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Searches South of the Border Admission of Evidence Seized by Foreign Officials

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SEARCHES SOUTH OF THE BORDER: ADMISSION OF EVIDENCE SEIZED BY FOREIGN OFFICIALS

In *Mapp v. Ohio*[1] the Supreme Court effectively closed all courtroom doors to evidence obtained through an unreasonable search by either federal or state law enforcement officials.[2] Current efforts to control narcotics traffic have raised questions of the treatment to be accorded evidence acquired by foreign officers.

In *Brulay v. United States*[3] the Ninth Circuit affirmed the admission of evidence seized in Mexico and introduced in a criminal prosecution by the United States.[4] The evidence probably would have been excluded if the seizure had been made by federal officers.[5] The court held it admissible, however, since neither federal nor state officers were involved in the search. Incriminating statements made by the defendant during a prolonged interrogation by Mexican police were likewise admitted. The fourth amendment[6] was held inapplicable to acts committed by foreign officials within their own jurisdiction,[7] since any violation was complete at the time and place of the search and seizure.[8] The fifth amendment was satisfied by the trial court's finding that the statements were made voluntarily.[9] The case thus raises

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1 367 U.S. 643 (1961).

2 Today we . . . close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct.

Id. at 654-55.

3 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

4 Brulay was convicted of conspiring to smuggle amphetamine tablets into the United States in violation of 18 U.S.C. §§ 371, 545 (1964). He was arrested by Tijuana police officers who noticed that his car looked heavy in the rear. Following his arrest without a warrant, he opened the trunk of the car at the request of the officers, revealing several hundred pounds of amphetamine tablets. After prolonged questioning at the police station, he led officers to a house in Tijuana where an additional 1980 pounds of tablets were found. Possession and transportation of amphetamines apparently were not violations of Mexican law at the time of Brulay's arrest.

5 *See* Weeks v. United States, 232 U.S. 383 (1914). The *Weeks* rule requires exclusion of evidence obtained by federal officers in violation of the defendant's fourth amendment rights when such evidence is introduced in a federal prosecution. In the principal case Brulay argued that the evidence seized should be excluded because there was neither probable cause for his arrest nor a warrant for the searches.

6 U.S. CONST. amend. IV:

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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

7 383 F.2d at 348.

8 *Id.* at 349 n.5.

9 *Id.*

questions regarding the standards to be applied when evidence obtained by foreign officers acting within their own jurisdiction is introduced in a criminal prosecution in a United States court.

I

DEVELOPMENT OF THE EXCLUSIONARY RULE IN THE UNITED STATES

At common law, evidence obtained by illegal search and seizure was nevertheless admissible in a criminal trial,[10] since its admission did not conflict with either purpose of the rules of evidence: to enable the trial court to reach the truth and to secure a fair trial for the accused.[11] Since incriminating evidence obtained in an unlawful search may be just as true and reliable as that acquired in a legitimate manner, there was arguably no justification for its exclusion.[12]

In contrast to the common law rule, *Weeks v. United States*[13] adopted an exclusionary rule for federal criminal proceedings when federal officers had violated the fourth amendment rights of the accused. The rule was a prophylactic measure designed to control the conduct of federal officers.[14] The Court later applied the *Weeks* rule to unlaw-

10 *See, e.g.*, People v. Defore, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926); Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841) (dictum). *See generally* 8 J. WIGMORE, EVIDENCE § 2183 (rev. ed. J. McNaughton 1961).

11 *See* People v. Cahan, 44 Cal. 2d 434, 442-43, 282 P.2d 905, 910 (1955).

12 Holding illegally obtained evidence inadmissible results only in the apparently guilty accused going free and in the officer who conducted the unlawful search suffering a mild, indirect rebuke. Arguably, the officer should be punished more sternly, perhaps to the extent of a direct fine or imprisonment. In theory, the offending officer can be held liable in a civil action or a criminal prosecution for his trespass. But the prospects of success in such an action are questionable, because the jury may be indisposed to award damages to a person convicted of crime as a result of the search. Likewise the jury may not wish to punish an officer when his efforts, even though unconstitutional, have exposed the complaining party's criminal activity. *See* notes 21 & 23 *infra*.

13 232 U.S. 383 (1914). The defendant had been arrested and his room searched without a warrant. He was subsequently convicted on the basis of evidence thus obtained. The Supreme Court reversed the conviction and ordered the illegally seized papers returned to the defendant.

14 The Court reasoned that the incidence of such unlawful searches would be substantially reduced if federal officers were on notice that any evidence obtained as a result thereof could not be utilized in prosecution of the accused. By removing this apparent incentive to violate an individual's constitutional rights, the privacy of law-abiding citizens is theoretically enhanced. The Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have

ful searches conducted jointly by federal and state officials.[15] Evidence was also excluded when seized by state officials acting alone if, because of the nature of the offense charged, the search was deemed to have been on behalf of the federal government.[16] More recently the Court discarded the remnants of the "silver platter" doctrine[17] by hold-

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a right to appeal for the maintenance of such fundamental rights.

Id. at 392.

To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Id. at 394.

15 Byars v. United States, 273 U.S. 28 (1927). Evidence was seized during a search under a state warrant that would have been invalid by fourth amendment standards. A federal prohibition agent was invited to participate in the search and did so, "as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent." *Id* at 32. The Court held:

[T]he participation of the agent in the search was under color of his federal office and . . . the search in substance and effect was a joint operation of the local and federal officers. In that view . . . the effect is the same as though he had engaged in the undertaking as one exclusively his own.

Id. at 33. This holding appears to require exclusion if a federal officer participates in a foreign search. The issue then is one of determining what constitutes participation. For example, is a federal officer participating if he gives information leading foreign officers to conduct a search, or if he requests such a search? Or must he actually accompany the foreign officers in the venture?

16 Gambino v. United States, 275 U.S. 310 (1927). Gambino was arrested by New York state troopers and searched without a warrant and without probable cause. Intoxicating liquor was found in his automobile. He and the liquor were turned over to federal officers for prosecution for violation of the National Prohibition Act. The Court stated:

It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such coöperation, as by the state officers' acting under direction of the federal officials. . . . The prosecution thereupon instituted by the federal authorities was . . . in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States.

Id. at 316-17. The *Gambino* case is analogous to the foreign search. Distinctions may be drawn based on the original purpose of the foreign officers—*i.e.*, their search originally may have been intended to detect violations of foreign law, or it may have been intended to assist United States officials in their law enforcement efforts. A second distinction recognizes that foreign officials are not part of our governmental system, as are state police officers. The fact remains that the evidence obtained is used in our federal courts to prove a violation of federal law. If the arrest is wrongful by constitutional standards and the evidence used only in a federal prosecution, *Gambino* may require exclusion.

17 The "silver platter" term was coined by Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 78-79 (1949) (dictum):

The crux of [the *Byars*] . . . doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.

In *Lustig* a federal agent informed local police of his suspicion that the accused was counterfeiting. The police issued a warrant for his arrest on another ground, entered and

ing that federal prosecutors could no longer use any evidence unconstitutionally seized by state officials even without implication of either a federal involvement or a federal objective in the search.[18]

Wolf v. Colorado[19] extended federal control over the conduct of state officials. There the Court announced that the right of privacy,

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searched his room during his absence, and found evidence of counterfeiting. The federal agent arrived later and examined the evidence. He was present when the accused returned and was arrested. Although the agent did not request the search and it was not undertaken specifically to help the federal prosecution, his selection and removal of evidence was held to be part of the search. The case, however, does not indicate the limits of when a federal official "has a hand" in the search or when he might be deemed not to have participated in it within the meaning of Byars v. United States, 273 U.S. 28 (1927). *See* note 15 *supra.*

18 Elkins v. United States, 364 U.S. 206 (1960). The search and seizure, conducted under a state warrant, were held unlawful by the state courts. The defendant was subsequently convicted in a federal court on the basis of evidence seized in the unlawful search. In holding such evidence inadmissible, the Supreme Court stated:

> Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

Id. at 221-22 (dictum).

The same arguments regarding cooperation and subterfuge may be advanced with regard to the activities of federal and foreign officers. *See* pp. 895-96 *infra.* Justice Frankfurter's dissent in *Elkins* is illustrative of the persuasive argnments favoring admission of such evidence:

> We are concerned with a rule governing the admissibility of relevant evidence in federal courts. The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

Id. at 234. A public good may readily be found in exclusion of evidence seized illegally by domestic officials if such exclusion reduces the incidence of such searches. Whether an equivalent public benefit would result from exclusion of foreign evidence may be questioned. It is not certain that exclusion would alter foreign search policies, nor is it clear that such an alteration is a justifiable motive for actions by the federal courts. It is possible, however, that exclusion would benefit all citizens of the foreign state by encouraging revision of search practices. Likewise, the benefit might flow only to Americans abroad, at least to the extent that such searches are undertaken with the sole motive of providing evidence for a United States prosecution.

19 338 U.S. 25 (1949). The defendant was convicted by a state court for a state offense. Evidence was admitted that had been obtained under circumstances that would have rendered it inadmissible in a federal court.

protected against federal infringement by the fourth amendment, is likewise protected against the states by the fourteenth amendment.[20] The exclusionary rule was not applied, however, since there were other available remedies that might be more effective if consistently enforced by the states.[21] In *Mapp v. Ohio*,[22] decided twelve years later, the Court determined that the other remedies had not proven effective and that exclusion was constitutionally required.[23] Both federal and state

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[20] The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.

Id. at 27-28.

[21] Though the Court recognized the existence of other remedies, it did not express its opinion as to how well those remedies were enforced. Writing for the Court, Justice Frankfurter stated:

> The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. . . . We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

Id. at 30-33 (footnotes omitted). Among the other remedies cited were actions for damages against the searcher, use of force to resist an unlawful search, and statutory provisions penalizing officers conducting such searches. *Id.* at 30 n.I. *See* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[22] 367 U.S. 643 (1961).

[23] Several years earlier, in adopting the exclusionary rule, Justice Traynor stated for the California Supreme Court:

> [W]e have concluded . . . that evidence obtained in violation of the constitutional guarantees is inadmissible. . . . We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955) (footnotes omitted).

> [C]ase after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions

courts are thus barred from using evidence obtained through violation of constitutional rights by federal or state officers.

It is still possible, however, for a prosecutor to use evidence unlawfully obtained by a private person acting on his own initiative, even though that evidence would be excluded if acquired in the same manner by an officer. The rationale of this exception, announced in *Burdeau v. McDowell*,[24] is that, since the fourth amendment limits only governmental action and no government official is involved in a search by a private individual, there is no constitutional reason to exclude the evidence. The *Burdeau* holding has been attacked in the lower courts several times recently in both civil and criminal cases with varying degrees of success.[25]

In *Brulay* the Ninth Circuit recognized an additional exception to the exclusionary rule by admitting evidence seized by foreign officials.[26] Several approaches may be taken in evaluating this exception. Resolution of the issue requires consideration of the constitutional arguments for excluding such evidence and of policy factors favoring exclusion based on the supervisory powers of the courts over the administration of criminal justice.[27]

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that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are nonexistent. In short, the constitutional provisions are not being enforced.

Id. at 448, 282 P.2d at 913.

24 256 U.S. 465 (1921). McDowell was suspected by his employer of fraudulent conduct in the course of business operations. A company official and private detectives took possession of McDowell's office, forced open his safes and desk, and removed various papers. These papers were later turned over to the Justice Department for use in prosecution of McDowell for fraudulent use of the mails.

25 *See* Williams v. United States, 282 F.2d 940 (6th Cir. 1960) (dictum that *Elkins* had changed the *Burdeau* rule). Evidence seized by private parties was admitted over defendants' objections in the following criminal cases: Barnes v. United States, 373 F.2d 517 (5th Cir. 1967); United States v. Goldberg, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964); United States v. Frank, 225 F. Supp. 573 (D.D.C. 1964), *aff'd*, 347 F.2d 486 (D.C. Cir.), *cert. dismissed*, 382 U.S. 923 (1965); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (1963), *cert. denied*, 377 U.S. 1000 (1964); People v. Torres, 49 Misc. 2d 39, 266 N.Y.S.2d 695 (Sup. Ct. 1966).

Evidence unlawfully obtained by private persons was excluded in two divorce actions: Del Presto v. Del Presto, 92 N.J. Super. 305, 223 A.2d 217 (Ch. 1966); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. 1966). *Contra*, Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

26 The Fifth Circuit also has admitted evidence seized in Mexico. Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965). Birdsell was convicted of transporting stolen automobiles from the United States to Mexico and of a related conspiracy offense.

27 What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has "from the

II

ARGUMENTS FAVORING EXCLUSION

A. *Constitutional Basis*

The Supreme Court clarified the constitutional origin of the exclusionary rule when it declared in *Mapp* that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[28] Thus, the exclusionary rule is not merely an exercise of the supervisory powers of the Court, but rather a constitutional requirement. Concurring in *Mapp*, Justice Black expressed doubt that the fourth amendment alone would compel exclusion; but when he considered it together with the fifth amendment ban against self-incrimination, he found a constitutional theory that not only supports but actually requires exclusion.[29] This development leads to the premise that the constitutional violation may not be complete at the time of the unlawful search, but rather continues throughout the prosecution if the evidence obtained is admitted at trial. Although the original fourth amendment violation may be complete, the fifth amendment may also be violated when the product of the earlier transgression is admitted over defendant's objection. Such an interaction of the fourth and fifth amendments had been suggested previously by the Court.[30]

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very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions."

Elkins v. United States, 364 U.S. 206, 216 (1960) (dictum), *quoting* McNabb v. United States, 318 U.S. 332, 341 (1943).

For a summary listing of the arguments for and against exclusion generally, see Berman & Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U.L. REV. 525, 533-35 (1960).

28 367 U.S. at 655.

29 *Id.* at 661-62.

30 The original judicial exposition of the relatiouship is found in Boyd v. United States, 116 U.S. 616, 633 (1886):

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Similar language is found in Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting); Gambino v. United States, 275 U.S. 310, 316 (1927) (*see* note 16

A similar approach in the foreign search situation can be supported by the theory that the fourth amendment may be violated initially when the search is conducted, and again when evidence resulting from the initial transgression is admitted at trial.[31] Although the Constitution does not expressly prohibit use of the evidence, there may be a sufficient overlap between the fourth and fifth amendments to bar use of all incriminating evidence obtained in a *manner* violative of the fourth amendment. Even though the search and seizure in a *Brulay* situation does not itself violate the fourth amendment, since it is conducted by foreign officers on foreign soil, the privilege against self-incrimination may be violated when the evidence is admitted at trial to the same extent as if the search had been led by federal officers. The difficulty with this interaction approach is that there appears to be no overlap if the search itself is not unconstitutional. When the fourth amendment violation is removed from the picture, the defendant must rely on the fifth amendment alone. The Court's decision in *Schmerber v. California*[32] indicates that the defendant in that case could not rely on the fifth amendment alone to exclude the evidence, since fifth amendment protection extends only to communicative matter, such as testimony and writings.[33] Exclusion of evidence of a physical nature thus requires a fourth amendment violation to support the purported overlap of the fifth. Without such support a defense based on the fifth amendment alone falls.

The Supreme Court previously has required exclusion on fifth amendment grounds of a confession obtained through coercion by foreign officers.[34] It is likely that other foreign evidence obtained under

supra); Agnello v. United States, 269 U.S. 20, 33-34 (1925); Gouled v. United States, 255 U.S. 298, 306 (1921). That such a relationship might exist was suggested prior to any of the above decisions:

> It is believed that under [the fourth] . . . amendment, the seizure of one's papers, in order to obtain evidence against him, is clearly forbidden; and the spirit of the fifth amendment, that no person shall be compelled, in a criminal case, to be a witness against himself, would also forbid such seizure.

T. COOLEY, CONSTITUTIONAL LIMITATIONS 305-06 n.5 (1st ed. 1868).

31 *See* Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1346-47 (1967).

32 384 U.S. 757 (1966).

33 The defendant had been involved in an automobile accident. After detecting signs of drunkenness, a police officer directed that a blood sample be withdrawn and analyzed by a physician at the hospital where the defendant was being treated for injuries. Admission of the blood analysis in evidence was upheld. *Id.* at 761.

34 Bram v. United States, 168 U.S. 532 (1897). The defendant was accused of murder on a ship at sea. He was put ashore in Nova Scotia and questioned there after being stripped of his clothing. The questioning elicited incriminating statements that were used by the prosecution in a federal trial. Bram's conviction was reversed because of the coercion

conditions that shock the conscience would also be excluded.[35] When force upon the defendant's person is employed in a search and seizure, as in the extorted confession case, the accused becomes the unwilling instrument of his own conviction. Consideration of the fifth amendment privilege invoked at trial in such search and seizure cases[36] indicates that the evidence should be excluded. The issue then becomes the determination of the degree of force that warrants exclusion. A logical point at which to draw the line is where the fourth amendment would require it to be drawn if the search took place within the United States.

B. *The Official Action Approach*

A further argument in favor of exclusion rests on the premise that judicial action is official or governmental action within the meaning of the constitutional prohibitions. That court action may be deemed state action in violation of the fourteenth amendment is evident,[37] though the Supreme Court has not yet extended the concept beyond cases involving racial discrimination.[38] Under this theory, a fourth amendment violation is renewed at trial if the illegally obtained evidence is admitted over the defendant's objection.[39] Evidence obtained illegally in a foreign jurisdiction would thus be excluded even though the searching officers are not subject to the Constitution. The concept of a secondary fourth amendment violation at trial eliminates the problems raised by application of the theory of overlapping fourth and fifth amendment violations in the foreign search context.

Moreover, the Supreme Court indicated in *Weeks* that courts

involved. According to the Court, the fact that the interrogation occurred in a foreign state was significant only because of possible increased fear on the part of the accused. This fear factor could well be magnified in a country such as Mexico, where both the langnage and the legal system are unfamiliar to United States citizens.

35 *See* Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965):

> We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers . . . might not refuse to allow the prosecution to enjoy the fruits of such action.

36 *See* cases cited note 30 *supra*.

37 Barrows v. Jackson, 346 U.S. 249, 254 (1953); Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

38 *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Comment, *The Applicability of the Exclusionary Rule to Civil Cases*, 19 BAYLOR L. REV. 263 (1967); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967); Note, *supra* note 31, at 1356.

39 *See generally* Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961).

should be bound by the same constitutional standards as are investigating officers.[40] It has also been suggested that the activities of the prosecution and those of the courts cannot be separated in reviewing criminal convictions.[41] Excluding unlawfully seized evidence not only removes a major incentive for violation of individual rights by officials, but also eliminates the condonation of such activities that necessarily accompanies acceptance of their products as evidence. The upholding of judicial integrity as a basis for exclusion is not contrary to earlier search and seizure decisions except those involving searches by private individuals.[42] This basis for exclusion has found support also as a means of maintaining and increasing public respect for the judiciary.[43] This public response will theoretically follow when it is understood that the courts will not allow officials to benefit from their own lawbreaking in order to convict a criminal suspect.

C. *Practical Considerations*

A third factor favoring exclusion is the fear of collusion among law enforcement officials if illegally seized evidence is routinely accepted.[44] Arguably, use of foreign evidence would ease the burden on domestic law enforcement officers, especially in the area of narcotics control. Searches and seizures without regard for the fourth amendment standards may become routine in neighboring countries, since they may prove to be more efficient than searches adhering to constitutional standards. A return on an international basis to the "silver platter" era,

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40 Weeks v. United States, 232 U.S. 383, 392 (1914). *See* note 14 *supra.*

41 [N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.

Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting). *See also* Elkins v. United States, 364 U.S. 206, 222 (1960); Olmstead v. United States, *supra* at 485 (Brandeis, J., dissenting); People v. Cahan, 44 Cal. 2d 434, 445, 449, 282 P.2d 905, 912, 914 (1955); Broeder, *supra* note 39, at 214.

42 The most extreme application of the judicial integrity and judicial action theories would render inadmissible all evidence obtained by any illegal act in both civil and criminal cases, whether the act was committed by private persons or by officials. *See* note 25 *supra.*

43 People v. Cahan, 44 Cal. 2d 434, 449, 282 P.2d 905, 914 (1955).

44 A similar fear was expressed in Mapp v. Ohio, 367 U.S. 643, 658 (1961) (dictum): "Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted." *See also* Rea v. United States, 350 U.S. 214 (1956), where the Court affirmed an order enjoining a federal agent from transferring to state authorities evidence that he had seized under an invalid warrant and from testifying with respect to such evidence in the state courts.

seemingly put to rest in *Elkins v. United States*,[45] would result. Although international collusion would compel exclusion of the evidence under existing law, the difficulties in proving collusion appear greater in the international situation than in the federal-state situation. Cooperation within constitutional standards among federal, state, and foreign officials in law enforcement should be encouraged,[46] but collusion among the same agencies without regard for constitutional requirements must be condemned, and rules of evidence that encourage such activities should be changed.

III

Arguments Against Exclusion

The common law arguments regarding admissibility of evidence may still be viable. Their basis is that evidence obtained illegally can be just as reliable as that acquired legitimately. An exclusionary rule reduces the efficiency of criminal justice by denying the court access to relevant material.[47] If the court's only interest were in determining guilt or innocence of the accused, exclusion would not be justified. Courts, however, must serve other, equally important objectives.[48] There appears to be no direct evidence that adoption of the exclusionary rule has hindered law enforcement;[49] there are, however, indications that admission of illegally seized evidence leads to increasingly frequent violations of the rights protected by the fourth amendment.[50] Exclusion, therefore, serves to protect innocent victims of illegal searches as well as to discipline offending officers.

Our courts admittedly do not have the authority to discipline foreign officers. On the other hand, there is nothing requiring blanket acceptance of the products of foreign searches without inquiry into and approval of the methods used, especially if the foreign search was directed solely towards collection of evidence for a prosecution in United States courts.[51] If the effect of the fourth amendment is limited

45 364 U.S. 206 (1960). *See* notes 17-18 *supra*.

46 Elkins v. United States, 364 U.S. 206, 221 (1960).

47 *See* Justice Frankfurter's dissent in *Elkins*, quoted in note 18 *supra*.

48 Courts are properly concerned with maintaining judicial integrity, enforcing constitutional limitations, and discouraging certain police practices. *See* pp. 894-95 *supra*.

49 Elkins v. United States, 364 U.S. 206, 218 (1960).

50 People v. Cahan, 44 Cal. 2d 434, 448, 282 P.2d 905, 913 (1955), quoted in note 23 *supra*.

51 *Compare* Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 383 U.S. 963 (1965) (arrest and search in Mexico for violation of laws of both Mexico and United

to the immediate search, there could be no constitutional violation in the foreign evidence situation, because the search occurs outside the United States and is conducted by foreign officers deriving their authority from an independent soverign. Foreign officials owe no allegiance to the laws of the United States, nor are they subject to the jurisdiction of its courts. Argnably, therefore, our courts should accept such evidence upon its proven competence, and should not inquire into the means of its acquisition. This approach, however, disregards the possibility that the same search might also have violated foreign law.[52]

Perhaps the same exception to the exclusionary rule currently applied to searches by private persons should be adopted for searches by foreign officials, since neither is expressly proscribed by the Constitution, and since United States courts could not directly regulate the conduct of foreign officials acting within their own jurisdiction. This solution, however, ignores the remedies available to the victim of an unlawful search by a private citizen, including criminal prosecution and civil damage suits based on trespass. Although as a practical matter these remedies may be illusory, they are more likely to be effective against unlawful private searches than against searches conducted by foreigu officials. The activities complained of may not be unlawful in the foreign state, and it will be very difficult, probably impossible, to obtain personal jurisdiction over the offending officer in the United States. The victim, whether innocent or gnilty, is left without any effective relief. Exclusion, however, might operate to reduce the incidence of illegal searches in conjunction with United States law enforcement by removing the offending foreign officer's incentive.

A final argument against exclusion is that it might impair relations with foreign governments by giving the impression that the United States courts will iguore their efforts at law enforcement, or that our courts are attempting to apply the Constitution extraterritorially. The Constitution is not exported, however, when the courts simply obey its mandates as they apply to judicial actions. Nor does exclusion impair the internal law enforcement ability of the foreign government, since it may still prosecute Americans for violations of its laws using its own

States, *see* note 26 *supra*), *with* Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967) (no violation of Mexican law).

52 If a search by foreign officers would have been unconstitutional if conducted by federal agents and is actually unconstitutional according to the foreign law, exclusion of the seized evidence seems most appropriate. *Cf.* Elkins v. United States, 364 U.S. 206 (1960). The status of the evidence is less clear if the search is merely illegal, but not unconstitutional according to the foreign law. The third situation, presented by *Brulay*, is a search neither illegal nor unconstitutional by the standards of the foreign sovereign.

procedural rules. If exclusion of evidence results in a dismissal of charges or an acquittal in United States courts, the foreign sovereign may still pursue prosecution for violation of its own laws under existing extradition treaties. But exclusion will make clear to all nations that United States courts will not wink at foreign violations of rights considered basic to all persons brought before them.

CONCLUSION

The scarcity of cases dealing with the foreign evidence problem indicates that the issue arises infrequently and that foreign evidence plays a relatively minor role in our domestic law enforcement. The constitutional basis of the exclusionary rule and the practical consequences of applying a more lenient standard to evidence obtained abroad indicate that foreign evidence should be admitted only if the constitutional safeguards required in domestic searches were respected in the foreign search. This rule will place all nations on notice of the high regard of our courts for individuals' rights, and will relieve the courts of the problem of applying different standards according to the place where the search occurred. The rule does not export the Constitution or impose its terms upon a foreign sovereign; it merely refuses to condone a lesser standard of protection against unreasonable searches and seizures outside the territorial limits of the United States.

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