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Federal Courts' Control of Illegal Conduct of State Officers Who Aid in Enforcement of Federal Law

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FEDERAL COURTS' CONTROL OF ILLEGAL CONDUCT OF STATE OFFICERS WHO AID IN ENFORCEMENT OF FEDERAL LAW

The defendants were arrested by a state law enforcement officer. After placing the defendants in custody, the officer made an illegal search of their car and seized incriminating evidence. The evidence and the defendants were then turned over to federal authorities for federal criminal prosecution.[1]

An accused in such a case is clearly a victim of illegal conduct by state officers. He desires to rely on this conduct to exclude the evidence which has been illegally obtained; yet he is faced with the fact that federal courts do not consider a state officer, not acting in concert with federal authorities, an agent of the federal government, but rather a "stranger"[2] to the proceedings over whom they have no direct control. This Note will attempt to determine under what conditions federal courts will and should *indirectly* control the conduct of state officers by excluding evidence or granting an acquittal. The discussion will be limited to the acts of illegal search and seizure, unreasonable detention, and entrapment, which constitute the majority of illegal police conduct. The extent to which federal courts will and should control these acts of state police will be determined by an examination of the manner in which the law has developed in these areas, an analysis of the distinctions which have been drawn, and a presentation of a number of important considerations essential to any sound solution of the problem.

Search and Seizure

Evidence obtained by state officers in a search and seizure which would have been illegal by federal standards will nevertheless be admitted into a federal court if there is no evidence of federal participation or instigation.[3] The rationale for this exception to the federal exclusionary rule is somewhat formalistic. It is founded on the assumption that the federal exclusionary rule is a command of the fourth amendment which does not apply to the states.[4] Since an unreasonable search and seizure by a state officer does not violate the fourth amendment, the evidence obtained is not subject to the federal exclusionary rule.[5]

1. Shurman v. United States, 219 F.2d 282 (5th Cir.), *cert. denied*, 349 U.S. 921 (1955).
2. See United States v. Haywood, 208 F.2d 156, 158 (7th Cir. 1953).
3. Weeks v. United States, 232 U.S. 383 (1914); Lustig v. United States, 338 U.S. 74, 78-79 (1949) (dictum).
4. See, *e.g.*, Wheatley v. United States, 159 F.2d 599, 601 (4th Cir. 1946).
5. Weeks v. United States, 232 U.S. 383 (1914).

This exception appears to sit uncomfortably with the principles which support the general rule of exclusion in federal courts. It encourages police lawlessness by prompting federal officers to employ state officers to make illegal search and seizures so that the federal exclusionary rule may be circumvented.[6] It places the burden on the accused to prove the actual agreement or persuade the court to draw an inference of collaboration from the facts.[7] These results can be neither justified nor condemned without an examination of the origin, use, and modification of this exception to the federal exclusionary rule.

Initially, this exception was formulated in *Weeks v. United States*.[8] The Supreme Court said that evidence obtained by state officers in an illegal search and seizure would not be excluded because:

> It does not appear that they [state officers] acted under any claim of Federal authority such as would make the Amendment [fourth] applicable to such unauthorized seizures.... What remedies the defendant may have against them we need not inquire as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies.[9]

This broad language was soon restricted by the court of appeals in *Flagg v. United States*.[10] The court found that the illegal search and seizure had been instigated by federal officers because:

> [T]o attribute such an elaborate and carefully prepared proceeding as was planned to convict the defendant, to a few local patrolmen or to some unknown parties . . . makes too severe a demand upon the imagination.[11]

The usefulness of the *Flagg* case in controlling police illegality was short-lived. In 1921, the Supreme Court in *Burdeau v. McDowell*[12] held that the federal government could use evidence which had been illegally obtained by *private individuals*. Subsequently, the fed-

6. For recent discussion of the dangers inherent in this qualification see Machen, The Law of Search and Seizure 125-27 (1950); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1, 23 (1950). See generally Comment, *Judicial Control of Illegal Search and Seizure*, 58 Yale L. J. 144 (1948).

7. The present test for federal participation is the so-called "silver platter" test announced by Justice Frankfurter in *Lustig v. United States*. Speaking for the majority, he stated that "the crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." 338 U.S. 74, 78-79 (1949).

8. 232 U.S. 383 (1914).

9. *Id.* at 398.

10. 233 Fed. 481 (2d Cir. 1916).

11. *Id.* at 483; *accord*, United States v. Bush, 269 Fed. 455 (D.C. N.Y. 1920).

12. 256 U.S. 465 (1921).

eral courts began to consider state officers as "private individuals" and admit evidence which had been illegally obtained by these officers without a great deal of concern over the degree of cooperation between federal and state officers.[13] This result was no doubt due to the courts' desire to aid federal officers in their increasingly difficult task of enforcing the federal prohibition laws.

However, the abuses of dispensing with an accurate determination of federal participation for the sake of enforcing the National Prohibition Act soon became apparent.[14] The Supreme Court sought to remedy the situation in *Byars v. United States*,[15] and *Gambino v. United States*.[16] The Court held in the *Byars* case that the mere presence of a federal officer during the act was sufficient participation. This rule was broadened in *Gambino*, where the Court excluded evidence obtained by state police in an illegal search for liquor even though federal officers had not participated in the act. The Court reasoned that the state police were acting "solely on behalf of the United States" in the enforcement of its law because no violation of a state law was involved.

The immediate response of the lower federal courts to the *Gambino* case was to limit it to its facts[17] or to utilize the law of arrest[18] to restrict the broad scope which the Supreme Court had given to

13. For an apparent classification of a state officer as a private individual, see United States v. Viess, 273 Fed. 279, 282 n.1 (D.C. Wash. 1921). As to lack of concern over federal-state cooperation, see, *e.g.*, Park v. United States, 294 Fed. 776 (1st Cir. 1924); Timonen v. United States, 286 Fed. 935 (6th Cir. 1923). But see *In re* Schuetze, 299 Fed. 827 (D.C. N.Y. 1924); United States v. Falloco, 277 Fed. 75 (D.C. Mo. 1922).

14. See Brown v. United States, 12 F.2d 926 (9th Cir. 1926), in which federal agents instructed city police to make the search, accompanied them to the scene, and entered after the evidence was seized. Yet the court held that the federal officers "took no part in the search and the search was not made under their authority." *Ibid.* In Schroeder v. United States, 7 F.2d 60 (2d Cir. 1925), although there was no state prohibition law in force, the court refused to find collaboration where a city policeman illegally seized liquor and turned it over to federal authorities.

15. 273 U.S. 28 (1927). See Comment, 36 Yale L.J. 988 (1927), for a discussion of the situation which the Court in *Byars* sought to correct.

16. 275 U.S. 310 (1927), 12 Minn. L. Rev. 424 (1928). It is interesting to note that the dissent in Kanellos v. United States, 282 Fed. 461, 464 (4th Cir. 1922), may have anticipated the result in *Gambino*.

17. See United States v. Blanco, 27 F.2d 375 (D.C. Tex. 1928).

18. Immediately after the decision, the federal courts resorted to state law to justify an arrest by a state officer for possession of liquor. If the federal court could find that the state officer made the arrest for a violation of a state statute or municipal ordinance such as a traffic regulation, any evidence discovered by a subsequent search and seizure without a warrant would be admitted into federal court because it was obtained pursuant to a "valid arrest." See March v. United States, 29 F.2d 172 (2d Cir. 1928), in which the justification for the search and seizure by state officers was an alleged failure to stop for a traffic light. See also United States v. Jankowski, 28 F.2d 800 (2d Cir. 1928), in which a defective headlight provided grounds for a "valid arrest" and subsequent search by state officers.

the fourth and fifth amendments. However, the lower federal courts soon became willing to find federal-state collaboration without substantial proof. This attitude prevailed for a short time after the repeal of the prohibition law when the courts excluded evidence on the slightest showing of federal participation.[19] Then the lower federal courts gradually reverted to the point where they would not exclude evidence without substantial proof of federal participation.[20]

In 1949 the Supreme Court cast doubt upon the validity of admitting into a federal court evidence which had been illegally obtained by state officers. The Court in *Wolf v. Colorado*[21] was concerned with whether or not the fourteenth amendment required exclusion of evidence in a state court which had been illegally obtained by state officers. The Court held that the fourteenth amendment did not command exclusion. Important for the purpose of examining the distinction drawn between state and federal officers, is the concurring opinion, which interpreted language used by the majority to mean that:

> [T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.[22]

If this were in fact the position of the majority, then the foundation of the argument for admitting into federal courts evidence which has been illegally obtained by state officers would be destroyed. Heretofore the federal exclusionary rule has been restricted to those search and seizures in which there was some evidence of federal participation because it has been assumed that the source of the rule was the fourth amendment which is limited to acts of the federal government.[23] If the rule were to be severed from the fourth amendment and allowed to exist apart as a judicially created and controlled rule of evidence, it could be applied to exclude evidence obtained in *any* illegal search and seizure.

No doubt the Court was aware of this important implication of the *Wolf* case. In *Lustig v. United States*,[24] decided the same day,

19. In Fowler v. United States, 62 F.2d 656 (7th Cir. 1932), the court found collusion where local police had an agreement with federal authorities that the United States would have the first opportunity to try all prohibition violators if a sufficient amount of illegal liquor was involved. In Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937), the court held that "general co-operation" was sufficient to sustain a finding of federal collaboration. But see Rettich v. United States, 84 F.2d 118 (1st Cir. 1936).

20. See, *e.g.*, Kitt v. United States, 132 F.2d 920 (4th Cir. 1942).

21. 338 U.S. 25 (1949). See also Note, 50 Colum. L. Rev. 365 (1950).

22. 338 U.S. at 39.

23. See, *e.g.*, Wheatley v. United States, 159 F.2d 599, 601 (4th Cir. 1946).

24. 338 U.S 74 (1949).

the Court found federal participation whenever a federal officer "has a hand in the search," but took care to add:

> 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.[25]

However the concurring opinion, written by Justice Murphy, took exception with the majority's decision to leave the question open and stated:

> In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us.[26]

Although the concurring opinions in *Wolf* and *Lustig* provided persuasive arguments for eliminating the exception to the exclusionary rule, lower federal courts have not responded in this manner. From 1949 to date, they have utilized the "hand in the search" test of *Lustig*[27] and have ignored the comments of Justice Murphy.[28] They have continued to consider the federal exclusionary rule to be a command of the fourth amendment which cannot be used in a federal court to exclude evidence which has been illegally obtained by a state officer acting without the aid of a federal officer.[29]

UNREASONABLE DETENTION

Under federal law, an accused has the right to be taken before a United States Commissioner and charged or dismissed within a "reasonable" period after arrest.[30] A confession obtained during an "unreasonable" period of detention by *federal* officers will not be admitted as evidence in a federal court if the government cannot rebut the presumption of coercion.[31] The power to refuse admission of a confession is not derived from the Constitution, but is based on

25. *Id.* at 79.
26. *Id.* at 80.
27. See, *e.g.*, Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955); Symons v. United States, 178 F.2d 615 (9th Cir. 1949), *cert. denied*, 339 U.S. 985 (1950).
28. See United States v. Stirsman, 212 F.2d 900 (7th Cir. 1954).
29. See, *e.g.*, United States v. Moses, 234 F.2d 124 (7th Cir. 1956); Williams v. United States, 215 F.2d 695 (9th Cir. 1954).
30. Rule 5(a) of the Federal Rules of Criminal Procedure provides: "An officer making an arrest under a search warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. . . ."
31. See United States v. Echeles, 222 F.2d 144, 155 (7th Cir. 1955); Patterson v. United States, 183 F.2d 687 (5th Cir. 1950). But the accused must show that the delay was unnecessary. Joseph v. United States, 239 F.2d 524 (5th Cir. 1957).

the power of the Supreme Court to establish rules of evidence and procedure for federal courts.[32] However, the federal courts will admit a confession of a federal crime obtained during an unreasonable period of detention by *state* officers if there is no evidence of federal participation.[33] As in the case of illegal search and seizures, the key to admissibility is the presence or absence of federal participation.

The Supreme Court established the rule as to admissibility of confessions in *McNabb v. United States.*[34] Although only federal officers were involved in the unreasonably long detention, the Court phrased its decision in language which could be applied to the admissibility, in federal courts, of evidence so obtained by state officers. It said that:

> [T]o permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law [the requirement of commitment without unreasonable delay].[35]

The Court was "not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement."[36]

In *Anderson v. United States,*[37] decided the same day, the Court was faced with a motion to exclude a confession which had been obtained during an unreasonable period of detention by *state* officers. Although the opinion said that both cases were "governed by the same considerations," the Court did not base its refusal to admit the confession as evidence on the broad policy statement made in *McNabb.* Rather, it relied on the fact that:

> There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of evidence which they secured improperly through collaboration with state officers.[38]

If the Court had refused to admit the confessions under the considerations of the *McNabb* rule, it could have avoided the issue of federal participation. However, the Court's citation of the *Gambino* and *Byars* cases[39] indicated that the distinction between federal and

32. McNabb v. United States, 318 U.S. 332, 341 (1943).
33. See Brown v. United States, 228 F.2d 286 (5th Cir. 1955), *cert. denied,* 351 U.S. 986 (1956); White v. United States, 200 F.2d 509 (5th Cir. 1952), *cert. denied,* 345 U.S. 999 (1953).
34. 318 U.S. 332 (1943).
35. *Id.* at 345.
36. *Id.* at 347.
37. 318 U.S. 350 (1943).
38. *Id.* at 356.
39. *Ibid.*

state officers in the area of illegal search and seizure had apparently become so well-entrenched that the Court was unwilling to eliminate that distinction in the admissibility of confessions. Apparently the areas were too analogous to set up opposing results and thus be forced to either collaterally overrule the distinction in search and seizures or re-examine the entire problem at this time. Neither alternative appeared feasible.[40]

ENTRAPMENT

If the federal court finds that a state officer has illegally entrapped the accused into committing a federal crime, it will grant an acquittal without requiring proof of federal participation.

The effect on a federal criminal prosecution of entrapment of the accused by a state officer had not been decided until the recent case of *Henderson v. United States*.[41] Henderson and others were indicated for conspiring to violate the Internal Revenue Code by distilling "moonshine" whiskey. His principle defense was that he had been entrapped into committing the crime by a state liquor control agent. The evidence showed that the agent, a deputy sheriff, induced Henderson to operate the illegal distillery. The district court denied the defense of entrapment as a charge to the jury on the theory that Henderson could not deny participation in conspiracy, while at the same time claiming that he was entrapped into participating in the conspiracy.

The Fifth Circuit reversed Henderson's conviction and remanded his case for a new trial on the ground that he should be able to raise the defense of entrapment as to his acts *apart* from the conspiracy. Then, on its own motion, the court, in seeking "another reason, a sound reason which would justify the action of the district court," raised the question of whether or not the defense of entrapment was available to the accused in a federal

40. The lower federal courts have also continued to maintain the distinction between federal and state officers. See, *e.g.*, White v. United States, 200 F.2d 509 (5th Cir. 1952), *cert. denied*, 345 U.S. 999 (1953); United States v. Harris, 211 F.2d 656 (7th Cir.), *cert. denied*, 348 U.S. 822 (1954). An explanation for the reluctance of the lower federal courts to control the state police in this area can only be based on speculation. Some weight must be given to the fact that the Supreme Court has never questioned the *Anderson* decision. Also important, aside from the factors which influenced the *Anderson* decision, is the fact that the federal courts have failed to reach a uniform agreement as to the rules that should govern the admissibility of *any* confession. See Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411 (1954); Inbau, *The Confession Dilemna in the United States Supreme Court*, 43 Ill. L. Rev. 442 (1948). Federal courts, including the Supreme Court, are no doubt unwilling to extend it to state officers while it provides only an uncertain standard for federal officers.

41. 237 F.2d 169 (5th Cir. 1956).

criminal prosecution when the entrapment was by a state officer. The question was one of first impression.[42]

Historically, in the area of entrapment, the federal courts have not been concerned with the distinction between state and federal officers, but between "officers of the goverment" and private individuals.[43] It appears well settled that an accused in a federal criminal prosecution cannot raise the defense of entrapment when he has been induced into committing the crime by a private individual.[44] The rationale is that the doctrine of entrapment was meant to operate as a check on the enforcement power of the government, and to extend it to acts of a private individual would serve no useful purpose. *Polski v. United States,* the leading case in point, states that, "the very heart of the doctrine is that the government itself has brought about the crime."[45] If, however, the defendant could establish that the private individual was an agent of the federal government, the defense of entrapment could be used.[46]

It was in this setting that the Fifth Circuit in *Henderson* recognized that state officers were not agents of the federal government—at least not in the sense in which that term had been used in prior decisions. Quite logically, it could have then classified state officers as "private individuals." Instead, the court took judicial notice of the fact that:

> While state officers are not agents of the United States, yet under the cooperative conception of the federal system, they bear to the Government a much closer relationship than strangers.[47]

In view of the fact that this relationship has produced a high degree of collaboration,[48] the court argued that there was no rational basis for distinguishing between entrapment by a state or federal officer. In addition, the court was of the conviction that:

> The moral wrong in each instance is equally grave, and each is equally outside of and contrary to the spirit of the statute defining the federal offense.[49]

A possible explanation for such a holding is that the court was aware of the problems that would be created by not extending the

42. *Id.* at 174.
43. See Brown v. Robbins, 122 F. Supp. 229, 232 (D. Me. 1954); Jindra v. United States, 69 F.2d 429, 431 (5th Cir. 1934); Newman v. United States, 28 F.2d 681, 682 (9th Cir. 1928).
44. See Beard v. United States, 59 F.2d 940 (8th Cir. 1932); Polski v. United States, 33 F.2d 686 (8th Cir.), *cert. denied,* 280 U.S. 591 (1929).
45. 33 F.2d 686, 687 (8th Cir.), *cert. denied,* 280 U.S. 591 (1929).
46. See, *e.g.,* Brown v. Robbins, 122 F. Supp. 229 (D. Me. 1954).
47. Henderson v. United States, 237 F.2d 169, 176 (5th Cir. 1956).
48. See note 68 *infra.*
49. Henderson v. United States, 237 F.2d 169, 176 (5th Cir. 1956).

doctrine of entrapment to state officers. Denying the defense of entrapment would have called attention to the fact that federal officers could make unofficial agreements with state officers whereby the state officers would make illegal entrapments and then turn the defendants over to federal authorities for prosecution. The federal courts would then be faced with the problem of determining the extent of federal participation whenever a state officer induced an accused into committing a federal crime.

An Examination of the Distinctions

The Fifth Circuit in *Henderson v. United States,*[50] in seeking an answer to the problem of whether or not the defendant should be allowed to raise the defense of entrapment when he has been induced to commit the crime by a state officer, stated that:

> The apparent analogy which comes most readily to mind is the doctrine of the search and seizure cases under which evidence obtained by an illegal search or seizure by state officers, not made for the purpose of aiding in the prosecution of a federal offense, and in which no federal officer has taken any part, is admissible notwithstanding the illegality of the search or seizure. [cases omitted] Those cases, however, rest upon reasoning not here applicable, principally upon disciplinary considerations tending to practical respect for the Fourth Amendment.[51]

The court's reason for distinguishing the search and seizure cases is far from being clear. The question of whether the considerations underlying the exclusionary rule in the search and seizure cases are different from those underlying the defense of entrapment warrants closer inspection.

Perhaps the most compelling argument for distinguishing between the federal exclusionary rule and the defense of entrapment is that the former is a constitutional mandate applicable only to the federal government while the latter was developed by the courts as a means of effectuating legislative policy and has no constitutional foundation.[52] However, the *Wolf* and *Lustig* cases, noted above,[53] do not give strong support to this distinction. On the contrary, the *Wolf* decision, as interpreted by the concurring opinion, implies that the federal exclusionary rule is a "judicially created and con-

50. 237 F.2d 169 (5th Cir. 1956).
51. *Id.* at 175.
52. The basis of the defense of entrapment was announced in Sorrells v. United States, 287 U.S. 435 (1932). Apparently neither the majority nor the minority considered it a constitutional mandate, but the agreement went no further as to the reason for allowing the defense.
53. See pp. 124-25 *supra.*

trolled rule of evidence."[54] The concurring opinion in *Lustig* openly rejects the constitutional foundation argument.

Arguably, then, the federal exclusionary rule should be regarded as a tool of the judiciary. As such it implements the fourth amendment but is not necessarily limited by it. Viewed in this light, the exclusionary rule is analogous to the defense of entrapment which implements federal statutes but is by no means bound by them.

Assuming that neither the federal exclusionary rule nor the doctrine of entrapment derive their existence from the Constitution, the distinction is advanced that they were developed and are used to accomplish different purposes. The defense of entrapment is a device used to ascertain whether a criminal intent was present in the mind of the accused independent of the solictation of the officer or whether it was induced by the officer.[55] On the other hand, the purpose of the federal exclusionary rule is to control police lawlessness.[56]

This distinction breaks down upon consideration of a distinction which the courts have drawn within the area of entrapment itself. Thus, a court will allow the defense of entrapment when a federal officer has planted the seeds of crime in the mind of the accused but will not allow the defense when a private individual has entrapped the accused.[57] It would seem that criminal intent is no less present in the mind of the accused simply because a private individual rather than a federal officer induced the accused to commit the crime. If this last proposition is accepted, then the more apparent reason for allowing the defense of entrapment is to control police lawlessness. Therefore, it appears that the exclusionary rule and the defense of entrapment are indistinguishable in purpose.

54. The Court has given further evidence of this opinion in the recent case of Rea v. United States, 350 U.S. 214 (1956). The Court held that evidence which had been illegally obtained by *federal* officers must be excluded in a *state* court because the officers are bound by Rule 41(c) of the Federal Rules of Criminal Procedure. This rule incorporates the federal exclusionary rule. If the Court had placed their decision on the fourth amendment it could not have controlled the admission of this evidence in state courts.

As a judicially created and controlled rule of evidence, both the exclusionary rule and the *McNabb* rule could be extended to state officers under the Supreme Court's power:

> To prescribe from time to time, rules of pleading, practice and procedure with respect to any or all proceedings prior to and including verdict . . . in criminal cases and proceedings. 18 U.S.C. § 3771 (1952).

This power necessarily includes the authority to formulate rules for the admissibility of evidence in federal courts.

55. See generally, Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245 (1942).

56. See Comment, 58 Yale L. J. 144, 150-52 (1948).

57. See Beard v. United States, 59 F.2d 940 (8th Cir. 1932).

A further distinction which has been drawn is that the federal exclusionary rule, but not the defense of entrapment, raises the problem of a "double burden." The argument is that there are a number of state courts which do not exclude illegally obtained evidence;[58] therefore, if the federal exclusionary rule is extended to state officers, the same evidence may be admissible in the state court but inadmissible in a federal court. If the state officer conducts a search for evidence of a crime which constitutes both a state and federal offense, he must comply with both state and federal standards because of the possibility that the accused may be prosecuted in a federal court. Therefore the state officer assumes a "double" burden. In comparison, all but two of the state courts recognize the defense of entrapment.[59] Thus, the argument goes, there are no special problems incurred in extending the defense of entrapment to state officers as there would be if the federal exclusionary rule were extended.

This argument assumes too much. It is premised on the assumption that state and federal standards for entrapment are the same. On the contrary, state courts generally appear to exercise less control over the conduct of state officers in this area than federal courts do over federal officers.[60] The result is that the defendant is rarely successful with the defense of entrapment in a state court where he might have been in a federal court.[61] Thus, the problem of a "double burden" or opposing standards, exists in both search and seizure and entrapment.

By way of summary, both the federal exclusionary rule and the defense of entrapment appear to be judicially developed and controlled means by which a court may restrain police lawlessness. For purposes of comparison with the law of unreasonable detention, they will be considered similar in all important respects.

Turning then to the area of unreasonable detention, it has been seen that the *McNabb* rule is a judicially created and controlled rule of evidence. If the argument is accepted that the federal exclusionary rule is similarly created and controlled, the two rules can be equated. Neither of the rules is a constitutional mandate and both are used

58. Twenty-seven states, including Minnesota, admit evidence which has been obtained in an illegal search and seizure. See Note, 35 Minn. L. Rev. 457, 464-65 (1951).

59. The defense is not recognized in New York and Tennessee. See People v. Schacher, 47 N.Y.S.2d 371 (1944); People v. Mills, 178 N.Y. 274, 70 N.E. 786 (1904); Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Palmer v. State, 187 Tenn. 527, 216 S.W.2d 25 (1948).

60. See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs,* 60 Yale L. J. 1091, 1105-06 (1951).

61. *Id.* at 1106 n.42.

by the courts to restrain illegal police activity. If the equating process is accepted up to this point, it becomes a matter of logic to argue that the *McNabb* rule can also be equated to the defense of entrapment.

PROSPECTIVE

Assuming that the areas of illegal search and seizure, unreasonable detention, and entrapment can be equated, any significant move by the federal courts in one area, to extend control over state officers, should apply with equal weight in the others. To date the Supreme Court has refused to take a definite stand on the problem. For the present the problem is one for the lower federal courts to resolve. In this setting the *Henderson* case could be the impetus for an extension of the federal exclusionary rule and the *McNabb* rule to state officers who aid in the enforcement of federal law. A more important consideration is whether these rules *should* be extended.

The argument most frequently advanced for not extending these rules is that such an extension would create opposing standards of conduct for state police in those states which do admit evidence obtained in an illegal search[62] and a confession obtained during an unreasonable period of detention. These "double" standards would seriously hamper the efficiency of both federal and state law enforcement. State officers would have to secure a search warrant which was sufficient under federal standards and hold the accused for only a "reasonable" length of time after arrest whenever there was a possibility that the accused would be prosecuted in a federal court. If they later found that no federal crime had been committed, only a state crime, or the accused is tried in a state rather than a federal court, the officers would have unnecessarily incumbered the enforcement of state law. On the other hand, if they knew that a federal crime was involved, they might refrain from cooperating with federal authorities because they would not have enough evidence to obtain a federal search warrant. Rather they would use state methods of enforcement and prosecute the matter in state courts. Such a result would deprive the federal officers of the vital assistance which they are now receiving from state officers. The problem of enforcing the difficult areas of federal law, such as the control of narcotics, would be left entirely to an inadequate number of federal officers.

However, the opposing arguments on the "double burden" question seem equally persuasive. Where the state officer knows

62. See note 58 *supra* and related text.

that *only* a federal violation is involved, he is already subject to the federal exclusionary rule under the *Gambino* test.[63] The rationale of *Gambino* argues equally for extending the *McNabb* rule to state officers when *only* a federal violation is involved. In those cases where there is only a "possibility" that a federal law has been violated, there is some doubt as to whether the efficiency of state law enforcement would in fact be impaired. As a practical matter, state police should be aware that in areas such as narcotics or illegal distillation of liquor, federal and state law coincide.[64]

Although it cannot be denied that the extension of the federal exclusionary rule and the *McNabb* rule would create some confusion in state law enforcement practices, any loss of efficiency in law enforcement has generally been offset with protection of the rights of the accused.[65] When a state officer makes an illegal search and seizure or holds the accused for an unreasonable length of time before presenting him before a magistrate, the accused is a victim of police lawlessness. If the federal courts make a distinction between state and federal officers in either of these acts, they are not administering federal justice with equality. The comments of a federal district judge on this issue are appropriate:

> It seems a sad commentary on justice where an illegal search is made upon an individual and his property seized as a result thereof, that such evidence should be admissible in a court of law. . . .[66]

The "safeguard" of finding federal participation is of little or no value in diminishing this inequality. The burden is on the defendant to establish it, show it was directly responsible for the illegal conduct of the state officers, and that his rights were substantially impaired

63. See p. 123 *supra.*

64. It is common knowledge that the FBI conducts training schools for state law enforcement officers. Facts and figures as to how many of these schools are conducted each year and exactly what is taught are not available. This information, along with other information on federal-state cooperation in law enforcement, is classified and cannot be released. However, it seems likely that state officers attending these schools would become familiar with federal law and federal law enforcement practices. Thus a state officer probably knows what crimes are federal offenses and what crimes, which are both state and federal offenses, the federal government prefers to prosecute in federal courts.

65. The most quoted remark in support of this proposition is the language of Justice Holmes in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 470 (1938):

> It is desirable that criminals should be detected . . . [but] 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.

66. United States v. Suttenberg, 35 F. Supp. 861, 862 (E.D.N.Y. 1940). See also the court's comments in United States v. Linderman, 32 F. Supp. 123, 124 (E.D.N.Y. 1940).

by it. This has proven extremely difficult to establish[67] without a willingness on the part of the police to open their records. However, it is naiveté to assume that the police will be willing to cooperate or that there are no unofficial, unrecorded "working agreements."

Finally, it is important to recognize that the present exceptions to the federal exclusionary rules were developed in an age when federal and state law enforcement were distinct operations. These exceptions are not adaptable to the present high degree of cooperation between federal and state officers recognized by the court of appeals in the *Henderson* case. They operate to deprive the accused of his rights and encourage police lawlessness.[68] These factors do not present an overwhelming argument for the extention of the federal exclusionary rule and the *McNabb* rule. However, they do argue for a re-examination by the federal courts of their grounds for refusing to extend those rules.

67. See Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 Ill. L. Rev. 1, 23 (1950).

68. [L]aw enforcement officers have found it increasingly difficult in recent years to cope with the kind of nation-wide syndicated criminal activity that has developed following the two World Wars. Close-knit organization and the effective use of modern transportation and communication facilities have enabled big-time racketeers and other criminals to take greater and greater advantage of the historic jurisdictional limitations on police officers. Law enforcement agencies of every kind, local, state, and federal, have found it absolutely essential to join together in a cooperative effort, so far as physically and legally possible, to meet the challenge. By and large, federal-state cooperation has in recent years been on a very high level and has proved effective in the suppression of crime. Such cooperation when carried out on the proper plain is to be encouraged. Unfortunately there have been instances of failure on the part of some officers to distinguish between cooperation and collusion — cooperation for the more effective enforcement of law by legitimate means, and collusion for the shortcut, "easy" enforcement of law by illegitimate means.

Machen, The Law of Search and Seizure, 125-26 (1950). See also Beisel, *Control Over Illegal Enforcement of Criminal Law; Role of the Supreme Court,* 34 B.U.L. Rev. 413 (1954).