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JUDICIAL CONTROL OF ILLEGAL SEARCH AND SEIZURE

While it is fundamental to our polity that law enforcers may not themselves disregard the law, the widespread practice of illegal search¹ has long suggested that both police and public are of a different persuasion. As with the related investigative illegalities of wiretapping,² false arrest,³ and the third degree,⁴

1. The great number of cases involving illegal search and seizure is some indication of its broad incidence. See CORNELIUS, *SEARCH AND SEIZURE* 2 (2d ed. 1930); LASSON, *THE FOURTH AMENDMENT* 106 (1937). In fact, there appear to be so many incidents of illegal search that even though many are not recorded the practice is common knowledge. See statement of Senator Dunningan in 1 *NEW YORK STATE CONSTITUTIONAL CONVENTION, REVISED RECORD* 365 (1938).

2. For a collection of some known and some surmised data on the practice, see *Wiretapping, Congress, and the Department of Justice*, 9 *INT'L JURID. ASS'N BULL.* 97 (1941). The law of wiretapping, which since *Olmstead v. United States*, 277 U.S. 438 (1928) has been technically distinguished from other kinds of search, is treated in GREENMAN, *WIRE-TAPPING: ITS RELATION TO CIVIL LIBERTIES* (1938) and ROSENZWEIG, *The Law of Wire-tapping*, 32 *CORN. L.Q.* 514 (1947) and 33 *CORN. L.Q.* 73 (1947).

3. HOPKINS, *OUR LAWLESS POLICE* 61-99 (1931); WILLEMSE, *BEHIND THE GREEN*

the common incidence of illegal search and seizure indicates more than the normal divergence between theory and practice. Rather it evidences a popular belief that crime is a necessary and therefore justifiable weapon in the fight against crime.⁵

Particularly when they are dealing with known criminals, or the "criminal classes," police and prosecutors tend to regard lawless methods as justifiable. For the average policeman the community tends to become divided into good men and bad men; the "good" men are the more respectable elements, and the "bad" men are not only the known criminals but the "suspicious characters," the vagrants, and the members of unpopular minority groups. For these groups, constitutional privileges are deemed waived in varying degrees, depending on the disfavor with which the policeman views the suspect.⁶ The

LIGHTS (1931) *passim*; Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. OF CAL. L. REV. 345, 362 (1936); Plumb, *Illegal Enforcement of the Law*, 24 CORN. L. Q. 337, 338 (1939). Professor Hall, *supra*, concluded that approximately one out of three persons arrested was released without being brought before any judicial officer, and that in the year 1933 there were roughly 3,500,000 illegal arrests in the United States.

4. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 13-263 (1931); BARNES AND TEETERS, NEW HORIZONS IN CRIMINOLOGY 274-8 (1943); WILLEMSE, *op. cit. supra* note 3, *passim*. The report of the national commission (Wickersham Commission), *supra*, is severely criticized by Professor Waite in *Report on Lawlessness in Law Enforcement: Comment*, 30 MICH. L. REV. 54 (1931), as relying on inadequate data and probably exaggerating the incidence of illegalities. The unabashed confessions of ex-police captain Willemse, *supra*, however, suggest that the Commission's estimates were conservative.

5. "Some kinds of lawless enforcement of law like the 'third degree' or searches and seizures without the warrants required by law, appear to result from a definite official policy favoring habitual disregard of particular legal rules. The remedy for an abuse of this sort involves the serious difficulty of altering rooted official habits." NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *op. cit. supra* note 4, 340. HOPKINS, *op. cit. supra* note 3, at 47, quotes a Buffalo police official: "My oath of office requires me to protect this community. If I have to violate that oath of office or violate the Constitution, I'll violate the Constitution. Nobody thinks of hedging a fireman about with a lot of laws that favor the fire. Crime is as dangerous as fire, and the policeman and the fireman should be equally free." And see *id.* at 314-323.

Apart from these beliefs, policemen may tend to disregard the law simply for the sake of convenience, or because of preconceived theories as to the suspect, or because of professional jealousy and the need for speed. See Kooker, *Post War Influence Upon Criminal Investigation*, 35 J. CRIM. L. & CRIMINOLOGY 426 (1945).

6. HOPKINS, *op. cit. supra* note 3, at 321, 327-31; WILLEMSE, *op. cit. supra* note 3, at 30-1. Police treatment of aliens, especially, has been characterized by mass illegal arrests, searches and seizures. See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 55, 133-7 (1931). Although it was stated that shortly after the Commission's report mass raids were discontinued, Kane, *The Challenge of the Wickersham Deportations Report*, 23 J. CRIM. L. & CRIMINOLOGY 575, 583 (1932), the practice of dispensing with the formalities when dealing with Chinese and other aliens appears to be still not unknown in New York City.

Compare Hall, *supra* note 3, at 368-9, as to illegal arrests: "Every large city has thou-

prosecutor, whose record of convictions is his political opportunity, may be tempted to adopt the same attitude, albeit sometimes in a more sophisticated form.⁷

Police lawlessness excused as expediency has been encouraged by apathy and occasional affirmative support both from the public and its elected leaders.⁸ Defendants are to a large extent protected, for statutes generally provide that civil servants' salaries cannot be garnished in the event of civil suit,⁹ and policemen are frequently indemnified from loss¹⁰ and defended without cost.¹¹ But the wronged plaintiff, who is likely to be both ignorant and poor, receives little or no help from the public,¹² and must usually proceed alone for whatever

sands of homeless, unemployed men and women who persist in getting into the way of police officers. The police operation is one of very superficial prophylaxis—an overnight removal of these unsightly elements from the city streets. The utter impotence of this class of arrestees is ample guarantee that they will not employ attorneys or otherwise annoy the police."

7. "Under our legal system the way of the prosecutor is hard, and the need of 'getting results' puts pressure upon prosecutors to use the 'third degree,' to suppress evidence, to bulldoze witnesses, and generally to indulge in the lawless enforcement of the law which produces a vicious circle of disrespect for law. Yet in causes involving few possibilities of publicity they may be perfunctory and supine, with no check upon the resulting inefficiency." POUND, *CRIMINAL JUSTICE IN AMERICA* 186 (1930). And see FRANK, *IF MEN WERE ANGELS* 32 (1942); TRAIN, *FROM THE DISTRICT ATTORNEY'S OFFICE* 116-137 (1939).

8. See, e.g.: remarks of Representative Fish in 1 *NEW YORK STATE CONSTITUTIONAL CONVENTION, REVISED RECORD* 562-5 (1938). And see Vanderbilt, *Message to the Bill of Rights Review*, 1 *BILL OF RIGHTS REV.* 41, 42 (1940): "The individual whose constitutional rights are assailed is generally a member of an unpopular minority, for in a democracy the politicians do not often strike at majorities. . . . The social pressure that is likely to hamper the individual lawyer in this field is intensified in the case of our law enforcing officers, for generally they are active in politics, and subject, therefore, to the pressures of politics."

The attitude of the public may vary from hearty approbation of police lawlessness coupled with active vigilantism, to strong protest, depending to some extent on the popularity of the victims. See CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* 14-22 (1947). Perhaps the most thoroughly organized public participation in illegal investigative work recorded was that of the American Protective League in the First World War. See, for a eulogistic history of the A.P.L., HOUGH, *THE WEB* (1919) and for brief criticism, see Black, *Burdeau v. McDowall: A Judicial Milepost on the Road to Absolutism*, 12 *B. U. L. REV.* 32, 38-9 (1932).

Most usually, perhaps, insistence on results and apathy or ignorance as to means is characteristic of public opinion. Thus: "Recent gangster murders having caused an outcry for police activity, two thousand luckless unemployed had to serve as convenient cell-fodder." HOPKINS, *op. cit. supra* note 3, at 50. And see generally *id.* at 50-60.

9. The state rules and cases are collected in 6 *MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS* § 2681 (2d ed. 1928).

10. 2 *MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS*, § 532 (Rev. ed. 1939). It is the general rule that a municipal officer may be reimbursed even where he has exceeded his authority or committed an illegal act, provided the act is related to his proper duties.

11. CORNELIUS, *op. cit. supra* note 1, at 45.

12. With the exception of the aid that may be provided by organizations such as the Civil Liberties Union.

damages he can collect.¹³ Chief executives of municipalities, states, and the nation itself have aided in the handicapping process by their reluctance to demand prosecution of offending officers,¹⁴ and in some cases are themselves responsible for policies of wholesale illegality.¹⁵

In the unique area of lawless enforcement of the law, the neglect, if not the adverse interest, of the normal prosecuting agencies and the public leaves the courts alone to intervene. Since the normal law enforcement agencies are themselves the law-breakers, control of this kind of crime is peculiarly difficult and also doubly important.¹⁶

Although the judiciary in general has recognized and accepted its responsibility,¹⁷ at least to the extent of repeated denunciations of police lawlessness,¹⁸

13. Municipalities, like states, are generally not liable in tort, so that ". . . where there is liability (as in the case of a policeman), the fact of financial irresponsibility is operative and, presumably, conclusive; while, where financial responsibility exists (as in the case of a city), there is no liability." Hall, *supra* note 3, at 348. The most effective potential step toward municipal liability, the filing of official bonds, has had only limited coverage and effect. *Id.* at 349-52.

Nor does it appear that the federal government will be held liable under the Federal Torts Claims Act. See note 36 *infra*.

14. The chief executive or police chief may, with some reason, prefer to discipline rather than to prosecute police. But, as with instances of illegal arrest, see NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 19 (1931), it is not everyone who has the influence to cause him to do so, or even to bring the matter to his attention. The down-and-outer can hardly afford even to complain, for fear of police retribution. See HOPKINS, *op. cit. supra* note 3, at 90.

15. See, *e.g.*: orders of Commissioner of Police Mulrooney and Mayor Walker of New York City and description of incidents that followed in HOPKINS, *op. cit. supra* note 3, at 45; statement of findings of the district court in Hague v. C.I.O., 307 U.S. 496, 504-6 (1939); NATIONAL POPULAR GOVERNMENT LEAGUE, REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE 44-54 (1920).

16. Contrast the statement of Thomas E. Dewey in 1 NEW YORK STATE CONSTITUTIONAL CONVENTION: REVISED RECORD 373 (1938): "This bill [authorizing wire-tapping] is founded on the theory that public officials may be trusted to do their duty. Any other theory asserts that democracy is a failure. I do not believe that democracy is a failure."

The essential choice seems to be between two points of view: the point of view of the typical court, and that of the typical prosecutor. The one opinion asserts the need of checks and balances, especially where civil rights are concerned, the other asserts the need for a free administrative hand. See, generally, FRANK, *op. cit. supra* note 7, at 316-331; POUND, *op. cit. supra* note 7, at 54, 57, 59.

17. There have been certain exceptions, particularly in the lower courts. An example of police-court lawlessness is afforded by the conduct of the New York magistrate's courts prior to the Seabury investigation, when both police and police courts were the agents of politics rather than law. See FINAL REPORT OF SAMUEL SEABURY, REFEREE, IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES' COURTS AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS (N.Y. Sup. Ct., App. Div., 1st Jud. Dept. 1932); MacKaye, *The House That Justice Built*, quoted in MOLEY, TRIBUNES OF THE PEOPLE 12-18 (1932). Such instances of nonfeasance or malfeasance in police courts are particularly vicious in that the usual victims of police lawlessness seldom have the means to appeal. "No court has a more direct influence for good or evil, [than a police court] or for a creation of a respect or a disregard for the

the adjudicative nature of a court's power limits its attempt to control police illegalities by a sanction more forceful than moral suasion.¹⁹ Though it may have full knowledge of the prevalence of illegal activity, courts as presently constituted are helpless to act until the parties appear and the issues are placed before it. Thus where police, neither intending nor undertaking to prosecute, take the law in their own hands for purposes of harassment, threat, or revenge,²⁰ the courts have no means of control at all. Only as to illegalities incident to prosecution have the courts been able to devise a governor for the machine of law enforcement.

The device consists simply in judicial nullification of the illegal act by a refusal to allow it to aid the prosecution. Although subsequently applied in the related fields of illegal detention²¹ and wire-tapping,²² and applied or sug-

law. For an overwhelming majority of our citizens, particularly those of foreign birth or extraction, it is the only court of justice in existence." TRAIN, *op. cit. supra* note 7, at 40.

18. "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." Weeks v. United States, 232 U.S. 383, 392 (1914). ". . . there appears to be a growing public sentiment against the observance of or obedience to any constitutional restraint that obstructs or stands in the way of the desires of those who seek to accomplish their purposes regardless of constitution or laws. . . ." Youman v. Commonwealth, 189 Ky. 152, 156, 224 S.W. 860, 861 (1920).

19. See, as to arrest, Hall, *supra* note 3, at 345-6.

20. "There's plenty of law at the end of a nightstick." Thus Commissioner Whalen of New York summed up the spirit of this sort of extra-judicial control of the populace by the police. Quoted in HOPKINS, *op. cit. supra* note 3, at 49. And see *id.* at 90, 94; WILLEMSE, *op. cit. supra* note 3, at 40.

21. McNabb v. United States, 318 U.S. 332 (1943) and Anderson v. United States, 318 U.S. 350 (1943) (illegal detention tainted confessions so as to make their admission reversible error *per se*), reversing previous doctrine that illegalities in the procurement of a confession, if it were "voluntarily" made, were relevant only in a civil action against the officials. People v. Mummiana, 258 N.Y. 394, 180 N.E. 94 (1932). The McNabb rule was shortly afterwards somewhat modified, however, Comment, 53 YALE L. J. 758 (1944), so that it is still uncertain whether the courts will exclude on mere showing of illegality where there is no doubt as to voluntariness. Strong reassertion of the McNabb rule is, however, provided in the recent holding in *In re Fried*, 161 F.2d 453 (2d Cir. 1947) *cert. granted*, 331 U.S. 804, which for the first time remanded a case because the lower court had failed to make a finding prior to indictment on the legality of the means by which a confession was secured. The court based its decision on the analogy to the exclusionary rule in search and seizures. The court declared: "The courts refuse to receive in evidence an unlawfully acquired confession, not because of its presumptive untruthfulness or unreliability or because it is irrelevant, but because of the illegality of the means by which it was acquired." *Id.* at 458. See Note, 38 J. CRIM. L. AND CRIMINOLOGY 509 (1948).

The similarity between the McNabb rule and the search and seizures rule was in a sense foreseen over 40 years ago, when the upstart rule of exclusion following illegal

gested in a variety of other fields,²³ the nullification principle was first enunciated

search was criticized as being contrary to the well accepted, pre-*McNabb* principle of the admissibility of illegally secured confessions. Note, 4 Col. L. Rev. 60 (1904).

22. *Nardone v. United States*, 308 U.S. 338 (1939). *Olmstead v. United States*, 277 U.S. 438 (1927) had held, over the eloquent dissents of Justices Brandeis and Holmes, that wiretapping did not constitute an unreasonable search within the meaning of the Fourth Amendment, and that the exclusionary rule did not apply. Although the *Nardone* opinion did not reverse the previous holding as to the status of wiretapping under the Fourth Amendment, it did hold that the exclusionary rule could be invoked on the ground that the tap was illegal under the newly enacted § 605 of the Federal Communications Act. See sources cited *supra* note 2.

23. *Illegal Arrest*: Almost universally, courts have allowed prosecution in spite of illegal arrest or illegal rendition across state lines. See Plumb, *supra* note 3, at 340, n. Defense attorneys, however, still suggest the extension of the exclusionary principle to this type of investigative illegality. See *Rose v. McKeon*, 190 Misc. 982, 76 N.Y.S.2d 391 (Sup. Ct. 1948).

Detectaphones: In *Goldman v. United States*, 316 U.S. 129 (1942) the Court relied on *Olmstead v. United States*, 277 U.S. 438 (1928), holding that use of detectaphones, like wire taps, was not repugnant to the Fourth Amendment, but that, unlike wiretapping, it was not subject to § 605 of the Federal Communications Act. There had been a previous illegal entry to install a dictaphone which, however, failed to work. Had it been used, the Court suggested ". . . it might, with reason, be claimed that the continuing trespass was the concomitant of its use." 316 U.S. at 134-5. But a detectaphone, unlike a dictaphone, can be—and was here—installed outside the room under investigation, and no "trespass" resulted. The lower court had likened it to ". . . the use of a common aid to hearing by a person somewhat deaf." *United States v. Goldman*, 118 F.2d 310, 314 (2d Cir. 1941). The court therefore refused to exclude evidence obtained by use of the detectaphone. Mr. Justice Murphy dissented on the ground that here was an unreasonable search, observing: "It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters. . . ." 316 U.S. at 141.

Entrapment: In *Sorrells v. United States*, 287 U.S. 435 (1932) the lower court ruled as a matter of law that there was no entrapment. The Supreme Court reversed, but with a fundamental disagreement among the concurring justices as to the nature of the defense of entrapment. Five Justices declared that the defense constituted a denial of the commission of the crime, and that therefore the question should go to the jury on the general issue. Justices Roberts, Brandeis and Stone, however, urged the discharge of the defendant on the ground that entrapment was properly considered a plea in bar: ". . . the courts must be closed to the trial of a crime instigated by the Government's own agents." *Id.* at 459. In other words, illegality on the part of government agents, once proved, should cause the release of the defendant, though he had committed the crime. See Kent, Note, *The Nature of the Defense of Entrapment*, 1 U. OF CHI. L. REV. 115 (1933).

Miscellaneous: See *Churn v. State*, 184 Tenn. 646, 202 S.W. 2d 345 (1947), 47 Col. L. Rev. 1380 (evidence excluded on the sole ground that during an otherwise legal search officials had committed a minor assault on the accused); *But cf. Stasney v. State*, 208 S.W.2d 894 (Ct. Crim. App. Tex. 1948) (officer's testimony as to defendant's drunkenness not inadmissible simply because of illegalities in the detention of the accused). *But cf. In re Wallace & Tiernan Co. Inc.*, 76 F. Supp. 215 (D.R.I. 1948) (grand jury at whose instance subpoenas were issued was illegally constituted; held, evidence secured by the subpoena must be returned and was inadmissible).

ated in a search and seizure case.²⁴ It remains today the sole instrumentality of the courts for maintaining legal standards in the procurement of evidence.

THE EXCLUSIONARY RULE

The specific rule in the field of searches and seizures was first laid down by way of dictum some 60 years ago: that evidence should be excluded if it had been illegally seized.²⁵ The audacity of the suggestion was perhaps partially responsible for its slow acceptance. It was 28 years after its first mention that the exclusionary rule was clearly enunciated by the Supreme Court,²⁶ and in the interim few states had discovered the existence of the principle,²⁷ despite the fact that almost all of the constitutions included a search and seizure clause.²⁸ With the advent of prohibition, however, the illegal search cases came thick and fast,²⁹ the doctrine grew and developed limitations,³⁰ and nearly half the states adopted it in one form or another.³¹ Despite the vigorous

24. *Boyd v. United States*, 116 U.S. 616 (1886).

25. *Boyd v. United States*, 116 U.S. 616 (1886) (statute requiring production of invoice of goods held by revenue officers, under penalty of forfeiture, held unconstitutional under Fourth and Fifth Amendments). The Court went to great lengths to assert a connection between the Fourth Amendment and the self-incriminating clause of the Fifth, and declared that the facts here constituted unreasonable search and seizure, and that evidence so "seized" was inadmissible. There appears no reason, however, why the case could not have been decided on the self-incrimination clause alone. See concurring opinion, 116 U.S. at 638; Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 (1921); Note, 4 COL. L. REV. 60 (1904). Apparently the first case to hold that evidence illegally seized, as distinguished from compelled in testimony, was inadmissible, was *United States v. Wong Quong Wong*, 94 Fed. 832 (D. Vt. 1899) which, on very different facts, cited the *Boyd* case as authority for the holding. Prior to the *Boyd* case, the law had been well settled, stemming in this country, apparently, from *Commonwealth v. Dana*, 2 Metc. (Mass.) 329 (1841), that the method of procurement of evidence did not affect its admissibility.

26. *Weeks v. United States*, 232 U.S. 383 (1914).

27. Apparently the first state to adopt the still embryonic federal rule was Vermont, *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 (1901), but it quickly distinguished the rule away. *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 (1905). The courts of a few other states soon adopted the rule, citing the *Boyd* case. Fraenkel, *supra* note 25, at 368, n. 43.

28. The state provisions as of 1930 are collected in CORNELIUS, *op. cit. supra* note 1, at 8. At that time 47 of the states included a search and seizures provision in their constitution or bill of rights. Only New York had a mere statutory provision, but its constitution was amended in 1938 to include the clause. N.Y. CONST. ART. I, § 12.

29. CORNELIUS, *op. cit. supra* note 1, preface; Comment, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 YALE L. J. 536, 537 (1927).

30. The device of exclusion was early extended to evidence acquired as a result of knowledge gained by a previous illegal search, in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920). Generally, as to the growth of the rule and the development of exceptions thereto, see Grant, *Circumventing the Fourth Amendment*, 14 So. CALIF. L. REV. 359 (1941). See pp. 153-60 *infra*.

31. Nineteen states have adopted the rule (Fla., Idaho, Ill., Ind., Ky., Mich., Miss., Mo., Mont., Ohio, Okla., Ore., S.D., Tenn., Tex., Wash., W. Va., Wis., Wyo.) while twenty-six have rejected it (Ala., Ark., Cal., Colo., Conn., Del., Ga., Iowa, Kan., La., Mo.,

protests of a sizable proportion of the commentators,³² the exclusionary rule must be regarded, at least as to the federal courts, as ineradicable law.

Of the possible explanations for the rule, the simplest and best seems to be that the searches and seizures clauses require it, if the granted immunity is to be in fact enjoyed.³³ The necessity which mothered the rule was the widespread practice of illegal search, untrammelled as it was by existing legal or social restraints.³⁴ Then and in recent years civil suits for damages have seldom been undertaken even by innocent search victims, for the same reasons which militate against the recovery of persons injured by any other police illegality. Despite the ineffectiveness of civil suit,³⁵ governments have generally failed to provide an effective statutory remedy for the search victim,³⁶ and have

Mass., Minn., Neb., Nev., N.C., N.D., N.H., N.J., N.M., N.Y., Pa., S.C., Utah, Vt., Va.). One state, Maryland, has virtually rejected the rule, while another, Rhode Island, is indefinite, and the last, Arizona, has reserved the question. See 1 WHARTON, EVIDENCE IN CRIMINAL CASES, § 373 (11th ed. 1935); 8 WIGMORE, EVIDENCE, § 2183 (3d ed. 1940).

32. It is contended against the rule that it succeeds in punishing neither the guilty defendant nor the guilty searcher, see pp. 160-3 *infra*, while those favoring the rule in effect confess, and avoiding say that the Fourth Amendment is meaningless without it. The most complete argument against the rule is given in Plumb, *supra* note 3, at 370-385. Among other arguments opposed are 8 WIGMORE, *op. cit. supra*, note 31, §§ 2183-4; WOOD AND WAITE, CRIME AND ITS TREATMENT 390-94 (1941); Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 ILL. L. REV. 303 (1925); KNOX, *Self Incrimination*, 74 U. OF PA. L. REV. 139 (1925); Waite, *Police Regulations by Rules of Evidence*, 42 MICH. L. REV. 679 (1944). Some of the principal arguments for the rule are found in CORNELIUS, *op. cit. supra* note 1, at 39-46; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11 (1925); Corvin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); Chafee, *The Progress of the Law*, 35 HARV. L. REV. 673, 694-704 (1922).

33. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Weeks v. United States*, 232 U. S. 383, 393 (1914).

34. "Once more we confront a rule disturbingly indicating failure of official discipline. Once more the courts have failed to discover adequate direct process for control of lawless enforcement of the law." MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 124-5 (1947).

35. No American case has been found in which large damages have been awarded for illegal search alone. The judge himself may suggest the award of only nominal damages. See *Fennemore v. Armstrong*, 29 Del. 35, 96 Atl. 204 (1915). It is not unusual to make significant the amount claimed by demanding punitive damages. See *Simpson v. McCaffrey*, 13 Ohio 508 (1845); *Gamble v. Keyes*, 35 S. D. 644, 153 N.W. 833 (1915). And see Hall, *Interrelations of Criminal Law and Torts*, 43 COL. L. REV. 967, 977-8 (1943) suggesting punitive damages for an "exceptional wrong" of this type. Even violence is not likely to enlarge damages, unless the injury caused is itself serious. See *Caffini v. Hermann*, 112 Me. 282, 91 Atl. 1009 (1914). And see Chafee, *supra* note 32, at 695.

36. See note 13 *supra*.

Whether the Federal Torts Claims Act provides a remedy for illegal search by

uniformly failed to prosecute the wrongdoers.³⁷ Thus the exclusionary rule's specific purpose is to furnish a needed deterrent to illegal search not otherwise provided by law.³⁸

Federal officers is not yet decided by a case holding, but there is one clear dictum to the effect that it does not. See *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal. 1947) (action against federal officers *qua* individuals, alleging illegal search and seizure beyond authority of office; court held that the Fourth Amendment could only apply to federal government and its agents acting as such, and defendants not liable as individuals). The court moreover stated that defendants could not be sued as federal officers, the federal government not having consented to suit, in view of § 421(h) of the Act, 60 Stat. 845 (1946), 28 U.S.C. § 2680(h) (1948), which exempts "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." A similar view as to this section's effect on illegal search claims seems to be implicit in Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L. J. 1, 49-50 (1946): "These exceptions are in accord with the exclusion of punitive damages under § 410(a) of the Act and together show the intent of Congress to exclude cases involving malicious and wilful torts from the pattern of this remedial legislation." Even were illegal search not characterized as a malicious or deliberate tort, there might not be liability. § 421(a) of the Act, 60 Stat. 845 (1946), 28 U.S.C. § 2680(a) (1948), withholds jurisdiction to consider "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." Thus to the extent that illegal search is treated as an abuse of discretion, there can be no recovery. The section is thus commented upon in Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Col. L. Rev. 722, 729 (1947): "The same policy considerations which argue against imposing personal liability upon an officer were apparently persuasive that the Government should also be free from liability for mistaken or even abusive exercises of judgment." It thus appears likely that most, if not all, illegal searches will be held not to create federal liability under the Act.

37. To some extent the lack of prosecutions in the states may derive from doubt as to whether illegal search constitutes a punishable crime. See *State v. Leathers*, 31 Ark. 44 (1876) (demurrer to indictment for search without warrant where there was no forcible entry held properly sustained because no statute defined the act as a crime); *State v. Wagstaff*, 115 S.C. 198, 105 S.E. 283 (1920) (defendants forcibly took satchel and searched it; conviction of simple assault and battery—not illegal search—sustained). But federal officers, though long restricted by a specific statute, have apparently never yet been prosecuted. See *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940). CORNELIUS, *op. cit. supra* note 1, at 45, declares: "[T]he writer has yet to learn of a single instance where either a state or federal officer has been prosecuted criminally for an illegal search and seizure, although extended inquiry has been made and illegal searches are common." And see Rosenzweig, *The Law of Wire Tapping*, 32 CORN. L. Q. 514, 553 (1947). And see note 14, *supra*.

38. The rule might be and sometimes has been identified with the catch-all principle of "clean hands." See dissents of Justices Holmes and Brandeis in *Olmstead v. United States*, 277 U.S. 438, 470, 483-5 (1928). It has been suggested that the interest of "Justice" itself must be "vindicated" by the exclusion of evidence illegally gotten. See GLUECK, *CRIME AND JUSTICE* 74 (1936). More specifically, it has been asserted that government is "the omnipresent teacher" and therefore that all branches of government, including the courts, must neither indulge in nor condone lawlessness in law enforcement, on pain of "terrible retribution" from the people. See Brandeis, J., dissenting in the *Olmstead* case, *supra*. But it seems possible to be still more specific. To the great mass

Although the courts might easily have articulated the rule so as to accord with its clear purpose, they seem from the outset to have been but dimly aware of its function and to have confused it too easily with unrelated doctrine. In particular, the doctrinal notion has grown that the rule resembles relief awarded to the defendants in a tort counterclaim against the prosecuting government.³⁹ The question on which admissibility depends is cast in the vocabulary of tort law: Did an "officer of our government" commit an "act of trespass" on "defendant's property"? The rule is said to provide a personal "protection" for the victim against illegal search, or, more precisely, to provide a "remedy."⁴⁰

The inconsistencies involved in the counterclaim concept of the rule are readily apparent. Since the rule is invoked only after the search has taken place, it cannot be said to "protect" the defendant from the illegal act itself; it can provide protection only from deserved conviction upon the evidence seized. Defendant thus is protected not from the wrongs of others, but against the just consequences of his own wrong.

If, on the other hand, exclusion is sought to be justified as a remedy, to compensate the defendant for the prior trespass, the objection first presents itself that the remedy does not become the wrong. Only fortuitously, moreover, is it related to the gravity of the wrong. In the many cases when the

of people the police, not the courts, are "the law," the teachers, and, in some cases, the tyrants. It is not the decisions of the courts *per se*, but their effect on police methods, which seems most likely to affect the everyday lives of citizens and their attitude towards law. Rather than excluding evidence on some vague theory of "clean hands," with its attendant doctrine developed in other fields of law, courts might better consider the rule specifically as a deterrent.

The rule might be, but never has been, doctrinally explained as an outgrowth of conceptions of an individual's right to due process. If it were construed as required by the Federal Constitution's due process clause, however, the Fourteenth Amendment would require not only the rule, but a uniformity of standards as to what constituted legal search. Since the efficiency and discipline of state police forces is highly variable, see Stone, *The Control and Discipline of Police Forces*, 146 ANNALS 63 (1929), uniform standards in this area might be undesirable.

39. See WHARTON, *op. cit. supra* note 31, §§ 374-5; 8 WIGMORE, *op. cit. supra* note 31, § 2184a. Wigmore, although recognizing the nature of the rule in discussing it among other "Rules of Extrinsic Policy" nevertheless criticizes it as an attempt to try a collateral cause of action. *Id.* § 2183.

40. The view is thus concisely stated by Judge Learned Hand in *Connolly v. Medalie*, 58 F.2d 629, 630 (2d Cir. 1932): "The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong . . . should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless."

search victim is not prosecuted, the "remedy" will not be available at all. If he is prosecuted and is innocent, the "remedy" is worthless. If he is guilty and is convicted, where the tainted evidence is insignificant, the victim gains nothing from his "remedy." Where he is guilty and exclusion of the illegal evidence secures his acquittal, the remedy—as in a murder trial—may be out of all proportion to the injury suffered.

The immunity given to the search victim, if rationalized as a protection or remedy designed for his benefit, rather than as a broad rule of public policy, thus amounts to unmerited partiality, unjustified by any extrinsic policy.⁴¹ Nevertheless, the courts have followed the counterclaim concept of the rule, and largely because of its influence have developed two major exceptions⁴² to the principle that evidence illegally seized is inadmissible.

The first of these, which may be termed the personal interest exception, is that the rule's protection may be claimed only by a person "aggrieved" by illegal seizure.⁴³ Only one whose constitutional rights have been invaded is said to be entitled to "complain";⁴⁴ the privilege of suppressing evidence is said to be "personal";⁴⁵ and suppression is likened to a "remedy" for the victim of the search, not to be sought by others.⁴⁶ Secondly, the rule is held

41. The following bitter passage has frequently been quoted, as descriptive of the effect of the rule: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 WIGMORE, *op. cit. supra* note 31, at 40.

42. Properly speaking, there are no exceptions to the exclusionary rule other than the two described in the text above. There is a time requirement as to when the motion to suppress must be made, see WHARTON, *op. cit. supra* note 31, § 376, which is sometimes confusingly termed an exception. Certain commentators, notably Wigmore, list as "exceptions" to the rule various concepts concerning the legality of the search. See WIGMORE, *op. cit. supra* note 31, § 2184a. The latter confusion is noted *infra*, pp. 161-2.

43. See *Kelley v. United States*, 61 F.2d 843, 845 (8th Cir. 1932). This is the word used to codify the limitation in Rule 41(e) of the Federal Rules of Criminal Procedure, 54 STAT. 688 (1940), 18 U.S.C. § 687 (1946). But see note 48 *infra*. For collections of cases on the limitation, see 78 A.L.R. 343 (1932); CORNELIUS, *op. cit. supra* note 1, at 54-8; WHARTON, *op. cit. supra* note 31, § 374; Grant, *supra* note 30, at 368-9. The first case involving an illegal search in which the limitation was applied apparently was *Moy Wing Sun v. Prentis*, 234 Fed. 24 (7th Cir. 1916), although the limitation had previously arisen in cases involving subpoenas duces tecum. *Hale v. Henkel*, 201 U.S. 43 (1906). See note 54 *infra*.

44. See *Ingram v. United States*, 113 F.2d 966, 968 (9th Cir. 1940).

45. *Penrod v. State*, 38 Okla. Crim. Rep. 46, 49, 258 Pac. 1052, 1053 (1927); CORNELIUS, *op. cit. supra* note 1, at 57.

46. See *Connolly v. Medalie*, 58 F.2d 629, 630 (2d Cir. 1932). Where defendants made no claim to ownership of the premises searched or the property seized, the court declared: ". . . [I]n the absence of such a claim they are in no position to raise the objection that the search was unreasonable or unauthorized, or that their constitutional

inapplicable if the evidence has been seized by persons other than officials of the prosecuting government, and without their prior encouragement.⁴⁷ Both limitations on the exclusionary rule are almost universally accepted in the federal courts⁴⁸ and in those state courts where the rule is in force.⁴⁹

rights were invaded." See *Lewis v. United States*, 6 F. 2d 222, 223 (9th Cir. 1925). "One malefactor may not claim the right to escape by reason of the fact that the constitutional rights of another were violated." *Holt v. United States*, 42 F.2d 103, 105 (6th Cir. 1930), quoted with approval in *Kelley v. United States*, 61 F.2d 843, 846 (8th Cir. 1932).

47. CORNELIUS, *op. cit. supra* note 1, at 50-67; 1 WHEARTON, *op. cit. supra* note 31, § 375. See also cases cited in notes 65-8 *infra*.

48. In cases of actual illegal search, the personal interest limitation has never been specifically upheld by the Supreme Court, although the point was virtually ruled upon in *Goldstein v. United States*, 316 U.S. 114 (1942), which was, however, a wiretapping case, not one under the Fourth Amendment. Apparently accepting tacitly the personal interest limitation, five justices held that a similar limitation applied *a fortiori* where the evidence was used merely to induce a witness to turn state's evidence, and the illegality was statutory rather than a violation of the Fourth Amendment. 316 U.S. at 121. The lack of precedent was thus made, by a bootstrap process, to strengthen, rather than weaken, the case for the limitation. Three justices dissented, saying that the limitation should not apply to the Federal Communications Act, and, further, questioning the soundness of the limitation in any context. 316 U.S. at 127. Of the present members of the court three (Black, Reed and Douglas) apparently favored the limitation, while two (Murphy and Frankfurter) opposed it.

See, as to cases involving subpoenas duces tecum, note 54, *infra*.

The circuit courts have unanimously upheld the limitation in the following cases: 2d Cir.: *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (1946); 3d Cir.: *Chepo v. United States*, 46 F.2d 70 (1930); 4th Cir.: *Chicco v. United States*, 284 Fed. 434 (1922); 5th Cir.: *Cantrell v. United States*, 15 F.2d 953 (1926); 6th Cir.: *Holt v. United States*, 42 F.2d 103 (1930); 7th Cir.: *Haywood v. United States*, 268 Fed. 795 (1920); 8th Cir.: *Kelley v. United States*, 61 F.2d 843 (1932); 9th Cir.: *Ingraham v. United States*, 113 F.2d 966 (1940); 10th Cir.: *McShann v. United States*, 38 F.2d 635 (1930). 1st Cir.: *See Klein v. United States*, 14 F.2d 35, 36 (1926).

A recent attempt to oust the well-entrenched personal interest limitation has apparently failed. Rule 41(e) of the new Federal Rules of Criminal Procedure, see note 43 *supra*, provides: "If the motion [for return and suppression of evidence by the aggrieved person] is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible *at any hearing or trial.*" [Italics added]. The wording could be taken to mean that once a motion is successfully made by the owner of the seized property, the non-owner would also be protected. However, the drafting committee had specified in the footnote to the rule that "this rule is a codification of existing law and practice," and had so indicated in various articles interpreting the rules. See *Dession, The New Federal Rules of Criminal Procedure*: II, 56 *YALE L. J.* 197, 243 (1947); *Holtzoff, The New Federal Criminal Procedure*, 37 *J. CRIM. L. & CRIMINOLOGY* 111 (1946); *Orfield, The Federal Rules of Criminal Procedure*, 21 *N.Y.U.L.Q. REV.* 167, 209 (1946). As between the wording and the apparent intent of the drafters, two district courts in the third circuit relied on the wording, and determined that under the rule, illegally seized evidence was "tainted" and could not be used against even a person who was not aggrieved. *United States v. Janitz*, 6 F. R. D. 1 (D.N.J. 1946); *United States v. Dugan & McNamara*, 16 *L. WEEK.* 2290 (1947). *Contra*: *Lagow v. United States*, 159 F.2d 245 (2d Cir. 1946). The Court of Appeals for the Third Circuit, however, has

The doctrinal rationalizations for the personal interest limitation, frequently attacked by the commentators,⁵⁰ are far from convincing. Since the rule was early based on the joint foundation of the Fourth Amendment and the self-incrimination clause of the Fifth,⁵¹ its protection was said to be limited to the accused.⁵² There appears, however, no reason why a rule designed to enforce an immunity against the search should depend on provisions other than the search and seizures clause, nor any reason why the self-incrimination privilege, which by definition can only be personal, should be engrafted to limit the enforcement device of a basically broad immunity. That it is not necessary to read the Fifth Amendment into the Fourth to justify the rule is evidenced by cases involving corporations. Corporations are protected by the rule,⁵³ although they are not protected by the privilege at all;⁵⁴ thus in corporate cases

recently indicated its agreement with the Second Circuit, by citing the *Lagow* case with apparent approval, on an appeal of the *Janitz* case on a procedural point. See *United States v. Janitz*, 161 F.2d 19, 21 n. (3d Cir. 1947). Thus, in the two circuits in which the point has been raised it is apparent that Rule 41(e) will not alter the limitation.

The second major limitation on the exclusionary rule has been developed by the Supreme Court itself and thus is universal in the federal courts. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence illegally seized by state officers not excluded); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (evidence illegally seized by private individuals not excluded).

49. See sources, notes 42 and 43 *supra*. Illustrative are: *Personal Interest Limitation*: *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922); *People v. Anscomb*, 234 Mich. 203, 208 N.W. 45 (1926); *Ragland v. Commonwealth*, 204 Ky. 598, 265 S.W. 15 (1924); *Search by Third Parties*: *Kendall v. Commonwealth*, 202 Ky. 169, 259 S.W. 71 (1924). But *cf. Lowry v. State*, 276 Pac. 513 (Okla. Cr. 1929).

50. Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 So. CALIF. L. REV. 60 (1941); Harno, *supra* note 32; Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures*, 34 W. VA. L. Q. 1, 15 (1927).

51. "And we have been unable to perceive that the seizure of a man's private books and papers to be used as evidence against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States*, 116 U.S. 616, 633 (1886).

The Fourth Amendment reads:

"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."

The self-incrimination clause of the Fifth Amendment reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

For a thorough criticism of the interdependence doctrine of the *Boyd* case, on historical and functional grounds, see WIGMORE, *op. cit. supra* note 31, § 2264.

52. See Corwin, *op. cit. supra* note 32, at 16, 203.

53. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

54. *Wheeler v. United States*, 226 U.S. 478, 480 (1913). The scope of the rule as it applied to corporations had been thoroughly examined for the first time in *Hale v. Henkel*, 201 U.S. 43 (1906), which involved a subpoena duces tecum directed to an officer of a corporation. In the course of the opinion the court stated 1) that a corporation was subject not only to the visitatorial powers of the state but to the investigation, by subpoena or otherwise, of the federal government; 2) that a corporation could not object to a

the rule stands on the strength of the search immunity alone. There seems to be no doctrinal justification for the double standard.

The illogic of limiting the exclusionary protection to the "aggrieved" party appears in a pattern of inequitable decisions. Where, for example, a conspiracy exists in which one member of a gang owns property used by all, the owner, frequently the master criminal, may go free, while his helpers are punished.⁵⁵ Where the papers of a corporation or association are illegally seized, the organization may claim its property, but neither stockholders,⁵⁶ officers,⁵⁷ employees,⁵⁸ or members⁵⁹ are personally entitled to invoke the rule,

subpoena on the basis of the self-incrimination privilege, since the latter was meant to be personal; 3) but that a subpoena might constitute an unreasonable search and thus a corporation might validly refuse compliance with it under the Fourth Amendment; 4) that a corporate officer could not object on the grounds that compliance would personally incriminate him. Apparently none of the four propositions had been clearly established prior to the *Hale* case.

Thus, in this type of case, the self-incrimination privilege was in actuality taken away from the individual, for whom it was originally intended, and in effect given (by means of the exclusionary rule) to corporations, for which it was not. See Justice McKenna, dissenting, in *Wilson v. United States*, 221 U.S. 361, 386 (1911). This construction has since been followed. *Wheeler v. United States*, 226 U.S. 478 (1913); *Essgee Co. v. United States*, 262 U.S. 151 (1923); *United States v. B. Goedde & Co.*, 40 F. Supp. 523 (E.D. Ill. 1941).

The doctrine that corporations, like natural persons, are protected by the Fourth Amendment, has been primarily significant in the field of government regulation of business, by providing a restriction on the permissible scope of the subpoena. The function of the exclusionary rule in these cases—that of limiting legislative power—is wholly different from its function in cases of actual illegal search—that of controlling police illegality. Nor does the permissible scope of the subpoena power bear any relation to the permissible scope of actual search, although a contrary notion has been expressed. See Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L. J. 571, 578 (1948). And see, generally, Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694 (1926).

55. See *Remus v. United States*, 291 Fed. 501 (6th Cir. 1923) (among seven co-defendants, one who owned property seized waived his objection to its admission in evidence; other co-defendants held not entitled to object on theory that only the owner could do so); *Kelley v. United States*, 61 F. 2d 843 (8th Cir. 1932) (defendant who had bootleg liquor in his custody as an employee of owner of premises when illegal search took place held not entitled to object to admission of evidence thus seized). But *cf.* *Alvau v. United States*, 33 F.2d 467 (9th Cir. 1929) (employee domiciled in owner's residence held entitled to join in motion to suppress).

56. *Bilodeau v. United States*, 14 F.2d 582 (9th Cir. 1926), *cert. denied*, 273 U.S. 737 (1926); *United States v. De Vasto*, 52 F.2d 26 (2d Cir. 1931). Here the owner of the evidence is held to be the corporation, and although the stockholders own the corporation, the corporate veil cannot be pierced; only the corporation may object.

57. *A. Guckenheimer & Bros. Co. v. United States*, 3 F.2d 786 (3d Cir. 1925), *cert. denied*, 268 U.S. 688 (1925) (corporation's president and director cannot object).

58. *Holt v. United States*, 42 F.2d 103 (6th Cir. 1930) (corporate agent in charge of trucking could not complain of illegal search of truck).

59. *Haywood v. United States*, 268 Fed. 795 (7th Cir. 1920), *cert. denied*, 256 U.S. 689 (1921). See *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922).

although only they can be said to have suffered, in any meaningful sense, an undue invasion of privacy.

But the most serious effect of the personal interest limitation—on a rule which is primarily designed to strike at the practice of illegal search—is its weakening of the judicial object lesson to investigative personnel. At present, if police in walking down a hotel corridor smell opium through a transom, and thereupon knock on the door, arrest the occupant and seize the opium, their action is held illegal for lack of a warrant and the evidence is inadmissible;⁶⁰ on the other hand, if police, in order to reach defendant's room, break into a boarding house, unwarrantedly search a series of rooms and finally, on reaching the defendant's room, act in what is declared to be a legal manner, their previous actions will not cause exclusion of the evidence seized.⁶¹ To the extent that the police and the prosecutors are familiar with the rule, they will then know that they may rummage everywhere for evidence concerning a suspect except among his belongings or in his house. No motion to suppress at the trial stage need be feared, there being no one who can successfully make the motion.⁶² And without accurate awareness of the technical doctrine involved, police may interpret judicial application of this limitation as a green light to further improper conduct.

The second major limitation to the exclusionary rule, that it may not be invoked where illegal search is made by persons other than the officials of the prosecuting government,⁶³ rests on the limited applicability of the constitutions and on the basic concept of sovereignty. The several constitutional provisions of the federal government and the states dealing with searches and seizures protect citizens only against actions by the particular government or its agents.⁶⁴ The courts, therefore, are said to have no power to protect the people against illegal searches of other agencies, or to censure or nullify those acts.⁶⁵

60. *Johnson v. United States*, 333 U.S. 10 (1948).

61. *McDonald v. United States*, 166 F.2d 957 (D.C. Cir. 1948).

62. Fraenkel, *supra* note 25, at 375, was perhaps the first commentator to condemn the limitation on this ground: "This last ruling [referring to *Haywood v. United States*, 268 Fed. 795 (7th Cir. 1920)], it is submitted, is at variance with both the letter and spirit of the Constitution, as it ignores the security given to the papers and effects as well as the houses of the people, and because it permits the Government to benefit by illegal search so long as it is careful not to take property from the possession of its owners." It has also been observed that the requirement that a defendant must allege and prove ownership of the seized property in order to move to suppress, *United States v. Edelson*, 83 F. 2d 404, 406 (2d Cir. 1936), means, in practice, that many defendants dare not so move when the illegality of the search is in any doubt. See Grant, *supra* note 30, at 370. Although it may be supportable that the defendant should be in the dilemma of having to confess ownership or waive the rule's protection, the requirement—a procedural implementation of the personal interest limitation—helps further to reduce the net effect of the rule on police action.

63. See note 47 *supra*.

64. *Barron v. Baltimore*, 7 Peters 243 (U.S. 1833).

65. "The record shows that what [the policeman] did by way of arrest and search

But the question remains as to what official acts of the prosecuting government are of such legal significance as to involve the government in the violation of the search immunity. The rule might perhaps be called into play only when the particular government's officials actually conducted the search; on the other hand, it might be invoked whenever such officials acted in such a way as to encourage illegal search by others. The line drawn by the courts, however, is somewhere in between. If the officers cooperate in the search⁶⁵ or instigate it by a prior agreement even of a generalized nature,⁶⁷ the evidence seized may be suppressed; if they merely make a practice of using evidence so discovered by others even if such practice is in fact well known, their actions are legally irreproachable.⁶⁸ The criterion is thus whether official encouragement of illegality has taken place before or after the particular search. Where in fact illicit searches are regularly and reciprocally made by various agencies and their fruits consistently delivered for use in prosecution to other agencies,⁶⁹ the distinction becomes non-existent. Routine acceptance and use of tainted evidence secured by another agency encourages illegal search to the same extent as would a prior agreement.⁷⁰

On doctrinal and practical grounds, which here seem to merge, the choice before the courts is between forbidding their officials to do the actual work of illegal search and forbidding them to link themselves to the chain of illegalities. The first alternative hardly enforces the constitutional immunity, for the police can always rely on others to commit the physical act of trespass.⁷¹ The second choice, by forbidding official use of illegally seized evi-

and seizure was done before the finding of the indictment in the Federal Court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitation reaches the Federal Government and its agencies." *Weeks v. United States*, 232 U.S. 333, 398 (1914).

66. *Byars v. United States*, 273 U.S. 28 (1927).

67. *Gambino v. United States*, 275 U.S. 310 (1927); *U. S. v. Falloco*, 277 Fed. 75 (W.D. Mo. 1922).

68. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Kendall v. Commonwealth*, 202 Ky. 169, 259 S.W. 71 (1924). See Black, *supra* note 8.

69. "In dozens of cases in my own experience as a Federal prosecutor we had to rely on the evidence procured by the unhampered police of the State of New York; or important criminals would have gone free." Statement of Thomas E. Dewey, in 1 *NEW YORK CONSTITUTIONAL CONVENTION, REVISED RECORD* 372 (1938).

70. "We exalt form above substance when we hold that the use is made lawful because the intruder is without a badge of office." Cardozo, J., in *People v. Defore*, 242 N.Y. 13, 22, 150 N.E. 585, 588 (1926).

"If [the Government] pays its officers for *having got* evidence by crime I do not see why it may not as well pay them *getting* it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits." (Italics added). Holmes, J., dissenting in *Olmstead v. United States*, 277 U.S. 438, 470 (1928).

71. With the police of other governments, long practice may establish a system of reciprocal favors. If aid of private individuals is desired, the system depends on suitable compensation as with the system of informers in the field of arrest. In particular cases,

dence, would place a direct responsibility on police to investigate by legal methods and would thus effectuate the overriding purpose of the immunity.

Apparently the one satisfactory explanation for the distinction presently made by the courts is the doctrinal one that again they are formulating the exclusionary device as a collateral cause of action, rather than viewing it in terms of the rule's function. A tort action for trespass would presumably fail at the point where it became impossible to show that the searcher was the agent of the government for commission of the particular tort.⁷² Where a prior agreement could be shown, agency would be established; where there was mere acceptance of the fruits of the search, it would perhaps be difficult to establish agency and thereby bind the actual principal. By the same token the exclusionary rule in its present posture requires, in effect, a showing of an agency relationship between government and searcher. If, however, the courts were to view their exclusionary invention as a method of reinforcing a constitutionally guaranteed immunity free of unrelated doctrine, the rule could be as broad as required for its purpose.⁷³

If legality is to be enforced by means of the rule, it is clear that its two chief exceptions must be eliminated. As long as police may evade the rule when evidence against a suspect is available among the belongings of third parties, or through the help of third parties, and as long as no other effective deterrent exists, the practice of illegal search will flourish despite judicial condemnation, and despite the existence of the rule.⁷⁴

THE RULE AS A COURT ENFORCEMENT DEVICE

Although full orientation of the exclusionary rule to the prevention of illegal search would be highly desirable if the rule be retained, it is far from generally conceded that the exclusionary device as such represents the most effective available deterrent. The searching criticisms and defenses of the

where sections of the public feel that their interests are at stake they may cooperate with police as vigilantes, rather than employees. See note 8 *supra*.

72. For an example of a court's use of the agency analogy, see *U. S. v. Falloco*, 277 Fed. 75 (1922).

73. A prohibition on use of evidence illegally seized in another jurisdiction might be grounded on general notions of fairness or public policy. See Brandeis, J., dissenting in *Burdeau v. McDowall*, 256 U.S. 465, 477 (1921). If the *acceptance* of the evidence by officials of the prosecuting government is to be deterred as undue encouragement of illegality, however, there appears no reason why exclusion should not be based simply on the fact of acceptance.

74. It has been estimated that during a seven-year period (1920-1927), in 290 of 490 federal illegal search cases involving liquor, evidence was admitted under exceptions to the rule. See Comment, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 YALE L. J. 536, 537 n. (1927). The weakening effect of the exceptions was recognized by many of the supporters of the federal rule when New York considered its adoption, and the proposal was made to eliminate the rule's two major exceptions. See VI NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE: SUB-COMMITTEE ON BILL OF RIGHTS AND GENERAL WELFARE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 215-220 (1938).

rule by the courts and commentators, argued and reargued almost since its inception, show a thoroughgoing disagreement as to the desirability and effectiveness of using the barrier of exclusion to stem police lawlessness.⁷⁵

The criticisms of the enforcement mechanism chosen by the courts fall into two general categories. In the first place, it is asserted that the rule, when it operates at all, may free otherwise guilty men, thus hampering law enforcement and punishing an innocent public.⁷⁶ In the second place, it is said that since the rule does not operate to punish the lawless searcher, it is not an effective deterrent to lawlessness.⁷⁷

The contention that the rule is bad because it operates to release the guilty men is analytically neither more nor less than an argument that in criminal investigation the end justifies the means. If the rule allows unmerited acquittals, it does so only in the cases where the illegality is indispensable to the conviction. An after-the-fact prohibition on use of the evidence prevents convictions in no greater degree than would effective prior direction to police to search only by legal means. Exclusion is restrictive only to the same extent as a high standard of police discipline. If too many criminals are acquitted in court or released prior to trial because legal means of investigation are required by the rule, it may well be concluded that the definition of legal means is too rigid,⁷⁸ or that the police are too lax or inefficient⁷⁹ to find legal

75. See note 32 *supra*.

76. Professor Waite has found that in a specified period in Detroit, one out of every four guilty "gun-toters" was released because of the exclusion rule. See Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749, 763-5 (1933). No estimate is given as to the proportion of men thus released whose conviction might have been secured by legal means.

77. "The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution and then proceeding to affirm the sentence of the convicted criminal." 8 WIGMORE, *op. cit. supra* note 31, § 2184.

78. Such, in fact, is the meat of almost every attempted criticism of the rule's effect on law enforcement. See especially Waite, *supra* note 32, at 685-7. And see articles cited note 32 *supra*.

A strong case may be made to the effect that the present definition of "probable cause" for a search warrant is not required by the Fourth Amendment. Marshall's definition of "probable cause," that it ". . . imports a seizure made under circumstances which warrant suspicion," *Locke v. United States*, 7 Cranch 339, 348 (U.S. 1813), is perhaps more supportable than today's strict requirements. See Note, *The Probable Cause Requirements for Search Warrants*, 46 HARV. L. REV. 1397 (1933).

Perhaps in the search-without-warrant field there is also room for some relaxation of standards. See WAITE, *CRIMINAL LAW IN ACTION* 80-87 (1934); Ploscowe, *Measures of Constraint in European and Anglo-American Criminal Procedure*, 23 GEO. L. J. 762, 793 (1935). And see *Carroll v. United States*, 267 U.S. 132, 149 (1925): "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

The anti-exclusion rule position in this respect is summed up in WOOD AND WAITE,

means of acquiring evidence. But the maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary.

That the exclusionary device does not function to deter the individual searcher is not proof of its inefficiency. The rule operates to hold the prosecutor and the police chief responsible for illegal search by their investigators, and to punish them, in a real sense, by marring their record of convictions and their reputation for effective and proper law enforcement.⁸⁰ By consistently bringing pressure to bear on top officials to discipline their own organizations, exclusion might be more effective than an action against the guilty searcher, which would seldom reach above the lower ranks. Since existing deterrents which depend on prosecution and civil suit are ineffective, and since the courts have no direct means of reaching individual offenders, a sanction against their superiors seems at least a reasonable substitute for purposes of judicial administration.⁸¹

The only alternative method of judicially controlling lawlessness which seems within the courts' inherent powers, an extension of the contempt sanction to apply to deviating officials, appears at best inadequate. With the aid of statutory authorization, it might be invoked against one seeking to introduce illegally seized evidence,⁸² on the theory that he thereby affronted the dignity of the court. But the threat of the sanction would discourage the use

op. cit. supra note 32, at 394: ". . . courts could mitigate the evils caused by their judge-made rule that evidence obtained by unreasonable search cannot be used for the public benefit, if they would but modify some of their opinions as to what is reasonable."

As to search without a warrant there is widespread disagreement as to what is "reasonable," opinions ranging from assertions that the founders meant all searches and seizures without judicial authority to be unreasonable, see Frankfurter, J., dissenting in *Davis v. United States*, 328 U.S. 582, 605 (1946), to suggestions that any search for evidence, on grounds of common sense suspicion, should be reasonable. See Waite, Comment, 42 MICH. L. REV. 147 (1943). There is also basic disagreement as to what constitutes "inspection" and what constitutes "search." Compare opinions of majority and minority in the *Davis* case, *supra*, and see *Flint v. Stone Tracy*, 220 U.S. 107 (1911); FREUND, *THE POLICE POWER* 42 (1904). Further, there appears no clear definition of the scope of reasonable search following legal arrest. Compare *United States v. Lefkowitz*, 285 U.S. 452 (1932) with *Harris v. United States*, 331 U.S. 145 (1947), and see Hill, *A Recent Extension by the United States Supreme Court of the Doctrine of Incidental Search*, 38 J. CRIM. L. & CRIMINOLOGY 244 (1947). See generally, Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472 (1948).

79. The range of abilities and aptitudes required of a modern policeman, and the difficulties involved in recruiting and training men fitted for the job are well summarized in VOLLMER, *POLICE AND MODERN SOCIETY* 216-237 (1936).

80. Fraenkel, *supra* note 25, at 372.

81. WOOD AND WAITE, *op. cit. supra* note 32, at 393, flatly deny that the federal rule has any beneficial effect at all. In fact, they say, the contrary is evident for police in states without the rule are no worse behaved than those in states with it. Such a conclusion, however, supportable or not, proves little, for police are able to evade the present rule through its exceptions in the states where it applies.

82. The suggestion was made in 8 WIGMORE, *op. cit. supra* note 31, § 2184.

not only of tainted evidence, but all evidence whose procurement was of even doubtful legality. The procedure would operate to free even more guilty defendants than does the exclusionary rule, and would similarly fail directly to punish the searching officer. If, on the other hand, the sanction were directed to officers violating search warrant instructions, on the theory that the violation was a contempt of court,⁸³ the sanction would fail to include the great majority of illegal search cases, in which no warrant is secured at all, for these cases would never reach a court. Furthermore, the incentive would be all the greater for neglecting to use the warrant.⁸⁴

Thus, of the two methods available to the courts to control illegal search, the exclusionary rule seems potentially the more effective.

Where illegally seized evidence is not intended to be used in court, the seizure is, as in other cases of illegality not incident to prosecution,⁸⁵ outside the control of the court. Clearly no court rule of evidence is likely to deter police from making such a search and seizure. In fact, as one commentator has suggested, the strictness of the exclusionary rule may increase the incentive for this type of infraction.⁸⁶ Certainly its existence is sufficiently separate from a search for evidentiary purposes, and its practice sufficiently widespread, to suggest the need for different treatment.

Since the essential devices of control needed for this type of police action are investigative and prosecutive, it would appear that the courts might well be supplied with an independent prosecuting arm to aid them. The function of such an agency would be to seek out lawlessness in law enforcement, prosecute offenders, and thus bring offenses within the jurisdiction of the courts.⁸⁷ Its character as an agency independent of the usual investigative bodies might be assured by allocating to the courts the power of appointing its members.⁸³

83. Contempt may of course be found where a district attorney refuses to return evidence on the court's order, see *Wise v. Wills*, 220 U.S. 549 (1911) and *Wise v. Henkel*, 220 U.S. 556 (1911), but such a sanction is no different from other contempts for disobeying court orders. There is no sanction thus imposed for the illegal search or against the searcher.

84. For a brief discussion of the problems involved, including the constitutional one, see *Plumb*, *supra* note 3, at 388-9. See, generally, as to the history and functions of civil and criminal contempt, Comment, 57 *YALE L. J.* 83 (1947).

85. See note 20, *supra*.

86. *Waite*, *supra* note 32, at 685-8.

87. Professor Chafee suggested the creation of such agencies in his preface to *HOPKINS*, *op. cit. supra* note 3.

The metaphor that the Constitution provides "both a shield and a sword" to protect civil rights, see *CARR*, *op. cit. supra* note 8, at 1-32, and *KONVITZ*, *THE CONSTITUTION AND CIVIL RIGHTS* (1947), might also be appropriately applied to protection of the public's civil liberties against official lawlessness. If the courts can invent an enforcement device to implement the Fourth Amendment, there seems no good reason why Congress could not constitutionally establish prosecuting agencies. Certainly the states could do so.

88. Such agencies should not only be free of control by the usual investigative and prosecutive bodies, but one step further removed from political taint. For the same reasons, it has been suggested that public defenders be appointed by the courts. See *FINAL REPORT OF SAMUEL SEABURY*, *supra* note 17, at 219-22.

In addition to extending the rule of law to police practices not incident to prosecution the institution of efficient prosecuting agencies would, in effect, replace the exclusionary device in its own sphere, for the threat of an action would forestall attempts to use unlawfully procured evidence. In the event of an agency's laxity or abuse of its power however, the existence of the exclusionary barrier would provide an alternative method of court governance of investigative methods.

CONCLUSION

Until legislators see fit to assert control over the whole array of official crimes by the creation of independent prosecuting bodies especially designed to govern law enforcement methods, the exclusionary rule will serve a useful purpose in its limited field. At least as to investigative illegalities, which must pass review of the courts, the rule is potentially an effective deterrent. Formulation of the rule in accord with its function would help fulfill a responsibility which the courts themselves have at least temporarily assumed.