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The Fourth Amendment and the Exclusionary Rule in Civil Cases

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THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE IN CIVIL CASES

THERE undoubtedly remain many perplexing problems concerning the meaning and application of the exclusionary rule[1] in criminal trials,[2] but the most unsettled question relates to its application to civil trials. Does an individual have a right to have evidence excluded on the grounds that it was seized in violation of the fourth amendment when he is subject, not to a criminal prosecution, but rather to a civil suit instituted either by the government or by a private citizen? There are statements by the United States Supreme Court which are cited for the proposition that the fourth amendment and the exclusionary rule apply to *all* cases,[3] and others which are cited for the proposition that their application is limited solely to *criminal prosecutions.*[4] The difficulty involved in evaluating such authority is that in none of these cases was the Court specifically addressing itself to the problem of the application of the fourth amendment and the exclusionary rule to *civil cases.*[5] In only one case, *One 1958 Plymouth Sedan v. Pennsylvania,*[6] has the Supreme Court so addressed itself. In that case the Court held that evidence seized illegally by state agents could not be introduced into evidence in forfeiture proceedings. The first problem discussed in this Note deals with the

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[1] The rule set forth in Weeks v. United States, 232 U.S. 383 (1914), and made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961), excludes all evidence in criminal trials obtained in violation of the fourth amendment.

[2] See generally Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L. J. 319.

[3] In Weeks v. United States, 232 U.S. 383, 391-92 (1914) the Court said:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. *This protection reaches all alike, whether accused of crime or not* . . . . (Emphasis added.)

Similarly in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), the Court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Emphasis added.)

[4] In Burdeau v. McDowell, 256 U.S. 465, 475 (1921) the Court said:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, *and was not intended to be a limitation upon other than governmental agencies* . . . . (Emphasis added.)

[5] Weeks v. United States, 232 U.S. 383 (1914) was a criminal trial involving illegal seizure of documents. The statement in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) was made in reference to a subpoena for documents that had been illegally seized and returned. Burdeau v. McDowell, 256 U.S. 465 (1921) was a criminal trial in which evidence illegally seized by private individuals was turned over to the government.

[6] 380 U.S. 693 (1965).

applicability of this holding to other civil suits in which the government is a party, and the second involves the application of the exclusionary rule in private actions where the government is not a party.

I. CIVIL SUITS IN WHICH THE GOVERNMENT IS A PARTY

A. *Forfeiture Proceedings*

This area is the more settled of the two, particularly since the decisive opinion in *One 1958 Plymouth Sedan.*[7] Until this decision the circuit courts were split on the question of whether illegally seized evidence could be offered into evidence in forfeiture proceedings.[8] In *One 1958 Plymouth Sedan* two Pennsylvania officers stationed at the New Jersey border noticed a car entering Pennsylvania which appeared to be low in the rear. On stopping the car, they found thirty-one cases of liquor not bearing Pennsylvania tax seals, and immediately seized both the car and the liquor. In accordance with a Pennsylvania statute, which declared that no property right existed in any automobile used to transport illegal liquor and that such an auto was subject to forfeiture,[9] the government instituted an action for forfeiture of the car. The trial court sustained the defendant's contention that the testimony of the officers concerning the contents of the car should be excluded because the officers acted without probable cause, and dismissed the action.[10] The superior court reversed and ordered the automobile forfeited.[11] This order was affirmed by the state supreme court.[12] The United States Supreme Court reversed and

[7] *Ibid.*

[8] The confusion resulted in a large part from the failure of the circuit courts to distinguish between the illegality of the search and seizure as affecting the jurisdiction of the court to entertain the forfeiture proceeding and as affecting the admissibility of evidence so obtained. It was held in Dodge v. United States, 272 U.S. 530 (1926) that the jurisdiction of the court in a forfeiture proceeding depended solely upon whether the government had possession of the *res* at the time of the trial, and the manner in which it obtained possession was irrelevant. This rule is followed in all jurisdictions. *E.g.,* United States v. 1058 in United States Currency, 323 F.2d 211 (3d Cir. 1963); United States v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (4th Cir. 1958); Sanders v. United States, 201 F.2d 158 (5th Cir. 1953); Harman v. United States, 199 F.2d 34 (4th Cir. 1952). The problem arose when the courts attempted to construe the language of the *Dodge* case for the proposition that the exclusionary rule does not apply in forfeiture proceedings. See United States v. One 1956 Ford Tudor Sedan, 185 F. Supp. 76 (E.D. Ky. 1960). The Second, Seventh and Tenth Circuit Courts relied on Boyd v. United States, 116 U.S. 616 (1886) and held that evidence illegally obtained should be excluded in forfeiture cases. *E.g.,* United States v. Five Thousand Six Hundred and Eight Dollars and Thirty Cents in United States Coin and Currency, 326 F.2d 359 (7th Cir. 1964); United States v. Physic, 175 F.2d 338 (2d Cir. 1949); United States v. Butler, 156 F.2d 897 (10th Cir. 1946). For further discussion of the confusion see 69 DICK. L. REV. 284 (1965).

[9] PA. STAT. ANN. tit. 47, § 6-601 (1952).

[10] Pennsylvania v. One 1958 Plymouth Sedan, Misc. Liquor Condemnation Docket No. 4, Quarter Sessions Court of Philadelphia County, Pa., Feb. Term, 1961.

[11] Pennsylvania v. One 1958 Plymouth Sedan, 199 Pa. Super. 428, 186 A.2d 52 (1962).

[12] Pennsylvania v. One 1958 Plymouth Sedan, 414 Pa. 540, 201 A.2d 427 (1964).

remanded for a rehearing on the issue of probable cause.[13] In holding that the exclusionary rule applied to forfeiture cases, the Court relied heavily on *Boyd v. United States,*[14] stating that "although there is this factual difference between *Boyd* and the case at bar, nevertheless the basis of the *Boyd* holding applies with equal, if not greater, force to the case before us."[15] The reasoning of the Court was that although a forfeiture proceeding is technically civil, it is criminal in substance because it requires proof of a crime, and because the effect of the proceeding, loss of the automobile, was punitive rather than compensatory.

> Finally . . . a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law . . . . It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts.[16]

The Court also settled once and for all the distinction between contraband per se and derivative contraband. The general theory behind the distinction is that there exists a certain class of articles which, for the protection of the public, should never be allowed in the hands of private individuals. The most effective method to insure that such articles do not find their way back to their original possessor is to refuse to apply the exclusionary rule to evidence in forfeiture cases relating to the seizure of the articles. By thus making irrelevant the legality of the search, the state has only to prove that the individual had possession or used the goods in violation of state law. The courts, however, were not agreed as to the class of goods to which this reasoning should be applied. Some courts applied it to goods which, although not intrinsically illegal, were used for illegal purposes.[17] Others applied it only to goods the mere possession of which was illegal.[18] The Pennsylvania Supreme Court adopted the former application in holding that since the statute declares that no property right exists in any automobile used for the transportation of illegal

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[13] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702-03 (1965).

[14] 116 U.S. 616 (1886). In an action by the government to forfeit thirty-five cases of plate glass imported without payment of custom duties, the Court held that an order for production of papers and records was in violation of the fourth amendment.

[15] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 698 (1965).

[16] *Id.* at 700.

[17] United States v. 1058 in United States Currency, 323 F.2d 211 (3d Cir. 1963) (evidence relating to the illegal seizure of money in a gambling raid deemed admissible because the money was *used* for illegal purposes).

[18] United States v. Burns, 4 F.2d 131 (S.D. Fla. 1925) (illegally seized liquor not admissible in evidence since mere *possession* was not unlawful per se).

liquor, the possession of the auto was illegal and evidence relating to its search and seizure would not be excluded.[19] In other words, in determining if the exclusionary rule should be applied, the court did not rely on the intrinsic nature of a car, which is certainly not such as to make its possession illegal, but rather on the use to which the car was put, which did make its possession illegal. The Supreme Court rejected this application when it stated:

> It is apparent that the nature of the property here, though termed contraband by Pennsylvania, is quite different. There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss . . . . We, therefore, do not have a case before us in any way analagous to the contraband involved in *Jeffers* and *Trupiano* and these cases can in no way be deemed to impair the continued validity of *Boyd* which, like this case, involved property not *intrinsically illegal in character*.[20] (Emphasis added).

It can thus be concluded that in a forfeiture case involving an illegal search or seizure, the exclusionary rule will be applied to all evidence resulting from the search or seizure except when the goods are "property intrinsically illegal in character."[21]

B. *Tax Proceedings*

Although the *One 1958 Plymouth Sedan* case does leave unanswered a few questions relating to forfeiture proceedings,[22] the most stimulating question deals with its possible application to other types of civil suits by the government. One area involves tax collection suits by the government in which the assessment of properties is based on evidence obtained as a result of an illegal search and seizure. The protection of the fourth amendment is usually used as the basis for an action to restrain collection of the tax,[23] or as a defense to a suit in assumpsit by the government.[24] Although the protection has usually been afforded, it has been restricted to cases where the plaintiff could show that the government acted solely on the knowledge illegally obtained.[25] One court utilized the fruits doctrine

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[19] Pennsylvania v. One 1958 Plymouth Sedan, 414 Pa. 540, 201 A.2d 427 (1964).

[20] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699-700 (1965).

[21] *Id.* at 700.

[22] An interesting question not yet settled is the effect of an acquittal of the criminal charge on the forfeiture proceedings. Coffey v. United States, 116 U.S. 436 (1886) held that an acquittal on the criminal charge barred the forfeiture proceeding. However, the case has either been circumscribed or rejected in two later Supreme Court cases: Helvering v. Mitchell, 303 U.S. 391 (1938); Various Items of Personal Property v. United States, 282 U.S. 577 (1931). The Court has based its decisions primarily on the ground that the issues and burden of proof are different in the two proceedings. Problems relating to the effect of a conviction on the criminal charge, or no verdict at all, are discussed in Annot., 27 A.L.R.2d 1137 (1953).

[23] Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962); Tovar v. Jarecki, 83 F. Supp. 47 (N.D. Ill. 1948).

[24] Rogers v. United States, 97 F.2d 691 (1st Cir. 1938).

[25] Tovar v. Jarecki, 83 F. Supp. 47 (N.D. Ill. 1948).

of *Silverthorne Lumber Co. v. United States* [26] in granting an order barring the government from using "in any proceeding of any kind"[27] the evidence illegally obtained and from "reacquiring it by any means." [28] However, it was held in *Lord v. Kelley*[29] that although the government would be required to return the records illegally seized, a motion to suppress their use in subsequent criminal or civil proceedings would not be granted if the government had prior knowledge of the existence of the records.[30] It has also been held that illegally seized evidence in a tax assessment case may be used to impeach the petitioner.[31] Such would seem to be in accord with the rule that illegally seized evidence may be used for impeachment purposes in criminal cases.[32]

The *One 1958 Plymouth Sedan* case should have somewhat of a solidifying effect on these cases, since the basic reasons behind the holding in that case seem applicable. First, it appears that many of the cases involving tax assessment are brought in lieu of a criminal proceeding because of the realization by the government that a criminal proceeding would fail as a result of the exclusion of the illegally seized evidence. The terse analysis of such practices in forfeiture proceedings by Mr. Justice Bradley in *Boyd v. United States,*[33] cited in *One 1958 Plymouth Sedan,*[34] would seem applicable:

> If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants . . . can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be.[35]

Secondly, although proof of a crime is not required in these cases, and the result — the tax — is not criminal in effect, it is clear that the individual can be subject to penalties as severe as those imposed in many criminal cases.[36] The end result — penalties criminal in nature based on illegally seized evidence — is present.

In the use of the investigative powers of the Internal Revenue

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[26] 251 U.S. 385 (1920).

[27] Hinchcliff v. Clarke, 230 F. Supp. 91, 97 (N.D. Ohio 1963).

[28] *Ibid.*

[29] 223 F. Supp. 684 (D. Mass. 1963).

[30] *Ibid.* In this case the petitioner was required to keep the records by law.

[31] Compton v. United States, 334 F.2d 212 (4th Cir. 1964).

[32] Walder v. United States, 347 U.S. 62 (1954).

[33] 116 U.S. 616, 634 (1886).

[34] 380 U.S. at 697.

[35] 116 U.S. at 634.

[36] INT. REV. CODE OF 1954, § 7203, among other things, makes it a misdemeanor, punishable by a fine of not more than $10,000, or imprisonment for not more than a year, or both, for failure to keep records or supply information as required by law or regulation.

Service there is little doubt that where the evidence is obtained by "stealth or trickery" it will be excluded.[37] The unsettled area seems to concern the use by the Internal Revenue Service of its power to subpoena taxpayers' records.[38] The most frequent grounds for exclusion are that the subpoena constitutes an unreasonable search and seizure because it lacks specificity,[39] or because it imposes an oppressive burden on the taxpayer.[40] Since for failing to comply with a subpoena a taxpayer can be found in contempt of court,[41] as well as fined as much as 1,000 dollars, imprisoned for a year, or both,[42] it seems that the reasoning used in the case of tax assessments would be applicable and require that all evidence obtained as a result of a subpoena issued without probable cause be excluded.

C. *Condemnation Proceedings*

The holding in *One 1958 Plymouth Sedan* should have a determined effect on the body of case law holding that the protections of the fourth amendment do not apply in condemnation proceedings under the Federal Food and Drug Act.[43] It has been held: in a proceeding for condemnation of tuna fish, the order of attachment does not require a finding of probable cause;[44] misrepresentation of purpose by an inspector will not exclude evidence thereby obtained;[45] there need be no verification of probable cause in the affidavit supporting the condemnation proceeding.[46] One of the reasons given for the holdings in such cases is that since a condemnation proceeding is a proceeding in rem, as opposed to a proceeding in personam, the owner of the goods is not entitled to raise the protections of the fourth amendment.[47] This distinction, relied on by the Pennsylvania Supreme

[37] See generally De Reuil, *Applicability of the Fourth Amendment in Civil Cases*, 1963 DUKE L.J. 472; Gordon, *When Can Records Be Withheld During Tax Investigations?*, 17 J. TAXATION 174 (1962); Note, *Constitutional Aspects of Federal Tax Investigations*, 57 COLUM. L. REV. 676 (1957).

[38] See articles cited note 37 *supra.*

[39] See United States v. Morton Salt Co., 338 U.S. 632 (1950) (not too indefinite); Wilson v. United States, 221 U.S. 361 (1911) (suitably specific); Hale v. Henkel, 201 U.S. 43 (1906) (too sweeping to be reasonable).

[40] First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947) (subpoena requiring bank to produce six million records for inspection unreasonable). *But see*, United States v. First Nat'l Bank, 295 Fed. 142 (S.D. Ala. 1924).

[41] INT. REV. CODE OF 1954, § 7604.

[42] INT. REV. CODE OF 1954, §§ 7203, 7210.

[43] 52 Stat. 1040 (1938), 21 U.S.C. §§ 301-92 (1964).

[44] United States v. Eighteen Cases of Tuna Fish, 5 F.2d 979 (W.D. Va. 1925).

[45] United States v. Seventy-Five Cases, 146 F.2d 124 (4th Cir. 1944).

[46] United States v. 935 Cases, 136 F.2d 523 (6th Cir. 1943); United States v. Two Barrels of Desiccated Eggs, 185 Fed. 302 (D. Minn. 1911); United States v. 62 Packages, 48 F. Supp. 878 (W.D. Wis. 1943).

[47] In United States v. Seventy-Five Cases, 146 F.2d 124 (4th Cir. 1944), the court held that the goods were "outlaws of interstate commerce" and that since the action was not against the owner he could not raise the protections of the fourth amendment.

Court in *One 1958 Plymouth Sedan*,[48] and by various other courts in forfeiture cases,[49] was definitely rejected as immaterial by the United States Supreme Court in *One 1958 Plymouth Sedan*. The Court said:

> This Court in *Boyd v. United States* . . . rejected any argument that the technical character of a forfeiture as an *in rem* proceeding against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights.[50]

The distinction and its effects would seem to be equally irrelevant in condemnation proceedings.

Also, one ground upon which the decision in *One 1958 Plymouth Sedan* was based — that proof of a crime was necessary — would seem to have a bearing on these cases. Violation of the provisions in the Federal Food and Drug Act concerning misbranded and adulterated[51] goods not only subjects the goods to condemnation but also could subject the owner to criminal penalties.[52] The most effective argument for not extending the *One 1958 Plymouth Sedan* holding to condemnation proceedings is that misbranded or adulterated goods represent a threat to the public health, safety, and welfare. It will be recalled that in forfeiture proceedings it was concluded that the exclusionary rule will not apply to illegally seized property that is intrinsincally illegal in character, since to exclude the evidence would be in effect to allow the return of the goods.[53] It is submitted that the same policy consideration would govern in condemnation proceedings, at least in respect to those instances in which the deficiency could not readily be corrected or eliminated by the owner.

D. *Conclusion*

The principal result of the *One 1958 Plymouth Sedan* case is to illustrate that the fourth amendment will be applied to civil actions initiated by the government if the reasons are sufficient. It will be recalled that the Court approved the application of the fourth amendment and the exclusionary rule because: (1) The proceeding required proof of a crime; (2) The effect of the proceeding was criminal; and (3) It appeared that the government frequently brought the civil action in lieu of a criminal action. Whether its application to other areas will require all three of these factors, or a combination of any two, or just one, remains to be seen. True, there was no sweeping language to the effect that it would be applied in all such cases, but

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[48] 414 Pa. 540, 201 A.2d 427 (1964).

[49] United States v. One 1941 Chrysler Brougham Sedan, 74 F. Supp. 970 (E.D. Mich. 1947); United States v. One 1940 Packard Coupe, 36 F. Supp. 788 (D. Mass. 1941).

[50] 380 U.S. at 701 n.11.

[51] 52 Stat. 1042 (1938), 21 U.S.C. § 331 (1964).

[52] 52 Stat. 1043 (1938), 21 U.S.C. § 333 (1964).

[53] See notes 17-21 *supra* and accompanying text.

neither was there language restricting it to forfeiture cases. In other areas the lower courts have interpreted the fourth amendment as applying to civil actions brought by the government when abuses seemed apparent;[54] when the issue is presented in the future, it should be considered in light of the statement by Mr. Justice Clark in *Gouled v. United States* that the fourth amendment should "receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by [it,] by [the] imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers."[55]

II. PRIVATE ACTIONS

If it can be said that the present portends the increasing application of the fourth amendment and exclusionary rule to civil actions by the government, it can also be said that the future holds no such promise for civil actions by private citizens. In the first place, the case law indicates no such trend.[56] A sampling of the cases shows little consistency in approach or result. In *Lebel v. Swincicki*,[57] a suit for damages resulting from injuries sustained in a car accident, the plaintiff attempted to prove the intoxicated condition of the defendant by introducing into evidence blood taken from the defendant while he was unconscious. The court held that "the taking of blood for purpose of analysis from the person of one who is unconscious at the time constitutes a violation of his rights and that testimony . . . should not be admitted in evidence."[58] This result has been criticized on the ground that the plaintiff was innocent of any wrongdoing because it was the hospital that took the blood.[59] In *Walker v. Penner*,[60] the court allowed into evidence a bottle of whiskey illegally seized from defendant's car by the plaintiff's husband, stating that the exclusionary rule was limited to cases involving the government. In cases concerning alienation of affections, one court held that love letters from the defendant to the plaintiff's husband were admissible

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[54] In deportation proceedings it has been held reversible error to admit illegally seized evidence: *Ex parte* Jackson, 263 Fed. 110 (D. Mont. 1920); United States v. Wong Quong Wong, 94 Fed. 832 (D. Vt. 1899); Schenck v. Ward, 24 F. Supp. 766 (D. Mass. 1938). *Cf.*, Skeffington v. Katzeff, 277 Fed. 129 (1st Cir. 1922).

In Strawn v. Western Union Telegraph, Sup. Ct. D.C., March 11, 1936, commented upon in N.Y. TIMES, March 12, 1936, p. 1 (not officially reported), the court granted an order enjoining the telegraph company from complying with a blanket subpoena issued by the Senate Lobby Investigating Committee on the grounds that it amounted to an unreasonable search and seizure. See 84 U. PA. L. REV. 904 (1936).

[55] 255 U.S. 298, 304 (1921).

[56] See cases collected in Annot., 5 A.L.R.3d 670 (1966).

[57] 354 Mich. 427, 93 N.W.2d 281 (1958).

[58] *Id.*, 93 N.W.2d at 287. However, the court did not hold such error to be grounds for reversal because of the adequacy of other evidence.

[59] 17 WASH. & LEE L. REV. 155 (1960).

[60] 190 Ore. 542, 227 P.2d 316 (1951).

even though the plaintiff had violated the United States' postal laws in obtaining them,[61] but another court held that a plaintiff's fourth amendment rights were violated when his estranged wife took letters from his suitcase, and that the letters should have been excluded.[62] However, these and other state court cases are weak authority either for or against the proposition, since in most of them the court either handled the issue perfunctorily or relied on the pre-*Mapp* rules in criminal cases.[63]

In the most recent case, *Sackler v. Sackler,*[64] the issue ran the gamut of the court system of New York. In a suit for divorce by the husband, he attempted to prove his wife's adulterous conduct by offering evidence obtained when he and a force of private detectives illegally entered her apartment. At the trial level, the wife's motion to suppress this evidence was granted.[65] The appellate division reversed three to two,[66] and was affirmed by the court of appeals five to two.[67]

The *Sackler* decision resulted in a rash of comments,[68] most of which did little to clarify the issue. By careful analysis it can be seen that the question resolves itself into two distinct issues: (1) Does the fourth amendment protect individuals from illegal searches and seizures by other individuals? (2) If so, is the exclusionary rule to be applied to such evidence? Thus, the writers who begin by asking whether the exclusionary rule, as enunciated in *Mapp v. Ohio,*[69] should be applied in civil cases, fail to recognize the distinction between the two issues and thus omit half of the problem. A discussion of the second issue is valueless unless it is preceded by a determination that the fourth amendment does apply to the actions of private individuals.

A. *Applicability of the Fourth Amendment to Actions of Individuals*

In considering this first question, one argument against the proposition that the fourth amendment applies in civil cases can be quickly dismissed. It has frequently been stated that the historical purpose of the fourth amendment was to protect the citizens against

[61] Mercer v. Parsons, 95 N.J.L. 224, 112 Atl. 254 (1920).

[62] Kohn v. Superior Court, 12 Cal. App. 2d 459, 55 P.2d 1186 (1936).

[63] See Munson v. Munson, 27 Cal. 2d 659, 166 P.2d 268 (1946).

[64] 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

[65] 33 Misc. 2d 600, 224 N.Y.S.2d 790 (1962).

[66] 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (1962).

[67] 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

[68] 31 BROOKLYN L. REV. 407 (1965); 63 COLUM. L. REV. 168 (1963); Note, 48 CORNELL L.Q. 345 (1963); Note, 31 FORDHAM L. REV. 390 (1962); 25 MD. L. REV. 186 (1965); 46 MINN. L. REV. 1119 (1962); 43 N.C.L. REV. 608 (1965); 41 N.D.L. REV. 559 (1965); Note, 11 N.Y.L.F. 141 (1965); Note, 14 S.C.L.Q. 433 (1962); 16 SYRACUSE L. REV. 884 (1965); Comment, 110 U. PA. L. REV. 1043 (1962); Note, YALE L.J. 1062 (1963).

[69] 367 U.S. 643 (1961).

unfettered governmental action and that this purpose in itself precludes its application to private action. The majority opinion in *Sackler* [70] cited *Boyd v. United States*[71] in support of this proposition. That the original purpose of the fourth amendment was to protect against the odious writs of assistance and general warrants is not questioned.[72] However, the assumption that the historical purposes should serve to limit all later constructions of the amendment is questionable, and in light of the recent opinion by the United States Supreme Court in *Frank v. Maryland*[73] it seems unlikely that this limitation will be the case. In *Frank* the Court said:

> While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds.[74]

It has also been argued that the Supreme Court has already held that the fourth amendment does not apply to civil cases by virtue of its holding in *Burdeau v. McDowell*[75] which stated that evidence unlawfully obtained by a private person would not be excluded in a criminal prosecution since the Constitution does not apply to individuals.[76] The dissent in *Sackler*[77] argued that *Burdeau* was implicitly overruled by the holding in *Elkins v. United States*[78] that evidence seized by state officers in violation of the fourth amendment was inadmissible in federal courts. Indeed, *Elkins* was so construed in dictum in *Williams v. United States*.[79] These cases would seem to be poor authority since both involve criminal prosecutions. However, since *Burdeau* was also a criminal case, it is submitted that it should not be allowed to preclude a fresh examination of the issues.[80]

What then, are the possible constitutional grounds for applying the fourth amendment to private searches? The first possibility involves the right to be free from compulsory self-incrimination arising

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[70] 15 N.Y.2d 40, 42, 203 N.E.2d 481, 483, 255 N.Y.S.2d 83, 85 (1964).

[71] 116 U.S. 616 (1886).

[72] See COOLEY, CONSTITUTIONAL LIMITATIONS at 427 (7th ed. 1903).

[73] 359 U.S. 360 (1959).

[74] *Id.* at 365-66.

[75] 256 U.S. 465 (1921).

[76] *Id.* at 475. This case was relied on by the majority in the court of appeals decision in Sackler v. Sackler, 15 N.Y.2d 40, 42, 203 N.E.2d 481, 483, 255 N.Y.S.2d 83, 85 (1964).

[77] 15 N.Y.2d at 43, 203 N.E.2d at 484, 255 N.Y.S.2d at 86.

[78] 364 U.S. 206 (1960).

[79] 282 F.2d 940, 941 (6th Cir. 1960).

[80] In 72 YALE L.J. 1062, 1064 (1963) it is stated that "*Sackler* may be distinguished from *Burdeau* on the ground that the public's interest in criminal prosecutions was the gravamen in the latter case."

out of the "intimate relationship" between the fourth and fifth amendments.[81] In *Boyd,* Mr. Justice Bradley said:

> [T]he two amendments . . . throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment.[82]

Originally the application of the fifth amendment was limited to criminal proceedings,[83] but it has since been held applicable in civil proceedings, the only requirement being that it must appear that the incriminating evidence, if not excluded, could reasonably be said to lead to a criminal prosecution.[84] Analyzed in this light, the evidence should have been excluded in *Sackler* since the evidence obtained could well lead to a criminal prosecution for adultry. Just how heavily the Court has relied on this formula in criminal cases is not clear. It was not mentioned in the majority opinion in *Weeks v. United States*[85] or in *Elkins v. United States.*[86] However, in *Mapp* the Court indicated that this might have been partly responsible for their holding when they quoted the language in *Boyd* which states that the two amendments run "almost into each other,"[87] and indeed, Mr. Justice Black stated in his concurring opinions in *Mapp*[88] and *One 1958 Plymouth Sedan*[89] that it was this reasoning that persuaded him to abandon the position he took in *Wolf v. Colorado*[90] — that the constitutional provision against illegal searches and seizures did not require the exclusion of the evidence in state courts.

However, this argument contains the fatal flaw mentioned earlier in this section. The reasoning used in *Boyd,* mentioned in *Mapp,* and relied on by Mr. Justice Black in *One 1958 Plymouth Sedan,* was that the fifth amendment was the basis for *excluding* evidence seized in violation of the fourth amendment. The fifth amendment applies to the *exclusion* of the evidence, not to the seizure

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[81] Boyd v. United States, 116 U.S. 616, 633 (1886).

[82] *Ibid.*

[83] See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (pts. 1-2), 29 MICH L. REV. 1, 13-14, 191, 195-96 (1930).

[84] Brown v. Walker, 161 U.S. 591 (1896).

[85] 232 U.S. 383 (1914).

[86] 364 U.S. 206 (1960).

[87] 367 U.S. at 646.

[88] *Id.* at 661-66.

[89] 380 U.S. at 703-05.

[90] 338 U.S. 25 (1949).

of it. There must be independent grounds for holding that it was originally seized in violation of the fourth amendment.

Perhaps the most plausible method for accomplishing this is found in the argument for extending the "state action" concept as applied in *Shelly v. Kraemer*.[91] This case held that a state court's injunction enforcing a private covenant designed to discriminate against Negroes in the sale of property was state action denying equal protection. However, neither post-*Shelly* decisions[92] nor commentators[93] have construed this holding to apply to all judicial conduct which tends to encourage private behavior in which a state could not constitutionally engage. The present interpretation of *Shelly* seems to be that it is limited to instances in which the court is asked to *compel* a private citizen to do an act which would be unconstitutional for the state to perform as opposed to acquiescing in the admission of evidence offered by an individual, which if offered by the government, would be excluded.[94] Even though the Supreme Court has not shown any inclination to extend the application of this principle beyond cases involving racial discrimination,[95] neither has it definitely declined to do so, since the problem of "state action" as it relates to the fourth amendment in private actions has never directly confronted the Court. A warrant for its extension to private actions involving *reception* of evidence can be found in the realization that if one of the purposes of the concept is to discourage "private misconduct," it should make little difference whether the court is asked to enforce it or merely acquiesce in the reception of its results into evidence.

From this analysis it is evident that the first step in the application of the exclusionary rule to private actions presents serious obstacles. There seems to be no readily apparent basis for holding that the fourth amendment in any of its judicial interpretations applies to private actions, and without this there is little practical reason for considering the second step. One might also avoid a discussion of this second issue by determining that if the fourth amendment does apply, the exclusionary rule automatically applies. Indeed, it could

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[91] 334 U.S. 1, 15 (1948).

[92] In Black v. Cutter Labs, 351 U.S. 292 (1956) the Court refused to apply the *Shelly* reasoning when, in accordance with a collective bargaining agreement, the employee was discharged for membership in the Communist Party. In denying the employee enforcement of an arbitration award of reinstatement the Court held that the contract was of a local nature and did not raise a federal question.

[93] See Lewis, *The Meaning of State Action*, 60 COLLUM. L. REV. 1083, 1108-20 (1960); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 14 (1959).

[94] See 46 MINN. L. REV. 119, 1126 (1962); 72 YALE L.J. 1062, 1064 n.17 (1963).

[95] In Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (1961) the Court applied the state action concept to a Negro who was refused service in a restaurant on property leased by the state, but expressly limited its holding to the precise facts of the case.

be argued that as a result of *Mapp,* the exclusionary rule is now an inherent part of the fourth amendment right, and that anytime the latter is applied the former is also. If reflection on the criminal cases is of any help, it will be recalled that although the Supreme Court had been condemning unconstitutional searches and seizures for many years, it was not until 1914, in *Weeks v. United States* [96] that the Court decided to enforce it in the federal courts by means of the exclusionary rule. And although in 1949 the Court recognized that the fourth amendment applied to the states through the due process clause,[97] it was not until twelve years later in *Mapp* that they applied the exclusionary rule to state courts. Thus, even if one concludes that the remedy is now a part of the right, it is obvious that this is not so simply because of the inherent nature of the right. In reply to this it could be argued that we should learn from past mistakes and short-cut this torturous process by declaring *ab initio* that the remedy is inherent in the right. This would indeed foreclose discussion but for the fact that the policy reasons behind the application of the exclusionary rule in criminal cases are not applicable to civil cases.[98] Thus, after finding the fourth amendment applicable to civil cases, the Court may very well be faced with a similar arduous task of determining *which* remedy is most appropriate to give protection to the right.[99]

B. *Applicability of the Exclusionary Rule*

Assuming then that one of the grounds discussed above is found sufficient for applying the fourth amendment to private actions, and also that the exclusionary rule is not to be automatically applied, the discussion turns to the second issue — Should evidence seized unconstitutionally be excluded in private actions? Many of the arguments made both for and against the proposition that the rule should apply miss the point, for they fail to keep in mind the primary purpose of the exclusionary rule. It has been said that the purpose of the exclusionary rule is twofold: (1) To police the law enforcement agencies; and (2) To protect the civil rights of citizens by deterring future illegal searches and seizures by the police.[100] This analysis is misleading, since the purpose of the rule is not to punish the police, but to enforce the rights of citizens by deterring future illegal searches and seizures by the police. It was based on the proposition that the

[96] 232 U.S. 383 (1914).

[97] Wolf v. Colorado, 338 U.S. 25 (1949).

[98] See generally discussion notes 100-105 *infra.*

[99] Another difficult problem, not considered in this Note, is what standards would be used to determine if one individual had violated another's fourth amendment rights.

[100] 17 WASH. & LEE L. REV. 155, 159 (1960).

exclusionary rule would have a prospective effect on police behavior.[101] Thus, it is ineffectual to argue that since civil remedies are available against the violator there is no need for the exclusionary rule.[102] An action in trespass may punish the individual, but it is doubtful that it will have any deterrent effect.[103] Even assuming that a trespasser would consider the possible civil remedies available against him, he may proceed nevertheless, in the expectation that the damages he hopes to collect in his civil action will exceed the amount he may be required to pay in a trespass suit, since such damages are usually insignificant.[104]

The reasons for the application of the exclusionary rule in criminal cases are irrelevant when offered to support the proposition that the rule should apply in civil actions. The statement that it is logically inconsistent to make the application of the rule depend on the nature of the trespasser,[105] while reasonable at first glance, is fallacious when examined closely. It is this very difference between the government and an individual which supplies the rationale for the exclusionary rule in criminal cases. The police department is in the business of detecting crime, and supposedly, the exclusion of illegal evidence in one case will affect its behavior in the future. The only possible application of such reasoning in private actions would be in the case of a detective agency, in which case it could be argued that the exclusion of the evidence would modify their behavior in the future. In the case of a private citizen, however, his trespass is usually a singular affair, and thus in the average case the effect of the rule would be to punish rather than to deter. The argument that the trespasser will not win his case if the evidence is excluded[106] is not persuasive, since the purpose of the rule is not to prevent the winning of lawsuits, but to deter future illegal searches and seizures.

Thus, the reasons for the exclusionary rule as applied in criminal

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[101] That this was the main reason for the holding in *Mapp* can be shown from the Court's recognition of the failure of other means to deter the police.

> In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that 'other means of protection' have been afforded 'the right to privacy.' 338 U.S., at 30. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court . . . .

367 U.S. at 651-53. See also Elkins v. United States, 364 U.S. 206, 217 (1960).

[102] See 14 BUFFALO L. REV. 554 (1965).

[103] Suppose for example that *A* sees his wife enter a motel room with *B*. Is it reasonable to assume that he will refrain from entering the room for fear of a civil action in trespass or invasion of privacy?

[104] See Note, 72 YALE L.J. 1062, 1071 n.59-60 (1963).

[105] Sackler v. Sackler, 15 N.Y.2d 40, 44, 203 N.E.2d 481, 484, 255 N.Y.S.2d 83, 86 (1964) (dissenting opinion).

[106] See article cited note 100 *supra*.

cases are inapplicable in private actions, and the only remaining basis for its application would be the "intimate relationship" between the fourth and fifth amendments discussed earlier.[107] If the searches and seizures are found to be unconstitutional, the most reasonable grounds for excluding the evidence will be found in the protection of the fifth amendment.

C. *Equitable Considerations*

If reliance upon the Constitution as a means of excluding evidence in private actions appears too hazardous, there are two other possibilities. The first is based on the theory that the integrity of the judicial process requires the exclusion of tainted evidence. It has been relied on at least incidentally in several cases. In *Elkins v. United States*[108] the Court, in rejecting the "silver platter" doctrine said, "But there is another consideration — the imperative of judicial integrity."[109] In *Sorrells v. United States,*[110] Mr. Justice Roberts, in a concurring opinion, stated:

> Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong . . . . The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court.[111]

The principle was stated succinctly in *People v. Cahn:*[112] "Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' "[113] However, the above cases were all criminal prosecutions, and the principle was invoked incidentally. However salutory its purposes, it would seem a difficult task to convince a court to exclude vital evidence in a civil case solely on this ground.

The second possibility involves the "clean hands" doctrine which deprives the plaintiff of his cause of action if he has obtained the right by inequitable means.[114] The most common application of the doctrine has been to refuse judicial enforcement of illegal schemes,[115]

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[107] See note 90 *supra* and accompanying text.

[108] 364 U.S. 206 (1960).

[109] *Id.* at 222.

[110] 287 U.S. 435 (1932).

[111] *Id.* at 455-57.

[112] 44 Cal. 2d 434, 282 P.2d 905 (1955).

[113] *Id.*, 282 P.2d at 912.

[114] See McCLINTOCK, EQUITY § 26 (2d ed. 1948); 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed. 1941).

or of contracts deemed to be against public policy.[116] The reasoning that no one should be allowed to take advantage of his own wrong[117] appears applicable to a fact situation such as that present in *Sackler*, where the wrong was a deliberate planned trespass committed for the sole purpose of using the results as evidence.[118]

The real question is whether the policy considerations involved in the above theories are sufficient to overcome the common law doctrine that the manner of obtaining evidence is not cause for its suppression in a civil or criminal proceeding.[119] The purpose of the judicial inquiry is the ascertainment of the truth, and all relevant and reliable evidence should be admitted unless the exclusion of the evidence "has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[120] Public policy has been deemed sufficiently overriding in the instances of evidence obtained in the course of a husband and wife relationship,[121] or an attorney and client relationship,[122] but the reasoning here is founded upon the belief that exclusion of the evidence will tend to preserve and further such relationships in the future,[123] and such a concept of continuity is lacking in illegal searches by private persons. The most persuasive principles of public policy would seem to lie in a synthesis of the values espoused in the "contamination" and "clean hands" doctrines.

D. *Conclusion*

In summary, it is evident that the question of the application of the exclusionary rule to civil cases involves a maze of both legal and policy questions. If the Constitution is relied upon to exclude the illegally seized evidence, it must be first determined that private action falls within the scope of the fourth amendment. The only presently apparent ground for doing this is to decide that it would be "state action" for a court to admit evidence which if seized by the government would have been illegal. If by the use of this concept,

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[115] The courts often dismiss actions in which the plaintiff has fraudulently lured the defendant into the jurisdiction in which to obtain service. Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937); Dunlop & Co. v. Cody, 31 Iowa 260 (1871); Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539 (1902).

[116] Crocker v. United States, 240 U.S. 74 (1916); Hazleton v. Sheckels, 202 U.S. 71 (1906).

[117] See BLACKSTONE, COMMENTARIES at 952 (Gavit. ed. 1941).

[118] 33 Misc. 2d 600, 605, 224 N.Y.S.2d 790, 795 (1962).

[119] 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).

[120] Elkins v. United States, 364 U.S. 206, 234 (1960) (dissent by Mr. Justice Frankfurter).

[121] MCCORMICK, EVIDENCE § 82 (1954).

[122] *Id.* § 91.

[123] *Id.* § 72.

the first obstacle is thus overcome, there must be adequate policy reasons for *excluding* the illegally seized evidence. Since the reasons for exclusion in criminal cases are irrelevant in civil cases, the most logical ground for exclusion would be the fifth amendment — that by admitting over objection evidence seized in violation of the fourth amendment, the witness is being forced to testify against himself. In order to do this, Mr. Justice Black would have to convince a majority of the Court that this was why they excluded illegally seized evidence in criminal and quasi-criminal cases.[124] Aside from these constitutional grounds, the only other apparent reason for excluding the evidence would be based purely on public policy — the integrity of the judicial process and the feeling that no one should profit from his own wrong demand that the tainted evidence be excluded.

In the final analysis it appears that the application of the exclusionary rule in private actions is unlikely. Until more persuasive constitutional grounds are proposed, there appears to be no basis for the application of the fourth amendment, and until a better enunciation of the public policy reasons involved is given, it is submitted that the courts will not so hinder the judicial process in its ascertainment of the truth.

Harry N. MacLean

[124] See note 90 *supra* and accompanying text.