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# NOT SO PRIVATE SEARCHES AND THE CONSTITUTION

*John M. Burkoff*†

One of the few longstanding benchmarks of constitutional criminal procedure is that the exclusionary rule<sup>1</sup> does not apply to evidence unearthed in unlawful searches or seizures<sup>2</sup> undertaken by private individuals or entities not acting at the express behest of state or federal agents or employees. As the Supreme Court firmly, albeit parenthetically, declared in 1976, "It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party . . . commits the offending act."<sup>3</sup> The reason generally tendered for this proposition is that the fourth and fourteenth amendments, which support the exclusionary rule, apply only to the unconstitutional conduct of employees of the state or federal governments or their agents.<sup>4</sup>

As with many such black-letter propositions, however, the closer one scrutinizes the logical underpinnings of the private search rule, the less firmly grounded it appears. There is good reason, as a matter of settled fourth and fourteenth amendment policy, to apply the exclusionary rule to the evidentiary fruits of some unlawful "private searches."<sup>5</sup> The traditional treatment of all private searches as a separate and distinct activity untainted by "state involvement" is more an exercise in semantics than a sound

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<sup>1</sup> The exclusionary rule permits courts to exclude the fruits of unconstitutional activity from admission into criminal proceedings against an appropriately wronged defendant. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). See also note 88 *infra*.

<sup>2</sup> This Article uses the term "unlawful searches and seizures" to classify activity that violates statutory or common law; it should not be taken as signalling the unconstitutionality of a particular act. Common examples of such unlawful activity would be trespass or conversion.

<sup>3</sup> *United States v. Janis*, 428 U.S. 433, 456 n.31 (1976). See notes 209-27 and accompanying text *infra*. See also *Walter v. United States*, 447 U.S. 649 (1980) (Stevens, J.); *id.* at 660 (White, J., concurring in part); *id.* at 662 (Blackmun, J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

<sup>4</sup> See text accompanying notes 23-24 & 86-87 *infra*.

<sup>5</sup> See notes 48-80 and accompanying text *infra*.

application of precedent, and it does not adequately account for contemporary policing practices.<sup>6</sup> State involvement with nominally private law enforcers is often pervasive even when it appears to fall short of an actual agency relationship.<sup>7</sup> This is particularly true when the unlawful private search and seizure activity results in criminal prosecution in state or federal criminal courts.<sup>8</sup>

This Article elaborates on the propositions sketched above, analyzes the decisions and underlying doctrines that support them, and suggests that the rigid conceptual distinction the Supreme Court has drawn between private and public searches is not consistent with sound policy or constitutional principles. In light of the development of fourth amendment and exclusionary rule jurisprudence since 1960 and current "state action" doctrine, many—if not most—of those searches deemed private under existing Supreme Court precedent are simply not so private. Accordingly, such activity should be considered state action for exclusionary rule purposes if a criminal defendant with standing<sup>9</sup> can show that the evidence in question was the fruit of an unlawful private search or seizure.

## I

### BURDEAU V. MCDOWELL

The Supreme Court first established that private searches are not covered by the fourth amendment in *Burdeau v. McDowell*,<sup>10</sup> decided in 1921. Jesse McDowell was a director and head of the natural gas division of the Cities Service Company, as well as an executive officer in various oil and gas companies owned and controlled by Cities Service, including Quapaw Gas Company, a Cities

<sup>6</sup> See notes 85-208 and accompanying text *infra*.

<sup>7</sup> It is extremely difficult to determine whether or not an agency relationship exists. As a general rule, "a search is not private in nature if it has been ordered or requested by a government official." W. LAFAVE, I SEARCH AND SEIZURE 114 (1978). An actor is also an "agent" of the government if public authorities have any "share . . . in the total enterprise," although "[i]t is immaterial whether [the authorities] originated the idea or joined in it while the search was in progress." *Lustig v. United States*, 338 U.S. 74, 79 (1949) (Frankfurter, J.). See also *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

Apart from clear instances of joint public-private endeavor, the case law is inconsistent and confused. See W. LAFAVE, *supra*, at 85-91. This legal confusion is generally irrelevant to this Article, however, which focuses on the "worst case"—those searches in which no express governmental participation, instigation, orders, or requests can be found.

<sup>8</sup> See text accompanying notes 185-99 and notes 202-08 and accompanying text *infra*.

<sup>9</sup> See note 88 *infra*.

<sup>10</sup> 256 U.S. 465 (1921).

Service subsidiary. In early 1920, a colleague of McDowell, immediately prior to committing suicide, confessed to Cities Service management that he had defrauded the company by accepting secret commissions on property sold to the various entities held by Cities Service. In so confessing, he implicated McDowell in the scheme.<sup>11</sup> McDowell was immediately discharged by Cities Service and Quapaw Gas Company.<sup>12</sup> After McDowell's discharge, Cities Service sent company representatives and private detectives in their hire to audit McDowell's books to determine the extent of the company's financial damage. These Cities Service agents, without consulting McDowell, searched his office suite<sup>13</sup> and seized company and personal documents.<sup>14</sup> After the Cities Service auditors examined these documents, the company turned them over to the U.S. Department of Justice<sup>15</sup> in the hope that the Department would prosecute McDowell under federal criminal mail fraud statutes.<sup>16</sup>

McDowell petitioned a federal district court for an order mandating the return of all "stolen"<sup>17</sup> documents, which he

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<sup>11</sup> Brief for United States at 3, *Burdeau v. McDowell*, 256 U.S. 465 (1921).

<sup>12</sup> *Id.*

<sup>13</sup> Quapaw Gas Company leased an office for McDowell in the Farmer's Bank Building in Pittsburgh; McDowell himself leased an adjoining room to create, along with the room leased by Quapaw, a suite. McDowell used the room that he leased as his private office.

<sup>14</sup> The private agents took the documents from McDowell's desk and from two safes that they blew open. Although one of the safes was owned by Quapaw Gas Company, the record firmly established that private papers belonging only to McDowell were taken from that safe and from McDowell's personally owned desk and locked desk drawers. 256 U.S. at 473. See also Brief for United States at 9, *Burdeau v. McDowell*, 256 U.S. 465 (1921).

<sup>15</sup> The record does not indicate which materials were in the Justice Department's possession at the time of the district court hearing. At least one of McDowell's personal letters that had been taken from his desk was turned over to the government by Cities Service representatives. A number of additional letters and portions of McDowell's diary seized in the course of the same search also had apparently been offered to the Justice Department by Cities Service. 256 U.S. at 474.

<sup>16</sup> Appellee McDowell's Motion to Dismiss Appeal at 5, *Burdeau v. McDowell*, 256 U.S. 465 (1921); Brief for United States at 8-9, *id.*

<sup>17</sup> The lawfulness of the Cities Service searches and seizures is problematic for other reasons. The search of the safe owned by Quapaw Gas Company which was apparently located in the room leased by Quapaw Gas Company might conceivably be held lawful today, even if undertaken by law enforcement officers, depending upon resolution of factual questions with respect to McDowell's standing and legitimate expectations of privacy. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978); *Mancusi v. DeForte*, 392 U.S. 364 (1968). The private seizures in this case, however, included seizure of documents other than those in which Cities Service had any property right or interest, such as McDowell's personal diary. See note 15 *supra*. In any event, the Supreme Court avoided this issue by concluding without comment that the search and seizure of McDowell's "private property" was "illegal" and "wrongful." 256 U.S. at 475.

alleged were about to be submitted to a federal grand jury.<sup>18</sup> Joseph Burdeau, a Special Assistant to the Attorney General, defended the government's right to use the seized materials. The district court granted McDowell's petition and directed the Justice Department to return all the seized documents.<sup>19</sup> The government was further directed not to present to the grand jury any evidence obtained from the documents.<sup>20</sup> The Supreme Court reversed the district court's orders.

As one constitutional commentator recently suggested, "[s]hort opinions, like 'great' cases and 'hard' cases, often make bad law."<sup>21</sup> The Supreme Court's treatment of the fourth amendment issues of the lawfulness of the government's acquisition and use of stolen documents was not only short, it was summary. In two brief paragraphs entirely devoid of citation,<sup>22</sup> Justice Day, writing for himself and six of his brethren, held that fourth amendment protections apply only "to governmental action."<sup>23</sup> The "origin and history [of the fourth amendment] clearly show," Justice Day continued, "that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . ."<sup>24</sup> Justice Day concluded that because

the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company [, i]t is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another.<sup>25</sup>

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<sup>18</sup> The district court concluded in its findings of fact that this was the Justice Department's intent. 256 U.S. at 471-72.

<sup>19</sup> *Id.* at 471.

<sup>20</sup> *Id.*

<sup>21</sup> Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 217 (footnote omitted).

<sup>22</sup> In a preceding paragraph, the Court cited a series of cases, simply noting that "An extended consideration of the origin and purposes of [the fourth and fifth] Amendments would be superfluous in view of the fact that this court has had occasion to deal with those subjects in a series of cases." 256 U.S. at 474.

<sup>23</sup> *Id.* at 475.

<sup>24</sup> *Id.* See also text accompanying notes 86-87 *infra*.

<sup>25</sup> 256 U.S. at 475.

Although the illegality of the private search activity led the Supreme Court to assert that McDowell "has an unquestionable right of redress against those who illegally and wrongfully took his private property,"<sup>26</sup> the right to such a private remedy was held to be irrelevant to McDowell's right to an exclusionary remedy against the State.<sup>27</sup>

Justice Brandeis, joined by Justice Holmes, forcefully dissented. That stolen documents ultimately were turned over to the government for its use did not, in the dissent's view, cure the initial unlawfulness of the seizure, nor should it end the constitutional inquiry in criminal proceedings:

Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?

. . . I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.<sup>28</sup>

## 11

### THE SILVER PLATTER DOCTRINE

Despite the eloquent Brandeis and Holmes dissent, *Burdeau's* holding that private searches were not subject to constitutional restrictions went largely unquestioned by the lower courts for many years. This lack of critical attention might be explained by the fact that a far more flagrant abuse of "prosecutorial etiquette" was being countenanced by the federal courts on the same theory.

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<sup>26</sup> *Id.*

<sup>27</sup> The Court's position was that the private individuals who committed the wrong were not in any way involved in the criminal action brought by the state; hence, there was no wrong committed by any party in those proceedings to remedy.

<sup>28</sup> 256 U.S. at 476-77. See also Black, *Burdeau v. McDowell—A Judicial Milepost on the Road to Absolutism*, 12 B.U. L. REV. 32 (1932).

Until 1960, federal courts permitted the use of illegally seized evidence in federal criminal trials when the seizure had been committed solely by state law enforcement officers or their agents without intent to enforce federal law or involvement of federal law enforcement authorities.<sup>29</sup>

In *Byars v. United States*,<sup>30</sup> a unanimous Supreme Court first signalled its tolerance of such practices, concluding *ipse dixit*: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."<sup>31</sup> In such cases, the evidence was turned over to federal agents "on a silver platter" and, because federal agents were not themselves involved in illegal conduct, it was available for use in federal criminal proceedings.<sup>32</sup>

<sup>29</sup> See note 7 *supra*, and text accompanying notes 193-99 *infra*. The theory was that the actions of federal law enforcement agents and prosecutorial officers were not constitutionally tainted by the unlawful searches or seizures engaged in by others, which produced evidentiary materials in the hands of federal authorities.

<sup>30</sup> 273 U.S. 28 (1927).

<sup>31</sup> *Id.* at 33. See also *Gambino v. United States*, 275 U.S. 310, 314-18 (1927).

<sup>32</sup> Justice Frankfurter coined the term "silver platter" in *Lustig v. United States*, 338 U.S. 74, 79 (1949). Cases involving "reverse silver platter" practice—where federal law enforcement agents turn illegally seized evidence over to state law enforcement agents—were infrequent; it was not until 1961 that the Supreme Court held the exclusionary rule binding upon the states. *Mapp v. Ohio*, 367 U.S. 643 (1961). Hence, prior to *Mapp*, in the absence of a state exclusionary statute or a state constitutional interpretation establishing an exclusionary rule, illegally seized evidence could lawfully be admitted into evidence in most state courts regardless of the source or manner of its acquisition. As a result, there was little incentive prior to 1961 to litigate "reverse silver platter" questions.

It is noteworthy that Justices Holmes and Brandeis joined in the majority opinion in *Byars* without separate opinion, despite their dissent six years earlier in *Burdeau*. See text accompanying note 28 *supra*. Justice Frankfurter later argued that their concurrence indicated that "in 1927 [they did not] question the right of the Federal Government to utilize the very kind of evidence involved in [*Burdeau* and *Byars*]." *Elkins v. United States*, 364 U.S. 206, 235 (1960) (Frankfurter, J., dissenting). See also *United States v. Newton*, 510 F.2d 1149, 1154 n.5 (7th Cir. 1975). Justice Frankfurter's account is misleading, however. Justices Holmes and Brandeis remained fiercely opposed to the silver platter doctrine in general and specifically with reference to *Burdeau*. See, e.g., Letter from Louis D. Brandeis to Felix Frankfurter (July 2, 1926), reprinted in 5 LETTERS OF LOUIS D. BRANDEIS 227-29 (M. Urofsky & D. Levy eds. 1978); Letter from Oliver Wendell Holmes to Sir Frederick Pollock (June 20, 1928), reprinted in 2 HOLMES-POLLOCK LETTERS 222-23 (M. Howe ed. 1941). See also *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting). It is much more likely that they failed to write separately in *Byars* because the sentence that countenanced the silver platter doctrine was dictum. The *Byars* Court excluded the illegally seized evidence notwithstanding the silver platter doctrine because "the search in substance and effect was a joint operation of local and federal officers." 273 U.S. at 33. The decision in *Gambino v. United States*, 275 U.S. 310 (1927), written by Justice Brandeis, was to similar effect. See text accompanying notes 184-90 *infra*.

In 1949, the Supreme Court recast the *Byars* approval of the "silver platter" practice as an open question, despite its apparent gratuitous resolution (albeit in dictum) twenty-two years earlier.<sup>33</sup> It was not until *Elkins v. United States*,<sup>34</sup> decided in 1960, that the Court finally discarded the *Byars* dictum. *Elkins* involved a federal prosecution initiated on the basis of evidence seized by state law enforcement agents in Oregon using a search warrant that a state court subsequently held invalid under Oregon law. Because of the warrant's invalidity, the state court suppressed all evidence seized and dismissed the state indictment.<sup>35</sup> A five-Justice majority of the Supreme Court invoked its supervisory power to suppress the illegally seized evidence in federal criminal proceedings. Justice Stewart, writing for the majority, gave three reasons for repudiating the silver platter doctrine.

First, although the Court had not yet held the exclusionary rule applicable to the states through the fourteenth amendment (something it would do the very next Term in *Mapp v. Ohio*<sup>36</sup>), Justice Stewart stated that it had been "unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."<sup>37</sup> Therefore, Justice Stewart continued, "the doctrinal underpinning for the admissibility rule"<sup>38</sup> in silver platter cases had been destroyed:

[S]urely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not

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<sup>33</sup> *Lustig v. United States*, 338 U.S. 74 (1949). Justice Murphy, joined by Justices Douglas and Rutledge, concurred in *Lustig* because this question was left open and not decided adversely to the government. Justice Murphy noted that, "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." *Id.* at 80.

<sup>34</sup> 364 U.S. 206 (1960).

<sup>35</sup> *Id.* at 207 n.l. The facts in *Elkins* graphically illustrate "silver platter" practice: During the course of these state proceedings federal officers, acting under a federal search warrant, obtained the articles from the safe-deposit box of a local bank where the state officials had placed them. Shortly after the state case was abandoned, a federal indictment was returned, and the instant [federal] prosecution followed.

*Id.*

<sup>36</sup> 367 U.S. 643 (1961).

<sup>37</sup> 364 U.S. at 213. The Court's reference is to the decision of *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>38</sup> 364 U.S. at 213.

whether his constitutional right has been invaded by a federal agent or by a state officer.<sup>39</sup>

Because unlawful searches or seizures undertaken by state law enforcement agents clearly violated the federal fourteenth amendment, the argument that only violations of the fourth amendment by federal law enforcement officers require evidentiary exclusion in federal criminal proceedings "would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution."<sup>40</sup> When state officials violate the fourteenth amendment, the damage to individual liberty is obviously no less severe or unconstitutional than when federal officials violate the fourth amendment.

The Court's second ground for rejecting the silver platter doctrine was the deterrent impact of applying an exclusionary sanction to this practice.<sup>41</sup> Although the Supreme Court remains reluctant to draw firm conclusions about the deterrent efficacy of the exclusionary rule as an empirical matter,<sup>42</sup> a reluctance expressed as early as the decision in *Elkins*,<sup>43</sup> the silver platter doctrine presented a strong case for a pragmatic assumption of deterrent efficacy. It was clear to the *Elkins* Court that the silver platter doctrine had created a substantial disincentive for state law enforcement officials to obey the Constitution because they could accomplish the very same law enforcement objectives by turning illegally seized evidence over to federal authorities.<sup>44</sup>

<sup>39</sup> *Id.* at 215 (footnote omitted). Justice Murphy made this argument in *Lustig*. See note 33 *supra*.

<sup>40</sup> 364 U.S. at 215.

<sup>41</sup> The argument that the exclusionary rule is constitutionally rooted in the fourth (and fourteenth) amendments is a longstanding one rejected at present by a majority of the Supreme Court. See Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 184-87 (1979). However, the marginal deterrence question that the *Elkins* Court faced in exercising its supervisory power is relevant today when the Court decides whether the fourth amendment itself requires that the exclusionary remedy be applied in a particular case. See note 50 *infra*.

<sup>42</sup> See *United States v. Janis*, 428 U.S. 433, 450 n. 22 (1976); Burkoff, *supra* note 41, at 157-58 n.25.

<sup>43</sup> 364 U.S. at 218.

<sup>44</sup> In this light, the effects on federalism of rejecting the silver platter doctrine clearly were salutary. As Justice Stewart eloquently reasoned for the majority:

[W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. In states which have not adopted

Finally, the *Elkins* majority offered what arguably was the most important reason for employing its supervisory power to reject the silver platter doctrine: "the imperative of judicial integrity."<sup>45</sup> Harkening back to the dissenting opinions of Justices Holmes and Brandeis in the mid-1920s,<sup>46</sup> Justice Stewart concluded that

"a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of law." . . . Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.<sup>47</sup>

### III

#### *Burdeau* AND THE SILVER PLATTER DOCTRINE

Although the Supreme Court has not reconsidered *Burdeau* in light of the demise of the silver platter doctrine, there is a strong argument to be made that the *Elkins* rationales apply with equal force to private searches.<sup>48</sup> Assuming for the moment that private persons can commit unconstitutional searches and

the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way. . . .

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 (citation omitted).

<sup>45</sup> *Id.* at 222.

<sup>46</sup> *Id.* at 222-23. Citation was to the famous Holmes and Brandeis dissenting opinions in *Olmstead v. United States*, 277 U.S. 438 (1928). See text accompanying note 77 *supra*.

<sup>47</sup> 364 U.S. at 223 (quoting *McNabb v. United States*, 318 U.S. 332 (1943)).

<sup>48</sup> The Supreme Court in the 1920s clearly saw the "private search doctrine" and the "silver platter doctrine" as part and parcel of the same issue. Indeed, the 1925 Supreme Court summarily applied the *Burdeau* decision to affirm a conviction based upon silver platter evidence seized by state authorities. *Center v. United States*, 267 U.S. 575 (1925) (*facts reported in Gambino v. United States*, 275 U.S. 310, 317 (1927)).

seizures,<sup>49</sup> Justice Stewart's reasoning in *Elkins* directly supports the application of an exclusionary remedy to the fruits of illegal private searches.

Justice Stewart hinged resolution of *Elkins*, at least in part, on the question of marginal deterrence: to what extent the Court could perceive a benefit flowing from the discouragement of unconstitutional conduct through the use of the exclusionary rule in the particular setting. In *Elkins*, eliminating the silver platter doctrine eliminated any incentive for federal law enforcement authorities to rely upon the illegal acts of state law enforcement authorities. The *Elkins* decision also discouraged state law enforcement authorities from participating in illegal searches and seizures. Similarly, excluding evidence derived from illegal private searches would deter law enforcement authorities from subtly—or openly—encouraging such violations.

The constitutional analysis in the private search setting should focus on the marginally deleterious effect on constitutional rights of the State's acquiescence in such illegal conduct.<sup>50</sup> As the *Elkins* Court observed, "To the victim it matters not whether his constitutional right has been invaded by a federal agent or a state officer."<sup>51</sup> Similarly, victims of unlawful private conduct care lit-

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<sup>49</sup> See notes 85-208 and accompanying text *infra*. Of course, this proposition is critical. To the extent the argument fails on this point, *Elkins* and *Burdeau* can be superficially reconciled by concluding, as has Professor LaFave, that "*Elkins* never mentioned *Burdeau*, and the reasoning employed in *Elkins* was specifically directed to searches by state officials." W. LaFAVE, *supra* note 7, at 111-12 (footnote omitted). More fundamentally, these two cases could be distinguished because in *Elkins* the search by the state officers did violate the fourth amendment under *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>50</sup> Because the Burger Court has not deemed the exclusionary rule to be of constitutional dimension, *see* note 41 *supra*, it has premised the availability of the exclusionary rule in criminal proceedings upon the existence of a deterrent effect on unlawful conduct. "If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted." *United States v. Janis*, 428 U.S. 433, 454 (1976) (footnote omitted). *See also* *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Calandra*, 414 U.S. 338 (1974). Recent Supreme Court cases, however, particularly those decided in the area of fourth amendment standing, do not fully take deterrence into account in applying the exclusionary rule. *See* *Burkoff*, *supra* note 41, at 176-77 ("current Supreme Court exclusionary practice . . . creates no disincentive to the illegal harassment of those individuals who are not the ultimate target of police activity") (footnote omitted). Although such cases may diminish the value of the deterrence inquiry as the sole exclusionary *litmus* test, the Supreme Court may have limited the role of deterrence only in cases "where the illegal conduct did not violate the . . . rights [of the actor seeking to invoke the exclusionary rule]. . . ." *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980). In the present context, therefore, the marginal deterrence question should be viewed as significant only when the defendant seeks to remedy the violation of his own "personal" rights. *See* note 88 *infra*.

<sup>51</sup> 364 U.S. at 215. *See also* note 33 *supra*.

tle whether they have fallen prey to illegal law enforcement conduct or nominally private searches. As the Pennsylvania Supreme Court stated:

[I]f detectives and private intermeddlers may, without legal responsibility, peer through keyholes, eavesdrop at the table, listen at the transom and over the telephone, and crawl under the bed, then all constitutional guarantees become meaningless aggregation of words, as disconnected as a broken necklace whose beads have scattered on the floor.<sup>52</sup>

The deleterious impact on individual liberty of sustained unconstitutional-like conduct is as pronounced when the source of such conduct is nominally private activity as it is when it results from the explicit activity of the State. Indeed, in *Marsh v. Alabama*,<sup>53</sup> the Supreme Court concluded in an analogous vein<sup>54</sup> that the mere fact that activity which would have constituted substantial and continuing deprivations of right if undertaken by state officials was undertaken instead by a private entity was "not sufficient to justify the State's permitting [that private entity] to govern a community of citizens so as to restrict their fundamental liberties. . . ." <sup>55</sup> One commentator reasons:

[T]he rationale underlying *Marsh* seems equally applicable in the situation where the state permits private organizations to perform police functions. The danger of recurrent invasions of privacy resulting from the assumption of that public function indicates that institutionalized private searches should be subject to constitutional standards.<sup>56</sup>

Some commentators, however, have questioned the deterrent effect of extending the exclusionary rule to private searches. Pro-

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<sup>52</sup> *Commonwealth v. Murray*, 423 Pa. 37, 51-52, 223 A.2d 102, 110 (1966). See also *Lebel v. Swincicki*, 354 Mich. 427, 440, 93 N.W.2d 281, 287 (1958) (civil proceedings); *State v. Helfrich*, \_\_\_ Mont. \_\_\_, 600 P.2d 816, 818-19 (1979); *State v. Coburn*, 165 Mont. 488, 493-94, 530 P.2d 442, 450-51 (1974); *State v. Brecht*, 157 Mont. 264, 270, 485 P.2d 47, 50-51 (1971); *Commonwealth v. Eshelman*, 477 Pa. 93, 102, 383 A.2d 838, 842-43 (1978).

<sup>53</sup> 326 U.S. 501 (1946).

<sup>54</sup> The *Marsh* Court considered whether the first amendment forbids criminal punishment of a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town's management, where the town was generally accessible to the public.

<sup>55</sup> 326 U.S. at 509. See also *id.* at 510-11 (Frankfurter, J., concurring); *Evans v. Newton*, 382 U.S. 296, 299 (1966); *People v. Zelinski*, 24 Cal. 3d 357, 368, 594 P.2d 1000, 1006, 155 Cal. Rptr. 575, 581 (1979); *Stapleton v. Superior Court of Los Angeles County*, 70 Cal. 2d 97, 103 n.4, 447 P.2d 967, 971 n.4, 73 Cal. Rptr. 575, 579 n.4 (1969).

fessor Wayne LaFave, for example, has argued "that the exclusionary rule would not likely deter the private searcher, who is often motivated by reasons independent of a desire to secure criminal conviction and who seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary sanction."<sup>57</sup> This view fails to recognize the variety and number of private searches and searchers potentially at issue. There are over 1,000,000 individuals employed today in the private security business alone,<sup>58</sup> many of whom are retained strictly to engage in law-enforcement-like behavior.<sup>59</sup> As one state supreme court observed, arguments such as that posed by Professor LaFave "erroneously characterize the 'private person' as the little old lady next door who has a desire to assist in law enforcement."<sup>60</sup> But individuals—whether they be private police, little old ladies, or anyone else—who lawfully attempt to assist the police or who simply stumble upon evidence that might aid law enforcement efforts, are not even a part of the private search controversy. Their efforts are by definition lawful and constitutional.<sup>61</sup>

Moreover, some commentators observe that many private actors are well aware that they are virtually immune from

<sup>56</sup> Note, *Seizure by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 617 (1967). For a discussion of the "public function" aspects of *Marsh* and other Supreme Court decisions, see notes 85-160 and accompanying text *infra*. See also Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U. L. REV. 464, 474-75 (1971); Note, 12 U.C.L.A. L. REV. 232, 236 n.29 (1964). But see W. LAFAVE, *supra* note 7, at 128.

The holding in *Marsh* has more recently been limited in application as a matter of federal constitutional law to "an economic anomaly of the past, 'the company town.'" *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 561 (1972). *But cf.* *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (involving state constitutional law). See also *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 159 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 514-17 (1976). It is also noteworthy, as the Court observed in *Tanner*, that the company town in *Marsh* was held to be distinctive precisely because it provided "the customary services and utilities normally afforded by a municipal or state government [including] police . . . protection . . ." 407 U.S. at 562. See related discussion at text accompanying notes 127-39 *infra*.

<sup>57</sup> W. LAFAVE, *supra* note 7, at 113. See also Brief for the United States at 24, *Walter v. United States*, 447 U.S. 649 (1980); *People v. Botts*, 250 Cal. App. 2d 478, 482-83, 58 Cal. Rptr. 412, 415-16 (1967).

<sup>58</sup> See note 95 *infra*.

<sup>59</sup> See text accompanying notes 145-48, *infra*. See also *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005, 155 Cal. Rptr. 575, 580 (1979) ("[P]rivate security personnel . . . may regularly perform . . . quasi-law enforcement activities in the course of their employment.").

<sup>60</sup> *State v. Coburn*, 165 Mont. 488, 502, 530 P.2d 442, 450 (1974).

<sup>61</sup> The Supreme Court has reasoned that "it is no part of the policy underlying the Fourth and Fourteenth amendments to discourage citizens from aiding to the utmost of

sanction when they commit unlawful searches and seizures.<sup>62</sup> Certainly such individuals are not often brought to task for the consequences of their illegal activity. A Rand Corporation study completed in 1977 reported:

It does not appear from public records that prosecutions for illegal searches [by private actors] are frequent . . . [T]he nature of the material that is the object of the search might be such as to deter any potential plaintiff from filing charges; the owner of the property may not be aware of the search or may not realize it is illegal; or the wronged citizen may simply complain without seeking prosecution because he is unaware of how to proceed or because he wishes to avoid the bother and expense of litigation.<sup>63</sup>

Thus, because the courts refuse to exclude evidence illegally obtained by private actors and because the government rarely prosecutes those guilty of such private conduct, individuals may jeopardize the privacy rights of others with virtual impunity.<sup>64</sup>

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their ability in the apprehension of criminals." *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971). However, the *Coolidge* Court was referring to police tactics urging Mrs. Coolidge to produce evidence hidden in her home linking her husband to criminal activity. Production of such evidence was perfectly lawful on her part because the evidence was produced voluntarily and was secreted in areas where she had full control. See *Walter v. United States*, 447 U.S. 649, 652 n.2 (1980) (White, J.). Obviously, lawful cooperation with the police in all their investigatory endeavors is both welcome and, perhaps, even necessary in an orderly society. The *Coolidge* language, however, does not apply where private citizens are encouraged to commit unlawful acts. It is difficult, if not impossible, to argue that the Supreme Court in *Coolidge*—or any other case—intended to indicate that the fourth and fourteenth amendments were themselves intended, in part, to encourage the commission of lawless private activity.

<sup>62</sup> See, e.g., J. KAKALIK & S. WILDHORN, *THE PRIVATE POLICE: SECURITY AND DANGER* 209, 223, 228-29 (1977); Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555, 569-70 (1971); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1350 (1967).

<sup>63</sup> J. KAKALIK & S. WILDHORN, *supra* note 62, at 235. The Supreme Court has recognized the futility of relying upon non-exclusionary remedies to protect fourth amendment rights. In *Franks v. Delaware*, 438 U.S. 154, 169 (1978), the Court reaffirmed that "the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp v. Ohio* implicitly rejected the adequacy of those alternatives." Because the alternative of administrative sanction is even less generally available in the context of private searches, it might be argued that such searches present an even more compelling case than police searches for reliance upon the remedial protections of the exclusionary rule.

<sup>64</sup> "For example, private investigators, utilized by both domestic and business interests, commonly conduct illegal searches of dwellings and engage in illicit surveillance activities, primarily to obtain information for use in a civil action or to influence some private decision or venture." Comment, *supra* note 62, at 569-70 (1971) (footnotes omitted).

Finally, commentators who argue that exclusion will not effectively deter private actors overlook another aspect of deterrence in the private search and seizure context. The most significant deterrent effect of applying an exclusionary rule in this setting may well be to discourage law enforcement agents from encouraging or entering into unlawful, *sub rosa* compacts with private actors. The *Elkins* Court observed that the failure to exclude evidence illegally seized by state officials would induce federal officials to withdraw from formal cooperation with state law enforcement authorities "tacitly to encourage . . . the disregard of constitutionally protected freedom."<sup>65</sup> Applying this reasoning to private searches,

the grave danger exists that the general admissibility of such evidence [illegally seized by private persons] . . . may create an atmosphere encouraging government officials to act in clandestine concert with private persons; while concerted activity would undoubtedly taint such evidence and require its exclusion in a criminal action, the problems of proof are obvious.<sup>66</sup>

Even Professor LaFave concedes that this point is "[t]he soundest anti-*Burdeau* argument."<sup>67</sup>

Professor LaFave also puts too great a burden of proof on those seeking to apply the exclusionary rule to private searches. Presumably, he would not argue that a state police officer who is motivated by reasons other than a desire to secure criminal conviction (for example, simple harassment), and who seldom engages in searches on a regular basis, should be held immune from silver platter exclusion.<sup>68</sup> Admitting the fruits of illegal private searches into evidence frustrates the enforcement of state civil and criminal laws to the same extent as if police violations had produced the same evidence. Indeed, the social costs may be far higher in the former case; the wages of the state's assisting—or merely tolerating—vigilantism are obvious. Moreover, an antisocial animus may more often motivate private searches than the

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<sup>65</sup> *Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

<sup>66</sup> 63 COLUM. L. REV. 168, 174-75 (1963) (footnotes omitted). See also 16 AM. U. L. REV. 403, 407-08 (1967); 90 HARV. L. REV. 463, 467 (1976); 1966 UTAH L. REV. 271, 276.

<sup>67</sup> W. LAFAVE, *supra* note 7, at 114 n.24.

<sup>68</sup> Professor LaFave has, however, recently concluded that a police officer's improper motive in searching should *not* suffice to support an exclusionary remedy in the absence of deviation from "usual police practices." W. LAFAVE, *supra* note 7, at 15-18 (1981 Supp.).

searches of the police, which generally are spurred by a good faith desire to enforce the law.

The argument for applying the exclusionary rule to illegal private searches, however, is supported by more than the possible deterrent effects of such a rule. The *Elkins* Court also based its unequivocal rejection of the silver platter doctrine on the "imperative of judicial integrity."<sup>69</sup> Professor LaFave and others have argued that judicial integrity is not relevant in assessing the continuing vitality of *Burdeau*, however, because "it would seem that where the conduct in question is by private individuals rather than the police 'the courts do not, by using this evidence, condone the actions of the individual.'"<sup>70</sup> What authority can be garnered for this normative proposition? No intuitively obvious moral distinction exists between prosecutorial use and judicial acceptance of evidence illegally seized by the police and that seized by private actors.<sup>71</sup> More important, focusing on "condonation" misconceives the judicial integrity argument. The Supreme Court has recently reaffirmed that "the Fourth Amendment exclusionary rule . . . is applied in part 'to protect the integrity of the court rather than to vindicate the constitutional rights of the defendant . . . .'"<sup>72</sup> Following the lead of Brandeis and Holmes, the *Elkins* Court similarly held that the silver platter doctrine tainted the judiciary itself because it forced courts to become "accomplices in willful disobedience of law."<sup>73</sup> Brandeis and Holmes had argued this point in their dissent in *Burdeau*. It was not condoning crime that was at issue but rather the courts' participation in the criminal act itself:

At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct

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<sup>69</sup> See text accompanying notes 45-46 *supra*.

<sup>70</sup> W. LAFAVE, *supra* note 7, at 113 (footnotes omitted) (quoting *State v. Rice*, 110 Ariz. 210, 212, 516 P.2d 1222, 1224 (1973)).

<sup>71</sup> "[W]hile the Government will not be a thief through the agency of one of its own officers, it has no compunction against acting as the 'fence' for an unofficial thief. Strange as this doctrine may seem, it has been approved by the Supreme Court in the case of *Burdeau v. McDowell* . . ." Knox, *Self Incrimination*, 74 PA. L. REV. 139, 144-45 (1925).

<sup>72</sup> *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980) (emphasis in original) (quoting *id.* at 747 (Marshall, J., dissenting)).

<sup>73</sup> *Elkins v. United States*, 364 U.S. 206, 223 (1960) (quoting *McNabb v. United States*, 318 U.S. 332, 345 (1943)). See also *United States v. Payner*, 447 U.S. 727, 744 (1980) (Marshall, J., dissenting).

that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor.<sup>74</sup>

Such "procedural irregularity" as acceptance and utilization of illegally seized evidence as the basis for conviction should itself be considered an unlawful act. Indeed, merely accepting the fruits of unlawful private searches may be seen as an unconstitutional "seizure" by the State.<sup>75</sup>

The State cannot with equanimity process law breakers while participating in law breaking itself.<sup>76</sup> The *Elkins* Court quoted Justice Brandeis to emphasize the point: "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."<sup>77</sup> This is no metaphysical question of condonation. The more basic and significant issue is the State's affirmation of its own democratic norms through its adherence to the rule of law.

In short, as a few courts have perspicaciously held,<sup>78</sup> the *Elkins* decision is nothing short of total acceptance of the philosophy that guided Brandeis and Holmes, the *Burdeau* dissenters. As one state supreme court concluded, the *Elkins* Court condemned "the silver platter concept . . . in any context."<sup>79</sup> And, as Judge Wisdom of the Fifth Circuit recently expostulated, the private

<sup>74</sup> *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

<sup>75</sup> See text accompanying note 186 *infra*.

<sup>76</sup> See *United States v. Payner*, 447 U.S. 727, 746-47 (1980) (Marshall, J., dissenting). See also *United States v. Cortina*, 630 F.2d 1207, 1216-17 (7th Cir. 1980).

<sup>77</sup> *Elkins v. United States*, 364 U.S. 206, 223 (1960) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). See also Burkoff, *supra* note 41, at 174-75.

<sup>78</sup> See, e.g., *United States v. Williams*, 314 F.2d 795, 796-97 (6th Cir. 1963); *Williams v. United States*, 282 F.2d 940, 941 (6th Cir. 1960); *People v. Botts*, 250 Cal. App. 2d 478, 481-82, 58 Cal. Rptr. 412, 415 (1967); *Moody v. United States*, 163 A.2d 337 (Mun. Ct. D.C. 1960); *State v. Coburn*, 165 Mont. 488, 492-504, 530 P.2d 442, 445-51 (1974); *Del Presto v. Del Presto*, 92 N.J. Super. 305, 307, 223 A.2d 217, 218 (1966), *rev'd*, 97 N.J. Super. 446, 235 A.2d 240 (1967); *Sackler v. Sackler*, 33 Misc. 2d 600, 603-04, 224 N.Y.S. 2d 790, 793, *rev'd*, 16 A.D.2d 423, 229 N.Y.S.2d 61 (1962), *aff'd.*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (Van Voorhis, Bergan, J.J., dissenting). See also Sutherland, *Use of Illegally Seized Evidence in Non-Criminal Proceedings*, 4 CRIM. L. BULL. 215, 222 (1968); Note, *supra* note 62, at 1350-51; Note, *Seizure by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 610 n.16 (1967); 12 U.C.L.A. L. REV. 232, 234-35 (1964); 48 CORNELL L.Q. 345, 347 n.13 (1963). But see *United States v. Harper*, 458 F.2d 891, 893 n.2 (7th Cir. 1971); *United States v. McGuire*, 381 F.2d 306, 314 n.5 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); *United States v. Goldberg*, 330 F.2d 30, 35 (3d Cir. 1964), *cert. denied*, 377 U.S. 953 (1964); *People v. Horman*, 22 N.Y.2d 378, 381-82, 239 N.E.2d 625, 627-28, 292 N.Y.S.2d 874, 876-77, *cert. denied*, 393 U.S. 1057 (1968).

<sup>79</sup> *State v. Coburn*, 165 Mont. 488, 503, 530 P.2d 442, 450 (1974).

search doctrine "permits the government to accomplish circuitously what it could not accomplish directly. . . . [I]t is the twin of 'silver platter' doctrine that allowed federal prosecutors to use illegal evidence independently obtained by state and local officers."<sup>80</sup> Courts should not tolerate an artificial distinction under the fourth amendment between private and public searches. Eliminating this distinction would not only deter the violation of individual rights, but would eliminate the sordid spectre of the State seeking to secure criminal convictions based in whole or in part upon evidence seized by illegal—even criminal—acts.

#### IV

##### THE STATE ACTION CONTROVERSY

The threshold constitutional inquiry in any debate over whether the fruits of illegal private searches may be excluded from criminal trials is whether private individuals can ever act unconstitutionally with respect to search and seizure violations. The fourth<sup>81</sup> and fourteenth<sup>82</sup> amendments to the Constitution have traditionally been interpreted as applying only to the conduct of sovereign entities within our federal system.<sup>83</sup> To the extent that entitlement to an exclusionary remedy derives from the existence

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<sup>80</sup> *United States v. Sanders*, 592 F.2d 788, 801 (5th Cir. 1979) (Wisdom, J., dissenting), *rev'd sub. nom. Walter v. United States*, 447 U.S. 649 (1980). *See also United States v. Kelly*, 529 F.2d 1365, 1371-72 (8th Cir. 1976).

<sup>81</sup> 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.  
U.S. CONST. amend. IV.

<sup>82</sup> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

<sup>83</sup> The fourth amendment restricts the permissible search and seizure activities of *federal* law enforcement authorities, *see, e.g., Weeks v. United States*, 232 U.S. 383 (1914); the fourteenth amendment, incorporating fourth amendment restrictions on searches and seizures, restricts *state* law enforcement activity, *see, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

of a violation of the fourth or fourteenth amendments, it would appear that unlawful acts carried out by private actors where no "state action" is implicated would not—could not—be deemed unconstitutional *in se* so as to trigger exclusionary protections. This is the doctrinal position the Supreme Court adopted in *Burdau v. McDowell*.<sup>84</sup> Analysis under two separate but related strands of the state action doctrine, however, yields a contrary conclusion.

### A. *The Public-Function Doctrine*

There is good reason to conclude that certain significant categories of private searches, although not conducted by actors in an express agency relationship with the State,<sup>85</sup> are nonetheless suffused with state action for constitutional purposes. Such activity should be subject to constitutional restrictions on the scope and nature of search and seizure activity.<sup>86</sup> As the Supreme Court has stated, "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."<sup>87</sup> Accordingly, fourth amendment violations committed by private actors whose conduct is freighted with state action should trigger an exclusionary remedy as a matter of right for a wronged criminal defendant.<sup>88</sup>

Assessing whether or not state action is present in a given case or context is, however, tricky and uncertain. The Supreme

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<sup>84</sup> "The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . ." 256 U.S. 465, 475 (1921). See also *Walter v. United States*, 447 U.S. 649, 656 (1980) (Stevens, J.); *id.* at 660 (White, J.); *id.* at 662 (Blackmun, J. dissenting); *United States v. Janis*, 428 U.S. 433, 455-56 n.31 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

<sup>85</sup> See note 7 *supra*.

<sup>86</sup> Otherwise, "the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated . . ." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). See also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

<sup>87</sup> *Evans v. Newton*, 382 U.S. 296, 299 (1966). See also *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 285-86 (1913).

<sup>88</sup> A criminal defendant must, however, be able to demonstrate a violation of "personal" fourth amendment rights before he may claim the right to an exclusionary remedy. See *United States v. Payner*, 447 U.S. 727 (1980); *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). See also *Burkoff*, *supra* note 41, at 165-67; note 50 *supra*. Therefore, use of evidence wrongfully seized by a private actor from a defendant who would lack standing had the search and seizure been carried out by law enforcement authorities would be constitutional under current fourth amendment and supervisory powers decisions.

Court has warned, "To fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'This Court has never attempted.' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."<sup>89</sup> The Court has further concluded that the existence of state action hinges on "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action . . . may be fairly treated as that of the State itself."<sup>90</sup>

Of late, the Supreme Court has been reluctant to find state action in problematic activity.<sup>91</sup> Nonetheless, the Court recently reaffirmed that such a "sufficiently close nexus" with state activity does exist under the so-called "public-function doctrine" where a court finds "the exercise by a private entity of powers traditionally exclusively reserved to the State."<sup>92</sup> Furthermore, the Burger Court<sup>93</sup> has concluded that the key factor in its public-function analysis is the requirement of "exclusivity." However, as the Court recently observed: "While many functions have been traditionally

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<sup>89</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Kotch v. River Port Pilot Comm'rs.*, 330 U.S. 552, 556 (1947)). See also *Gilmore v. City of Montgomery*, 417 U.S. 556, 573-74 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

<sup>90</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)).

<sup>91</sup> See, e.g., *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Cf. *United States v. Orleans*, 425 U.S. 807 (1976) (federally funded community action agency not a federal agency for purpose of Federal Torts Claims Act). For a critical discussion of this line of cases, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 108 (1979 Supp.).

<sup>92</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (citing *Evans v. Newton*, 382 U.S. 296 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Nixon v. Condon*, 286 U.S. 73 (1932)). However, those cited decisions employed a substantially less exacting test for finding public-function state action. See, e.g., text accompanying notes 53-56 & 81 *supra*; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1163-67 (1978); *The Supreme Court, 1977 Term*, 92 *HARV. L. REV.* 57, 127-29 (1978). See also text accompanying notes 124-27 *infra*.

<sup>93</sup> The term "Burger Court" is used to demarcate the period from the appointment of Warren Burger as Chief Justice of the Supreme Court on June 23, 1969, to the present. Although there may be methodological and philosophical problems in treating the Supreme Court as an entity doctrinally divisible by the tenure of respective Chief Justices, there are significant differences between the Warren and Burger Courts' treatment of constitutional criminal procedure issues. See C. WHITEBREAD, *WHITEBREAD ON CRIMINAL PROCEDURE* 4 n.24 (1980); Allen, *The Judicial Quest for Penal Justice: the Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518, 518-19; Burkoff, *supra* note 41, at 152 n.2; Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 *MICH. L. REV.* 1319, 1320 n.1 (1977); Stone, *The Miranda Doctrine in the Burger Court*, 1977 *SUP. CT. REV.* 99, 99 n.2.

performed by governments, very few have been 'exclusively reserved to the State.'<sup>94</sup>

At least one significant category of nominally private search and seizure activity appears, however, to meet this test for state action: the search and seizure activity of the over 1,000,000 individuals employed as "private police."<sup>95</sup> Such private police are a part of the

<sup>94</sup> *Flagg Bros. Inc., v. Brooks*, 436 U.S. 149, 158 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). See also *White v. Scrivner Corp.*, 594 F.2d 140, 142 (5th Cir. 1979).

<sup>95</sup> In this Article, "private police" includes "all privately employed guards, investigators, patrolmen, alarm and armored-transport personnel, and any other personnel performing similar functions." J. KAKALIK & S. WILDHORN, *supra* note 62, at 3 n.1. See also P. MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* 40 (1977); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, *PRIVATE SECURITY: REPORT OF THE TASK FORCE ON PRIVATE SECURITY* 3, 10-11 (1976) [hereinafter referred to as *TASK FORCE ON PRIVATE SECURITY*].

The number and significance of private security personnel is extraordinary:

*There are more than 1 million people involved in private security in the United States.* The private security industry is a multibillion-dollar-a-year business that grows at a rate of 10 to 12 percent per year. In many large cities, the number of private security personnel is considerably greater than the number of police and law enforcement personnel. Of those individuals involved in private security, some are uniformed, some are not; some carry guns, some are unarmed; some guard nuclear energy installations, some guard golf courses; some are trained, some are not; some have college degrees, some are virtually uneducated.

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There is virtually no aspect of society that is not in one way or another affected by private security. A business may employ guards to protect persons and property from damage, injury or loss. Special security services are obviously required in places of public accommodation, such as airports, schools, and commercial complexes. The pervasive involvement of private security plays a vital role in efforts to create a safe environment in which to work and live.

*TASK FORCE ON PRIVATE SECURITY, supra*, at Foreward (emphasis added).

Though little is known about it, there . . . is a sizable private police industry in the United States . . . Private agencies are of two types: (1) purchased or contract private security services, and (2) in-house or proprietary police security services . . . About one in every 100 persons in the civilian labor force of the United States is employed in public or private law-enforcement or security work. In 1969 there were an estimated 804,900 persons employed in law enforcement or security work . . . Of these, 64 percent were employees of public organizations, 49 percent employed as policemen or investigators, and 15 percent as guards and watchmen. The remaining 36 percent were in the private sector. In 1969, between one-fourth and one-third of all privately employed guards and investigators worked for contract security firms and the remainder were in-house employees.

Reiss, *Discretionary Justice*, in *HANDBOOK OF CRIMINOLOGY* 679, 681 (D. Glaser ed. 1974) (citations omitted). See also *People v. Zelinski*, 24 Cal. 3d 357, 366-67, 594 P.2d 1000, 1005-06, 155 Cal. Rptr. 575, 580-81 (1979); *Halt! A Job Market in Security*, *New York Times*, Sept. 21, 1980, at F21, col. 2; R. POST & A. KINGSBURY, *SECURITY ADMINISTRATION: AN INTRODUCTION* 35-36 (3d ed. 1977); M. C. BASSIOUNI, *CITIZEN'S ARREST* 3 (1977); M.

variety of forces found in most complex societies that share with the formally constituted police the right to use violence: security guards, private detectives, reserve constables, and the like (usually loosely controlled by the full-time police force), regardless of their relationship to the law as a resource for rationalization of their actions.<sup>96</sup>

Justices Stevens, White, and Marshall recently observed in dissent in *Flagg Brothers, Inc. v. Brooks*:<sup>97</sup>

[In determining "exclusivity" for state action purposes, t]he question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering for damages for such activity. For instance, *it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action.*<sup>98</sup>

The sole authority cited for the proposition that private exercise of police powers involves state action was the Supreme Court's decision in *Griffin v. Maryland*.<sup>99</sup> In *Griffin*, five blacks were arrested for trespassing after they had refused to leave an amusement park at the command of a "special policeman" named Collins.<sup>100</sup> Collins, hired by arrangement with a private detective agency, acted under direct orders of the park management.<sup>101</sup> The Court found it beyond dispute "that if the State of Maryland had operated the amusement park on behalf of the owner thereof, and had enforced the owner's policy of racial segregation against [the defendants, they] would have been deprived of the equal protection of the laws."<sup>102</sup> The *Griffin* Court reversed the convictions because Collins had acted under state authority.<sup>103</sup>

Subsequent analysis of *Griffin* reveals why the Court found state action. The five-Justice majority of the Supreme Court in *Flagg Brothers* pointed out that the *Griffin* Court "specifically found that [Collins] 'purported to exercise the authority of a dep-

LIPSON, ON GUARD: THE BUSINESS OF PRIVATE SECURITY 6-7 (1975); *Creeping Capitalism*, *Forbes*, Sept. 1, 1970, at 22.

<sup>96</sup> P. MANNING, *supra* note 95, at 40.

<sup>97</sup> 436 U.S. 149 (1978) (involving question whether or not a warehouseman's proposed sale of goods entrusted to him for storage under New York statutes was state action).

<sup>98</sup> *Id.* at 172 n.8 (Stevens, J., dissenting) (emphasis added).

<sup>99</sup> 378 U.S. 130 (1964).

<sup>100</sup> *Id.* at 132.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 135-36.

<sup>103</sup> *Id.* at 135. See text accompanying note 105 *infra*.

uty sheriff.' ”<sup>104</sup> The *Griffin* Court had reasoned that “[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity. . . . Thus, it is clear that Collins’ action was state action.”<sup>105</sup> Because Collins had not acted in a private capacity, the *Flagg Brothers* majority concluded that, “[c]ontrary to Mr. Justice Stevens’ suggestion, . . . this Court has never considered the private exercise of traditional police functions.”<sup>106</sup> Accordingly, in the absence of what the *Flagg Brothers* majority deemed to be binding precedent, the Court, in dictum, concluded that the extent to which police functions undertaken by private parties could be viewed as subject to constitutional restrictions under the public-function strand of the state action doctrine was an open question.<sup>107</sup>

The *Flagg Brothers* majority, however, may have been a bit too facile in concluding that “*Griffin* . . . sheds no light on the constitutional status of private police forces.”<sup>108</sup> It is true that in *Griffin*, at the request of the amusement park, the “special policeman” Collins had been deputized as a sheriff of Montgomery County, Maryland. But the deputization was entirely pro forma. Under then applicable Maryland law, as explicitly recognized by the *Griffin* Court, any individual could be “deputized” in order to police private property.<sup>109</sup>

<sup>104</sup> *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 n.14 (1978) (quoting *Griffin v. Maryland*, 378 U.S. 130, 135 (1964)).

<sup>105</sup> 378 U.S. 130, 135 (1964) (citation omitted).

<sup>106</sup> *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 n. 14 (1978). The Court then stated that “*Griffin* thus sheds no light on the constitutional status of private police forces, and we express no opinion here.” *Id.* at 163-64 n.14.

<sup>107</sup> See note 106 *supra*. More broadly, the *Flagg Brothers* majority continued, “We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education, fire and police protection, and tax collection] and thereby avoid the strictures of the Fourteenth Amendment.” *Id.* at 163-64. See also *Griffin v. Maryland*, 378 U.S. 130, 137-38 (1964) (Clark, J., concurring). On the other hand, somewhat inconsistently, the *Flagg Brothers* majority also declared that:

[W]e would be remiss if we did not note that there are a number of state and municipal functions . . . which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called “dispute resolution.” Among these are such functions as education, fire and police protection, and tax collection.

436 U.S. at 163 (footnote omitted). See Comment, *The State Action Comundrum Reexamined: A New Approach and Its Application to the Constitutionality of Creditor Self-Help Remedies*, 62 MARQ. L. REV. 414, 416 n.15 (1979).

<sup>108</sup> 436 U.S. at 163-64 n.14.

<sup>109</sup> Collins was deputized at the request of the park management pursuant to § 2-91 of the Montgomery Code of 1955 which provides that the sheriff

The *Flagg Brothers* majority's suggestion that *Griffin* established that deputization of this sort creates state action<sup>110</sup> reveals a great deal about the constitutional status of private police forces. Many private police and security guards perform their policing duties either as "special deputies" or under statutory authority that delegates to them police powers within their areas of private employment.<sup>111</sup> Contrary to the majority view,<sup>112</sup> the argument in Justice Stevens' *Flagg Brothers* dissent—that the *Griffin* decision established that "the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action"<sup>113</sup>—seems justified on the basis of the *Griffin* facts. So long as the delegation of police power is as express as that in *Griffin*, the actions of private police should be considered state action under the views of both the *Flagg Brothers* majority and the dissent.<sup>114</sup>

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[o]n application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of . . . such corporation or individual; such special deputy sheriffs to be paid wholly by the corporation or person on whose account their appointments are made. Such special deputy sheriffs . . . shall have the same power and authority as deputy sheriffs possess within the area to which they are appointed and in no other area.

378 U.S. at 132 n.1 (quoting *Griffin v. State*, 225 Md. 422, 430, 171 A.2d 717, 721 (1961)).

<sup>110</sup> See text accompanying notes 104-07 *supra*. See also *Williams v. United States*, 341 U.S. 97 (1951); *El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980); *Pratt v. State*, 9 Md. App. 220, 263 A.2d 247 (1970); *People v. Eastway*, 67 Mich. App. 464, 467, 241 N.W.2d 249, 250 (1976); *People v. Diaz*, 85 Misc. 2d 41, 43-44, 376 N.Y.S.2d 849, 851-52 (Crim. Ct. 1975); *People v. Smith*, 82 Misc. 2d 204, 205-08, 368 N.Y.S.2d 954, 955-58 (Crim. Ct. 1975); *People v. Bowers*, 77 Misc. 2d 697, 698-99, 356 N.Y.S.2d 432, 434-35 (App. Term 1974); Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U. L. REV. 464, 474-75 (1971). Cf. *United States v. Fannon*, 556 F.2d 961, 964 (9th Cir. 1977) (searches by airline employees of packages subject to fourth amendment limitations since air carrier authorized by federal statute to conduct searches), *rev'd. sub. nom. United States v. Gumerlock*, 590 F.2d 794 (9th Cir. 1979) (en banc), *cert. denied*, 441 U.S. 948 (1979). But see *White v. Scrivner Corp.*, 594 F.2d 140, 143 (5th Cir. 1979) (store employee's detention of suspect held not a public function); *Weyandt v. Mason's Stores, Inc.*, 279 F. Supp. 283 (W.D. Pa. 1968) (state shoplifting statute authorizing detention of suspect and evidence of licensing of private detectives under state statute insufficient to constitute state action).

<sup>111</sup> Private policing statutory arrangements, although highly idiosyncratic, are very common. See TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 10; J. KAKALIK & S. WILDHORN, *supra* note 62, at 151-72, 207; R. POST & A. KINGSBURY, *supra* note 95, at 130-32; Comment, *supra* note 62, at 557-60 (1971).

<sup>112</sup> See text accompanying notes 106-08 *supra*.

<sup>113</sup> 436 U.S. at 172 n.8.

<sup>114</sup> [T]he proposition that the state has delegated a sovereign function is easily transmuted into the proposition that the legislation, by its delegation of power, has transformed a private party into an agent of the state. That is ultimately what Justice Rehnquist [for the majority in *Flagg Brothers*] treated the [state action] challenge as meaning.

L. TRIBE, *supra* note 91, at 108-09. See also *Williams v. United States*, 341 U.S. 97 (1951); *DeCarlo v. Joseph Horne & Co.*, 251 F. Supp. 935 (W.D. Pa. 1966).

This proposition, which emerges so clearly from *Flagg Brothers*, seems to elude many lower courts. For example, in *State v. McDaniel*,<sup>115</sup> the Ohio Court of Appeals concluded that private security guards employed by a large department store chain were not subject to constitutional restrictions when they spied on customers trying on clothing even though the court found that the customers, "while using the [department store] fitting rooms, had a reasonable expectation of privacy or freedom from intrusion. . . ." <sup>116</sup> Despite the fact that most of the security guards in question had been sworn and commissioned as "special deputy sheriffs" by the county sheriff in a fashion similar to the guard in *Griffin*,<sup>117</sup> the court refused to find state action:

Only [the department store] controls the conduct and activities of its security employees, whether or not commissioned as special deputy sheriffs, and there is no indication herein that the sheriff exercises any control whatsoever over the activities of such security employees. They do not perform their duties for the benefit of the public but rather, for the benefit of [the store].<sup>118</sup>

On the basis of the *Griffin* and *Flagg Brothers* decisions, *McDaniel* was wrongly decided.<sup>119</sup> Nonetheless, it has been followed by the Ohio courts<sup>120</sup> and by appellate courts in other states.<sup>121</sup>

In any case, the *Flagg Brothers* majority still can be seen as having left open the significant question of whether private police

<sup>115</sup> 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975).

<sup>116</sup> *Id.* at 170, 337 N.E.2d at 178.

<sup>117</sup> *Id.* at 164, 337 N.E.2d at 175.

<sup>118</sup> *Id.* at 175, 337 N.E.2d at 180.

<sup>119</sup> In *Griffin*, the detective Collins also appeared to be acting in his private employment: "At the time the arrests were made, the park officer had on the uniform of the [detective] agency, and he testified that he arrested the [defendants] under the established policy of [the park operator] of not allowing Negroes in the park." *Griffin v. State*, 225 Md. 422, 426, 171 A.2d 717, 718 (1961), *rev'd*, 378 U.S. 130 (1964).

<sup>120</sup> See *State v. Edwards*, 50 Ohio App. 2d 63, 65, 361 N.E.2d 1083, 1085 (1976). See also *State v. Bolan*, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971); *City of University Heights v. Conley*, 20 Ohio Misc. 112, 252 N.E.2d 198 (Mun. Ct. 1969). *But cf.* *State v. Glover*, 52 Ohio App. 2d 35, 38, 367 N.E.2d 1202, 1204 (1976) (duly commissioned police officer has right and duty to arrest and detain a shoplifter even though acting as a private security guard).

<sup>121</sup> See *People v. Toliver*, 60 Ill. App. 3d 650, 653, 377 N.E.2d 207, 210 (1978); *State v. Gonzales*, 24 Wash. App. 437, 440, 604 P.2d 168, 170 (1979). See also *United States v. Lima*, 424 A.2d 113 (D.C. Ct. App. 1980) (en banc); *People v. Holloway*, 82 Mich. App. 629, 632-33, 267 N.W.2d 454, 455-56 (1978); *People v. Smith*, 31 Mich. App. 366, 373-74, 188 N.W.2d 16, 19-20 (1971); *Gillett v. State*, 588 S.W.2d 361 (Tex. Crim. App. 1979) (alternative holding).

who are not deputized or otherwise operating under state or local authorization are state actors under the public-function analysis. A strong argument can be made that their activity also constitutes state action under the test of "exclusivity"<sup>122</sup> because private policing activity often involves the exercise of policing functions that have been traditionally reserved to the states.

Unfortunately, the Supreme Court has offered little guidance as to what constitutes "traditional exclusivity" with respect to a public function. One noted constitutional scholar has gone so far as to conclude that under the Court's *Flagg Brothers* public-function test it is a "virtual impossibility [to suggest] criteria to determine what is and what is not [an] inherently governmental [function]." <sup>123</sup> Justices Stevens, White, and Marshall, dissenting in *Flagg Brothers*, argued on narrower grounds that the exclusivity test was simply inapposite to police functions: "As the [majority] is forced to recognize, its notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions, such as " 'education, fire and police protection, and tax collection.'" <sup>124</sup> In any event, despite confused assertions to the contrary by the *Flagg Brothers* majority,<sup>125</sup> prior Court opinions had recognized that police activities are exclusive state functions.<sup>126</sup> As recently as 1974, the Supreme Court explicitly characterized police protection as a "traditional state monopol[y]." <sup>127</sup>

Moreover, the Supreme Court had substantial grounds upon which to base this conclusion. The pervasive presence of public police authority with an exclusive mandate to enforce all criminal laws had developed in the United States by the end of the nineteenth century.<sup>128</sup> One commentator has observed that public

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<sup>122</sup> See text accompanying notes 92-94 *supra*.

<sup>123</sup> L. TRIBE, *supra* note 91, at 108 (footnote omitted).

<sup>124</sup> *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 173 n.10 (1978) (Stevens, J., dissenting) (quoting *id.* at 163). Professor Choper posits a "power theory" analysis in this setting that might be viewed as reconciling the "exclusivity" approach with the dissenting view, finding state action present in the activity of "providers of basic services . . . which our historic and evolving traditions indicate would be supplied by the public but for the existence of the private counterpart." Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 778-79.

<sup>125</sup> See note 107 *supra*.

<sup>126</sup> See *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 561-62 (1972); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

<sup>127</sup> *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974).

<sup>128</sup> See, e.g., R. FOGELSON, *BIG-CITY POLICE* 13-17 (1977); M. LIPSON, *supra* note 95, at 19; P. MANNING, *supra* note 95, at 89-102; Comment, *Who's Watching the Watchman? The Regulation, or Non-Regulation of America's Largest Law Enforcement Institution, The Private Police*, 5

control over policing activity became accepted as a public necessity because "[t]he view that the law is the sole legitimator of official violence ha[d] become conventional wisdom in mass societies and thus suffuse[d] the ideology of everyday law and order conceptions."<sup>129</sup> Hence, "[t]he exercise of official coercion is made possible by the legalistic legitimation of the police and by the backup or support function they can obtain from other agencies within a community."<sup>130</sup> In contrast, "[t]he vigilante group represents a symbolic threat because it reduces the power that a quasi-monopoly on symbols of authority and violence provides the police,"<sup>131</sup> and "[t]he proliferation of private security forces is viewed by some as evidence of fragmentation of the [traditional] authority of the police. . . ."<sup>132</sup>

Although the proliferation of private police activity into areas traditionally monopolized by the states began in earnest in the mid-nineteenth century,<sup>133</sup> the most rapid expansion of the private security industry began after World War II<sup>134</sup> and continued to grow—particularly during the last decade—at an extraordinary rate.<sup>135</sup> While many explanations have been offered to account for this growth, one of the more convincing is purely economic:

GOLDEN GATE L. REV. 433, 443-45 (1975). Private police forces in England, which were widespread as late as the early nineteenth century, were vastly reduced in size and influence during the rapid expansion of public police forces in the middle and late nineteenth century. See, e.g., S. CHAPMAN & T.E. ST. JOHNSTON, *THE POLICE HERITAGE IN ENGLAND AND AMERICA* 11-15 (1962); M. LIPSON, *supra* note 95, at 20; P. MANNING, *supra* note 95, at 91.

<sup>129</sup> P. MANNING, *supra* note 95, at 100.

<sup>130</sup> *Id.* at 101.

<sup>131</sup> *Id.* at 367-68 (citation omitted).

<sup>132</sup> *Id.* at 368.

<sup>133</sup> According to two commentators,

If one takes a standard definition of police functions, e.g., . . . crime prevention, crime repression, criminal apprehension, and the regulation of non-criminal behavior and social welfare functions (including traffic control, intervention in domestic squabbles, handling of drunks, etc.), it is clear that private police have been heavily involved in the performance of these functions since, at least, the establishment of the Pinkerton Agency in the 1850s.

Scott & McPherson, *The Development of the Private Sector of the Criminal Justice System*, 6 *LAW & SOC'Y REV.* 267, 267 (1971).

<sup>134</sup> See, e.g., M. LIPSON, *supra* note 95, at 41-59; TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 31-32; J. KAKALIK & S. WILDHORN, *supra* note 62, at 42-67; Comment, *supra* note 128, at 433-34.

<sup>135</sup> "[T]he Department of Labor's Bureau of Labor Statistics projects employment of 820,013 private security guards in 1990, well over twice the number ten years ago. That makes it one of the fastest-growing trades that the bureau tracks." *Halt! A Job Market in Security*, *supra* note 95, at F21, col. 2.

[C]ommerce and industry, rather than the individual and his home, [became] the main targets of crime [after World War II]. Those who committed crimes gravitated to the areas where the pickings were best: the office, the factory, the bank, the railroad station, the airport, the stores and other business establishments. So business . . . joined in the clamor for more and more protection by the law enforcement agencies. But because they could not wait as their profits and capital eroded, they resorted in increased numbers to self-help—private security.<sup>136</sup>

The most significant modern delegation of traditional policing authority to private entities or individuals consists of the legal privilege to use otherwise unlawful force against others.<sup>137</sup> The surrender by the State of forcible investigatory and detention powers, whether by statute or simply as a matter of “state-enforced custom,”<sup>138</sup> is clearly a delegation of traditional sovereign power. As the Supreme Court stated in 1947:

It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers. *And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto.*<sup>139</sup>

Even if the State has not expressly delegated to private police any greater legal authority than that theoretically possessed by ordinary citizens,<sup>140</sup> “[a]s a practical matter, . . . because of training, experience, and position, security personnel have a greater opportunity to use their citizens’ powers.”<sup>141</sup> A recent Rand Corporation study concluded, “private security personnel generally do not possess powers any greater than those of other private citizens. As a practical matter, however, they are likely to be able

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<sup>136</sup> M. LIPSON, *supra* note 95, at 52. See also R. POST & A. KINGSBURY, *supra* note 95, at 35; *Halt! A Job Market in Security*, *supra* note 95, at F21, col. 2.

<sup>137</sup> The *Flagg Brothers* majority purported to reserve the question of the extent to which delegation of police powers through “state authorization of private breach of the peace,” is state action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.9 (1978). See also Note, *supra* note 110, at 470-73 (1971); J. KAKALIK & S. WILDHORN, *supra* note 62, at 231-32.

<sup>138</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970).

<sup>139</sup> *NLRB v. Jones & Laughlin Corp.*, 331 U.S. 416, 429 (1947) (emphasis added). See also *Williams v. United States*, 341 U.S. 97, 99 (1951).

<sup>140</sup> See M. BASSIOUNI, *supra* note 95; Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502 (1965).

<sup>141</sup> TASK FORCE ON PRIVATE SECURITY, *supra* note 95, app. VIII, at 391. Private police employed by retail establishments make approximately 500,000 arrests a year. M. LIPSON, *supra* note 95, at 8-9.

to exercise those powers more easily, especially by gaining tacit consent from the public."<sup>142</sup> Indeed, it appears that some private police, as a matter of psychological and tactical advantage, prefer having only the ordinary citizen's powers of arrest and detention. As one commentator has observed, "[t]he illusion (or deception) of having security personnel present whose legal status is not clearly understood [by those with whom they come in contact] is often viewed as a [crime] deterrent asset."<sup>143</sup> Because private police can expect the same obeisance to their show or threat of authority that is generally accorded public law enforcement authorities without being subject to the constitutional constraints that apply to public authorities, "private police are accorded not only the psychological advantage over those whom they detain . . . , but advantage under the law as well."<sup>144</sup>

Equally important, to the extent that state law enforcement planning and activity has become intertwined with and, in some instances, dependent upon the increasingly substantial presence of individuals and entities engaged in private policing,<sup>145</sup> the public and the private law enforcement sectors have become mutually dependent. According to the 1977 Rand Corporation report on private police:

Cooperative arrangements [between public and private law enforcement authorities] take many forms. Public police may provide private police with arrest records; they sometimes operate a nightly call-in service for security agencies, with patrol cars being dispatched to check on those guards who fail to call in periodically; they may provide retail merchants with bulletins describing known shoplifters; they may respond to calls for aid; they sometimes complete investigations begun by private police; some departments provide private police with radios preset to the police frequency; some freely exchange information; some departments permit the installation of direct-dial alarms and/or central-station alarms which simultaneously notify the police de-

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<sup>142</sup> J. KAKALIK & S. WILDHORN, *supra* note 62, at 208. One significant danger with assuming that private police activity is not "state action" is that private police need not demonstrate compliance with constitutional requirements of avoiding coercion in obtaining waivers of right. *See, e.g.,* *Bumper v. North Carolina*, 391 U.S. 543 (1968); Note, *Consent to Search in Response to Police Threats to Seek or to Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. & CRIM. 163 (1980).

<sup>143</sup> R. POST & A. KINGSBURY, *supra* note 95, at 99. *See also* Becker, *The Place of Private Police in Society: An Area of Research for the Social Sciences*, 21 SOC. PROB. 438, 446-47 (1974).

<sup>144</sup> Becker, *supra* note 143, at 449 (footnote omitted). *See also* Scott & McPherson, *supra* note 133, at 284-85; text accompanying notes 62-63 *supra*.

<sup>145</sup> *See* J. KAKALIK & S. WILDHORN, *supra* note 62, at 94-97; P. MANNING, *supra* note 95, at 368; TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 18-22, 204-39.

partment. Reciprocally, private police often act as extended eyes and ears of the public police; they occasionally assist in serving warrants and citations on private property, or in traffic control around private property; they report suspicious persons and circumstances to public police; they may make preliminary investigations; they may make or assist in making arrests; they may apprise police of impending, unusual situations, such as strikes, gathering of unruly crowds, and so on.<sup>146</sup>

The Task Force on Private Security of the National Advisory Committee on Criminal Justice Standards and Goals recently concluded that, given the pervasiveness of such modern trends as cooperative crime prevention planning and activity, "it is sometimes difficult to differentiate between the efforts of the public and private security elements in crime prevention . . ." <sup>147</sup> Furthermore, the interdependency of private and public security efforts is not restricted to the prevention of crime.<sup>148</sup>

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<sup>146</sup> J. KAKALIK & S. WILDHORN, *supra* note 62, at 94. "As to actual contact with public police, 7 percent of the private security employees claimed they called local police for assistance once or twice a week, 14 percent said once or twice a month, 30 percent said once or twice a year, 15 percent said when necessary, and 27 percent said never." *Id.* at 95. "[B]oth public 'policing' and private 'security' are parts of the whole, e.g., public security or protective services." R. POST & A. KINGSBURY, *supra* note 95, at 5. See also Scott & McPherson, *supra* note 133, at 281-85; Post, *Relations With Private Police Services*, Police Chief 54, 55-56 (Mar. 1971); *Creeping Capitalism*, Forbes, Sept. 1, 1970, at 22; Becker, *supra* note 143, at 439-41.

Other forms of private and public police interaction are common. For example:

There are numerous instances in which police officers, still active in their own departments, are open or silent partners or owners of private contract security agencies. While they may be involved in this moonlighting activity on their own off-duty time only, the knowledge of their interest by a customer or potential customer could lead to the belief that special sworn police attention would be paid to any premises the moonlighter's firm protects . . . . There are many more examples of sworn police officers moonlighting as private security guards, sometimes even in official sworn police uniform, wearing an official badge, and carrying an official gun. The presence of these trained men undoubtedly increases the security of the guarded business, but it also connotes conflict of interest . . . .

M. LIPSON, *supra* note 95, at 179. See also TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 231-39.

Anecdotal evidence is also revealing. It was reported in 1967 that the Governor of Florida was "instrumental in organizing a privately financed war on crime through the use of . . . a private detective agency." Comment, *Regulation of Private Police*, 40 SO. CAL. L. REV. 540 n.6 (1967) (citing L.A. Times, Feb. 12, 1967, § 1, at 1, col. 4); *id.*, Feb. 19, 1967, § G, at 3, col. 5; *id.*, Mar. 23, 1967, § 11, at 4, col. 1. See also *Private Unit to Patrol in Downtown Kansas City*, N.Y. Times, Nov. 11, 1980, § A, at 12, col. 6.

<sup>147</sup> TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 6. See also *id.* at 18-22, 204-39; Becker, *supra* note 143, at 443.

<sup>148</sup> Although the private security industry interacts most frequently with the public law enforcement component of the criminal justice system, it also in-

This functional interrelatedness figures significantly in the public-function analysis. Where private and public activities are demonstrably interdependent, the Supreme Court has concluded that the private actor "must be recognized as a joint participant [with the state] in . . . challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the [Constitution]." <sup>149</sup> Although the Burger Court has signalled its reluctance to expand this proposition beyond so-called "symbiotic relationships," <sup>150</sup> the "facts and circumstances" at issue <sup>151</sup>—including state delegation of sovereign authority to commit breaches of the peace <sup>152</sup> and massive interdependent relationships—are compelling. Indeed, in adopting this state action analysis, the Supreme Court of California noted "the increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and

teracts with other components. For example, when a shoplifter is observed committing the act by private security personnel of a retail establishment, security personnel may apprehend and detain the person until the police take formal custody. For purposes of prosecution and formal arraignment on charges of larceny, the store security agent becomes the complainant. The chief accuser and witness in a court of law also is the security person who observed the shoplifting incident.

Private security investigative personnel often work closely with investigators from law enforcement agencies and prosecutors' offices in investigating internal theft by employees, embezzlement, fraud, and external theft by organized criminal groups. For example, in large retail establishments (department stores, discount houses), security personnel have an interest in removing organized criminal rings that systematically prey upon the stores. The security personnel can exchange information among themselves and provide information to law enforcement investigators to assist them in the development of criminal cases. Law enforcement officers frequently provide information to the store security personnel regarding a suspect under arrest or investigation, who may have been involved in criminal offenses in their stores. Private security personnel commonly provide information to law enforcement agencies on criminal activities they observe or suspect that are not directly related to their asset-protection function, such as narcotics, gambling, and other vice offenses.

TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 21.

<sup>149</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). See also *Gilmore v. City of Montgomery*, 417 U.S. 556, 565, 573 (1974); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 133 n.3 (1973) (Stewart, J.); *id.* at 172-75 (Brennan, J., dissenting); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

<sup>150</sup> See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-57 (1974). But see *id.* at 359-60 (Douglas, J., dissenting); *id.* at 366 (Marshall, J., dissenting); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611 (5th Cir. 1980).

<sup>151</sup> See text accompanying note 89 *supra*.

<sup>152</sup> See note 137 *supra*, and notes 161-201 and accompanying text *infra*. See also *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

enforcement of the criminal law and the increasing threat to privacy rights posed thereby.”<sup>153</sup>

In short, many private actors participating in such “law enforcement-like” activity clearly engage in searches and seizures that should be subject to constitutional principles applicable under the public-function doctrine.<sup>154</sup> Private police who engage in illegal searches are “often quasi-public officials or agents, cloaked with the authority of the state by virtue of their licenses, badges, uniforms, and other apparatus. . . .”<sup>155</sup> Moreover, as the recent *Flagg Brothers* decision demonstrates, the express delegation of police powers to private police should alone establish state action for purposes of applying constitutional limits on the exercise of those powers. Even where no express delegation of policing authority can be found, the exercise by private police of traditional public policing powers and the interdependency of private and public police forces dictate that private police should be subject to the same constitutional limitations that govern public law enforcement authorities.

This conclusion follows not only from an application of established state action doctrine, but also from highly salutary public policy goals. One study of private police activity concluded:

[T]o the extent that the private police system in its activities and methods provides a means by which the public police are able to bypass, evade, or subvert systems of accountability and rules of procedure, the unregulated development of a closely interacting private and public police system will inevitably create serious problems.<sup>156</sup>

Unchecked and unlawful behavior of private actors seriously threatens the constitutionally protected concerns of privacy and personal autonomy. Because of the lack of judicial scrutiny or legal limitation under existing law, “[a]lmost nothing is known from

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<sup>153</sup> *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005, 155 Cal. Rptr. 575, 580 (1979). See also *In re Deborah C.*, 111 Cal. App. 3d 289, 168 Cal. Rptr. 556 (1980); *In re Bryan S.*, 110 Cal. App. 3d 144, 167 Cal. Rptr. 741 (1980); *Cervantez v. J.C. Penney Co., Inc.* 24 Cal. 3d 579, 588-89, 595 P.2d 975, 979-80, 156 Cal. Rptr. 198, 203 (1979). But see *People v. Sapper*, 102 Cal. App. 3d 301, 162 Cal. Rptr. 360 (1980).

<sup>154</sup> See Note, *Private Assumption of the Police Function Under the Fourth Amendment*, *supra* note 110, at 474 (“In a constitutional sense, the police function is a public function.”); J. KAKALIK & S. WILDHORN, *supra* note 62, at 209-15, 231.

<sup>155</sup> J. KAKALIK & S. WILDHORN, *supra* note 62, at 255.

<sup>156</sup> Scott & MacPherson, *supra* note 133, at 284-85. See also *id.* at 285-88; TASK FORCE ON PRIVATE SECURITY, *supra* note 95, at 11; M. BASSIOUNI, *supra* note 95, at 72-73; Comment, *supra* note 62, at 567-71 (1971).

systematic inquiry about how . . . private police exercise discretion over criminal matters,"<sup>157</sup> and the public can do little, if anything, to control unlawful private police activity.

Sanctions are rarely invoked. . . . [C]urrent tort, criminal, and constitutional law is not adequate—substantively or procedurally—to control certain problem areas involving private security activities, such as searches, arrests, use of firearms, and investigations. Nor has current law always provided adequate remedy for persons injured by actions of private security personnel.<sup>158</sup>

Constitutional doctrine simply has not kept pace with the rapid expansion in numbers and authority of private police. Existing laws and doctrinal analyses "stem from a time when there was no large private security industry."<sup>159</sup> The time is nigh to reevaluate the legal status of the relationship between public and private law enforcement and to subject the latter to the same constitutional restrictions that currently apply to the former.<sup>160</sup>

#### B. *State Authorization or Encouragement*

State action can also be found when the State has either "authorized" or "encouraged" private conduct.<sup>161</sup> As with the public-function test, however, the Supreme Court has recently been somewhat less than consistent, coherent, or enthusiastic in its explication of this aspect of state action doctrine. As a result, cases in this area have become a popular target of scholarly criticism. Professor Charles Black acidly observed that "[t]he field is a conceptual disaster area."<sup>162</sup> More recently, two commentators con-

<sup>157</sup> Reiss, *supra* note 95, at 681. "Existence of . . . a private [police] profession without effective controls by society over its actions . . . creates a danger of abuse to which little attention has been given." J. KAKALIK & S. WILDHORN, *supra* note 62, at 209. See also *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005, 155 Cal. Rptr. 575, 580 (1979).

<sup>158</sup> J. KAKALIK & S. WILDHORN, *supra* note 62, at 6; Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 615-16 (1967); 1966 UTAH L. REV. 271, 275-76.

<sup>159</sup> J. KAKALIK & S. WILDHORN, *supra* note 62, at 209.

<sup>160</sup> "[U]ntil the Court . . . directly confronts the idea that private power is indeed responsible for the effects it has on individual rights, its contributions to the creation of norms in th[e] state action] area will remain at a standstill." Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of The Civil Rights Cases and State Action Theory*, 12 HARV. C.R. C.L. L. REV. 297, 363 (1977).

<sup>161</sup> See, e.g., *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978); *Reitman v. Mulkey*, 387 U.S. 369, 375-76 (1967).

<sup>162</sup> Black, *the Supreme Court, 1966 Term: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967).

cluded that "[a]lthough several tests for finding state action have emerged from Supreme Court decisions, none is adequate to predict whether state action will be found in a new case."<sup>163</sup> Professor Laurence Tribe's observation is hardly more charitable: "Those who simply criticize the Court's attempts are . . . both correct and irrelevant. Plainly, the state action decisions fail as doctrine; the question is, do they make sense as anything else?"<sup>164</sup>

The Warren Court interpreted and applied the authorization or encouragement principle rather broadly, particularly in race discrimination cases.<sup>165</sup> The Burger Court, on the other hand, has narrowed its application, often with revisionist zeal. For example, in *Jackson v. Metropolitan Edison Co.*,<sup>166</sup> the Burger Court refused to find state action based on authorization or encouragement even though the Court conceded that the private party in question had acted pursuant to "extensive state regulation."<sup>167</sup> The *Jackson* Court concluded that the particular "initiative [in acting under the regulation] comes from [the private party] and not from the State,"<sup>168</sup> and "there is no suggestion in th[e] record that [the state] intended either overtly or covertly to encourage the practice."<sup>169</sup> Disregarding the overriding question of whether the

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<sup>163</sup> Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (footnote omitted). See also *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 125-27 (1978); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WISC. L. REV. 1, 9.

<sup>164</sup> L. TRIBE, *supra* note 92, at 1157.

<sup>165</sup> See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). See also Black, *supra* note 162, at 84-91. Professor Black proposed a "realistic" analysis of Warren Court state action cases involving race discrimination:

The "state action" concept in the [race discrimination] field . . . has just one practical function; if and where it works, it immunizes racist practices from constitutional control. Those who desire to practice racism are therefore motivated, even driven, to test it through total possibility; the metaphor of Proteus is exact . . . . The commitment of the Court to a single and exclusive theory of state action, or to just five such theories, with nicely marked limits for each, would be altogether unprincipled, in terms of the most vital principle of all — the reality principle. It would fail to correspond to the endless variations not only of reality as presently given, but of reality as it may be manipulated and formed in the hands of people ruled by what seems to be one of the most tenacious motives in American life.

*Id.* at 90-91.

<sup>166</sup> 419 U.S. 345 (1974).

<sup>167</sup> *Id.* at 350.

<sup>168</sup> *Id.* at 357 (footnote omitted).

<sup>169</sup> *Id.* n.17 (emphasis added). The Court also relied on the district court's conclusion that "[n]o state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the [challenged activity]." *Id.* at 356 n.15 (quoting 348 F. Supp. 954, 958 (M.D. Pa. 1972)). See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). (1972).

Court applied the doctrine correctly, one might have questioned the latter point directly on the grounds that the subjective intent of the State should be irrelevant to the objective constitutional issue of authorization or encouragement for state action purposes.<sup>170</sup> To no avail, however. In 1978, a bare majority of the Supreme Court in *Flagg Brothers, Inc. v. Brooks*<sup>171</sup> continued its restrictive application of the authorization or encouragement test by concluding that some measure of state "compulsion"—as contrasted with mere "acquiescence"—was a prerequisite to a finding of state action under this approach.<sup>172</sup>

Neither the *Jackson* nor the *Flagg Brothers* decision indicates that the Court will become more willing to find state action in new settings, whatever doctrine guides the inquiry. Despite these recent crabbed constructions of the authorization or encouragement mode of state action, however, the Burger Court has repeatedly reaffirmed the holding and, at least by implication, the analysis in its pathbreaking state action decision, *Shelley v. Kraemer*.<sup>173</sup> *Shelley's* reasoning is not only directly apposite to the private search question, but it can be reconciled—if a bit uncomfortably in a result-oriented sense—with these recent Burger Court decisions.

In *Shelley*, the Court unanimously<sup>174</sup> held that judicial enforcement of private restrictive covenants "which ha[d] as their purpose the exclusion of persons of designated race or color from

<sup>170</sup> Cf. *Scott v. United States*, 436 U.S. 128, 136 (1978) (footnote omitted) (for purposes of evaluating governmental compliance with Omnibus Crime Control and Safe Streets Act of 1968, "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional"). See also Burkoff, *supra* note 41, at 181-90; W. LAFAVE, *supra* note 7, at 3-18 (1981 Supp.).

<sup>171</sup> 436 U.S. 149 (1978).

<sup>172</sup> *Id.* at 164-66. But see *id.* at 170-71 (Stevens, J., dissenting) (footnote omitted): There is no great chasm between "permission" and "compulsion" requiring particular state action to fall within one or the other definitional camp. Even *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 [1972], upon which the Court relies for its distinction between "permission" and "compulsion," recognizes that there are many intervening levels of state involvement in private conduct that may support a finding of state action.

See also *Dieffenbach v. Attorney Gen.*, 604 F.2d 187, 194 n.12 (2d Cir. 1979).

<sup>173</sup> 334 U.S. 1 (1948). See, e.g., *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 219 n.12 (1976); *Watson v. Kenlick Coal Co., Inc.*, 422 U.S. 1012, 1017 (1975) (cert. denial) (Douglas, J., dissenting); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *id.* at 361-62 (Douglas, J., dissenting); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 169 (1970). See also Tushnet, Book Review, 78 MICH. L. REV. 694, 698-99 (1980).

<sup>174</sup> Justices Reed, Jackson, and Rutledge did not participate in the consideration or decision of *Shelley*.

the ownership or occupancy of real property"<sup>175</sup> was unconstitutional state action. Although the Court observed that private parties possess full freedom to engage in private contracting and bargaining, "[p]articipation of the State consist[ed] in the enforcement of the restrictions so defined."<sup>176</sup> Judicial enforcement became unconstitutional state action because "the States . . . made available to [private] individuals the full coercive power of government"<sup>177</sup> in enforcing these discriminatory covenants. The Court noted that such covenants would have been clearly unconstitutional under the fourteenth amendment if state officials had been parties to them.<sup>178</sup> In short, the Court found state action because "[t]he judicial action . . . bears the clear and unmistakable imprimatur of the State."<sup>179</sup>

The *Shelley* case is noteworthy, at least in the revisionist light of recent Burger Court decisions, because the State's "authorization or encouragement"—its "compulsion" in 1970s' doctrinal parlance—consisted entirely of its making available to private parties "the full coercive power of government."<sup>180</sup> Such an approach is clearly an appropriate response to the problem posed in distinguishing private and public action. As Professor Bruce Ackerman has recently commented, "we live in a world in which the powers of government are routinely called upon to enforce (as well as define) . . . 'private' entitlements. Without this reinforcement, there is no reason to think that those presently advantaged by the distribution of 'private' rights would remain so."<sup>181</sup> Court enforcement of private actions that would be unconstitutional if entered into by governmental actors surely belies any claim that the State's role can be viewed as one of merely "neutral" judicial activity.<sup>182</sup>

This conclusion can be reconciled with *Flagg Brothers*. As the Seventh Circuit concluded, the *Flagg Brothers* majority did not expressly require a showing of compulsion "when the state activity might be characterized as an affirmative act rather than mere 'inaction.'"<sup>183</sup> Indeed, the *Flagg Brothers* Court explicitly observed

<sup>175</sup> *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

<sup>176</sup> *Id.* at 13.

<sup>177</sup> *Id.* at 19.

<sup>178</sup> *Id.* at 11-12.

<sup>179</sup> *Id.* at 20.

<sup>180</sup> *Id.* at 19.

<sup>181</sup> B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 19 (1980).

<sup>182</sup> See also *Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>183</sup> *Musso v. Suriano*, 586 F.2d 59, 62 n.5 (7th Cir. 1978).

that the "crux of [the] complaint [in the case] is not that the State *has* acted, but that it has *refused* to act."<sup>184</sup>

The applicability of this doctrinal approach to private searches is manifest. To the extent that the State makes available to private actors "the full coercive power of government" by affirmatively acting to prosecute individuals on the basis of evidence seized in activity that would be unconstitutional if undertaken by governmental officials, the State's action cannot be seen as neutral. Rather, the State must be viewed as a principal or accomplice in such unlawful private activity.<sup>185</sup> Indeed, the State's use of the fruits of a private search might itself constitute in some circumstances a "seizure" by the State cognizable under the fourth amendment.<sup>186</sup> Moreover, such judicial enforcement not only creates "state action" in the doctrinal sense, it also leads to the tacit encouragement and ratification of private citizens' unlawful conduct,<sup>187</sup> which is neither a neutral nor a salutary position for the State to take.<sup>188</sup>

<sup>184</sup> *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978) (emphasis in original).

<sup>185</sup> See text accompanying notes 69-77 *supra*; *People v. Zelinski*, 24 Cal. 3d 357, 367-68, 594 P.2d 1000, 1006, 155 Cal. Rptr. 575, 581 (1979). See also M. BASSIOUNI, *supra* note 95, at 71; Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1044-45 (1971); Comment, *Search and Seizure by Private Parties: An Exception to the Exclusionary Rule*, 5 LAND & WATER L. REV. 653, 659-60 (1970); Note, *supra* note 62, at 1356-58. But see W. LAFAVE, *supra* note 7, at 138-39.

Professor Choper has aptly criticized arguments for an exaggerated extension of *Shelley* based on the conclusion that "[o]nce the state courts are brought in, there is state action." Choper, *supra* note 124, at 761. The State in the private search setting, however, is not acting simply to "[enforce] a private common-law or statutory right," *id.*, but is bringing its own action in the courts based upon the product of a private breach of the law. See notes 202-08 and accompanying text *infra*. Neither criminal nor civil prosecution of lawbreakers detained by private citizens is, of course, mandatory under any state law. As in *Shelley*, however, it is not the existence *per se* of "unconstitutional" private acts that creates state action; rather, it is the state's act of enforcing private actions that serves as ratification of—or complicity in—those actions. 334 U.S. at 13-14.

<sup>186</sup> *United States v. Sanders*, 592 F.2d 788, 800-02 (5th Cir. 1979) (Wisdom, J., dissenting), *rev'd sub nom.* *Walter v. United States*, 447 U.S. 649 (1980). The Supreme Court has reserved judgment on this question. Compare *United States v. Kelly*, 529 F.2d 1365, 1371-72 (8th Cir. 1976), with *United States v. Sherwin*, 539 F.2d 1, 7-8 (9th Cir. 1976) (en banc). See also *United States v. Small*, 297 F. Supp. 582, 585 n.2 (D. Mass. 1969). As one commentator has noted:

Finding a seizure in the government's acceptance of the fruits of a private search permits scrutiny of the privacy interests of absent third parties and, where relevant, directs attention to first amendment rights at stake. It also significantly restricts the scope of the *Burdeau* exemption [from the exclusionary rule of private searches], which has been the subject of much criticism.

90 HARV L. REV. 463, 467 (1976) (footnote omitted).

<sup>187</sup> See text accompanying notes 48-80 *supra*.

<sup>188</sup> See text accompanying notes 72-77 *supra*.

The Supreme Court has accepted an argument of this nature in an analogous factual setting. In *Gambino v. United States*,<sup>189</sup> decided in 1927, two New York state troopers made an automobile search without probable cause that uncovered contraband liquor possessed in contravention of federal prohibition laws. Because probable cause is required for such a search under the fourth amendment, it would clearly have been unconstitutional if it had been undertaken by federal agents.<sup>190</sup> The New York state police immediately turned the evidence over to federal authorities for their use in prosecuting the possessors in federal court. Today, this scenario would be forbidden under *Elkins v. United States*, which declared such silver platter practice unconstitutional.<sup>191</sup> In 1927, however, the silver platter doctrine was still viable—at least in the view of a majority of the Supreme Court.<sup>192</sup>

This state of the law notwithstanding, the Court reversed the *Gambino* defendants' convictions for conspiracy to violate the federal prohibition laws. Although the Court explicitly found that the state law enforcement authorities had not acted as "agents" of the federal authorities,<sup>193</sup> it concluded nonetheless that the evidence had been unconstitutionally secured because "the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws."<sup>194</sup> Justice Brandeis spoke for a unanimous Court:

The evidence . . . secured was the foundation for the prosecution and supplied the only evidence of guilt. 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 [implied] cooperation, as by the state officers' acting under direction of the federal officials.<sup>195</sup>

The Court's reasoning in *Gambino*<sup>196</sup> applies with equal force to private searches. The actions of private actors who unlawfully

<sup>189</sup> 275 U.S. 310 (1927).

<sup>190</sup> *Id.* at 314.

<sup>191</sup> 364 U.S. 206 (1960). See notes 34-47 and accompanying text *supra*.

<sup>192</sup> See *Byars v. United States*, 273 U.S. 28 (1927). See also text accompanying notes 31-32 *supra*.

<sup>193</sup> 275 U.S. at 313, 315, 316.

<sup>194</sup> *Id.* at 317.

<sup>195</sup> *Id.* at 316. See also *Casey v. United States*, 276 U.S. 413, 423-24 (1928) (Brandeis, J., dissenting).

<sup>196</sup> See also *Anderson v. United States*, 318 U.S. 350, 356 (1943); *United States v. Searp*, 586 F.2d 1117, 1120 (6th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1, 6 n.5 (9th Cir.

seize evidence for the purpose of helping law enforcement authorities prosecute defendants should be treated as unconstitutional state action.<sup>197</sup> Because the Court decided *Gambino* before extending the fourth amendment to the states in *Wolf v. Colorado*,<sup>198</sup> *Gambino* cannot fairly be distinguished from private search cases on the ground that law enforcement officers, rather than private citizens, committed the illegal act. In both instances, for purposes of the state action inquiry, the actors in *Gambino* committed the breach at a time when the fourth amendment did not directly restrict their actions.<sup>199</sup>

In sum, many nominally private searches are suffused with state action under the authorization or encouragement strand of the state action doctrine. As one state appellate court has explained, *Gambino* teaches that

whenever one who is not an official has engaged in [an] illegal seizure, not in pursuance of some other interest but solely for the purpose of law enforcement, he becomes, in effect, an agent for the government which cannot avail itself of the fruits of his acts without assuming the responsibility for them.<sup>200</sup>

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1976) (en banc); *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 363 (9th Cir. 1969); *Knoll Assocs., Inc. v. FTC*, 397 F.2d 530, 533-34 (7th Cir. 1968); *Corngold v. United States*, 367 F.2d 1, 5 (9th Cir. 1966). *But see* *United States v. Gumerlock*, 590 F.2d 794, 800 n.19 (9th Cir.) (en banc), *cert. denied*, 441 U.S. 948 (1979).

<sup>197</sup> *See* *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005, 155 Cal. Rptr. 575, 580 (1979); *Commonwealth v. Eshelman*, 477 Pa. 93, 101-02, 383 A.2d 838, 842 (1978); Note, *Private Assumption of the Police Function Under the Fourth Amendment*, *supra* note 110, at 467-68; Comment, *State Action After Jackson v. Metropolitan Edison Co.: Analytical Framework for a Restrictive Doctrine*, 81 Dick. L. Rev. 315, 332-33 (1977). *See also* note 191 *supra*.

<sup>198</sup> 338 U.S. 25 (1949).

<sup>199</sup> "[T]he status of a state policeman [in *Gambino*] with regard to the federal government was for Fourth Amendment purposes essentially that of a private citizen. . . ." *Commonwealth v. Eshelman*, 477 Pa. 93, 99, 383 A.2d 838, 841 (1978). *See text* accompanying notes 29-32 *supra*. *See also* *Black, Burdeau v. McDowell—A Judicial Milepost on the Road to Absolutism*, 12 B.U. L. Rev. 32, 36 (1932). *But see* *United States v. Sherwin*, 539 F.2d 1, 6 n.5 (9th Cir. 1976) (en banc).

<sup>200</sup> *State v. Anonymous*, 34 Conn. Supp. 104, 379 A.2d 946, 947 (1978). *See also* *Watson v. Kenlick Coal Co.*, 422 U.S. 1012, 1017-18 (1975) (*cert. denial*) (Douglas, J., dissenting); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392-93 (1971); *Knoll Assocs., Inc. v. FTC*, 397 F.2d 530, 535-36 (7th Cir. 1968); *Corngold v. United States*, 367 F.2d 1, 8 (9th Cir. 1966); *United States v. Krell*, 388 F. Supp. 1372, 1374 (D. Alaska 1975); *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005-06, 155 Cal. Rptr. 575, 580 (1979); *Commonwealth v. Eshelman*, 477 Pa. 93, 102, 383 A.2d 838, 842 (1978). *But see* *United States v. Mekjian*, 505 F.2d 1320, 1327 (5th Cir. 1975); *United States v. Newton*, 510 F.2d 1149, 1153 (7th Cir. 1975); *In re Bryan S.*, 110 Cal. App. 3d 144, 167 Cal. Rptr. 741 (1980); *Gasaway v. State*, 137 Ga. App. 653, 655-56, 224 S.E.2d 772, 774 (1976); *W. LaFAVE*, *supra* note 7, at 136-37.

The California Supreme Court, sitting *en banc*, expressed a similar view: "Searches and seizures to assist criminal prosecutions may be such an inherently governmental task as to fall under the rationale of *Marsh v. Alabama*. . . . The application of the exclusionary rule to such 'private' searches is more likely to deter unlawful searches than it would in other cases."<sup>201</sup>

When the State uses evidence in its criminal justice system that private actors unlawfully acquire, its behavior is hardly neutral. Such private activity is only nominally private and should constitute state action. When a private actor engages in acts that would be unconstitutional if undertaken by law enforcement authorities—and when the aim of such activity is potential use of the State's law enforcement processes—the fruits of such activity under *Gambino*, *Shelley*, and current authorization or encouragement doctrine should be deemed the product of state action and, therefore, should be subject to application of the exclusionary rule.

## V

### STATE ACTION REDUX

One last word on state action. There comes a point in this setting, after separate and distinct analyses of the cases and doctrinal minutiae surrounding both the public function and the authorization or encouragement strands of the state action doctrine, that the two analyses converge.<sup>202</sup> In *Flagg Brothers, Inc. v. Brooks*,<sup>203</sup> a five-Justice majority of the Supreme Court rejected the proposition that certain forms of private, commercial, civil dispute resolution mechanisms were traditionally the exclusive domain of the State.<sup>204</sup> Thus, the Justices concluded that private actors had assumed no public function, at least for state action purposes. Under the private search doctrine, however, the fruits of illegal private searches are introduced and admitted into evidence in the *criminal* sanctioning process, an arena which unreservedly remains

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<sup>201</sup> *Stapleton v. Superior Court of Los Angeles County*, 70 Cal. 2d 97, 103 n.4, 447 P.2d 967, 971 n.4, 73 Cal. Rptr. 575, 579 n.4 (1969) (citation omitted) (obiter dicta). See also *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005-06, 155 Cal. Rptr. 575, 580 (1979).

<sup>202</sup> It might less charitably be concluded that ultimately these strands of the state action doctrine collapse rather than converge. See text accompanying notes 162-64 *supra*.

<sup>203</sup> 436 U.S. 149 (1978), discussed at notes 85-160 and accompanying text *supra*.

<sup>204</sup> *Id.* at 157-64. The Court observed that the procedures at issue were "not a significant departure from traditional private arrangements." *Id.* at 162 n.12.

within the exclusive prerogative of the State.<sup>205</sup> Hence, even when the State is not responsible for the procedural defect, the Supreme Court has held that “[w]hen a State obtains a criminal conviction through . . . a trial [lacking in “the procedural and substantive safeguards that distinguish our system of justice”], it is the State that unconstitutionally deprives the defendant of his liberty.”<sup>206</sup>

When the State affirmatively accepts illegally seized evidence in its criminal justice system, thereby authorizing or encouraging actions by private parties that would be unconstitutional if performed by governmental officials, it ignores reality to then assert that there is no “sufficiently close nexus between the State and the challenged action.”<sup>207</sup> The State accepts the illegally seized evidence; the State encourages its use through the lack of deterrent disincentives;<sup>208</sup> and the State tries and punishes the criminal defendant on the basis of the evidence so received. Whichever strand of the state action doctrine is invoked, many private searches therefore bear the unmistakable imprimatur of the State. The question of evidentiary exclusion in this setting should not turn upon the largely semantic barrier of state action, but on traditional fourth amendment principles.

## VI

### THE PRIVATE SEARCH DOCTRINE IN THE STATES

Most federal and state courts that have considered the private search doctrine since *Elkins* have steadfastly refused to permit an exclusionary remedy to be applied to the fruits of unlawful private searches.<sup>209</sup> Of course, most of these courts have reached

<sup>205</sup> See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980); *Lisenba v. California*, 314 U.S. 219, 236-37 (1941); *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923). See also Tushnet, *supra* note 173, at 699.

<sup>206</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) (Court found defendant's conviction tainted by ineffective assistance of counsel even though not alleged that state officials knew or should have known of this procedural defect).

<sup>207</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)). See text accompanying note 90 *supra*.

<sup>208</sup> See text accompanying notes 67-80 *supra*.

<sup>209</sup> See, e.g., *United States v. Lima*, 424 A.2d 113 (D.C. Ct. App. 1980); *United States v. Keuylian*, 602 F.2d 1033, 1039-40 (2d Cir. 1979); *United States v. Rodriguez*, 596 F.2d 169, 172-73 (6th Cir. 1979); *United States v. Sanders*, 592 F.2d 788, 792 (5th Cir. 1979), *rev'd on other grounds sub nom. Walter v. United States*, 447 U.S. 649 (1980); *United States v. Gumerlock*, 590 F.2d 794, 800 (9th Cir.), *cert. denied*, 441 U.S. 948 (1979); *United States v. Lamar*, 545 F.2d 488, 489-90 (5th Cir. 1977); *United States v. Sherwin*, 539 F.2d 1, 5-7 (9th Cir. 1976); *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348-49 (7th Cir.), *cert. denied*,

this conclusion simply on the authority of *Burdeau* and scattered subsequent references by the Supreme Court to that decision.<sup>210</sup> It is notable, however, that the Supreme Court has not, since 1927, squarely reconsidered the *Burdeau* doctrine; comments by Supreme Court Justices on the continuing validity of *Burdeau* have all been dicta.<sup>211</sup>

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421 U.S. 1011 (1975); *United States v. Issod*, 508 F.2d 990, 993-94 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *Barnes v. United States*, 373 F.2d 517, 518 (5th Cir. 1967) (per curiam); *United States v. Goldberg*, 330 F.2d 30, 35 (3rd Cir.), cert. denied, 377 U.S. 953 (1964); *In re J.M.A. v. State*, 542 P.2d 170, 174 (Alaska 1975); *People v. Leutkemeyer*, 74 Ill. App. 3d 708, 710-12, 393 N.E.2d 117, 119-21 (1979); *People v. Toliver*, 60 Ill. App. 3d 650, 653, 377 N.E.2d 207, 210 (1978); *State v. Bryant*, 325 So. 2d 255, 259 (La. 1976); *Commonwealth v. Storella*, 375 N.E.2d 348, 350-52 (Mass. App. 1978); *People v. Holloway*, 82 Mich. App. 629, 631-32, 267 N.W.2d 454, 455-56 (1978); *State v. Keyser*, 117 N.H. 45, 46-47, 369 A.2d 224, 225-26 (1977); *People v. Cibelli*, 94 Misc. 2d 316, 318, 404 N.Y.S.2d 811, 813 (Sup. Ct. 1978); *Gillett v. State*, 588 S.W.2d 361, 363 (Tex. Crim. App. 1979); *State v. Gonzales*, 24 Wash. App. 437, 440, 604 P.2d 168, 170 (1980). See also Annot., 36 A.L.R.3d 553 (1971).

For state court decisions rejecting the private search doctrine based on state constitutions, see notes 217-18 *infra*.

<sup>210</sup> See note 3 *supra*.

<sup>211</sup> For example, in *Walter v. United States*, 447 U.S. 649 (1980), eight members of the Court appeared to embrace the proposition that private searches were not subject to constitutional limitations, but the references were all dicta.

The *Walter* Court considered whether a warrantless FBI screening of allegedly obscene films, which a private party had turned over to the FBI after receiving them through a mistaken delivery, was an unconstitutional search and seizure and thus subject to the exclusionary rule. In a plurality opinion finding the screening an unconstitutional search, Justice Stevens, with whom Justice Stewart concurred, observed: "It has, of course, been settled since *Burdeau v. McDowell* . . . that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." *Id.* at 656. Justice White, with whom Justice Brennan concurred, wrote separately but noted that the Court recognized "in *Burdeau v. McDowell* . . . and *Coolidge v. New Hampshire* . . . that the Fourth Amendment proscribes only governmental action." *Id.* at 660 (footnote omitted).

Justice Blackmun, joined by Chief Justice Burger and Justices Powell and Rehnquist, dissented, prefacing his objections with the observation:

The Court at least preserves the integrity of the rule specifically recognized long ago in *Burdeau v. McDowell* . . . . That rule is to the effect that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.

*Id.* at 662.

Since Justice Marshall concurred in the judgment reached without issuing or joining any written statement, all eight of the Justices who wrote or joined in opinions in *Walter* appeared to accept with facility *Burdeau's* private search doctrine.

Yet, the references to the private search doctrine in *Walter* were all dicta. The dispositive question for the four plurality Justices in *Walter* was strictly the unconstitutional scope and "intensity" of the subsequent governmental search—the screening of the films by the FBI: "[P]etitioners possessed a legitimate expectation of privacy in the films, and this expecta-

Reconsideration of the *Burdeau* private search doctrine in light of modern constitutional developments should produce a different result.<sup>212</sup> Moreover, in this age of increasingly independent state appellate courts,<sup>213</sup> it is quite possible that the impetus in this matter will not be with the Supreme Court of the United States.

At least one state already has rejected the private search doctrine in construing its own constitution. In *State v. Helfrich*,<sup>214</sup> the Montana Supreme Court held that "the search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers."<sup>215</sup> Accordingly, the court concluded, "[e]vidence obtained through illegal invasions of individual privacy [by private actors is] not to be admitted into evidence in a court of law of this State."<sup>216</sup> The Montana Supreme Court relied on 1972 Montana constitutional provisions on individual privacy and, searches and seizures.<sup>217</sup> As the *Helfrich* court concluded, "We

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tion was infringed by the Government's unauthorized screening of them." *Id.* at 662 (White, J.). See also *id.* at 658-59 (Stevens, J.). Indeed, the plurality opinion made it clear that the Court did not even reach the preliminary question of whether "the delivery of the films to the FBI by a third party was [or was] not a 'seizure' subject to the warrant requirement of the Fourth Amendment." *Id.* at 652 n.4 (Stevens, J.). See also *id.* at 660 n.1 (White, J.). In addition, the United States had argued in *Walter* that *Burdeau* was inapposite because "this is not a case where petitioners' private materials 'were stolen [and] [t]he thief, to further his own ends, delivered them to the law officer of the United States.'" Brief for the United States at 26, *Walter v. United States*, 447 U.S. 649 (1980) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (Brandeis, J., dissenting)). But see *United States v. Sanders*, 592 F.2d 788, 800-02 (5th Cir. 1979) (Wisdom, J., dissenting), *rev'd on other grounds sub nom. Walter v. United States*, 447 U.S. 649 (1980). See also text accompanying notes 75 & 186 *supra*. Other cases containing dicta on the private search question are *United States v. Janis*, 428 U.S. 433, 456 n.31 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

<sup>212</sup> See notes 48-208 and accompanying text *supra*.

<sup>213</sup> See, e.g., Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 47-50 (5th ed. 1980); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

<sup>214</sup> — Mont. —, 600 P.2d 816 (1979).

<sup>215</sup> *Id.* at —, 600 P.2d at 819.

<sup>216</sup> *Id.* at —, 600 P.2d at 819.

<sup>217</sup> The Montana Constitutional provisions at issue read:

*Right of privacy.* The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

MONT. CONST. art. II, § 10.

*Searches and seizures.* The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

find the Montana Constitution affords an individual greater, explicit protection in this instance than is offered in the Fourth Amendment decision of the *Burdeau* Court.”<sup>218</sup>

While the *Helfrich* decision itself is clearly distinguishable from all other decisional precedent outside of Montana on the basis of its roots in the Montana Constitution, it is significant that the Montana Supreme Court reached the same result eight years earlier on the concurrent basis of federal constitutional law. In *State v. Brecht*,<sup>219</sup> the Montana Supreme Court concluded:

This Court . . . would be remiss were it not to recognize that evidence obtained by [private actors through] the unlawful or unreasonable invasion of several of the constitutionally protected rights guaranteed to its citizens by both the federal and Montana constitutions properly comes within the contemplation of this Court's exclusionary rule. To do otherwise would lend Court approval to a fictional distinction between classes of citizens: those who are bound to respect the Constitution and those who are not. Were the exclusionary rule to recognize such distinctions it would by indirection circumvent the rule established by this Court to enforce these rights and would in fact render the rule and the constitutional guarantees it protects meaningless.<sup>220</sup>

The *Brecht* court did not mention *Burdeau* in its opinion. In 1974, however, the Montana Supreme Court declined to overrule *Brecht*, reasoning:

If one considers that any exclusionary process only excludes “unreasonable” conduct it can readily be seen that *all* intrusions are not *unreasonable*. Like it or not, *unreasonable or illegal intrusions knowingly accepted and used*, from the private sector by the government amount to an extension of the silver platter doctrine condemned by *Elkins*, particularly when viewed in the light of judicial integrity emphasized in *Elkins*. It has been argued that *Elkins* did not disturb *Burdeau*, it may not have been clear in the pure Fourth Amendment context, but a

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MONT. CONST. art. II, § 11.

<sup>218</sup> \_\_\_ Mont. at \_\_\_, 600 P.2d at 818. There is also a significant trend in state decisions rejecting the private search doctrine as applied to private security officers. See *People v. Zelinski*, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979); *State v. Hutchinson*, 349 So. 2d 1252 (La. 1977); *People v. Eastway*, 67 Mich. App. 464, 241 N.W.2d 249, 250 (1976) (dicta); *People v. Diaz*, 85 Misc. 2d 41, 376 N.Y.S.2d 849, 851-52 (Crim. Ct. 1975); *People v. Smith*, 82 Misc. 2d 204, 368 N.Y.S.2d 954, 955-58 (Crim. Ct. 1975); *People v. Bowers*, 77 Misc. 2d 697, 356 N.Y.S.2d 432 (App. Term 1974).

<sup>219</sup> 157 Mont. 264, 485 P.2d 47 (1971).

<sup>220</sup> *Id.* at 271, 485 P.2d 51.

close examination does move one to believe that the silver platter concept was condemned in any context.<sup>221</sup>

In short, the Montana Supreme Court has concluded that federal constitutional law involving the right to privacy also supports the application of exclusionary principles to the fruits of nominally private searches. It is true that the source and the scope of the federal constitutional privacy right remain controverted and obscure.<sup>222</sup> What is noteworthy, however, is that the Montana Supreme Court's decision based upon its own constitutional counterpart to the fourth amendment and its own privacy provision<sup>223</sup> is as easily reached by any state court acting under its own state constitutional authority.

#### CONCLUSION

Opponents of the "extension" of constitutional protections to victims of private searches often argue that it is absurd to attempt to deter those well-motivated individuals who, in the name of conscientious citizenship, gallantly seek to assist the police in their appointed duties. In practice, however, one is hard pressed to find heroism in the vigilante, in the private citizen who plots to obtain information or evidence illegally in order to destroy his neighbor, competitor, or spouse, in the security guard who secretly spies on retail customers undressing in department store changing rooms, or in the "special deputy sheriff" who flouts individual property and privacy rights without fear of significant legal consequence.

Scores of such illegal violations of individual rights occur daily, many resulting from the conduct of those employed to, or merely bent upon, augmenting the enforcement of the State's criminal laws. As the California Supreme Court recently concluded in a decision applying state constitutional limitations to private security personnel:

Unrestrained, such [private] action would subvert state authority in defiance of its established limits. It would destroy the protection those carefully defined limits were intended to afford to everyone, the guilty and innocent alike. It would afford de facto authorizations for searches and seizures incident to arrests

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<sup>221</sup> *State v. Coburn*, 165 Mont. 488, 530 P.2d 442, 450 (1974) (emphasis in original).

<sup>222</sup> See, e.g., Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

<sup>223</sup> See note 217 *supra*.

or detentions made by private individuals that even peace officers are not authorized to make.<sup>224</sup>

Private actors and those in the State's employ who tacitly or openly encourage them can and should be deterred from unlawful activity simply by eliminating any advantage provided by such conduct. The judiciary, moreover, need not and should not compromise itself by playing the part of accomplice after the fact by using the fruits of nominally private—but nonetheless illegal—misconduct.

From a functional perspective, perhaps state action doctrine should be viewed pragmatically as “a tool for separating out those nongovernmental activities whose existence so impairs certain fundamental values that they are proscribed by the Constitution.”<sup>225</sup> Writing nearly thirty years ago, A. A. Berle similarly analyzed the case for “constitutionalizing” private (corporate) activity that clearly denigrated individual rights otherwise guaranteed by the Constitution:

[C]ertain human values are protected by the American Constitution; any fraction of the governmental system, economic as well as legal, is prohibited from invading or violating them. The principle is logical because, as has been seen, the modern state has set up, and come to rely on, the [private] corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible.<sup>226</sup>

The State's ultimate responsibility for the policing function is self-evident as a matter of sovereign authority and concomitant obligation to enforce the laws and maintain order.<sup>227</sup>

Ultimately, the classic *Burdeau* state action barrier to application of constitutional limitations in the private search setting amounts to little more than an elaborate semantical construction based upon often incoherent doctrinal prescriptions. Indeed, the frailty of state action doctrine makes it extremely difficult to offer effective logical or factual proofs of the existence of state action in challenged activity. As a result, there are obvious strains in any

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<sup>224</sup> *People v. Zelinski*, 24 Cal. 3d 357, 368, 594 P.2d 1000, 1006, 155 Cal. Rptr. 575, 581 (1979).

<sup>225</sup> Glennon & Nowak, *supra* note 163, at 259. See also Choper, *supra* note 124, at 776.

<sup>226</sup> Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933-943 (1952). See also Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1349 (1967).

<sup>227</sup> See text accompanying notes 128-32 *supra*.

analysis that swims against the Burger Court stream by attempting to satisfy state action criteria which are essentially unarticulated and, perhaps, unarticulable.

Nevertheless, even under the most rigorous and uncharitable standards, *some* private search activity should be characterized as "state action" if only on the basis of stare decisis or for the sake of superficial doctrinal consistency. The wisdom of such a finding is compelling. Quite bluntly, what little precious liberty is preserved for us by judicial enforcement of fourth amendment rights is mortally compromised if such rights can be flouted wholesale, as they are today, by nominally private actors.