

Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards

Robert A. Hillman

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Robert A. Hillman, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 Cornell L. Rev. 507 (1971)
Available at: <http://scholarship.law.cornell.edu/clr/vol56/iss3/6>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

ADMISSIBILITY OF EVIDENCE SEIZED BY PRIVATE UNIVERSITY OFFICIALS IN VIOLATION OF FOURTH AMENDMENT STANDARDS

Recent cases indicate that students are subject to on-campus searches and seizures that may result in the imposition of criminal sanctions. In *Moore v. Student Affairs Committee*,¹ the Dean of Men of Troy State University, a public institution, and two state narcotics agents conducted a search for marijuana in a student's dormitory room.² Similarly, in *People v. Cohen*,³ private university officials admitted police to the dormitories of Hofstra University for the purpose of determining whether marijuana was being used by students.⁴ In each case, the search was conducted without either probable cause or a warrant, and in each case, marijuana was discovered and seized.⁵ In these circumstances, the students in question face not only disciplinary action by the university, but also possible criminal prosecution.⁶ A crucial question, therefore, is whether constitutional restraints apply to the search; if they do, illegally seized material will not be admissible into evidence in a subsequent trial.⁷

In *Cohen*, the search was held violative of the fourth amendment prohibition against unreasonable searches and seizures.⁸ The court pointed out that, even assuming that a student impliedly consents to

¹ 284 F. Supp. 725 (M.D. Ala. 1968).

² *Id.* at 727.

³ 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Dist. Ct. 1968).

⁴ *Id.* at 368, 292 N.Y.S.2d at 708.

⁵ 284 F. Supp. at 727-28; 57 Misc. 2d at 368, 292 N.Y.S.2d at 708.

⁶ In *Moore*, the student in question was indicted for possession of marijuana. 284 F. Supp. at 727 n.1.

⁷ The fourth amendment protects individuals from governmental incursions into their "persons, houses, papers, and effects" without a warrant or probable cause. *Weeks v. United States*, 232 U.S. 383, 391-92 (1914). Furthermore, evidence seized by the federal government without a warrant or probable cause is inadmissible in federal criminal proceedings under the exclusionary rule announced in that case. *Id.* The exclusionary rule as it applies to federal courts was extended to cover evidence seized illegally by state officials in *Elkins v. United States*, 364 U.S. 206 (1960). *Mapp v. Ohio*, 367 U.S. 643 (1961), extended the exclusionary rule to the state courts. Thus, if state or federal police or officials are sufficiently involved with an illegal search, the evidence is inadmissible in a state proceeding. However, if a private individual alone seizes evidence illegally, it will be admissible in state or federal proceedings. *Burdeau v. McDowell*, 256 U.S. 465 (1921); note 15 *infra*.

If the fourth amendment applies to university situations, a warrant or probable cause would be necessary in searches of dormitory rooms, and evidence seized in a search conducted without a warrant or probable cause would be inadmissible in criminal proceedings.

⁸ 57 Misc. 2d at 373, 292 N.Y.S.2d at 713.

university officials entering his room at almost all times, this consent is limited to university officials and cannot be delegated by them.⁹ Thus, the presence of the police rendered the search and seizure subject to the fourth amendment.¹⁰ In *Moore*, the search and seizure was also held to be subject to the fourth amendment,¹¹ but there the manner in which it was conducted was found to be consistent with that amendment's requirements.¹² The court also recognized that searches conducted by public university officials would be subject to constitutional restraints.¹³

Thus, fourth amendment restrictions apply to searches of students' rooms conducted by public university officials as well as to those conducted by police. Investigation of criminal behavior of students, however, is not limited to these searches. Private university officials might undertake such searches without direct police assistance. Recent decisions suggest that the actions of private university officials are not considered state action, and are not subject to fourth amendment restraints;¹⁴ thus, evidence obtained by such officials in searches that vio-

⁹ *Id.* at 369, 292 N.Y.S.2d at 709.

The consent cannot be delegated, the court said, because the "dorm is a home and it must be inviolate against unlawful search and seizure." *Id.* at 373, 292 N.Y.S.2d at 713.

The court was also concerned because students who live in off-campus housing, where the university is not the landlord, are protected by the fourth amendment, while those on campus would not be protected if university officials could consent to police searches on campus. The court said: "To suggest that a student who lives off campus in a boarding house is protected but that one who occupies a dormitory room waives his constitutional liberties is at war with reason, logic and law." *Id.*

¹⁰ *Id.* at 369, 292 N.Y.S.2d at 709.

¹¹ 284 F. Supp. at 729-30.

¹² *Id.* The court said that because of the special necessities of the student-college relationship, the student's "rights must yield to the extent that they would interfere with the institution's fundamental duty to operate the school as an educational institution." *Id.* at 730 (emphasis in original). Thus, where the university has "reasonable cause to believe" that a student's conduct is "illegal or . . . would otherwise seriously interfere with campus discipline," it may conduct a search of the student's room. The court held that this standard, which is "lower than . . . 'probable cause,'" had been met. *Id.*

¹³ *Id.* at 729. The federal courts have had no difficulty finding state action in the activities of public universities. *E.g.*, *Powe v. Miles*, 407 F.2d 73, 82-83 (2d Cir. 1968); *Wright v. Texas S. Univ.*, 392 F.2d 728, 729 (5th Cir. 1968); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961); Note, *Admissibility of Testimony Coerced by a University*, 55 CORNELL L. REV. 435, 435 n.3 (1970).

¹⁴ *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

These cases point out that on-campus actions of private university students are not protected by any constitutional guarantees because the private university does not act under color of state law. See Schubert, *State Action and the Private University*, 24 RUTGERS L. REV. 323 (1970); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*,

late fourth amendment standards would appear to be admissible in subsequent criminal proceedings.¹⁵ The relationship between private universities and local police, however, may establish a state action link sufficient to require constitutional protection of students' rights in this area.

I

STATE ACTION AND THE PRIVATE UNIVERSITY

Several theories have been advanced to find state action at private universities. The receipt of government funds, the public function of education, and state contacts with educational institutions have all

20 U. FLA. L. REV. 290 (1968); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Comment, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911 (1969); Note, *Admissibility of Testimony Coerced by a University*, 55 CORNELL L. REV. 435 (1970); 44 TUL. L. REV. 184 (1969).

State action must be found because constitutional guarantees do not extend to infringements by private individuals. The fourteenth amendment is limited by its literal meaning to action by the state: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See *Civil Rights Cases*, 109 U.S. 3, 11 (1883), where the Court said: "Individual invasion of individual rights is not the subject-matter of the amendment."

An argument may be made that the fourth amendment is applicable in the university situation because of the vast amount of federal aid to private universities. President Nixon has, in fact, suggested that federal agents should be able to intervene in campus cases involving bombing or arson because the institutions receive federal aid. *N.Y. Times*, Sept. 23, 1970, at 1, col. 5. Nevertheless, recent cases have refused to rule that the amount of federal aid to private universities subjects them to fourth amendment restrictions. See, e.g., *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

¹⁵ In *Burdeau v. McDowell*, 256 U.S. 465 (1921), petitioner had evidence stolen from him by detectives and a bank representative. He argued that this evidence should not be admissible in a federal proceeding against him because the property could not legally remain in the hands of the federal government. The Court held that since no official of the federal government was involved with the wrongful seizure of the property, there was no invasion of fourth amendment rights. The Court reasoned that the fourth amendment was intended to protect citizens only from searches and seizures by police and other governmental officials. The evidence could therefore be used against the petitioner. *Id.* at 476. *Accord*, *People v. Botts*, 250 Cal. App. 2d 478, 58 Cal. Rptr. 412 (1967); *People v. Horman*, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968), *cert. denied*, 393 U.S. 1057 (1969); *People v. Zalduondo*, 58 Misc. 2d 326, 295 N.Y.S.2d 301 (Dist. Ct. 1968).

A private university may conduct a search that does not comport with fourth amendment standards when it seeks to enforce reasonable disciplinary rules. *Cf. Moore v. Student Affairs Comm.*, 284 F. Supp. 725, 730 (M.D. Ala. 1968). As a result of *Burdeau*, however, even though a private university's search does not comply with the fourth amendment, the evidence it obtains will be admissible in a criminal proceeding.

been argued as bases for determining that the actions of private university administrators are subject to constitutional restraints.

The receipt of government funds was considered in *Grossner v. Trustees of Columbia University*.¹⁶ There, student participants in sit-ins at Columbia University sued to enjoin disciplinary proceedings brought against them. They alleged jurisdiction under the Civil Rights Act of 1871,¹⁷ and argued the presence of state action because, among other things, the University received government funds. The court did not accept this argument because the majority of the University's government income was federal; the small amount of money received solely from the state was found to be insufficient to make the University action state action.¹⁸ The court also pointed out that, in any case, receipt of government funds alone was insufficient to constitute state action.¹⁹

*Powe v. Miles*²⁰ also dealt with this issue. There, a demonstration during a ROTC ceremony at Alfred University resulted in the suspension of seven students, four of whom were members of the University's private liberal arts school.²¹ These students, alleging violation of the Civil Rights Act of 1871, sought injunctions ordering Alfred University to reinstate them.²² The court stated that the small amount of aid to the private college was "a long way from being so dominant as to afford basis for a contention that the state is merely utilizing private trustees to administer a state activity"²³

¹⁶ 287 F. Supp. 535 (S.D.N.Y. 1968).

¹⁷ REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964). This section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁸ The court reasoned that if small amounts of state money were sufficient to find state action, local contractors and enterprises could also be charged with state action. 287 F. Supp. at 548.

¹⁹ *Id.* at 547-48.

²⁰ 407 F.2d 73 (2d Cir. 1968).

²¹ The other three students, members of a state college at Alfred, were afforded constitutional protection. *Id.* at 82-83. The courts are unanimous in holding that public universities are subject to constitutional restraints. Note 13 *supra*.

²² Relief was sought under 28 U.S.C. § 1343 (1964). This section provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

.....
 (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States

²³ 407 F.2d at 81.

*Browns v. Mitchell*²⁴ also considered receipt of government funds as a basis for state action. In that case, students were also suspended, and brought class actions alleging that disciplinary action by the University of Denver was under color of state law and therefore must conform to fourteenth amendment due process requirements. The court considered the argument that since the University and its income-producing property were not taxed, it received the equivalent of a financial contribution from the state.²⁵ Nevertheless, the court held that the money could not influence the administration of University affairs, and therefore government aid did not render the University disciplinary action equivalent to state action.²⁶

The receipt of government funds argument is weak because it proves too much. Government subsidies to other institutions would also render their activities state action. Thus, the test would result in almost all institutional activity being under color of state or federal law. Also, the amount of aid necessary to find state action would remain unclear if the test were adopted.

The public function of education has also been discussed in cases dealing with state action at private universities.²⁷ In *Grossner*, the court dismissed the argument as being "without any basis":

[P]laintiffs are correct in a trivial way when they say education is "impressed with a public interest." Many things are. And it may even be that action in some context or other by such a University as Columbia would be subject to limitations like those confining

²⁴ 409 F.2d 593 (10th Cir. 1969).

²⁵ *Id.* at 596.

²⁶ *Id.*

²⁷ The public function argument is derived from two Supreme Court cases. In *Terry v. Adams*, 345 U.S. 461 (1953), the Court held that the Jaybird Democratic Association was engaged in a public function when it conducted elections to determine Democratic Party candidates, and thus violated the fifteenth amendment by excluding blacks. Similarly, in *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court held that the regulation of a company-owned town was a public function and therefore could not infringe on the inhabitants' constitutional rights.

The public function argument was introduced to the area of universities by *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La.), *rev'd*, 306 F.2d 489 (5th Cir. 1962). Tulane University was accused of discriminating against blacks. Although reversed on appeal, language in the case was persuasive:

[O]ne may question whether any school or college can ever be so "private" as to escape the reach of the Fourth Amendment. . . . [E]ducation is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. . . . Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action . . . ?

203 F. Supp. at 858-59 (footnotes omitted).

the State. But nothing supports the thesis that university . . . "education" as such is "state action."²⁸

This argument was also rejected in *Powe*. The court reasoned that because the football field where the demonstration took place was not open to the public, but "was open only to persons connected with the University or licensed by it to participate in . . . [University] events," the public function argument was inapplicable.²⁹

Such an argument proves too expansive because there are numerous other activities that are impressed with a "public interest." Their performance might have to be considered state action if the public function rationale were accepted.³⁰ Furthermore, as the *Grossner* court pointed out, if all education were state action, it would be difficult for private parochial schools to continue in existence because religious training at private institutions would be subject to the establishment clause of the first amendment.³¹

The third theory, state contacts with educational institutions, has provided the only approach that the courts have determined may lead to state action. However, the theory has been greatly refined by the courts. Instead of general contacts such as a charter from the state,³² public officials on the board of trustees,³³ or state regulation of educational standards,³⁴ the *Grossner* court said there must be specific involvement in the activity under constitutional attack.³⁵ Since, in that case, the state was not specifically involved in the disciplinary proceedings to which the suit was directed, there was no state action.³⁶

The *Grossner* court pointed out that in *Burton v. Wilmington Parking Authority*,³⁷ the case relied upon by the plaintiffs, the critical involvement was in the very discriminatory action under constitutional challenge.³⁸ Thus, there was in *Burton* "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."³⁹ The *Gross-*

²⁸ 287 F. Supp. at 549. The court added that if the plaintiffs succeeded with this line of reasoning, "the very idea of a parochial school would be unthinkable." *Id.* n.19.

²⁹ 407 F.2d at 80.

³⁰ See Schubert, *supra* note 14, at 333-34.

³¹ See note 28 *supra*.

³² On the question of whether a charter from the state should be sufficient to find state action, see Schubert, *supra* note 14, at 334-38.

³³ *McLeod v. College of Artesia*, 312 F. Supp. 498, 501 (D.N.M. 1970).

³⁴ *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968); Schubert, *supra* note 14, at 338-40.

³⁵ 287 F. Supp. at 548.

³⁶ *Id.*

³⁷ 365 U.S. 715 (1961).

³⁸ 287 F. Supp. at 548.

³⁹ *Id.*, quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724 (1961).

ner court said, however, that the “[p]laintiffs show nothing approximating the requisite degree of ‘state participation and involvement’ in any of the University’s activities, let alone the specific proceedings in question”⁴⁰

In *Powe*, the Second Circuit followed *Grossner*’s reasoning. The court said that the state’s regulation of educational standards at private colleges and universities did not make Alfred’s disciplinary action state action because “the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.”⁴¹ Following a similar line of reasoning, the Tenth Circuit said in *Browns* that in order to find state action at private universities, the state must have “so insinuated itself’ in the affairs of [the] private [u]niversity as to be judicially ‘recognized as a joint participant in the challenged’ disciplinary proceeding.”⁴²

The strength of the *Grossner* test is that by requiring state involvement in the challenged activity it avoids the implication that all activity is infected with state action. The weakness of the test is that the degree of involvement necessary for a finding of state action has not been spelled out by the courts employing the test; the only indication of degree is the *Browns* pronouncement that “joint participation” is essential. Nevertheless, the courts have made one aspect of the test clear by requiring specific involvement in the activity under attack and by rejecting other approaches.

II

STATE ACTION AND PRIVATE UNIVERSITY SEARCHES AND SEIZURES

A. *Actual Involvement of the State in University Searches and Seizures*

That the state is actually involved in private university searches and seizures is demonstrated by the relationship between local police and university officials. Cornell University, an essentially private institution,⁴³ provides an excellent example of the relationship. Weekly

⁴⁰ 287 F. Supp. at 549 (emphasis in original).

⁴¹ 407 F.2d at 81.

⁴² 409 F.2d at 595, quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). See also *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970).

⁴³ Although Cornell has four state colleges, their students comprise only about 25% of the total student body. Office of the Registrar, Cornell University, Registration—Fall Term 1970 (Oct. 7, 1970). Furthermore, out of 39 voting members of the Board of Trustees, only five are appointed by the state. Bylaws of Cornell University art. II, § 2 (June 12, 1966).

meetings with local officials determine which criminal infractions should be handled by the University and which will be reported to the police.⁴⁴ The rationale for these meetings is that

community law enforcement officials must and should be involved in understandings and procedures jointly worked out with the University and periodically reviewed by both. For example, the determination of what serious law violations are assignable to the civil jurisdiction obviously involves the judgment and cooperation of law enforcement officials.⁴⁵

Furthermore, in recent incidents involving the use of marijuana on campus, the University Proctor⁴⁶ played a dual role. Although he was primarily a University official interested in University code violations, at the same time he was "charged with the responsibility of transmitting to local law enforcement officials information and evidence concerning significant traffic in marijuana."⁴⁷

The relationship between the local police and University officials stems from the University's desire to remain isolated from general law enforcement procedures.⁴⁸ Thus, there is, in effect, a trade-off between the two groups. University officials agree to report certain offenses and all felonies, and to investigate suspected major drug offenders, so that the police will be kept off campus as much as possible. Since city police wish to avoid major campus confrontations, they are willing to allow University officials to do much of the investigative work and they employ the campus police to arrest offenders on campus.⁴⁹

The extent of police involvement at Cornell is not unique; understandings between local police and university officials seem to be

⁴⁴ Telephone interview with Capt. Ralph J. Coskey, Cornell University Safety Division, Sept. 16, 1970.

⁴⁵ Cornell University, Report of the Commission on the Interdependence of University Regulations and Local, State, and Federal Law 21 (Sept. 27, 1967) [hereinafter cited as Cornell Report].

⁴⁶ The Cornell University Proctor was "primarily concerned with the investigation of all student misconduct . . . committed both on and off campus." Office of the Proctor, Cornell University, University Proctor 1 (undated).

⁴⁷ Cornell Report 22.

⁴⁸ *Id.* at 3. See also McKay, *The Student as Private Citizen*, 45 DENVER L.J. 558 (1968). McKay states:

Indeed, there is often an informal understanding that the police will not enter the campus except upon invitation or in the case of unusual disturbance. In exchange for this quasi-immunity from police surveillance, the University *must* have some obligation to report violations of law that would ordinarily be prosecuted by the civil authorities.

Id. at 564 (emphasis added).

⁴⁹ Telephone interview with Capt. Ralph J. Coskey, *supra* note 44.

quite common,⁵⁰ and are being developed further in anticipation of future campus crises.⁵¹

The agreements, which appear to separate the functions of the local police and university officials, in fact unite them in a joint effort at effective law enforcement.⁵² For example, Cornell's campus police have been made deputy sheriffs of the county in which Cornell is located.⁵³

Thus, when a search is conducted as a result of a specific request by police or under a general policy established in weekly meetings, the police are involved; the first criterion of the *Grossner* test is therefore satisfied. The remaining question concerns the extent of involvement necessary for a finding of state action.

B. *The Necessary Degree of Involvement*

The degree of involvement in search and seizure situations necessary to invoke constitutional protections is suggested by recent cases that have considered searches and seizures in other than university settings. In discussing the extent of involvement by public officials with private searches and seizures that would render the fruits of the searches inadmissible, the cases have indicated that knowledge of the

⁵⁰ At Princeton University there are "quite carefully worked out mutual understandings" between the campus and local police. Letter from Neil L. Rudenstine, Dean of Students, Princeton University, to the *Cornell Law Review*, Sept. 18, 1970. At Bates College, there are "informal arrangements and understandings based on a long mutual cooperation and respect." Letter from George R. Healy, Provost, Bates College, Lewiston, Me., to the *Cornell Law Review*, Sept. 16, 1970. Similarly, at New York University the police authorities are conferred with regularly "as . . . on other occasions in the past." Memorandum to Members of the Faculties, Student Body, and Staff from President James M. Hester, New York University, Sept. 4, 1970, at 2 (on file, *Cornell Law Review*).

⁵¹ The American Council on Education issued a report recommending that college presidents develop with local authorities a specific strategy for handling disturbances. *N.Y. Times*, April 26, 1970, at 42, col. 5. The effect of the suggestion will be to more closely unite the university and local police at many universities throughout the country. The President's Commission on Campus Unrest has made a similar suggestion. It urges "state and local officials to make plans for handling campus disorders in full cooperation with one another and with the universities." *Id.*, Sept. 27, 1970, at 66, col. 5. Finally, in Chapter Letter No. 3, May 21, 1970, at 1, the American Association of University Professors urges chapter committees to "consult promptly with key administrative officers and to offer . . . assistance in developing appropriate institutional guidelines and in reaching helpful understandings with the civil authorities."

⁵² The Cornell Commission decried this sense of a "police presence" on campus. Cornell Report 35.

⁵³ *Id.* This fact alone would make certain actions by the campus police subject to constitutional restraints. See *Griffin v. Maryland*, 378 U.S. 130 (1964), in which a park employee who was also a deputy sheriff ordered Negroes to leave the grounds of a private park. The Court said: "If an individual is possessed of state authority, and purports to act under that authority, his action is state action." *Id.* at 135.

search by police may be sufficient. In *Stapleton v. Superior Court*,⁵⁴ the court indicated that it would refuse to admit evidence obtained by a credit card agent in searching the defendant's car if the police had knowledge of the illegality of the search:

Contrary to the assumption of the respondent court, the police need not have requested or directed the search in order to be guilty of "standing idly by"; knowledge of the illegal search coupled with a failure to protect the petitioner's rights against such a search suffices.⁵⁵

Similarly, in *People v. Horman*,⁵⁶ the New York Court of Appeals pointed out that to be admissible in court, evidence seized by a private individual must be seized "without the participation or knowledge of any governmental official."⁵⁷

Thus, where the police know of the specific search in question, evidence seized in violation of the fourth amendment will be inadmissible. It remains unclear whether their knowledge must be of a specific search, or whether a general knowledge that an individual or institution such as the university is conducting searches and will report serious violations to the police is sufficient to render illegally seized evidence inadmissible. Indeed, there are no cases that deal directly with this issue. A comparable situation existed, however, prior to the decision in *Elkins v. United States*,⁵⁸ which applied the exclusionary rule to evidence illegally seized by state officials.⁵⁹

In general, before *Elkins*, the only evidence to which the exclusionary rule applied was evidence illegally seized by federal officials.⁶⁰ Evidence seized by state officials in violation of fourth amendment standards was admissible in federal prosecutions unless sufficient federal involvement could be shown.⁶¹ Thus, for purposes of the exclusionary rule, the position of state officials in pre-*Elkins* cases is directly analogous to the present position of private citizens or institutions. The degree of state involvement in a university search and seizure required

⁵⁴ 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968).

⁵⁵ *Id.* at 103, 447 P.2d at 970-71, 73 Cal. Rptr. at 578-79.

⁵⁶ 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968), *cert. denied*, 393 U.S. 1057 (1969).

⁵⁷ *Id.* at 382, 239 N.E.2d at 628, 292 N.Y.S.2d at 877.

⁵⁸ 364 U.S. 206 (1960).

⁵⁹ *Id.* at 223. Thus, *Elkins* overturned the "silver platter" doctrine that had allowed state police to turn over evidence seized in an illegal search to federal authorities. Such evidence could then be used in a federal prosecution as long as federal agents were not involved in the search.

⁶⁰ *Id.* at 208-10.

⁶¹ *Id.* at 210-12; *accord*, *Lustig v. United States*, 338 U.S. 74 (1949); *Wright v. United States*, 224 A.2d 475 (D.C. Ct. App. 1966).

to invoke the exclusionary rule should therefore be identical to the degree of federal involvement in a state search and seizure that was required to invoke the exclusionary rule prior to *Elkins*.⁶²

In *Lustig v. United States*,⁶³ a Federal Secret Service Agent was involved in an illegal search of a hotel room by local police. In determining whether the federal involvement was sufficient to render seized evidence inadmissible, the Supreme Court said:

The decisive factor . . . is the actuality of a share by a federal official in *the total enterprise* of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.⁶⁴

The concept of the total enterprise was further defined in *Wheatley v. United States*.⁶⁵ There, the court said the participation in the total enterprise may be merely "an understanding between [state and federal officials] . . . that the federal offenses discovered by state officers will be prosecuted in the federal courts . . ." ⁶⁶ In that case, "the same rule as to the admissibility of the evidence obtained in the course of the search is applied as if the search were made by the federal officers themselves or under their direction."⁶⁷

Thus, *Wheatley* indicates that it is immaterial whether or not police have instructed the university to perform a specific search as long as general agreements have been reached. This is in accord with *Gilbert v. United States*.⁶⁸ There, the defendant had possession of intoxicating liquor in "Indian country," where such possession was prohibited by federal statute.⁶⁹ State police searched her premises and

⁶² *Lustig v. United States*, 338 U.S. 74 (1949), considered the degree of federal involvement in a state investigation necessary to exclude illegally seized evidence from a federal proceeding. In *Wright v. United States*, 224 A.2d 475 (D.C. Ct. App. 1966), the court stated: "This same reasoning [of *Lustig*] applies to a determination of the participation of governmental authorities in a search and seizure by a private citizen." *Id.* at 477. See text accompanying notes 63-64 *infra*.

⁶³ 338 U.S. 74 (1949).

⁶⁴ *Id.* at 79 (emphasis added).

⁶⁵ 159 F.2d 599 (4th Cir. 1946). In this case a state police officer, acting without a warrant, searched a suspect and found a knife. The evidence was admitted in a federal proceeding because it was not found in a search instigated by or with the knowledge of federal officers. *Id.* at 601.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 163 F.2d 325 (10th Cir. 1947).

⁶⁹ *Id.* at 326.

seized the liquor for use in subsequent criminal proceedings. The court admitted the evidence, holding that there was no federal involvement in the search and seizure. However, the court pointed out that

where a general understanding and common practice exists between state or municipal officers and federal authorities that the latter will adopt and prosecute in the federal courts offenses which the former discovered in the course of their operations, and a prosecution which originated by an unlawful search and seizure of state or municipal officers is adopted, the evidence obtained as the result of such search and seizure should be suppressed in like manner as though the search and seizure had been made by federal officers.⁷⁰

University relationships with local police are often similar to the relationship of federal and state officers that rendered evidence inadmissible in the federal courts prior to *Elkins*. As pointed out earlier,⁷¹ the University and police meet frequently at Cornell to determine which offenses will be handled by the University and which will be reported to the police. Moreover, as a consequence of these meetings, the University knows that evidence discovered in room searches will be used by local police. Furthermore, the local police will prosecute students as a result of these searches.

The motive for the cooperation between Cornell and local officials appears to be to provide effective and orderly law enforcement throughout the Ithaca community. This intermeshing of roles has advantages for both sides.⁷² Nevertheless, the meetings and arrangements between the two groups satisfy the *Grossner* requirement of direct state involvement in the area of searches and seizures. In addition, this involvement is sufficient to invoke the protection of the exclusionary rule. In such circumstances, evidence seized by university officials in violation of fourth amendment standards should be inadmissible in subsequent criminal proceedings.

Robert A. Hillman

⁷⁰ *Id.* at 327. See *Gallegos v. United States*, 237 F.2d 694, 696 (10th Cir. 1956), where the court said:

Federal courts zealously guard the rights of all persons to be free from unlawful search and seizure . . . and upon the slightest showing of direct or indirect participation by federal officers all fruits thereof are rendered inadmissible in federal prosecutions.

⁷¹ Notes 44-45 and accompanying text *supra*.

⁷² Notes 48-49 and accompanying text *supra*.