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THE FUGITIVE IN NEW YORK: CAN LAW ENFORCEMENT CROSS STATE LINES AND ACT UNDER COLOR OF ITS OFFICE?

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THE FUGITIVE IN NEW YORK: CAN LAW ENFORCEMENT CROSS STATE LINES AND ACT UNDER COLOR OF ITS OFFICE?*

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I. INTRODUCTION

For some in New York State, it could be said that 1993 was the year of "The Fugitive." In the summer of 1993, millions of movie viewers flocked to see *The Fugitive*, which starred Harrison Ford as Doctor Richard Kimble, everyone's favorite murder suspect on the lam.

1993 was also the "Year of the Fugitive" for a New York State Supreme Court trial court. That court considered a question that was novel to New York jurisprudence: may a police officer from a foreign state, not in hot pursuit of a suspect sought by such state, arrest that person on New York State soil?

The case in which this issue was raised was *People v. La Fontaine*,[1] in which the trial court upheld an arrest in New York City by Paterson, New Jersey officers, not in close pursuit, pursuant to a federal arrest warrant.[2] Specifically, the *La Fontaine* court applied the "under color of authority" doctrine first promulgated in a Florida decision, *Collins v. State*,[3] and held that foreign state police officers, not in close pursuit, who "invoke the 'color or indicia' of their office to effect an extrajurisdictional arrest in New York State" are to be treated as police

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1. 603 N.Y.S.2d 660 (N.Y. Sup. Ct. 1993).

2. *Id.*

3. 143 So. 2d 700 (Fla. Dist. Ct. App. 1962), *cert. denied*, 148 So. 2d 280 (Fla. 1962) (holding that officers acting outside their jurisdiction and under "color of authority" must have a valid legal basis to enter a motel room); *see also* Phoenix v. State, 428 So. 2d 262 (Fla. Dist. Ct. App. 1982), *aff'd*, 455 So. 2d 1024 (Fla. 1984) (limiting the "under color of authority" doctrine to extrajurisdictional pre-arrest investigations or acquisitions of evidence); State v. Filipi, 297 N.W.2d 275 (Minn. 1980)(agreeing with rule promulgated by *Phoenix*, but holding that a post-arrest search conducted by officers outside their jurisdiction and acting "under color of authority" fell within the scope of the Fourth Amendment).

officers under the Fourth Amendment.[4] Consequently, the court held the officers' conduct fell within the ambit of the Fourth Amendment and the exclusionary rule.[5]

This article will first discuss *La Fontaine* and examine how other states have addressed extraterritorial arrests.[6] Second, the article will examine the history of the "under color of authority" doctrine and its variations.[7] Finally, this principle will be recommended to New York courts to resolve issues akin to the one before the *La Fontaine* court.[8]

It should be noted that the issue under consideration does not pertain to foreign state police officers who are designated by the governor of New York to effect an arrest pursuant to a formal extradition requisition from a sister state, nor to foreign state officers who are in close pursuit of suspects in New York, nor to sister state officers acting as agents of police officers from any law enforcement agency empowered by New York law.[9]

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4. *La Fontaine*, 603 N.Y.S.2d at 666.

5. *Id.*

6. *See infra* Parts II-IV. Although many of these cases entail extrajurisdictional arrests made by police officers within one state, they are equally applicable to interstate extraterritorial arrests such as the one presented in *La Fontaine*. Although this article will discuss cases which apply to intrastate extrajurisdictional arrests, its sole concern will be with arrests conducted by officers from State A on the soil of State B. Also, for purposes of this article, jurisdiction pertains to territories, including but not limited to townships, villages, municipalities, cities, counties, and states.

7. *See infra* Part V.

8. *See infra* Part VI.

9. This article does not address arrests made pursuant to the Uniform Criminal Extradition Act. (N.Y. CRIM. PROC. LAW § 570 (McKinney 1984). However, one provision under the Uniform Extradition Act may be applicable. *See* N.Y. CRIM. PROC. LAW § 570.34 (McKinney 1984):

> The arrest of a person in this state may be lawfully made also by any police officer or private person, without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. . . .

Id.

For purposes of this article the statute is deemed not controlling because it does not expressly provide a remedy for its violations, and because in New York state suppression motions are brought under the Fourth Amendment and the New York State Constitution (N.Y. CONST. art. I, § 12), which both provide the remedy of evidence exclusion. *See* Weeks v. United States, 232 U.S. 383 (1914) (holding that the exclusionary rule applies to violations of the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that under the Due Process Clause of the Fourteenth Amendment the exclusionary rule applies to violations of the Fourth Amendment allegedly committed by state law enforcement agents); People v. P.J. Video, 501 N.E.2d 556, 561 n.4 (N.Y. 1986) (recognizing the common history of the Fourth Amendment and New York State's

II. *LA FONTAINE*

A. *Case Facts*

On November 18, 1992, four New Jersey police officers came into Manhattan to arrest Sixto La Fontaine.[10] La Fontaine was wanted by a New Jersey state court for committing the felonies of conspiracy to murder and aggravated assault on August 16, 1992.[11] In addition, he was wanted by a federal district court sitting in Newark, New Jersey for crossing the New Jersey-New York State line on August 21, 1992 to avoid prosecution for the conspiracy to murder charge.[12] This offense is a felony under federal law.[13] Prior to November 18, 1992, both a New

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parallel provision, N.Y. CONST. art. I, §12, and implying that, after *Mapp* was decided, the exclusionary rule was applied in the same manner with respect to the Fourth Amendment and N.Y. CONST. art. I, § 12); Sackler v. Sackler, 203 N.E.2d 281 (N.Y. 1964) (implying that N.Y. CONST. art I, § 12 applies only to the government and its agents); *cf.* cases cited *infra* notes 39-41. Also, this provision may not be applicable to scenarios which involve arrests in the home and which mandate the acquisition of a warrant. *See infra* note 52 and accompanying text.

See also N.Y. CRIM. PROC. LAW § 570 (McKinney 1984) (Uniform Criminal Extradition Act); N.Y. CRIM. PROC. LAW § 140.55 (McKinney 1984) (Uniform Close Pursuit act); N.Y. CRIM. PROC. LAW § 1.20 (defining terms of general use in the Criminal Procedure Law) (McKinney 1970); Burdeau v. McDowell, 265 U.S. 465 (1921)(holding that the Fourth Amendment does not apply to activities of private citizens and applies to government officials only).

Fresh or close pursuit has been construed as meaning "the continuous and uninterrupted pursuit of a suspect with unnecessary delay after the commission of an offense," People v. Lindsey, 805 P.2d 1134 (Colo. Ct. App. 1990), *cert. denied*, 1991 Colo. LEXIS 137 (Colo. Mar. 11, 1991), *overruled on other grounds by* People v. Milton, 864 P.2d 1097 (Colo. 1993) (en banc), or that the pursuit must be immediate or continuous, State v. Cochran, 372 A.2d 193, 196 (Del. 1977), or pursuit without unreasonable delay, State v. Steinbrun, 774 P.2d 55 (Wash. Ct. App. 1989) (construing Washington's close pursuit statute, Wash. Rev. Code § 10.89.050 (1990)).

Finally, this article will not discuss arrests and seizures of evidence effected by police officers from other nations.

10. *La Fontaine*, 603 N.Y.S.2d at 662.

11. *Id.* n.1; *see also* N.J. STAT. ANN. § 2C:5-4(a) (1982) (grading of . . . conspiracy); *id.* § 2C:11-3(b) (1982) (murder); *id.* § 2C:12-1(b)(1) (aggravated assault).

12. *La Fontaine*, 603 N.Y.S.2d at 662 n.2; *see* 18 U.S.C § 1073 (1989) (flight to avoid prosecution or giving of testimony).

13. *La Fontaine*, 603 N.Y.S.2d at 662 n.2; *see* 18 U.S.C. §§ 1073, 3559 (1989) (Section 1073 is a class E felony for which an offender thereunder may be sentenced to a term of imprisonment not to exceed five years.).

Jersey state court and a federal district court sitting in Newark, New Jersey had issued warrants for La Fontaine's arrest.[14]

Upon entering New York City, the New Jersey detectives enlisted the assistance of detectives from the New York City Police Department's 34th Precinct in an effort to locate La Fontaine in a street canvass.[15] The canvass proved to be fruitless.[16] Thereafter, without any help from their New York City counterparts, the New Jersey officers continued their quest for La Fontaine and eventually seized him on a fire escape landing outside of his apartment.[17]

After La Fontaine's apprehension, the New Jersey officers took him into his apartment, where one officer administered to him his rights under *Miranda v. Arizona*.[18] From the apartment, that same officer recovered cocaine and alleged narcotics paraphernalia, which, the officer contended, were in plain view.[19]

Eventually, the New Jersey police surrendered La Fontaine and the seized contraband to the 34th Precinct.[20] There, in the presence of police from the 34th Precinct, one of the New Jersey officers re-administered to La Fontaine his "Miranda" warnings, after which La Fontaine admitted to possessing the cocaine.[21] Ultimately, a New York grand jury indicted

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14. *La Fontaine*, 603 N.Y.S.2d at 662.

15. *Id.*

16. *Id.*

17. *Id.* at 663. Upon arriving in the area immediately outside La Fontaine's apartment, the New Jersey detectives knocked on his door, and identified themselves as the police. *Id.* This action induced La Fontaine to flee from his apartment onto a fire escape which was outside of the apartment. *Id.* In light of this action, the *La Fontaine* court held that La Fontaine was constructively arrested in his apartment. *Id.* at 668.

18. *Id.*; *see* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that, pursuant to the Fifth Amendment, governmental officials, prior to conducting any custodial interrogation, must advise a suspect that he has the right to remain silent, that anything he states may be used against him, that he has a right to consult with a lawyer and have an attorney present during the questioning, and that he has the right to have counsel provided if unable to afford one); *see also* Malloy v. Hogan, 378 U.S. 1 (1964) (holding that the Fifth Amendment is binding on the states through the Fourteenth Amendment).

19. *La Fontaine*, 603 N.Y.S.2d at 663; *see also* Suppress Hr'g Record at 11, 39-42, People v. Sixto La Fontaine, (No. 11964/92). The narcotics paraphernalia seized consisted of plastic baggies of cocaine and a heater seal, which is frequently utilized in the narcotics trade to seal plastic baggies. 603 N.Y.S.2d at 663; *see also* cases cited *infra* note 55.

20. *La Fontaine*, 603 N.Y.S.2d at 663.

21. Suppress Hr'g Record at 12-14.

La Fontaine for illegal possession of narcotics under New York law.[22] New York City police officers did not participate in La Fontaine's arrest or in the seizure of the contraband.[23]

During the course of the litigation, La Fontaine's attorney moved to suppress the contraband and the confession as products of an unlawful arrest.[24] The trial court conducted a suppression hearing.[25] After the hearing, La Fontaine argued that the New Jersey officers had no authority to arrest him outside of New Jersey, which rendered his apprehension unlawful.[26] In opposition to La Fontaine's motion to suppress, the government contended that the New Jersey officers had the same right to arrest La Fontaine as a private citizen has under the New York Penal Law provision granting private citizens the right to arrest in certain circumstances.[27] Additionally, averred the prosecution, the New Jersey officers, as agents of the New York City Police Department, were entitled to seize La Fontaine.[28] Both parties did acknowledge that on November

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22. 603 N.Y.S. at 663. Specifically, the defendant was indicted for two counts of criminal possession of a controlled substance in the third degree (N.Y. PENAL LAW § 220.16(1) (McKinney 1989); *id.* § 220.16(12) (McKinney 1989, Supp. 1993)) and one count of criminally using drug paraphernalia in the second degree (N.Y. PENAL LAW § 220.50 (McKinney 1971)).

23. 603 N.Y.S.2d at 665.

24. *Id.* at 662. This motion to suppress evidence was made pursuant to Mapp v. Ohio, 367 U.S. 613 (1961), Dunaway v. New York, 439 U.S. 979 (1978) (excluding a confession as the product of an arrest unsupported by probable cause), and People v. Huntley, 204 N.E.2d 179 (N.Y. 1965) (requiring that, before trial, a judge conduct a hearing to determine the voluntariness of a statement, and, ultimately, its admissibility); *see also* Suppress Hr'g Record at 2.

25. 603 N.Y.S.2d at 662. An evidence suppression hearing was conducted on March 29, 1993. *Id.* The only witness who testified at the hearing was Detective Ronald Humphrey of the Paterson, New Jersey Police Department. *Id.*

26. *Id.*

27. *Id.* See N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1992) (arrest without a warrant; by any person; when and where authorized) which states:

> 1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.
>
> 2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed.

Id.

28. *La Fontaine*, 603 N.Y.S.2d at 662; *see also supra* text accompanying note 7.

18, 1992 the New Jersey officers acted as police officers and not as private citizens.[29]

B. *The Decision*

In a written opinion dated June 8, 1993, the suppression court ruled that La Fontaine's arrest was valid.[30] At the outset of the decision, the court noted that the validity of an arrest in New York State by foreign state police officers not in close pursuit had not been addressed by any New York authority.[31] The court recognized that neither party contended that the New Jersey officers were acting in close pursuit pursuant to the Uniform Close Pursuit act of New York's Criminal Procedure Law.[32] That fact was significant because this provision is the only New York State Criminal Procedure Provision that expressly grants sister state police officers the right to arrest in New York.[33]

The court then determined that no part of the Criminal Procedure Law either grants or denies foreign state police officers not in close pursuit the power to arrest in New York.[34] However, the court found authority

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29. 603 N.Y.S.2d at 663.

30. *La Fontaine*, 603 N.Y.S.2d 660.

31. 603 N.Y.S.2d at 662, 663.

32. *Id.* at 663. *See* N.Y. CRIM. PROC. LAW § 140.55 (McKinney 1981) (arrest without a warrant; by peace officers of other states for offenses committed outside state; uniform close pursuit act), which permits a foreign state police officer who enters New York State in close pursuit of a suspect to arrest the suspect on the ground that she has committed a crime in another state. *Id.* § 140.55(2). Such crime must be a crime under New York law, *id.*, and the officer must be from a state which has enacted a provision similar to N.Y. CRIM. PROC. LAW § 140.55 (McKinney 1981). *Id.* § 140.55(6). In its original opinion the court also observed that the People did not challenge La Fontaine's Fourth Amendment standing to contest the arrest and that La Fontaine did not assert that the New Jersey and federal arrest warrants were not based on probable cause. People v. La Fontaine, No. 11964/92, slip op. at 9 (N.Y. Co. Sup. Ct. June 8, 1993). *See* Rakas v. Illinois, 439 U.S. 128 (1978) (requiring that a defendant demonstrate standing to claim protection under the Fourth Amendment); *see, e.g.*, Payton v. New York, 445 U.S. 573 (1980) (observing that an arrest warrant for a felony is based on probable cause).

33. *See generally* N.Y. CRIM. PROC. LAW § 120 (McKinney 1981) (warrant of arrest) and N.Y. CRIM. PROC. LAW § 140 (McKinney 1981) (arrest without a warrant).

34. *La Fontaine*, 603 N.Y.S.2d at 664-65. In People v. Saxton, 236 N.E.2d 640 (N.Y. 1968), without opinion, the New York State Court of Appeals affirmed a burglary conviction involving an arrest made in Queens County by a Nassau County police officer. Implicitly, the court accepted the People's contention that under § 8-21.0 of the Nassau County Administrative Code (L. 1939, ch. 272 as amended) and New York State's repealed Code of Criminal Procedure, the officer was entitled to effect the arrest, even though he was not in hot pursuit. *See* 236 N.E.2d at 640-41.

from other states and secondary authorities establishing two basic principles: 1) a police officer has the power to arrest only within the state which bestows such authority;[35] and 2) a police officer from one state, not in close pursuit, is authorized to apprehend a suspect in another state if a private citizen there may do so.[36] The *La Fontaine* court was persuaded by these authorities, and imported them to New York jurisprudence.[37] Under these principles, the New Jersey police officers had the same authority to arrest La Fontaine as would have a private citizen under the Criminal Procedure Law provision which bestows upon private citizens the power to arrest.[38] However, the court declined to determine the legality of La Fontaine's arrest by applying this statute, finding that it did not expressly impose a remedy for any violation of it.[39] Instead, the court chose to analyze La Fontaine's claim under the Fourth Amendment which does provide redress for its infringement, i.e, exclusion at trial of illegally procured evidence.[40]

Under N.Y. CRIM. PROC. LAW § 140.10 (1), (3) (McKinney 1992) (arrest without a warrant; by police officer; when and where authorized), for a non-petty offense, a New York State police officer, any where in the state, may arrest a person if he has reasonable cause to believe such crime was perpetrated, and such officer need not be in close pursuit of such person. Thus, this provision appears to have codified the People's position advanced in *Saxton* and impliedly endorsed by New York's Court of Appeals.

35. *La Fontaine*, 603 N.Y.S.2d at 665. The court relied upon 6A C.J.S. *Arrest* § 53(a) (1975) (Jurisdictional and Territorial Limits of Arresting Authority; a. Arrest Outside of State of Offense); 5 AM. JUR. 2D *Arrest* § 50 (1962), M. CHERIF BASSIOUNI, CITIZEN'S ARREST (1977); State v. Slawek, 338 N.W.2d 120, 121 (Wis. Ct. App. 1983) (recognizing that generally a police officer acting beyond her bailiwick does not have the authority to effect arrests and that an extensive line of authorities from several states validate an extrajurisdictional arrest as that of a private citizen if such states sanction private citizen arrests).

36. *La Fontaine*, 603 N.Y.S.2d at 665. The court relied upon M. BASSIOUNI, *supra* note 35, 6A C.J.S., *supra* note 35, 5 Am. Jur. 2D, *supra* note 35, and *Slawek*, 338 N.W.2d 120. The court also cited State v. Stevens, 603 A.2d 1203, 1208 (Conn.App.1992), *aff'd*, 620 A.2d 789 (Conn. 1993) (recognizing that generally police officers acting extraterritorially have the same authority to arrest as do private citizens), and Commonwealth v. Gullick, 435 N.E.2d 348, 351 (Mass. 1982) (acknowledging that a police officer effecting an arrest outside of her jurisdiction does so as a private citizen and that such arrest may be deemed valid as a private citizen's arrest).

37. *La Fontaine*, 603 N.Y.S.2d at 665.

38. *Id.* at 665; *see* N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1981).

39. *La Fontaine*, 603 N.Y.S.2d at 665; *cf. infra* text accompanying notes 104-11.

40. *La Fontaine*, 603 N.Y.S.2d at 665; *cf.* cases cited *infra* pp. 22-24 and notes 104-11; *see also* City of Kettering v. Hollen, 416 N.E.2d 598 (Ohio 1980) (ruling that as to extrajurisdictional police conduct in violation of Ohio law, absent legislative mandate requiring application of exclusionary rule to such violations, the rule is generally

Second, the court held that the Fourth Amendment did not apply under the "state action" principle.[41] The court stated that, without evidence of New York City Police Department participation in or awareness of La Fontaine's arrest or the seizure of the contraband, the 34th Precinct's issuance of a police radio to the New Jersey officers did not constitute sufficient involvement by a New York State law enforcement authority to trigger the application of this rule.[42] In light of this view, the arrest and search and seizure apparently fell beyond the ambit of the Fourth Amendment and any constitutional attack.[43]

Nonetheless, the court elected to apply this amendment and the exclusionary rule by application of the "under color of authority" doctrine.[44] Relying upon two court decisions from Florida[45] and one from Minnesota,[46] the court held that "any out-of-state police officer, not in close pursuit, who invokes the 'color or authority of her office' to

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inapplicable to such conduct unless violative of constitutional rights); *cf.* State v. Tingle, 477 N.W.2d 544 (Neb. 1991) (holding that if an extrajurisdictional arrest is unauthorized by state statutory or common law, then such arrest is unconstitutional).

41. *La Fontaine*, 603 N.Y.S.2d at 665; *see* Burdeau v. McDowell, 265 U.S. 465; *see also* People v. Esposito, 332 N.E.2d 865 (N.Y. 1975) (noting that the Fourth Amendment applies only to governmental officials or their agents and not to private citizens); People v. Horman, 239 N.E.2d 625, (N.Y. 1968) (holding that the Fourth and Fourteenth Amendments do not apply to evidence seized without the participation or knowledge of the government); Sackler v. Sackler, 203 N.E.2d 481 (N.Y. 1964).

42. *La Fontaine*, 603 N.Y.S.2d at 665; *see* Lustig v. United States, 338 U.S. 74, 79 (1949) (finding that a Secret Service agent had participated in a search before it was completed); *accord* Corngold v. United States, 367 F.2d 1, 6 (9th Cir. 1966); *cf.* United States v. Bennett, 709 F.2d 803, 805 (2d Cir. 1983), *cert. denied*, 469 U.S. 1075 (1984) (holding that the Fourth Amendment applies to private citizen conduct if the government is aware of it and acquiesces in it); United States v. Gumerlock, 590 F.2d 794, 800 (9th Cir. 1979) (en banc) (ruling that a search conducted by a private citizen who harbors a unilateral desire to aid law enforcement is not subject to Fourth Amendment coverage).

43. *La Fontaine*, 603 N.Y.S.2d at 666. Also, the court noted that the New Jersey officers' surrendering of the evidence to New York authorities did not transform the former officers into agents of New York State. *Id.*; *see* People v. Adler, 409 N.E.2d 888, 891 (N.Y. 1980) (ruling that, under the Fourth Amendment, a private person does not become a governmental agent merely by surrendering evidence to the police); *see also Horman*, 239 N.E.2d at 625.

44. *La Fontaine*, 603 N.Y.S.2d at 666.

45. *Id.* The two Florida cases cited by the court were Collins v. State, 143 So. 2d 700 (Fla. Dist. Ct. App. 2d Dist. 1962), *cert. denied*, 148 So. 2d 280 (Fla. 1962) and State v. Phoenix, 428 So. 2d 262 (Fla. Dist. Ct. App. 4th Dist. 1982), *aff'd*, 455 So. 2d 1024 (Fla. 1984).

46. *La Fontaine*, 603 N.Y.S.2d at 666. The Minnesota case relied upon by the court was State v. Filipi, 297 N.W.2d 275 (Minn. 1980).

effect an extrajurisdictional arrest in New York State is not to be treated as a private citizen for purposes of Fourth Amendment analysis."[47] The court noted the absence of any state or federal authority addressing the scenario presented by the case.[48] It predicated its decision to apply the "under color of authority" test on New York State constitutional principles[49] and on a constitutional concern for the protection of individual rights and liberties.[50] The court also desired to exclude evidence obtained by foreign state police officers in violation of federal and state law and surrendered "on a silver platter" to their New York State counterparts.[51]

The court then applied this theory to the facts of the case and found that the New Jersey officers utilized the authority of their office to arrest La Fontaine and obtain the cocaine.[52] Therefore, pursuant to the court's holding, the officers' activities fell within the scope of the Fourth Amendment and the exclusionary rule.[53]

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47. *La Fontaine*, 603 N.Y.S.2d at 666.

48. *Id.* at 666.

49. *Id.* The court applied United States v. Di Re, 332 U.S. 581, 589 (1948) (holding that in the absence of federal authority a federal suppression court must apply the law of the state in which an arrest transpires to determine its validity) and United States v. Swarovski, 557 F.2d 40, 43 (2d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978) (applying the *Di Re* rule).

50. *LaFontaine*, 603 N.Y.S.2d at 666. The court relied upon Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1174 (N.Y. 1978) (recognizing that the New York State Constitution protects imperiled personal liberties regardless of from where the danger emanates), People v. P.J. Video, 501 N.E.2d 556 (N.Y. 1986), and People v. Harris, 570 N.E.2d 1051, 1054 (N.Y. 1991) (recognizing that the New York State Court of Appeals has construed a discrete law of search and seizure under the New York State Constitution apart from that embodied by the Fourth Amendment to best safeguard individual rights).

51. *LaFontaine*, 603 N.Y.S.2d at 666. The "silver platter" doctrine was abrogated in Elkins v. United States, 364 U.S. 206, 224 (1960). Pursuant to this doctrine, evidence obtained in violation of the Fourth Amendment by state officials not acting on behalf of the federal government was admissible in federal trials. *Id.* Such evidence was deemed to have been surrendered to federal authorities by their state counterparts "on a silver platter." The court also cited BASSIOUNI, *supra* note 35, at 34.

52. *La Fontaine*, 603 N.Y.S.2d at 667. The court found that the New Jersey officers acted like police officers, and unlike private citizens, when they identified themselves as police officers, conveyed to the defendant that they had a fugitive warrant for his arrest, and, administered *Miranda* warnings. *Id.* at 667-68. Also, the court noted that the New Jersey officers induced the defendant to forego the privacy in his apartment by exerting their authority as police officers. *Id.*

53. *Id.* at 668.

However, the court concluded that the New Jersey officers had been legally entitled under the Fourth Amendment to seize La Fontaine pursuant to the federal arrest warrant.[54] Since the apprehension was legal, the warrantless seizure of the contraband was lawful also, because the

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54. *Id.* at 669. The court applied Payton v. New York, 445 U.S. 573 (1980) (requiring that, absent consent or exigent circumstances, the police may not without an arrest warrant enter a suspect's home to arrest him therein), after having determined that La Fontaine was arrested in his home. *La Fontaine*, 603 N.Y.S.2d at 668. *See also* People v. Lindsey, 805 P.2d 1134 (Colo. Ct. App. 1990), *cert. denied*, 1991 Colo. LEXIS 137 (Colo. Mar. 11, 1991), *overruled on other grounds by* People v. Milton, 864 P.2d 1097 (Colo. 1993) (en banc) (applying *Payton* to warrantless entry by police officers acting extrajurisdictionally).

Because a warrant was required to validate the defendant's arrest, the court analyzed whether the New Jersey warrant and/or the federal warrant validated the arrest under *Payton*. *La Fontaine*, 603 N.Y.S.2d at 668. The court found the New Jersey warrant could be executed only within New Jersey. *Id.* *See* N.J. R. Governing Crim. Prac. § 3:3-3(b) (1992) (defining territorial limits of service or execution); N.Y. CRIM. PROC. LAW § 10.10(1), (3) (McKinney 1970) (definition of "criminal courts" and "local criminal courts" respectively); N.Y. CRIM. PROC. LAW § 120.10(1) (Warrant of arrest; definition...). *See* State v. Bradley, 679 P.2d 635 (Idaho 1983), (holding that an Oregon arrest warrant was not sufficient to arrest defendant in his home in Iowa), *cert. denied*, 464 U.S. 1041; *but cf.* State v. Reasoner, 742 P.2d 1363 (Ariz. Ct. App. 1987) (upholding warrantless entry into defendant's home by Arizona police officers because they were aware of a warrant issued for defendant's arrest in Colorado); Commonwealth v. Sawyer, 452 N.E.2d 1094 (Mass. 1983) (ruling that defendant's arrest in and the seizure of evidence from defendant's Maine motel room by Maine police officers were lawful and the latter admissible in a Massachusetts trial for murder because the arrest and seizure were based on warrants issued for Sawyer's arrest in New York State); Allen v. Wrightson, 800 F. Supp. 1235 (D.N.J. 1992) (holding that in extradition context, the Fourth Amendment rights of a suspect who was arrested in his New Jersey home by a New Jersey law enforcement agent pursuant to a New York State bench warrant were protected by the issuance of the warrant); State v. Payano, 528 A.2d 721 (R.I. 1987) (holding that the existence of a valid warrant in one state may be used as a basis for a lawful arrest in another state, thereby rendering it unnecessary for the latter state to issue a warrant).

However, the possession of the federal warrant validated La Fontaine's arrest. *La Fontaine*, 603 N.Y.S.2d at 669. The court held that a federal warrant can be executed in New York State by foreign state police officers, including those from New Jersey. *Id.* at 669; *cf.* People v. Hamilton, 666 P.2d 152 (Colo. 1983) (en banc) (holding that under Colorado statutory authority police officers with an arrest warrant are prohibited from crossing jurisdictional lines unless in fresh pursuit of a suspect).

evidence was obtained under the "plain view" exception.[55] Finally, La Fontaine's statements were deemed admissible.[56]

On August 19, 1993, in New York State Supreme Court, La Fontaine pleaded guilty to attempted criminal possession of a controlled substance in the third degree.[57] On December 10, 1993, he received a jail sentence of three to six years, because he was found to be a repeat felony offender.[58]

The court's opinion in *La Fontaine* is significant for several reasons. First, it was the first written authority in New York State to discuss the legal status and rights of out-of-state officers, not in close pursuit, who engage in extrajurisdictional activities in New York,[59] and are not acting as agents of any New York law enforcement agency.[60] Second, it is the first New York State opinion to apply the "under color of authority" doctrine to such activities. Third, it is the first state court authority to hold explicitly that certain conduct of foreign state police officers falls within the parameters of the Fourth Amendment and the exclusionary rule. Fourth, the opinion was the first reported New York opinion to hold that foreign state officers, not in close pursuit, may arrest in New York pursuant to a valid federal arrest warrant.

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55. *La Fontaine*, 603 N.Y.S.2d at 670; *see* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (permitting the police to seize, without a warrant, evidence found in "plain view").

56. People v. La Fontaine, No. 11964/92, slip op. at 32-33 (N.Y. Co. Sup. Ct. June 8, 1993). In so finding, the court held that the New Jersey officers were acting as agents of New York State when they obtained his admission at the 34th Precinct. *Id.* Alternatively, these officers were acting "under color of authority" at the same juncture. *Id.* at 33. Because the statements were voluntary and were obtained in compliance with Miranda v. Arizona, 384 U.S. 436 (1966), they were admissible.

57. People v. La Fontaine, (No. 11964/92) Court File (N.Y. Co. Sup. Ct.). The statutes under which La Fontaine pled were N.Y. PENAL LAW §§ 110, 220.16 (McKinney 1965, 1966).

58. *Id.* As of April 25, 1994, there has been no indication that La Fontaine has appealed the suppression order.

59. Prior to *La Fontaine*, 603 N.Y.S.2d 660, the Court of Appeals had addressed the validity of extraterritorial arrests effected by police officers from New York State in foreign states. People v. Walls, 321 N.E.2d 875 (N.Y. 1974) (deeming valid an extraterritorial arrest in New Jersey by New York City police officers despite the officers' unintentional and unknowing failure to comply with New Jersey's fresh pursuit statute); People v. Sampson, 536 N.E.2d 617 (N.Y. 1989) (upholding the admission of a statement obtained in Vermont by New York police officers, even if the New York officers obtained the statement in violation of Vermont's fresh pursuit statute, because any such violation was unintentional). *Walls* and *Sampson* do not address extraterritorial arrests effected on New York State soil by foreign state officers.

60. *See generally* People v. Horman, 239 N.E.2d 625 (N.Y. 1978).

This article will focus on the second and third of these four significant aspects of the opinion, and analyze the "under color of authority" principle. Thereafter, it will be recommended that New York State trial courts and, perhaps, the New York State legislature and appellate courts apply the "under color of authority" doctrine to cases involving extraterritorial arrests and seizures of evidence conducted by police officers from other states.[61] However, before the full-blown analysis of the "under color of authority" doctrine may be undertaken, it is helpful to examine the legal status of police officers acting extrajurisdictionally in New York State, and to discuss briefly principles other than the "under color of authority" theory, which have been utilized by foreign state courts.

III. STATUS OF POLICE OFFICERS ACTING EXTRAJURISDICTIONALLY

The *La Fontaine* court was confronted with an issue new to New York jurisprudence, but which is nevertheless settled in other states, i.e., what official arrest powers, if any, do police officers from State A, not operating in close pursuit, possess when arresting a suspect in State B alleged to have violated the laws of State A? In the absence of any New York authority, the *La Fontaine* court was left with little choice but to regard the law from other states.[62]

Generally, courts have held that State A's officers do not have official arrest powers unless State B bestows such authority on them.[63] A vast

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61. *La Fontaine*, 603 N.Y.S.2d at 665. During the suppression hearing Detective Humphrey stated that, prior to arresting La Fontaine in New York City, he had surveilled Paterson, New Jersey residents who had purchased narcotics in New York City. *Id.* at 663. Also, Detective Humphrey indicated that he had executed warrants issued by New Jersey in New York State without the assistance of New York State police officers. *Id.*

62. *Id.* at 664-65.

63. 6A C.J.S., *supra* note 35; 5 AM. JUR. 2d, *supra* note 35, § 50; *see also* Russell G. Donaldson, Annotation, *Validity in State Criminal Trial of Arrest Without a Warrant by identified Peace Officer Outside of Jurisdiction, When Not in Fresh Pursuit*, 34 A.L.R.4th 328, 332 (1984); Wright v. State, 850 S.W.2d 34 (Ark. Ct. App. 1993) (holding that a local law enforcement officer is authorized to effectuate an extrajurisdictional arrest only if authorized by statute); State v. Hodgson, 200 A.2d 567, 569 (Del. Super. Ct. 1964); Williams v. State, 321 S.E.2d 386, 389 (Ga. Ct. App. 1984) (holding under Georgia law that a DEA agent had no authority to arrest in his capacity as a Deputy Sheriff) *cert. denied sub nom.* Batiste v. Georgia, 469 U.S. 966 (1985); People v. Pollard, 575 N.E.2d 970 (Ill. App. Ct. 1991) (recognizing common law rule that police officers do not have authority to effect extrajurisdictional arrests, but holding that Illinois statute has modified such rule to permit arrests anywhere in Illinois); State v. Wallace, 361 N.E.2d 516 (Ohio Ct. App. 1976) (acknowledging common law

majority of court decisions apply this maxim to warrantless arrests.[64] In fact, only a handful of reported cases have addressed a scenario in which the extrajurisdictional arrest was made with an arrest warrant.[65] However, all of these authorities permit out-of-state arrests if carried out by police officers in "close" or "hot" pursuit.[66]

Thus, foreign state authorities hold that unless a police officer is in close pursuit of a suspect beyond his bailiwick, such officer has no authority as a police officer to arrest the suspect. That this rule is followed by a majority of states left the *La Fontaine* court with little choice but to import the mandate to New York, which had no such rule to follow.

However, the rule itself does not determine whether such extraterritorial arrest is legal. And, the precept fails to provide any theory or test to determine such legality. This article will next consider the legal theories utilized by various states throughout the country and the analysis promulgated by the *La Fontaine* court. Thereafter, the reasons as to why the *La Fontaine* approach is most consonant with New York State constitutional provisions will be put forth.

IV. "OTHER" THEORIES OF LEGALITY

A. *The State Involvement Approach*

Under this approach, which is followed in Colorado, a police officer, not in close pursuit, may not make an extrajurisdictional arrest unless

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rule that a police officer may only effect a warrantless arrest in the confines of that officer's jurisdiction); Van Horn v. State, 802 P.2d 883 (Wyo. 1990) (applying common law rule confining territorial jurisdiction of municipal police officers to their respective municipalities).

64. *See generally* Donaldson, *supra* note 63.

65. People v. Schultz, 611 P.2d 977 (Colo. 1980)(en banc); San-Martin v. State, 562 So. 2d 776 (Fla. Dist. Ct. App. 1990); *La Fontaine*, 603 N.Y.S.2d 660; State v. Payano, 528 A.2d 721 (R.I. 1987); State v. Baton, 488 A.2d 696 (R.I. 1985).

66. 5 AM. JUR. 2d, *supra* note 35, § 51 (fresh pursuit); *see generally* People v. Vigil, 729 P.2d 360 (Colo. 1986) (en banc) (stating rule that a police officer acting extraterritorially may not effect an arrest unless the officer is in fresh pursuit); Stevenson v. State, 413 A.2d 1340 (Md. 1980) (recognizing that at common law an exception to the rule limiting a police officer's authority to arrest within the officer's jurisdiction is the "fresh pursuit" doctrine); *accord* Wright v. State, 473 A.2d 530, 533 (Md. Ct. Spec. App. 1984); State v. De Grote, 347 A.2d 23, 25-6 (N.J. Super. Ct. Law Div. 1975) (holding that a foreign state officer may not enter New Jersey and act in his capacity as a police officer unless in fresh pursuit); *cf.* People v. Hamilton, 666 P.2d 152, 155 (Colo. 1983) (en banc) (holding that under Colorado statutes a police officer lacks the authority to execute an arrest warrant beyond that officer's jurisdiction unless in hot pursuit).

assisted by police officers from the locale of arrest,[67] thereby eschewing the "private citizen approach."[68] Hence, the Colorado rule requires some involvement or participation of officers authorized to arrest in that state.[69]

Rhode Island has essentially applied a rule akin to Colorado's. In *State v. Baton*, the Supreme Court of Rhode Island upheld an arrest in Connecticut by a Rhode Island detective[70] because it occurred under the supervision of a Connecticut police officer with the power to arrest in Connecticut.[71]

The state involvement approach addresses a concern expressed in *State v. Shipman*, a Florida appellate court decision which also applied the "under color of authority" theory.[72] *Shipman* upheld an arrest pursuant to the principle that police officers not in close pursuit, who make extrajurisdictional arrests have the same arrest authority as do private citizens.[73] However, the *Shipman* court, sharing a concern conveyed by the trial court, expressed concern over an increase in extrajurisdictional activity by police officers in Florida.[74] The court preferred to see foreign state police officers make arrests in Florida only when granted authority to do so.[75] Further, the court noted: "it seems rather ludicrous for police officials to have to rely upon a citizen's authority to justify an arrest made in the culmination of an official police operation."[76]

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67. People v. Hamilton, 666 P.2d 152 (Colo. 1983) (en banc); People v. Wolf, 635 P.2d 213 (Colo. 1981); People v. Schultz, 611 P.2d 977 (Colo. 1980) (en banc) (stating that so long as individuals with lawful authority to make an arrest are present at the scene of arrest and participate therein, it is immaterial who executes an arrest warrant); *cf.* Commonwealth v. Mason, 476 A.2d 389 (Pa. Super. Ct. 1984) (holding that, although the service of a search warrant by police officers acting outside their jurisdiction is unauthorized and illegal, if said officers are accompanied by officers with official power to act and who participate in conducting and executing the search, then the same is legal).

68. *See* discussion *infra* Part IV.B.

69. *Id.*

70. 488 A.2d 696 (R.I. 1985). A warrant had been issued for Baton's arrest by a Rhode Island justice. *Id.* at 698.

71. *Id.* at 700.

72. 370 So. 2d 1195 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So. 2d 769 (Fla. 1980).

73. 370 So. 2d at 1196; *see also* discussion *infra* Part IV.B.

74. 370 So. 2d at 1197.

75. *Id.*

76. *Id.*

The state involvement approach forestalls reliance on citizen authority by requiring involvement from local police officers. Additionally, the state involvement theory can be viewed as *deterring* unsupervised extrajurisdictional police activities by foreign state police officers. Indeed, as expressed in *La Fontaine*, such activity of police officers unfamiliar with the law of the state of arrest poses a threat to the rights and liberties of citizens in these states.[77] Foreign state police officers who are not required to obtain direct assistance from local officers have no incentive to do so, increasing the likelihood of such threats to citizens' rights and liberties.[78]

The "posse comitatus" theory is a variation of the state involvement approach.[79] In *State v. Goodman*[80] the Supreme Court of Missouri rejected an extrajurisdictional arrest in a town outside of Missouri City by a Missouri City marshal because the marshal was acting under a "posse comitatus."[81] The court held that such a person is:

> neither an officer nor a mere private person, but occupies the legal position of a posse comitatus and while cooperating with the sheriff and acting under his orders is just as much clothed with the protection of the law as the sheriff himself. It is not essential for a posse comitatus to be and remain in the actual physical presence of the sheriff; it is sufficient if the two are actually endeavoring to make the arrest and acting in concert with a view to effect their common design.[82]

Although the arrest was ultimately deemed unlawful on other grounds,[83] the *Goodman* court found that the marshal validly acted under the direction of a sheriff from the town of arrest, and was thus acting under "posse comitatus."[84] Significantly, the *Goodman* court declined

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77. 603 N.Y.S.2d at 666.

78. *See* case cited *supra* note 60; *cf. Shipman*, 370 So. 2d at 1197 (expressing concern regarding an intrastate increase of extrajurisdictional police activity); People v. Wolf, 635 P.2d 213, 217 (Colo. 1981) (en banc) (failing to approve Denver police officers' extrajurisdictional arrest in violation of Colorado statutory authority); *accord* State v. Wilson, 403 So. 2d 982 (Fla. Dist. Ct. App. 1980).

79. *See* State v. Goodman, 449 S.W.2d 656, 661 (Mo. 1970) (defining a "posse comitatus" as a group of private citizens called upon to attend the sheriff).

80. 449 S.W.2d 656.

81. *Id.* at 661.

82. *Id.* (citations omitted).

83. *Id.* at 656.

84. *Id.*

to accept the People's argument that the city marshal made a valid extrajurisdictional arrest as a private citizen.[85] The court simply restated the maxim that the Fourth Amendment does not apply to searches and seizures conducted by private individuals and determined Goodman's motion to suppress as a matter of federal constitutional law.[86]

The significance of the *Goodman* decision is that it sought to resolve the legality of the arrest only under the Fourth Amendment and not under private citizen's statutes as is done by many states. As will be seen in the following section, many decisions fail to reconcile the applicability of private citizen's arrest statutes, violation of which may lead to evidence suppression, and the Fourth Amendment's and exclusionary rule's inapplicability to arrests effected by private citizens.[87]

Finally, yet another variation can be found in *People v. Seybold*.[88] In *Seybold* agents of a joint task force comprised of police officers from several municipalities arrested Seybold and others.[89] Noting the unusual circumstances of the case, the *Seybold* court determined the legality of the arrest under the Fourth Amendment[90] because when the officers arrested Seybold, they "believed at the time that they were acting as police officers and that they were, in fact, conducting the drug investigation on behalf of the state."[91] Hence, the conduct of an officer operating extrajurisdictionally and under such belief was deemed action on behalf of the state of arrest, thereby necessitating Fourth Amendment scrutiny. This analysis is no different than those which apply the Fourth Amendment to police officers acting extrajurisdictionally and with the assistance of those officers empowered to arrest[92] or under "posse comitatus."[93]

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85. *Id.* at 661.

86. *Id.*

87. *See supra* notes 4, 39 and accompanying text. *See, e.g.*, Monteiro v. Howard, 334 F. Supp. 411 (D. R.I. 1971) (applying the common law permitting an extrajurisdictional arrest as that of a private citizen); State v. Slawek, 338 N.W.2d 120 (Wis. Ct. App. 1983); *cf.* Stevenson v. State, 413 A.2d 1340, 1343 n.2 (Md. 1980) (declining to consider whether under the United States Constitution an extrajurisdictional arrest was unlawful on the grounds: 1) that the aggrieved party did not raise a constitutional question; and 2) that constitutional questions can only be addressed when non-constitutional grounds have been exhausted).

88. 432 N.E.2d 1132 (Ill. App. Ct. 1981).

89. *Id.* at 1133.

90. *Id.* at 1134.

91. *Id.*

92. *See, e.g.*, People v. Wolf, 635 P.2d at 217 (Colo. 1981).

93. *See, e.g.*, *Goodman*, 449 S.W.2d at 661.

B. *The Private Citizen Approach*

Pursuant to the private citizen principle, many states have held that because police officers, not in close pursuit, who conduct extraterritorial arrests are to be treated as private citizens, then state law that pertains to private citizens' arrests determines the legality of the arrest in question.[94] Ultimately, a determination of the arrest's propriety will decide whether evidence obtained in the arrest should be excluded at trial.[95]

However, this approach is problematic, particularly for New York. Generally in New York, evidence suppression motions are brought under the Fourth Amendment or New York State Constitution article I, § 12, or both. For both provisions to apply, the state must act.[96] State action may entail action by government officials or private citizens acting as their agents.[97] Consequently, if foreign state police officers acting extrajurisdictionally and not under the supervision of New York Agents have the same legal status to arrest as private citizens, then it must follow that the Fourth Amendment and the New York State Constitution are inapplicable to these arrests. Exclusion would be predicated only on a violation of a statute authorizing private citizens' arrests, a remedy not provided for by this statute or any other New York State authority.[98] Thus, under the private citizen approach a class of police conduct would

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94. *See, e.g.*, State v. McCullar, 520 P.2d 299 (Ariz. 1974) (holding that Colorado police officers were entitled to make a private citizen's arrest in Arizona under its private citizen arrest statute); People v. Lacey, 105 Cal. Rptr, 72 (Cal. Ct. App. 1973); State v. Kuskowski, 510 A.2d 172 (Conn. 1986); State v. Hodgson, 200 A.2d 567 (Del. Super. Ct. 1964); Williams v. State, 321 S.E.2d 386 (Ga. Ct. App. 1984), *cert. denied*, 469 U.S. 966 (1985); People v. Lahr, 589 N.E. 2d 539 (Ill. App. Ct. 1992); State v. O'Kelly, 211 N.W.2d 589 (Iowa 1973), *cert. denied*, 417 U.S. 936 (1974); State v. Shienle, 545 P.2d 1129 (Kan. 1976); State v. Bickham, 404 So. 2d 929 (La. 1981); Stevenson v. State, 413 A.2d 1340 (Md. 1980); Commonwealth v. Harris, 415 N.E.2d 216 (Mass. App. Ct. 1981); Windschitl v. Commissioner of Public Safety, 355 N.W.2d 146 (Minn. 1984); Nash v. State, 207 So. 2d 104 (Miss. 1968); State v. Keeny, 431 S.W.2d 95 (Mo. 1968); State v. McDole, 734 P.2d 683 (Mont. 1987); State v. Littlewind, 417 N.W.2d 361 (N.D. 1987); State v. McDonald, 260 N.W.2d 626 (S.D. 1977); State v. Harp, 534 P.2d 842 (Wash. Ct. App. 1975); State v. Slawek, 338 N.W.2d 120 (Wis. Ct. App. 1983).

95. *See* State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1992) (noting that this rule applies equally to evidence acquisition by police officers who have made extrajurisdictional arrests in adjoining jurisdictions and to police officers from one state who have entered another state and have made arrests and seized evidence therein).

96. *See* cases cited *supra* notes 9, 41, & 42.

97. *See* cases cited *supra* notes 9, 41-43.

98. *See supra* note 39 and accompanying text.

be beyond federal and state constitutional regulation, a seemingly anomalous result.

C. *The Constitutional Approach*

A constitutional approach determines that an extrajurisdictional arrest is illegal if the arrest violates the Fourth Amendment or state constitutional law. This approach is quite similar to that of *La Fontaine*, although *La Fontaine* additionally requires that foreign state police officers act "under color of authority" for the Fourth Amendment to be activated.[99]

For example, in *People v. Wolf*[100] the Supreme Court of Colorado upheld an extrajurisdictional arrest conducted by Denver police officers in Colorado.[101] The court found that the Denver officers "violated [two] statutes [including one pertaining to private citizens' arrests] governing their authority to arrest."[102] Because the officers were not acting as private citizens but as police officers, they had no legal authority to justify the arrest as that of a private citizen pursuant to the statute authorizing private citizens' arrests.[103] The *Wolf* court, nevertheless, deemed the arrest lawful under the Fourth Amendment of the United States Constitution and the Colorado Constitution.[104] Since the arrest was predicated on probable cause and thus was not an unreasonable search and seizure under both of these constitutional provisions, the court refused to use the exclusionary rule as a remedy for the statutory transgressions committed by the Denver officers.[105]

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99. *See supra* text accompanying notes 44-53.

100. 635 P.2d 213 (Colo. 1981) (en banc).

101. *Id.*

102. *Id.* at 217. The statutes pertained to extrajurisdictional arrests (COLO. REV. STAT. §§ 16-3-102, 16-3-106 (1986)) and private citizens' arrests (Colo. Rev. Stat. § 16-3-201 (1986). 635 P.2d at 216. The basis for the violation under the latter statute was that the police officers were not deemed to be acting as private citizens. *Id.* at 217.

103. 635 P.2d at 217. This pronouncement is similar to that found in cases applying the "under color of authority" doctrine. *See e.g.*, *La Fontaine*, 603 N.Y.S.2d 660, 668 (finding that extrajurisdictionally operating officers were not acting as private citizens, but as police officers, thus triggering the application of the Fourth Amendment and the exclusionary rule); Commonwealth v. Troutman, 302 A.2d 430, 432 (Pa. Super. Ct. 1973) (holding that a police officer exhibiting the indicia of her office acts like a police officer and not as a private citizen).

104. 635 P.2d at 217; *see* COLO. CONST. art. II, § 7.

105. 635 P.2d at 217. However, the *Wolf* court did not sanction the Denver officers' unauthorized extraterritorial operation and warned that similar future transgressions could trigger the application of the exclusionary rule. *Id.*

Wolf bucks the trend deeming arrests invalid if violative of statutory or decisional law pertaining to private citizens' arrests. Despite finding that the Denver police officers had no statutory authority to make an extrajurisdictional arrest or even to arrest as private citizens, the highest court in Colorado expressly decided not to cite these violations as a basis for excluding evidence obtained by the Denver officers in the arrest. In fact, to exclude the seized evidence, the key issue was not whether such statutory transgressions transpired, but whether they were of constitutional dimensions.[106] Consequently, the *Wolf* court found violations of two separate arrest statutes, did not deem the violations to be dispositive, and applied only federal and state constitutional prohibitions against unreasonable searches and seizures to determine the legality of arrest. *Wolf* sparked a series of decisions which ruled that statutory violations committed by police officers were not dispositive as to the legality of extrajurisdictional arrests.[107]

A similar approach can be found in *State v. Mangum*,[108] which preceded *Wolf*. In *Mangum* the Court of Appeals of North Carolina noted that, under a North Carolina provision,[109] an arrest by a Franklinton, North Carolina sheriff three miles beyond Franklinton city limits was

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106. *Id.*

107. *See* People v. Florez, 680 P.2d 219 (Colo. 1984) (en banc) (construing People v. Hamilton, 666 P.2d 152 (Colo. 1983) (en banc) as promulgating a two-step analysis to extrajurisdictional arrest: (1) A determination as to whether the police officer exceeded statutory authority in making such an arrest; and (2) Whether the arrest violated constitutional proscriptions against unreasonable searches and seizures); *see also* People v. Vigil, 729 P.2d 360 (Colo. 1986)(en banc)(following the two-step analysis delineated in *Hamilton*); People v. Lindsey, 805 P.2d 1134, 1137 (Colo. Ct. App. 1990), *cert. denied*, 1991 Colo. LEXIS 137 (Colo. Mar. 11, 1991), *overruled on other grounds by* People v. Milton, 864 P.2d 1097 (Colo. 1993) (en banc) (holding that an extrajurisdictional arrest is not illegal even if in violation of a Colorado statute, so long as the violation is not willful or so egregious as to infringe on a suspect's constitutional rights); *cf. La Fontaine*, 603 N.Y.S.2d at 665 (wherein the trial court declined to consider any statutory violation as a basis for excluding evidence.) *See also* cases cited *infra* note 120.

It should be noted that *Hamilton* held that the exclusionary rule is designed to protect against the violation of constitutional rights and that the violation of statutes pertaining to arrest authority is not a per se violation of constitutionally protected rights. 666 P.2d at 156.

108. 226 S.E.2d 852 (N.C. Ct. App. 1976).

109. N.C. GEN. STAT. § 15A-402(c) (1988) (territorial jurisdiction of officers to make arrests). The statute granted law enforcement officers from North Carolina's cities the power to arrest "at any point which is one mile or less from the nearest point in the boundary of such city." *Id.*

unauthorized.[110] However, although the arrest was not statutorily authorized, it was valid under the Fourth Amendment because it was predicated on probable cause.[111] Furthermore, the *Mangum* court held that evidence obtained as a result of an apprehension which is constitutionally sound but afoul of the law of North Carolina should not be excluded at trial.[112] As was true for the *Wolf* court, in *Mangum* the decisive factor triggering the application of the exclusionary rule was whether the arrest ran counter to the Fourth Amendment's proscriptions rather than whether the police officers were statutorily authorized to effect an extrajurisdictional arrest.

Finally, in *Graham v. State*, a Florida court rejected an extrajurisdictional arrest conducted in state[113] because the police officers arrested the defendant in his motel room without an arrest warrant, in violation of the Fourth Amendment and of *Payton v. New York*.[114] Again, a significant constitutional violation was dispositive.

The constitutional approach, especially the one utilized in *Wolf*, is very similar to the one found in *La Fontaine*.[115] Both decisions eschewed reliance on the view that extrajurisdictional arrests should be considered as those by a private citizen. Both invoked federal and state constitutional law to determine the propriety of such arrests. The differences between the two approaches are minor, if not merely semantic. Without expressly alluding to the "under color of authority" doctrine, *Wolf* declined to apply the Colorado statute authorizing private citizens' arrests because the police officers were acting as police officers.[116] Thereafter, *Wolf* applied constitutional precepts outright to judge the validity of the arrest at issue.[117] Likewise, *La Fontaine* declined to find

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110. *Mangum*, 226 S.E.2d at 853-54.

111. *Id.* at 854.

112. *Id.* The *Mangum* court applied the teachings of State v. Eubanks, 196 S.E.2d 706 (N.C. 1973) in support of this proposition. In *Eubanks* a police officer illegally arrested the defendant without a warrant in violation of North Carolina statutory law and obtained evidence as a result of the arrest. 196 S.E.2d at 707-08. The *Eubanks* court held that if an arrest is constitutionally sound but illegal under the law of North Carolina, evidence acquired as a result of the arrest should not be excluded. *Id.d* at 709. The court stated: "An unlawful arrest may not be equated, as defendant seeks to do, to an unlawful seizure." *Id.*

113. 406 So. 2d 503 (Fla. Dist. Ct. App. 1981).

114. *Id.* at 505; *see* cases cited *supra* note 54.

115. 603 N.Y.S.2d 660 (N.Y. Sup. Ct. 1993).

116. *See supra* text accompanying notes 100-07.

117. *See Wolf*, 635 P.2d 213.

that New York's private citizen arrest statute was dispositive.[118] The *La Fontaine* court applied the Fourth Amendment only after expressly concluding that the New Jersey officers were operating "under color of authority" by acting as police officers and not as private citizens.[119] Thus, the only distinction between the two cases is that *La Fontaine* invoked by name the "under color of authority" doctrine and *Wolf* did not. Both cases achieved the same end, that is, that extrajurisdictional police behavior falls only within the scope of federal and state constitutional law.[120]

V. THE "UNDER COLOR OF AUTHORITY" DOCTRINE

Generally, following the "under color of authority" theory, a police officer who operates beyond his jurisdiction may not use his position as a police officer to view illegal activity or "to gain access to evidence not available to a private citizen."[121] The doctrine has precluded officers from claiming the right to arrest as private citizens[122] and has triggered the application of the Fourth Amendment.[123]

A. *The View from Florida:* Collins v. State *and Progeny*

Florida was the first state to promulgate the "under color of authority" analysis. The first reported case was *Collins v. State*,[124] in which police

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118. *See supra* text accompanying notes 30-40.

119. *See supra* text accompanying notes 44-53.

120. *See infra* part VI; *see also* City of Kettering v. Hollen, 416 N.E.2d 598 (Ohio 1980) (holding that, as to extrajurisdictional police conduct in contravention of Ohio law, the federal exclusionary rule will not be applied to evidence obtained as a result of police activity if constitutional rights are not infringed); State v. Peterson, No. 15936, 1993 Ohio App. LEXIS 2267 (Ohio Ct. App. Apr. 21, 1993). *Contra* Commonwealth v. Fiume, 436 A.2d 1001 (Pa. Super. Ct. 1981) (without invoking the Fourth Amendment, the court decided that under Pennsylvania statutory law an arrest founded on an extrajurisdictional investigation was illegal, and that any evidence obtained as a result of the arrest was excludable); Commonwealth v. Saul, 499 A.2d 358 (Pa. Super.Ct. 1985) (deciding that the exclusionary rule is an inappropriate sanction as to evidence obtained through an investigation conducted extrajurisdictionally by a municipal detective).

121. Phoenix v. State, 455 So. 2d 1024, 1025 (Fla. 1984). *Phoenix* appears to have promulgated Florida's most current version of the "under color of authority" doctrine.

122. Commonwealth v. Troutman, 302 A.2d 430 (Pa. 1973).

123. State v. Stevens, 603 A.2d 1203 (Conn. App. Ct. 1992), *aff'd*, 620 A.2d 789 (Conn. 1993); *see also* People v. La Fontaine, 603 N.Y.S.2d 660, 666.

124. 143 So. 2d 700 (Fla Dist. Ct. App. 1962), *cert. denied*, 148 So. 2d 280 (Fla. 1962).

officers from the City of West Palm Beach, Florida were investigating marijuana trafficking, presumably in West Palm Beach.[125] Herbert Lee Collins was implicated in this activity and the police officers were led out of the jurisdiction to Riviera Beach, Florida.[126] The officers went to a Riviera Beach motel, where they believed Collins was staying.[127] At the motel the officers, who were in uniform, went to Collins's room and knocked on his door.[128] Collins recognized the officers through a peephole and invited them into his motel room.[129] Upon entering the room, the officers observed a marijuana plant, and eventually seized it along with other pieces of incriminating evidence revealed in a search of the room.[130] Collins was then arrested.[131] Before conducting this warrantless search, the officers did not request to search the premises, and did not obtain Collins's consent to do so.[132] The officers did not arrest Collins pursuant to an arrest warrant.

At a pre-trial suppression hearing the trial court granted Collins's motion to suppress all evidence seized by the police except for the marijuana plant, which was originally observed protruding from a waste basket and was in plain view.[133] Collins was convicted of growing and possessing marijuana.[134]

Collins appealed his conviction to the Florida District Court of Appeal, Second District.[135] The district court reversed the conviction.[136] Emphasizing the inviolability of a suspect's rights under the Fourth and Fifth Amendments of the United States Constitution and

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125. *Id.* at 701. In the district court opinion, there is no explicit indication as to where the alleged marijuana trafficking transpired. However, language in the opinion indicating that the West Palm Beach officers were entitled to engage in law enforcement activities in West Palm Beach leads to the inference that the West Palm Beach officers were conducting their investigation of the trafficking within West Palm Beach. *Id.* at 703.

126. *Id.* at 702. Another suspect involved in the trafficking implicated Collins. *Id.* at 701.

127. *Id.* at 702.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* at 700.

136. *Id.* at 701.

under the Florida Constitution,[137] the district court held that the West Palm Beach officers had no power to conduct the extrajurisdictional arrest in Riviera Beach, and, at most, had only the power to act as private citizens.[138] Up to this point the Florida district court opinion followed the vast majority of cases by applying a private citizen arrest analysis to determine whether police acting beyond their bailiwicks effected a lawful arrest.[139] However, at this juncture the district court departed significantly from these other decisions. The court noted that the investigation began in West Palm Beach and that the officers' activity in Riviera Beach was part of a continuing investigation they had lawfully begun in West Palm Beach.[140]

The court then stated that "their presence at the door of the motel room, in the uniform signifying their official position as police officers, was part of a continuing investigation begun as police officers. They were acting under color of their office."[141] The district court noted that Collins acquiesced to the police officers because they had asserted their authority.[142] Then the court proclaimed: "Any officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion."[143] In reversing the conviction, the court concluded that any other rule would infringe "'the right of the people to be secure in their persons, houses, papers, and effects'"[144] and would render government a police-state in which the police "are the law."[145] The government appealed the district

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137. *Id.* at 702.

138. *Id.* at 703.

139. *See* cases and authorities cited *supra* note 94. The *Collins* court acknowledged that police officers operating extrajurisdictionally may be treated as private citizens and can effect private citizens' arrests. 143 So. 2d at 703.

140. 143 So. 2d at 703.

141. *Id.*

142. *Id.*; *cf.* Marden v. State, 203 So. 2d 638 (Fla. Dist. Ct. App. 1967). In *Marden* police officers acting extrajurisdictionally drove in a marked police car alongside Marden, a robbery suspect. *Id.* at 639. Marden surrendered to the officers and was placed under arrest. The *Marden* court did not consider any claim that the arrest was effected "under color of authority."

143. *Collins*, 143 So. 2d at 703.

144. *Id.* Although the court did not attribute any authority to this quote, the language appears to be quoted from the Fourth Amendment. This Amendment, in pertinent part, states: "The right of the people to be secure in their persons, houses, papers, and effects shall not be violated. . . ." U.S. CONST. AMEND. IV.

145. 143 So. 2d at 703 (citations omitted).

court decision and the Supreme Court of Florida denied certiorari without opinion.[146]

This opinion merits several observations. First, the court promulgates the "under color" principle without any citation to specific statutory or common law authority. Second, the "under color" rule may arguably apply only to police entry into private living quarters because the rule is mentioned only in the context of such entry.[147] Third, although the district court does not expressly cite the Fourth Amendment as a basis for its rule, the Fourth Amendment implicitly provides such a basis because the court requires that an officer acting under color of authority and beyond his jurisdiction must have legal grounds for such action and that any other requirement would abridge rights granted by the Fourth Amendment.[148] Fourth, the *Collins* court does not deem illegal an extrajurisdictional arrest made under "color of authority"; rather, the test is whether the arrest violates the Fourth Amendment. Fifth, whether the officers had the right as private citizens to arrest Collins was irrelevant to the court's analysis. Sixth, the district court opinion sought to safeguard the same Fourth Amendment right of privacy in one's residence as the Supreme Court did 18 years later in *Payton v. New York.*[149]

In *State v. Crum,*[150] the District Court of Appeal of Florida, Third District extended the "under color of authority" principle to extraterritorial arrests predicated on an undercover sale of narcotics.[151] In *Crum,* a police officer acting undercover outside of his jurisdiction met with Benjamin Crum and purchased narcotics from him.[152] The officer then arrested Crum where the deal had transpired.[153] An officer empowered to arrest also participated.[154] Crum moved to suppress the narcotics obtained on the grounds that the undercover officer was operating beyond his bailiwick at the time of the purchase and arrest.[155] The trial court granted the motion.[156]

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146. State v. Collins, 148 So. 2d 280 (Fla. 1962).

147. *See* 143 So. 2d at 703.

148. *Id.*

149. 445 U.S. 573, 589-90 (1980).

150. 323 So. 2d 673 (Fla. Dist. Ct. App. 1975).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

On appeal, the district court applied a four-point analysis.[157] First, the court held that the undercover officer's extrajurisdictional activities were those of a private citizen.[158] Second, the court noted that the activities were valid only if a private citizen would have had the right to arrest in these circumstances.[159] Third, the court stated that "[w]hether the officer['s] . . . actions are sustainable as a private citizen must be determined by ascertaining whether [the undercover] officer . . . was acting 'under color of his office' at the time of the contraband purchase and subsequent arrest."[160] And fourth, the court defined the "under color of office" doctrine as one entailing a law enforcement officer who represents himself as a police officer by either wearing a uniform or by some other means.[161]

The district court then applied its rule to the facts, concluded that the undercover officer had the same right to arrest Crum as would a private citizen, and reversed the trial court.[162] Of significance to the court was that the officer was working undercover and always held himself out as a private citizen.[163] Therefore, the officer was in the same position as a private citizen to obtain incriminating evidence and to arrest.[164]

Although the *Crum* court cited *Collins*, it varied the *Collins* rule and extended its sweep. First, the *Crum* court did not confine the *Collins* rule to a citizen's private residence, but, basically extended it to any location.[165] Second, unlike *Collins*, *Crum* did not predicate a determination of an arrest's validity on the Fourth Amendment but did so on whether a private citizen would have had the right to arrest. Third, even though *Collins* seemed to suggest that an arrest effected "under color of office" was permissible if sanctioned by the Fourth Amendment,[166] *Crum* implicitly conveyed the notion that such arrest was illegal. This is

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 673-74 (citation omitted).

161. *Id.* at 674 (*citing* FLA. ATT'Y GEN. ANN. REP. 111 (1971)).

162. *Id.*

163. *Id.* at 674.

164. *Id.*

165. Although the *Crum* court did not indicate where the undercover officer conducted the narcotics transaction or effected Crum's arrest, it is apparent from the holding that the "under color of authority" rule does not apply only to a person's home. *See* 323 So. 2d at 674 (quoting FLA. ATT'Y GEN. ANN. REP. 111 (1971)). Compare the language in *Collins* which appears to confine the doctrine to a police invasion of the home. Collins v. State, 143 So. 2d 700 (Fla. Dist. Ct. App. 1962).

166. *Collins*, 143 So. 2d at 703.

so because the undercover officer did not exert the power of his office and was consequently in the same position as a private citizen when he engaged in the activities which served to validate Crum's arrest.[167] Had the undercover officer represented himself as a police officer, and thereby put himself in a more favorable position than a private citizen to obtain evidence and arrest Crum, it is reasonable to assume that the district court would have upheld Crum's motion to suppress.

Four years after *Crum*, the Florida District Court of Appeal, Second District rendered a decision in *State v. Williams*.[168] In *Williams*, during an investigation of a robbery in Gulfport, Florida, Gulfport police officer John Nelson, who was in uniform, took a witness to James A. Williams's residence in St. Petersburg, Florida.[169] The witness there observed a car parked on the street and identified it as having been used in the robbery.[170] A police officer from St. Petersburg responded to Nelson's call for assistance.[171] Williams then entered his car, and tried to drive off.[172] The St. Petersburg officer stopped the car and acquiesced as Officer Nelson administered the *Miranda* warnings to Williams and questioned him about his activities at the time of the Gulfport robbery.[173] Another Gulfport police unit arrived with another witness, who identified Williams as the getaway driver.[174] Officer Nelson then arrested

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167. *Id.*

168. 366 So. 2d 135 (Fla. Dist. Ct. App. 1979). *Contra* State v. Jimerson, 330 So. 2d 169 (Fla. Dist. Ct. App. 1976) (Mager, J. dissenting). *Jimerson* upheld without opinion a trial order granting evidence suppression. *Id.* The dissenting judge would have affirmed contending that the subject extraterritorial arrest was valid as a private citizen's arrest. *Id.* at 170. According to the facts delineated in the dissent, a policeman outside of his jurisdiction, after trailing Jimerson, identified himself as a police officer to Jimerson by showing Jimerson his badge. *Id.* Thereafter the officer conducted a fruitful search for contraband. *Id.* Without referring to the "under color of authority" principle, Justice Mager stated, "[w]ith all due respect, it is inconceivable to me under these circumstances that a police officer, *because* he was a police officer, lacked the power of an ordinary citizen; and that the officer should have refrained from taking any action. . . ." *Id.* (emphasis added). From this language, it would appear that Justice Mager would not allow the "under color of authority" doctrine to serve as a means to render unlawful the actions of police officers acting extraterriorially. *See id.*

169. *Williams*, 366 So. 2d at 136. Williams' residence was just a few blocks from the robbery. *Id.* There is an indication that the officer was not proceeding in hot pursuit. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

Williams, seized his car, and ultimately recovered contraband from it.[175] Before trial, Williams moved to suppress the contraband, asserting that the car containing it was seized by Officer Nelson while operating out of his jurisdiction.[176] The trial court granted the motion to suppress and the government appealed.[177]

The District Court of Appeal overturned the suppression order.[178] The court held that Officer Nelson had the right to act as a citizen and to seize evidence.[179] The court then ruled: "[N]onetheless, a police officer cannot justify a seizure made outside his jurisdiction as the action of a private citizen if he is acting under color of his office, and thereby gains access to evidence not available to a private citizen."[180] The court went on to state that Officer Nelson did not use the color of his office to view Williams's car, since it was parked on a public street and readily observable by anyone.[181]

Although the court cited *Collins* as authority for its main proposition,[182] the *Williams* decision was closer to *Crum* than to *Collins*. While *Collins* permits police officers acting extrajurisdictionally and under color of their office to enter a residence if such entry is legally cognizable, *Crum* and *Williams* ostensibly do not permit such entry if a private citizen would not normally have access to the residence. Thus, *Crum* and *Williams* are closer to cases holding that officers acting extraterritorially and not in hot pursuit have the same right to arrest as private citizens.[183]

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175. 366 So. 2d 135.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 136-37. The *Williams* court cited State v. Crum, 323 So. 2d 673 (Fla. Dist. Ct. App. 1975) for the proposition that a private citizen has the right to seize evidence. *Williams*, 366 So. 2d at 136. *See supra* text accompanying notes 150-67.

180. *Williams*, 366 So. 2d at 136. The court relied upon Collins v. State, 143 So. 2d 700 (Fla. Dist. Ct. App. 1962) for this statement. *See supra* text accompanying notes 124-49.

181. 366 So. 2d at 136-37. The court followed authorities from other states which admitted evidence obtained under like circumstances. *Id.* at 137. These were State v. Harp, 534 P.2d 842 (Wash. Ct. App. 1975) (holding that a Deputy Town Marshal could arrest Harp outside of his jurisdiction as a private citizen because he had reasonable and probable cause to arrest Harp); People v. Lacey, 105 Cal. Rptr. 72 (Cal. Ct. App. 1973), State v. Keeny, 431 S.W.2d 95 (Mo. 1968) (ruling that a police officer beyond his bailiwick was entitled as a private citizen to arrest a robbery suspect); Nash v. State, 207 So. 2d 104 (Miss. 1968) (deeming an extrajurisdictional apprehension to be a lawful private citizen's arrest).

182. *See supra* note 180 and accompanying text.

183. *See* cases cited *supra* note 94.

However, *Crum* and *Williams* impose an added burden on the government because an officer may not validly make a private citizen's arrest while acting "under color of authority."[184]

This approach was followed by the District Court of Appeal, Fourth District in *State v. Shipman*.[185] *Shipman* entailed an extraterritorial undercover sale of narcotics. The Fourth District followed *Williams* and *Crum* and held that an undercover officer buying narcotics was in no more of a favorable position to arrest suspects and seize evidence than a private citizen would have been.[186] The *Shipman* court defined "under color of office," as "refer[ring] to a law enforcement officer actually holding himself out as a police officer, by either wearing his uniform or in some other manner openly asserting his official position, in order to observe the unlawful activity involved or the contraband seized."[187] While this definition is basically consistent with the holdings of *Crum* and *Williams*,[188] it appears to confine the doctrine to extrajurisdictional observations of unlawful activity or to evidence recovered.[189] The statement does not refer to arrests, themselves, such as the one detailed in *La Fontaine*, in which police officers from one jurisdiction enter another jurisdiction solely to effect an arrest in the latter place.[190]

Likewise, in *State v. Chapman*,[191] the Florida District Court of Appeal, Third District followed *Crum* and held that an off-duty police officer not in uniform and operating beyond his bailiwick did not have the authority to conduct a stop and frisk of a suspect because private citizens do not have such a right.[192] The district court also invalidated Chapman's seizure because the officer exerted the color of his office in effecting the seizure by identifying himself as a police officer, displaying his badge, issuing Chapman a directive, patting him down, and detaining him for local authorities.[193] It is somewhat unclear from the opinion

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184. *Crum*, 323 So. 2d at 673; *Williams*, 366 So. 2d at 136.

185. 370 So. 2d 1195 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So. 2d 769 (Fla. 1980).

186. 370 So. 2d at 1196-97.

187. *Id.*

188. *See supra* text accompanying notes 150-84.

189. *See* 370 So. 2d at 1196-97.

190. *See* discussion *supra* part II.

191. 376 So. 2d 262 (Fla. Dist. Ct. App. 1979).

192. *Id.* at 264. The court issued this proclamation under Florida's stop and frisk statute. *Id.*; *see* FLA. STAT. ch. 901.151 (1977); *see also* State v. Schuyler, 390 So. 2d 458 (Fla. Dist. Ct. App. 1980) (applying *Chapman* to an extraterritorial stop not predicated on probable cause by an off-duty municipal officer).

193. 376 So. 2d at 264.

whether such action under color of authority rendered the arrest illegal, although such can be inferred by the court's reference to *Collins*.[194]

After *Chapman*, the Florida District Court of Appeal, Third District in *McAnnis v. State*[195] and *State v. Pinoamador*[196] presented facts akin to those in *Crum*, in which an undercover police officer conducted a narcotics transaction beyond his jurisdiction.[197] Quoting *Shipman*,[198] the *McAnnis* court held that because the undercover officer represented himself as a private citizen and did not take advantage of his status as a police officer to purchase the narcotics, the "under color of authority" doctrine was inapplicable.[199] Likewise, the *Pinoamador* court employed the same analysis and reached the same result, notwithstanding the undercover officers' use of an official unmarked police vehicle and that they were on duty at the time of the purchase.[200]

From *Collins* through *McAnnis* and *Pinoamador* the "under color of law" doctrine was applied to warrantless arrests.[201] Would the result be the same if the doctrine is applied to an apprehension based on a search warrant? In *Wilson v. State*[202] the Florida District Court of Appeal, First District reversed a trial order denying Wilson's motion to suppress evidence. Police officers from Lake City, Florida had investigated Wilson's putative possession of narcotics outside of Lake City.[203] The

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194. *Id.*; *see also supra* text accompanying notes 124-49. This inference can be drawn because *Crum*, 323 So. 2d 673 and *Williams*, 366 So. 2d 135 render such arrests illegal by referring directly to *Collins*. *See supra* accompanying notes 150-84. Also, the *Chapman* court utilized the same approach. 376 So. 2d at 264.

195. 386 So. 2d 1230 (Fla. Dist. Ct. App. 1980).

196. 389 So. 2d 317 (Fla. Dist. Ct. App. 1980) Ruben Maquera was a named defendant in this case. *Id.*

197. In McAnnis's Dade County, Florida residence, an undercover police officer from Broward County, Florida along with one other individual purchased drugs from McAnnis. 386 So. 2d at 1231. At the end of the transaction, the undercover officer identified himself as a Broward police officer and announced his intent to detain McAnnis and the other individual until the arrival of Dade County police officers. *Id.*

In *Pinoamador*, City of Hialeah Gardens police officers purchased contraband from Pinoamador and Ruben Maquera in Miami. 389 So. 2d at 318.

198. 386 So. 2d at 1232.

199. 386 So. 2d at 1232.

200. 389 So. 2d at 318. Also, the court held that, even though the officers acted "under color of authority" with respect to a confidential informant who gave the officers information on Pinoamador and Maquera, the two defendants could not vicariously claim that the officers acted "under color of authority" as to them. *Id.*

201. *See supra* text accompanying notes 124-200.

202. 403 So. 2d 982 (Fla. Dist. Ct. App. 1980).

203. *Id.* at 983.

Lake City officers placed an electronic listening device on confidential informant and directed him to buy drugs at one of Wilson's homes.[204] After the sale, a Lake City officer obtained a warrant to search Wilson's home, which was outside of the Lake City limits.[205] With the help of officers from the county in which Wilson lived, the Lake City officers searched the home, seized contraband and arrested Wilson.[206] At the suppression hearing the Lake City officers conceded that they did not have the authority to execute the search warrant or to arrest Wilson.[207]

Initially, the *Wilson* court acknowledged that a municipal police officer may conduct investigations out of her jurisdiction, so long as the subject matter of the investigation originated in her jurisdiction,[208] and that a police officer acting as a private citizen may have the same right.[209] The court further held that the investigation would have been lawful only if a private citizen would have been in the same position to conduct a similar investigation.[210] However, the court found that the Lake City officers were not authorized as private citizens to intercept the communications transmitted over the electronic recording device placed on the informant.[211] Having made such determination, the District Court of Appeal then grappled with the validity of the search warrant.[212] The court applied the "under color of authority" doctrine articulated in *Shipman*[213] and ruled that the entire investigation and affidavit used by the Lake City police to obtain the warrant were improper.[214] Because the Lake City police, who had no more authority to proceed than private

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204. *Id.*

205. *Id.* It is presumed that Wilson's home was beyond city limits because of hearing testimony that the police officers had no authority to effect the subject extraterritorial arrest. *Id.* at 984.

206. *Id.* at 983.

207. *Id.* at 983-84.

208. *Id.* at 984 (citing State v. Chapman, 376 So. 2d 262 and Parker v. State, 362 So. 2d 1033 (Fla. Dist. Ct. App. 1978) (finding that Parker obstructed a police officer engaged in a legal duty, even though such engagement entailed an extrajurisdictional investigation commenced within the officers bailiwick)).

209. *Wilson*, 403 So. 2d at 984.

210. *Id.*

211. *Id.* This determination was based on FLA. STAT. ch. 934.03(2)(c), (d), which would have authorized the interception had all parties given prior consent to the interception. Such was not the case in *Wilson*. 403 So. 2d at 984.

212. 403 So. 2d at 984.

213. *See supra* text accompanying notes 185-90.

214. 403 So. 2d at 984.

citizens, had "acted under color of authority" to induce the issuance of the warrant, it was deemed invalid.[215]

The moral of *Wilson* is that what rendered the Lake City police activity illegal was not the Fourth Amendment principles and concerns raised in *Collins*,[216] but that the officers exerted the power of their office to obtain the search warrant. In fact, *Collins* may have upheld the Lake City officers' exercise of the color of their office if they had proceeded on some valid basis, perhaps via a search warrant.[217] Instead, for the *Wilson* court such exercise, which induced the issuance of a warrant, ipso facto rendered the conduct illegal.

Another substantial Florida case is *Phoenix v. State*, a case from the Florida District Court, Fourth District, which ostensibly limited the "under color of authority" doctrine to the acquisition of evidence secured by the assertion of such authority and which also determined that arrests based on such acquisition are unlawful.[218] In *Phoenix*, police officers from Martin County, Florida conducted a covert surveillance of a reputed smuggling operation in St. Lucie County.[219] The investigation commenced in Martin County and continued into St. Lucie County where the Martin County officers, before the arrival of officers from St. Lucie County, used their lights to stop a truck suspected of participating in the smuggling,[220] drew and pointed their guns, identified themselves as

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215. *Id.* Also, the *Wilson* court expressed the same concern raised by the *Shipman* court as to the proliferation of extrajurisdictional activities by municipal police officers; *see also Shipman*, 370 So. 2d at 1197.

Although the *Wilson* court is not clear as to which court issued the subject warrant, it would have been deemed invalid under either of these two possible scenarios: (1) a warrant issued by a Lake City court but executed extraterritorially; or (2) a warrant issued by a court located outside of Lake City. Because Wilson's alleged illegal conduct transpired outside of Lake City, it is reasonable to conclude that the warrant was issued by a court sitting within the jurisdiction of Wilson's residence. *See* FLA. STAT. ANN. § 3.120 (West 1994) (Committing Magistrate).

216. *See supra* text accompanying notes 124-49.

217. 403 So. 2d 982. However, assuming that the warrant was issued by a court sitting in a jurisdiction within Lake City, the warrant would have been invalid if executed outside of Lake City. *See supra* notes 51 and 215 and accompanying text.

218. 428 So. 2d 262 (Dist. Ct. App. 1982), *aff'd*, 455 So. 2d 1024 (Fla. 1984). Steven Michael Trusz, Morton Neal Hall, Jr., and Richard Hale were co-litigants with Michael Harrision Phoenix. *Id.*

219. 428 So. 2d at 264. Although the court confined its ruling to an intrastate extrajurisdictional arrest, its decision can easily be applied to interstate extraterritorial arrests. *See, e.g., supra* note 95 and accompanying text.

220. 428 So. 2d at 264.

police officers, and ordered the occupants out.[221] The Martin County officers opened the truck and seized marijuana.[222] The occupants of the truck were arrested.[223] Before trial, the defendants moved to suppress evidence found in the truck.[224] The trial court granted the motion, finding that by their actions, the Martin County officers illegally utilized the color of office beyond their jurisdiction.[225] The state appealed.[226]

Initially, the court held that the halting of the truck and its occupants in St. Lucie County was an arrest.[227] The court then reiterated the basic tenet that officers generally are not authorized to make extrajurisdictional arrests if not in fresh pursuit.[228] The court determined that the trial court correctly found that the Martin County officers were not empowered to arrest the occupants of the truck stopped in St. Lucie County.[229]

The *Phoenix* court recognized that police officers have a common law right as citizens to effect private citizens' arrests.[230] Further, the court stated: "We do not mean to imply that police officers acting outside their jurisdictions are treated as private persons for purposes of the exclusionary rule."[231] Rather, it held that the state legislature, by bestowing upon police officers the authority to arrest, did not deny them their common law right to effect a private citizen's arrest.[232]

The court then stated that the purpose of the "under color of office" doctrine is "to prevent officers from improperly asserting official authority

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221. *Id.*

222. *Id.* Another truck was seized in Martin County; its occupants were also arrested. *Id.* at 262.

223. Although it is not stated in the opinion, it can reasonably be inferred from the reference to "defendants" challenging the stop of the truck that these defendants were its occupants. *Id.* at 265.

224. *Id* at 265.

225. *Id.* at 265-66.

226. *Id.* at 265. Also suppressed was evidence seized from the truck stopped in Martin County and a confession. *Id.* at 265. The basis for such suppression was that this evidence was tainted by the unlawful arrest in St. Lucie County. *Id.*

227. *Id.* The court relied on McAnnis v. State, 386 So. 2d 1230 (Fla. Dist. Ct. App. 1980). *McAnnis* promulgated the four elements constituting an arrest. *Id.* at 1232.

228. *Phoenix*, 428 So. 2d at 265, citing State v. Shipman, 370 So. 2d 1195 (Fla. Dist. Ct. App. 1979), *cert. denied*, 381 So. 2d 769 (Fla. 1980); FLA.STAT. ch. 901.25 (1979) (authorizing extraterritorial arrests if made in fresh pursuit).

229. 428 So. 2d at 265.

230. *Id.* (citing *Shipman*, 370 So. 2d 1195).

231. 428 So. 2d at 265.

232. *Id.*

to gather evidence not otherwise obtainable."[233] If there is such improper assertion, then such evidence must be excluded.[234] Arrests based on evidence acquired illegally under color of authority are unlawful and the "fruits" of such arrest must be suppressed.[235] However, "this doctrine does not prevent officers from making an otherwise valid citizen's arrest just because they happen to be in uniform or otherwise clothed with the indicia of their position when making the arrest."[236] So long as officers acting extraterritorially have a sufficient basis for making a citizen's arrest, they should not be obliged to surrender the indicia of their authority before making the arrest.[237] Furthermore, an officer in uniform or in a marked patrol car who inadvertently observes a felony should not be precluded from carrying out a valid citizen's arrest.[238]

Accordingly, the appellate court disagreed with the trial court's finding that the arrests were predicated on the forbidden assertion of authority.[239] The Martin County officers asserted their authority only to arrest, not to ferret out evidence.[240] For the court, this assertion plus the officers' use of a police car to make the apprehensions was "not enough to prevent them from making valid citizens' arrests."[241] The appellate court remanded the case to ascertain whether sufficient legal basis for the arrests existed and whether the acquisition of the evidence was lawful.[242]

The Supreme Court of Florida affirmed,[243] basically adopting the district court's holding and reasoning. The supreme court noted the ambiguity of the "under color of authority" doctrine and that its application has led to "inconsistent results."[244] It appeared to reject the

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233. *Id.* at 266.

234. *Id.*

235. *Id.*

236. *Id*; *see* United States v. Hernandez, 715 F.2d 548 (11th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984) (upholding under Florida law an extraterritorial arrest by officers who, at the time of arrest, held themselves out as police officers, but discovered innocently as private citizens the commission of the underlying felony).

237. 428 So. 2d at 266.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 267.

242. *Id.*

243. 455 So. 2d 1024.

244. *Id.* at 1025; *see* United States v. Ible, 630 F.2d 389 (5th Cir. 1980) (applying Florida's "under color of authority" doctrine to police officers who observe unlawful activity or seized contraband while acting extraterritorially).

view endorsed in *Chapman* that "a police officer is acting under color of office if he announces he is a police officer and displays his badge when making an arrest outside his jurisdiction."[245] However, it accepted the majority position among Florida authorities barring police officers from utilizing the power of their office to observe illegal conduct or to gain access to evidence beyond a private citizen's reach.[246] It held that the district court correctly relied on these cases in its ruling and correctly applied the law.[247]

The *Phoenix* rulings require several observations. First, the holdings appear to be derived from common law principles and are not based on any reference to the Fourth Amendment or the Florida Constitution. Second, while the district court cites *Collins* when it defines the "under color of authority" doctrine,[248] it relies primarily on *Collins*'s progeny, *Wilson*, to hold that evidence obtained by the exercise of an officer's illegal assertion of authority must be suppressed.[249] Third, the higher courts explicitly refused to hold that a police officer's self-identification as such or mere use of the visible and superficial indicia of his position, such as a badge, marked police car, or police lights, is enough to invalidate a private citizen's arrest.[250] Fourth, the appellate court limited the "under color of authority" rule to the acquisition of evidence through the assertion of police authority.[251] Finally, an extra-jurisdictional arrest is valid as a private citizen's arrest, even if the officers use the indicia of their office to effect the arrest unless the arrest is based on evidence obtained through exertion of police power.[252]

The *Phoenix* rulings exemplify the vast evolution of the "under color of authority" doctrine. At least in Florida, the current state of the doctrine significantly varies from that promulgated in the seminal *Collins* case, in that it addresses only arrest law. Whereas *Collins* concerned itself with the defendant's reaction to the exertion of police authority, and

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245. 455 So. 2d at 1025.

246. *Id.*

247. *Id.*

248. 428 So. 2d at 266 (citing *McAnnis*, 386 So. 2d 1230, and *Shipman*, 370 So. 2d 1195).

249. 428 So. 2d at 266.

250. 428 So. 2d at 266-67; 455 So. 2d at 1025. In fact, one authority outside of Florida has viewed *Phoenix* as having limited the application of the "under color of authority" doctrine to evidence acquisition of the ferreting out of criminal activity. *See* State v. Littlewind, 417 N.W.2d 361, 363 (N.D. 1987).

251. 428 So. 2d at 266. It can be inferred that this rule applies to evidence obtained both before and after an arrest.

252. 428 So. 2d at 266-67; 455 So. 2d at 1025.

concomitant surrendering of his privacy in letting the police officers into his motel room,[253] there was no expressed solicitude for the protection of such privacy in either *Phoenix* decision.

Also, neither *Collins* nor *Phoenix* considers the perspective of a suspect seized by police officers acting under color of office. In *Phoenix*, the defendants stopped the truck and capitulated to police officers proceeding extraterritorially and using their status as police officers to act.[254] However, the *Phoenix* courts focused instead on whether the evidence obtained by the Martin County officers before the arrest had been obtained illegally under color of authority.[255] In essence, *Phoenix* narrowed *Collins*'s focus on the use of indicia of authority. Additionally, while the *Collins* court appeared to predicate its ruling directly under the Fourth Amendment,[256] *Phoenix* is predicated on Florida common law deeming extrajurisdictional arrests to be those of a private citizen.[257]

An interesting means to understand the differences between the two opinions would be to apply their respective rules to the facts presented by the other case. Although the result might be the same, the means used to obtain the result are plainly different. Thus, in applying the *Phoenix* rule to the facts adduced in *Collins*, an imaginary suppression court would first determine whether, prior to the arrest, police officers operating within their jurisdiction lawfully obtained evidence implicating Collins, or, whether, acting extraterritorially, these officers used the color of their office to acquire damning evidence not otherwise accessible to a private citizen. In *Collins*, police officers interrogated a co-suspect who implicated Collins in criminal wrongdoing.[258] Assuming that the evidence established sufficient grounds for a private citizen's arrest, would the *Phoenix* courts have found lawful the warrantless police entry into Collins's motel room and the resulting seizure of evidence therefrom? A definitive answer is not readily ascertainable. On one hand, a basis for a negative response would probably be that a private citizen would not have had the same access to Collins's room as would have a police officer operating under color of her authority. However, this argument would be inconsistent with both *Phoenix* decisions because it is likely that an ordinary private citizen would have been in a less advantageous position to stop the truck and to arrest the *Phoenix* defendants than were the officers in that case. Also, a negative answer might result because of the

253. *Collins*, 143 So. 2d at 703.

254. *Phoenix*, 428 So. 2d at 264-65.

255. *Id.* at 266-67.

256. *Collins*, 143 So. 2d at 703.

257. *Phoenix*, 428 So. 2d at 265-67.

258. *Collins*, 143 So. 2d at 701.

illegal use of superficial indicia of authority to gain entry into the motel room to arrest. Indeed, such analysis was rejected by the *Phoenix* courts.[259] Finally, the arrest could be considered unlawful because, by using the authority of their office, the officers were able to uncover incriminating evidence which was used to establish a basis for Collins's arrest.[260] A court subscribing to *Phoenix* would find this reasoning palatable in light of *Phoenix*'s rejection of arrests predicated on the acquisition of evidence by officers acting under color of authority.

On the other hand, an affirmative response could be grounded as follows. Since, prior to the arrest, the officers had lawfully obtained enough evidence to arrest as private citizens, they should not have been obligated to discard the indicia of their office to enter Collins's room and, as private citizens, to arrest him therein. However, such a ruling would also validate a police officer's extrajurisdictional warrantless entry into and arrest in one's residence, a constitutionally significant act under *Payton v. New York*.[261] Nevertheless, some language from *Collins*, which permits a private citizen to "justify his failure to obtain a warrant by proving the person arrested was actually guilty of [a] felony,"[262] could place said conduct beyond *Payton*.

In contrast, a clear result would be yielded by applying the *Collins* rule to the *Phoenix* facts. If a suppression court was to find that the Martin County officers used the color of their office to arrest the *Phoenix* defendants, the only concern would be whether they had a valid basis for doing so, i.e, probable cause to arrest or some other justification sanctioned by the Fourth Amendment.[263] If they did have such basis, then they could have effected a valid private citizen's arrest.

What makes the *Collins* rule more palatable than the *Phoenix* mandate is the ease with which the former can be applied to either an arrest in the home or on the street. Such application to the *Phoenix* facts produces a clear cut result, and not the ambiguous one found in the application of the *Phoenix* holding to *Collins*'s facts.

Finally, one Florida case which addresses the execution of a warrant by a police officer operating extraterritorially is *San-Martin v. State*.[264] In this case, the Florida District Court of Appeal, Second District upheld a trial court's decision to deny suppression of evidence obtained after Louis San-Martin had been arrested pursuant to the execution of an arrest

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259. *See supra* text accompanying notes 218-52.

260. *Collins*, 143 So. 2d at 702.

261. 445 U.S. 573 (1980); *see also supra* note 54 and accompanying text.

262. *Collins*, 143 So. 2d at 703 (citations omitted).

263. *Id.* at 703.

264. 562 So. 2d 776 (Fla. Dist. Ct. App. 1990).

warrant.[265] On appeal, citing *Phoenix*, San-Martin claimed that the arrest was not sanctionable because by executing the arrest warrant, the arresting officer was "acting under color of authority."[266]

Noting that the officer was not in hot pursuit of San-Martin, the court strictly construed *Phoenix* and found that the officer was not acting "under the color of his authority" as a police officer.[267] According to *San-Martin*, *Phoenix* proscribes such assertion of authority only if used to view unlawful activity or to acquire access to evidence not readily available to private citizens.[268] "The purpose of that *Phoenix* proscription was to ensure that officers located outside their geographical jurisdictions are on equal footing with private citizens in making arrests. While they should not have any greater power outside their jurisdictions than do private citizens neither should they have less such power."[269] The court noted that *Collins* sanctioned arrests predicated on probable cause with or without a warrant, and that in the case at bar, the arresting officer made a citizen's arrest based on a warrant or a citizen's apprehension founded on probable cause embodied by the arrest warrant.[270] And, the *San-Martin* court directly followed the *Phoenix* case holding that the mere assertion of authority by a police officer proceeding beyond his bailiwick when effecting an arrest is not an illegal exercise of his police power.[271] Thus, the post-arrest search was valid because such searches are permitted when made incident to a lawful arrest.[272]

San-Martin appears to address whether a police officer acting extrajurisdictionally can execute an arrest warrant. However, the decision does not indicate whether the arrest warrant was local or federal, or whether it was issued by a court located within or without the jurisdiction where the arrest was made. If the warrant had been a federal arrest warrant, as was the case in *La Fontaine*, or was issued by a court having jurisdiction over the place of arrest, then it was validly executed.[273] If the warrant had been issued by another municipality or township from

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265. *Id.* at 777. The court never indicated where the arrest warrant was executed.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* (citations omitted).

270. *Id. Collins* never directly addressed whether private citizens may execute arrest warrants. *See* 143 So. 2d at 703.

271. *San-Martin*, 562 So. 2d at 778.

272. *Id.* The basis for this ruling was New York v. Belton, 453 U.S. 454 (1981) (pertaining to post-arrest searches for automobiles).

273. 6A C.J.S *Arrest* § 53(a) (1975); *see also* People v. La Fontaine, 603 N.Y.S.2d 660, 668-69 (N.Y. Sup. Ct. 1993); FLA. STAT. ANN. § 3.120 (West 1994).

Florida, the same result may hold, if the arrest is viewed as a citizen's arrest founded on probable cause as embodied by the arrest warrant.[274] But, if the warrant had been issued by another state and had been executed by police officers from such other state, then it would have had no validity in Florida, unless statutory authority indicates otherwise.[275] Thus, *San-Martin*'s application of *Phoenix* failed to address this interstate arrest scenario.

B. *The "Under Color of Authority" Doctrine Outside of Florida and New York*

Decisions from states other than Florida and New York also apply the "under color of authority" rule.

Although not expressly referring to the rule, the Appellate Court of Connecticut essentially used this doctrine in *State v. Stevens*.[276] In *Stevens*, a Stonington, Connecticut police officer named Diamanti investigated a drunk driving incident in Stonington.[277] The driver of the vehicle, Frances I. Stevens, after being arrested by Diamanti, was taken to a hospital in Westerly, Rhode Island, which was nearest to the scene of the accident.[278] At the hospital Diamanti administered *Miranda* warnings to Stevens, performed two sobriety tests, advised her of Connecticut's implied consent law, offered her the option to contact an attorney, and secured her consent to a blood test.[279] Diamanti returned the blood sample to Connecticut for chemical analysis.[280]

Before trial, Stevens moved to suppress the evidence obtained in the case, claiming that her arrest was illegal.[281] The basis for the claim was that Diamanti was not empowered to act as a police officer in Rhode Island.[282] The trial court denied the motion.[283] The appellate court upheld the lower court's ruling. After citing a litany of cases and

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274. *San-Martin*, 562 So. 2d at 777.

275. 6A C.J.S. § 53(a); *see also La Fontaine*, 603 N.Y.S.2d at 668-69.

276. 603 A.2d 1203 (Conn. App. Ct. 1992), *aff'd*, 620 A.2d 789 (Conn. 1993).

277. 603 A.2d at 1205.

278. *Id.*

279. *Id.* The officer administered a sobriety test and made observations of Stevens, which led the officer to believe that Stevens was intoxicated. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

principles pertaining to extraterritorial conduct,[284] the appellate court held that as a private citizen, Diamanti had the right to obtain the evidence in Rhode Island.[285]

The import of the appellate court's decision is a discussion of Stevens's due process claim. The court's analysis of this claim centered on the applicability of the Fourth Amendment to Diamanti's actions in Rhode Island.[286] The court held: "[a]lthough he was no longer cloaked with the official authority of a police officer when he entered Rhode Island, it would be disingenuous to think Diamanti was not acting as an agent or instrumentality of the police simply because he crossed the state line."[287] The appellate court then found no due process violation.[288]

The Supreme Court of Connecticut affirmed the judgment of the appellate court.[289] The supreme court did not address the applicability of the Fourth Amendment to the extraterritorial acquisition of evidence. Instead, it found that crossing state borders did not preclude the admission of the evidence at trial, and that Diamanti, though stripped of some of his statutory and common law authority outside of Connecticut, did not cease to be a police officer when enforcing a Connecticut statute in Rhode Island.[290]

Although the appellate court's decision did not invoke the "under color of authority" doctrine by name, it can, nevertheless be viewed as an "under color of authority" case with respect to the applicability of the Fourth Amendment. Clearly, Diamanti asserted the authority of his office as a Connecticut police officer to obtain the incriminating evidence in Rhode Island. In so doing, the appellate court found him to be an agent

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284. *Id.* at 1207-08.

285. *Id.* at 1208-09.

286. *Id.* at 1209.

287. *Id.* at 1210 (footnote omitted). The court followed the principle proffered in Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) holding that the Fourth Amendment applies to private citizens acting as state agents. *Stevens*, 603 A.2d at 1210.

288. 603 A.2d at 1210.

289. 620 A.2d 789 (Conn. 1993). Two justices dissented on the grounds that Officer Diamanti had no authority as a police officer in Rhode Island to order the intoxication tests. *Id.* at 796-99.

290. *Id.* at 796. The statute is CONN. GEN. STAT. § 14227(b) (1993) (Implied Consent). Also, critical to the Supreme Court of Connecticut's decision was the fact that the accident produced an emergency situation which required Diamanti to take Stevens to the Rhode Island hospital. *Stevens*, 620 A.2d at 795.

of Connecticut, thus rendering the Fourth Amendment applicable under the state action concept.[291]

Stevens can be directly compared to and distinguished from *Phoenix*. *Phoenix* held that officers using color of authority while operating extraterritorially to obtain evidence not otherwise available to private citizens may not claim to have a private citizen's right to arrest based on such evidence.[292] Such arrests are thus invalid.[293] Likewise, in *Stevens*, the Connecticut appellate court recognized that Diamanti acted as an agent from his jurisdiction, Connecticut.[294]

Stevens and *Phoenix* contrast, too. In *Stevens*, as was true in *Collins*,[295] the assertion of a police officer's authority when operating extrajurisdictionally while obtaining evidence does not render such conduct illegal and also brings it within the ambit of the Fourth Amendment.[296] However *Phoenix* would deem an arrest based on such assertion unlawful if the same led police to evidence not readily available to a private citizen.[297]

Unlike Connecticut's *Stevens*, Illinois' *People v. O'Connor*[298] followed *Phoenix*. *O'Connor* entailed a police officer who was out of his jurisdiction when he observed O'Connor speeding.[299] The officer pursued O'Connor into the officer's jurisdiction, arrested him and charged him with driving under the influence of alcohol.[300] Citing *Phoenix*, the *O'Connor* court held that the officer did not observe O'Connor's speeding by asserting the officer's authority as a police officer.[301] The court reversed a trial court decision quashing O'Connor's arrest and suppressing evidence derived from the arrest.[302]

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291. *See* cases cited *supra* note 36; *cf.* State v. Andrews, 637 A.2d 787, 791 (Conn. App. Ct. 1994) (promulgating two pronged test to determine if an off-duty police officer is acting in his or her official capacity: (1) The capacity in which the off-duty officer initially confronted the situation; and (2) The manner in which the officer conducted himself or herself after such initial confrontation).

292. *Phoenix*, 428 So. 2d at 266.

293. *Id.*

294. *See supra* text accompanying notes 287-88.

295. *See supra* text accompanying notes 124-49.

296. *See supra* text accompanying notes 287-88.

297. *See supra* text accompanying notes 218-52.

298. 520 N.E.2d 1081 (Ill. App. Ct. 1988).

299. *Id.* at 1082.

300. *Id.*

301. *Id.*

302. *Id.*

People v. Lahr is another case from Illinois that implicitly followed *Phoenix*, but intended to confine its ruling to police radar cases.[303] In *Lahr*, a police officer in his jurisdiction conducted stationary radar surveillance of a car driven by Lahr outside of the officer's jurisdiction.[304] The officer, who was in uniform, stopped Lahr's vehicle with the officer's marked patrol car, and issued Lahr a traffic summons.[305] The trial court and an intermediate appellate court found that the arrest was unauthorized under an Illinois statute authorizing a private citizen's arrest.[306]

The Supreme Court of Illinois affirmed the lower courts' decisions, noting that an extrajurisdictionally operating police officer has the right to arrest as a private citizen,but may not to arrest if he has "used the powers of his office to obtain evidence not available to private citizens."[307] The *Lahr* court concluded that the officer's use of the radar was an unlawful exercise of his authority, but confined its holding to the use of radar surveillance.[308] The court took great pains to distinguish itself from *O'Connor* because in *O'Connor* the officers used a radar to surveil a road within the officer's jurisdiction.[309] Also, although the government's case urged that the supreme court adopt *Phoenix*, the court refused, finding that *Phoenix* did not offer much in determining whether the use of police radar was an unlawful assertion of authority.[310]

However, without admitting it, the *Lahr* court did adopt *Phoenix*'s teachings. As much as the court sought to confine itself to the use of police radar as delineated in the opinion, thereby rendering *Phoenix* inapposite, the court used exactly the same language found in *Phoenix*.[311] The only difference between *Phoenix* and *Lahr*, as the *Lahr* court indicated, is that *Phoenix* focused on a police officer directly

303. 589 N.E.2d 539 (Ill. 1992).

304. *Id.*

305. *Id.*

306. *Id.* at 540.

307. *Id.* The court cited *O'Connor*, 520 N.E.2d 1081.

308. *Lahr*, 589 N.E.2d at 542.

309. *Id.* at 541. The court also distinguished its ruling from People v. Gupton, 487 N.E.2d 1060 (Ill. App. Ct. 1985), People v. Rowe, 471 N.E.2d 578 (Ill. App. Ct. 1985), and People v. Marino, 400 N.E.2d 491 (Ill. App. Ct. 1980) on the grounds that *Gupton* and *Rowe* did not address the pre-arrest acquisition of evidence obtained as a result of extrajurisdictionally operating police officers using their authority and that *Marino* did not respond to any defense argument that the extrajurisdictional arrest was based on the illegal pre-arrest assertion of authority. *Lahr*, 589 N.E.2d at 541.

310. *Lahr*, 589 N.E.2d at 541-42.

311. *Phoenix*, 428 So. 2d at 266.

imposing his authority on another person, while in *Lahr* such "confrontation was subtle and indirect." Indeed, one dissenting judge recognized that by implication the majority accepted the "under color of authority" doctrine as promulgated by *Phoenix*.[312]

Without invoking the "under color of authority" doctrine by name, the Supreme Judicial Court of Maine has used it implicitly. In *State v. LeGassey*,[313] the court applied the Fourth Amendment to a case entailing an extrajurisdictional arrest by an off-duty state park ranger. The ranger responded to an automobile accident in a truck bearing Maine's insignia and a blue light.[314] The ranger discussed the accident with LeGassey, placed him in the truck, told him to remain there, and radioed the local police for help.[315] LeGassey believed that he was under arrest and not free to leave.[316] Local police arrived, administered *Miranda* warnings to LeGassey, and obtained a confession from him.[317] A trial judge suppressed the statement as being the fruit of an unconstitutional seizure by the ranger.[318]

Maine's Supreme Judicial Court concurred. Citing a leading secondary authority, the court held that the Fourth Amendment's applicability depended on whether the ranger acted as a police officer or as a private citizen.[319] The court held that the ranger acted as a police officer, thus triggering the Fourth Amendment.[320] Consequently, the arrest was unlawful and the statement was excludable as the product of such illegality.[321]

This analysis is similar to *La Fontaine*. In both cases extrajurisdictional police officers acted in their official capacity and thus violated the Fourth Amendment. The only true distinction is that *La Fontaine* explicitly relied upon the "under color of authority" doctrine, whereas *LeGassey* did so implicitly.

In a manner similar to the *O'Connor* court, the Supreme Court of Michigan applied *Phoenix* to a case involving an extrajurisdictional

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312. *Lahr*, 589 N.E.2d 539, 546 (Heiple, J., dissenting).

313. 456 A.2d 366 (Me. 1983).

314. *Id.* at 366.

315. *Id.*

316. *Id.*

317. *Id.* at 367.

318. *Id.*

319. *Id. See* WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.6 at 113, 133 (1978).

320. 456 A.2d at 367.

321. *Id.* at 367-68.

undercover narcotics operation. In *People v. Meyer*,[322] the Supreme Court of Michigan reversed a trial court's dismissal (which was affirmed by the Michigan Court of Appeals) of an indictment charging Meyer with violating Michigan's narcotics statutes.[323] Central to the court's determination was that the undercover officer did not exercise his authority outside his jurisdiction to collect incriminating evidence.[324] The *Meyer* court relied upon *Phoenix* and issued a succinct statement about undercover officers acting beyond their bailiwicks: "An undercover officer, by definition, does not obtain information through actions taken under color of law."[325]

A case which *La Fontaine* followed, and which analyzed this issue similar to *Collins* and *Phoenix*, is *State v. Filipi*,[326] which was decided by the Supreme Court of Minnesota more than two years before the first *Phoenix* decision. *Filipi* involved an extrajurisdictional undercover investigation which culminated in the extraterritorial arrest of Kenneth Filipi and the warrantless seizure from his car of marijuana contained in a closed duffel bag and the seizure of cocaine from his person.[327] Ultimately, he was tried for and convicted of possession of marijuana and cocaine.[328]

The *Filipi* court reversed the marijuana possession conviction, but sustained the conviction for cocaine possession. First, the court acknowledged that officers acting extrajurisdictionally have the power to arrest as private citizens, if those officers are making an arrest under the statute which provides for private citizens' arrests.[329] Second, the court rejected Filipi's contention, based on *Collins*, that the arrest was invalid because the officers acted "under color of authority."[330] *Collins* was distinguishable, the court found, because the police used the entry into Collins's motel room to establish a basis for Collins's arrest, whereas in

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322. 379 N.W.2d 59 (Mich. 1985).

323. *Id.* at 59.

324. *Id.* at 67.

325. *Id.*

326. 297 N.W.2d 275 (Minn. 1980).

327. 297 N.W.2d at 276-77. The officers involved in the investigation, which targeted a suburb of Minneapolis, were from Minneapolis. *Id.* at 276. The *Filipi* court did not indicate if the officers had the authority to investigate crimes in the suburb. Filipi was pursued and arrested in Dakota County, an area beyond the officers' bailiwick. *Id.* at 276-77.

328. *Id.* at 276.

329. *Id.* at 278. The court cited the Minnesota provision for private citizens' arrests. MINN. STAT. § 629.37 (1978).

330. *Filipi*, 297 N.W.2d at 278.

Filipi, the police officers "while outside their jurisdiction, did not establish the basis for their private citizen's arrest by using incidents of their authority, e.g., badges and uniforms, to induce defendant to surrender protections he enjoyed against private citizens generally."[331] Finally, the court held that the officers used their authority only after they established a valid basis for arrest, and that the arrest itself was tantamount to a lawful private citizen's arrest.[332]

Although the arrest was proper and the seizure of the cocaine from Filipi's person was permissible as incident to a lawful arrest,[333] the court stated that the search of the automobile "was conducted under color of police authority and the limits of the Fourth Amendment apply."[334] The court held that the seizure violated the Fourth Amendment through limitations imposed by the United States Supreme Court on the "automobile exception."[335] *Filipi* is significant because it seems to be the first reported case which expressly applied the Fourth Amendment to police activity conducted "under color of authority." The court did not cite any authorities or supply any extensive reasoning for this holding. In fact, prior to *Filipi*, the "under color of law" doctrine was a matter of common law in states such as Florida, and not one of constitutional significance. Finally, *Filipi*, with an assist from *Collins*, may have persuaded the *La Fontaine* court to apply the Fourth Amendment to the conduct of the extraterritorially operating officers.[336]

A further Minnesota "under color of authority" case is the recently decided *State v. Tilleskjor*.[337] In *Tilleskjor* the Minnesota Court of Appeals held that a police officer outside of his bailiwick cannot first exert his police authority to obtain evidence and then use it to make a private citizen's arrest.[338] *Tilleskjor* struck down a police officer's extrajurisdictional arrest of a suspect after the officer had used his police authority to conduct an investigatory stop.[339] The court rejected the

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331. *Id.*

332. *Id.*

333. *Id.* at 279.

334. *Id.*

335. *Id.* The Filipi Court cited United States v. Chadwick, 433 U.S. 1 (1977) (holding that a search of a footlocker at a police station could not be deemed as a search incident to a lawful arrest because it transpired long after Chadwick was in custody) and Arkansas v. Sanders, 442 U.S. 753 (1979) (requiring that a warrant was mandated to search a suitcase which had been placed in the trunk of a taxi cab).

336. *See supra* text accompanying notes 45-53.

337. 488 N.W.2d 327 (Minn. Ct. App. 1992).

338. *Id.* at 331.

339. *Id.* at 328.

government's claim that a private citizen's arrest power includes the right to make an investigative stop because private citizens do not have the authority to investigate crimes.[340]

It appears that *Tilleskjor* followed *Phoenix* and *Filipi*, but raised a very serious question: if private citizens do not have police authority to investigate crimes, how can extrajurisdictionally acting police officers, who are stripped of their police authority and are treated as private citizens under these decisions, be granted such authority? The question was never addressed in *Phoenix*, which purports to permit undercover police officers outside of their jurisdiction to conduct investigations or gather evidence so long as the same is not done through the exertion of police authority. *Tilleskjor* also did not answer this question. *Tilleskjor* could mean doom for the *Phoenix* rule insofar as it applies to undercover operations.

In *State v. Williams*,[341] the Superior Court of New Jersey implicitly applied the "under color of authority" doctrine to an extrajurisdictional arrest, and focused on a suspect's perspective when confronted with such authority. In *Williams*, uniformed Park Ridge, New Jersey Police Officer Ruth responded to a report of a van without its lights on parked on the side of a road.[342] Eventually, the van went into Montvale, New Jersey, and was followed by Officer Ruth in his patrol car.[343] In Montvale, Ruth ordered the van to stop after seeing someone throw a beer bottle from the passenger's side of the van.[344] Ruth searched the van with Williams consent, and recovered a stolen license plate.[345] Williams moved to suppress the license plate, contending that Officer Ruth did not have the authority to stop the van.[346] To counter this claim, the prosecution argued that, as a private citizen, Ruth had the right to make a citizen's arrest and to search the van.[347]

The court deemed the prosecutor's position to be groundless and concluded that "Williams believed he gave his consent for a search of his vehicle to a uniformed police officer, not to a private citizen. The State cannot therefore justify the stopping of the vehicle and subsequent consent

340. *Id.* at 331.

341. 347 A.2d 33 (N.J. Super. Ct. Law Div. 1975).

342. *Id.* at 34-35.

343. *Id.*

344. *Id.*

345. *Id.* The defendant apparently consented to the search, which was precipitated by Officer Ruth's observation of beer bottles in the van's interior. *Id.*

346. *Id.* at 34. Williams noted that Patrolman Ruth was not in hot pursuit when he chased the van. *Id.*

347. *Id.* at 34-35.

to search on the basis of a private citizen's right to arrest."[348] However, the court denied the defendant's motion on other grounds.[349]

Although the phrase "under color of authority" did not appear in *Williams*, the decision used a rationale similar to *Collins* in rejecting the notion that the arrest in this case was by a private citizen. In both cases, the suspects permitted a police intrusion of their privacy because they believed they were responding to police officers, not to private citizens.[350] Or, put another way, the officers' assertion of law enforcement authority induced Collins to let the police into his motel room, and Williams to consent to the search of his car.[351] Accordingly, both courts refused to accept the government's claim that the officers were proceeding as private citizens.[352]

Graham v. State[353] addressed whether an off-duty police officer, acting under color of authority, was entitled to conduct a warrantless search outside of Sapulpa, Oklahoma, where the officer was employed.[354] The off-duty officer observed an illegally parked car outside of Graham's residence.[355] The car was parked partly within Sapulpa and partly beyond its geographical limits.[356] The officer went to Graham's residence, which was located outside of Sapulpa, to request that the car be moved.[357] The officer and Graham spoke outside of his home.[358] When Graham tried to close the door to his home, the officer smelled marijuana emanating from the residence.[359] Without a warrant, the off-duty officer entered the dwelling and seized a bag of marijuana, which the officer described as being in plain view.[360] Graham was arrested for and convicted of marijuana possession.[361]

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348. *Id.* at 35 (citations omitted).

349. *Id.* The police conduct was legal because the officer was entitled to stop the vehicle because it was done on a road intended to be within the officer's jurisdiction by the New Jersey State Legislature. *Id.* at 35-36.

350. *Collins*, 143 So. 2d at 703; *Williams*, 347 A.2d at 35.

351. *Collins*, 143 So. 2d at 703; *Williams*, 347 A.2d at 35.

352. *Collins*, 143 So. 2d at 703; *Williams*, 347 A.2d at 35.

353. 560 P.2d 200 (Okla. Crim. App. 1977).

354. *Id.* at 202-03.

355. *Id.*

356. *Id.* at 201.

357. *Id.* at 202.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 200, 202.

The Oklahoma Court of Criminal Appeals struck down the arrest because the search of the residence was improper.[362] The court ruled that the off-duty officer was not authorized to conduct the search while acting under color of authority.[363] Although a police officer acting extrajurisdictionally may engage in the hot pursuit of a suspect,[364] or one municipality may seek the assistance of another's police personnel,[365] the general rule is that a police officer is not empowered to act beyond his bailiwick and, thus, beyond his authority.[366]

For several reasons *Graham* is distinguishable from other "under color of authority" cases. Unlike *Phoenix*, *Graham* never confined the "under color of authority" doctrine to a particular set of circumstances, but issued a general proclamation barring police officers from acting "under color of authority" while outside their jurisdiction. Also, in contrast to *La Fontaine*, which viewed the doctrine as triggering the Fourth Amendment, *Graham*'s mandate is one of common law. In fact, *Graham* never relied upon any authority in fashioning its "under color of authority" formula.[367] *Phoenix*,[368] *La Fontaine*[369] and *Commonwealth v. Troutman*,[370] had offered a much more precise definition of the "under color of authority" doctrine than did *Graham*.[371]

Another case from Oklahoma is *Meadows v. State*,[372] which involved an extraterritorial undercover investigation.[373] Law enforcement from the county of arrest properly executed an arrest warrant and arrested the suspect.[374] The Court of Criminal Appeals of Oklahoma upheld the officer's undercover activities as those of a private

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362. *Id.* at 203.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *See id.* at 203.

368. 455 So. 2d 1024.

369. 603 N.Y.S.2d 660.

370. 302 A.2d 430 (Pa. Super. Ct. 1973). For further discussion of *Troutman*, see *infra* notes 377-86 and accompanying text.

371. *Id.*

372. 655 P.2d 556 (Okla. Crim. App. 1983).

373. In *Meadows* a police officer from Mustang, Oklahoma purchased narcotics from Meadows in Oklahoma City, which was beyond the officer's jurisdiction. *Id.* at 557.

374. *Id.*

citizen. The court found that the undercover officer did not "act under color of law" and never held himself out as a police officer.[375]

Finally, in Pennsylvania's *Commonwealth v. Troutman*,[376] two police officers pursued motorist Troutman, whom they suspected of driving while intoxicated.[377] During the pursuit, the officers went beyond their Penn Hills Township jurisdiction.[378] Outside of the township the officers sounded their patrol car sirens and flashed their blinking red lights to stop Troutman.[379] The trial court quashed the accusatory instrument filed against Troutman because his arrest was unauthorized.[380]

The Superior Court of Pennsylvania affirmed the trial court's decision, agreeing that officers have no statutory right to follow a suspected misdemeanant beyond their jurisdiction.[381] The court then held:

> In the instant case, the Penn Hills Township policemen sounded their sirens, flashed their lights, exhibited their badges, and made the arrest pursuant to their authority as law enforcement officials. The police officers' behavior was that of a policeman and not of a private citizen. Once an officer invokes the power of his township to make an arrest, he cannot preserve the legality of the arrest by labelling his behavior a citizen's arrest.[382]

Although not an expressly "under color of authority" case, *Troutman*'s language is similar to that found in Florida's *State v. Chapman*,[383] an "under color of authority" case. In both decisions, arrests made by police officers using the superficial indicia of their respective offices were not seen as arrests by a private citizen.[384] The

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375. *Id.* The court cited *Filipi*, 297 N.W.2d 275, to support the finding. *Meadows*, 655 P.2d at 557.

376. 302 A.2d 430 (Pa. Super. Ct. 1973).

377. *Id.* at 431.

378. *Id.*

379. *Id.*

380. *Id.* Troutman was charged with a misdemeanor; the accusatory instrument filed was an information. *Id.*

381. *Id.*

382. *Id.* at 432.

383. *See Chapman*, 376 So. 2d at 264.

384. *Id.*; *Troutman*, 302 A.2d at 432.

officers asserted their authority as police officers to make arrests and thus their arrests cannot be construed as private citizens' arrests.[385]

C. *Distinctions Between* La Fontaine *and Its Predecessor Cases*

La Fontaine[386] was the first case to regard the "under color of authority" doctrine as triggering the application of the Fourth Amendment. In contrast, most of the cases hold that the doctrine is derived from the common law.[387] Although *Collins*,[388] *Filipi*,[389] and *Troutman*[390] are "under color of authority" cases, their approach was somewhat different than *La Fontaine*'s. For instance, in *Collins*, the court did not expressly state that the Fourth Amendment applied to the police conduct. The *Collins* court held that entry by police officers "acting under color of office" had to be predicated on a valid basis in law.[391] The court then quoted the Fourth Amendment, and implied that such entry must be permissible under the Fourth Amendment.[392] However, *Collins* confined its rule only to the entry and did not extend it to an arrest, as did *La Fontaine*.[393]

Similarly, although the *Filipi* court held that the search of the defendant's vehicle was conducted "under color of authority," and thus was within the scope of the Fourth Amendment, the court did not view

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385. *Id.*; *Troutman*, 302 A.2d at 432.

In Commonwealth v. Phillips, 487 A.2d 962 (Pa. Super. Ct. 1985), the court considered an extraterritorial arrest made by a police officer not in hot pursuit. *Id.* at 963-64. The court applied 42 PA. CONS. STAT. § 8953(a)(6) (authorizing extraterritorial arrest by a municipal police officer), which was enacted nine years after *Troutman*, and upheld the arrest. 487 A.2d at 964. Under this statute, an officer under any circumstances may effect an extraterritorial arrest if she has probable cause to believe that a felony offense has been committed, and makes a reasonable effort to identify herself as a police officer. *Id.* The court reached its determination without addressing whether a police officer can make a citizen's arrest beyond her jurisdiction. *Id.* at 964 n.2. However, the court indicated that *Troutman* had been severely criticized by authorities from other states and cited a number of cases seeming to equate a police officer's extraterritorial arrest with that of a private citizen. *Id.*

386. 603 N.Y.S.2d 660.

387. *See, e.g.*, *Collins*, 143 So. 2d 700; *Filipi*, 297 N.W.2d 275; *Troutman*, 302 A.2d 430.

388. 143 So. 2d 700.

389. 297 N.W.2d 275.

390. 302 A.2d 430.

391. 143 So. 2d at 703.

392. *Id.*

393. 603 N.Y.S.2d 660, 666-67.

Filipi's arrest as deserving Fourth Amendment scrutiny.[394] Rather, the *Filipi* court upheld the arrest as a private citizen's arrest on grounds proffered by both *Phoenix* courts, that is, that the police did not exercise their authority to establish the basis for the arrest.[395] *La Fontaine* did not apply this analysis.

Perhaps *Troutman*'s rule is closest to *La Fontaine*'s in that both cases applied the "under color of authority" doctrine to an arrest by officers asserting police authority.[396] However, unlike *La Fontaine*, the *Troutman* court did not apply the Fourth Amendment to the arrest, but simply stated that it could not be validated as the activities of a private citizen.[397]

Finally, *La Fontaine* contrasts with *Phoenix* and its sister cases because it applied the "under color of authority" doctrine only to the arrest itself, and did not consider whether the New Jersey officers operating extraterritorially exercised their authority to ferret out evidence.[398] In fact, in *La Fontaine*, the New Jersey officers, presumably established La Fontaine's involvement in the crime while acting within their jurisdiction and did not need to use their position as police officers to establish La Fontaine's federal offense of crossing state lines to avoid prosecution.[399] Thus, would a court following *Phoenix*, have treated La Fontaine's arrest as one by a private citizen? The response would necessarily have been yes because the New Jersey officers did not use their authority extraterritorially to ferret out evidence or to investigate suspected wrongdoing.[400]

D. People v. Marino: *A Criticism of the "Under Color of Authority" Doctrine*

One case which issued a stinging critique of the "under color of authority doctrine" generally, and specifically as promulgated in *Troutman*, is *People v. Marino*.[401] In *Marino*, Chicago police conducted

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394. 297 N.W.2d 275, 278-79.

395. *Id.* at 278; *Phoenix*, 455 So. 2d at 1026.

396. *Troutman*, 302 A.2d at 432; *La Fontaine*, 603 N.Y.S.2d at 667-68.

397. 302 A.2d 432.

398. *See Phoenix*, 428 So. 2d at 266.

399. *See* Suppress Hr'g Record; *see also La Fontaine*, 603 N.Y.S.2d 660. There was no evidence in the hearing record which would contradict this assertion.

400. *See, e.g., Phoenix*, 428 So. 2d at 226; *Filipi*, 297 N.W.2d at 278.

401. 400 N.E.2d 491 (Ill. App. Ct. 1980).

an extensive investigation of a burglary perpetrated in Chicago.[402] The investigation commenced in Chicago and culminated in Wood Dale, Illinois, where the Chicago officers arrested the defendant and one other suspect without a warrant and seized evidence after the arrest.[403] No Wood Dale police officers were involved in the investigation, arrest, or seizure of evidence.[404]

Before trial, Marino[405] moved to suppress the evidence obtained by the Chicago officers.[406] Marino claimed that his arrest was unauthorized, and that the evidence obtained as a result of this impropriety should have been excluded.[407] The trial court denied the motion.[408] Ultimately, Marino was convicted of burglary after a jury trial.[409]

On appeal, the Appellate Court of Illinois, Second District found that the Chicago officers had no statutory authority to arrest Marino beyond their jurisdiction.[410] Nevertheless, the court upheld Marino's arrest, holding "that a warrantless arrest effected by a police officer who asserts official authority to arrest which he does not in fact have is nevertheless valid if an arrest made by a private person under the same circumstances would have been valid."[411] Marino's arrest was valid under Chicago's statute authorizing an arrest by private citizens.[412]

In making this determination, the court rejected Marino's claim that the arrest could not be treated as that of a private citizen because the

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402. *Id.* at 493. The investigation lasted eight days and involved 12 Chicago police officers. *Id.*

403. *Id.*

404. *Id.*

405. Marino was tried with one David Wilhite, who was arrested simultaneously with Marino. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 494.

410. *Id.* at 495. This finding was reached notwithstanding ILL. REV. STAT. ch. 24, para. 7-4-7 (1977), which the *Marino* court found to extend the authority of police from municipality into adjoining municipalities within the same county. *Marino*, 400 N.E.2d at 494. The reason for this statute's inapplicability was that Wood Dale, Illinois and Chicago, Illinois were not adjoining municipalities. *Id.* at 495.

411. *Marino*, 400 N.E.2d at 497.

412. *Id.* That statute is ILL. REV. STAT. ch. 38, para. 1073 (1977). *Marino*, 400 N.E.2d at 497. The *Marino* court found that, under this statute, the Chicago police had reasonable grounds to believe that Marino was committing a felony. *Id.*

officers exercised nonextant official police authority to arrest Marino.[413] Marino cited *Troutman* in support of this argument.[414]

The appellate court found that *Troutman* represented a minority view.[415] More palatable was the majority view which holds that an extrajurisdictional arrest by a police officer is valid if a private citizen had the authority to make the arrest.[416] The court cited several cases from other states and federal cases that supported this view.[417] In these cases, an officer's assertion of the color of his office to arrest while operating extraterritorially was irrelevant.[418] Rather, the dispositive issue was whether there was statutory authority for a private citizen to arrest, regardless of the capacity of the arresting officer.[419] Further, the court cited the Restatement (Second) of Torts, which advocates a police officer's right to conduct a private citizen's arrest regardless of whether she asserts her office or whether the arrest is within her jurisdiction.[420]

In conclusion, the court found that the Restatement's and the majority views were better reasoned than the minority view and should be controlling.[421] Returning to *Troutman*, the court said that "[t]he emphasis in the *Troutman* decision upon sirens, flashing lights, and badges, is, in our opinion, superficial and we decline to follow the holding of that case . . . ."[422]

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413. *Marino*, 400 N.E.2d at 495-96.

414. *Id.* at 496.

415. *Id.* at 497.

416. *Id.* at 496.

417. *Id*; *see, e.g.*, State v. McCullar, 520 P.2d 299 (Ariz. 1974); Nash v. State, 207 So. 2d 104 (Miss. 1968); and United States v. Swarovski, 557 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

418. *Marino*, 400 N.E.2d at 496.

419. *Id.*

420. *Id.* at 496-97. Specifically, the court focused on the following language:

> In such a case, [a peace officer's] privilege to arrest is not dependent on his being a peace officer; *and it is immaterial whether he purports to act in his capacity as peace officer or as a private person or whether he is or is not acting within the territorial or other limits of his designation.*

Id. at 497 (quoting Restatement (Second) of Torts § 121 (1965)) (arrest by peace officer without a warrant) (emphasis in original).

421. *Id.* at 497.

422. *Id. But cf.* State v. Littlewind, 417 N.W.2d 361 (N.D. 1987). In *Littlewind*, the Supreme Court of North Dakota, after noting the limits placed upon the "under color of authority" doctrine by *Phoenix*, declined to "adopt" this doctrine, or, as the court put it, the "Florida rule." *Id.* at 363. This decision not to "adopt" was reached upon consideration of the case facts, which led the court to conclude that the subject police officer was in hot pursuit when he left his jurisdiction. *Id.* The use of the term "adopt"

Thus, *Marino* rejected the application of the "under color of authority" doctrine to an arrest. In fact, both *Phoenix* courts took the same action, but they also clearly indicated that they would apply the doctrine to extrajurisdictional investigations or evidence gathering. In contrast, there was no expressed willingness from the *Marino* court to apply the doctrine to these phases of police activity. Arguably, *Marino* rejects the doctrine with respect to any of these phases by its validation of extrajurisdictional arrests regardless of the assertion of official police authority and its repudiation of *Troutman*.

However, *Marino* did not forestall the Supreme Court of Illinois from promulgating a *Phoenix*-type doctrine in *People v. Lahr*.[423] Therefore, the *Lahr* court permitted the application of the doctrine at least as to pre-arrest investigations, thereby addressing an issue not raised in *Marino*.[424]

VI. THE UTILITY OF THE *LA FONTAINE* APPROACH IN NEW YORK STATE

Although the "under color of authority" approach is not the majority view[425] and was criticized by the *Marino* court as being superficial,[426] the doctrine and its variation as promulgated in *La Fontaine* is most consonant with New York State constitutional law principles.

Preliminarily, as indicated in *La Fontaine*, in the absence of federal authority, state law must determine the legality of an arrest.[427] And, since the motion to suppress in *La Fontaine* was brought under the Fourth Amendment, state constitutional law was used to determine a Fourth Amendment question. Such an approach is not unheard-of, because federal courts similarly use state law to resolve issues raised under the Fourth Amendment.[428]

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was ambiguous, however. Did the court mean that it would not apply the "Florida rule" to the specific case sub judice? Or, was the court saying that it would never apply the rule to any case involving extraterritorial police activity?

423. 589 N.E.2d 539 (Ill. 1992); *see also supra* text accompanying notes 305-14.

424. 598 N.E.2d 539. *Lahr* seemed to confine its ruling to the use of police radar. *Id.* at 542; *see also Marino*, 400 N.E.2d 491.

425. *See Marino*, 400 N.E.2d at 497.

426. *Id.*

427. *La Fontaine*, 603 N.Y.S.2d 660, 664 (N.Y. Sup. Ct. 1993).

428. *See, e.g., Swarovski*, 557 F.2d 40, wherein local law was used to resolve a question ultimately raised under the Fourth Amendment. In federal court and as to a federal prosecution a motion to suppress evidence stemming from an unlawful arrest can be brought in the first instance only under the federal constitutional law, i.e. the Fourth Amendment. *See id.*

In New York, Article I, section 12 of the State Constitution governs the legality of an arrest. Although Article I, section 12[429] shares similar language and a common history with the Fourth Amendment,[430] the New York State Court of Appeals has "delineated an independent body of search and seizure law under the State Constitution to govern citizen-police encounters when doing so best promotes "the protection of the individual rights of our citizens."[431] When this protection has been sought, the Court of Appeals has remarked that Article I, § 12 is more protective of State privacy guarantees than the Fourth Amendment with respect to federal privacy concerns.[432] In a period of Supreme Court decisions often viewed as more supportive of law enforcement concerns[433] than protective of individual rights and liberties, it can reasonably be said that Article I, section 12 emphasizes the primacy of the protection of these rights and liberties over law enforcement concerns.[434] Consequently, when selecting a rule pertaining to extraterritorial arrests by police officers not in close pursuit, New York State courts and the State Legislature must be acutely mindful of this emphasis. And, the *La Fontaine* rule, along with *Collins*'s and *Troutman*'s mandates and the Colorado approach,[435] is more protective of individual rights and liberties than those extrajurisdictional arrest rules espoused by other courts.

Before discussing the suitability of the *La Fontaine-Collins-Troutman* rule, the reasons for rejecting the other formulae are proffered. First, the *Phoenix/Filipi* rule, which appears to represent the majority approach for the "under color of authority" doctrine is to a degree more protective of law enforcement concerns than private citizen concerns. This is so

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429. *See, e.g.*, People v. Scott, 79 N.Y.2d 474 (1992) (holding that unlike the Fourth Amendment, which does not protect an owner of open fields, Oliver v. United States, 466 U.S. 170 (1984), Article I, § 12 does afford such an owner a privacy right in areas outside the curtilage); People v. Harris, 77 N.Y.2d 434 (1991); People v. P.J. Video, 68 N.Y.2d 296 (1986).

430. *Harris*, 77 N.Y.2d at 438.

431. *Id.* (quoting People v. P.J. Video, 68 N.Y.2d 296, 304 (1986) (quoting People v. Johnson, 66 N.Y.2d 398, 407 (1985))).

432. *See also* People v. Torres, 74 N.Y.2d 224, 228 (1989).

433. *See* People v. Johnson, 66 N.Y.2d 398 (1985)(rejecting under New York State constitutional law Illinois v. Gates, 462 U.S. 213 (1983) "totality of the circumstances" test to determine the validity of a warrant, and choosing to apply the more exacting "Aguilar/Spinelli" rule). *See* Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) (promulgating a test to determine the validity of a warrant based on evidence furnished by an informant).

434. *La Fontaine*, 603 N.Y.S.2d at 666-67.

435. *See supra* text accompanying notes 67-69.

because in these cases, the authority asserted by the officers did not establish the arrests' validity. These cases only forbade the officers from using the color of their office to obtain evidence establishing a basis for arrest. Although the *Phoenix/Filipi* holding is consistent with safeguarding individual rights and liberties with respect to pre-arrest investigation or evidence gleaning, it does not go far enough to protect the rights of a suspect at the time of arrest. At that moment, the right to be free from unreasonable searches and seizures, the right to privacy, and liberty itself are most imperiled. Indeed, in *Phoenix*, not only did Phoenix and his cohorts give up their individual liberty when they surrendered to the police, but also they surrendered their privacy interests in the truck which they were driving.[436] And, while *Filipi* expressed its concern for Filipi's privacy and Fourth Amendment interest in his privacy rights to the trunk of his car and the container which was seized, the opinion did not display such concern for Filipi's arrest, which vitiated his liberty, or for the privacy interest in his person, which was searched by the police.[437] Indeed, whenever an arrest is lawfully made, one's privacy interest in one's person is always jeopardized because a lawful arrest allows a warrantless search of the person.[438] The same danger holds true with respect to an automobile, seized pursuant to a valid arrest, in which a privacy interest may also be found.[439]

The *Phoenix* test also does not consider police entries into one's residence, in which a person has the greatest privacy interest, and entry into which may trigger the application of the Fourth Amendment.[440] Moreover, a police officer outside of his bailiwick who exercises the authority of his office would be in a much better position than a private citizen to gain entry in the home of an ordinary citizen and make a warrantless arrest. The reason is that an ordinary citizen is probably more inclined to submit to the authority of a person she perceives as a police officer than to a person she believes is a civilian. Thus, should police officers who operate extrajurisdictionally "under color of their authority" and who threaten a basic and fundamental right to privacy in the home be entitled to arrest as private citizens and have their conduct evade Fourth

436. *Phoenix*, 428 So. 2d at 264-65.

437. *Filipi*, 297 N.W.2d 275, 276-77.

438. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (authorizing under the Fourth Amendment a search of the person if conducted as an incident to a lawful arrest).

439. *See, e.g.*, New York v. Belton, 453 U.S. 454 (1981) (permitting under the Fourth Amendment a search of a vehicle's passenger compartment and any container found therein if conducted as a search incident to a lawful arrest).

440. *See* cases cited *supra* note 54.

Amendment scrutiny?[441] Florida would say yes, if the basis for the arrest was not obtained by officers acting extraterritorially and "under color of their authority," despite the lack of parity between private citizens and police officers who strive to seize a suspect and gain post-arrest evidence. It is this disregard for a citizen's rights which renders *Phoenix* and its disciple authorities from other states ill-suited to New York State jurisprudence.

Plainly, undercover officers who conduct investigations or find incriminating evidence do not imperil the constitutional rights of citizens[442] because these officers do not reveal their identity as police officers. Otherwise, however, citizens may be inclined to surrender their rights to the display of the badge or the uniform or other identification of authority.[443] To trivialize the significance of such police action, as did *Phoenix* and *Filipi*, cheapens constitutional guarantees.[444]

Finally, at least one decision may erode the precepts of *Phoenix*. It appears that *Tilleskjor*'s rule proscribing private citizens from claiming police authority to investigate crimes could be extended to extrajurisdictional police officers.[445] If some courts were to extend *Tilleskjor* in this way, what would happen to the *Phoenix* approach?

In like fashion, the majority approach as enthusiastically endorsed by *Marino*, which determines the validity of extrajurisdictional arrests pursuant to the law of private citizen arrests,[446] is inimical to New York law. Such a rule clearly favors law enforcement interests because it extends the authority of police officers outside of their jurisdiction, thereby rendering the Fourth Amendment and possibly similar state constitutional provisions inapplicable to such arrests under the state action principle. Although law enforcement interests would be substantially augmented if New York were to adopt the *Marino* approach, the rights of New York's populace would be substantially diminished. New York is committed to protecting individual rights and liberties above all else and these principles would suffer if a foreign state police officer, operating in

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441. *See* cases cited *supra* note 40.

442. *See, e.g., Phoenix*, 428 So. 2d at 264-65.

443. *See, e.g., La Fontaine*, 603 N.Y.S.2d 660.

444. Did the *Phoenix* court fashion a rule to achieve a specific result? By deemphasizing the importance of displays of indicia of authority at the time of arrest, *Phoenix* was in a position to hold expressly and impliedly that the Fourth Amendment did not apply to the arrest by a private citizen. Consequently, the court ruled that the police activity was authorized, unfettered by Fourth Amendment concerns, and that the evidence derived therefrom was admissible.

445. *See supra* text accompanying notes 339-40; *see also Tilleskjor*, 488 N.W.2d 327, 331.

446. *Marino*, 400 N.E.2d 491, 495-97.

New York and holding himself out as a police officer and not as a private citizen, could claim the same right to arrest as a private citizen and thus erode the Fourth Amendment. Also, from a New York perspective, *Marino*'s argument that *Troutman*'s analysis was superficial is itself shallow, for it overlooks the real possibility that the assertion of police authority at the time of arrest may necessarily induce the surrender of cherished constitutional rights and liberties.[447] And, as is true with the *Phoenix/Filipi* rule, the majority approach does not address scenarios in which police officers outside of their jurisdiction use their authority to enter a residence without an arrest warrant to apprehend a suspect—a *Payton* scenario.[448] However, such is not the case with the *La Fontaine* rule. By applying the Fourth Amendment to the New Jersey officers' conduct, the *La Fontaine* court ensured that La Fontaine received this amendment's protection. Specifically, the entry into La Fontaine's apartment, the most severe invasion of privacy, and the means by which the officers arrested him had to pass muster under the stringent requirements of the Fourth Amendment.[449] And a court applying the Fourth Amendment may apply the exclusionary rule.[450] Although this rule has been viewed as a prophylactic measure designed to ensure compliance with a citizen's rights, and not as a right of a citizen,[451] the deterrent effect of the exclusionary rule is yet another means to insure that a citizen's rights and liberties will not be regarded lightly by any police officer.

The *La Fontaine* rule is also more flexible than *Collins*. Both *La Fontaine* and *Collins* recognize that a citizen encountering a police officer acting "under color of authority" responds to the officer as a police officer and not as a private citizen.[452] Both courts stated that the officer's action would trigger constitutional protections.[453] However, while *Collins* limited itself to police entry,[454] *La Fontaine* imposed no such limitations. The underlying flexibility of the *La Fontaine* rule is that it can be applied to any citizen-police encounter, be it "on the street" or in the home.

Although the *La Fontaine* rule does not address pre-arrest investigations or the ferreting out of evidence in New York State by

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447. *See supra* text accompanying notes 414-24; *see also La Fontaine*, 603 N.Y.S.2d at 666-67.

448. *See* cases cited *supra* note 54.

449. *La Fontaine*, 603 N.Y.S.2d at 666.

450. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

451. *See* United States v. Calandra, 414 U.S. 338 (1974).

452. *Collins*, 143 So. 2d at 703; *La Fontaine*, 603 N.Y.S.2d at 667-68.

453. *Collins*, 143 So. 2d at 703; *La Fontaine*, 603 N.Y.S.2d at 667-68.

454. *Collins*, 143 So. 2d at 703.

foreign state officers, this can easily be remedied by extending the application of the Fourth Amendment to such conduct, if done so "under color of authority." However, since undercover investigations do not involve the exercise of such authority, they should not be governed by the *La Fontaine* rule. Undercover officers should be allowed to conduct investigations or search for evidence as private citizens in the same circumstances.[455] This view, consonant with *Phoenix*,[456] would simultaneously exclude evidence obtained "under color of authority" and preserve the sanctity of undercover operations.[457] New York could also follow the Colorado approach.[458] Colorado invariably applies the Fourth Amendment and the Colorado Constitution to all extrajurisdictional arrests.[459] The only difference between the Colorado method, as seen in *Wolf*, and *La Fontaine* is that Colorado concludes that extrajurisdictionally operating police officers are not entitled under Colorado statutory law to arrest as private citizens and that these operations trigger federal and state constitutional protections.[460] In comparison, *La Fontaine* expressly uses the "under color of authority" doctrine to activate the Fourth Amendment.[461] The methodology is slightly different, but the result the same. Or, New York could follow *LeGassey*, which utilizes the same approach as *La Fontaine*, but which differs only along semantic lines.[462]

Thus, in New York, the rule should be that the Fourth Amendment protects citizens against extraterritorial activity conducted by a foreign state officer who is not in close pursuit, if such activity is conducted "under color of authority." Such activity should include all pre-arrest activity, arrests, and post-arrest evidence seizures. And, since this rule is predicated on New York State Constitution Article 1, section 12, it would determine the legality of such foreign state police action in New

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455. *See Phoenix*, 428 So. 2d at 266.

456. *Id.*

457. *See supra* text accompanying notes 218-75. But what about *Tilleskjor* and its statement that private citizens do not have police authority and thus, the right to investigate crimes, thereby calling into question whether extrajurisdictionally acting police officers, stripped of their police authority, from claiming such right? *See supra* text accompanying notes 339-40. And, should one confine *Lahr*'s reach only as to pre-arrest radar surveillance or will other forms of pre-arrest surveillance be within the decision's ambit? *See supra* text accompanying notes 305-14.

458. *See* discussion *supra* Part IV.A.

459. *See* discussion *supra* Part IV.A.

460. *La Fontaine*, 603 N.Y.S.2d at 666.

461. *See supra* text accompanying notes 44-53.

462. *See supra* text accompanying notes 315-21.

York whether challenged under the Fourth Amendment or New York State law.

VII. CONCLUSION

Prior to *La Fontaine*, at least 35 states had grappled with the legality of an extrajurisdictional arrest by a police officer not acting in close pursuit.[463] *La Fontaine* considered the law from those states and formulated a rule which appears to be consonant with New York State constitutional concerns. However, *La Fontaine* was decided by a trial court and, at most, offers persuasive authority to other New York State courts. Until *La Fontaine* reaches an appellate court, or the state legislature enacts a specific provision dealing with extrajurisdictional arrests, or an appellate court addresses such arrests in other cases, *La Fontaine* is all that New York can offer. Waiting for further developments in this area of New York's arrest law may keep the bar and judges in the same state of suspense as were rapt followers of "The Fugitive" who wondered whether Dr. Kimble would ever clear his name.

463. *See* Donaldson, *supra* note 63.