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ADMISSIBILITY IN FEDERAL COURT OF EVIDENCE ILLEGALLY SEIZED BY STATE OFFICERS*

Alan C. Kohn†

The admissibility of evidence obtained in an illegal search and seizure is a problem which has plagued the Supreme Court of the United States with increasing frequency during the past 75 years. The latest wrinkle in the uneven course of the problem's judicial development has been the statement of Chief Justice Warren, speaking for a unanimous Court in *Benanti v. United States*,¹ that it "has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in the federal courts despite the Fourth Amendment."² This assertion warrants careful examination. If it is true that the use in federal courts of evidence illegally seized by state³ agents has "remained an open question," has it remained open throughout three hundred and fifty-four volumes of United States Reports? If the question has previously been decided, has the language of the Chief Justice cast the only doubt upon that decision, or have other recent adjudications by the Supreme Court disclosed the apparent need for a new look? Further, if a new look is to be taken, what should be its result? The purpose of this article is to examine the problem of use in federal court of evidence illegally seized by state officers, first, by considering the historic basis

† Member of the Missouri Bar; associated with the firm of Coburn & Croft, St. Louis, Missouri.

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1. 355 U.S. 96 (1956).

2. *Id.* at 102, n.10.

3. Throughout this article, the word "state" will be used to describe state, county, city, or other local authorities.

and past judicial treatment of the problem, and, second, by considering how this "open question" should ultimately be decided by the Supreme Court.

I. THE PRIOR COURSE OF DECISION

A. *Uncertain Beginnings—Boyd and Adams*

The starting point is *Boyd v. United States*,⁴ variously described as "a case that will be remembered as long as civil liberty lives in the United States"⁵ and as an "ill-starred" case "which has exercised unhealthy influence upon subsequent judicial opinion."⁶ The Government, after seizing 35 cases of plate glass allegedly imported from Liverpool, England, with intent to defraud the United States of the duty on the merchandise, filed an information in the District Court for the Southern District of New York seeking their forfeiture. Boyd and others entered a claim for the goods and denied the alleged fraud. During trial, upon motion by the district attorney, the trial court entered an order pursuant to Section 5 of the Act of June 22, 1874,⁷ directing the claimants to produce the invoice for the glass. Section 5 provided that if the paper ordered produced is not brought into court, then the allegations contained in the motion of the district attorney concerning the contents of the paper shall be taken as confessed.⁸ The claimants produced the invoice under protest and it was received in evidence over the objection that the law requiring its production was unconstitutional. The jury returned a verdict for the United States and a judgment of forfeiture was accordingly entered. The judgment was affirmed on appeal, and review was then obtained in the Supreme Court.

Justice Bradley, speaking for the Court, held that Section 5, as applied, violated both the fourth amendment, prohibiting "unreasonable searches and seizures,"⁹ and the claimants' privilege against self-incrimination guaranteed by the fifth amendment.¹⁰ Admittedly adopt-

4. 116 U.S. 616 (1886).

5. *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion of Justice Brandeis).

6. 8 Wigmore, *Evidence* § 2184 (3d ed. 1940).

7. 18 Stat. 187 (1874), 19 U.S.C. § 535 (1952).

8. *Ibid.*

9. U.S. Const. amend. IV, provides:

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

10. U.S. Const. amend. V, provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

ing a liberal construction¹¹ of these two constitutional amendments, the Court held, in an unnecessarily broad opinion,¹² that "the compulsory extortion of a man's . . . private papers to be used in evidence to convict him"¹³ is the "essence"¹⁴ of a violation of both the fourth and fifth amendments. Justice Miller, joined by Chief Justice Waite, concurred in a separate opinion.¹⁵ They found no search and seizure at all, much less an "unreasonable" one, but only a violation of the privilege against self-incrimination.

The opinion of the Court is significant in three respects. First, the Court based its decision forbidding the "compulsory production of a man's private papers, to be used in evidence against him,"¹⁶ upon the plain meaning of the fourth amendment itself, rather than upon a judicial rule of exclusion adopted in the exercise of the Court's supervisory power over the conduct of federal criminal cases.¹⁷ Indeed, no such judicial rule could have been adopted in view of the fact that such a rule can be imposed by the Supreme Court only in the absence of an expression of congressional will.¹⁸ Here, the Court was determining the constitutionality of a statute which explicitly authorized the receipt in evidence of material produced by compulsory order. Second, the Court said that although the police did not break into Boyd's home in order to obtain the invoice for the glass, still such elements of force were merely "circumstances of aggravation"¹⁹ in determining whether there is a violation of the fourth amendment. Thus, it is clear from the opinion that if, as the Court held, an act of Congress compelling a person to produce incriminatory matter for use at trial is a violation of the fourth amendment, *a fortiori* it is a violation of that amendment if a person's home is forcibly searched by federal agents and incriminatory material is seized and put in evidence against him in a criminal case. Third, the broad pronouncement of the Court gave both the fourth and fifth amendments substantially identical meaning with regard to the use as evidence of

11. 116 U.S. at 635.

12. There was no need for the Court to determine whether Section 5 violated both the fourth and fifth amendments; a violation of one of the amendments was sufficient to invalidate the law.

13. 116 U.S. at 630. The Court held that although the proceeding was technically a civil one, it was "in substance and effect a criminal one" since the information alleged the commission of acts also made criminal by the statute under which the proceeding was brought. *Id.* at 634.

14. *Id.* at 630.

15. *Id.* at 638.

16. *Id.* at 622.

17. See, e.g., *McNabb v. United States*, 318 U.S. 332 (1943).

18. See *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

19. 116 U.S. at 630.

illegally seized property.²⁰ The Court indicated that both amendments are violated where a defendant is searched and his personal property is seized and later used against him at his trial.²¹

The prospects that the pronouncement in *Boyd* might ever become an enduring principle of constitutional law apparently were eliminated nineteen years later, in 1904, when the Court handed down its decision in *Adams v. New York*.²² Armed with a search warrant authorizing the search of Adams' office for gambling materials, New York state police officers entered the office and seized not only 3500 policy slips used in the "numbers game" but also certain other papers unconnected with gambling which contained samples of Adams' handwriting. Subsequently, Adams was tried in a New York court for the crime of knowingly having in his possession gambling paraphernalia. Over his objection, the papers containing his handwriting were received in evidence for the purpose of proving that it was Adams' handwriting which appeared on the policy slips. Adams was convicted and the case ultimately reached the Supreme Court of the United States. Relying on *Boyd*, Adams contended that the receipt in evidence of the papers containing his handwriting violated the fourth and fifth amendments and that these amendments were applicable to state action through the privileges and immunities clause of the fourteenth amendment.²³

The Supreme Court affirmed the conviction. It found no need to determine the applicability of the fourth and fifth amendments to the states since it held that even had this been action by federal agents and had the evidence been admitted in federal court, such admission would not violate the fourth or fifth amendment. Although the Court said it did not want "to detract from [the] authority"²⁴ of *Boyd*, it proceeded to emasculate the holding in that case by reverting to the common law rule²⁵ that a court will not take notice of how evidence is obtained. The Court said that as long as evidence is pertinent to an issue in the case, it does not matter whether or not that evidence has been illegally seized.²⁶

The Court thus took a full 180 degree turn from the broad, sweeping decision in *Boyd*, which had held that the use of evidence obtained by compulsory process violated the fourth amendment. *Adams* made the source of evidence of no consequence so long as that evidence was pertinent to the issue in controversy. Although that case could pos-

20. *Id.* at 633-35.

21. *Ibid.*

22. 192 U.S. 585 (1904). The Court's personnel had changed entirely, except for the first Justice Harlan, in the period between *Boyd* and *Adams*.

23. *Id.* at 594.

24. *Id.* at 597.

25. 8 Wigmore, *Evidence* § 2183 (3d ed. 1940).

26. 192 U.S. at 594-96.

sibly be interpreted narrowly as holding merely that the search was lawful, such an interpretation seems unsupportable because the search warrant did not purport to authorize the seizure of the papers containing Adams' handwriting.

B. The Resolution—Weeks

It was ten years before the Court resolved the contradiction between the common law principle apparently adopted in *Adams* and the broad pronouncement in *Boyd*. The decision came in *Weeks v. United States*.²⁷ Kansas City police officers, acting without a warrant, searched Weeks' home and seized a number of incriminating documents and articles. Later the same day, still acting without a warrant, the city police returned to Weeks' home with the United States Marshal, and together they carried away additional incriminatory matter. Evidence seized during both searches was transmitted to the Marshal and was subsequently used in obtaining Weeks' conviction in federal court.

On appeal to the Supreme Court,²⁸ as in his original petition,²⁹ Weeks did not distinguish between material seized by city police alone during the first search and material seized by them and the United States Marshal during the second search. He treated all property as seized by "officers of the Government"³⁰ and contended that the seizure and subsequent receipt in evidence infringed the fourth and fifth amendments.³¹ Weeks relied primarily on the *Boyd* case,³² while the Government contended that his position was foreclosed by *Adams*.³³

Justice Day, who wrote the opinion in *Adams*, also delivered the *Weeks* opinion—an opinion which took the surprising course of burying *Adams* and unearthing *Boyd*. The Court held that the articles seized by the Marshal could not be received in evidence but that the articles seized solely by the Kansas City police were admissible. *Adams* was distinguished on the ground that defendant there had waived any objection to the use of the handwriting samples when he failed to file a timely application prior to trial seeking their return.³⁴

27. 232 U.S. 383 (1914).

28. Brief for Plaintiff in Error, passim, especially pp. 29-55, *Weeks v. United States*, 232 U.S. 383 (1914).

29. 232 U.S. at 387-88.

30. Brief for Plaintiff in Error, p. 29, *Weeks v. United States*, 232 U.S. 383 (1914). See *Weeks v. United States*, 232 U.S. at 387.

31. Brief for Plaintiff in Error, pp. 29-55, *Weeks v. United States*, 232 U.S. 383 (1914). See *Weeks v. United States*, 232 U.S. at 387-88.

32. Brief for Plaintiff in Error, pp. 29-55, *Weeks v. United States*, 232 U.S. 383 (1914).

33. 232 U.S. at 385-86.

34. There was such an application prior to Weeks' trial.

Moreover, the Court said that the seizure in the *Adams* case was reasonable, while in *Weeks* the seizure was unreasonable.³⁵ The distinctions drawn by the Court do not succeed in concealing its affinity for the analysis in *Boyd* and its departure from the common law rule, as expressed in *Adams*, for the *Adams* opinion attached no apparent significance to the fact that there was no pretrial motion to suppress the material seized. Furthermore, as already pointed out,³⁶ the seizure of the samples of Adams' handwriting was apparently unreasonable since the search warrant extended only to gambling paraphernalia.

Besides its renunciation of the common law rule recognized in *Adams*, the *Weeks* case has two other notable features. First, unlike *Boyd*, which indicated that the use of evidence illegally seized by federal officers itself violated the fourth amendment,³⁷ the Court in *Weeks* based its decision excluding such evidence upon a judicially created rule of exclusion rather than upon the command of the Constitution. It said that it would not "sanction"³⁸ the use of such evidence because otherwise the fourth amendment would be "of no value"³⁹ and "might as well be stricken from the Constitution."⁴⁰ This distinction is significant because, if the fourth amendment does not prohibit the use of illegally seized evidence, then an act of Congress authorizing such use might constitutionally supersede the judicial rule of exclusion.⁴¹

The final important aspect of the *Weeks* decision is that the Supreme Court for the first time drew a distinction between search and seizure by state officers and search and seizure by federal agents. Because the fourth amendment applies to federal action, the Court said only the search and seizure by the United States Marshal violated the Constitution, rendering the articles he seized inadmissible in evidence. As to the articles seized by city police, the Court said that "it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures What remedies the defendant may have against them we need not inquire"⁴²

The Court in *Weeks* resolved the apparent contradiction between *Boyd* and *Adams*. Articles seized in an unreasonable search and seizure by federal officers cannot be introduced in evidence at a federal criminal trial if timely application is made for their return. This is

35. 232 U.S. at 394-96.

36. See p. 233 supra

37. See p. 231 supra.

38. 232 U.S. at 394.

39. *Id.* at 393.

40. *Ibid.*

41. See *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

42. 232 U.S. at 398.

a rule of judicial implication rather than a command of the fourth amendment, and is not applicable to material seized by state officers since their action is not in violation of defendant's federal constitutional rights.⁴³

43. There was, however, one issue apparently decided in *Boyd* and rejected in *Adams* which was not resolved in *Weeks*: Does the self-incrimination clause of the fifth amendment bar the receipt in evidence of articles obtained by federal officers in violation of the fourth amendment? It was not necessary to decide this question in *Weeks* since the Court concluded that such evidence should be excluded, without regard to the fifth amendment, in order to give effect to the fourth amendment. For that matter, if *Weeks* were to remain the law, no future case need decide the issue either. Nevertheless, the issue was decided seven short years later. In *Gouled v. United States*, 255 U.S. 298 (1921), and *Amos v. United States*, 255 U.S. 313 (1921), both decided on the same day by unanimous Courts, it was held that where government agents are guilty of unreasonable searches and seizures, the articles obtained thereby cannot subsequently be received in evidence without violating the fifth amendment's self-incrimination clause. Relying on *Boyd* in both cases, the Court held that in such a situation a defendant is in practical effect the "unwilling source of evidence" illegally seized and that therefore he is being "compelled in [a] criminal case to be a witness against himself." 255 U.S. at 306.

The result reached in *Gouled* and *Amos* is open to criticism. It is clear that the question decided in the two cases was a question significantly different from the one decided in *Boyd*. The defendant in the *Boyd* case was himself compelled by statute to bring into court incriminatory matter. Thus, he was, in the express words of the fifth amendment, "being compelled in [a] criminal case to be a witness against himself." In *Gouled* and *Amos*, however, defendants were not themselves compelled to produce incriminatory material; it was the Government which produced the articles put in evidence at trial. It would seem, therefore, that there was no violation of the fifth amendment. That amendment is designed primarily to prevent inquisitorial practices. See Note, 31 *Yale L.J.* 518, 522 (1922). It prohibits the federal government from wrenching from an accused information to be used at trial against him. The defendant, as in *Boyd*, is *active* in that he himself is the one who furnishes the information which is used against him. See Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 *Colum. L. Rev.* 11, 14 (1925). This distinguishes a fifth amendment invasion from a violation of the fourth amendment, where the individual is *passive* and it is the government which actively and arbitrarily invades the individual's home and person and seizes incriminatory articles. Indeed, if the use at trial of illegally seized evidence can truly be said to compel a person to be a witness against himself, then the use of all evidence seized from a person without his consent, whether it be obtained by an illegal search and seizure or by a legal one and whether it can be obtained by an agent of the federal government or by a private individual, could, with equal validity, be said to be compelling a person to be a witness against himself. But it is clear that articles obtained by a reasonable search and seizure (*United States v. Rabinowitz*, 339 U.S. 56 (1950)) or by a private person (*Burdeau v. McDowell*, 256 U.S. 465 (1921)) can be admitted in evidence without violating the fifth amendment's self-incrimination clause. Mr. Justice Holmes put the matter succinctly and accurately when he said: "A party is privileged from producing the evidence but not from its production." *Johnson v. United State*, 228 U.S. 457, 458 (1913).

C. *The Affirmation*—Center, Byars, and Feldman

The dichotomy established in *Weeks* between the use in federal court of evidence illegally seized by federal officers and evidence illegally seized by state officers received affirmation in later decisions. In *Center v. United States*,⁴⁴ city police officers from Greenville, South Carolina, arrested defendant in his car and seized whiskey which they found inside. The police had neither a search nor arrest warrant and acted solely upon the basis of an unsubstantiated tip that Center was transporting liquor illegally. Center was subsequently tried in federal court for the unlawful possession and transportation of liquor in violation of the National Prohibition Act. At trial the two policemen who participated in the search were permitted to testify that they found whiskey in Center's car.⁴⁵ On appeal from his conviction,⁴⁶ Center contended in the Supreme Court that the fourth amendment applied to "all officers" and not just to federal officers,⁴⁷ and therefore prohibited the officers from testifying to what they found in the car because this testimony was a product of an illegal search. The Government contended that since there was clearly no federal participation in the search, the testimony was admissible even though derived from a wrongful search and seizure.⁴⁸ The Supreme Court affirmed the judgment of conviction in a per curiam decision. It relied on *Burdeau v. McDowell*,⁴⁹ a case which was not precisely in point because it held only that evidence wrongfully taken by a *private person* is admissible in federal court. The Court apparently believed that the absence of state action in *Burdeau* was without significance.⁵⁰ In any event, the decision in *Center* is a square holding that evidence wrongfully seized by state officers is admissible in federal court.

In *Byars v. United States*,⁵¹ an Iowa county judge issued a search warrant, concededly insufficient when tested by federal standards, authorizing the search of Byars' home for intoxicating liquor. Four

44. 267 U.S. 575 (1925).

45. The whiskey itself was not put in evidence because it had previously been destroyed by state authorities.

46. The facts of this case can be found in the briefs and transcript of record filed with the Supreme Court. *Center v. United States*, 267 U.S. 575 (1925). See also *Gambino v. United States*, 275 U.S. 310, 317 (1927), where some of the facts are stated. There is no reported district court opinion in the case.

47. Brief for Plaintiff in Error, pp. 21-22, *Center v. United States*, 267 U.S. 575 (1925).

48. Brief for the United States, pp. 1-4, *Center v. United States*, 267 U.S. 575 (1925).

49. 256 U.S. 465 (1921).

50. The significance of whether the search was by a state officer, as distinguished from a private person, was not readily apparent until the decision in *Wolf v. Colorado*, 338 U.S. 25 (1949). See pp. 241-42 *infra*.

51. 273 U.S. 28 (1927).

Iowa police officers, accompanied by a federal prohibition agent, executed the warrant and seized incriminatory articles found in the home. Byars was subsequently indicted and tried in federal court for violation of prohibition laws, and the articles seized were admitted in evidence over his objection. Byars was convicted, and after the court of appeals affirmed,⁵² the Supreme Court granted certiorari.⁵³

The sole issue presented was whether the search, admittedly illegal under federal standards, was state or federal. Recognizing the thrust of the *Weeks* decision, both parties agreed that the fruits of the search were admissible if a state search were involved and inadmissible if there had been a federal search.⁵⁴ The Court held unanimously that there had been a federal search and reversed the judgment of conviction. It agreed with the premise of counsel, however, by saying: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."⁵⁵ Thus, there can be little doubt that the Court would have affirmed the conviction had it found that the search and seizure was solely a state enterprise.⁵⁶

In *Feldman v. United States*,⁵⁷ the question presented for decision was whether incriminatory testimony elicited from Feldman in a state proceeding under a state immunity statute could be admitted in evidence against him in a subsequent federal criminal case without violating the fifth amendment. In a four-to-three decision, the Court held it could. Although dealing directly with the fifth amendment, the reasoning of the Court's opinion, delivered by Justice Frankfurter, relies heavily upon fourth amendment cases and, more particularly, upon the premise that evidence illegally seized by state officers can be used in a federal court. Justice Frankfurter began by quoting with approval the statement in the *Boyd* case that there is an intimate relation between the fourth and fifth amendments and that there is no substantial difference between the use in evidence of articles obtained

52. 4 F.2d 507 (8th Cir. 1925).

53. 268 U.S. 684 (1925).

54. Petition for Writ of Certiorari, pp. 6-7, 13-18, *Byars v. United States*, 273 U.S. 28 (1927); Brief for the United States, pp. 7-24, *Byars v. United States*, 273 U.S. 28 (1927).

55. 273 U.S. at 33.

56. In *Gambino v. United States*, 275 U.S. 310 (1927), the Court logically extended the rule of the *Byars* case that evidence illegally seized by state and federal agents acting together is inadmissible in federal court by holding that evidence illegally seized by the state officers only, but seized solely for the purpose of aiding a federal prosecution, is also inadmissible in federal court. The holding in *Weeks* that evidence illegally seized by the city police is admissible in federal court was distinguished upon the basis that the search was for the purpose of enforcing state—not federal—law.

57. 322 U.S. 487 (1944).

by an unreasonable search and seizure and compelling a man to be a witness against himself.⁵⁸ The Justice then pointed out that the fourth amendment is applicable only to federal action and that, although evidence illegally obtained by federal officers is inadmissible in a federal court, evidence illegally seized by state agents can be admitted.⁵⁹ Since the fourth and fifth amendments are intimately related, the same set of rules should apply in the fifth amendment area. Thus, evidence obtained through testimonial compulsion by federal officers should not be admissible in a federal court, while such evidence obtained by state officers should be admissible. Accordingly, the Court affirmed the conviction because Feldman's testimony was elicited solely by state officers.⁶⁰

It is noteworthy that Justice Frankfurter's statement that "incriminating documents . . . secured by state officials [in an illegal search and seizure] without participation by federal officials but turned over for their use are admissible in a federal prosecution"⁶¹ was crucial to the decision. If that proposition were not correct, then the Court's analogy between the fourth and fifth amendments would be incomplete, and its rationale invalid. *Feldman*, then, like *Weeks*, *Center*, and *Byars*, is strong support for the view that evidence ille-

58. The Court quoted with approval the following statement in *Boyd*:

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Id. at 490; *Boyd v. United States*, 116 U.S. 616, 633 (1885).

59. 322 U.S. at 492. The Court cites *Burdeau v. McDowell*, 256 U.S. 465 (1921), as support for the statement that evidence illegally seized by state agents is admissible in federal courts, but, as previously noted (see p. 236 *supra*), that case stands only for the proposition that evidence wrongfully taken by a private person is admissible in federal court. No state action was involved in the *Burdeau* case.

60. Mr. Justice Black, joined by Justices Douglas and Rutledge, dissented, *Feldman v. United States*, 322 U.S. 487, 494 (1944). The basis of the dissent was that the plain meaning of the words of the fifth amendment prohibited the use of Feldman's testimony in a federal criminal case. Clearly, Feldman had been "compelled in [a] Criminal Case to be a witness against himself." It is no answer to say that the original compulsion took place in a state proceeding; the fifth amendment prohibits convictions in federal court based upon self-incriminatory testimony which has been extracted by anyone against defendant's will.

61. 322 U.S. at 492.

gally seized by state agents is admissible in federal court,⁶² and it is certain that the Court, at the times these four cases were decided, was for affirmance of federal judgments of conviction based upon the use of evidence illegally seized by state agents.

D. *The Renunciation—Wolf and Lustig*

Any certainty produced by the decisions in *Weeks*, *Center*, *Byars*, and *Feldman* was soon dispelled by a series of events commencing on Sunday, March 10, 1946. On that day, New Jersey policemen illegally searched the hotel room of Emil Lustig, alias Dr. Edward E. Fischer, and discovered various articles used in counterfeiting operations. The state police notified the federal agent who had supplied the police with the information which led to the search, and he proceeded to the hotel room where he selected those articles which were used in a subsequent federal counterfeiting prosecution. Lustig was convicted and the court of appeals affirmed.⁶³

The case was argued before the Supreme Court during the October, 1947, Term of Court. As in *Byars*, the parties based their arguments on the question whether the search was federal or state. Lustig maintained that there was federal participation,⁶⁴ while the Government,

62. While the per curiam decision in *Center* is precisely in point, it could be argued that none of the other three decisions constitutes a square holding on the issue because in none of them did the Court affirm a judgment of conviction founded upon evidence illegally seized by state officers. See Patterson, *Men and Ideas of the Law* 310-15 (1st ed. 1953); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928). On the other hand, in all three cases the statement indicating that such evidence is admissible in federal court is logically a part of the major premise upon which the results reached depended, and therefore it could be said they all are holdings on the question. See Patterson, *op cit. supra* at 313, where the following statement is made: "A dictum is a statement of law in the opinion which *could not logically*, on the facts found, be a major premise for the selected facts and the decision." In any event, it seems certain that the Court, at the times *Weeks*, *Byars*, and *Feldman* were decided, would have affirmed federal judgments of conviction based upon the use of evidence illegally seized by state agents.

63. 159 F.2d 798 (3d Cir. 1947). A petition for rehearing was denied on March 21, 1947, and on April 19, 1947, Mr. Justice Burton extended the time for filing a petition for writ of certiorari to May 19, 1947. Transcript of Record, p. 109, *Lustig v. United States*, 338 U.S. 74 (1949). The petition was filed on May 19, (Id. at front cover of Transcript of Record), and on June 16, 1947, the Court denied certiorari. 331 U.S. 853 (1947). However, on July 5, 1947, and January 28, 1948, petitioner submitted letters to the Court concerning his case, and on February 16, 1948, the Court, treating the letters as a petition for rehearing, granted a rehearing, vacated the order denying certiorari, and granted the petition for writ of certiorari. 333 U.S. 835 (1948).

64. Brief for Petitioner, pp. 8-12, *Lustig v. United States*, 338 U.S. 74 (1949).

conceding that the search was illegal if tested by the standards of the fourth amendment, urged that it was solely a state enterprise.⁶⁵

Before decision, the Court, on April 26, 1948, granted certiorari in *Wolf v. Colorado*.⁶⁶ The question presented in *Wolf* was whether evidence obtained by state police under circumstances which would amount to an unreasonable search and seizure if tested by the standard applicable to federal agents under the fourth amendment could be used in a state court without violating the due process clause of the fourteenth amendment. If the Court answered the question in the negative, the consequences for the *Lustig* case would be obvious. If it violated fourteenth amendment due process to use evidence seized illegally by state officers in a *state* prosecution, fifth amendment due process would very likely bar use of such evidence in a *federal* prosecution. Accordingly, on June 21, 1948, the Court entered the following order in the *Lustig* case:⁶⁷

This case is ordered restored to the docket and assigned for reargument. Counsel are requested to discuss in their briefs and on oral argument the relevance of the legality of the search and seizure. See *Wolf v. People of the State of Colorado*, Nos. 593-594, October Term, 1947, 333 U.S. 879. . . . This case is transferred to the summary docket and assigned for hearing immediately following those cases.

Since the search was admittedly illegal when tested by the standard of the fourth amendment, the Court was apparently inquiring whether the evidence was admissible in federal court even though it was obtained solely by state officers. Thus, the grant of certiorari in *Wolf* and the order for reargument in *Lustig* had opened, at least for the moment, the question which *Weeks*, *Center*, *Byars*, and *Feldman* had apparently settled.

In his brief on reargument, *Lustig* conceded that *Weeks* permitted the use in federal court of evidence illegally seized by state officers, and asked the Court to overrule that part of the decision.⁶⁸ The Government submitted a detailed fifty page brief contending that *Weeks* had properly distinguished between evidence illegally seized by federal officers and that seized by state officers and that subsequent decisions had affirmed this distinction.⁶⁹ Moreover, there was "no reason in law or in policy"⁷⁰ not to admit evidence illegally seized by

65. Brief for the United States, *passim*, *Lustig v. United States*, 338 U.S. 74 (1949).

66. 333 U.S. 879 (1948).

67. 68 Sup. Ct. 1518 (1948).

68. Brief for Petitioner on Reargument, pp. 2-7, *Lustig v. United States*, 338 U.S. 74 (1949).

69. Brief for the United States on Reargument, pp. 10-18, *Lustig v. United States*, 338 U.S. 74 (1949).

70. *Id.* at 20.

state officials, for if there is no federal participation in the illegal search and seizure, then the Government has done nothing illegal or unethical for which it deserves punishment.⁷¹ Nor could it be fairly argued, said the Government, that exclusion would deter future violations because the federal government has no control over state action.⁷²

On June 27, 1949, the Court handed down its decisions in *Wolf*⁷³ and *Lustig*.⁷⁴ Speaking for a majority of the Court in *Wolf*, Justice Frankfurter noted approval of prior decisions holding that the due process clause of the fourteenth amendment does not incorporate all of the provisions of the first eight amendments to the Constitution, but only those "implicit in the concept of ordered liberty."⁷⁵ It was held that the fourteenth amendment incorporated the "core" of the fourth amendment and that state police therefore act unconstitutionally when they seize evidence under circumstances which would amount to an illegal search by federal agents.⁷⁶ But the opinion went on to point out that the *Weeks* decision, which held that evidence obtained unlawfully by federal officers was inadmissible in a federal court, was not based upon the compulsions of the fourth amendment itself, but rather on a judicially created rule of exclusion. The Court concluded that this rule of exclusion was not "implicit in the concept of ordered liberty." The State of Colorado, therefore, did not violate the due process clause by using evidence unconstitutionally seized by its state officers.⁷⁷ Justice Black concurred in the result.⁷⁸ Although adhering to his view that the entire bill of rights, including the fourth amendment, is incorporated into the due process clause of the fourteenth amendment,⁷⁹ he agreed that the fourth amendment did not of itself prohibit the use in federal court of evidence illegally

71. *Id.* at 26-49.

72. *Id.* at 21-25.

73. 338 U.S. 25 (1949).

74. 338 U.S. 74 (1949).

75. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

76. 338 U.S. at 28. Since only the "core" of the fourth amendment is incorporated into the fourteenth, conceivably there may be some acts which violate the fourth amendment when carried out by federal officers but which do not amount to a violation of due process when carried out by state officers.

77. The Court stated that a state may rely on other methods of enforcing the fourteenth amendment's proscription against unreasonable searches and seizures. The other methods suggested by the Court were a common law action for damages by the aggrieved party against the police officers who took part in the illegal search, prosecution of the officers by the state, or possible contempt of court action. But see note 127 *infra*.

78. 338 U.S. at 39.

79. See *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion).

seized by federal officers. He therefore was of the opinion that the states could use evidence illegally seized by state officers.⁸⁰

The most significant aspect of the *Wolf* decision is its holding that because the core of the fourth amendment is incorporated into the fourteenth, it is unconstitutional for state officers to search for and seize evidence in a manner which would violate the standard applicable to federal officers under the fourth amendment. What effect would this holding have on a case involving the use in federal court of evidence unlawfully obtained solely by state officers? This question might have been answered in *Lustig* had the Court found that the search and seizure there had been entirely a state enterprise.

But *Lustig* did not answer the question. In fact, a majority of the Court was able to agree on only one thing—that the judgment of the court of appeals should be reversed. None of the three opinions filed could command a majority. Justice Frankfurter, joined by Justices Douglas, Murphy, and Rutledge, delivered the Court's judgment in an opinion which expressed the view that there was federal participation in the search and therefore, under *Weeks* and *Byars*, the

80. Three dissenting opinions were filed. Justice Douglas dissented upon the basis that the fourth amendment is applicable to the states through the fourteenth amendment and the rule of exclusion prohibiting the use of illegally seized evidence is also applicable to the states in order to give "effective sanction" to the amendment. 338 U.S. at 40. Justice Murphy, joined by Justice Rutledge, dissented upon the same basis and stated that he regarded as ineffective the other remedies that the Court suggested might be pursued by the states in order to enforce the fourteenth amendment's prohibition against unlawful searches and seizures. Justice Rutledge, joined by Justice Murphy, also wrote a dissenting opinion. He took the position that the fourth amendment itself prohibits the use in federal court of evidence obtained by an unreasonable search and seizure and this ban should be applicable to the states through the due process clause of the fourteenth amendment. The view of Justice Rutledge that the fourth amendment itself prohibits the use in federal court of illegally seized evidence, although adopted in *Boyd* (see p. 231 supra), was rejected in *Weeks* (see p. 234 supra).

It was not even argued to the Court that the fifth amendment's self-incrimination clause prohibits the use of illegally seized evidence and that this prohibition is applicable to the states through the fourteenth amendment. In *Boyd*, it was suggested that the self-incrimination clause prohibits the use in federal court of evidence illegally seized by federal officers, and that suggestion was later adopted in two Supreme Court decisions. See note 43 supra. Of course, even had this view been put forward in *Wolf*, the Court perhaps would still have affirmed the judgment of the Supreme Court of Colorado either by rejecting the validity of this view (see note 43 supra) or by holding that, assuming such a position is tenable, still the fourteenth amendment does not incorporate that part of the fifth amendment which prohibits the use of such evidence. Cf. *Adamson v. California*, 332 U.S. 46 (1947). However, Justice Black, who concurred in *Wolf*, could not have accepted the latter alternative since his view is that the fourteenth amendment incorporates the entirety of the first eight amendments. *Adamson v. California*, 332 U.S. 46, 68 (dissenting opinion).

fruits of the search were inadmissible in a federal court. Thus, it was "not necessary to consider what would be the result if the search had been conducted entirely by State officers."⁸¹

Justice Black merely noted that he concurred in the judgment of reversal for "substantially" the same reasons expressed in his dissenting opinion in the *Feldman* case.⁸² And Justice Murphy, joined by Justices Douglas and Rutledge, stated cryptically that, in accord with his dissenting opinion in *Wolf*, illegally seized evidence should be inadmissible in any court regardless of whether the illegal search was conducted by federal or state officers.⁸³ Although the opinion is not explicit all three Justices apparently agreed that the use of such evidence would violate fifth amendment due process since in *Wolf* they all expressed the belief that the use of such evidence in a state proceeding violated fourteenth amendment due process.⁸⁴ At the very least, they would undoubtedly be willing to hold that articles illegally seized by state officers should be subject to a judicial rule of exclusion in the federal court.

Justice Reed, joined by Chief Justice Vinson and Justices Jackson and Burton, dissented, saying that there was no federal participation in the search and therefore the articles seized were admissible.⁸⁵ The dissenters apparently did not believe that the *Wolf* decision should undermine the earlier holdings in *Weeks*, *Center*, *Byars*, and *Feldman* that evidence illegally seized by state officers is admissible in a federal court.

What effect did *Wolf* have upon the basic legal question in *Lustig*—the admissibility in federal court of evidence illegally seized by state officers? First of all, because *Wolf* held that the constitutionality of a search and seizure conducted by state officers rests upon the federal law of search and seizure applicable to federal officers under the fourth amendment, it is clear that the state law on search and seizure is immaterial to the validity of the search for the purpose of determining the admissibility of its fruits in federal court.⁸⁶ Second, the

81. 338 U.S. at 79.

82. *Id.* at 80. In *Feldman*, Justice Black took the position that the plain meaning of the words of the fifth amendment prohibits the federal government from using in a federal criminal case testimony previously elicited involuntarily from a person in a state proceeding under a state immunity statute. See note 60 *supra*. In *Lustig*, his position probably was that the plain meaning of the words of the fourth amendment prohibits unreasonable searches and seizures, whether carried out by state or federal officers, and that all evidence seized in violation of the fourth amendment should be subject to a judicial rule of exclusion.

83. 338 U.S. at 80.

84. See note 80 *supra*.

85. 338 U.S. at 80 (dissenting opinion).

86. The United States took the position that the legality of the search under state law is immaterial in its briefs in *Byars* and *Lustig*. See Brief for the

holding that the fourteenth amendment, by incorporating the fourth amendment, renders unconstitutional those searches and seizures by state officers which fall below the federal standard severely undercuts the basis for the holdings in *Weeks*,⁸⁷ *Center*,⁸⁸ *Byars*,⁸⁹ and *Feldman*⁹⁰ that evidence improperly seized by state officers is admissible in federal court. Until *Wolf*, the only inquiry made by the Court when it considered an admittedly illegal search was whether or not the search had been conducted by federal officers. If it was not a federal search, then the Federal Constitution was not violated and the evidence seized was admissible. After the *Wolf* decision, however, the Federal Constitution is infringed even by a state search and there remains unanswered the serious question whether evidence seized by an unconstitutional state search is admissible in federal court. Realizing this implication of *Wolf*, the Court in *Lustig* could no longer repeat what had been said in *Byars* that it did "not question the right of the federal government to avail itself of [such] evidence."⁹¹ Instead, Justice Frankfurter carefully stated merely that "it is not necessary to consider what would be the result if the search had been conducted entirely by State officers."⁹²

II. RESOLUTION OF THE ISSUE—AN EVALUATION

A. In General

How should the Supreme Court decide the question of admissibility in federal court of evidence obtained by state officers in an illegal search and seizure?⁹³ Those who espouse the general view that all

United States, p. 27, *Byars v. United States*, 273 U.S. 28 (1927); Brief for the United States, *Lustig v. United States*, p. 19, n.4, 338 U.S. 74 (1949).

87. See text supported by note 42 supra.

88. See text supported by notes 47-50 supra.

89. See text supported by note 55 supra.

90. See text supported by notes 57-61 supra.

91. 273 U.S. at 33.

92. 338 U.S. at 79.

93. Some selected readings on the more general problem of use in court of illegally obtained evidence are: *In favor of admitting illegally obtained evidence*: 8 Wigmore, Evidence §§ 2183-84 (3d ed. 1940). Wood & Waite, Crime and Its Treatment 390-94 (1941); Grant, Search and Seizure in California, 15 So. Calif. L. Rev. 133 (1942); Grant, Circumventing the Fourth Amendment, 14 So. Calif. L. Rev. 359 (1941); Harno, Evidence Obtained by Illegal Search and Seizure, 19 Ill. L. Rev. 303 (1925); Knox, Self-Incrimination, 74 U. Pa. L. Rev. 139 (1925); Plumb, Illegal Enforcement of the Law, 24 Cornell L.Q. 337, 370-75 (1939); Waite, Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944). *In favor of excluding illegally obtained evidence*: McCormick, Evidence 291 (1954); Cornelius, Search and Seizure 2 (2d ed. 1930); Machen, The Law of Search and Seizure (1950); Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1 (1950); Atkinson, Admissibility

illegally seized articles should be admitted in evidence rely on the tenet that admissibility should be predicated exclusively upon considerations of reliability and relevance.⁹⁴ Once it is determined that illegally seized evidence is both reliable and relevant, there is no reason for its exclusion. Moreover, it is argued, for courts to exclude such evidence frequently will enable the guilty to go free, thereby fostering the criminal element in society instead of helping the police to eliminate it.⁹⁵

Those who would exclude all illegally seized evidence reply that the law of evidence is not guided solely by considerations of reliability and relevancy but often is guided by overriding considerations of public policy. Two policy considerations are put forward as reasons for excluding illegally seized evidence.⁹⁶ First, it is contended that exclusion preserves and protects the integrity of the court. The individual's freedom from unauthorized governmental invasion of his property was considered so worthy of protection by the founding fathers that they engraved it in constitutional bedrock. The courts, as well as the police, have a duty to protect his freedom, and this should be done in part by disqualifying evidence obtained illegally. Second, it is argued that exclusion of illegally seized evidence will deter future illegal action by the police. If the police know that

of Evidence Obtained Through Unreasonable Searches and Seizures, 25 Colum. L. Rev. 11 (1925); Beisel, Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court, 34 B.U.L. Rev. 413 (1954); Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411 (1954); Chaffee, The Progress of the Law, 1919-1922, 35 Harv. L. Rev. 673, 694-704 (1922); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 191 (1930); Cowen, The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions, 5 Vand. L. Rev. 523 (1952); Farrelly, Searches and Seizures During the Truman Era, 25 So. Calif. L. Rev. 1 (1951); Fraenkel, Recent Developments in the Federal Law of Searches and Seizures, 33 Iowa L. Rev. 472 (1948); Comment, 47 Nw. U.L. Rev. 493 (1952); Note, 58 Yale L.J. 144 (1948).

94. 8 Wigmore, Evidence §§ 2175, 2183 (3d ed. 1940).

95. 8 id. § 2183.

96. See, e.g., *Hanna v. United States*, 260 F.2d 723 (D.C. Cir. 1958); *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). It has been suggested that there are two other reasons for a rule of exclusion: (1) exclusion gives a remedy to the victim; (2) exclusion punishes the prosecution for its own misconduct. Comment, 57 Colum. L. Rev. 1159, 1165-67 (1957). The first suggested basis is not an adequate reason for exclusion, for exclusion almost always gives a remedy only to the guilty and not to the innocent. A sound basis for exclusion should not discriminate in favor of those whom the illegal search reveals to be guilty of a crime and against those who have done no wrong. The second suggested basis has no application to cases in which evidence illegally seized by state officers is offered in evidence in federal court by the United States Attorney. The federal government was not the perpetrator of the illegal search and should not be punished for something it did not do.

articles they have improperly seized are inadmissible in court, they will be careful to avoid such illegal activity because of their interest in obtaining convictions. The validity of these two reasons for excluding tainted evidence and their applicability to the immediate problem at hand—use in federal court of evidence illegally obtained by state police—warrant detailed examination.

B. Judicial Integrity

Since *Wolf* it has been clear that evidence obtained by state agents in an illegal search and seizure is not only illegally seized evidence but also unconstitutionally seized evidence. If such evidence is used in federal court, is there a violation of judicial integrity; that is, is the court acting immorally and corruptly? The view that judicial integrity does call for the exclusion of tainted evidence finds support from opinions of Justices Holmes and Brandeis and from statements in recent court opinions. The gist of Justice Holmes' argument for exclusion is that "if the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence was allowed to be used."⁹⁷ In *Olmstead v. United States*, he stated his position more fully as follows:⁹⁸

It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part, I think it a less evil that some criminals should escape than that the government should play an ignoble part.

For those who agree with me, no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. . . .

In the same case, Justice Brandeis said:⁹⁹

When these unlawful acts were committed, they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. . . . [A]nd if this court should permit the government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would be a lawbreaker.

97. *Dodge v. United States*, 272 U.S. 530, 532 (1926).

98. 277 U.S. 438, 469-70 (1928) (dissenting opinion).

99. *Id.* at 483 (1928) (dissenting opinion).

Will this court by sustaining the judgment below sanction such conduct on the part of the executive?

More recently, in *McNabb v. United States*,¹⁰⁰ the Supreme Court held that a confession obtained by federal officers during a period of illegal detention is inadmissible in federal court. One basis of the Court's decision, as expressed by Justice Frankfurter, was:¹⁰¹

[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of the law.

It has been argued that the exclusionary rule may lead to the release of the guilty¹⁰² but this argument has been answered by the observation that it amounts to nothing more than an assertion that the ends justify the means.¹⁰³ Moreover, if the police had obeyed the law in the first instance and had not committed the illegal search and seizure, there would be no evidence upon which to base a prosecution and conviction.¹⁰⁴ Thus, suppression of the tainted evidence merely returns affairs to the status quo existing prior to the unlawful police intrusion; it does not prevent a conviction which would have occurred had the police acted legally.

On the other side of the argument, it is well to point out initially that a majority of the states in this country—twenty-seven in all¹⁰⁵—do not follow the *Weeks* rule excluding illegally obtained evidence. Then, too, the English Commonwealth jurisdictions have been admitting illegally obtained evidence literally for centuries¹⁰⁶ and these courts must all be credited with having as fine a sense of integrity as the excluding courts of this country. An excellent judicial expression against the rule of exclusion has come from Justice Cardozo, a man of the most delicate sensibilities. While sitting on the New York Court of Appeals, he viewed the moral question this way:¹⁰⁷

100. 318 U.S. 332 (1943). See also *Mallory v. United States*, 354 U.S. 449 (1957).

101. 318 U.S. 332, 345 (1943).

102. See, e.g., 8 Wigmore, *Evidence* § 2184 (3d ed. 1940); Plumb, *Illegal Enforcement of the Law*, 24 *Cornell L.Q.* 337, 370-71 (1939); Waite, *Police Regulation by Rules of Evidence*, 42 *Mich. L. Rev.* 679, 682-83 (1944).

103. Note, 58 *Yale L. J.* 144, 161 (1948). See also Douglas, *The Means and the End*, 1959 *Wash. U.L.Q.* 103.

104. See *People v. Cahan*, 44 *Cal. 2d* 434, 449, 282 *P.2d* 905, 914 (1955).

105. For the latest compilation of states admitting and rejecting illegally seized evidence, see Annot., 50 *A.L.R.2d* 531 (1956).

106. *Bishop Atterbury's Trial*, 16 *State Tr.* 323, 496, 629-30 (1723); *The Queen v. Granatelli*, 7 *State Tr. (n.s.)* 979, 987 (1849). See 8 Wigmore, *Evidence* § 2183 (3d ed. 1940); Cowen, *op. cit. supra* note 93, at 528-31.

107. *People v. Defore*, 242 *N.Y. 13*, 23-24, 150 *N.E.* 585, 588 (1926).

We are confirmed in this conclusion [that the law of New York does not demand the exclusion of illegally obtained evidence] when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied. We may not subject society to these dangers until the Legislature has spoken with a clearer voice.

Thus, the argument rejecting the idea that judicial integrity demands exclusion of tainted evidence emphasizes the possible undesirable result—criminals freed and crimes unpunished.¹⁰⁸

108. Among the legal writers, Professor Edward L. Barrett, Jr., has rejected the notion that judicial integrity calls for the exclusion of tainted evidence with the following observation:

These moralistic notions, however, would seem to add little weight to the exclusionary rule. Is not the court which excludes illegally obtained evidence in order to avoid condoning the acts of the officers by the same token condoning the illegal acts of the defendant? Suppose a policeman by an illegal search has obtained evidence which establishes the defendant as a peddler of narcotics to juveniles. Where lies the duty of the judge? Can we assume from any social point of view that the policeman's conduct is so much more reprehensible than the defendant's, that the duty of the judge is to reject the evidence and free the defendant?

Law enforcement is not a game in which liberty triumphs whenever the policeman is defeated. Liberty demands that both officials and private lawlessness shall be curbed. And in any specific instance it is hard to say that, put to the choice between permitting the consummation of the defendant's illegal scheme and the policeman's illegal scheme, the court must of necessity favor the defendant. So to say is to abandon any presumption of official regularity and to assume that the policeman's action always involves a greater social evil than the defendant's. It should be noted that the exclusion of the evidence usually results in the defendant's completely escaping punishment for his act, while the admission of the evidence does not constitute a judicial approval of the officer's conduct, and that officer is still, at least in theory, subject to some form of civil or criminal liability.

Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 Calif. L. Rev. 565, 582 (1955). Professor Wigmore has summed up the views of those opposed to an exclusionary rule as follows:

All this [the rule of exclusion] is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the law-evading classes of the population. It puts the Supreme Court in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the

It can be seen that both views may be stated persuasively. But, more important, both views demonstrate that the problem involves the reconciliation of the principle of protection of the individual and the principle of protection of society. A value judgment must be made. The proponents of the exclusionary rule have judged that protection of the individual against unreasonable searches and seizures is the more important consideration, while those who would admit tainted evidence believe that elimination of the criminal element from society is more important. The problem of integrity then is the problem of choice between the lesser of two evils—the evil of permitting criminals to go free and the evil of condoning illegal acts by policemen who infringe individual liberties. Whichever choice is made, one evil is being tolerated and the other condemned.

One intermediate view is that proper weighing of the interests of society and individual should lead to different results depending on the circumstances of each case. Thus, in cases in which the illegal act of the policeman is inadvertent or slight, the offense heinous and difficult to detect, and all other factors indicate that use of the tainted evidence would not be unduly unfair to the defendant,¹⁰⁹ it does not seem amiss to suggest that the moral view, if there be one, is to overlook the illegal police action, admit the evidence, and punish the criminal. On the other hand, if the policeman's act is in bad faith, the offense is not morally revolting, and all other factors indicate that the admission of the evidence would be unfair to the defendant, then it is better to exclude rather than to admit the evidence. Such a case by case approach to the problem would be somewhat analogous to the approach adopted by the Supreme Court in *Rochin v. California*,¹¹⁰ which held that evidence obtained by state officers by conduct which is so unfair that it "shocks the conscience"¹¹¹ is inadmissible in state court. Thus, although in accordance with the holding in *Wolf*,¹¹² states normally may admit illegally seized evidence, such evidence cannot be admitted when its use would be so fundamentally unfair that the due process clause of the fourteenth amendment would be violated. In the situation where evidence illegally seized by state officers is offered in federal court, the court, in determining whether such evidence should be admitted, would exclude not only evidence obtained by methods

overzealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.

8 Wigmore, Evidence § 2184 (3d ed. 1940).

109. See text supported by notes 117-23 *infra*.

110. 342 U.S. 165 (1952).

111. *Id.* at 172.

112. 338 U.S. 25 (1949). See text supported by notes 75-80 *supra*.

which shock the conscience but also evidence which, all circumstances considered, it would be unfair to admit. This latter decision in favor of exclusion would be on a different level than exclusion under the *Rochin* decision. It would not be a constitutional question whether the evidence should be excluded; rather, the question would be whether or not evidence seized under circumstances which do not shock the conscience should nonetheless be excluded under a judicial rule of exclusion because it would be unfair to admit it.

Such a case by case analysis of the problem of use of tainted evidence has recently been adopted in Scotland. Although the law in Scotland, as in other British Commonwealth jurisdictions, had been that relevant evidence should be admitted regardless of its source, in 1949 and 1950 the Scottish High Court of Justiciary adopted a new approach. In *Lawrie v. Muir*¹¹³ and *McGovern v. H. M. Advocate*,¹¹⁴ the court held illegally seized evidence inadmissible. Recognizing that the problem was one of reconciliation between the conflicting interests of citizen and society, the court said that neither should be "insisted upon to the uttermost."¹¹⁵ The correct rule, the court held, was that "an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible."¹¹⁶ It added:

Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick. . . . On the other hand, to take an extreme instance figured in argument, it would usually be wrong to exclude some highly incriminatory production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained.¹¹⁷

In *Lawrie*, the court held that the balance was tipped in favor of exclusion because the persons who made the illegal search were special inspectors who "ought to know the precise limits of their authority and should be held to exceed these limits at their peril."¹¹⁸ They were not ordinary police officers who enjoy "a large residuum of common

113. [1950] Scots L.T.R. 37 (1949).

114. [1950] Scots L.T.R. 133.

115. *Lawrie v. Muir*, [1950] Scots L.T.R. 37, 40 (1949).

116. *Ibid.* (Emphasis in the original.)

117. *Ibid.*

118. *Ibid.*

law discretionary powers.”¹¹⁹ In the *McGovern* case, the evidence was excluded mainly because its use would have denied the defendant a “fair trial”¹²⁰ and because it was obtained by police in an irregular manner and under circumstances in which “it would have been very simple for the police to have adopted the appropriate procedure in relation to a search of his [defendant’s] person.”¹²¹ In a more recent case, *Fairly v. Fishmongers of the City of London*,¹²² evidence illegally seized was held admissible because the court found “nothing to suggest that any departure from the strict procedure was deliberately adopted with a view to securing the admission of evidence obtained by an unfair trick.”¹²³

The Scottish cases take a realistic approach to the question of integrity involved in the admission of tainted evidence because they recognize the fact that a proper weighing of the interest of society against the interest of the individual may lead to different results under different circumstances. It is doubtful, however, that such a case by case analysis provides the certainty that is needed in this area. The determination in each case tends to leave too much to the visceral reaction of the judge.¹²⁴ The Supreme Court itself would have to give each case its individual consideration since the judges in lower courts, without a clearly ascertainable standard, might be prone to make varying judgments. An absolute prohibition or acceptance, by providing certainty, would be a more practical guide to the police than an amorphous standard dependent on all the circumstances of each case. It is desirable that the police, federal and state, know the exact consequences of their acts. Prosecuting attorneys also need to know precisely what evidence is admissible and what is not.

C. Deterrence

Consideration must next be given to the question whether the exclusion in federal court of illegally seized evidence will deter state police officers from engaging in such improper activity. Although courts usually base holdings excluding such evidence on reasons of judicial integrity, recent court decisions,¹²⁵ as well as the writings of

119. *Ibid.*

120. *McGovern v. H.M. Advocate* [1950] Scots L.T.R. 133, 135.

121. *Ibid.*

122. [1951] Scots L.T.R. 54 (1950).

123. *Id.* at 58.

124. See Comment, 21 *Fordham L. Rev.* 287 (1952); Comment, 50 *Mich. L. Rev.* 1367 (1952); Comment, 4 *Stan. L. Rev.* 591 (1952). But see Note, 66 *Harv. L. Rev.* 122 (1952).

125. See, e.g., *Hanna v. United States*, 260 F.2d 723 (D.C. Cir. 1958); *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

legal scholars,¹²⁶ have given increasing recognition to deterrence as a basis for an exclusionary rule.¹²⁷ Unfortunately, however, there exists no statistical proof that the general rule of exclusion adopted in the federal courts and in many of the state courts has served the purpose of deterring illegal searches and seizures. The most valuable study has been conducted by Professor Edward L. Barrett, Jr., who analyzed the consequences of a recent California decision which overturned prior California law and held that evidence illegally seized is inadmissible in state court.¹²⁸ Professor Barrett found that the decision evoked increased determination by state authorities to eliminate illegal searches and seizures. Law enforcement personnel re-examined the pertinent law, and the California Attorney General and the District Attorney of Los Angeles both published pamphlets designed to give peace officers a practical guide in how properly to make a search and seizure. Newspaper publicity gave further impetus to the police to adopt lawful procedures which they formerly had ignored.¹²⁹

The California example illustrates that, given political morality in the community and a tradition in the police force of respect for law,¹³⁰ it is not far-fetched for courts to expect that a rule of exclusion will help deter illegal searches. However, the question of exclusion in federal court of state-illegally obtained evidence presents a special problem. In particular, the Government has contended on at least one occasion¹³¹ that exclusion of such evidence in federal court will not deter future illegal searches and seizures by state officers because the federal government has no control over state action.

126. See, e.g., Allen, *supra* note 93, at 16-20; Barrett, *supra* note 108, at 583-88; Note, 57 *Colum. L. Rev.* 1159, 1164-65 (1957); Note, 58 *Yale L.J.* 144, 151-52 (1948).

127. A possible reason that deterrence as a basis for an exclusionary rule has taken on increased importance recently is the growing realization that other possible deterrents to unlawful police intrusions, short of judicial exclusion, have proven inadequate. See Allen, *supra* note 93, at 17-18; Paulsen, *Safeguards in the Law of Search and Seizure*, 52 *Nw. U.L. Rev.* 65, 72 (1957). The victim of an illegal search is unlikely to undergo the expense and uncertainties of a tort action for damages against the police officer who conducted the illegal search. There is also an unlikelihood that the aggrieved party will be able to obtain a substantial judgment against the police officer who is likely to be irresponsible financially. An action against the city or state is likely to fail because of general rules of sovereign immunity. See Note, 58 *Yale L.J.* 144, 147, n.13 (1948). Criminal prosecution of the police officer is likewise unlikely. Few, if any, prosecuting attorneys would be so ungrateful to those who have aided them in obtaining convictions. See Allen, *supra* note 93, at 18.

128. Barrett, *supra* note 108, at 587-88.

129. *Id.* at 568-78.

130. *Id.* at 585-86; Allen, *supra* note 93, at 17.

131. See text supported by note 72 *supra*.

It would seem, however, that exclusion in federal court of evidence illegally seized by state officers would encourage the federal executive branch to take steps to discourage such illegal activity. There is an ever-increasing area in which federal and state crimes overlap,¹³²—for example, possession and sale of narcotics,¹³³ certain types of embezzlement,¹³⁴ sending threatening or extortive communications in the mails,¹³⁵ fleeing from justice,¹³⁶ fraud,¹³⁷ bank robbery,¹³⁸ kidnapping,¹³⁹ and illegal transportation of liquor,¹⁴⁰ lottery tickets,¹⁴¹ obscene matter,¹⁴² stolen goods, and automobiles.¹⁴³ Such overlap naturally results in a concomitant duplication in federal and state investigative activity. Serious impairment of federal law enforcement could result if state officers, during investigation of state crimes which overlap federal crimes, commit an illegal search and seizure. For example, if federal and state officers are both independently investigating the operations of a large dope ring, and a state officer, through overzeal or ignorance, raids the central headquarters of the ring under circumstances which would amount to an unreasonable search and seizure, the fruits of the search would not be admissible in federal court and the offenders would go free unless they could be prosecuted in a state court. And even if the evidence could be used in a state prosecution,¹⁴⁴ federal officers might be unable to round up and prosecute other members of the ring located in other states because the illegal raid made evidence unusable which was necessary for the successful prosecution in federal court of the other members.

132. Parsons, *State-Federal Crossfire in Search and Seizure and Self-Incrimination*, 42 Cornell L.Q. 346, 348-49 (1957); Note, 57 Colum. L. Rev. 1159, 1170 (1957).

133. 35 Stat. 614 (1909), as amended, 21 U.S.C. §§ 173-74 (1952), as amended 21 U.S.C.A. § 174 (Supp. 1956).

134. 18 U.S.C. §§ 153, 641 (1952).

135. 18 id. §§ 875-76

136. 18 id. § 1073.

137. 18 id. §§ 1001, 1341, 1343.

138. 18 id. § 2113.

139. 18 id. § 1201.

140. 18 id. § 1262.

141. 18 id. §§ 1301-02.

142. 18 id. §§ 1461-63.

143. 18 id. §§ 2312, 2314.

144. There are 27 states which admit illegally seized evidence. See the latest tabulation of states in Annot., 50 A.L.R.2d 531 (1956). Cf. *Rea v. United States*, 350 U.S. 214 (1956), where the Supreme Court held that a federal agent who had illegally seized incriminatory evidence could be enjoined by a federal district court from turning the evidence over to state authorities for state prosecution and from orally testifying in state court.

This definite interest of the federal government in state law enforcement techniques would naturally incline it to encourage states to improve their law enforcement methods. Close cooperation between federal and state police would facilitate such encouragement and it is notable that such cooperation has existed in the past and exists today in an increasing degree. For example, in 1935, the Federal Bureau of Investigation established the FBI National Academy,¹⁴⁵ which provides law enforcement instruction for local officers throughout the United States. This program has resulted in very close cooperation and understanding between the FBI and many local police organizations and might well serve as a vehicle by which the federal government could help reduce the incidence of illegal searches and seizures by state agents. More recently, the Department of Justice undertook a long range program for combating crime throughout the country¹⁴⁶ which has resulted in close cooperation and liaison between federal and state police.¹⁴⁷ This latest program presents additional opportunities for the federal government to curb improper state police practices in cases in which a violation of federal law may be involved.

Close federal and state cooperation is not the only method available to the federal government to control state investigative techniques. A correlative method is to call to the attention of state agents the but-rarely-invoked Civil Rights Act, which provides for the punishment of anyone who "under color of any law, statute, ordinance, regulation, or custom willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution. . . ."¹⁴⁸ Willful perpetrators of an

145. Whitehead, *The FBI Story* 149-50 (1956). In its first 21 years of operation, over 3200 law enforcement officers received instruction on all phases of law enforcement, including proper investigative techniques and methods. *Id.* at 151. Many of these officers later obtained executive positions in their local police organizations and many others returned home to instruct the other members of their police forces. *Ibid.*

146. See press release of the Department of Justice, April 10, 1958. The release states that "the liaison with local police that the FBI has established through the National Police Academy and the FBI Laboratory" was expected "to be of aid in cooperation in the field [of federal offenses such as the Hobbs Anti-racketeering Act, Obstruction of Justice, Extortion, and Interstate Fraud by Wire]." The release also stated that "Herbert Wiltsee of the Council of State Governments and Secretary of The National Association of Attorneys General has expressed interest in the plan [for combating organized crime in this country] and pledged cooperation."

147. See note 146 *supra*. On March 30, 1959, FBI Director J. Edgar Hoover announced that the FBI will conduct special conferences with local police officials throughout the country to coordinate the program. *The St. Louis Post-Dispatch*, March 30, 1959, p. 9A, col. 5. One such conference was held on April 15, 1959; see *St. Louis Post-Dispatch*, April 16, 1959, p. 1A, col. 2.

148. 18 U.S.C. § 242 (1952).

illegal search and seizure are by this act subject to punishment by imprisonment for one year or a \$1000 fine, or both. Although it is unlikely that the federal government would¹⁴⁹ or could¹⁵⁰ enforce this statute against local law officers except in extreme cases, the threat of such a prosecution would help federal efforts to deter illegal state action.

It is therefore submitted that a decision excluding in federal court evidence illegally seized by state officers would probably help deter future illegal activity by state officers because federal officials could make successful use of methods available to them to discourage state agents from engaging in illegal searches and seizures.¹⁵¹ At the very least, any existing tacit, but unprovable, encouragement by federal officers of this illegal state activity would be eliminated.

149. There have been very few prosecutions under this statute. See the appendix to the dissenting opinion of Justice Douglas in *Irvine v. California*, 347 U.S. 128, 153-54 (1954).

150. See *Screws v. United States*, 325 U.S. 91 (1945). The difficulties involved in the enforcement of this statute are analyzed in Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 Colum. L. Rev. 175 (1947).

151. It has been suggested that the federal courts should exclude evidence illegally seized by state officers only where the judicial policy of the state whose officers seized the evidence is in favor of exclusion. Parsons, *supra* note 132, at 362-68. If a state court admits illegally seized evidence, then the federal courts too should admit evidence illegally seized by that state's officers. Thus, in so far as the 21 states which follow the exclusionary rule are concerned, the federal courts would not admit evidence illegally seized by their officers but would admit evidence illegally seized by the officers of the 27 states which do not follow the exclusionary rule. See Annot., 50 A.L.R.2d 531 (1956), for the latest compilation of states admitting and rejecting illegally seized evidence. The advocate of this position suggests that reasons of comity should lead the federal court to recognize and respect state policy that the exclusionary rule is or is not a necessary measure for protecting the right of citizens to be free of illegal searches and seizures. Parsons, *supra* note 132, at 363.

It is submitted that this view that the federal law of exclusion should follow the state law of exclusion in regard to evidence illegally seized by state agents cannot withstand analysis. Although the possible objection to this approach that it would be too difficult to determine in each case whether the state involved follows the exclusionary rule can at once be set aside as insubstantial, the decisive objection to the approach is that it serves no purpose. All states are interested in preventing illegal search and seizures, and while some states have implemented that interest by an exclusionary rule and others have not, the only method by which the federal government can show deference to that basic interest is to exclude the tainted evidence in all cases. Other federal methods are impractical. A civil action in federal court against state officers who deprive persons of their constitutional rights is authorized (17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952)), but there is good cause to doubt that an aggrieved party would be willing to undergo the uncertainties of such litigation. See note 127 *supra*. Prosecution by the federal government of the state officers is also authorized, but the success of such a prosecution is, as previously pointed out, unlikely. See text supported by notes 149 and 150 *supra*. Thus, the only practical way for the federal govern-

CONCLUSION

Since the 1949 decisions in *Wolf* and *Lustig*, the Supreme Court has not considered whether evidence illegally seized by state agents is admissible in federal court.¹⁵² Courts of appeal, without careful analysis,¹⁵³ have generally adhered to the old rule that such evidence is admissible.¹⁵⁴ Recently, however, in *Hanna v. United States*,¹⁵⁵ the Court of Appeals for the District of Columbia held that evidence illegally seized by state officers is not admissible in federal court. The court pointed out that the question of admissibility has been open

ment to assist states in their efforts to enforce this basic interest is to exclude the tainted evidence. On the other hand, the admission of the illegally seized evidence would do nothing to deter unreasonable searches and seizures by state officers. Moreover, excluding tainted evidence in no way impinges upon or frustrates a state rule admitting tainted evidence. Under *Wolf*, the state is still free to admit illegally seized evidence and to use other methods to deter illegal police action. An admitting state, therefore, should have no reason to resent a federal rule excluding such evidence. It is submitted that excluding in federal court all evidence illegally seized by state agents is not only the single practical method available of assisting all states in enforcing their policy to prevent unreasonable searches and seizures but also it in no way interferes with the policy of some of the states to admit such evidence. Thus, there is no reason, state or federal, for drawing a distinction between state jurisdictions admitting tainted evidence and those which do not.

152. Since *Wolf* and *Lustig*, the Supreme Court has denied certiorari in four cases which have presented the issue: *Costello v. United States*, 255 F.2d 389 (8th Cir.), cert. denied, 358 U.S. 830 (1958); *Gaitan v. United States*, 252 F.2d 256 (10th Cir.), cert. denied, 356 U.S. 937 (1958); *Fredericks v. United States*, 208 F.2d 712 (5th Cir. 1953), cert. denied, 347 U.S. 1019 (1954); *Serio v. United States*, 203 F.2d 576 (5th Cir.), cert. denied, 346 U.S. 887 (1953).

153. Cf. *Hanna v. United States*, 260 F.2d 723 (D.C. Cir. 1958); *Jones v. United States*, 217 F.2d 381 (8th Cir. 1954).

154. *Costello v. United States*, 255 F.2d 389 (8th Cir.), cert. denied, 358 U.S. 830 (1958); *Gaitan v. United States*, 252 F.2d 256 (10th Cir.), cert. denied, 356 U.S. 937 (1958); *United States v. Moses*, 234 F.2d 124 (7th Cir. 1956); *Collins v. United States*, 230 F.2d 424 (6th Cir. 1956); *United States v. White*, 228 F.2d 832 (7th Cir. 1956); *Jones v. United States*, 217 F.2d 381 (8th Cir. 1954); *United States v. Stirsman*, 212 F.2d 900 (7th Cir. 1954); *Fredericks v. United States*, 208 F.2d 712 (5th Cir. 1953), cert. denied, 347 U.S. 1019 (1954); *Serio v. United States*, 203 F.2d 576 (5th Cir.), cert. denied, 346 U.S. 887 (1953); *Parker v. United States*, 183 F.2d 268 (9th Cir. 1950); *Losieau v. United States*, 177 F.2d 919 (8th Cir. 1949); *Shelton v. United States*, 169 F.2d 665 (D.C. Cir.), cert. denied, 335 U.S. 834 (1948); *Wheatley v. United States*, 159 F.2d 599 (4th Cir. 1946); *Lotto v. United States*, 157 F.2d 623 (8th Cir.), cert. denied, 330 U.S. 811 (1946); *Butler v. United States*, 153 F.2d 993 (10th Cir. 1946); *United States v. Dinguid*, 146 F.2d 848 (2nd Cir.), cert. denied, 325 U.S. 857 (1945); *Shushan v. United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574, rehearing denied, 314 U.S. 706 (1941); *Miller v. United States*, 50 F.2d 505 (3d Cir.), cert. denied, 284 U.S. 651 (1931); *Kanellos v. United States*, 282 Fed. 461 (4th Cir. 1922), overruling *Dukes v. United States*, 275 Fed. 142 (4th Cir. 1921).

155. 260 F.2d 723 (D.C. Cir. 1958).

since *Wolf*, and that it therefore did not feel bound to follow an old decision¹⁵⁶ in that circuit admitting such evidence.¹⁵⁷ The court based its decision both on considerations of judicial integrity and deterrence of state officers from engaging in illegal searches and seizures. Although the decision created a conflict among the circuits, the Government did not seek review by the Supreme Court of the holding in *Hanna*.¹⁵⁸ Subsequently, however, the Supreme Court granted certiorari in *Rios v. United States*,¹⁵⁹ a case which again presents the issue of use in federal court of evidence illegally seized by state officers. In *Rios*, however, the Court may well not reach that issue since it may decide that, under the circumstances of that case, the search by state officers was lawful.¹⁶⁰

156. *Shelton v. United States*, 169 F.2d 665 (D.C. Cir.), cert. denied, 335 U.S. 834 (1948).

157. *Hanna v. United States*, 260 F.2d 723, 727 (D.C. Cir. 1958).

158. The Solicitor General of the United States has stated that the Government did not file a petition for writ of certiorari in *Hanna* because it interpreted that decision "as laying down a rule of evidence which the Court of Appeals has formulated for the District of Columbia under its special supervisory powers." See letter from J. Lee Rankin to James R. Browning, Clerk of the Supreme Court of the United States, filed in connection with No. 40 Misc., 1958 Term, *Rios v. United States*, certiorari granted on April 20, 1959, 79 Sup. Ct. 881. Although it is true that the court of appeals decided the issue "as a matter of sound policy in the administration of judicial proceedings in the District of Columbia," the court also decided the question "on principle" and made it clear that it believed that "the courts of the United States . . . cannot afford to play the 'ignoble part' by themselves permitting the use of unconstitutionally obtained evidence . . ." *Hanna v. United States*, 260 F.2d 723, 728 (D.C. Cir. 1958). The Court thus believed that it was deciding the question on general principles applicable to all federal courts and not just those applicable to federal courts in the District of Columbia.

159. 79 Sup. Ct. 881 (1959).

160. Los Angeles police officers undertook the surveillance of a taxicab in a "problem-area" of the city. They observed Rios "approach the cab, look furtively about, and enter." The police followed the cab in their unmarked police car, and when the taxicab stopped at a traffic signal, one officer got out of his car, came over to the side of the cab where Rios was seated, and identified himself as a police officer. He then saw Rios reach into his pocket and drop an object on the floor of the taxicab. The police officer focussed his flashlight on the object and identified it as a transparent rubber contraceptive filled with a light colored powder. The officer knew that it was common practice for narcotics dealers to carry heroin by this means. At that point, Rios pushed the taxicab door out, and at the same time, the officer pulled the door open and immediately placed Rios under arrest "for narcotics." *Rios v. United States*, 256 F.2d 173, 174-75 (9th Cir. 1958).

It is important to note that the policeman made no arrest until he had identified the object on the floor of the taxicab as a package of narcotics. At that time, it would seem that there was probable cause for an arrest without a warrant because the policeman reasonably believed that Rios illegally possessed narcotics. It would therefore follow that the search was lawful because made incident to a lawful arrest.

An indication of how the Supreme Court will decide the question of use in federal court of evidence illegally seized by state officers, should it reach that issue in *Rios*, was provided recently in *Benanti v. United States*.¹⁶¹ The issue in *Benanti* was whether evidence obtained by state officers through the use of wiretapping, which is a federal crime,¹⁶² is admissible in federal court. The Government argued that wiretap evidence seized by state agents should be admissible in federal court, by analogizing it to evidence obtained by state officers in an unreasonable search and seizure. The Government pointed out that although *Weeks* held that evidence illegally seized by federal officers is inadmissible in federal court, *Wolf* held that evidence illegally seized by state officers is admissible in state courts. It argued, moreover, that *Weeks* and *Byars* established that evidence illegally seized by state officers is admissible in federal court. The same set of rules should be applicable to evidence which is the product of illegal wiretapping activity. Thus, although federal wiretap evidence is inadmissible in federal court,¹⁶³ state wiretap evidence is admissible in state court.¹⁶⁴ To complete the analogy, the Government contended, the Court in *Benanti* should hold that state wiretap evidence is admissible in federal court. To hold otherwise, the Government concluded, would be to adopt an "odd concept that somehow a Constitutional prohibition is to be given less dignity than a statutory one."¹⁶⁵

The Court held the evidence inadmissible. The Government's analogy was not well taken, the Court said, because of the explicit statutory prohibition of Section 605 of the Federal Communications Act against the interception and divulgence of the existence or contents of a telephone conversation. It was therefore "neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment."¹⁶⁶ Moreover, the Court added in a footnote, "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment."¹⁶⁷

But the Court was on extremely shaky ground in differentiating wiretapping cases from illegal search and seizure cases. The fourth amendment also contains an explicit prohibition—it explicitly prohibits unreasonable searches and seizures. Section 605 does not

161. 355 U.S. 96 (1957).

162. 48 Stat. 1103, 47 U.S.C. § 605 (1952).

163. *Nardone v. United States*, 302 U.S. 379 (1937), 308 U.S. 338 (1939).

164. *Schwartz v. Texas*, 344 U.S. 199 (1952).

165. Brief for the United States, p. 14, *Benanti v. United States*, 355 U.S. 96 (1958), paraphrasing a statement by Judge Learned Hand in *United States v. Goldstein*, 120 F.2d 485, 490 (2d Cir. 1941), *aff'd* 316 U.S. 114 (1942).

166. 355 U.S. at 102.

167. *Id.* at 102, n.10.

expressly prohibit the use in evidence of articles obtained as a result of wiretapping,¹⁶⁸ nor does the fourth amendment expressly prohibit the use in evidence of articles obtained in an unreasonable search and seizure. The exclusion of either kind of evidence in federal court is a matter of judicial implication rather than the result of an express statutory or constitutional mandate.¹⁶⁹ Accordingly, the Government position in *Benanti* was unacceptable only because it could not establish that articles illegally seized by state officers are admissible in federal court. But now, the decision in *Benanti* that articles obtained through illegal wiretapping by state officers are inadmissible in federal court has made applicable a converse argument, for it would now be anomalous to hold that the statutory prohibition against wiretapping should be given greater protection than the constitutional prohibition against unreasonable searches and seizures. Reasoning from the *Benanti* decision, it would seem *a fortiori* that articles obtained in an unconstitutional search and seizure by state officers will be held inadmissible in federal court.

"Courts proceed step by step," Justice Holmes once said.¹⁷⁰ The history of the use in federal court of illegally seized evidence substantiates this statement. Although the Supreme Court started off uncertainly in *Boyd* and *Adams*, it took a definite position in *Weeks* when it adopted a judicial rule of exclusion barring the use in federal court of evidence obtained by federal officers in an illegal search and seizure. Although the other part of the decision in *Weeks*—that evidence illegally seized by state officers is admissible in federal court—received affirmation in *Center*, *Byars*, and *Feldman*, the premise upon which those decisions were founded was undercut by the *Wolf* decision that an unreasonable search and seizure by state officers violates the fourteenth amendment. It now appears that the Court will finally resolve the uncertainties of the past by ruling that

168. In *Nardone v. United States*, 308 U.S. 338, the Court held inadmissible the fruits of an illegal wiretap. The basis for this decision was not the plain meaning of section 605, but, rather, the need for a judicially created rule of evidence designed to give effect to section 605. *Id.* at 340-42; see *McNabb v. United States*, 318 U.S. 332, 341, where Justice Frankfurter, the author of the *Nardone* decision, indicated that the *Nardone* result was based upon a judicially formulated rule of evidence. In *Benanti*, there was an actual violation of section 605 at the trial because there was a divulgence of the existence of a wiretap. 355 U. S. at 100. However, the Court clearly indicated in *Benanti* that it would have reached the same result if there had been no violation of section 605 at the trial but only the use in evidence of articles obtained as a result of illegal wiretapping. *Id.* at 100, 102, n.9.

169. See note 168 *supra* and *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

170. *Johnson v. United States*, 228 U.S. 457, 458 (1913).

evidence illegally seized by state agents is inadmissible in federal court. Although this decision would not possess a clear-cut justification on the grounds of judicial integrity, it would assist somewhat in helping to deter future violations of the right to be free from unreasonable searches and seizures.