13 *Fourth amendment*: *Ker v. California*, 374 U.S. 23 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *fifth amendment*: *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Spano v. New York*, 360 U.S. 315 (1959); *sixth amendment*: *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *eighth amendment*: *Robinson v. California*, 370 U.S. 660 (1962).

14 See, *e.g.*, the article by the Chief Justice of Ohio, Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815 (1964).

15 344 U.S. 443 (1953).

authorized district courts to be the organ of higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.¹⁶

Congress has set the stage for federal review of state convictions involving federal constitutional rights,¹⁷ and the federal courts have seized the opportunity for review in such cases involving fourth amendment rights.¹⁸ It would appear that one cannot effectively contradict Professor Amsterdam's observation that "it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim."¹⁹

The Case for State Discretion

Notwithstanding the federal protection accorded under the doctrine of *Mapp v. Ohio*,²⁰ eminent authority suggests that there is still room for a state court to apply its harmless error standard. Most frequently cited for this proposition are the dissenting opinion of Mr. Justice Harlan in *Fahy v. Connecticut*²¹ and the opinion by California Supreme Court Justice Traynor in *People v. Parham*.²² The views of these eminent jurists carry great weight and respect, requiring that one in disagreement carefully consider the reasons they advance.

Justice Traynor maintains that, if independent evidence of the defendant's guilt is plain, a state appellate court should be allowed to save the conviction by resort to the harmless error doctrine.²³ Justice Harlan apparently agrees, noting that "evidentiary questions of this sort are not a proper part of this court's business, particularly in cases coming here from state courts over which

¹⁶ *Id.* at 510.

¹⁷ 28 U.S.C. § 2241 (1964). Some state constitutions have expressly acknowledged the superior authority of federal law. Maryland, for example, has provided that

The Constitution of the United States . . . shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding. Md. CONST. art. 2.

Nevada demands that the "Paramount Allegiance of every citizen is due to the Federal Government in the exercise of all its Constitutional powers as the same have been or may be defined by the Supreme Court of the United States." Nev. CONST. art 1, § 2. Indeed, an allegiance clause is not uncommon.

¹⁸ *Davis v. California*, 341 F.2d 982 (9th Cir. 1965); *Dillon v. Peters*, 341 F.2d 337 (10th Cir. 1965); *United States v. Rundle*, 337 F.2d 268 (10th Cir. 1964); *United States v. Fay*, 333 F.2d 12 (2d Cir. 1964), *aff'd sub nom. Angelet v. Fay*, 381, U.S. 654 (1965); *Sisk v. Lane*, 331 F.2d 235 (7th Cir. 1964); *California v. Hurst*, 325 F.2d 891 (9th Cir. 1964); *Hall v. Warden, Maryland Penitentiary*, 313 F.2d 483 (4th Cir. 1963); *MacKenzie v. Robbins*, 248 F. Supp. 496 (S.D. Me. 1965). *But see*, as to collateral attack in state court, *In re Harris*, 56 Cal. 2d 879, 366 P.2d 305, 16 Cal. Rptr. 889 (1961) (Traynor, J., dissenting).

¹⁹ Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 380 (1964).

²⁰ 367 U.S. 643 (1961). In *Mapp* the Court reversed a state court conviction based on evidence obtained through an unlawful search and seizure.

²¹ 375 U.S. 85, 92 (1963) (Clark, Stewart, and White, JJ., concurring).

²² 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963).

²³ A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty, not for the officer's illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. 384 P.2d at 1005, 33 Cal. Rptr. at 501.

this court possesses no supervisory power."²⁴ Of course, this position is sound when nonconstitutional error is at issue;²⁵ moreover, it is difficult to dispute Justice Harlan's observation that "erroneously admitted 'constitutional' evidence may often be more prejudicial than erroneously admitted 'unconstitutional' evidence."²⁶ Indeed, that observation, together with the notion that a reviewing state court may disregard the error when independent evidence of the defendant's guilt is plain, finds support in the rationale of *Linkletter v. Walker*.²⁷ In that case the Court held that *Mapp*'s exclusionary rule does not require retroactive application insofar as the rule's purpose is not directed to the "fairness of the trial — the very integrity of the fact finding process."²⁸ The reliability and relevancy of the evidence were not at issue in *Linkletter*, and the Court noted that these factors may well have had no effect on the outcome of the trial.²⁹

Preserving the Integrity of the Fourth Amendment

If our sole concern were the fairness of the trial, nothing more would be needed to convince one that the harmless error rule has a legitimate function in search and seizure cases. However, this is not our sole concern: the preservation and integrity of a constitutional right must also be considered.

The primary purpose of the framers of the fourth amendment was to protect privacy.³⁰ Mr. Justice Brandeis described the "right to be let alone" as "the most comprehensive . . . and the . . . [one] most valued by civilized man."³¹ Unjustifiable intrusions upon privacy are abhorrent to a civilized society; and when they occur appellate courts must, in evaluating damage or prejudice, consider the integrity of the right and the necessary means to preserve it. Indeed, the impetus behind the Court's extending the exclusionary rule to state trials was that "other remedies" had proven worthless and futile.³² The inquiry now becomes whether the purpose of the fourth amendment may be frustrated by resort to harmless error.

Justice Harlan argues that the purpose of the fourth amendment is not thwarted by application of the rule. He reasons:

Since the harmless-error rule plainly affords no shield under which prosecutors might use damaging evidence, unconstitutionally obtained, to secure a conviction, there is no danger that application of the rule will undermine the prophylactic function of the rule of inadmissibility.³³

24 375 U.S. 85, 92 (1963) (dissenting opinion). See also *Stoner v. California*, 376 U.S. 483, 490 (1964) (Harlan, J., dissenting): "I would remand to the state court so that it may consider whether the admission of illegally seized evidence was harmless."

25 On the other hand, by virtue of 28 U.S.C. § 2241 (1964) federal courts exercise supervisory power in state criminal convictions involving constitutional questions. See notes 17 and 18 *supra* and accompanying text.

26 *Fahy v. Connecticut*, 375 U.S. 85, 94 (1963) (dissenting opinion).

27 381 U.S. 618 (1965).

28 *Id.* at 639.

29 *Ibid.*

30 Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 481 (1961).

31 *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

32 *Mapp v. Ohio*, 367 U.S. 643, 652 (1960).

33 *Fahy v. Connecticut*, 375 U.S. 85, 94 (1963) (dissenting opinion).

One may properly quarrel with that statement. Many lawyers believe that the rule does provide a shield, and that prosecutors are thereby encouraged to persuade trial courts that the evidence is admissible.

The antecedent comment of Judge Jerome Frank concerning prosecutor misconduct is relevant and worth noting:

This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, "Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial." Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.³⁴

The "harmless error gamble" may be willingly encountered by a prosecutor bent on victory, if he believes the law of his state manifests appellate liberality in using harmless error to save a conviction.³⁵

Almost twenty years later, Professors Hall and Kamisar reiterate Frank's concern. Articulating the current doubt surrounding the validity of Mr. Justice Harlan's observation, they ask:

Does this very case [*Fahy v. Connecticut*]—which saw the Court divide sharply over whether the challenged evidence did "affect the outcome," did "prejudice" petitioner—indicate that the harmless-error rule might well afford a shield for the prosecution's use of damaging evidence, unconstitutionally obtained?³⁶

34 *United States v. Antonelli Fire Works Co.*, 155 F.2d 631, 661 (2d Cir. 1946).

35 California decisions would indicate that that state is such a jurisdiction. *E.g.*, *People v. Bostick*, 62 Cal. 2d 820, 402 P.2d 529, 44 Cal. Rptr. 649 (1965); *People v. Culp*, 241 Cal. App. 2d 445, 50 Cal. Rptr. 471 (Dist. Ct. App. 1966); *People v. Potter*, 240 Cal. App. 2d 687, 49 Cal. Rptr. 892 (Dist. Ct. App. 1966); *People v. Phillips*, 240 Cal. App. 2d 206, 49 Cal. Rptr. 480 (Dist. Ct. App. 1966); *People v. Boyden*, 237 Cal. App. 2d 821, 47 Cal. Rptr. 136 (Dist. Ct. App. 1965); *People v. Daugherty*, 235 Cal. App. 2d 564, 45 Cal. Rptr. 528 (Dist. Ct. App. 1965); *People v. Erb*, 235 Cal. App. 2d 650, 45 Cal. Rptr. 503 (Dist. Ct. App. 1965); *People v. Luckman*, 235 Cal. App. 2d 75, 45 Cal. Rptr. 41 (Dist. Ct. App. 1965); *People v. Von Blum*, 236 Cal. App. 2d 737, 47 Cal. Rptr. 679 (Super. Ct. App. Div. 1966) (*per curiam*). These cases concerned comment on the defendant's failure to testify, and were decided in the wake of *Griffin v. California*, 380 U.S. 609 (1965), which held that the California comment rule violated the fifth amendment privilege against self-incrimination. *People v. LaVergne*, 64 Cal. 2d 275, 411 P.2d 309, 49 Cal. Rptr. 557 (1966); *People v. Gilbert*, 63 Cal. 2d 722, 408 P.2d 365, 47 Cal. Rptr. 909 (1965); *People v. Cockrell*, 63 Cal. 2d 691, 408 P.2d 116, 47 Cal. Rptr. 788 (1965); *People v. Hillery*, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965). These cases involved admissions erroneously received following *Escobedo v. Illinois*, 378 U.S. 478 (1964), which held inadmissible a confession obtained when the suspect had been denied his sixth amendment right to counsel.

36 HALL & KAMISAR, *MODERN CRIMINAL PROCEDURE* 300 (1965).

Justice Traynor's position is that the basic purpose of the exclusionary rule is to deter unconstitutional methods of law enforcement, which purpose is not defeated by permitting harmless error application in a proper case. He suggests that the deterrent effect of the rule is "derived from the principle that the state must not profit from its own wrong," and a profit does not accrue "when the erroneously admitted evidence does not affect the result of the trial."³⁷ Moreover, he argues that "to require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial."³⁸

The "profit" argument is not persuasive, for it rests upon the narrow assumption that the state's sole interest is to convict the guilty. The interest of government to protect and preserve the integrity of a constitutional right is thereby given only subordinate significance. One may properly question whether such was the intendment of *Mapp v. Ohio*, for the court there noted that "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."³⁹

Although it may be true, as Justice Traynor states, that automatic reversal would "generate pressure to find that unreasonable police conduct was lawful after all," it is at least equally true that the harmless error doctrine would generate pressure to find the unreasonable police conduct insignificant. Unreasonable police conduct may be condoned in either of two ways: by finding it reasonable, or by finding it harmless. In either instance the right to be let alone is not protected, and unlawful police activity remains undeterred.

In discussing the purpose of the exclusionary rule, Mr. Justice Black made this telling point:

One reason — perhaps a basic one — put forward by the Court for its refusal to give Linkletter the benefit of the search and seizure exclusionary rule is the repeated statement that the purpose of that rule is to deter sheriffs, policemen, and other law officers from making unlawful searches and seizures. The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. I have read and reread the *Mapp* opinion but have been unable to find one word in it to indicate that the exclusionary search and seizure rule should be limited on the basis that it was intended to do nothing in the world except to deter officers of the law.⁴⁰

If Justice Black's observation is correct, the ultimate protection of the defendant's rights would be assured by the automatic reversal of cases in which evidence seized illegally had been admitted. There would appear, then, to be no room for harmless error application when the fourth amendment has been violated.

There is automatic reversal when the record reveals that evidence has been admitted that denies due process. This judgment is made without regard to

³⁷ *People v. Parham*, 384 P.2d 1001, 1005, 33 Cal. Rptr. 497, 501 (Cal. 1963).

³⁸ *Ibid.*

³⁹ 367 U.S. 643, 659 (1961).

⁴⁰ *Linkletter v. Walker*, 381 U.S. 618, 648 (1965) (dissenting opinion).

whether prejudice is shown, for in such cases prejudice is presumed.⁴¹ The thought of automatic reversal is probably unpopular with state judges dealing with a fourth amendment question. Perhaps it is true that inflexible rules should rarely control the decisional process, for a judge likes to weigh and balance and then decide.⁴² Reasonable judges, however, weigh and balance differently. The inevitable result of such balancing is that a right is sometimes honored and sometimes ignored. When that right possesses constitutional stature, a rule precluding the uncertain exercise of judicial discretion may be in order. The Supreme Court did not resolve the question in *Fahy*, but it did announce a standard that approaches the rule of automatic reversal. The words of Chief Justice Warren, quoted earlier in this article, should be recalled:

We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.⁴³

Noted scholars ask: "When, if ever, may this question be answered in the negative?"⁴⁴ It is extremely difficult to find a satisfactory response. A conscientious jurist harbors serious doubt about his capacity to read a cold record and declare with confidence that a bit of unconstitutionally obtained evidence could not possibly have influenced the jurors. Yet, that declaration is made repeatedly.⁴⁵ In many cases the pressure generated to save the conviction seems to win the day.

Conclusion

One objective of *Mapp v. Ohio* was to promote the observance of the same fundamental criteria by state and federal courts in applying constitutional doctrine.⁴⁶ Since reasonable uniformity in this area is manifestly desirable, basic constitutional doctrine should carry the same meaning in either court. If each state is allowed to apply its own conception of harmless error, the possibility of reaching that desired goal is greatly diminished. California is the most prominent state continuing to apply its own standard in constitutional cases, refusing to depart from its "probability" test of reversible error, notwithstanding the "possibility" standard of *Fahy*.⁴⁷

One speculates why the majority in *Fahy* did not come to grips with the harmless error problem. Perhaps it was thought that insufficient time had passed since *Mapp* to afford reliable information concerning state court application of the exclusionary rule. In any event, it seems clear that the "reasonable possibility" test announced in *Fahy*, if honestly applied, renders the harmless error rule a myth in search and seizure cases.

41 See *Davis v. North Carolina*, 384 U.S. 737 (1966); *Haynes v. Washington*, 373 U.S. 503 (1963); *Spano v. New York*, 360 U.S. 315 (1959).

42 Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L. J. 318, vividly points to the many problems presented by the exclusionary rule.

43 375 U.S. 85, 86-87 (1963).

44 HALL & KAMISAR, MODERN CRIMINAL PROCEDURE 299 (1965).

45 See cases cited in note 9 *supra*.

46 367 U.S. 655, 658 (1961).

47 WITKIN, CALIFORNIA CRIMINAL PROCEDURE (Supp. 1965, at 135-37) reviews some of the recent cases. See discussion in note 10 *supra*.