Illegally obtained evidence and democracy

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Onder wetenschappelijke leiding van Prof. Dr. M. Adams

"Me face bevir penado ta libre captividat."[1]

1. INTRODUCTION

In this paper, I will research, from a comparative angle, on the question: to what extent do the American and Belgian democracies have their power critical *"people"* reflected in their exclusionary rules concerning illegally obtained (criminal) evidence? In other words, to what extent do those rules allow for a balancing of the different interests at stake? Exclusionary rules can be considered as a procedural continuation of human rights protection. Since human rights historically have a vertical effect, i.e. the protection against abuses of power by the state, I will have to make a distinction between illegally obtained evidence by the public police on the one hand and the private police on the other.

2. METHODOLOGY

For methodological purposes, I already would like to refer to my conclusion of this paper. First of all, I will conclude that it is important that the United States and Belgium are ready to learn from each other. Secondly, I will ask a new research question: "To what extent could a *"transnational political society"* add to legitimate decisions and solutions concerning the international exchange of evidence?"

"Democracy" is a highly cultural bounded concept. Accordingly, the achievement of democracy does not necessarily depend on specific choices, i.e. specific decisions and solutions. That is to say, the Belgian and American democracy may make **different** choices which, in fact, give **similar** democratic results. Nonetheless, the ideal of *"democracy"* as a *"tertium*

[1] *"Freedom in restraint"*: J. M. REIJNTJES, *Boef of burger: over de relatie tussen toezicht en opsporing*, Arnhem, Gouda Quint, 1989, 49.

comparationis"[2], i.e. as a common point of departure for my comparison, aims at the avoidance of unbalances of power in general (cf infra: 3. Democracy) and, therefore, could be achieved in a much more fruitful way by inter-national cooperation.

My aim in this paper is, more concretely, to focus on the extent to which the Belgian and the American choices concerning illegally obtained (criminal) evidence are democratic choices. Since the major part of the Law of Evidence is a product of case law, I will mainly focus on the legitimacy of judicial choices concerning illegally obtained (criminal) evidence. Let me first of all, for a better understanding of how democratic choices should be conceived of, have a look at how democracy works.

3. DEMOCRACY[3]

3.1. THE "PEOPLE"

Metaphorically speaking, the *"people"* stand not for the sum of individual's private interests, but for the public interest. Accordingly they aim at developing individual freedom, which is inextricably bound up with the avoidance of concentrations of power on a legislative and executive level as well as on an adjudicative level. In other words, the *"people"* stand for what IAN SHAPIRO calls *"the spirit of democratic oppositionalism"*.[4]

3.2. HUMAN RIGHTS

The power-critical *"people"* reveal themselves in the conceptions of human rights[5], which also logically aim at protecting against concentrations of power, i.e. unbalances of power in the relation between citizens themselves

[2] J. C. REITZ, "How to Do Comparative Law", *The American Journal of Comparative Law* 1998, (617) 622.

[3] This section of my paper is based on two other papers of mine, respectively written for another methodological course "*Interdisciplinary Study of Law"* and for the thematic course *"Foundations of Law"*. They are respectively titled *"Security Policies and Democracy"* and *"Veiligheidsbeleid en Democratie"*. My thanks go to Professor RENÉ FOQUÉ for the useful cooperation and comments.

[4] D. A. SKLANSKY, "Private Police and Democracy", *American Criminal Law Review* 2006, (89) 96 and 97.

[5] M. ADAMS, *Recht en democratie ter discussie. Essays over democratische rechtsvorming*, Leuven, Universitaire Pers Leuven, 2006, 173: *"Filosofisch gezien is de meest oorspronkelijke idee achter de mensenrechten die van het sociale contract.": From a philosophical point of view the most seminal idea behind human rights is the idea of the social contract.* The most seminal idea behind the social contract and consequently, behind human rights, is the idea of the *"people"* who aim at the avoidance of unjustified unbalances of power.

(horizontal effect of human rights) as well as between citizens and the state (vertical effect of human rights).[6]

3.3. DEMOCRACY

Democracy stands for a society in which the *"people"* govern.[7] In a democracy the *"people"*, symbolized[8] in a social contract developed within the public sphere[9], give birth to and consequently legitimate the state (republic)[10] as an emanation of the public interest.[11] That is to say, a rational citizen, in order to be free, has to give up *some*[12] freedom to the state[13] as a platform on which the *"people"* as a metaphor for the general interest can transcend private interests.[14]

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[6] During a discussion with Professor PAUL LEMMENS, he pointed to me that the Belgian Constitutional Court in a very recent judgment deemed the obligation to respect the right to non-discrimination not only to aim at the state but also at private individuals who because of their significant "*position of power*" are more likely to violate other people's rights in a discriminating way. Constitutional Court February 12th 2009, nr. 17/2009, *http://www.arbitrage.be/*, B.10.4, B.17.2, B.18.2, B.19.2, B.20.2, B.22.6, B.29.3.

[7] Democracy is derived from the Greek word *"dèmokratia"*: *"dèmos"* (people) and *"kratia"* (rule).

[8] R. FOQUÉ, "Criminal Justice in a Democracy: Towards a Relational Conception of Criminal Law and Punishment", *Criminal Law and Philosophy* 2008, (207) 222: *"To sumbolaion in Greek means to deal with others on the basis of shared terms of recognition. And sumbolon means what belongs to each. In a society a symbolic order constitutes community; it provides for a language of common signs of recognition, of common procedures and institutions. And not only this, but it also refers to shared value-orientations and open textured meanings which are constitutive of society. Only by living in a shared symbolic order of a community, recognition and respect—of oneself and the other—become possible."*

[9] J. HABERMAS, "The Public Sphere: An encyclopedia Article", *New German Critique* 1974, vol. 3, (49) 49: The public sphere as a *"realm of our social life in which something approaching a public opinion can be formed."*; J. B. THOMPSON, *The media and modernity: a social theory of the media*, Cambridge, Cambridge Polity press, 1995, 70: The public sphere described by Habermas *"is a bourgeois public sphere which consisted of private individuals who came together to debate among themselves the regulation of civil society and the conduct of the state. This new public sphere was not part of the state but was, on the contrary, a sphere in which the activities of the state could be confronted and subjected to criticism. The medium of this confrontation was itself significant: it was the public use of reason, as articulated by private individuals engaged in argument that was in principle open and unconstrained."*

[10] Republic is derived from the Latin word *"respublica"*: *"res"* (good) and *"publica"* (common). In short: the *"common good"*.

[11] J. BOHMAN and W. REHG, "Introduction", J. BOHMAN and W. REHG *Deliberative Democracy. Essays on Reason and Politics*, Cambridge, MITT press, 1997, IX: *"Legitimate government should embody the 'will of the people'."*

[12] M. ADAMS, "Lettres Persanes 12. Populisme en representatieve democratie", *R&R* 2008, (267) 274 and 276: Professor Adams distinguishes between an *accepted* gap between citizen and state on the one hand and an *unjustified* gap which comes down to an *alienation* between citizen and state on the other.

[13] M. TIRARD, "Privatization and Public Law Values: A View from France", *Indiana Journal of Global Legal Studies* 2008, (285) 288: "*The state is not the government, but rather the res publica.*"; E. ZOLLER, *Introduction To Public Law: A Comparative Study*, Martinus Nijhoff Publishers, 2008, 199.

[14] R. FOQUÉ, "Criminal Justice in a Democracy: Towards a Relational Conception of Criminal Law and Punishment", *Criminal Law and Philosophy* 2008, (207) 211-216: *"A democratic*

4. GOVERNMENT

The result of a power-free dialogue on the level of the government will show, among other things, to what extent a rational citizen wants to assign security policies to the state and/or to citizens[15] and to what extent such policies can justify that infringing measures of human rights are not punishable.[16] The same

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*conception of power should never be disconnected from the plurality of claims on truth and justice among citizens. But it should neither be disconnected from a shared concern as to the development and the contextualisation of a shared conception of the public interest. Both, plurality and the public interest, are in the hands of responsible citizenship. The self-instituting capacity of a democratic legal order should provide citizens with workable and strong institutions and procedures which can and should enable them in participating as autonomous agents in the process of political will-formation.(...) What (...) Charles Taylor—in his analysis of the modern sources of the self—has recently called strong evaluations (...) is co-acting citizens, actively orienting themselves to one another, and by their capacity of binding themselves to certain shared value-orientations. (...) At issue here, then, is that 'higher standpoint', that set of value-orientations which transcends the hustle and bustle experienced by citizens in their everyday life. And it offers thereby criteria and principles to legitimate their actions and utterances, as well as for the more concrete rules by which they wish to organise their society. This is what Habermas, in his theory of the democratic rule of law, called transcendence from within. (...) the tradition from (...) to Taylor and Habermas can be characterised by a specific relationship between both citizen and official to the political society of the polis. This relationship can be described as being reflexive. Co-operation among citizens and officials is only possible, in the fullest sense of that word, when that co–operation does not get bogged down or derailed in the immanence of the interplay among **individual interests**, but instead finds its place in the transcending perspective of the **public interest**."*(my own emphasis)

[15] Some countries consider the police function as an exclusive government function. For France, see: M. TIRARD, "Privatization and Public Law Values: A View from France", *Indiana Journal of Global Legal Studies* 2008, (285) 292: *" (...) corresponding public services cannot be privatized because they derive from the Constitution. These public services, called 'constitutional public services,' include justice, **police**, defense, education, and health care."* (my own emphasis)

[16] R. FOQUÉ, "Criminal Justice in a Democracy: Towards a Relational Conception of Criminal Law and Punishment", *Criminal Law and Philosophy* 2008, (207) 216: *"Criminal acts are foremost characterised by their disrupting effect on the reflexive relationship between offender and victim, as co-citizens in the public sphere. Moreover, such actions cause a rupture between the offender and the fundamental value-orientations of the polis. The legitimacy of punishment has to be found in the intensity and efficacy by which the response of the legal order can contribute to the repairing of the reflexive relationship of both the victim and the offender to the public good, to the shared value-orientations of their society."*; I. LOADER, *Youth, Policing and Democracy*, Basingstoke, Macmillan, 1996, 37*: " (...) the police also play a crucial and potentially enabling role in the mediation of social conflict. (...) Policing decisions are, in short, political ones concerned with the allocation of a significant public good."*; J. WOOD, "Why public opinion of the criminal justice system is important", in J. WOOD and T. GANNON (eds.), *Public Opinion and Criminal Justice*, Portland, Willan Publishing, 2009, 33: *"Since the public has this vital role in the administration of justice any lack of confidence they may have in the system could undermine or seriously disrupt the justice process. Consequently, to prevent the public from losing faith in the system it is necessary that there is at least some congruence between public opinion and criminal justice arrangements and arrangements.";* R. C. MAWBY, *Policing Images. Policing, communication and legitimacy*, Portland, Willan Publishing, 2002, 57-59: Quoting H. ARENDT, *On Violence*, Londen, Allen Lane The Penguin Press, 1970, 106 p.: *"Authority is an attribute of social organization and can be vested in persons, offices or organizations. Its 'hallmark is unquestioning recognition by those who are asked to obey: neither coercion nor persuasion is needed' (Arend 1970:45). Force can be used in support of authority and to exercise power. Legitimacy adds a further dimension to these relationships, being associated with the rightful exercise of authority or use of power."* Quoting D. BEETHAM, *The Legitimation of*

dialogue will equally show to what extent formal restrictions (as stipulated in a code of criminal procedure) should not only apply to the public police but equally to the private police. Logically, the reasonable expectations of a citizen will vary depending on the purpose of security policies, i.e. security policies serving the public interest (the finding of truth) and/or merely private interests.[17]

5. JUDICIARY

The result of a power-free dialogue on the level of the judiciary will show, among other things, to what extent a rational citizen would like to remedy illegally obtained (criminal) evidence with the exclusion of the evidence and/or with the punishment of the person who gathered the evidence.

Power, Londen, Macmillan, 2003, 267 p.: *"To Beetham (...) criteria for legitimacy are legal validity, shared values and expressed consent. Legal validity is concerned with rules. Here power is legitimate if it is acquired and exercised in accordance with established rules, which may be traditional and unwritten or formalized in law. (...) The second element is the dimension of justifying the rules by reference to beliefs shared by those in the power relationship, both dominant and subordinate. For this element to operate, there must be a minimum commonality of appropriate beliefs (...) in the rightful source of authority and what constitutes the common good. (...) Thirdly, the final element is evidence of consent on the part of the subordinate party in the power relationship.";* I. LOADER and N. WALKER, *Civilizing Security*, Cambridge, Cambridge University Press, 2007, 5: *"(...) the democratic state has a necessary and virtuous part to play in seeking to realize the good of security (...) in seeking (...) to civilize security and to release its civilizing potential"*, i.e. the state has to *"address and theorize fully the virtues and social benefits that can flow from members of a political community being able to put and pursue security in common."*

[17] D. A. SKLANSKY, "Private Police and Democracy", *American Criminal Law Review* 2006, (89) 98: *"But the interests of merchants depart in predictable ways from the interests of their poorest neighbors (...) and private security firms focus (...) on the interests of the people who hire them.";* J. GRAY, *After Social Democracy: Politics. Capitalism and the Common Life,* Londen, Demos, 1996, 11: *"Market institutions will be politically legitimate only in so far as they respect and reflect the norms and traditions, including the sense of fairness, of the cultures whose needs they exist to serve. Legitimating the market requires that it be curbed or removed in institutions and areas of social life where common understandings demand that goods be distributed in accordance with ethical norms that the market necessarily disregards.";* I. LOADER, "Thinking Normatively About Private Security", *Journal of Law and Society* 1997, (377) 386-388: Quoting S. CHAMBERS, *Reasonable democracy: Jürgen Habermas and the politics of discourse*, Ithaca, Cornell university press, 1996, 250 p: *" (...) the central requirement of policing in a democracy (is) that it can secure broad levels of acceptance across both dominant and subordinate groups. Allocation by and accountability to the market ought thus never to dominate in the sphere of security; for, as Simone Chambers reminds us: 'the more the issue is an issue of justice that affects us all' - and if security isn't such an issue then I don't know what is - 'the more the forum should replace the market'.(...) democratic deliberation is able (...) to recognize that the impact of security provision on people's quality of life gives all citizens (and not just those able to contract into private arrangements) a stake in* ***how it is to be delivered and brought to account***." (my own emphasis); M. WALZER, *Spheres of justice: a defense of pluralism and equality*, New York, Basis Books, 1983, 304: *"Democracy is a way of allocating power and legitimating its use - or better, it is the political way of allocating power. Every extrinsic reason is ruled out. What counts is argument among citizens. Democracy puts a premium on speech, persuasion, rhetorical skill. Ideally, the citizen who makes the most persuasive argument - that is, the argument that persuades the largest number of citizens - gets his way."*

The exclusion of illegally obtained (criminal) evidence essentially serves three purposes: (1) the *prevention* of illegally obtained evidence (purpose of prevention), (2) the *demonstration* of the exclusion of illegally obtained evidence (purpose of demonstration) and (3) the *reparation* for the victim of the illegally obtained evidence (purpose of reparation).[18]

On further consideration, those three purposes also serve as purposes for punishment: (1) the *prevention* of new violations of the penal law (purpose of prevention), (2) the *demonstration* of the punishment of a violation of the penal law (purpose of demonstration) and (3) the *reparation* for the victim of the violation of the penal law (purpose of reparation).

On further consideration, those three purposes have their own personal fields of application. The purpose of prevention is directed at the person who illegally obtained the evidence, the purpose of demonstration is directed at the "*people*" and the purpose of reparation is directed at the victim.

PURPOSES/REMEDY	**EXCLUSION**	**PUNISHMENT**
PREVENTION (Executive Power + Market)	*public + private police*	*public + private police*
REPARATION (Civil Society)	*victim*	*victim*
DEMONSTRATION (The "People" = State + Civil Society + Market)	*"people"*	*"people"*

The public and the private police desire exclusion and/or punishment as remedies for an illegal finding of evidence while the victim does not. In my view, the judge should prefer the remedy that the *"people"* desire, i.e. the remedy which balances at best the different interests at stake and therefore is acceptable for a rational citizen. Indeed, one could question how a remedy not acceptable for the *"people"*, i.e. a remedy of which the purpose of demonstration is not achieved, can go for an emanation of the public interest. In other words, I estimate the purpose of demonstration as superior to the two other purposes, especially because the *"people"* will have their choice for a certain remedy depending, *among other things*, but *not exclusively,* on the extent to which a remedy balances the purposes of prevention and reparation.
As far as the purpose of *prevention* is concerned, a rational citizen has to realize that the exclusion of evidence, in case it should not even have any

[18] M. C. D. EMBREGTS, *Uitsluitsel over bewijsuitsluiting: een onderzoek naar de toelaatbaarheid van onrechtmatig verkregen bewijs in het strafrecht, het civiele recht en het bestuursrecht*, Tilburg, Universiteit van Tilburg, 2003, 105.

preventative effect on the public police[19], *a fortiori* would not have a preventative effect on the private police. Unlike the former who are representatives of the general interest and accordingly intend to summon a suspect in order to hear him being tried, the latter are merely representatives of their private interests. An employer who spies upon his employee because of suspicions of criminal facts indeed does not intend in the first place a prosecution of the employee but rather his potential dismissal.

As far as the purpose of *reparation* is concerned, a rational citizen has to realize that a victim would prefer the exclusion of evidence when the evidence provides the only incriminating proof against him, whereas he or she would prefer punishment when the evidence fails to provide the only incriminating proof.

As I have already stated, the *"people"* will opt for the remedy which does not only provide the best balance between the purpose of prevention and the purpose of reparation. Moreover, they will also take into account other interests, like the finding of truth as pursued by the public police on the one hand and the private interests of the private police on the other.

My aforementioned reasoning comes down to a *"clash between the due process and crime control models of law enforcement"*. Consequently, the main task of the judiciary in a democracy is not …

" (…) to try and prevent this clash, which would be futile, but to ensure that it *is aired in public*." [20] (my own italics)

The doctrine of illegally obtained evidence is essentially a constitutional doctrine, more concretely the procedural continuation of human rights' protection. That is why, in a next step, I will focus on the extent to which the Belgian and the American (judicial) choices concerning illegally obtained evidence are democratic choices, i.e. choices that reflect the *"people"* who are aimed at the avoidance of unbalances of power and accordingly at a balancing of the different interests at stake. Thereto, I will first of all have a look at the Belgian and American *theoretical* scopes of human rights and, then, at the Belgian and American legal *practices* concerning illegally obtained (criminal) evidence.

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[19] D.A. SKLANSKY, "Is the Exclusionary Rule Obsolete?", *Ohio State Journal of Criminal Law* 2007, (567) 579, 581 and 582: *"Does it mean we have outgrown the exclusionary rule? Justice Scalia wrote in Hudson , civil liability is now all the deterrent effect we need for police illegality.(…) It is not exactly news that the exclusionary rule can only deter the police when they care about the admissibility of the evidence they obtain."* Consequently, there is *"the need to supplement the exclusionary rule with other remedies, particularly for* ***that vast category of police conduct that is not aimed at obtaining evidence for use in court****."* (my own emphasis)

[20] B. DAWSON, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study", *The International and Comparative Law Quarterly*, 1982, (513) 515.

6. HUMAN RIGHTS

6.1. UNITED STATES

The *"Bill of Rights"* is the name by which the first ten amendments to the United States' Constitution are known. The Fourth Amendment which is relevant to this paper reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment only holds for the public police, not for the private police.[21] This means that it only has a vertical but no horizontal effect. Analogously, American legal practice determines the prevention of illegal government conduct as the most important purpose of the exclusionary rule, which is the main enforcement mechanism of the Fourth Amendment.[22] That is why the United States Supreme Court in its *"Burdeau vs. McDowell"* judgment decided that the Fourth Amendment did not require the suppression of illegally obtained evidence by private citizens and accordingly by private security personnel.[23]

In other words, the American *"people" seem* to aim at the avoidance of unbalances of power in the vertical relations, i.e. the relations between the citizen and the state, and not in the horizontal relations, i.e. the relations between citizens themselves. However, one cannot jump too fast to such a conclusion. That is to say, the American *"people"* are equally directed at the avoidance of concentrations of power within the private sphere. First of all, they are reflected in the legal conception of human rights, i.e. the way in which the violations of human rights by citizens are punishable by law. Besides, they are reflected in those judicial decisions, which stretch the law concerning *"state action"* in order to apply the exclusionary rule to private searches.

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[21] R. L. WEAVER, L. W. ABRAMSON, J. M. BURKOFF and C. HANCOCK, *Principles of Criminal Procedure*, Thomson/West, 2008, 259.

[22] Y. MA, "Comparative analysis of exclusionary rules in the United States, England, France, Germany, and Italy", *Policing* 1999, (280) 296: *"Comparison of the American exclusionary rule with that of other countries reveals that the United States is the only country that relies solely on the rule's deterrent effect as its justifying ground."*

[23] B. DAWSON, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study", *The International and Comparative Law Quarterly*, 1982, (513) 516 and 517; S. EULLER, "Private Security and the Exclusionary Rule", *Harvard Civil Rights-Civil Liberties Law Review* 1980, (649) 649 and 653.

6.2. BELGIUM

Contrary to the Belgian Constitution but like the American Fourth Amendment, the Belgian Code of Criminal Procedure (which has no equivalence on the American federal level) only holds for the public police, that is, it only has a vertical effect.

However, contrary to the American legal practice, the Belgian legal practice also determines the purpose of demonstration and reparation, in addition to the purpose of prevention, as purposes of the exclusion of illegally obtained evidence. Consequently, the exclusionary rules will theoretically also apply to the private police.[24]

7. ILLEGALLY OBTAINED EVIDENCE

7.1. UNITED STATES

7.1.1. Public Police

The American judge theoretically will exclude illegally obtained evidence by the public police. Nonetheless, I would like to nuance that principle in a double sense. American legal practice first of all gives a broad interpretation to the *"good faith exception"*, which precludes the exclusion in case the public police gathered the evidence in good faith. Moreover, the capability of the exclusionary rule to reach its purpose of prevention has been debated.[25]

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[24] M. TIRARD, "Privatization and Public Law Values: A View from France", *Indiana Journal of Global Legal Studies* 2008, (285) 288 and 297: *"In the common law tradition, the basic model of constitutionalism denotes* ***negative limits on state action****. Reflecting this classical distrust of the state, the Constitution of the United States imposes various restrictions on the exercise of governmental power. Administrative law has also followed these outlines. Therefore, the U.S. government has very few substantive rights. Public law and its values such as accountability, due process, and fairness, are mainly procedural. Furthermore, because state actors trigger constitutional and administrative protections while non-state actors usually do not, the use of private parties to perform public functions 'obstructs the protection of these values.' In France, by contrast, the state has always been considered indispensable because of its role in protecting and developing the respublica. Consequently, it has* ***positive rights and duties****. This particularism must be understood within the French Republican model and its conception of 'public interest' (...) and 'public service' (...). It explains why public law values from a French perspective are more substantive than procedural and refer to the motto of the Republic: 'liberty, equality, fraternity' (...) Hence, public law norms may apply to private parties. (...) Indeed, if one objective of public law is to protect the interests and rights of individuals against invasion by the government, as is the case in the United States, it also has to be reconciled with a* ***sense of the community****."* (my own emphasis)

[25] B. DAWSON, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study", *The International and Comparative Law Quarterly*, 1982, (513) 518: *"The majority now argue that what is needed is a 'pragmatic analysis of the exclusionary rule's usefulness in a particular context' and to this end has adopted a balancing approach. In deciding whether to extend the rule to a new situation or forum, 'the answer is to be found by weighing the utility of the exclusionary*

Punishment of the public police could therefore be considered by the *"people"* as more legitimate.

7.1.2. Private Police

The American judge theoretically will not exclude illegally obtained evidence by the private police. Nonetheless, I would equally like to nuance that principle in a double sense. First of all, the penal law does also preclude violations of human rights by the private police.[26] Moreover, American legal practice gives a broad interpretation to the concept of *"state action"*. It means that (certain) acts of (certain types of) the private police are to be considered as acts of the public police, i.e. acts of the government. Building on my second nuance of the exclusionary rule in relation to the public police, I see that the new *"state action"* doctrine can have a paradoxical result: that is, the punishment of the private police could be perceived as more legitimate than the exclusion of illegally obtained evidence by the private police.

In my view, the broad interpretation of "*state action"* points to an increasing consciousness within the American society (i.e. the American *"people"*) concerning the potential abuses of power and the violations of human rights by the civil society.[27] In that respect, it is noteworthy to read the Preamble of the United States' Constitution:

*"**We the People** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."(my own emphasis)*

Consequently, such an increasing consciousness within American (democratic) society in the long run will be manifested in the jurisprudence of the highest American judicial court, i.e. the United States Supreme Court. In that respect, I would like to have a closer look at a judgment of the State of New Mexico's

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rule against the costs of extending it.' Not surprisingly, the Supreme Court has found that the incremental deterrent effect of a further extension of the rule is uncertain in each case and thus outweighed by the demands of the truth-seeking process."

[26] J. S. KAKALIK and S. WILDHORN, "Law and private police", *http://www.rand.org/pubs/reports/2007/R872.pdf* 1971, 220 p.

[27] Cf D. MAYER, "Workplace Privacy and the Fourth Amendment: an End to Reasonable Expectations?", *American Business Law Journal* 1992, (625) 629: *"Even though the fourth amendment does not directly govern private sector employers, its judicial interpretation is influential in providing guidance to courts, arbitrators, and all employers in the private sector about the kinds of privacy interests that deserve protection. Moreover, numerous state constitutions have provisions that parallel the fourth amendment. (...) Constitutional protections also provide societal benchmarks-standards that are apt to be honored by various segments of society. Thus, the Supreme Court's fourth amendment decisions merit close attention. They reveal the line of privacy protection beyond which public employers cannot **legally** go and beyond which private employers should not **ethically** go." (my own emphasis)*

Court of Appeal about the search of a citizen by private security guards.[28] In my opinion, the view of law expressed by the victim of the search equally expresses the *"spirit of democratic oppositionalism"*:

"I was yelling at him to stop because, I mean, I thought it wasn't **legal** to search anybody, you know, without any consent, you know." (my own emphasis)

The Court of Appeal interpreted *"state action"* in such broad terms that it encompasses much more than actions by private security companies which pursue evidence in preparation for criminal prosecutions[29]:

" (…) we have held that the Fourth Amendment applies to searches effected by a private party who is acting 'as an instrument or agent of the Government.' We therefore determine whether the mall security guards in this case were acting 'as an instrument or agent of the Government' when they seized and searched Defendant.

This requires an analysis to determine whether, and to what extent, police officers of the State were involved with, or connected to, the conduct of the mall security guards. If that involvement or connection is sufficient to conclude that the State was involved, then the conduct will be deemed 'state action' with the consequence that its validity will be scrutinized by Fourth Amendment standards.

a. State Action Under The Murillo Test

Murillo involved a search conducted by an off-duty investigator. (…) Under these circumstances, we concluded that the burden is on the State to show that the officer was acting in a truly private capacity, and to make this determination, we considered the four factors enunciated by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Leone* (…) Those factors are: **'(1) whether the guard acted under the control of his private employer; (2) whether the guard's actions clearly related to his private employer's private purposes; (3) whether the search was conducted as a legitimate means of protecting the employer's private property; and (4) whether the methods and manner of the search were reasonable and no more intrusive than necessary**.' In this case, however, there is no indication in the record that any of the Coronado Mall security guards were off-duty police officers. (…) Thus, while the factors to be considered by *Murillo* are helpful, they are not dispositive in answering the question posed in this case.

[28] Court of Appeal State of New Mexico, 31st January 2008, *http://coa.nmcourts.gov/documents/opinions/Santiago%20FO.pdf.*

[29] S. EULLER, "Private Security and the Exclusionary Rule", *Harvard Civil Rights-Civil Liberties Law Review* 1980, (649) 651: *"(...) there is state action when private security personnel, acting independently, investigate crimes and pursue evidence in preparation for criminal prosecutions."*

Nevertheless, we do consider them for guidance in resolving the ultimate issue before us.

The first *Leone* factor is whether the guard acts under the control of his private employer (…) If the investigation exceeds the guard's private duties or authorization, he may be considered a government actor. (…) most courts reason that 'the primary function and concern of privately employed security officers is protection of their employers' property, rather than conviction of wrongdoers.' (…) The mall security guards exceeded their private duties by chasing Defendant, throwing him to the ground, handcuffing him, and searching him. When they engaged in these activities the mall security guards were not doing anything to safeguard mall property or patrons. (…)

Secondly, we consider whether the actions of the mall security guards clearly related to the private employer's private purposes. (…). The conduct of the mall security guards in this case clearly exceeded any private legitimate needs of the Coronado Mall. No legitimate private purpose was being served by chasing Defendant, throwing him to the ground, handcuffing him, and searching him.

Third, 'the investigation must be a legitimate means of protecting the employer's property, and so must be reasonable in light of the circumstances surrounding it.' *(...)*. In this case, Defendant posed no threat to the Coronado Mall property, Defendant had not damaged or destroyed any mall property, and the mall security guards did not suspect him of shoplifting.

Finally, we consider whether the method and manner of the search performed by the mall security guards was reasonable and no more intrusive than necessary (…) There was no justification for macing and throwing Defendant to the ground simply because he did not obey their order to get to the ground. (…) Furthermore, the search performed by the mall security guards was clearly more intrusive than necessary.

b. State Action Under the Public Function and Government Agent Tests

The conduct of private security guards who are not off-duty police officers may also be measured under Fourth Amendment constitutional standards in appropriate cases. **'When they perform a public function or act as agents of a government investigation, their activities may therefore become state action for constitutional purposes.'** (…) Whether the private officers are performing a public function or are acting as agents of the government is determined as a question of fact. (…)

We conclude the evidence supports a finding that the mall security guards were performing public, police functions in this case. It is evident that '[s]ecurity personnel hired to protect private business premises are performing

traditional police functions when they arrest, question, and search for evidence against criminal suspects.' (…) We have recognized, as have other courts, that the use of private security forces is expanding in the United States (…) ('We are mindful, however, of the increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law and the increasing threat to privacy rights posed thereby') (…). One study of private policing has recently concluded that today, 'private police participate in much of the policing work that their public counterparts do.' Elizabeth E. Joh, *The Paradox of Private Policing* (…). It is clear that, like the public police, private security guards have the potential to violate citizens' constitutional rights. (…) It is also evident that a serious danger to constitutional liberties would result if private security guards were allowed to perform these traditional police functions such as arresting, questioning, and searching for evidence, without applying any constitutional protections. *See* 1 Wayne R. LaFave, *Search and Seizure* (…); David Alan Sklansky, *Private Police and Democracy* (…). We therefore align New Mexico with other courts that have expressed realistic concerns about safeguarding our constitutional rights where private police forces are used. (…) These few concerned courts have fashioned a realistic 'public function or acting in the public interest test' which maintains that where organized and structured private security entities or agents assert the power of the state to investigate or make an arrest, or detain persons for subsequent transfer of custody to the state, or subsequent state law enforcement and the state has acquiesced or allowed such use of public power, such private organized action, in contemplation of state involvement, is sufficient to enable a court to apply constitutional restraints (…) We therefore conclude the totality of the circumstances support a finding that the mall security guards were performing public, police functions." (my own emphasis)

Although *"state action"* traditionally required the active involvement of the public police in the acts of the private police[30], such a precondition does not seem to be necessary anymore in light of the aforementioned *"state action"* and *"public function"*[31] tests. In my view, those tests will add greatly to an interpretation of the Fourth Amendment in light of present social circumstances[32], rather than in light of its original intent. Consequently it could add greatly to more legitimate case law.

[30] S. EULLER, "Private Security and the Exclusionary Rule", *Harvard Civil Rights-Civil Liberties Law Review* 1980, (649) 654 and 656: *"Government involvement has been found, and the exclusionary rule applied, in three related classes of cases involving seizure of evidence by private security officers. First, direct assistance from public police officers has been found to constitute state action. (...) Second, state action has been found where private security personnel acted alone, but at the direction or suggestion of police officers. (...) Third, state action has been found where private security officers have been given special quasi-police status."*

[31] S. EULLER, "Private Security and the Exclusionary Rule", *Harvard Civil Rights-Civil Liberties Law Review* 1980, (649) 657-665.

[32] D. A. SKLANSKY, "The Fourth Amendment and Common Law", *Colombia Law Review* 2000, (1739) 1739 and 1740: *"To identify 'searches and seizures' governed by the Amendment, the*

7.2. BELGIUM

7.2.1. Illegally obtained evidence

According to Belgian law, evidence will be considered illegal when it is gathered (1) by the government or a private citizen with the intention to use it at trial and (2) by means of (i) the commitment of a criminal offence, (ii) a violation of the law of criminal procedure, (iii) a violation of the right to privacy, (iv) a violation of the right to a defense or (v) a violation of the right to human dignity.[33]

7.2.2. Exclusion of evidence

Three judgments of the Belgian Court of Cassation concerning the exclusion of illegally obtained evidence are noteworthy.

First of all, the Court deemed in a judgment of ***January 17th 1990***[34] the exclusion of illegally obtained evidence to be necessary in case of the cumulative fulfillment of two conditions: (i) in case the evidence was illegally *obtained* by the one (public or private police) who *uses* it at trial; (ii) in case the evidence was illegally obtained with the intention to use it in criminal proceedings.

Subsequently, the Court supplemented those conditions in its *"Antigoon"* judgment of ***October 14th 2003***[35] by judging that the exclusion of illegally obtained evidence is only necessary in particular circumstances. Thus the exclusion of illegally obtained evidence will not be an automatic sanction anymore. I would like to stress once more that such decisions manifesting a decline in legal protection for the suspect are legitimate as long as they are "*aired in public*".[36]

The Court deemed that the exclusion of illegally obtained evidence is only necessary in the following three cases: (i) in case the fulfillment of certain procedural rules is laid down in the law on penalty of nullity, (ii) in case the

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Supreme Court since Katz v. United States has asked whether a particular investigative technique invades an 'expectation of privacy that ***society is prepared to recognize as 'reasonable'****. (…) Fittingly, the Court's reasoning in Katz (...) focused on the realities of modern law enforcement rather than the eighteenth-century origins of the Fourth Amendment."* (my own emphasis)

[33] F. VERBRUGGEN and R. VERSTRAETEN, *Strafrecht en strafprocesrecht voor bachelors – deel 2*, Antwerpen-Apeldoorn, Maklu, 2007, 336.

[34] Court of Cassation 17th January 1990, *http://www.cass.be*.

[35] Court of Cassation 14th October 2003, *http://www.cass.be*.

[36] B. DAWSON, "The Exclusion of Unlawfully Obtained Evidence: A Comparative Study", *The International and Comparative Law Quarterly*, 1982, (513) 515.

illegality has affected the reliability of the evidence, and (iii) in case the use of the evidence at trial would breach the right to a fair trial.[37]

I would like to have a closer look at the last case in which a judge has to exclude illegally obtained evidence. The notion of a fair trial is inextricably linked to article 6 of the European Convention of Human Rights (ECHR). The Belgian Court of Cassation deemed in a judgment of ***March 23th 2004***[38] that the instance of a fair trial depends on the circumstances of the case, for example: the fact that the *government* intentionally committed the illegality, the fact that the severity of the crime goes far beyond the committed illegality, the fact that the illegally obtained evidence only points to a material element of the crime or the fact that the illegality only has a small impact on the right to freedom that is protected by the violated rule.

A closer look at the first assessment criterion brings us back to the *"Antigoon"* case in which the Court of Cassation agreed upon the reasoning of the Court of Appeal except for one part, i.e. to the extent that the Court of Appeal prohibited the *intentional* disregard of the interests of the accused, but not to the extent that the Court of Appeal prohibited to disregard his interests *in a rude way*.

7.3. EVALUATION

7.3.1. Public police

The American as well as the Belgian judge will base their decisions as to whether to exclude illegally obtained evidence on the *"good faith"* of the public police. Nonetheless, contrary to the American judge, the first step of the Belgian judge will not be the verification of the *"good faith"*; rather, it will verify whether the public police gathered the evidence with the *intention* to use it at trial. If so, the Belgian judge will then verify in a second step whether the public police *intentionally* violated the interests of the accused, i.e. whether the public police did not act in *"good faith"*.

In the same manner, contrary to the American judge, the Belgian judge will have his decision to exclude illegally obtained evidence not *exclusively* based on the *"good faith"* of the public police, but also on *other* criteria. In my view, such a decision allows for a much better balancing (cf supra: 3. Democracy) between the interest of the finding of truth on the one hand and the legal protection of the accused on the other than the American judge's decision, which excludes the illegally obtained evidence as a quasi-automatic sanction (except in case of the public police's good faith).

[37] F. VERBRUGGEN and R. VERSTRAETEN, *Strafrecht en strafprocesrecht voor bachelors – deel 2*, Antwerpen-Apeldoorn, Maklu, 2007, 339.
[38] Court of Cassation 23th March 2004, *http://www.cass.be*.

7.3.2. Private police

The **American** judge has the possibility to exclude illegally obtained evidence by the private police through a broad interpretation of the concept of *"state action"*.

The **Belgian** judge on his part will verify whether, in order to conclude to the (il)legality of the produced evidence, the private police gathered the evidence with the *intention* to use it at trial. Nonetheless, he will not verify whether, in order to conclude to the ex- or inclusion of the produced evidence, the private police *intentionally* violated the interests of the accused. In fact, the Court of Cassation in its aforementioned 2004 judgment determined that criterion to solely aim at the public police. Consequently, the decision to exclude illegally obtained evidence by the private police will (i) be independent of an *intentional* or *rude* violation of the interests of the accused, but merely (ii) dependent on the other assessment criteria, unless the private police's acts would be considered as government's acts by means of *"state action"*. In my opinion, a broad interpretation of *"state action"* could and should influence the case law of the European Court of Human Rights (ECHR), which has so far ascribed the acts of the private police to the government *only to the extent* that the latter played an active role in those acts.[39]

Besides, just as the *non-application* of the first assessment criterion unjustifiably (i.e. illegitimately) could reduce the protection of the accused, so the *application* of the other assessment criteria unjustifiably could reduce the interests of a private individual who illegally gathered the evidence, but who has no significant position of power in relation to the victim.

That is why I would like to stress that compared to Belgium, the United States are more democratic because they use a public function test in order to qualify private security acts as government's acts. But they are less democratic when they connect exclusion as a quasi-automatic sanction to illegally obtained evidence by the public police.

However, I also have to stress that compared to the United States, Belgium is more democratic with respect to its introduction of specific legislation for private detectives as one of the very first countries.[40] Although the United States has licensed private detectives for a very long time, it never considered such licensing to come down to enough government involvement in order to make the licensees government actors.[41] Nonetheless, the existence of *"state action"* is independent of some kind of state regulation of private policing

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[39] Cf ECHR November 23th 1993, A. vs. France, *http://www.echr.coe.int/echr/Homepage_EN*; ECHR April 8th 2003, M.M. vs. The Netherlands, *http://www.echr.coe.int/echr/Homepage_EN.*

[40] Wet 19 JULI 1991 tot regeling van het beroep van privé-detective, *B.S.* 2 oktober 1991.

[41] S. EULLER, "Private Security and the Exclusionary Rule", *Harvard Civil Rights-Civil Liberties Law Review* 1980, (649) 656.

since the state's failure to regulate comes down to the encouragement of private policing and subsequently also involves *"state action"*.[42]

In short, there is no reason for the United States nor for Belgium not to learn from one another so that they can reach the most legitimate or democratic decisions and solutions, on a governmental and an adjudicative level respectively.

8. CONCLUSION

My conclusion does not really come at a surprise: First of all, I would like to draw the general conclusion: it is important that the United States and Belgium are ready to learn from each other. During a discussion with Professor PAUL LEMMENS, he pointed to me that the Belgian Constitutional Court in a very recent judgment deemed the obligation to respect the right to non-discrimination not only to aim at the state but also at private individuals who because of their significant "*position of power"* are more likely to violate other people's rights in a discriminating way.[43] In my opinion, the broad interpretation of *"state action"* is based on the same power critical *"spirit of democratic oppositionalism"*.

Secondly, I believe that the principles I have developed in this paper give me the opportunity to formulate another research question: to what extent could international or European regulations concerning the international exchange of evidence be legitimated by the international or European *"people"*, i.e., the *"transnational political society"* or *"European political community"*?[44]

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[42] E. JOH, "The Forgotten Threat: Private Policing and the State", *Indiana Journal of Global Legal Studies* 2006, (357) 357: *"Private policing is not accurately described as one of intermittent regulation. Whether it encourages by inaction, or discourages through legislation and public critique, the state is always implicated in the development of private policing. Thus, while it may be convenient to speak of a notable lack of regulation over private police as a regulatory lapse, the state here is also taking a stance toward private policing, through its failure to act."*

[43] Constitutional Court February 12th 2009, nr. 17/2009, *http://www.arbitrage.be/*, B.10.4, B.17.2, B.18.2, B.19.2, B.20.2, B.22.6, B.29.3,

[44] D. HALBERSTAM, "Comparative Federalism and the Role of the Judiciary", in K. E. WHITTINGTON, D. R. KELEMEN and G. A. CALDEIRA, *The Oxford handbook of law and politics*, Oxford, Oxford university press, 2008, (142) 155: *"Arguments about the central government's superior moral and political claim to authority (...) are based on the idea of a political community that compromises individuals across the various constituent states."*; J. HABERMAS, "Towards a European political community", *Society* 2002, 58-62.