

## The Exclusionary Rule--"Federal" or "National"?

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courts reject the rule that federal law is applicable<sup>115</sup> and hold that state law is controlling.<sup>116</sup> Under this majority view the situs of the property right against unfair competition is of major importance. It would seem that the trademark concept of an independent situs should be applied in unfair competition cases, at least until unfair competition is federally treated.<sup>117</sup>

### *Conclusion*

There does not seem to be a basis for serious dissent to uniform protection of intangible property rights. Protection of intangibles as property has a sound foundation in natural justice, and expanding commerce necessitates uniformity in treatment. The obvious solution is universal uniformity achieved through international legislation. In that connection, the Universal Copyright Convention could serve as a model for the attainment of such an objective. Until practical political objections can be overcome, however, a norm for the solution of conflict of laws problems must be adopted. Situs is a norm, if situs is universally applied with consistency. A recapitulation of the laws governing real intangible property will show that intangibles are closely allied with tangible, readily-located property; a copyright is allied with a book it protects, good-will with a business and an idea with its concrete plan. Perhaps the situs of a real intangible can be considered to be the situs of its natural, physical ally. It is only in reliance on tangibles that the disharmonizing fiction of intangible situs can be limited if not eliminated.



## THE EXCLUSIONARY RULE — "FEDERAL" OR "NATIONAL"?

### *Introduction*

In *Rea v. United States*,<sup>1</sup> the defendant had been indicted in a federal district court for the unlawful acquisition of marihuana.<sup>2</sup>

v. Casco Products Corp., 190 F.2d 921 (2d Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

<sup>115</sup> See *Bulova Watch Co. v. Stolzberg*, 69 F. Supp. 543 (D. Mass. 1947).

<sup>116</sup> *National Fruit Product Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 140 F.2d 618 (1st Cir. 1944); see *Swarthmore Classics, Inc. v. Swarthmore Junior*, 81 F. Supp. 917 (S.D.N.Y. 1949); *Folmer Graflex Corp. v. Graphic Photo Service*, 44 F. Supp. 429 (D. Mass. 1940).

<sup>117</sup> Such federal control is advocated in Note, 60 HARV. L. REV. 1315, 1323 (1947).

<sup>1</sup> 350 U.S. 214 (1956).

<sup>2</sup> 53 STAT. 281 (1939), 26 U.S.C. § 2593(a) (1952).

Because federal agents had obtained the narcotics under an invalid search warrant, defendant's motion to suppress its use as evidence was granted. However, since it was contraband the evidence was not returned.<sup>3</sup> After dismissal of the indictment, the federal agent instigated a criminal action against Rea in New Mexico, alleging violation of that state's narcotics law.<sup>4</sup> Pending this action, the defendant sought an injunction in a federal district court to prevent the agent from testifying in the state court with respect to the unlawfully seized narcotics. Denial of his motion was affirmed by the Court of Appeals for the Tenth Circuit.<sup>5</sup> In a 5-4 decision, the Supreme Court reversed.

Mr. Justice Douglas, writing for the Court, stated that the case presented ". . . no problem concerning the interplay of the Fourth and the Fourteenth Amendments nor the use which New Mexico might make of the evidence."<sup>6</sup> He further pointed out that the court had not been asked to in any way "interfere with state agencies in enforcement of state law."<sup>7</sup> Thus viewed, the question involved in the case was limited to the supervisory powers of the Court over federal officers. The Court found that the agent had violated the Federal Rules governing searches and seizures<sup>8</sup> which are designed to protect a citizen's privacy. The injunction was granted because it was felt that "that policy is defeated if . . . [a] federal agent can flout . . . [the Federal Rules] and use the fruits of his unlawful act either in federal or *state* proceedings."<sup>9</sup>

The expression of these views by Mr. Justice Douglas conformed to those set forth in his dissent in *Stefanelli v. Minard*.<sup>10</sup> There, he noted that:

To hold first that . . . evidence may be admitted and second that its use may not be enjoined is to make the Fourth Amendment an empty and hollow guarantee so far as state prosecutions are concerned.<sup>11</sup>

In the *Stefanelli* case the Court refused to intervene in a New Jersey criminal proceeding. The petitioner there was denied an injunction forbidding the use of evidence obtained through an unlawful search by state officers. It was felt that this conclusion was necessary to preserve the delicate balance between state and nation, since arbitrary use of the federal equity power would serve to centralize power and upset our federal system of government.

<sup>3</sup> 28 U.S.C. § 2463 (1952); 53 STAT. 282 (1939), 26 U.S.C. § 2598 (1952); FED. R. CRIM. P. 41(e).

<sup>4</sup> N.M. STAT. ANN. § 71-636 (1941).

<sup>5</sup> *Rea v. United States*, 218 F.2d 237 (10th Cir. 1954), *rev'd*, 350 U.S. 214 (1956), 41 VA. L. REV. 662 (1955).

<sup>6</sup> *Rea v. United States*, 350 U.S. 214, 216 (1956).

<sup>7</sup> *Ibid.*

<sup>8</sup> See FED. R. CRIM. P. 41(c).

<sup>9</sup> *Rea v. United States*, *supra* note 6 at 218 (emphasis added).

<sup>10</sup> 342 U.S. 117 (1951), 37 IOWA L. REV. 439 (1952), 6 MIAMI L.Q. 621 (1952).

<sup>11</sup> *Stefanelli v. Minard*, 342 U.S. 117, 125 (1951) (dissenting opinion).

A departure from this policy in the *Rea* case may be justified on three main grounds. First, it is a well settled principle of equity that an injunction decree has only an in personam effect.<sup>12</sup> Thus, the decree in the instant case restrained only the action of the federal agent and had no direct effect upon the criminal processes of the state. Furthermore, the Court pointed out that the property seized in the instant case was contraband, which under federal statute is made "subject only to the orders and decrees of the courts of the United States."<sup>13</sup> A third ground of justification is found in the inherent power of federal courts to check unreasonable exertions of authority by federal law enforcement agencies.<sup>14</sup>

On the other hand, the *Rea* decision does run counter to certain principles of equity and constitutional law. It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions.<sup>15</sup> This maxim ". . . is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue."<sup>16</sup> Secondly, the Supreme Court has adhered to the policy that federal courts will not intervene in state criminal proceedings unless interference is necessary to prevent imminent irreparable injury,<sup>17</sup> or unless the defendant had taken advantage of available state remedies.<sup>18</sup> More pertinent to a consideration of the issues discussed in this article, however, is the apparent contradiction between the holding in the instant case and that in *Wolf v. Colorado*.<sup>19</sup> There, the Court reaffirmed the principle that the exclusionary rule is not applicable to state criminal proceedings.

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<sup>12</sup> See, e.g., *Platt v. Woodruff*, 61 N.Y. 378 (1875); *Union Pac. R.R. v. Rule*, 155 Minn. 302, 193 N.W. 161 (1923); *Lord Portarlington v. Souby*, 3 Myl. & K. 104, 40 Eng. Rep. 40 (Ch. 1834); cf. *J.R. v. M.P.*, Y.B. Hil. 37 Hen. 6, f. 13, pl. 3 (1459).

<sup>13</sup> 28 U.S.C. § 2463 (1952).

<sup>14</sup> See *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Wise v. Henkel*, 220 U.S. 556 (1911); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (dictum); *United States v. Hee*, 219 Fed. 1019, 1020 (1915) (dictum).

<sup>15</sup> See, e.g., *Stefanelli v. Minard*, *supra* note 11; *Douglas v. Jeannette*, 319 U.S. 157 (1943).

<sup>16</sup> *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951).

<sup>17</sup> See, e.g., *Stefanelli v. Minard*, *supra* note 16, 37 IOWA L. REV. 439 (1952), 6 MIAMI L.Q. 621 (1952); *Douglas v. Jeannette*, *supra* note 15; *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935). See also *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950).

<sup>18</sup> See, e.g., *Rea v. United States*, 350 U.S. 214, 221 (1956) (dissenting opinion); *Spielman Motor Sales Co. v. Dodge*, *supra* note 17. See also *Cooper v. Hutchinson*, *supra* note 17.

<sup>19</sup> 338 U.S. 25 (1949); see *Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950).

*Wolf v. Colorado*

In the *Wolf* case, the Supreme Court for the first time established the rule that:

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.<sup>20</sup>

The Court pointed out that for a state to affirmatively sanction such police incursion into privacy would be to run counter to the fourteenth amendment. Thus, the fourth amendment was added to the list of those provisions of the Bill of Rights which are essential to due process of law and which bind the states through the operation of the fourteenth amendment. But Mr. Justice Frankfurter, writing for the Court, reached the conclusion that the exclusion of evidence obtained by unreasonable searches and seizures was not an essential ingredient of the right guaranteed by the fourth amendment, so that the admission of such evidence in state courts was not barred by the application of the fourteenth.<sup>21</sup>

It is well settled that the provisions of the Bill of Rights apply only to the federal government.<sup>22</sup> At the same time, the theory that the language of the fourteenth amendment incorporates *all* the guarantees of these amendments, so as to restrain state action, has consistently been rejected.<sup>23</sup> Rather, the Supreme Court has resorted to a process of gradually determining what rights are contained therein. The scope of the due process clause has been dependent upon the applicable test of whether a particular right is basic to a free society and "implicit in the concept of ordered liberty."<sup>24</sup> Freedom of

<sup>20</sup> *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

<sup>21</sup> *Id.* at 33. This conclusion was reached for the following reasons: 1. A majority of the states as well as most of the countries comprising the United Kingdom at that time admitted evidence obtained through unlawful searches and seizures. 2. The availability of other remedies in those states which had rejected the "Weeks" doctrine. 3. The Court felt that the remedy of exclusion was one designed to protect only the guilty. 4. The Court thought that the reasons for excluding evidence obtained illegally by state or local police were less compelling than those present in the case of violations by federal officers because, "the public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." *Id.* at 32-33.

<sup>22</sup> See *Palko v. Connecticut*, 302 U.S. 319 (1937); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See also CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 61, 113 (10th ed. 1955); Note, *The Right Of Privacy And Due Process Of Law*, 3 BUFFALO L. REV. 283, 292 (1954).

<sup>23</sup> See, e.g., *Adamson v. California*, 332 U.S. 46 (1947); *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>24</sup> *Palko v. Connecticut*, *supra* note 22 at 325.

religion,<sup>25</sup> of speech<sup>26</sup> and of the press,<sup>27</sup> as well as the right to peaceable assembly<sup>28</sup> and the protection against the taking of property without just compensation,<sup>29</sup> have been held applicable to the states. On the other hand, the rights to indictment for felony,<sup>30</sup> confrontation of witnesses in criminal cases,<sup>31</sup> jury trial in civil<sup>32</sup> and criminal cases,<sup>33</sup> the privilege against self-incrimination<sup>34</sup> and the protection against double jeopardy<sup>35</sup> have been considered not "basic," and thus not entitled to protection against impairment by the states. The *Wolf* case, in declaring the right guaranteed by the fourth amendment to be enforceable against the states, became another link in the chain of inclusion and exclusion. But, as expressed by Mr. Justice Murphy in dissent, "it is difficult . . . to understand how the Court . . . [could] go this far and yet be unwilling to make the step which . . . [could] give some meaning to the pronouncements it [uttered]. . . ." <sup>36</sup>

### *Aftermath of the Wolf Case*

Despite the holding in *Wolf*, the exclusion of illegally obtained evidence in state courts has been effected in one situation. In *Rochin v. California*,<sup>37</sup> evidence obtained by local police through an unlawful search and seizure accompanied by physical coercion was held to be inadmissible in a state court. Rochin was convicted of possessing narcotics in violation of the laws of California. The chief evidence against him was two morphine capsules which he had swallowed after police officers had broken into his home. The capsules were forcibly extracted from his stomach through the use of an emetic solution which produced vomiting. Mr. Justice Frankfurter described these methods as being ". . . too close to the rack and the screw to permit of constitutional differentiation."<sup>38</sup> Though he made no reference to his recently expressed views in *Wolf*, he remarked that ". . . the Con-

<sup>25</sup> See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>26</sup> See, e.g., *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>27</sup> See, e.g., *Grosjean v. American Press Co.*, *supra* note 26; *Near v. Minnesota*, *supra* note 26.

<sup>28</sup> See, e.g., *Herndon v. Lowry*, *supra* note 26; *De Jonge v. Oregon*, *supra* note 26.

<sup>29</sup> See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

<sup>30</sup> See *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>31</sup> See *West v. Louisiana*, 194 U.S. 258 (1904).

<sup>32</sup> See, e.g., *Walker v. Sauvinet*, 92 U.S. 90 (1875).

<sup>33</sup> *Maxwell v. Dow*, 176 U.S. 581, 603 (1900) (dictum).

<sup>34</sup> See, e.g., *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>35</sup> See *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>36</sup> *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (dissenting opinion).

<sup>37</sup> 342 U.S. 165 (1952).

<sup>38</sup> *Id.* at 172.

stitution is 'intended to preserve *practical* and *substantial* rights, not to maintain theories.'"<sup>39</sup>

The seeming inconsistency of the *Wolf* and *Rochin* cases was reconciled in *Irvine v. California*.<sup>40</sup> In that case, the Supreme Court upheld a state court conviction which was obtained through the use of illegally obtained evidence. After procuring a key to Irvine's home, local police, on three separate occasions, entered it for the purpose of installing and adjusting a microphone. From a nearby garage, they listened to conversations of the defendant which were picked up by the microphone. On the basis of information learned from these conversations, the defendant was arrested and incriminating evidence found on his person was used at the trial over his objection. Mr. Justice Jackson, who wrote the majority opinion, condemned the police activity as "obnoxious."<sup>41</sup> He then restated the Court's position that the exclusion of unlawfully obtained evidence is not a basic ingredient of the right protected by the fourth amendment; hence it is not a mandate against the states by virtue of the due process clause of the fourteenth amendment. He distinguished the *Rochin* case on the ground that it involved an element totally lacking in the present case—coercion.

More pertinent to a clarification of the problem, however, were the views of Mr. Justice Frankfurter who dissented. He felt that the holding in the *Wolf* case should be limited to its facts; that case concerned a single instance of search and seizure. Conceding that the present case involved no element of physical violence, he pointed out that there was present ". . . however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass."<sup>42</sup> He thought that exceptions to the *Wolf* rule should not be limited to cases where the additional element was coercion but should rest on previously determined tests of when due process is violated. Nevertheless, the outcome of the decided cases is that evidence obtained as a result of physical trespasses to the person of the defendant by police officers is not admissible in both state and federal courts, though "governmental" trespasses to property, no matter how severe, will result in exclusion of evidence, only in the federal courts.

### *Conflict of Views*

The use of the exclusionary rule as a remedy for violations of the fourth amendment has evoked sharp criticism from bench and bar.<sup>43</sup> A classic argument favoring admission of evidence illegally ob-

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<sup>39</sup> *Id.* at 174 (emphasis added).

<sup>40</sup> 347 U.S. 128 (1954), 42 ILL. BAR J. 652 (1954), 39 IOWA L. REV. 676 (1954), 52 MICH. L. REV. 904 (1954).

<sup>41</sup> *Irvine v. California*, 347 U.S. 128, 133 (1954).

<sup>42</sup> *Id.* at 145-46 (dissenting opinion).

<sup>43</sup> See *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S.

tained is premised upon the thought that the exclusion of such evidence is in derogation of the common-law rule of admissibility of *all* relevant and trustworthy evidence.<sup>44</sup> A further complaint is that it is inconsistent with the policy of allowing private litigants to use illegally obtained evidence.<sup>45</sup> In addition, it is argued that the question of the evidence's illegal source is not germane to the issue at the trial, *i.e.*, the guilt or innocence of the defendant.<sup>46</sup> Exclusion is also said to be inappropriate as a protection of constitutional guarantees, first, because it protects only the guilty<sup>47</sup> and secondly, because it only indirectly punishes the violator,<sup>48</sup> so that in the final analysis, only the public suffers. From a policy standpoint exclusion is opposed on the ground that its consequences are too far reaching; it enables the pettiest police officer to confer immunity on a known offender.<sup>49</sup> At least one writer believes that the exclusionary rule limits the deterrent effect of law enforcement.<sup>50</sup> Others argue that there is no convincing proof that it has actually tended to prevent unlawful searches and seizures.<sup>51</sup>

On the other hand, many have advanced arguments in support of the exclusionary rule.<sup>52</sup> It is said that the protection afforded by the fourth amendment would be worthless if illegally obtained evidence

657 (1926). See also authorities cited in Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 579 n.62 (1955).

<sup>44</sup> See, *e.g.*, *Adams v. New York*, 192 U.S. 585, 596 (1904); *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841); *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, 910 (1955) (dictum). See Ray, *Restrictions On The Use Of Illegally Obtained Evidence*, 9 Sw. L.J. 434 (1955); MACHEN, *The Law Of Search And Seizure*, in LAW AND ADMINISTRATION 146 (1950).

<sup>45</sup> See *People v. Defore*, *supra* note 43 at 22, 150 N.E. at 588 (dictum); *People v. Cahan*, *supra* note 44 at 910 (dictum).

<sup>46</sup> See *Adams v. New York*, *supra* note 44 at 594. See also MACHEN, *op. cit. supra* note 44, at 145; 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

<sup>47</sup> See *Wolf v. Colorado*, 338 U.S. 25, 30-31 (1949) (dictum). See also MACHEN, *op. cit. supra* note 44, at 146-47.

<sup>48</sup> See also MACHEN, *op. cit. supra* note 44, at 147; 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

<sup>49</sup> See *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926).

<sup>50</sup> See Waite, *Judges And The Crime Burden*, 54 MICH. L. REV. 169, 186 (1955). ". . . [I]t follows ineluctably that by every unnecessary limitation the judges place on police efficiency, and by every discovered criminal they protect from deserved punishment, those judges are derogating from the force of deterrence and contributing to the country's already too heavy and increasing burden of crime." *Ibid.* In answer to the argument that the exclusionary rule affords a shelter for criminals, Mr. Justice Jackson said, ". . . the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect." *Harris v. United States*, 331 U.S. 145, 198 (1947) (dissenting opinion).

<sup>51</sup> See *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, 910 (1955).

<sup>52</sup> See authorities cited in Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 579 n.62 (1955).

were admissible; <sup>53</sup> the protection extends to all equally, the guilty as well as the innocent.<sup>54</sup> It is also asserted that when evidence is used which has been obtained in a manner violative of the fifth amendment as well as the fourth, the defendant is denied a fair trial.<sup>55</sup> Further, for a government to benefit from the lawlessness of its agents is said to be opposed to the fundamental principle of justice that one should not be permitted to profit from his own wrong.<sup>56</sup> Another argument is that by receiving the fruits of unlawful searches, courts are sanctioning and participating in the illegal action; this is manifestly inconsistent with their duty to enforce the Constitution and the laws passed pursuant thereto.<sup>57</sup> Finally, those who support the rule, believe it to be the only effective method of deterring violations by the police <sup>58</sup> and that its efficacy in this respect has been considerable.<sup>59</sup>

### *Origin and Development of the Exclusionary Rule*

The constitutional protection of the right of privacy stems from the common-law maxim that "every man's house is his castle."<sup>60</sup> More closely connected with its adoption, however, was the bitter resentment of the American colonists to the "writs of assistance." These

<sup>53</sup> See, e.g., *Weeks v. United States*, 232 U.S. 383, 393 (1914); *Stefanelli v. Minard*, 342 U.S. 117, 125 (1951) (dissenting opinion). See also Scott, *Federal Restrictions On Evidence In State Criminal Cases*, 34 MINN. L. REV. 489, 505 (1950).

<sup>54</sup> See, e.g., *Agnello v. United States*, 269 U.S. 20, 32 (1925); *Weeks v. United States*, *supra* note 53.

<sup>55</sup> See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>56</sup> See MACHEN, *The Law Of Search And Seizure*, in LAW AND ADMINISTRATION 143 (1950). This principle was eloquently set forth by Mr. Justice Brandeis in a dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928), where he said: "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the laws scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *Id.* at 485 (dissenting opinion).

<sup>57</sup> See *Weeks v. United States*, *supra* note 53; Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 579 (1955); MACHEN, *op. cit. supra* note 56, at 143-44. "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." *Olmstead v. United States*, *supra* note 56 at 470 (dissenting opinion, per Holmes, J.).

<sup>58</sup> See *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). See also Barrett, *supra* note 57, at 584; MACHEN, *op. cit. supra* note 56, at 144.

<sup>59</sup> See MACHEN, *op. cit. supra* note 56, at 149.

<sup>60</sup> See COOLEY, CONSTITUTIONAL LAW 265 (4th ed., Bruce 1931); CORNELIUS, SEARCH AND SEIZURE § 3 (1926); CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 86 (10th ed. 1955).

were general warrants<sup>61</sup> under which British officers were liberally granted power to search homes.<sup>62</sup> In 1761, James Otis vehemently denounced these writs as "the worst instrument of arbitrary power . . . that . . . was [ever] found in an English lawbook."<sup>63</sup> Demands for protection against the exercise of such arbitrary power<sup>64</sup> ultimately resulted in the adoption of the fourth amendment.<sup>65</sup> Traditionally, the rights secured by this amendment have been enforced in three ways.<sup>66</sup>

<sup>61</sup> See COOLEY, *op. cit. supra* note 60, at 268-69.

<sup>62</sup> See CUSHMAN, *op. cit. supra* note 60, at 86; HART, FORMATION OF THE UNION 1750-1829 53, 54 (rev. ed. 1926); KELLY & HARBISON, THE AMERICAN CONSTITUTION 47 (1948); NORTON, THE CONSTITUTION OF THE UNITED STATES 209 (1922).

<sup>63</sup> Quoted in 1 COOLEY, CONSTITUTIONAL LIMITATIONS 615 (8th ed., Carlington 1927).

<sup>64</sup> See *Boyd v. United States*, 116 U.S. 616, 624-25 (1886) (dictum). The memorable discussion by Lord Camden in the famous case of *Entick v. Carington*, 19 How. St. Tr. 1029 (1765), is said to have provided the basis which led to the adoption of the formal guarantees of the fourth amendment. The plaintiff had brought an action for trespass against officers of the king who had broken into his home and searched and examined his private papers. Later, the secret information they contained was made public. The officers were acting under the authority of a "general warrant." In pointing out that the acts complained of could only be justified under the mandate of some positive law, Lord Camden remarked: "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.

" . . . .

"Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society." *Id.* at 1066.

Mr. Justice Bradley, in speaking of this case in *Boyd v. United States*, *supra*, pointed out that: "as every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd v. United States*, *supra* at 626-27. See also COOLEY, *op. cit. supra* note 60, at 269.

<sup>65</sup> "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." U.S. CONST. amend. IV.

<sup>66</sup> See CORNELIUS, SEARCH AND SEIZURE §§ 230-57, 320-38, 360-61 (1926); MACHEN, *The Law Of Search And Seizure*, in LAW AND ADMINISTRATION 133-38 (1950); Grant, *Circumventing The Fourth Amendment*, 14 So. CALIF. L. REV. 359, 365 (1941). The Committee on Criminal Law and Procedure of the California State Bar Association has suggested a novel remedy for viola-

In addition to the exclusion of evidence, courts have provided redress to injured parties by civil action in tort.<sup>67</sup> Violators of the amendment have also been subjected to criminal penalties.<sup>68</sup>

The use of the exclusionary rule as a method of enforcing the fourth amendment was first employed by the Supreme Court in *Boyd v. United States*.<sup>69</sup> In *Adams v. New York*,<sup>70</sup> however, the Court, in refusing to follow the *Boyd* case, adhered to the common-law rule that "evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner."<sup>71</sup> The present rule in the federal courts was not formulated until 1914. In that year, the Supreme Court held in *Weeks v. United States*<sup>72</sup> that evidence obtained by federal officers, in violation of the fourth amendment, could not be used against an accused in a federal court, if he made timely objection thereto. But the federal rule of exclusion established in that case is not unlimited. If the defendant waives his constitutional rights at the time the search is made, his right to secure possession of the property or suppress its use in evi-

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tions of the right of privacy by police officers. ". . . [T]he answer might lie in a new kind of civil action, or better, a summary type of proceeding, for a substantial money judgment in favor of the wronged individual, whether innocent or guilty, and against the political subdivision whose enforcement officers violated that person's rights. After not many outlays of public funds the taxpayers and administrative heads would insist upon curbing unlawful police action." 29 CALIF. ST. B.J. 263, 264 (1954). Professor Edward L. Barrett, Jr. of the University of California Law School believes that "legislative action along these general lines gives promise of providing a more adequate solution than the exclusionary rule at a smaller social cost." Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 595 (1955). He points out, however, that in their desire to make the remedy attractive, legislators should not be unmindful of the dangers of unjustified raids upon local treasuries. *Ibid.* See also Grant, *supra* at 372.

<sup>67</sup> See Foote, *Tort Remedies For Police Violations Of Individual Rights*, 39 MINN. L. REV. 493 (1955).

<sup>68</sup> 18 U.S.C. § 2234 (1952); *cf.* N.Y. PEN. LAW §§ 1786, 1846-47; IDAHO CODE ANN. § 18-703 (1948); VA. CODE ANN. § 19-34 (1950). See also Edwards, *Criminal Liability For Unreasonable Searches And Seizures*, 41 VA. L. REV. 621 (1955).

<sup>69</sup> 116 U.S. 616 (1886). The *Boyd* case involved the question of the constitutionality of a federal statute authorizing the courts to compel the producing of a man's private books, papers, etc., under the penalty of having the facts alleged as to the information they contained, be taken as confessed, if the defendant or witness failed to produce them. The statute was held violative of the fourth and fifth amendments, and the introduction in evidence of books and papers produced under such statute was declared error.

<sup>70</sup> 192 U.S. 585 (1904). The *Adams* case involved an appeal from a conviction in a state court. Objection was made to the introduction in evidence of certain private papers which were illegally seized by state police officers. The Supreme Court upheld the state court conviction. Though not expressly overruling the *Boyd* case, the Court refused to apply it to the facts of the present case.

<sup>71</sup> *Id.* at 596.

<sup>72</sup> 232 U.S. 383 (1914).

dence is barred.<sup>73</sup> Generally, the defendant is required to make a seasonable application before trial for the return or suppression of the evidence.<sup>74</sup> This is to prevent the interruption of the trial by a consideration of issues collateral to the question of the accused's guilt or innocence.<sup>75</sup> This requirement of timely objection, however, is not absolute.<sup>76</sup> It has not been applied where the defendant has no knowledge of the search and seizure prior to trial<sup>77</sup> or where he has knowledge, but his counsel has failed to raise an objection.<sup>78</sup> Since exclusion is based upon the violation of personal rights guaranteed by the constitution, standing to challenge the admissibility of illegally obtained evidence is *personal*.<sup>79</sup> A caveat to this principle has been recently provided by the Supreme Court in *United States v. Jeffers*.<sup>80</sup> It was there said that "to hold that . . . [the unlawful search of a third party's premises was] lawful as to the [defendant] . . . would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."<sup>81</sup>

Another qualification of the rule of exclusion is the requirement that the invasion of the constitutional right be "governmental." Thus, where evidence is obtained as a result of an unlawful search and seizure perpetrated by a private person, it is admissible, provided the illegal acts were done without the knowledge or participation of the government.<sup>82</sup> In this connection, evidence is admissible in a federal court when unlawfully obtained by non-federal officers acting completely independently of the federal government, if it is turned over to federal officers on a "silver platter."<sup>83</sup> In holding this limitation inapplicable, courts have condemned as "federal," unlawful searches

<sup>73</sup> See, e.g., *United States ex rel. Williams v. Barry*, 260 Fed. 291 (S.D.N.Y. 1919); *United States v. Gouled*, 253 Fed. 242 (S.D.N.Y. 1918); see CORNELIUS, SEARCH AND SEIZURE § 17 (1926).

<sup>74</sup> See, e.g., *Agnello v. United States*, 269 U.S. 20, 34 (1925) (dictum); *Weeks v. United States*, 232 U.S. 383, 396 (1914) (dictum); see CORNELIUS, *op. cit. supra* note 73, § 10; MACHEN, *The Law Of Search And Seizure*, in LAW AND ADMINISTRATION 137 (1950); Note, 45 J. CRIM. L., C. & P.S. 51, 60 (1954).

<sup>75</sup> See *Adams v. New York*, 192 U.S. 585 (1904); *Agnello v. United States*, *supra* note 74 at 34 (dictum); MACHEN, *op. cit. supra* note 74, at 137.

<sup>76</sup> FED. R. CRIM. P. 41(e).

<sup>77</sup> *Agnello v. United States*, *supra* note 74 at 34.

<sup>78</sup> *United States v. Asendio*, 171 F.2d 122 (3d Cir. 1948).

<sup>79</sup> *Steeber v. United States*, 198 F.2d 615 (10th Cir. 1952); *Connolly v. Medalie*, 58 F.2d 629 (2d Cir. 1932); *MacDaniel v. United States*, 294 Fed. 769 (6th Cir. 1924); *Remus v. United States*, 291 Fed. 501, 510-11 (6th Cir. 1923) (dictum).

<sup>80</sup> 342 U.S. 48 (1951).

<sup>81</sup> *Id.* at 52.

<sup>82</sup> *Burdeau v. McDowell*, 256 U.S. 465 (1921); see CORNELIUS, SEARCH AND SEIZURE § 14 (1926); MACHEN, *The Law Of Search And Seizure*, in LAW AND ADMINISTRATION 137 (1950).

<sup>83</sup> *Burford v. United States*, 214 F.2d 124 (5th Cir. 1954); *Rettich v. United States*, 84 F.2d 118 (1st Cir. 1936); *Lustig v. United States*, 338 U.S. 74, 78-79 (1949) (dictum); *Byars v. United States*, 273 U.S. 28, 33 (1927) (dictum).

by state officers made at the request of federal officers<sup>84</sup> or participated in by the latter.<sup>85</sup> In *Lustig v. United States*,<sup>86</sup> the presence of a United States Treasury agent in a room being unlawfully searched by local police, and his selection of evidence deemed important for use in a federal prosecution, were held not severable from the entire transaction in the room and therefore part of the unlawful search. In addition, evidence that has been unlawfully obtained by state officers for the sole purpose of enforcing federal law has been held to be inadmissible in federal courts.<sup>87</sup>

### *Exclusionary Rule in States Courts*

Safeguards similar to those contained in the fourth amendment are found in every state's constitution.<sup>88</sup> Upon the assumption that the exclusion of evidence obtained in a manner violative of the fourth amendment is not a federal constitutional mandate, the states have felt free to implement their own constitutions by following or rejecting the *Weeks* rule. At the present time, twenty-nine states<sup>89</sup> admit evi-

<sup>84</sup> *Lustig v. United States*, *supra* note 83 at 79 (dictum); see MACHEN, *op. cit. supra* note 82, at 120.

<sup>85</sup> *Byars v. United States*, *supra* note 83.

<sup>86</sup> 338 U.S. 74 (1949).

<sup>87</sup> *Gambino v. United States*, 275 U.S. 310 (1927); *United States v. Butler*, 156 F.2d 897 (10th Cir. 1946).

<sup>88</sup> See ALA. CONST. art. 1, § 5; ARIZ. CONST. art. 2, § 8; ARK. CONST. art. 2, § 15; CAL. CONST. art. 1, § 19; COLO. CONST. art. II, § 7; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 6; FLA. CONST., Declaration Of Rights, § 22; GA. CONST. art. I, § 2-116; IDAHO CONST. art. 1, § 17; ILL. CONST. art. II, § 6; IND. CONST. art. 1, § 11; IOWA CONST. art. 1, § 8; KAN. CONST., Bill Of Rights, § 15; KY. CONST. § 10; LA. CONST. art. 1, § 7; ME. CONST. art. 1, § 5; MD. CONST., Declaration of Rights, art. 26; MASS. CONST., Declaration of Rights, art. XIV; MICH. CONST. art. II, § 10; MINN. CONST. art. 1, § 10; MISS. CONST. art. 3, § 23; MO. CONST. art. 1, § 15; MONT. CONST. art. III, § 7; NEB. CONST. art. I, § 7; N.H. CONST. pt. 1, art. 19; N.J. CONST. art. 1, ¶ 7; N.M. CONST. art. II, § 10; N.Y. CONST. art. I, § 12; NEV. CONST. art. 1, § 18; N.C. CONST. art. 1, § 15; N.D. CONST. § 18; OHIO CONST. art. I, § 14; OKLA. CONST. art. II, § 30; ORE. CONST. art. I, § 9; PA. CONST. art. 1, § 8; R.I. CONST. art. I, § 6; S.C. CONST. art. 1, § 16; S.D. CONST. art. VI, § 11; TENN. CONST. art. 1, § 7; TEX. CONST. art. 1, § 9; UTAH CONST. art. I, § 14; VT. CONST. c. 1, art. 11; VA. CONST. art. I, § 10; WASH. CONST. art. I, § 7; W. VA. CONST. art. III, § 6; WIS. CONST. art. I, § 11; WYO. CONST. art. 1, § 4.

<sup>89</sup> See (Alabama) *Banks v. State*, 207 Ala. 179, 93 So. 293 (1921); *Shields v. State*, 104 Ala. 35, 16 So. 85 (1894); (Arizona) *Argetakis v. State*, 24 Ariz. 599, 212 Pac. 372 (1923) (by implication); (Arkansas) *Benson v. State*, 149 Ark. 633, 233 S.W. 758 (1921); *Starchman v. State*, 62 Ark. 538, 36 S.W. 940 (1896); (Colorado) *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019 (1925); (Connecticut) *State v. Reynolds*, 101 Conn. 224, 125 Atl. 636 (1924); (Delaware) *State v. Chuchola*, 32 Del. 133, 120 Atl. 212 (Ct. Gen. Sess. 1922); (Georgia) *Kenemer v. State*, 154 Ga. 139, 113 S.E. 551 (1922); *Calhoun v. State*, 144 Ga. 679, 87 S.E. 893 (1916); *Williams v. State*, 100 Ga. 511, 28 S.E. 624 (1897); (Iowa) *State v. Rowley*, 197 Iowa 977, 195 N.W. 881 (1923); *State v. Tonn*, 195 Iowa 94, 191 N.W. 530 (1923); (Kansas) *State v. Johnson*, 116 Kan. 58, 226 Pac. 245 (1924); *State v. Miller*, 63 Kan. 62, 64 Pac. 1033

dence though unlawfully seized. On the other hand, eighteen states<sup>90</sup> have expressed adherence to the exclusionary rule. Rhode Island, the only state which has not directly passed upon the question, has in a dictum assumed the applicability of the federal rule to the criminal proceedings of that state.<sup>91</sup> Three states have enacted legislation which, in varying degrees, codify the principle established by the

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(1901); (Louisiana) *State v. Fleckinger*, 152 La. 337, 93 So. 115 (1922); (Maine) *State v. Schoppe*, 113 Me. 10, 92 Atl. 867 (1915); (Maryland) *Meisinger v. State*, 155 Md. 195, 141 Atl. 536 (1928); (Massachusetts) *Commonwealth v. Wilkins*, 243 Mass. 356, 138 N.E. 11 (1923); *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841); (Minnesota) *State v. Pluth*, 157 Minn. 145, 195 N.W. 789 (1923); (Nebraska) *Billings v. State*, 109 Neb. 596, 191 N.W. 721 (1923); (Nevada) *State v. Chin Gim*, 47 Nev. 431, 224 Pac. 798 (1924); (New Hampshire) *State v. Agalos*, 79 N.H. 241, 107 Atl. 314 (1919); *State v. Flynn*, 36 N.H. 64 (1858); (New Jersey) *State v. Black*, 5 N.J. Misc. 48, 135 Atl. 685 (Q.S. 1926); (New Mexico) *State v. Dillon*, 34 N.M. 366, 281 Pac. 474 (1929); (New York) *People v. Richter's Jewelers, Inc.*, 291 N.Y. 161, 51 N.E.2d 690 (1943); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926); *People v. Adams*, 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd*, 192 U.S. 585 (1904); (North Carolina) *State v. Simmons*, 183 N.C. 684, 110 S.E. 591 (1922); *State v. Wallace*, 162 N.C. 622, 78 S.E. 1 (1913); (North Dakota) *State v. Fahn*, 53 N.D. 203, 205 N.W. 67 (1925); (Ohio) *State v. Lindway*, 131 Ohio St. 166, 2 N.E.2d 490 (1936); (Oregon) *cf. State v. Folkes*, 174 Ore. 568, 150 P.2d 17 (1944); (Pennsylvania) *Commonwealth v. Dabbierio*, 290 Pa. 174, 138 Atl. 679 (1927); (South Carolina) *State v. Prescott*, 125 S.C. 22, 117 S.E. 637 (1923); *State v. Green*, 121 S.C. 230, 114 S.E. 317 (1922); (Utah) *State v. Aime*, 62 Utah 476, 220 Pac. 704 (1923); (Vermont) *State v. Stacy*, 104 Vt. 379, 160 Atl. 257 (1932); (Virginia) *Hall v. Commonwealth*, 138 Va. 727, 121 S.E. 154 (1924); *Lucchesi v. Commonwealth*, 122 Va. 872, 94 S.E. 925 (1918).

<sup>90</sup> (California) *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955); (Florida) *Atz v. Andrews*, 84 Fla. 43, 94 So. 329 (1922); (Idaho) *State v. Arregui*, 44 Idaho 43, 254 Pac. 788 (1927); (Illinois) *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924); (Indiana) *Batts v. State*, 194 Ind. 609, 144 N.E. 23 (1924); *Flum v. State*, 193 Ind. 585, 141 N.E. 353 (1923); *Callender v. State*, 136 N.E. 10 (Ind. 1922); (Kentucky) *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920); (Michigan) *People v. Margelis*, 217 Mich. 423, 186 N.W. 488 (1922); *People v. Marxhausen*, 204 Mich. 559, 171 N.W. 557 (1919); (Mississippi) *State v. Patterson*, 130 Miss. 680, 95 So. 96 (1923); (Missouri) *State v. Owens*, 302 Mo. 348, 259 S.W. 100 (1924); *State v. Pope*, 210 Mo. 558, 243 S.W. 253 (1922); (Montana) *State ex rel. Thibodeau v. District Court*, 70 Mont. 202, 224 Pac. 866 (1924); *State ex rel. King v. District Court*, 70 Mont. 191, 224 Pac. 862 (1924); (Oklahoma) *Hess v. State*, 84 Okla. 73, 202 Pac. 310 (1921); *Foster v. State*, 27 Okla. Crim. 270, 226 Pac. 602 (1924); *Gore v. State*, 24 Okla. Crim. 394, 218 Pac. 545 (1923); (South Dakota) *State v. Gooder*, 57 S.D. 619, 234 N.W. 610 (1930); (Tennessee) *Hughes v. State*, 145 Tenn. 544, 238 S.W. 588 (1922); (Texas) *Burton v. State*, 152 Tex. Crim. 444, 215 S.W.2d 180 (1948); *Timberlake v. State*, 150 Tex. Crim. 375, 201 S.W.2d 647 (1947); (Washington) *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922); (West Virginia) *State v. Wills*, 91 W. Va. 659, 114 S.E. 261 (1922); *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257 (1922); (Wisconsin) *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923); (Wyoming) *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342 (1920).

<sup>91</sup> See *State v. Lorenzo*, 72 R.I. 175, 48 A.2d 407, 412 (1946).

*Weeks* case.<sup>92</sup> Under the Maryland statutes, exclusion is limited to the trial of misdemeanors.<sup>93</sup> A more liberal attitude has been adopted in North Carolina and Texas. North Carolina has statutorily barred the use of evidence obtained by unlawful searches and seizures in all criminal cases,<sup>94</sup> while under the Texas statute all illegal evidence, whether obtained by a police officer or a private person, is inadmissible.<sup>95</sup>

Though the "exclusion" states are in the minority, "the tide seems to be flowing in that direction."<sup>96</sup> "Exclusion" has scored a great victory through the recent change in attitude of California. That state had for years consistently rejected judicial adoption of the *Weeks* rule.<sup>97</sup> But in *People v. Cahan*,<sup>98</sup> the Supreme Court of California overruled long standing precedent by holding that evidence, seized by local police after a forcible entry into the defendant's home without a search warrant, was inadmissible. In an exhaustive opinion, the court answered the argument that unreasonable searches and seizures were justified because of the necessity of bringing criminals to justice, by pointing out that the people of California had rejected this thought by the adoption of constitutional provisions.<sup>99</sup> Of greater import, however, was this statement of the court's rationale:

We have been compelled to reach . . . [the] conclusion [that illegally obtained evidence is inadmissible] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.<sup>100</sup>

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<sup>92</sup> See MD. ANN. CODE art. 35, § 5 (Supp. 1955); N.C. GEN. STAT. § 15-27 (1953); TEX. CODE CRIM. PROC. ANN. art. 727a (Supp. 1953).

<sup>93</sup> MD. ANN. CODE art. 35, § 5 (Supp. 1955).

<sup>94</sup> "Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action." N.C. GEN. STAT. § 15-27 (1953).

<sup>95</sup> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case." TEX. CODE CRIM. PROC. ANN. art. 727a (Supp. 1953).

<sup>96</sup> McCORMICK, EVIDENCE 295 (1954).

<sup>97</sup> *People v. Kelley*, 22 Cal. 2d 169, 137 P.2d 1 (1943); *People v. Gonzales*, 20 Cal. 2d 165, 124 P.2d 44 (1942); *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922). For the rule in California prior to the *Weeks* case, see *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517 (1909).

<sup>98</sup> 44 Cal. 2d 434, 282 P.2d 905 (1955).

<sup>99</sup> *Id.* at 907.

<sup>100</sup> *Id.* at 911-12.

Significantly, the court did not feel constrained to adopt the exclusionary rule because of the fact that the fourteenth amendment has been held to restrain affirmative state action in violation of the fourth amendment. Rather, in asserting its privilege to accept or reject the rule, it decided *as a matter of expediency* to make that remedy available. Since the evils prevailing in California prior to the decision in the *Cahan* case<sup>101</sup> are not confined to that state, it is possible that, quite aside from any constitutional considerations, the change in policy manifested by this case may cause a re-evaluation of the problem in other jurisdictions.

### Conclusion

Barring this possibility, it is at least apparent that the decision in the *Rea* case has effectively limited the rule formulated in *Wolf*. A remedy is now furnished, which, in effect, imposes the exclusionary rule on state courts when the evidence has been obtained through unlawful searches and seizures by federal officers. It is hoped that the instant case will provide the basis for a future departure from the narrow formula set forth in *Wolf*.<sup>102</sup> The application of the exclusionary rule on a "national" rather than a "federal" basis would equate the protection of the right of privacy guaranteed by the fourth and fourteenth amendments. Furthermore, imposition of the exclusionary rule on state courts would provide uniformity of remedy for the violation of a constitutional right, the protection of which is guaranteed against infringement by the states as well as the federal government. Thus, the *practical* value of the right will not be made to depend upon the jurisdiction in which the violation occurs or where the accused is being tried. Were the exclusionary rule held applicable to prosecutions in state courts, it is evident that those courts would be forced to provide a clearer explanation of the rules applicable to "probable cause," the issuance of warrants, and search incident to a lawful arrest. Such a result would protect both individual rights and the interest of society in suppressing crimes.<sup>103</sup>

Various methods have been suggested by which the exclusionary rule could be imposed upon state courts. It is conceded that Congress could make the rule binding upon the states in order ". . . to deter state invasions of the fourth amendment's guarantee, which is now recognized as limiting state as well as federal action."<sup>104</sup> However, political reasons reduce the possibility of this step being taken. It therefore depends upon the Supreme Court, which is perhaps farther removed from the pressures of public opinion, to provide the solution.

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<sup>101</sup> Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 568-78 (1955).

<sup>102</sup> See *Rea v. United States*, 350 U.S. 214, 221 (1956) (dissenting opinion).

<sup>103</sup> Barrett, *supra* note 101, at 578.

<sup>104</sup> *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, 908 (1955).

This may be accomplished by a direct overruling of the *Wolf* case through a holding that the exclusion of evidence is an essential ingredient of the right of privacy guaranteed by the fourth amendment.<sup>105</sup> Without directly overruling *Wolf*, the Court could re-examine the scope of the due process clause and include within it a bar to the use of illegally obtained evidence. Since "basic rights do not become petrified as of any one time,"<sup>106</sup> and since "it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right,"<sup>107</sup> this solution is not without justification.

But the "national" protection of the right of privacy by the exclusion of evidence may require a departure from the sources tapped in previous investigations of the problem. In this connection, the privileges and immunities clause of the fourteenth amendment may provide a fertile field for future consideration. Assuming that the exclusion of illegally obtained evidence in federal courts is a privilege afforded every citizen of the United States, an argument could be made that the admission of such evidence in state courts is an unconstitutional abridgement of that privilege. Since other remedies do not appear to provide adequate protection, the imposition of the exclusionary rule on the state level would seem to be necessary.



#### THE HOOVER REPORT — PROCEDURAL DUE PROCESS IN REQUIRED ADMINISTRATIVE HEARINGS

One of the most pressing problems in administrative law is that of procedural due process in administrative hearings.<sup>1</sup> The remedial Administrative Procedure Act<sup>2</sup> has provided only a limited solution.<sup>3</sup>

<sup>105</sup> See *Olmstead v. United States*, 277 U.S. 438, 462-63 (1928) (dictum); *Wolf v. Colorado*, 338 U.S. 25, 48 (1948) (dissenting opinion). See also MACHEN, *The Law Of Search And Seizure*, in LAW AND ADMINISTRATION 144 (1950).

<sup>106</sup> See *Wolf v. Colorado*, *supra* note 105 at 27.

<sup>107</sup> *Ibid.*

<sup>1</sup> See GELLHORN AND BYSE, ADMINISTRATIVE LAW 715-22 (1954); ATTORNEY GENERAL, MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 6 (1947); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT TO THE CONGRESS ON LEGAL SERVICES AND PROCEDURE 45-46 (1955) (hereinafter referred to as COMMISSION REPORT).

<sup>2</sup> 60 STAT. 237 (1946), 5 U.S.C. §§ 1001-1011 (1952).

<sup>3</sup> See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 137-43 (1955) (hereinafter referred to as TASK FORCE REPORT). Schwartz, *The Administrative Procedure Act In Operation*, 29 N.Y.U.L. REV. 1173 (1954).