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# Admissibility of Evidence Obtained by Unlawful Searches and Seizures

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# Admissibility of Evidence Obtained By Unlawful Searches and Seizures

> . . . [W]e must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.[1]

The above words, though pronounced by Mr. Justice Holmes in dissent, set forth the spirit and purpose behind the doctrine that evidence obtained through unlawful searches and seizures is inadmissible in the Federal courts. This doctrine, first established in *Boyd* v. *United States*,[2] later repudiated in *Adams* v. *New York*,[3] and restored—with modifications—in *Weeks* v. *United States*,[4] represents the Supreme Court's conclusion that the logical interpretation of the Fourth Amendment comprehends not only the prohibition of unreasonable searches and seizures, but also prohibition of the use of the forbidden fruits of evidence garnered by these unlawful procedures.

The Fourth Amendment was not conceived to be binding upon the states, and every state except New York had a similar constitutional provision. In New York this limitation on the power of the state is found in the Civil Rights Law.[5] In Virginia, Article I, Section 10 of the State Constitution provides as follows:

> *General Warrants of Search or Seizure Prohibited.*—That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and

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[1] Olmstead v. United States, 277 U.S. 438, 470 (1928).
[2] 116 U.S. 616 (1885).
[3] 192 U.S. 585 (1904).
[4] 232 U.S. 383 (1941).
[5] N.Y. Civil Rights Law §8 (1950).

supported by evidence, are grievous and oppressive, and ought not to be granted.

Thirty-one states, including Virginia, have judicial rulings in conflict with the Federal doctrine.[6] The Virginia view was pronounced in a lengthy opinion in *Hall* v. *Commonwealth ex rel. South Boston*,[7] with Mr. Justice West speaking for the Court. His opinion stressed the following points:

> (b) The provision of the Fourth Amendment, inhibiting search and seizure by officers without a search warrant *does not prohibit the introduction against the accused of the evidence procured in the course of the unlawful search.* The unlawful search is in itself a completed offense against the constitutional rights of the accused, of which the introduction of the evidence forms no part. Its introduction is the act of the court, and *not* the act of the offending party.
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> (c) An officer making a search without a warrant, or under an illegal warrant is a trespasser, and not the representative of the government. Nor is the introduction of the evidence illegally obtained by him a ratification of his illegal acts. Such evidence is of the same class as evidence illegally obtained by a private citizen, which is held to be admissible. . . .
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> (d) The language used by the framers of the state and federal constitutions clearly indicates that they intended to protect persons, houses, and effects against illegal searches and seizures by inflicting direct penalties upon the offending parties, and not by depriving the state or federal government of its right to use evidence, otherwise competent and pertinent, against those who have violated its penal laws.
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> (e) The law provides ample protection for the sanctity of the home by inflicting a proper penalty, as in other cases, upon the offending party in a direct proceeding instituted for that purpose.[8]

Thus, although we find agreement in the thought that the Fourth Amendment and similar provisions are desirable restraints on governmental power, there is a great deal less than unanimity

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[6] Table I, Appendix, Wolf v. Colorado, 338 U.S. 25, 38 (1948).
[7] 138 Va. 727, 121 S.E. 154 (1924).
[8] *Id.* at 748, 121 S.E. 154, 160.

for the proposition that in order to endow these checks of power with force and meaning, governments shall not use the evidence obtained through their violations. As discussed by Wigmore,[9] the common law before *Boyd* v. *United States*[10] considered the method whereby evidence was obtained to be a collateral issue not to be determined by the court and not affecting the admissibility of the evidence. *Weeks* v. *United States*[11] decided that evidence unlawfully procured would be excluded in the federal courts, provided the defendant made a formal motion before trial for the return of the evidence seized, and thus the illegality of the search and seizure was litigated before the trial of the main issue. Wigmore disapprovingly comments, "The point is that the fact of illegality of method in obtaining evidential materials is a collateral fact to the main issue; and all the motions in the world will not make it anything else."[12] Yet, there are few who would challenge the wisdom of amending a procedural rule of law in the interest of preserving a constitutional freedom.

In *Wolf* v. *Colorado* the Supreme Court in an opinion rendered by Mr. Justice Frankfurter stated:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment —is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.[13]

The Court neverthless declined to treat its rule as to non-admissibility "as an essential ingredient of the right,"[14] holding that the non-admissibility rule was a judicially created rule of evidence and hinting that Congress might have power to negate it by statute.[15] Justices Douglas, Murphy, and Rutledge dissented vigorously, holding to the view that the rule against admissibility is an intrinsic part of the Fourth Amendment, and that the Fourth Amendment should be construed as applicable to the the states through the Fourteenth. Justice Black likewise felt

[9] 8 Wigmore, *Evidence* 5 (3d ed. 1940).
[10] 116 U.S. 616 (1885).
[11] 232 U.S. 383 (1941).
[12] 8 Wigmore, *op. cit. supra* note 9, at 35.
[13] 338 U.S. 25, 27 (1948).
[14] *Id.* at 29.
[15] *Id.* at 33.

that the " . . . Fourteenth Amendment was intended to make the Fourth Amendment in its entirety applicable to the states," but concurred with the majority opinion that the non-admissibility rule was not a "command of the Fourth Amendment."

In attempting to appraise the conflicting views as to the admissibility of evidence obtained through illegal searches and seizures, the very presence of the Fourth Amendment in the Constitution is of significance. It may be argued that a limitation on the power of search and seizure is surplusage in an instrument creating a system of government which was to possess only those powers expressly or impliedly granted by the people to be governed. It is evident that the writers of the Constitution attached paramount importance to the immunity from unreasonable searches and seizures. The struggles in England against the general warrants[16] and in the colonies against the hated writs of attachment were very much in the thoughts of those who drafted the Bill of Rights. Those whose duty it is to interpret and administer the Constitution should be as zealous to activate the Fourth Amendment in its original spirit and intent since without such affirmative enforcement the amendment is reduced to a mere form of words.

> 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 seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[17]

*Hall* v. *Commonwealth*,[18] the basic Virginia case, observed that the state has fulfilled its duty to its citizens under Article 1, Section 10 of the State Constitution in providing the usual civil and criminal remedies to the injured party. The inadequacies of these remedies are dealt with by Mr. Justice Murphy in his dissent to *Wolf* v. *Colorado*.[19] Not only are the remedies inadequate to the injured party, but as a deterrent to would-be violators they are practically speaking, non-existent.

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[16] Money v. Leach, 3 Burr. 1742, 97 Eng.Rep. 1075 (K.B. 1765).
[17] Weeks v. United States, 232 U.S. 383 (1941).
[18] 138 Va. 727, 121 S.E. 154 (1924).
[19] 338 U.S. 25 (1948).

> The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.[20]

It is stated in the *Hall* case that the Fourth Amendment does not expressly prohibit the admission of evidence obtained by illegal searches and seizures.[21] This, of course, must be conceded. But manifestly the Fourth Amendment was not intended to provide a remedy for the breach but to establish a rule of conduct for the agents of government. The non-admissibility rule removes the incentive for the breach, while the so-called remedy neither protects the right nor cures the breach.

What interpretation of the laws of agency would convert an officer making an unlawful search and seizure into a "trespasser and not the representative of government"?[22] Is he on a "frolic of his own"? Note that the evidence is offered not by an individual, but by the police agency for which the illegal acts were performed, and in whose employ the guilty party usually remains. It can be strongly argued that this is indeed ratification of the illegal acts.

It has been said: "That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of rights by the police."[23] But to this Mr. Justice Frankfurter replied: "This court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured."[24]

The rule against admissibility has the merits of simplicity of interpretation and precision of application. A comparatively recent case demonstrated the need for such a criterion and also

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[20] Wolf v. Colorado, 338 U.S. 25, 44 (1948).
[21] 138 Va. 727, 748, 121 S.E. 154, 160 (1924).
[22] *Id.* at 749, 121 S.E. 154, 161.
[23] Irvine v. California, 347 U.S. 128, 136 (1954).
[24] *Id.* at 148.

gave a hint concerning the possible future development of the law. In *Irvine* v. *California*[25]—a case in which the police secretly made a key to the accused's front door, installed a microphone in his home by the use of the key and the boring of a hole through his roof, and entered the house twice more to move the microphone, first into the defendant's bedroom, and later into his bedroom closet—the Court found the action of the police "almost incredible,"[26] had the police themselves not admitted it. Yet the Court refused to enlarge the *Wolf* doctrine so as to make the non-admissibility rule binding upon the states, holding:

> Now that the *Wolf* doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power.[27]

The Court divided five to four on this case, with Justice Jackson writing the Court's opinion, in which Chief Justice Warren and Justices Reed and Minton joined. Justice Clark concurred in a separate opinion, and Justices Black, Douglas, Frankfurter and Burton dissented.

In his concurring opinion, Mr. Justice Clark stated that had he been on the Court in 1949 when the *Wolf* case was decided, he would have applied the *Weeks* doctrine to the states. He explained:

> But the Court refused to do so then, and it still refuses today. Thus *Wolf* remains the law and, as such, is entitled to the respect of this Court's membership.
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> . . . . .
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> In the light of the "incredible" activity of the police here, it is with great reluctance that I follow *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment for affirmance.[28]

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[25] 347 U.S. 128 (1954).
[26] *Id.* at 132.
[27] *Id.* at 134.
[28] *Id.* at 138, 139.

Mr. Justice Black and Mr. Justice Douglas dissented on the ground that the evidence against the accused was used in violation of the Fifth Amendment in that he had bought a federal wagering tax stamp and the information he thereby gave to the Federal Government was used against him by the California authorities.

Mr. Justice Frankfurter, joined by Mr. Justice Burton, dissented on the ground that the actions of the police in this case fell within the area prohibited by *Rochin* v. *California*[29] as violative of due process of law, quoting the opinion in that case that "Due Process of Law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that conviction cannot be brought about by methods that offend a 'sense of justice.' "[30]

The *Irvine* case, then, is one in which the actions of the police were described by the highest court of the land as "incredible." Mr. Justice Douglas said they "smack of the police state."[31] Four members of the Court dissented outright, and one went along "with great reluctance," with the final result that the judgment of the court was one which a majority of the members considered something to be desired; yet it became the ruling of the Court because the dissenters could not find common ground for dissent.

Incorporation of the non-admissibility rule into the Fourth Amendment and of the Fourth Amendment into the Fourteenth would remove the need for nice inquiries into the question of due process of law and provide an easily discernible guidepost for all concerned. Convictions procured by evidence gained through illegal searches and seizures should be considered in violation of due process of law—in whatever jurisdiction they occur. Corrective action on this subject, as an important matter of public policy, should commend itself to state legislators in those jurisdictions such as Virginia, where the rule favoring admissibility prevails.

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[29] 342 U.S. 165 (1952).
[30] *Id.* at 173.
[31] 347 U.S. 128, 139 (1954).

The rule requiring exclusion would have a salutary rather than a deleterious effect upon law enforcement agencies. Subjected to the public demand for apprehension and conviction of wrongdoers, and yet restricted by the constitutional injunction, police departments may be expected to improve their training and operation through modernization, enlargement, and greater adoption of scientific methods. The net result would be a more efficient police force, a higher percentage of convictions, and the enhanced respect of the citizenry toward the police and the law.

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