Journal of Criminal Law and Criminology

Volume 49 | Issue 5 Article 7

1959

Exclusion of Illegal State Evidence in Federal Courts, The

Gerald H. Galler

nessee courts started with a case denying the defense because the facts did not substantiate a claim of entrapment and later cases have concluded that the defense is not recognized in the state.

In *Reigan v. People*[65] the Colorado court adopted a novel approach. Defendants, who were game wardens, approached two boys and suggested the boys trap beaver (which was unlawful) and sell the skins to the defendants. When charged with conspiracy to violate the Fish and Game Laws the defendants argued they were only testing the boys. The court rejected this claim, decided the boys had been entrapped, and affirmed the conviction of the wardens. The court said: "We do not wish to be understood as intimating that the services of a detective cannot be legitimately employed in the discovery of the perpetrators of a crime that has been, or is being, committed, but we do say that when, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime, and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal. . . ."[66]

Whether this is a sound approach is seriously doubted. Such a result as reached in *Reigan* will certainly make law enforcement officers more conscious of their duty to stay within limits when pursuing suspects. The weakness of *Reigan* is that it does not define those limits and in reality may hamper law enforcement, since officers will be extremely hesitant in testing suspects because conduct on their part, however slight it may be, which trangresses that indefinite line separating permissible from prohibited police conduct can subject the officer to criminal prosecution. When entrapment is established, discharging the accused is enough protection to society and to the defendant.

[65] 120 Colo. 472, 210 P.2d 991 (1949).

[66] *Id.* at 993, 994. The approach of the Colorado court affirms a suggestion made by Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 264 (1942).

CONCLUSION AND RECOMMENDATIONS

The sheer fiction of *Sorrells v. United States* in establishing legislative intent as the basis of entrapment should be rejected. If the courts hesitate to go as far as founding the doctrine on due process, the *Sorrells* and *Sherman* concurring Justices view of entrapment as resting on considerations of public policy should be adopted. The same factors will be relevant whether the basis is due process or public policy but the constitutional approach provides the stronger foundation.

The accused's conduct is relevant since society recognizes law enforcement officials must be allowed freer reign when pursuing the naturally wary criminal. Yet a mere showing of past criminal tendency should not preclude the defense. A suggested approach is to balance against any showing of criminal predisposition the fairness and decency of the police methods employed. Regardless of how black the defendant's past may be, this balance must be struck.

The issue of entrapment is generally submitted to the jury unless subject to ruling as a matter of law. While it may not make any difference who decides the issue—there being no evidence to infer a judge would reach a different verdict than a jury —there are certain factors which favor submitting the issue to the judge. As a means of protecting judicial processes, entrapment is similar to the power of the judge to punish for contempt or to exclude evidence illegally obtained. Entrapment is analogous to deciding questions of jurisdiction for in each instance the judge must determine whether the doors of the court are to be open. On these grounds the question of entrapment should be for the judge. A final argument for submitting entrapment to the judge is that he is better able to weigh the methods employed by law enforcement officials in light of the defendant's past conduct. His judicial training equips him to make such decisions of degree. It is also assumed that a judge is less likely than a jury to be emotionally swayed when a defendant with a shameful past stands trial.

THE EXCLUSION OF ILLEGAL STATE EVIDENCE IN FEDERAL COURTS

GERALD H. GALLER

In 1914 the United States Supreme Court in the leading case of *Weeks v. United States*,[1] adopted what is commonly called the "federal exclusionary rule." This rule excludes from the federal courts any evidence seized by federal officers in violation of the fourth amendment.[2] The basis for the rule

[1] 232 U.S. 383 (1914).

[2] "The right of people to be secure in their homes, houses, papers and effects, against unreasonable search and seizure, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath and

is that the fourth amendment's prohibition against unreasonable searches and seizures would be of no value if the federal courts sanction a violation of it by allowing such evidence to be used in the courts.

The Court specifically based its exclusionary rule upon the fourth amendment and stated that the rule has no application to state officers, "as the fourth amendment is not directed to individual misconduct of such officers. Its limitations reach the federal government and its agencies."[3] Consequently, the federal courts would allow the introduction in federal cases of evidence illegally seized by state officers.[4]

The evil engendered by the *Weeks* exception in favor of state officers was that federal officers, wishing to overcome the burden of obtaining a valid search warrant, could enlist the aid of a state officer whose illegally seized evidence would then be admissible in the proceeding in which the federal officer was interested. In order to combat this practice the federal judiciary evolved what has been called the "participation doctrine." The doctrine was first enunciated in *Byars v. United States*.[5] Here the Court held that unlawfully obtained evidence would be inadmissible if obtained by state officers "when the federal government itself, through agents acting as such, *participates* in the wrongful search and seizure." (Emphasis added.) The Court excluded the evidence in question upon a finding of overt participation of federal officers in the search. Only upon this basis would the Court exclude the evidence because, in accord with the *Weeks* doctrine, there was no federal constitutional objection to a state officer's illegal search and seizure.[6]

For thirty-five years following the *Weeks* case no question was raised as to the possible application of the fourth amendment to the states and their police officers. Then in 1949 the Supreme Court in *Wolf v. Colorado*,[7] held that unreasonable searches and seizures by state officers are prohibited by reason of the fourteenth amendment's due process clause, which was considered to embody a protection against such police activities. It was further held, however, that although the invasion by state officers was unconstitutional, state court admissibility of evidence unlawfully obtained is not a denial of due process, because the exclusionary rule is a judicially created rule of evidence and not a constitutional bar extending to state courts.

In the course of its reasoning, the Court declared its reluctance to interfere with the internal affairs of the states in the absence of an express provision in the constitution authorizing it to act. Finding no express provision requiring the states to adopt

affirmation, and particularly describing the place to be searched, and the persons or things to be seized". U.S. CONST. amend. IV, §1.

[3] Weeks v. United States, 232 U.S. 383, 398 (1914).

[4] "Generally speaking, in the federal courts, state officers are considered as strangers as far as the use of evidence procured by search and seizure is considered; and although search and seizure by state officers may be illegal if made entirely independent of any federal officer, the evidence seized is usually admissible in prosecutions in the federal courts." United States v. Haywood, 208 F.2d 156,158 (7th Cir. 1953).

For criticism of *Weeks*, see People v. Defore, 242 N.Y. 13, 150 N.E. 585, *cert. denied* 270 U.S. 657 (1926); 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940); Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 ILL. L. REV. 303 (1925); For approval of Weeks, see Anderson, *Admissibility of Illegally Obtained Evidence*, 8 U. DET L.J. 97 (1945); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Search and Seizure*, 25 COLUM. L. REV. 11 (1925).

[5] 273 U.S. 28 (1927).

[6] To clarify its position on the subject and because of the obvious difficulty in applying the participation doctrine, the Court in the same year broadened the test to be applied in Gambino v. United States, 275 U.S. 310 (1927). Here, state officers acting alone and under no known prior agreement with federal officers illegally seized evidence which, while it could prove a federal offense, was not relevant to any state crime. A unanimous decision held the evidence to be inadmissable on the ground that even though there was no participation by federal officers, the state police acted solely on behalf of the United States. At first blush, the case would seem to remedy the fault of the present law by discouraging state and federal officers from taking advantage of the former's "immunity" in the federal courts. The evidence would be suppressed if a "federal intention" could be found. However, this "intention" has been found to exist only where there was no state crime involved. In the majority of cases where state and federal crimes overlap, the Gambino test is of no significance. See Burford v. United States, 214 F.2d 124 (5th Cir. 1954); Symons v. United States, 178 F. 2d 615 (9th Cir. 1949); Miller v. United States, 50 F. 2d 505 (3rd Cir.), *cert. denied* 284 U.S. 651 (1931); Sloan v. United States, 47 F.2d 889 (10th Cir. 1930).

The "participation" doctrine has been recently restated in Lustig v. United States, 338 U.S. 74 (1949). "The crux of that doctrine is that a search is a search by a federal officer if he had a hand in it; it is not a search by a federal officer if evidence secured by state authorities is turned over to the federal authority on a *silver platter*. The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal officer in the total enterprise of securing and selecting by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it."

[7] 338 U.S. 25 (1949).

the exclusionary rule, the Court held that the imposition of such a prohibition upon the states would be an undue interference.[8]

Apparently the Court was impressed by the fact that only a minority of the states were then following the exclusionary rule in their own courts.[9] In support of its position, the Court stressed the fact that the states which have rejected the exclusionary rule rely upon other remedies.[10] In respect to the efficacy of these remedies, the majority refused to condemn them as falling below the minimal standards of due process.

Although the *Wolf* case has sharply limited the federal exclusionary rule by not applying it to the states, it left open an important question. Now that state officers are bound by the command of the fourth amendment, should evidence unconstitutionally seized by them continue to be welcome in the federal courts?

In ruling that the fourth amendment operates through the fourteenth to make unreasonable state searches unconstitutional, the Court in *Wolf* overruled the very constitutional holding which was the basis for the *Weeks* exception in favor of admitting illegally seized state evidence in a federal court. Now that the basis for distinction between state and federal officers has been eliminated, it is no longer consonant with reason and justice to apply the exclusionary rule differently in the federal courts according to the governmental affiliation of the searching party.

The Supreme Court was immediately aware of the possible consequences of the *Wolf* case on the *Weeks* decision[11] but has not entertained a case since then where the question had to be decided. Consequently, the lower federal courts have all adhered to the original rule as laid down in *Weeks*.[12] Recently, however, the United States Court of Appeals for the District of Columbia, in the case of *Hanna v. United States*,[13] came to grips with the problem. The court reversed a decision based upon evidence illegally seized by state officers, holding that such evidence should be inadmissible in a federal court. The basis for this revolutionary decision was that the *Wolf* case had overruled part of *Weeks* and the court was therefore free to apply the federal exclusionary rule to all illegal evidence sought to be used in a federal court.[14] Meanwhile, in the remaining circuits, the *Weeks* rule continues to be applied with its original potency.

The result of allowing such evidence in the federal courts has been the cause of many evils. The obvious one is demonstrated where federal and state crimes overlap. In these situations state and federal officers necessarily co-operate to a large extent in crime prevention and law enforcement.[15]

[8] Until the *Wolf* case the federal exclusion rule was treated in the federal courts as being an integral part of the fourth amendment and not a rule of evidence enacted to enforce it. Now that the *Wolf* case has declared that the fourth amendment applies to the states through the fourteenth amendment, an obvious inconsistency was manifested when the Court refused to allow the exclusionary rule to be included in the fourteenth amendment. This confusion was recognized by Justice Black in his concurring opinion in the *Wolf* case. He stated that he would concur in the result on the ground that the exclusionary rule was a rule of evidence since it would be anomalous to have this result while deeming the rule to be part of the Constitution. The practical effect of the case, then, is virtually to leave to state determination the matter of making effective a federal guarantee of a basic constitutional right.

[9] Only seventeen states were following the federal exclusionary rule at this time according to the appendix of Justice Frankfurter's opinion in the *Wolf* case.

[10] It was argued that there is a common law action for damages against a policeman who acts unlawfully and that most states have criminal sanctions against such conduct. See Wolf v. Colorado, 338 U.S. 25,30 (1949). A dissenting opinion points out, however, that a plaintiff would be likely to recover only nominal damages in a tort action and that it was rather naive to assume that a district attorney or policeman would be prosecuted "for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered." *Id.* at 42.

[11] In Lustig v. United States, 338 U.S. 74 (1949), decided immediately after the *Wolf* case, the Court found federal participation in an illegal seizure and excluded the evidence on that ground. Mr. Justice Frankfurter, however, stated that "where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." *Id.* 79.

[12] *E.g.* Gallegos v. United States, 237 F.2d 694 (10th Cir. 1956); United States v. Moses, 234 F.2d 124 (7th Cir. 1956); Serio v. United States, 203 F.2d 576 (5th Cir. 1953), *cert. denied*, 346 U.S. 887. *Cf.* Jones v. United States, 217 F.2d 381 (8th Cir. 1954), (where the court said that while the exclusionary rule in the federal courts is now subject to doubt since the *Wolf* case, they would continue to apply *Weeks* until the Supreme Court "expressly changes it".

[13] __F.2d__(D.C. Cir. 1958).

[14] The court looked at the entire picture of search and seizure and concluded that, "on principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded". The case was handed down as this Comment was about to be published.

[15] *E.g.*, Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties*, 45 ILL. L. REV. 1,23; statement of Thomas E. Dewey in N.Y. CONSTITUTIONAL CONVENTION, Revised Record 372 (1938), "In dozens of cases in my own experience as a federal prosecutor we had to rely upon the evidence procurred by the unhampered police of the State of New York or important criminals would have gone free".

If overt participation between the two is established, the evidence will be excluded in federal courts under the participation doctrine;[16] but the extreme difficulty of proving joint participation in an unlawful seizure tends to encourage the practice, thereby allowing federal agents to circumvent federal policy with the help of state officers. It is, therefore, far from realistic to treat state police as private citizens in applying the exclusionary rule in the federal courts.[17]

Rule 26 of the Federal Rules of Criminal Procedure[18] provides generally for the admissibility of evidence in the federal courts. The philosophy behind this rule is that there shall be a "uniform body of rules of evidence to govern in criminal trials in the federal courts."[19] The present procedure in most of the federal courts in this field of search and seizure, however, does not promote a uniform application of this rule in all cases. As has been pointed out already, while evidence tainted by federal participation in an illegal seizure will be rejected, the same evidence when submitted by state officers as the result of state raid will be admitted.

The defect in the present system is particularly offensive *when the officer involved is an officer of a state which has adopted the exclusionary rule.*[20] When, under such circumstances, unlawfully seized evidence is turned over to a federal prosecutor, both officials frustrate the spirit of the state and federal policy of exclusion. It has been declared by the ever increasing number of courts following the exclusionary rule that the rule is the most effective means of discouraging unlawful police action.[21] Therefore, allowing officers of these states to circumvent the state evidential rule of exclusion when state and federal crimes overlap is to pervert the purpose behind the adoption of the rule itself. The admission by federal courts of illegally seized evidence presented by state officers serves as a practical encouragement to these officers to continue their unlawful practices, and thus constitutes a hindrance to efforts to raise and maintain high standards in law enforcement activities—especially in those states that have adopted the exclusionary rule.

The case of *Rea v. United States*[22] should be considered here. In this case the Supreme Court, by a 5–4 decision, held that a federal officer could be enjoined from introducing illegally acquired evidence in a state court. The Court did not discuss any possible constitutional implications of the conduct involved, but based its decision solely on the theory that federal agents should not be permitted to flout federal policy by going into a state court. In this respect, the Court pointed to its "supervisory powers over federal law enforcement agencies." The "federal policy" presumably is to keep federal agents and courts "clean" of illegally seized evidence. Allowing state illegally seized evidence in the federal courts is as contrary to federal policy as allowing a federal officer to enter a state court with the same kind of evidence. The federal courts also have at least as much "supervisory power" over their own rules of evidence as they do over

[16] Lustig v. United States, 338 U.S. 74 (1949), Byars v. United States, 273 U.S. 28 (1927).

[17] The illogical result was eloquently illustrated by Justice Cardozo in People v. Defore, 242 N.Y. 13, 16, 150 N.E. 585, 588, *cert. denied*, 270 U.S. 657 (1926). "How finely the line is drawn is seen when we recall that marshals in the service of the nation are on one side of it, and the police in the service of the states are on the other. The nation may keep what the servants of the states supply.... The professed object of the trespass rather than the official character of the trespasser should test the rights of the government.... We exhalt form over substance when we hold that the use is made lawful because the intruder was without a badge of office."

[18] "The admissibility of evidence—shall be governed, except where an Act of Congress or these rules otherwise provide, by the principals of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

[19] Notes of Advisory Committee on Rules, FED. R. CRIM. P. 26.

[20] The following states follow the federal exclusionary rule: California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming. Also Alaska and District of Columbia. Alabama and Maryland have adopted a modified version of it. The cases are collected in 50 A.L.R.2d 531 (1956).

[21] California recently adopted the federal rule of exclusion. The court states that a system that permits the prosecution to trust habitually the use of illegally obtained evidence cannot help but encourage violations of the Constitution at the expense of the lawful means of enforcing the law. It was also stressed that if courts respect the constitutional provisions by refusing to sanction their violations, they will not only command the respect of the law-abiding citizens, but they will arouse public opinion as a deterrent to lawless enforcement of the laws by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).

[22] 350 U.S. 214 (1956). Federal agents arrested Rea on a federal narcotics charge. The narcotics were illegally seized and were suppressed in the federal court. Undaunted by this turn of events, the federal agents swore out a warrant charging possession of narcotics in violation of a state law. Rea went into a federal district court to seek an injunction which would prevent the federal agents from testifying.

federal officers. In the light of the philosophy expressed in *Rea*, it is questionable whether the continued admission into the federal courts of such evidence is consistent with federal policy as exemplified by the exclusionary rule.[23] Moreover, a recent case has held that the defense of entrapment will be sustained in the federal courts even though the officer entrapping the defendant was a state officer.[24]

There remains the question as to whether the rejection of such evidence would unduly disturb the delicate federal-state relationship. In the three main cases in this area, *Weeks*, *Wolf*, and *Rea*, this conflict of rights has been a major determining factor in the Courts' decisions.[25]

[23] Few states have ruled on the admissibility of evidence of officers from other jurisdictions. Those states which normally admit such evidence from their own officers have welcomed federally seized evidence. *E.g.* People v. Harmon, 89 Cal. App.2d 55, 200 P.2d 32 (1948); Terrano v. State, 59 Nev. 247, 91 P.2d 67 (1939); Commonwealth v. Colpo, 98 Pa. Super. 460, *cert. denied*, 282 U.S. 863 (1930).

Some of the states following the exclusionary rule will also admit such evidence holding that the state exclusionary rule binds only their own officers. *E.g.*, State *ex rel.* Kuhr v. District Court, 82 Mont. 515, 268 Pac. 501 (1928), (noting that the federal courts allow evidence illegally obtained by state officers, so by the same reasoning, a state should not question federally obtained evidence); Johnson v. State, 155 Tenn. 628, 299 S.W. 800 (1927) (dictum). *Cf.* People v. Touhy. 361 Ill. 332, 197 N.E. 849 (1935) (holding that illegally seized evidence of officers of another state admissible).

Other adherents to the exclusionary rule, however, exclude the evidence regardless of the governmental affiliation of the searching party. *E.g.*, Little v. State, 171 Miss. 818, 159 So. 103 (1935); State v. Arregui, 44 Idaho 43, 254 Pac. 788 (1927); State v. Rebasti, 306 Mo. 336, 347, 267 S.W. 858, 861 (1924), "It is unthinkable that a State court is powerless to protect the constitutional rights of its citizens, guaranteed by the Federal Constitution. To hold the evidence of the Federal agents admissible in this case is to pronounce that doctrine. It is to say that an act of an officer is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question."

No state has ever attempted to preclude one of its officers from going into a federal court with his illegally seized evidence. This possibility was discussed by one writer who concluded that a state attempting to enjoin its officers would run afoul of the supremacy clause of the Constitution. Parsons, *State-Federal Crossfire*, 42 CORNELL L. Q. 346, 363 (1957).

[24] Henderson v. United States, 237 F.2d 169 (5th Cir. 1956).

[25] The matter was put in classic terms by Chief Justice Taney in Abelmen v. Booth, 62 U.S. (21 How.) 506, 516 (1858). "The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."

In determining whether there is any federal-state conflict involved if the federal courts reject state-procured illegal evidence, it is pertinent to compare and analyze the situation with the law regarding wiretapping. Although wiretapping has been held not to be included within the prohibition of the fourth amendment,[26] the policy considerations and federal-state relationship in this field are the same.

Section 605 of the Federal Communications Act,[27] as construed by the Supreme Court, prohibits the interceptions of conversations over electronic communication media. The leading case applying this act is *Nardone v. United States*,[28] in which the Supreme Court rejected wiretap evidence procured by federal agents. This case may be likened to the *Weeks* case in that the act was construed to apply to federal officers when their evidence was introduced in a federal court proceeding. In *Schwartz v. Texas*,[29] however, illegally seized wiretap evidence of state agents was held to be admissible in a *state* court. The basis of this ruling was substantially the same as that of the *Wolf* case, i.e., the court's reluctance to interfere with the state court procedure even though it was pointed out that the act applied to state officers and made their wiretaps illegal.[30] But the ostensible gap between the effect of the *Nardone* and *Schwartz* cases was partially closed in *Benanti v. United States*,[31] a unanimous Supreme Court decision holding that wiretap evidence obtained by state officers was inadmissible in a federal prosecution. The *Schwartz* case was distinguished by the Court on the ground that the case involved a state proceeding and "that despite the plain prohibition

[26] Olmstead v. United States, 277 U.S. 438 (1928).

[27] "... No person not being authorized by the sender shall intercept any communication and devulge or publish the existence, contents, substance, purport, effect, or meaning of any intercepted communication to any person ...". 18 STAT. 1103 (1934), 47 U.S.C. §605 (1953).

[28] 302 U.S. 379 (1937). This revolutionary decision was soon followed by a holding which greatly increased the scope of the Act. In the second *Nardone* case not are communications themselves excluded, but also the only information gained by the government as a result of the wiretap. Nardone v. United States, 308 U.S. 338 (1939).

[29] 344 U.S. 199 (1952).

[30] This case illustrates the unwillingness of the Supreme Court of the United States to interpret any act of Congress or Constitutional provision to be binding upon the states unless it expressly is provided for. The Act in question was held to apply to the states, and the Act expressly prohibited the use of such evidence; yet, the Court would still not interfere.

[31] 355 U.S. 96 (1957).