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## STATE-FEDERAL CROSSFIRE IN SEARCH AND SEIZURE AND SELF INCRIMINATION\*

*Judson A. Parsons, Jr.*†

In our federal system, it is basic that in enforcing criminal laws, the states and the federal government operate independently of each other, each being restricted to its own sphere.<sup>1</sup> In keeping with this theorem, the Fourth<sup>2</sup> and Fifth Amendments,<sup>3</sup> which apply only to the Federal Government, do not limit state action.<sup>4</sup> Nor do state constitutional guarantees restrict federal activity.<sup>5</sup>

This fundamental of our form of Government can produce some rather startling results. In order to protect against invasion of Fourth Amendment rights, federal courts will not admit evidence illegally obtained by federal officers.<sup>6</sup> Yet, when federal officers turn their ill-gotten gains over to state authorities, many state courts will receive them.<sup>7</sup> On the other hand, some state courts shun evidence illegally obtained by state officers;<sup>8</sup> yet federal courts will allow it so long as there was no federal participation in the illegal activity.<sup>9</sup> Since many federal and state crimes overlap, under this sort of reasoning federal officers may stand to gain by violating the Fourth Amendment and state officers, by violating state guarantees. Theoretically, at least, each could act wrongfully, turn the evidence over to the other and sit back and let the other prosecute its criminals and do its work for it.

To the citizen, it makes no difference what sort of lawyer's talk

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† See Contributors' Section, Masthead p. 374, for biographical data.

<sup>1</sup> *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>2</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.

<sup>3</sup> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>4</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949); *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>5</sup> *Feldman v. United States*, 322 U.S. 487, 492, rehearing denied, 323 U.S. 811 (1944).

<sup>6</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>7</sup> See note 21 *infra*.

<sup>8</sup> See *Wolf v. Colorado*, *supra* note 4 at 38.

<sup>9</sup> See note 83 *infra*.

produces this result. His rights are violated by government authority and he suffers for it.

Similarly, state-federal crossfire can nullify the basic privilege against self incrimination. Testimony concerning state crimes may be compelled from a witness by federal authority which state prosecutors can use in state courts.<sup>10</sup> States can compel testimony concerning federal crimes,<sup>11</sup> but cannot prevent federal prosecutions based upon such testimony, and federal courts will accept it in evidence.<sup>12</sup> Again, the bewildered citizen suffers. Again, the explanation that each government must operate only in its own sphere provides him little satisfaction.

In our legal system, the privilege against self incrimination is considered to be one of our basic freedoms.<sup>13</sup> The federal government and some states are committed to the rule against admission of illegally obtained evidence as necessary to enforce the basic guarantees against illegal search and seizure.<sup>14</sup> In view of these commitments, it seems clear that state-federal and federal-state one-two punches which undermine these freedoms should be eliminated whenever possible. If the basic two-spheres tenet must logically lead to such results, perhaps it ought to be re-examined.<sup>15</sup> Happily, though, such drastic action is unnecessary. Doctrine consistent with the federal idea has been developed to meet some of these problems, and further development seems possible. In 1956 the Supreme Court took a significant step in this direction in *Rea v. United States*,<sup>16</sup> so that now the situation in search and seizure is considerably improved. But there is still much to be done both here and in the area of self incrimination.

#### ILLEGALLY OBTAINED EVIDENCE

##### A. *Federally Obtained Evidence in State Courts*

As the rule is generally stated, federal courts will not accept evidence illegally obtained by federal officers, the rule being of extrinsic policy, designed to prevent federal officers from violating Fourth Amendment rights.<sup>17</sup> While the Supreme Court has said that due process includes a federal guarantee against unreasonable state searches and seizures, states are not required to follow the exclusionary rule<sup>18</sup> nor, despite the ex-

<sup>10</sup> *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>11</sup> *Jack v. Kansas*, 199 U.S. 372 (1905).

<sup>12</sup> *Feldman v. United States*, supra note 5.

<sup>13</sup> E.g., *Ullman v. United States*, 350 U.S. 422 (1956); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Griswold, The Fifth Amendment Today* (1954).

<sup>14</sup> See notes 4 and 6 supra.

<sup>15</sup> For a criticism of another result of the two spheres of philosophy in double jeopardy, see Grant, "The Lanza Rule of Successive Prosecutions," 32 *Colum. L. Rev.* 1309 (1932).

<sup>16</sup> 350 U.S. 214 (1956).

<sup>17</sup> E.g., 8 *Wigmore, Evidence* § 2184 (3d ed. 1940).

<sup>18</sup> *Wolf v. Colorado*, supra note 4.

istence of a statute which gives a federal cause of action where a state officer invades a federal constitutional right, will a federal court enjoin state officers from using state-obtained evidence in state courts.<sup>19</sup> Federal courts will admit evidence illegally obtained by private parties or state officers so long as federal officers do not participate in its acquisition.<sup>20</sup> Similarly, many state courts will admit evidence illegally obtained by federal officers.<sup>21</sup>

The area where federal and state crimes overlap is large. It covers much of the more common criminal activity including *inter alia* possession and sale of narcotics,<sup>22</sup> some types of embezzlement,<sup>23</sup> sending threatening or extorting communications in interstate commerce or the mails,<sup>24</sup> interstate fleeing from justice,<sup>25</sup> various sorts of fraud,<sup>26</sup> transportation of liquor into dry states,<sup>27</sup> interstate transportation or mailing of lottery tickets<sup>28</sup> or obscene matter,<sup>29</sup> racketeering affecting interstate commerce,<sup>30</sup> transportation in interstate commerce of stolen goods or vehicles

<sup>19</sup> *Stefannelli v. Minard*, 342 U.S. 117 (1951). The suit was brought under Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (Supp. 1956), formerly 8 U.S.C. § 43 (1952).

<sup>20</sup> *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Weeks v. United States*, supra note 6.

<sup>21</sup> As might be expected in states which reject *Weeks*, federally obtained evidence has been admitted. *Terrano v. State*, 59 Nev. 247, 91 P.2d 67 (1939); *State v. Lacy*, 212 N.W. 442 (N.D. 1927); *Commonwealth v. Colpo*, 98 Pa. Super. 460, cert. denied, 282 U.S. 863 (1930). *Weeks* rule states are split. At least one has noted the federal rule that evidence illegally obtained by state officers is admissible and said that by the same reasoning a state court should not question federally obtained evidence. *State ex rel Kuhr v. District Court*, 82 Mont. 515, 268 Pac. 501 (1928); see also *Johnson v. State*, 155 Tenn. 628, 630, 299 S.W. 800, 801 (1927). Other *Weeks* states say it would be wrong for them to sanction federal wrongdoing. *State v. Arregni*, 254 Pac. 788 (Idaho 1927); *Walters v. Commonwealth*, 199 Ky. 182, 200 S.W. 839 (1923); *Little v. State*, 171 Miss. 819, 159 So. 103 (1935); *State v. Rebasti*, 306 Mo. 336, 267 S.W. 858 (1924); *State v. Hiteshaw*, 42 Wyo. 147, 292 Pac. 2 (1930); cf. concurring opinion in *Badillo v. Superior Court*, 46 Cal. App. 2d 273, 294 P.2d 23 (1956). See *Annots.*, 50 A.L.R.2d 531, 575 (1956) 88 A.L.R. 362 (1934).

Arguably as a matter of state law all states should refuse federally obtained, illegally obtained evidence as a matter of comity, respect for an established federal policy, and the fact that state courts are after all a part of the federal system. But cf. *People v. Touhy*, 361 Ill. 332, 197 N.E. 849 (1935) where an Illinois court denied a motion to suppress evidence obtained by Wisconsin state officers illegally. While this is different from the problem of searches by federal officers, similar reasoning is applicable. In the most healthy system of federalism, should not states respect each other's search and seizure rules even though the rejection of the evidence in the forum could have little direct effect on law enforcement in the searching state?

But cf. *Gallegos v. Nebraska*, 342 U.S. 55, 70 (1951), in which Justices Jackson and Frankfurter suggested that Nebraska might admit an involuntary confession obtained by Texas officers since Nebraska could not deter them. And see Weinstein, "Recognition in the United States of the Privileges of Another Jurisdiction," 56 Colum. L. Rev. 597 (1956).

<sup>22</sup> 35 Stat. 614 (1909), as amended, 21 U.S.C. §§ 173-74 (1952), as amended, 21 U.S.C.A. § 174 (Supp. 1956).

<sup>23</sup> 18 U.S.C. §§ 153, 641 (1952).

<sup>24</sup> Id. §§ 875-76.

<sup>25</sup> Id. § 1073.

<sup>26</sup> E.g., 18 U.S.C. §§ 1001 et seq., 1341, 1343 (1952).

<sup>27</sup> Id. § 1262.

<sup>28</sup> Id. §§ 1301-02.

<sup>29</sup> Id. §§ 1461-63.

<sup>30</sup> Id. § 1951.

or falsely made or forged securities,<sup>31</sup> sale or receipt of these items<sup>32</sup> and interstate white slave traffic.<sup>33</sup> State and federal officers necessarily cooperate to a large extent in crime prevention and law enforcement. So long as a particular state will receive evidence illegally obtained by federal officers, federal officers operating in that state are apt not to be careful to obtain valid search warrants since they can turn the evidence over to the state if it is not acceptable in a federal court. They may even be tempted to act wrongfully to aid state officers where state and federal crimes overlap.

In 1956 the Supreme Court considered this problem specifically in *Rea v. United States*.<sup>34</sup> In that case a federal officer acting under an invalid search warrant issued by a United States Commissioner had seized narcotics from Rea, a prospective defendant. Before he was tried for the federal offense, Rea moved for suppression of the evidence, which motion the federal court granted. Thwarted in the federal courts, the federal narcotics agent decided to turn the evidence over to officers of the state of New Mexico. His oral testimony and the physical evidence would be necessary to convict Rea under state narcotics laws.

Rea did not wait until the state trial to raise the question of admissibility. Rather, he went back to the federal court and asked that the order suppressing the evidence be modified to enjoin the federal agent from turning the narcotics over to the state authorities and orally testifying in the state court. The district judge denied the application and was sustained in the Court of Appeals.<sup>35</sup> The Supreme Court reversed in a 5-4 decision, holding that both parts of the application should have been granted.

In the majority opinion, which was regrettably short, Mr. Justice Douglas expressly avoided decision on the question whether a state court could accept federally-obtained tainted evidence. The holding was placed upon the ground that this was a question of a federal court's "supervisory power over federal law enforcement agencies."<sup>36</sup> The Court cited *McNabb v. United States*,<sup>37</sup> where this power had been asserted and used to prevent the introduction of a confession illegally obtained by federal officers into federal court. The Court also noted that Rule 41 of the

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<sup>31</sup> Id. §§ 2312, 2314.

<sup>32</sup> Id. §§ 2313, 2315.

<sup>33</sup> Id. § 2421-24.

<sup>34</sup> 350 U.S. 214 (1956). In its issues through February 1957, the Index to Legal Periodicals had listed at least 35 law review comments on Rea. Of these the following are recommended: 56 Colum. L. Rev. 940 (1956), 70 Harv. L. Rev. 145 (1957) and 104 U. Pa. L. Rev. 868 (1956).

<sup>35</sup> The Court of Appeals decision appears at 218 F.2d 237 (10th Cir. 1954).

<sup>36</sup> 350 U.S. at 217.

<sup>37</sup> 318 U.S. 332, 341 (1943).

Federal Rules of Criminal Procedure<sup>38</sup> pertaining to the issuance of search warrants had been violated by a federal officer. It decided that it had power to correct the error, quoting from *Wise v. Henkel*, in which it had sustained the jurisdiction of a federal court to punish for contempt a federal district attorney who had disobeyed an order directing him to return papers illegally seized by a customs agent<sup>39</sup> and said that this action was part of a court's

. . . inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of [its] authority in connection with the execution of the process of the court.<sup>40</sup>

The Court in the *Rea* case then briefly discussed the equities of the situation. Since only a federal officer—not a state court—was being enjoined, it found that there was not too much interference with the delicate

<sup>38</sup> Rule 41 provides in part:

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States Commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property—

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probably cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and Return with Inventory. . . .

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

<sup>39</sup> 220 U.S. 556 (1911).

<sup>40</sup> 350 U.S. at 217, quoting 220 U.S. at 558.

state-federal relationships which keep federal hands off state law enforcement.<sup>41</sup> Also it was thought that failure to grant the injunction would allow the federal officer to flout federal policy designed to protect the privacy of citizens.

Mr. Justice Harlan, joined in dissent by Justices Reed, Burton, and Minton, questioned the exercise of this power.

The dissenters pointed out that this decision went much further than *McNabb* in so far as supervision of law enforcement officers was concerned; in *McNabb* the Court had not been "concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement."<sup>42</sup>

While the dissenters admitted that there was federal power to issue the injunction, they questioned the equity of doing so, pointing out that the effect of the decision was to hamstring a state prosecution and interfere with the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law" which had prevented the court from enjoining state use of state obtained tainted evidence in *Stefannelli v. Minard*.<sup>43</sup>

They also argued that the decision was inconsistent with *Wolf v. Colorado*,<sup>44</sup> holding that state courts could use evidence illegally obtained by state officers. They pointed out that the relief was premature since New Mexico might refuse the evidence. They said that to give relief at this point would "make the matter simply a race between a state prosecution and a federal injunction proceeding."<sup>45</sup> The dissenters assumed that but for the federal injunction, there would be no federal prohibition against New Mexico's use of the evidence.

As the dissenters point out, the case certainly does extend the federal court's search and seizure activity in two unprecedented ways. It goes beyond *McNabb* because it directly regulates a federal officer's conduct outside of the courtroom. And it interferes with state prosecution despite the *Stefannelli* conclusion against such interferences.

But when the background of the federal search and seizure rules is examined, it becomes clear that there is a good deal more support for the *Rea* holding than one might at first blush suppose. Indeed, the more the decision is studied, the greater the justification for it appears to be.

Thus, the fact that the court interfered with the law enforcement activities of the executive is not very surprising. The Fourth Amend-

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<sup>41</sup> *Stefannelli v. Minard*, 342 U.S. 117 (1951).

<sup>42</sup> 350 U.S. at 218-19, quoting 318 U.S. 332 at 347.

<sup>43</sup> 350 U.S. at 219 quoting 342 U.S. at 120.

<sup>44</sup> *Supra* note 4.

<sup>45</sup> 350 U.S. at 221.

ment clearly provides that the citizen is to be protected against invasion of his home and property by federal law enforcement agencies. The basic theory of the Amendment is that there shall be few searches without search warrants.<sup>46</sup> A search warrant is a command of a judicial officer and is executed under the authority of a court which takes control over whatever evidence is found.<sup>47</sup> The requirement that there must be search warrants before there will be searches and seizures carries the implication that there shall be judicial control of searches and seizures. It is this judicial control which is supposed to limit searches and seizures to reasonable ones and provide basic protection to the people from arbitrary executive action. An impartial judicial officer, not motivated by a desire to pile conviction upon conviction, objectively views the affidavits presented to him and makes the legal decision whether there are reasonable grounds for a warrant to issue.

Search and seizure would then seem to be a responsibility more of the judiciary than of the executive. A search and seizure is basically a judicial act. A warrant is executed out of court, but this does not reduce the responsibility of the court to see to it that the warrant is properly drawn and properly executed. Since, if the court's power is to be meaningful, it must also control searches without warrants, it would seem that these searches too are judicial acts and their control a judicial prerogative. To perform effectively its duty to regulate searches and seizures, the court may often have to interfere directly with law enforcement procedures which involve search and seizure or the fruits of a search and seizure.<sup>48</sup> This was done in the *Rea* case.

The development of the *Weeks* rule shows that the Supreme Court has more or less accepted this view of the Fourth Amendment. The *Weeks* rule has generally been thought of as basically a rule of evidence which may or may not have been required by the Constitution. Examination of *Weeks* and its predecessors, however, shows that it has been from its beginning a good deal more than a rule of evidence designed to deter indirectly unlawful executive activity. Rather as discussion of *Weeks* and its predecessors shows, the Court proceeded directly against the illegal searches and seizures by giving the party wronged the rough equivalent of a personal cause of action against the wrongdoer.

At common law and in the United States before 1886, the general rule was that evidence otherwise competent was not objectionable because it had been obtained by illegal methods.<sup>49</sup> Then in 1886 in *Boyd*

<sup>46</sup> An exception would be in the case where there is consent to the search.

<sup>47</sup> Rule 41(c), Fed. R. of Crim. P., note 38 supra; Form 15, Appendix of Forms, *ibid.*

<sup>48</sup> Beisel, Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court, pp. 30-31 (1955).

<sup>49</sup> 8 Wigmore, Evidence § 2183 (3d ed. 1940).



*v. United States*<sup>50</sup> a federal court operating under a federal statute ordered a man to produce certain documents bearing on a forfeiture proceeding. He objected to the order but to no avail in the lower court. The Supreme Court decided that the statute which authorized the order was unconstitutional on the ground that it was the equivalent of an unreasonable search and seizure in violation of the Fourth Amendment. The Federal rule against illegally obtained evidence was born when the Supreme Courts reversed the judgment.

The *Boyd* result was perfectly logical. A court had made an erroneous order, which harmed the owner of the documents. Obviously, the only way to correct the error was to reverse so that at the new trial the documents would not be in the hands of the Government, but back in the possession of the owner who could do with them as he wished.

In 1904 the Court decided *Adams v. New York*.<sup>51</sup> There state officers, searching under a valid state warrant, seized some policy slips which were covered by the warrant and also seized some other documents which were not. The defendant objected when the other documents were introduced in evidence in his state trial and took his conviction to the Supreme Court, claiming that his rights under the Fourth Amendment had been violated. The Court assumed *arguendo* that the Fourth Amendment applied to the state officers. It then held that the common law rule that a trial should not be halted to inquire into the method whereby competent evidence was obtained was applicable, and consistent with the Fourth Amendment. The Court also, however, partly relied upon the fact that the question of the legality of the seizure was not brought up

. . . in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony.<sup>52</sup>

Also, there was the important fact that while the seizure may have been illegal, the entry and search were not. But despite this fact, the language of the *Adams* opinion seemed clearly to indicate that the Court was adopting the common law evidence rule.

In *Weeks v. United States*,<sup>53</sup> decided in 1914, federal officers made an illegal search without any warrant at all. Before the trial, the person whose property was searched petitioned the court for return of the evidence seized. The lower court deferred judgment on the motion until trial—then, when at trial the evidence was offered by the Government, it

<sup>50</sup> 116 U.S. 616 (1886).

<sup>51</sup> 192 U.S. 585 (1904).

<sup>52</sup> *Id.* at 594.

<sup>53</sup> 232 U.S. 383 (1914).

was admitted over the defendant's objection. A unanimous Supreme Court reversed the conviction saying that

[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, . . . is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution.<sup>54</sup>

The Court also said:

The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court and subject to its authority, was recognized in *Wise v. Henkel*. . . . That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. . . .<sup>55</sup>

We therefore reach the conclusion that . . . there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.<sup>56</sup>

The Court distinguished *Adams* by pointing out that in that case there had been no objection to the evidence before trial and that the papers seized in *Adams* had been taken in an "incidental seizure made in the execution of a lawful warrant."<sup>57</sup>

In *Boyd* the trial court erroneously ordered evidence produced; in *Weeks* the trial court erroneously failed to order evidence returned. In *Adams* where there was no error occurring before trial, admission of evidence was not disturbed. The crucial error of the lower court in *Weeks* was not the reception of the evidence, but the failure to grant the pre-trial motion and return the property to its owner before the trial started, as the last quoted paragraph of the opinion shows. The primary thrust of the *Weeks* case was to give the wronged citizen a direct and immediate remedy against the Government, a right to petition the court for the return of the evidence seized, the equivalent of a new cause of action, something like a chance to replevy the evidence from the Government, or a new sort of specific performance—the return of a unique chattel. The exclusionary rule of evidence was a by-product of this basic cause of action, necessary to give it vitality.<sup>58</sup>

<sup>54</sup> *Id.* at 393.

<sup>55</sup> At this point the Court cited the following authorities. 1 Bishop, *Criminal Procedure* § 210 (2d ed. 1872); *Rex v. Barnett*, 3 Car. & P. 600, 162 Eng. Rep. 563 (K.B. 1829); *Rex v. Kinsey*, 7 Car. & P. 447, 173 Eng. Rep. 198 (K.B. 1836); *United States v. Mills*, 185 Fed. 318 (S.D.N.Y. 1911); *United States v. McHie*, 194 Fed. 894, 898 (N.D. Ill. 1912). In the English cases and Bishop, the duty of the court to return property seized is recognized—but only where it is irrelevant to the crime for which the possessor is to be tried. The American cases hold that property should be returned because it was illegally seized.

<sup>56</sup> 232 U.S. at 398.

<sup>57</sup> *Id.* at 392, 395.

<sup>58</sup> A further by-product was that the evidence should not be used indirectly. In *Silver-*

The basic remedy was logical, neat and direct. People are deterred from committing torts because they know they can be sued. The *Weeks* remedy deters law officers by giving the evidence back if they seize it illegally, whether or not it proves a crime.<sup>59</sup> It is, moreover, analogous to general principles of tort law—giving the victim of a trespass a right of action against the trespasser.

Thus it can be seen that the Court has previously viewed search and seizure as an area in which it can exert direct influence upon law enforcement officers. In so far as interference with the executive is concerned, *Rea* is hardly more than a corollary to these earlier cases—the granting of the further necessary remedy of silence.

This analysis of the *Weeks* rule may, incidentally, be helpful in other ways. Since its decision, *Weeks* has been the subject of much comment and criticism.<sup>60</sup> It is criticized as being a bad rule because it keeps evidence otherwise competent out of court, as being of questionable value as a deterrent against police violations of Fourth Amendment rights, as delaying trials by requiring a court to go into collateral matters during the trial which are not relevant to guilt or innocence, as operating only when a criminal's rights are invaded, as not applying when there is no prosecution because the searchers discover no incriminating evidence, as illogically punishing one set of criminals by letting another set go free, and as tempting some law enforcement officers to collude with criminals.

Most of these criticisms are based upon the assumption that *Weeks* is mainly a prophylactic rule of evidence, something like rules of evidence for privileged communications. While on the same assumption there is much to be said for the rule of evidence; if it is thought of as part of a more basic remedy designed to return what is taken away by force, the arguments against it are less persuasive. As a pretrial cause of action, it does not usually require the trial court to go any further afield from

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thorne Lumber Co. v. United States, 251 U.S. 385 (1920), an illegal search was made resulting in the seizure of documents. Before the documents were returned pursuant to a court order, the Government made copies of them. Held: the Government cannot use the copies or give oral testimony about the original. The court said:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.

*Id.* at 392.

<sup>59</sup> Wigmore recognized that the right to have the property returned is the basis of *Weeks*. He urged, however, that this right should depend upon the nature of the property. 8 Wigmore, Evidence 35 (3d ed. 1940).

<sup>60</sup> For criticisms of *Weeks*, see e.g., *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926); 8 Wigmore, Evidence § 2184 (3d ed. 1940); Harno, "Evidence Obtained by Illegal Search and Seizure," 19 Ill. L. Rev. 303 (1925). For approvals of *Weeks*, see e.g., Anderson, "Admissibility of Illegally Obtained Evidence," 8 U. Det. L.J. 97 (1945); Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 Colum. L. Rev. 11 (1925).

issues of guilt or innocence than to note what was decided before trial, unless, of course, the defendant has a good excuse, such as lack of knowledge of the search, for failure to move before the trial. If so in all fairness he ought to be able, as later cases have allowed, to assert his course of action when he first learns of it.<sup>61</sup> The basic pre-trial cause of action is available to guilty and innocent alike and, before trial, the presumption of innocence ought to mean that the successful petitioner is not necessarily a criminal winning on a technicality. If the remedy is not as effective a deterrent as might have been hoped,<sup>62</sup> it should not be scrapped merely because it is not demanded by all who have a right to it. It does not necessarily let criminals go free. If the matter is handled before trial, the victim has not yet been put in jeopardy and can still be proceeded against by legal methods. Also, if this pre-trial action is thought of as being the act of a court rectifying a judicial error created by the issuer of an invalid warrant or the searcher without a warrant, as the case may be, the action is more corrective than punitive. When an appellate court corrects a trial judge's error by reversing a judgment, it corrects the judge but does not punish him.

The practical effect of *Weeks* will, in many cases, be the same whether it is considered as an exclusionary rule of evidence or part of a cause of action. But thinking of *Weeks* as a personal cause of action helps explain some of the ramifications of the rule, as well as the result in the *Rea* case. For example, if evidence seized as a result of an illegal search of *A*'s premises is used against *B* in a criminal trial, lower federal courts say that *B* cannot object.<sup>63</sup> If the *Weeks* case is thought of as being basically a prophylactic rule of evidence, this limitation makes little sense.<sup>64</sup> But if *Weeks* is thought of as giving the wronged citizen a cause of action, then it is a logical corollary that only the person injured or those who claim under him have standing to litigate. *A* is the one who was hurt, and traditionally in tort theory, the victim of the trespass is the only one who can sue. If he does not assert his rights or wishes to forgive the sin of the searchers, or settle out of court, he is allowed to do so.<sup>65</sup>

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<sup>61</sup> E.g., *Gouled v. United States*, 255 U.S. 298 (1921).

<sup>62</sup> On the question of the effectiveness of the *Weeks* rule see Comment, "Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy," 47 Nw. U.L. Rev. 493 (1952). Illinois is a *Weeks* rule state, yet records of a criminal court of limited jurisdiction showed a multitude of cases which were dismissed because undeterred police officers had made illegal searches. And see the results of Mr. Justice Murphy's survey of police training methods, *Wolf v. Colorado*, 338 U.S. at 41, 44-46 (1949) (dissenting opinion).

<sup>63</sup> E.g., *United States v. White*, 228 F.2d 382 (7th Cir. 1956); *Scroggins v. United States*, 202 F.2d 211 (D.C. Cir. 1953).

<sup>64</sup> Note, "Judicial Control of Illegal Search and Seizure," 58 Yale L.J. 144 (1948).

<sup>65</sup> In *Walder v. United States*, 347 U.S. 62 (1954), narcotics were illegally seized from the defendant and a pretrial motion to suppress the evidence was granted. Subsequently the defendant was legitimately caught with other narcotics for which he was prosecuted. At the trial when the defendant took the stand and denied ever having had possession of narcotics,

Later Supreme Court cases have discussed *Weeks* mostly as a rule of evidence.<sup>66</sup> The *Rea* case focuses attention back to the basic source of the *Weeks* decision and gives the federal judiciary another weapon for discharging its Fourth Amendment responsibility to supervise whatever searching and seizing is done under color of authority of the federal government.

But while the foregoing may justify *Rea* insofar as the question of proper relations between branches of the central government are concerned, there is still to be dealt with the more difficult problem of federal-state relationships.

If *Weeks* means merely that the injured party has something like a cause of action, this does not necessarily mean that available remedies should include interference with state action. In *Stefannelli v. Minard*,<sup>67</sup> where there was a statutory cause of action for violation of constitutional rights by state officers, the court refused to grant relief because it would interfere too much with delicate state-federal relationships; state law enforcers would be continually harassed by petitions for federal injunctions. In *Rea*, as in *Stefannelli*, granting the injunction would halt a state prosecution which could otherwise have been brought. However, since in *Stefannelli* the relief sought was against state officers, whereas in *Rea* it was only against a federal officer, *Rea* hampers state procedures to a lesser degree. In cases where the evidence taken does not consist of narcotics, which are contraband,<sup>68</sup> the state officers would still be free under the *Rea* decision to go out and search and seize it illegally themselves and prosecute on the basis of it<sup>69</sup> whereas had relief been granted in *Stefannelli*, they would be stopped each time they moved illegally. Moreover, where the evidence seized is still in the possession of federal officers, a *Rea* type of injunction does not directly interfere with state action at all. It is no more of a hindrance than the withholding from state courts of federal income tax returns.<sup>70</sup>

If *Weeks* is considered as basically a cause of action, an important consideration in *Rea* should have been whether the petitioners had an

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the Government was allowed to use the illegally obtained evidence to impeach him. If *Weeks* is viewed as a rule of evidence, this exception is questionable. If *Weeks* is viewed as a cause of action in equity, the case looks more like the rule for a petitioner with unclean hands.

<sup>66</sup> E.g., *Irvine v. California*, 347 U.S. 128 (1954); *Wolf v. Colorado*, 338 U.S. 25 (1949). This, despite the fact that in *Wolf* a pre-trial motion was made. [Record at p. 5].

<sup>67</sup> *Supra* note 41.

<sup>68</sup> 350 U.S. at 215.

<sup>69</sup> However, the federal officer's oral testimony would be permanently lost to the state. Ordering a person to be silent is not unprecedented. In *E. I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917), the Court ordered a former DuPont employee not to reveal DuPont trade secrets.

<sup>70</sup> *Boske v. Comingore*, 177 U.S. 459 (1900).

adequate remedy elsewhere—whether absent federal intervention at the particular point, the courts of New Mexico would or could use the evidence. Yet this point, the majority did not consider; it did not even determine whether New Mexico would investigate the source of federally obtained evidence,<sup>71</sup> not to mention the Constitutional question whether, if New Mexico did convict on the evidence, the Supreme Court would reverse.<sup>72</sup> Yet these questions are relevant.

If the courts of New Mexico would not permit the use of the evidence, there would be less need to grant the injunction since Rea would have had a remedy in the courts of New Mexico. If New Mexico would permit the use of the evidence, even though federal officers had obtained it, perhaps the Supreme Court would decide it was unconstitutional for the

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<sup>71</sup> New Mexico is a non-Weeks state. *State v. Dillon*, 34 N.M. 366, 281 Pac. 474 (1929). It has not yet passed upon the problem of evidence illegally obtained by federal officers. Cf. note 21 *supra*.

<sup>72</sup> Even before Rea, when Weeks was generally thought of as a prophylactic rule of evidence, it was at least arguable that it was unconstitutional for a state court to admit evidence found in an illegal federal search. In view of the Wolf holding that states could reject Weeks without violating Due Process, such an argument would have to be based upon the Fourth Amendment rather than the Fourteenth. The premise of such an argument would have to be that Weeks, as a rule of evidence, is a requirement of the Fourth Amendment and not a judge-made rule which Congress could change. If Weeks is constitutionally necessary in federal courts, it is because it is implied in the Fourth Amendment as a means of enforcing the latter by taking the profit out of illegal federal search and seizure. So long as state courts receive evidence obtained in illegal federal searches, there is still some profit to federal officers in violating the Fourth Amendment. Therefore, it might have been held that the Fourth Amendment also requires by implication that this chance for profit be removed. Cf. *State v. Arregni*; *Walters v. Commonwealth*; *State v. Rebasti*; *State v. Hiteshaw*, *supra* note 21.

Since *Adams v. New York*, *supra* p. 353, the Court has never squarely decided whether the Weeks prophylactic rule of evidence is constitutionally necessary. Weeks itself was rendered as a constitutional decision, 232 U.S. at 398, and there have been other statements in Supreme Court opinions that this decision was constitutionally necessary. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28 (1949); *Olmstead v. United States*, 277 U.S. 438, 462 (1928). In other opinions the opposite is suggested. See *Irvine v. California*, 347 U.S. 128, 134-35 (1954); *On Lee v. United States*, 343 U.S. 747, 755 (1952). Cf. *Walder v. United States*, 347 U.S. 62 (1954). See also Allan, "The Wolf Case, Search and Seizure, Federalism and the Civil Liberties," 45 Ill. L. Rev. 1 (1950); Fraenkel, "Search and Seizure Developments in Federal Courts Since 1948," 66 Iowa L. Rev. 67 (1955); Perlman, "Due Process and the Admissibility of Evidence," 64 Harv. L. Rev. 1304 (1951); Note, "Search and Seizure—Implications of *Wolf v. Colorado*," 50 Colum. L. Rev. 364 (1950).

A review of the considerations relevant to Weeks viewed as a prophylactic rule of evidence suggests it constitutionally might be changed by statute. There is little historical basis for it in common law or the history of the Fourth Amendment. See note 49 *supra*. Its effectiveness as a device for restraining law enforcement officers has been challenged. See note 62 *supra*. While from a prosecutor's point of view the existence of the rule would tend to encourage compliance with the Fourth Amendment, there are other pressures which would have the same effect on an enlightened prosecutor, such as the statute making it a crime for a federal law enforcer to make illegal searches, 18 U.S.C. § 2236 (1952). But cf. Edwards, "Criminal Liability for Unreasonable Searches and Seizures," 41 Va. L. Rev. 621 (1955); possible civil actions, cf. *Bell v. Hood*, 327 U.S. 678 (1946); the oath to defend the Constitution and the constant public scrutiny to which public officers are subjected, especially in view of the large and articulate public concern over civil rights.

Even if Weeks is thought of as a cause of action, it would probably not follow that it is constitutionally necessary. While there might have to be some remedy for violation of Fourth Amendment rights, the remedy probably would not have to include suppressing the evidence. Congress has limited the remedy in another way by barring return where the property seized is contraband. 28 U.S.C. § 2463 (1952).

state court to do so. If the Supreme Court would reverse, then the need to grant early relief would also be smaller. On the other hand, the possibility that the Supreme Court might not disturb a state conviction based upon such evidence might be a two-edged sword. In such a case it might seem that this sort of indirect relief was inappropriate, or, on the other hand, it might seem that since this was the only relief left Rea, it should be granted.

Since, at any rate, the question is somehow relevant, if the majority were to avoid investigating New Mexico law or deciding the constitutional question, it must, logically, to grant Rea's motion, assume that these questions would be decided in the way most unfavorable in the eyes of the Court to Rea arguing the motion—which would probably mean they should have assumed either that the courts of New Mexico would not use the evidence or that the Supreme Court would reverse a conviction based on such a use.<sup>73</sup>

The decision then should be interpreted as holding that the need for federal intervention before the state action was so great that it was justified even though Rea may have had a remedy elsewhere. This holding is difficult to justify if *Weeks* is thought of as being basically only a rule of evidence or personal cause of action. But it is not so difficult if it is considered that under the Fourth Amendment the judiciary has the general primary responsibility for supervising federal searches and seizures which are judicial acts. For if the latter hypothesis is correct, it would seem to follow that the federal courts should go ahead and do whatever is necessary to control them without passing the buck to the state courts.

Moreover, in *Rea* the federal district court had, in performing this duty, made an error which affected petitioner adversely. It issued a search warrant when it should not have done so and as a result Rea's premises were invaded and his property taken. When Rea complained

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<sup>73</sup> Rea's litigating position must have been a problem. If he had argued that New Mexico constitutionally could not use the evidence, he would have been faced with the argument that the relief asked was premature and that he had an adequate remedy elsewhere. If, on the other hand, he had argued that New Mexico constitutionally could use the evidence, he would have taken a good deal of the bite from his position because he might seem to indicate that he had not been wronged very seriously. Moreover, if he lost the motion in the federal court (as must have seemed probable when it was made) after having argued for the constitutionality of New Mexico's use of the evidence, his own arguments might have been turned against him with no little embarrassment when he made his motion in the state court. Therefore, it is not surprising that Rea argued that it was unconstitutional for New Mexico to use the evidence. See Brief for Appellant, *Rea v. United States*, 350 U.S. 214 (1956).

Interestingly enough, the Government didn't take a position on this point—rather it pointed out that the problem was difficult, because there were arguments on both sides. It urged that the Court let the courts of New Mexico deal with it first in proceedings in which the state would be represented. See Brief for United States, *Rea v. United States*, supra. Perhaps the *Rea* result should be cited as a lesson to advocates that they should take definite positions.

to the court of its own mistake, should the court have admitted that it had made a mistake but nevertheless required the petitioner to go somewhere else to get it rectified? In the ordinary case where one individual harms another, it is sensible to limit the remedies available to the victim. But where the harm is done under the auspices of a particular court, it would seem that the same court should rectify its own error and consider this more important than an indirect interference with state affairs.<sup>74</sup> If a state were planning to base a prosecution—or for that matter had already based a judgment—upon an erroneous lower federal court order, should the Supreme Court hesitate to reverse the error of the federal court? Yet such a reversal could interfere with state processes as much as the *Rea* decision.

The fact that in *Rea*, the federal officers were operating with an erroneously issued warrant was, however, somewhat fortuitous, for in the more usual search and seizure problem there is no warrant at all. The dissenters in *Rea* asked what the result would have been had there been no warrant in that case. It seems obvious that the result would have to have been the same since otherwise federal officers would be encouraged to search without obtaining any warrant at all. If there were no warrant, the argument that error had been committed by the court would not be applicable. However, if the federal courts are primarily responsible for protecting Fourth Amendment rights, and if all searches and seizures are judicial acts, here too it would seem that the judiciary should be the agency to take whatever action is necessary to protect such rights. It might be remembered that there was no warrant at all in the *Weeks* case.

The *Rea* situation is considerably different from a case where state officers do the searching. In *Wolf v. Colorado*,<sup>75</sup> the court said that the Fourteenth Amendment required states to protect against unreasonable searches and seizures, but held that the state courts were not required to follow *Weeks*. In *Stefannelli v. Minard*,<sup>76</sup> the Court held it would not enjoin state activity where an illegal state search had taken place. These decisions left the states free to decide for themselves how they would go about protecting their citizens and what state agencies would have the primary responsibility for performing that function. But the Fourth

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<sup>74</sup> However, even such an error should be corrected only when it is prejudicial to the outcome in federal court. The Government brief before the Supreme Court in *Rea* points out that there was nothing in the record to indicate why the warrant was held invalid except that the supporting affidavit was somehow insufficient. [Brief for United States 33.] From this it might be argued that the Court should have investigated to see whether the error was prejudicial. However, the error had been held to be important enough for the evidence to be suppressed in the federal courts. It is difficult to imagine an error serious enough to cause this result which would not also be sufficiently prejudicial for *Rea* to apply.

<sup>75</sup> Note 4 *supra*.

<sup>76</sup> Note 19 *supra*.



Amendment applies to federal searches and under it the federal courts control federal action.

The dissenters suggested that the *Rea* result was bad because it would capriciously cause the rights of a victim of an illegal search to depend upon whether he was able to race to the federal courthouse before the state prosecutor had received the tainted evidence or introduced it into state court proceedings.<sup>77</sup> But such caprice is not inevitable; the federal courts might enjoin the state use of the evidence even if the victim lost the race. Again *Stefannelli* could be distinguished because there a state search was involved. The situation would be somewhat analogous to one where a federal court has taken control over a *res* and is proceeding to adjudicate concerning it. Once the court takes jurisdiction, it decides the case—and will enjoin the parties from interfering with it in a state court.<sup>78</sup>

It is interesting to speculate about other future effects of *Rea*. Sooner or later there is bound to be a state conviction based upon evidence illegally obtained by federal officers which will be reviewed by the Supreme Court. Should the Supreme Court reverse? One aspect of the *Weeks* rule was previously suggested to be that it gives a federal cause of action to the victim of an illegal federal search. In this situation, *Rea* might be viewed as giving a federal right to have the fruits of such a search kept out of state courts, which the state courts should respect just as they must respect other federal rights and duties. The Supreme Court could then reverse a state conviction where this right was not protected.

*Rea* will produce some other problems. Thus, there is the case where a state officer and a federal officer search together—the state officer picking up the evidence in the first instance and keeping it. In such a case there may be involved an abuse of both state and federal power. Federal courts would suppress such evidence so far as federal proceedings are concerned on the theory that it is a federal search if a federal agent participates in it.<sup>79</sup> Perhaps the same rule would be applied by federal courts to keep the evidence out of state courts. On the other hand, this might be the point where the Court would say that *Stefannelli* would

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<sup>77</sup> 350 U.S. at 221.

<sup>78</sup> Cf., *Triennies v. Sunshine Mining Co.* 308 U.S. 66, rehearing denied, 309 U.S. 693 (1939); (party can be enjoined by federal court from using state courts where state could not be enjoined); *Mississippi R.R. Comm. v. Illinois Central R.R.*, 203 U.S. 335 (1906) (state R.R. Comm. can be enjoined where state couldn't be enjoined); *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 134-36, rehearing denied, 314 U.S. 582, 585 (1941). But cf. *Ex Parte Young*, 209 U.S. 123, 163 (1908) (state attorney general enjoined from bringing a criminal proceeding; the Court said: "The difference between power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, . . .").

<sup>79</sup> See p. 367 *infra*.

apply since state law enforcement activities were more directly involved. Perhaps a test based upon the extent of the federal contribution to the search could be evolved.

Another problem could be caused by Rule 41(a) of the Federal Rules of Criminal Procedure which authorizes state judges to issue federal search warrants based upon affidavits showing probable cause for believing that a federal crime has occurred.<sup>80</sup> The question whether there is probable cause of a federal crime is a federal question. Searches under such warrants might be considered as federal judicial acts. This may mean that the Supreme Court could review state court decisions based upon evidence seized erroneously under federal warrants issued by state judges and could require states to apply *Weeks* in such cases. *Rea* could conceivably be applied even here.<sup>81</sup>

At any rate, whatever the further ramifications of *Rea* may be, the decision will be beneficial in that it should almost completely eliminate one half of any search and seizure crossfire, which may have previously been possible because of our dual system of government.

#### B. State Obtained Evidence in Federal Courts

Mr. Justice Frankfurter's appendix to *Wolf v. Colorado* in 1949 showed that the courts of 17 states had adopted *Weeks* as a rule of evidence and would not admit evidence illegally obtained by state officers.<sup>82</sup> Yet, as the law now appears to stand, even where officers of one of these states obtain evidence illegally, such evidence can be admitted in federal courts so long as federal officers did not participate in its acquisition—if the state officers seize it and give it to federal officers on a "silver platter."<sup>83</sup>

<sup>80</sup> See note 38 supra.

<sup>81</sup> *Rea* has already been extended somewhat in another direction in *United States v. Klapholz*, 230 F.2d 494 (2d Cir. 1956), where federal agents violated Rule 5 of the Federal Rules of Criminal Procedure by waiting approximately a day too long before bringing an arrested defendant before a U.S. Commissioner. In the interim, evidence was properly obtained from the defendant's apartment located in the Southern District of New York and the defendant was held in the same district. The district court for that district granted a motion to suppress this evidence, despite the fact that any proceeding against the defendant would lie only in the Eastern District of New York.

The court of appeals said that McNabb alone would have supported such a motion in the trial court, but not in another district. Since *Rea* had extended McNabb to direct supervision where the Federal Rules were violated, the court felt that the District Court of the Southern District was now able to supervise in its own district under Rule 5.

No such problem exists in the case of search and seizure since Rule 41(e) provides that a motion to suppress may be made in either the district of the search or the district where the prosecution is brought. Note 38 supra.

<sup>82</sup> 338 U.S. 25, 38 (1949).

<sup>83</sup> *Lustig v. United States*, 338 U.S. 74 (1949); *Gambino v. United States*, 275 U.S. 311 (1927); *Byars v. United States*, 273 U.S. 28 (1927); *Weeks v. United States*, 232 U.S. 383 (1914). The phrase "silver platter" was used by Mr. Justice Frankfurter in *Lustig*, supra at 78, in which he spoke for 4 of 9 justices and announced the judgment of the court.

In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Supreme Court said that while a state need

This then means that in a *Weeks* rule state, where state policy forbids the introduction of illegally obtained evidence in its courts, state officers may still procure the punishment of state criminals by violating that policy. In the many areas where state and federal crimes overlap, instead of following state policy which requires them diligently to invent legal means for catching and convicting state criminals, they need only seize the evidence and turn it over to federal officers on a "silver platter" and let the federal officers and courts do their work.

Surely in states whose courts would not admit such evidence, the federal courts should not do so either. In those states, it has been determined by proper authority that the rule of evidence is a necessary measure for protecting state citizens against unlawful state action. Federal courts ought to recognize this policy. The Supreme Court must carefully scrutinize state criminal procedure to keep it up to minimal due process standards. Should it not also see that federal courts help rather than hinder state efforts to bring state law enforcement up to even higher standards?

On the other hand, there is, of course, one important federal interest involved in any federal rule of evidence—that the truth be made known to federal courts. Excluding evidence illegally obtained by state officers may prevent full discovery of the truth. But if restraining federal officers from unconstitutional activity is important enough to cause federal courts to keep out some relevant evidence, surely state efforts to control state officers are important enough in the federal scheme of things to merit similar treatment.

Some of the state courts which have followed *Weeks* may attempt to solve this problem themselves by also following *Rea*. But here a state court would run afoul of the Supremacy Clause of the Constitution.<sup>84</sup> If a state court enjoined a state officer from testifying in a federal court and a federal court ordered him to testify, obviously the federal court would have to win such a tug of war. However, where a state court attempted to follow *Rea*, this might give a federal court an opportunity to distinguish silver platter precedent and adopt a comity rule. Where a *Rea* type of injunction had been issued, there would be a clearer statement of state policy that state officers should make no use whatsoever of evidence they illegally obtain, or the federal courts might find that the state had created a state cause of action which should be recognized.

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not follow *Weeks*, it might not affirmatively sanction illegal searches and seizures. It has been suggested by some commentators that this may mean that the Court will change the federal rule and decide not to receive evidence illegally obtained by state officers. Note, "Search and Seizure—Implications of *Wolf v. Colorado*," 50 Colum. L. Rev. 364, 367 (1950). Cf. Reynard, "Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right," 25 Ind. L. Rev. 259 (1950).

<sup>84</sup> U.S. Const. art. VI, cl. 2.

If exclusion should be the rule for federal courts where the evidence was seized by officers of *Weeks* states, what of those states which reject *Weeks* and admit illegally obtained evidence? It has been strongly argued that the evidence should be refused in federal courts no matter what state is involved because when federal courts admit it they sanction illegal state practices and play an "iguoble part."<sup>85</sup> And such a rule would give at least some federal support to the statement in *Wolf v. Colorado* that under the Fourteenth Amendment there is a federal right to be protected against illegal state searches and seizures. On the other hand, one might assume that in non-*Weeks* states other methods for protecting against them have been devised and that the *Weeks* rule is unnecessary. In such a case, receipt of the evidence in a federal court would not become a federal impediment to the implementation of state policy concerning the relationship between a state and its citizens. At any rate, the other half of state-federal crossfire by which state officers can gain by violating state policy could be removed by the federal courts' adoption of either a uniform rule rejecting all evidence illegally obtained by state officers or a rule of conformity rejecting it only when *Weeks* state officers are involved.

A possible obstacle to a rule of conformity appears in Rule 26 of the Federal Rules of Criminal Procedure which provides:

The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Language in the notes of the Advisory Committee to this rule indicates it was designed to create

... a uniform body of rules of evidence to govern in criminal trials in the Federal courts.<sup>86</sup>

But even though this calls for uniformity in most federal criminal rules of evidence, it does not seem to be conclusive when it comes to search and seizure. For the basic considerations involved in most evidentiary rules differ from those involved in search and seizure rules.

In many evidentiary rules, there is no more at stake than such questions as which method of proceeding is the most expeditious, orderly or understandable to the jury. Others, such as burdens of proof and pre-

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<sup>85</sup> Allan, "The Wolf Case: Search and Seizure, Federalism and the Civil Liberties," 45 Ill. L. Rev. 1 (1950); Note, "Judicial Control of Illegal Search and Seizure," 58 Yale L.J. 144 (1948); Note, "Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities," 51 Colum. L. Rev. 128 (1951). Cf. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting).

<sup>86</sup> Advisory Committee Notes to Fed. R. Crim. P. 26(a).

sumption, merge with substantive law and should clearly be uniform. Still others, such as when defendant's prior crimes should be considered, should in all fairness be uniform. There seems to be no strong reason why the hearsay rule and its exceptions and the development of the best evidence rule should not also be uniform.

None of these rules involve, as does the rule against illegally obtained evidence, a serious attempt by courts to regulate the conduct of people in their every day activities outside the courtroom. Therefore, there is no strong state interest—other than the convenience of the members of its bar—in having federal rules conform to state practice. Where there is no strong state interest involved, the policy of uniformity of Rule 26(a) clearly makes sense. On the other hand, where strong state policies are involved, the rule is not so sound.

Ideally, then, federal rules of evidence should be *uniform* where states have no strong policy interest—and should *conform* where they have such interest.<sup>87</sup>

However, the committee notes make it clear that uniformity was also to be the watchword for some evidence rules in which states do have strong interests—namely, the delineations of the privilege for confidential marital communications. For the notes of the Advisory Committee also point out that the rule is based upon two cases, both dealing with marital evidence questions which the Supreme Court felt free to decide in the light of reason and experience.<sup>88</sup> Obviously, marital problems and relationships are within the competence of the states—and so states are properly concerned with rules of evidence designed to make marriage more comfortable. It has been argued that here the federal courts can best leave the regulation of such relationships up to the states by con-

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<sup>87</sup> There has been considerable law review comment concerning uniformity and conformity prior to and surrounding the promulgation of the Federal Rules of Civil Procedure. See Dession, "The New Federal Rules of Criminal Procedure," 55 Yale L.J. 694 (1946) (under Rule 26a what is contemplated is "a judicial function which is continuously creative to an exceptionally high degree."); Note, "Rules of Evidence in Federal Criminal Trials," 47 Harv. L. Rev. 853 (1934) for the history of the problem and the rule. In Howard, "Evidence in Federal Criminal Trials," 51 Yale L.J. 763 (1942) and Callahan and Ferguson, "Evidence and the New Federal Rules of Civil Procedure," 45 Yale L.J. 622 (1936), the need for uniformity is stressed. Conformity to state law is urged in Leach, "State Law of Evidence in Federal Courts," 43 Harv. L. Rev. 554 (1930); Pugh, "Rule 43(a) and The Communication Privilege under State Law: An Analysis of Confusion," 7 Vand. L. Rev. 556 (1954); and Note, "Changes in the Federal Rules of Evidence in Criminal Trials," 43 Yale L.J. 849 (1934). And see Sweeney, "Federal or State Rules of Evidence in Federal Courts," 29 Ill. L. Rev. 394 (1933) for a position that there should be either complete uniformity or complete conformity in federal evidence rules.

<sup>88</sup> Wolf v. United States, 291 U.S. 7 (1934); Funk v. United States, 290 U.S. 371 (1933). Since the promulgation of the Federal Rules of Criminal Procedure the Supreme Court has considered a question of marital privilege in a criminal case in the light of reason and experience without discussing the problem of uniformity and conformity. Blau v. United States, 340 U.S. 332 (1951).

forming to state law.<sup>89</sup> By the same line of reasoning, federal courts should follow state leads in the privileges of attorney and client, doctor and patient, and priest and penitent.

But while an amendment to Rule 26(a) would probably be necessary to achieve conformity in the case of these privileges, conformity in search and seizure problems seems possible under the present Rule. Rule 26 was obviously not drafted with search and seizure rules in mind which were supposedly covered by another rule.<sup>90</sup> Moreover, there is a large difference of degree. The state policies involved in rules for privileged communications are not as serious and do not have as direct an effect upon state citizens as do those involved in search and seizure. Spouses, patients, clients, and penitents often aren't thinking of litigation when they confide. At best the effect of the rule can be only occasional—and even on those occasions, it is probably much less important than at least one other factor usually considered in making the decision whether to confide—namely, the degree of confidence the confidor has in the confidant.

On the other hand, while there is disagreement as to the effectiveness of the *Weeks* rule,<sup>91</sup> it cannot be disputed that, if it affects anyone, it affects people who are very interested in litigation—law enforcement officers who want convictions. Also, it involves basic policies designed to protect people from violence and oppression. It seems considerably more important that such state policies be followed, than that policies designed merely to allow added benefits from a limited number of personal relationships be observed.

In view of these considerations, it would seem that the Court could decide in the light of reason and experience, that in cases of searches and seizures by state officers, federal law should conform to state law.

Thus far the problem has been discussed as if there were no limit on the use in federal courts of state obtained tainted evidence. However, it is settled that federal courts must exclude evidence illegally obtained by state officers when federal agents participate in its acquisition.<sup>92</sup> This rule has been extended so considerably that at its outer limits it somewhat alleviates the problem of state officers of *Weeks* states using federal courts to violate state policy.

The general theory of the participation rule is that the Fourth Amendment protects against all illegal federal use of force in search and seizure.

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<sup>89</sup> Pugh, *supra* note 87; Note, "Changes in Rules of Evidence in Federal Criminal Trials," *supra* note 87. *Contra*, Weinstein, *op. cit.* *supra* note 21.

<sup>90</sup> See note 38 *supra*.

<sup>91</sup> See note 62 *supra*.

<sup>92</sup> See note 83 *supra*.

Thus, whenever a federal officer is present at an illegal search, there is a use or threat of federal force in violation of that Amendment, and the *Weeks* reasoning applies. This rule was established a generation ago in *Byars v. United States*<sup>93</sup> and recently reiterated in *Lustig v. United States*.<sup>94</sup>

The participation doctrine could and has been logically applied also when there are no federal officers on the scene if federal officers instigate the search or in any way aid or abet it.<sup>95</sup> As Mr. Justice Frankfurter said in *Lustig*, it is a federal search if federal officers "had a hand in it."<sup>96</sup> The *Weeks* rule ought to apply wherever the evidence is obtained through the wrongdoing of federal officials.

But neither of these approaches satisfactorily supports the decision in *Gambino v. United States*.<sup>97</sup> In *Gambino*, decided in 1927, state troopers acting alone, and under no prior agreement with federal officers, seized evidence which, while it could prove a federal offense, was not relevant to any state crime. The Court held that this evidence was inadmissible in a federal court. Mr. Justice Brandeis, speaking for the Court, found that the state troopers were acting "solely for the purpose of aiding in the federal prosecution."<sup>98</sup>

It was made more or less clear in the opinion that normally where state officers, independent of federal activity, seize evidence illegally and turn it over to federal officers on a silver platter, federal courts may use it.

In *Gambino*, there was no use or threat of federal force; there was no wrongdoing by federal officers. There was no violation of the Fourth Amendment at all. There were only two differences between *Gambino* and other silver platter situations; in *Gambino*, the state officer intended only a federal and not a state prosecution at the time the search was made, and in *Gambino*, the fact that there was no state crime involved created an overwhelming presumption that this intent actually existed. The case would seem to introduce still another theory—that all who attempt to enforce a federal law—whether or not they are in federal employ, must be deterred from wrongdoing by federal courts. In effect it introduces a test based upon the intent of the searchers.

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<sup>93</sup> 273 U.S. 28 (1927).

<sup>94</sup> 338 U.S. 74 (1949).

<sup>95</sup> *Fowler v. United States*, 62 F.2d 656 (7th Cir. 1932); *United States v. Castanzo*, 13 F.2d 259 (W.D.N.Y. 1926). Cf. *Anderson v. United States*, 318 U.S. 350 (1943).

<sup>96</sup> 338 U.S. 74, 78 (1949).

<sup>97</sup> 275 U.S. 311 (1927).

<sup>98</sup> *Id.* at 315. The Court also analogized to the ratification doctrine of the law of agency:

The rights guaranteed by the 4th and 5th Amendments may be invaded as effectively by such cooperation as by state officers. . . . The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States.

*Id.* at 316.

If the difference between the silver platter rule and *Gambino* is to be the state of mind of the state officer at the time of the search, there would no longer be a serious problem of federal courts encouraging state officers to thwart state policy. Every time they intended to search and seize evidence for use in federal courts, the evidence would be refused if a "federal intention" could be established.

Such a rule is not satisfactory. Under the Fourth Amendment, the federal courts should properly be concerned with policy making only with regard to wrongdoing of federal officers.<sup>99</sup> It is unrealistic to say that there is federal participation where no federal officer is on the scene or behind it.

It is also rather illogical to limit *Gambino* to the situation where the evidence relates solely to a federal crime, but this seems the wiser course. At least it removes difficult problems of proving intent, by applying *Gambino* to the one situation where the intent to go to federal court is beyond question. *Gambino* itself was stretching a point which should not be extended further.<sup>100</sup>

Therefore the participation doctrine is not a complete solution to the problem of state to federal search and seizure crossfire. A new federal rule of evidence giving comity to *Weeks* states is required.

#### SELF INCRIMINATION

##### A. *Federally Compelled Testimony in State Courts*<sup>\*</sup>

In the federal courts a witness need not answer questions which may incriminate him of a federal crime unless there is a federal statute immunizing him from federal prosecution for it.<sup>101</sup> However, the fact that

<sup>99</sup> The limitation of this theory to active wrongdoing by federal officers has been criticized, the arguments being that there is little difference in the effect on the citizen between federal officers expressly encouraging illegal state searches for federal purposes and federal officers from time to time merely accepting the results of such searches. Note, "Judicial Control of Illegal Search and Seizure," 58 Yale L.J. 144 (1948).

<sup>100</sup> As might be expected, the reception of *Gambino* in the lower federal courts has been mixed. Some have held that so long as the state officers are also enforcing a state law at the time of illegal search and seizure, the federal court may receive the evidence regardless of the intent of the officers. E.g., *Rettich v. United States*, 84 F.2d 118 (1st Cir. 1936); *Miller v. United States*, 50 F.2d 505 (3rd Cir.), cert. denied, 284 U.S. 651 (1931); *Sloan v. United States*, 47 F.2d 889 (10th Cir. 1930); *United States v. Walker*, 41 F.2d 538 (D. Tenn. 1930); *United States v. Blanco*, 27 F.2d 375 (W.D. Tex. 1928). Others say that it depends upon what the state officers plan on doing with the evidence at the time of the illegal seizure. E.g., *Gilbert v. United States*, 163 F.2d 325 (10th Cir. 1947); *Hall v. United States*, 41 F.2d 54 (9th Cir. 1930), second app., 48 F.2d 66 (9th Cir. 1931). See Annot., 50 A.L.R.2d 531, 573 (1956).

In the Fourth Circuit it was held in effect that *Gambino* puts an end to the silver platter doctrine and that the adoption of the evidence by the federal officers in *Gambino* was the crux of the case where there is a general pattern of cooperation between state and federal law enforcement agencies. *Sutherland v. United States*, 92 F.2d 305 (4th Cir. 1937). See note 98 supra. But it is difficult to see how, if adoption is the crux of *Gambino*, the silver platter doctrine which the *Gambino* opinion says is preserved, can be preserved at all, except in the isolated instances where state and federal officers never cooperate.

<sup>101</sup> *Counselman v. Hitchcock*, 142 U.S. 547 (1892).



the answers may tend to convict of a state crime is no excuse for failure to answer in a federal court.<sup>102</sup> This situation creates obvious opportunities for federal-state crossfire. Federal authority can compel testimony concerning state crimes in order to aid state prosecution. Where there is a federal immunity statute and the state and federal crimes overlap, the federal officers by compelling answers can make evidence for state prosecutions and in effect achieve federal law enforcement by forcing a man to be a witness against himself.

There have been implications or suggestions that a privilege against self incrimination of state crimes should be recognized in federal courts where the questions are asked with the intent of causing state prosecutions<sup>103</sup> where the danger of state prosecution is large,<sup>104</sup> or where the questions asked delve into an area of state competency.<sup>105</sup> But all of these tests are unsatisfactory solutions to the problem. Under any of them some testimony compelled by a federal court concerning state crimes would get into a state court. If this happens once, it happens too often.

The basic rule that state incrimination is no excuse for failure to answer in federal courts or Congressional Committees is now so well settled that it is too late to change. Besides this rule is justified by the need for federal courts to be able to proceed in their business of federal law enforcement without state interference.

If the extraction of such testimony must continue, perhaps its use can be stopped. Some state courts have said that they should not receive admissions of state crimes compelled by federal authority.<sup>106</sup> In addition, Congress has alleviated the situation somewhat by providing that some federal immunity statutes also immunize in state courts.<sup>107</sup>

In the absence of federal statutory provisions, can the Supreme Court prevent state use of such testimony? In *Rea* the Court held that it can enjoin federal officers from testifying in state courts about illegal

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<sup>102</sup> *United States v. Murdock*, 284 U.S. 141 (1931). This case is criticized in Grant, "Immunity from Compulsory Self-incrimination in a Federal System of Government," 9 *Temp. L.Q.* 57, 194 (1934). Cf. Clapp, "Privilege Against Self-Incrimination," 10 *Rutgers L. Rev.* 541 (1956).

<sup>103</sup> Note, 66 *Harv. L. Rev.* 186 (1952).

<sup>104</sup> Cf. *Jack v. Kansas*, 199 U.S. 372 (1905).

<sup>105</sup> *United States v. Di Carlo*, 102 F. Supp. 597 (N.D. Ohio 1952). The case is criticized in Dixon, "The First Amendment and Federal Immunity Statutes," 22 *Geo. Wash. L. Rev.* 447 (1954); and Note, "Legislation, The Federal Immunity Statute and its Potential for Protecting the Witness Against State Prosecution," 16 *U. Pitt. L. Rev.* 61 (1954). See also on the problem of state incrimination: Note, "The Privilege Against Self Incrimination and the Scope of Statutory Immunity," 41 *Yale L.J.* 618 (1932).

<sup>106</sup> See *State v. Verecher*, 124 Me. 178, 179, 136 *Atl.* 827, 828 (1924). Cf. *Boynton v. State*, 75 So. 2d 211 (Fla. 1954), 68 *Harv. L. Rev.* 1075 (1955) (state court refuses to admit evidence of registration under federal wagering tax); *Clark v. State*, 68 Fla. 433, 67 So. 135 (1914).

<sup>107</sup> E.g., 18 U.S.C. § 3486 (1952); *Adams v. Maryland*, 347 U.S. 179 (1954).

searches.<sup>108</sup> *Rea*, however, was based upon the fact that in making the search, the federal officers did something illegal.<sup>109</sup> Here there is nothing illegal about the extraction of the testimony<sup>110</sup> so *Rea* probably would not apply.

Nor is it likely that the Court would reverse a state conviction based upon federally compelled testimony in view of the holding in *Feldman v. United States*<sup>111</sup> that federal courts could constitutionally use testimony compelled under a state immunity statute.

The only remaining remedy, unless the matter is to be left to the states, is a general act of Congress prohibiting the use in state courts of all federal testimony incriminating the witness of state crimes which is given under protest. Recent decisions suggest that this step would be constitutional.<sup>112</sup> Such a statute should apply not only to the actual testimony given in federal proceedings, but also to the fruits of such testimony—thus requiring state officers to be just as diligent as they would have to have been if the testimony had never been given. It should apply whether or not there is a statute immunizing from federal prosecution.<sup>113</sup> Such a statute would no more interfere with delicate federal-state relationships than the *Rea* case or the withholding of federal income tax returns.<sup>114</sup> That there is need for such a statute was demonstrated several years ago in the Kefauver hearings.<sup>115</sup>

### B. State Compelled Testimony in Federal Courts

In *Jack v. Kansas*,<sup>116</sup> the Supreme Court held that it was constitutional for a state court to compel testimony incriminating the witness of a federal crime. In *Feldman v. United States*,<sup>117</sup> it held that federal courts could constitutionally receive such evidence. Again, there is room for state-federal crossfire. The Supreme Court indicated in *Feldman*, that in the case of federal-state collusion, the search and seizure participation doctrine could be used. But in self incrimination, the participation doctrine is subject to the same limitations as in search and seizure. Pre-

<sup>108</sup> *Rea v. United States*, 350 U.S. 214 (1956).

<sup>109</sup> Pp. 349-50 supra.

<sup>110</sup> See note 102 supra.

<sup>111</sup> 322 U.S. 487, rehearing denied, 323 U.S. 811 (1949).

<sup>112</sup> *Ullman v. United States*, 350 U.S. 422 (1956); *Adams v. Maryland*, 347 U.S. 179 (1954).

<sup>113</sup> Merely putting a provision in all federal immunity statutes forbidding state use of testimony compelled under the particular statute, as is sometimes suggested, would cover the area where state and federal crimes overlap. However, this would not protect a citizen where the testimony concerning the state crime is extracted without an immunity statute.

<sup>114</sup> Pp. 350-51 supra.

<sup>115</sup> See e.g., *United States v. Di Carlo*, 102 F. Supp. 597 (N.D. Ohio 1952).

<sup>116</sup> 199 U.S. 372 (1905).

<sup>117</sup> 322 U.S. 487, rehearing denied, 323 U.S. 811 (1944).

sumably, it wouldn't apply where testimony was extracted without federal help and turned over to the federal authorities on a silver platter.<sup>118</sup>

In search and seizure it was suggested that the federal courts should help rather than hinder state efforts to protect the basic rights of state citizens and that they could accomplish this by refusing evidence illegally obtained by officers of *Weeks* states.<sup>119</sup> In self incrimination, a federal rule of evidence against use of testimony given in state courts under protest would also be desirable. And the rule should apply to any other evidence obtained because of federal knowledge of such testimony. Such a rule would not hamper federal law enforcement—it would only require federal officers to rely on their own or state efforts not in derogation of basic rights.<sup>120</sup>

Unfortunately, however, the *Feldman* case stands as a formidable obstacle to such a rule, for it clearly held that such evidence is admissible in a federal court.<sup>121</sup>

Yet a careful examination of the case takes away some of its sting. This decision was concerned, not so much with the advisability of a federal rule of evidence, but rather with whether the Fifth Amendment barred the evidence. The Court said that it didn't—since the Fifth Amendment, like the Fourth, does not apply to state action. And this was the tone in which the defendant's arguments to the Court were

<sup>118</sup> Pp. 362-63 supra.

<sup>119</sup> Pp. 364 supra.

<sup>120</sup> The rule of evidence above suggested once appeared in a statute. Rev. Stat. § 860 (1875) provided:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be used in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture, provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed on discovery or testifying as aforesaid.

The statute was an early attempt by Congress to allow federal authority to compel answers which would incriminate of federal crimes—in effect an immunity statute—but the Supreme Court held it insufficient because while it would keep the testimony so compelled from being used, it would not protect the witness from other evidence discovered as a result of his testimony. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

As a result of this holding, the statute's original purpose was frustrated; yet it still existed and would keep testimony voluntarily given, not to mention affidavits and pleadings voluntarily made from being used in federal courts. Therefore the statute was repealed at the instance of the Attorney General. 36 Stat. 352 (1910).

It might be argued that this statute's repeal indicates a Congressional intent favoring *Feldman* as a rule of evidence; but the Committee reports and short debate on the bill show that the problem of state-federal self-incrimination crossfire was not on anybody's mind at the time. H.R. Rep. No. 266, 61st Cong., 2d Sess. (1910); S. Rep. No. 502, 61st Cong., 2d Sess. (1910); 45 Cong. Rec. 2251-53, 5764-65 (1910).

<sup>121</sup> *Feldman* is commented upon in 30 *Cornell L.Q.* 255 (1944); 8 *U. Det. L.J.* 35 (1944); 13 *Geo. Wash. L. Rev.* 105 (1944); 39 *Ill. L. Rev.* 184 (1944); 53 *Yale L.J.* 364 (1944). The *Yale L.J.* comment suggests federal courts should refuse the evidence because of "ideas of comity."

pitched.<sup>122</sup> Even the vigorous dissent by Justices Black, Douglas and Rutledge presented arguments only that the Fifth Amendment forbade the federal use as well as federal extraction of incriminating testimony. They were so absorbed in the Constitutional question that they did not bother to make the argument for a rule of evidence as a second line of defense. Thus it is arguable that the rule of evidence was decided *sub silentio* and not settled for the future.<sup>123</sup>

Search and seizure and self incrimination are closely related and the two traditionally "throw great light" on each other.<sup>124</sup> But if the *Feldman* case must be thought to foreclose the reasoning advanced here for self incrimination, it should not necessarily be applied to search and seizure. For in protecting its citizens' rights against self-incrimination, a state has a choice. It may either hold that federal incrimination is no excuse or it may hold or legislate that it justifies a refusal to answer in state proceedings.<sup>125</sup> Thus the state has a way of protecting the rights of its citizens. In search and seizure there is no such easy way for a state to prevent the illegal obtaining of physical evidence. Even adoption of the *Weeks* rule may not work.<sup>126</sup> Therefore, it might be argued that respect for state search and seizure policy is more important than bolstering its self incrimination privilege.

But rather than adopt such a distinction, the Court should here, as in search and seizure, render unto the states what is the states' and help the states implement their own policies designed to enhance the basic freedom of their citizens. By merely adopting a new rule of evidence, the Court could take some of the profit out of evasion by state officers of state policies for enforcing state guarantees against arbitrary state action.<sup>127</sup>

#### CONCLUSION

Thus, it will be seen that while according to some general principles of federalism, state-federal crossfire is possible in the fields of search and seizure and self incrimination, there are compensating doctrines which greatly help to alleviate the situation.

But there is room for improvement in the three following categories:

<sup>122</sup> See Brief in Support of Petition for Certiorari, Reply Brief in Support of Petition for Certiorari, Brief for Petitioner and Petition for Rehearing in *Feldman*, supra note 40.

However, the Court of Appeals for the Second Circuit may have been thinking of the advisability of a rule of evidence. See *United States v. Feldman*, 136 F.2d 394 (2d Cir. 1943).

<sup>123</sup> Cf. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952).

<sup>124</sup> *Boyd v. United States*, 116 U.S. 616, 635 (1886).

<sup>125</sup> Some states have so held, e.g., *State v. Dominguez*, 82 So. 2d 12 (La. 1955).

<sup>126</sup> Note 62 supra.

<sup>127</sup> The same result could be achieved by statute, cf. note 120 supra; Notes, 35 B.U.L. Rev. 297 (1935); 41 Cornell L.Q. 294 (1956), but it would seem that a "creative" judicial process could accomplish it by the case method. Cf. *Dession*, op. cit. supra, note 87.

1. Federal courts should help state efforts to protect basic rights of citizens from arbitrary action of state officials by refusing to accept evidence illegally obtained by officers of *Weeks* states and evidence of testimony given by the witness under protest in state proceedings which incriminates the witness of federal crimes.

2. Congress should legislate to prevent state courts from using testimony concerning state crimes given under protest in federal proceedings.

3. Until such legislation is passed, state courts should refuse to use as evidence, testimony concerning state crimes given under protest in federal proceedings.

Improvement should be made whenever a chance for federal-state crossfire exists. Basic rights should not be weak around the edges.