

11-2013

# Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality

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## Recommended Citation

Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 *IOWA L. REV.* 293 (2013), Available at: <http://ir.law.fsu.edu/articles/165>

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# Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality

Wayne A. Logan\*

*ABSTRACT: This Essay addresses a longstanding concern in American criminal justice: that law enforcement agents of different governments will work together to evade a legal limit imposed by one of the governments. In the past, with the U.S. Supreme Court in the lead, courts were prone to closely scrutinize intergovernmental investigative efforts, on vigilant guard against what the Court called improper “working arrangements.” Judicial vigilance, however, has long since waned, a problematic development that has assumed added significance over time as investigations have become increasingly multijurisdictional and technologically sophisticated in nature.*

*The Essay offers the first comprehensive examination of this phenomenon and its many negative consequences, highlighting the need for more exacting judicial scrutiny of intergovernmental investigations. Without such scrutiny, modern silver platter doctrine, which allows admission of evidence illegally secured by non-forum agents found to be acting independently of agents of the forum court, is permitted to reign supreme. The Essay thus picks up where mid-twentieth-century courts left off, providing a reinvigorated framework to smoke out forum government agent involvement in investigations and condemn the legal evasion that it allows. In doing so, the Essay shines a spotlight on a critically important matter implicating core rule-of-law and governmental transparency values, which will assume ever-greater importance in coming years as governments accelerate their combined investigative efforts in the battle against crime and domestic terrorism.*

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## INTRODUCTION

American federalism has long complicated efforts to regulate police investigative practices. The difficulty stems from the fact that when governments act on their individual sovereign power to impose legal limits on police authority, they do more than instantiate Madison's goal of affording citizens a "double security."<sup>1</sup> They also create the risk that officers, collectively engaged in the "competitive enterprise of ferreting out crime,"<sup>2</sup> will seek to evade a more demanding legal norm of one government.<sup>3</sup>

The Supreme Court first recognized this risk in the Prohibition Era, when it condemned efforts by the federal government, whose agents were alone subject to the Fourth Amendment exclusionary rule,<sup>4</sup> to mount prosecutions based on liquor illegally seized by state agents. In 1927, a unanimous Court proclaimed that the judiciary "must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent . . . [illegals] by circuitous and indirect methods."<sup>5</sup> The federal exclusionary rule should apply when a "search in substance and effect was a joint operation of the local and federal officers."<sup>6</sup> In another Prohibition case, decided that same term, the Court again unanimously condemned a state search resulting in a federal liquor prosecution, noting that "[e]vidence obtained through wrongful search and seizure by state officers who are cooperating with federal officials must be excluded."<sup>7</sup>

The Court's sensitivity to law enforcement's strategic behaviors remained a constant in later years. In 1949, the Court held that a search would be deemed federal in character, and hence subject to the exclusionary rule, if federal agents "participated in" or "had a hand in" the search yielding evidence.<sup>8</sup> Soon thereafter, in a pair of seminal Warren Court opinions, concern over law enforcement evasion reached its zenith. In *Elkins v. United States*, the Court outlawed what had come to be known as the "silver platter" doctrine,<sup>9</sup> which allowed evidence that state and local police had unconstitutionally seized to be handed over for use in federal criminal trials, when the police acted independently of federal agents.<sup>10</sup>

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1. THE FEDERALIST NO. 51, at 350–53 (James Madison) (Jacob Earnest Cooke ed., 1961).

2. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

3. *See State v. Mollica*, 554 A.2d 1315, 1324 (N.J. 1989) ("The problem of evidence acquired and used respectively by officers who are subject to differing legal standards has been with us a long time.").

4. *See Weeks v. United States*, 232 U.S. 383, 398 (1914).

5. *Byars v. United States*, 273 U.S. 28, 32 (1927).

6. *Id.* at 33.

7. *Gambino v. United States*, 275 U.S. 310, 314 (1927).

8. *Lustig v. United States*, 338 U.S. 74, 78–79 (1949).

9. *See Elkins v. United States*, 364 U.S. 206, 208 & n.2 (1960).

10. *Id.* at 223.

In its next term, in *Mapp v. Ohio*,<sup>11</sup> the Court held that the federal exclusionary rule applied to state criminal trials as well, based on the recognition that officers, “being human,” will submit to the “inducement to evasion” and seek to avoid legal limits.<sup>12</sup> Applying the exclusionary rule to state and federal agents alike, Justice Clark wrote on behalf of the six-member *Mapp* majority, upheld faith in the forthrightness of law enforcement: “Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of ‘working arrangements’ whose results are equally tainted.”<sup>13</sup>

Over the years it has been commonplace to suggest that in the early 1960s the Court did away with the “silver platter” doctrine.<sup>14</sup> In reality, however, the silver platter doctrine remains alive and well—albeit in a reincarnated variety of distinct forms. This is because the Warren Court intervened only with regard to the federal Fourth Amendment and its exclusionary rule, allowing silver platter doctrine to remain operative in a variety of other contexts.<sup>15</sup> Today, despite a sustained chorus of critical commentary,<sup>16</sup> state and federal courts typically permit silver platter hand-offs and the legal evasion it facilitates.<sup>17</sup>

Lacking in this commentary, however, is attention to what the New Jersey Supreme Court has aptly called the “vital, significant condition”<sup>18</sup> of silver platter doctrine: that evidence was secured independently by law enforcement of a sovereign other than that of the forum court. If not, if evidence in fact derives from what the *Mapp* Court called an improper “working arrangement,” government end-runs can deprive individuals of

11. *Mapp v. Ohio*, 367 U.S. 643, 658 (1961).

12. *Id.* at 658.

13. *Id.* (citing *Lustig*, 338 U.S. 74; *Byars v. United States*, 273 U.S. 28 (1927)).

14. See, e.g., Julius Berman & Paul Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U. L. REV. 525, 551 (1960) (noting “the abolition of the Silver Platter Doctrine in *Elkins*”); Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 11 (2010) (referring to the doctrine’s “obsolete status”).

15. See, e.g., *State v. Mollica*, 554 A.2d 1315, 1326 (N.J. 1989) (recognizing “[t]he essential dynamic of the silver platter doctrine [that] remains pertinent” today and the temptation among law enforcement to “sterilize” or “sanitize evidence” under less protective standards); *State v. Toone*, 823 S.W.2d 744, 748 (Tex. App. 1992) (“The essence of the silver-platter doctrine is still pertinent today.”).

16. See, e.g., Robert M. Bloom & Hillary Massey, *Accounting for Federalism in State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents*, 79 U. COLO. L. REV. 381 (2008); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223 (1996); David Gray et al., *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7 (2012); Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?*, 46 WM. & MARY L. REV. 1437, 1452 (2005).

17. See, e.g., *United States v. Dedrick*, 840 F. Supp. 2d 482, 492 (D. Mass. 2012) (“[S]tate officials could conceivably make an ‘end-run’ around more restrictive state constitutions by delivering evidence seized in violation of a state’s constitution and handing such evidence on a silver platter to federal officials acting under the more relaxed federal Constitution.”).

18. *Mollica*, 554 A.2d at 1329.

rights and undermine sovereign search and seizure limits. Of course, as the *Elkins* Court observed, from the perspective of a criminal defendant, “it matters not” who employs the government agents engaged in unlawful behavior.<sup>19</sup> As the discussion here makes clear, however, such line-drawing continues to have major importance today, serving—as it did in the first several decades of the twentieth century—as a vital bulwark against strategic governmental efforts to evade legal constraints.<sup>20</sup>

This Essay offers the first examination of modern intergovernmental “working arrangements” and the failure of courts to regulate the evasion of legal norms that it enables.<sup>21</sup> Part I examines caselaw dating from the 1920s and the “jolly little Prohibition game”<sup>22</sup> through the early 1960s on the issue, a time marked by considerable judicial scrutiny and concern. Part II surveys the varied and notably more indulgent approaches taken by state and lower federal courts since then, touching on such matters as wiretaps and search warrant requirements. Part III examines the many negative consequences of the judiciary becoming, as the *Elkins* Court put it, “accomplices” in wrongdoing.<sup>23</sup>

Part IV proposes a new, more robust mechanism to address the challenge of intergovernmental illegality, which has assumed ever-greater significance as law enforcement agencies of different governments increasingly join forces to combat crime and domestic terrorism.<sup>24</sup> Mindful

19. See *Elkins v. United States*, 364 U.S. 206, 215 (1960) (“To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.”); see also *State v. Minter*, 561 A.2d 570, 582 (N.J. 1989) (Pollock, J., concurring in part and dissenting in part) (“It makes little difference to a person whose conversation is tapped that the tap was carried out by federal, rather than state officials.”); cf. *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926) (“The professed object of the trespass rather than the official character of the trespasser should test the rights of government. . . . A government would be disingenuous, if, in determining the use that should be made of evidence drawn from such a source, it drew a line between them.”).

20. For discussion of the phenomenon in the state/local–federal context, see *Panel Discussion: The Prosecutor’s Role in Light of Expanding Federal Criminal Jurisdiction*, 26 *FORDHAM URB. L.J.* 657, 663, 668, 673–74 (1999).

21. Over fifty years ago, in an era marked by far less extensive and sophisticated intergovernmental law enforcement operations, Professor Yale Kamisar examined judicial efforts to regulate evasion. See Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 *MINN. L. REV.* 1083 (1959).

22. John Barker Waite, *Judges and the Crime Burden*, 54 *MICH. L. REV.* 169, 172 n.9 (1955).

23. *Elkins*, 364 U.S. at 223.

24. See, e.g., *Partnerships and Outreach*, FBI, [http://www.fbi.gov/about-us/partnerships\\_and\\_outreach/](http://www.fbi.gov/about-us/partnerships_and_outreach/) (last visited Sept. 14, 2013) (listing multiple task forces). The U.S. Drug Enforcement Agency alone boasts 259 state and local task forces. See *State & Local Task Forces*, DEA, <http://www.justice.gov/dea/ops/taskforces.shtml> (last visited Sept. 14, 2013). For an overview of the forces driving this shift, which accelerated in the early 1980s as a result of federal funding and incentives, see MALCOLM RUSSELL-EINHORN ET AL., *FEDERAL-LOCAL LAW ENFORCEMENT COLLABORATION IN INVESTIGATING AND PROSECUTING URBAN CRIME*, 1982–1999: DRUGS, WEAPONS, AND GANGS 11–52 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/201782.pdf>.

of the powerful incentives driving agents to evade legal controls, and the disincentives for them to be forthcoming about their activities, this Essay offers a proof and adjudicatory regime that will ensure greater transparency and accountability. The regime itself owes much to the sustained effort of the Supreme Court to regulate improper working arrangements among state and federal law enforcement, commencing in the Prohibition Era and dissipating in the early 1960s. With an eye toward the nation's useable past,<sup>25</sup> the Essay seeks to reconcile the seemingly inevitable continued growth in intergovernmental law enforcement operations<sup>26</sup> with the imperative that agents, when undertaking such efforts, not trammel rights and evade sovereign legal limits placed on their investigative authority.

### I. EVASION AND THE COURT

For a variety of reasons, including initially limited federal jurisdiction over criminal matters,<sup>27</sup> the Supreme Court was a relative latecomer with regard to the regulation of police investigative activity.<sup>28</sup> While the Court's limited constitutional oversight role increased beginning in the late 1800s,<sup>29</sup> its involvement did not really begin to take shape until 1914 with *Weeks v. United States*.<sup>30</sup>

While *Weeks* is best known today for its formal recognition of the exclusionary rule in enforcing Fourth Amendment expectations, the

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25. Cf. Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 603 (1995) (noting that "the idea of a *useable past* . . . points to the goal of finding elements in history that can be brought fruitfully to bear on current problems.").

26. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, CREATING A NEW CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 79 (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/178936.pdf> ("Multijurisdictional task forces (MJTFs) have become vital elements in the national effort to reduce the availability and use of illegal drugs and to reduce levels of violent crime. Because most law enforcement authority is limited to specific jurisdictions, but criminal activity is not, it is possible for large criminal enterprises to commit crimes beyond the scope of power of a particular law enforcement agency. Dealing with this problem requires cooperation among numerous law enforcement agencies."); NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL-LOCAL COLLABORATION 2 (2003), available at <https://www.ncjrs.gov/pdffiles1/nij/197040.pdf> (recognizing that intergovernmental "collaboration is likely to endure and expand," and noting various "operational incentives" in favor of collaboration).

27. See Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1172 (2012) (noting *inter alia* that federal criminal appeals were not even allowed until 1879).

28. See Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 SYRACUSE L. REV. 79, 92 n.70 (2007) (noting that a database search indicated only five mentions of the Fourth Amendment before 1891).

29. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886) (invalidating on Fourth and Fifth Amendment grounds a statute requiring compulsory process of private papers); *Hopt v. Utah*, 110 U.S. 574, 587 (1884) (reversing conviction based on confession secured as a result of inducements).

30. *Weeks v. United States*, 232 U.S. 383 (1914).

decision had major implications for state–federal law enforcement relations. Weeks had been prosecuted in federal court for transmitting lottery tickets through the mail, based on information provided by local police who had illegally seized papers from his home and a subsequent illegal search by a federal marshal accompanied by local police.<sup>31</sup> In a unanimous opinion, the Court reversed Weeks’s conviction, characterizing the search as one undertaken by federal agents and violative of the Fourth Amendment, warranting application of the federal exclusionary rule.<sup>32</sup>

The full effect of *Weeks* would not be felt until 1919 and the onset of Prohibition,<sup>33</sup> when Congress ratified the Eighteenth Amendment<sup>34</sup> and enacted the National Prohibition Act.<sup>35</sup> For the first time in the nation’s history, state and federal agents enjoyed concurrent authority,<sup>36</sup> resulting in a radical increase in enforcement activity nationwide.<sup>37</sup> Because its agents were few in number, the federal government looked to state and local law officers to arrest alleged bootleggers and to gather and collect evidence for use in federal Prohibition cases.<sup>38</sup> Unmistakably as well, reliance on non-

31. *Id.* at 386.

32. *Id.* at 398.

33. At the time, twenty-six states banned intoxicants in some manner, with half adopting statewide laws characteristic of the “bone-dry” approach taken by federal law. See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 5 n.6 (2006).

34. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. The text read:

(1.) After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

(2.) The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

*Id.*

35. National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305 (1919), *repealed by* Liquor Law Repeal and Enforcement Act, Pub. L. No. 74-347, 49 Stat. 872 (1935).

36. See Noel T. Dowling, *Concurrent Power Under the Eighteenth Amendment*, 6 MINN. L. REV. 447 (1922).

37. See generally Post, *supra* note 33, at 23–33 (discussing the unprecedented nationwide increase in law enforcement necessitated by Prohibition). In 1932, almost 66,000 Prohibition-related criminal cases were filed in federal court. Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 tbl.1 (1934).

38. J.P. Chamberlain, *Enforcement of the Volstead Act Through State Agencies*, 10 A.B.A. J. 391, 391 (1924) (“It is evident that there is no federal machinery adequate to cope with the problem of enforcing the National Prohibition Law.”); *No Way to Execute Harding Dry Order: Enforcement Officials Declare Army of Agents Is Necessary to Stop Bootlegging*, N.Y. TIMES, Nov. 28, 1922, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9Fo6E5DF1F3EEE3ABC4051DFB7678389639EDE> (noting that full enforcement would require “an army of enforcement agents far larger than it would be practicable to assemble or obtain an appropriation for”). Similar federal reliance was evident in the realm of anti-counterfeiting under the aegis of the U.S. Secret Service. See ARTHUR C. MILLSAUGH, *CRIME CONTROL BY THE NATIONAL GOVERNMENT* 118–19 (1937) (noting that the Service “could not function as



federal agents was driven by the strategic goal of avoiding application of the federal exclusionary rule,<sup>39</sup> applicable under *Weeks* only to federal agents.<sup>40</sup>

For some time, evasive efforts by federal agents and state and local police were quite unabashed and overt. In one reported opinion, the court noted that federal authorities started a “little school” to instruct their counterparts on how best to secure evidence in support of federal cases, based on a “procedure [that] was systematic and frictionless.”<sup>41</sup> Federal prosecutor and eventual U.S. presidential candidate Thomas Dewey was frank in his acknowledgement of intergovernmental evasion, relating that “[i]n dozens of cases in my own experience as a Federal prosecutor we had to rely on the evidence procured by the unhampered police of the State of New York, or important criminals would have gone free.”<sup>42</sup> The end result of such strategic behavior, one commentator lamented, was to render the Fourth Amendment “wholly innocuous [sic].”<sup>43</sup>

The situation eventually stirred the Taft Court—itself generally favorably predisposed to Prohibition<sup>44</sup>—to intervene with a pair of decisions in 1927 that cast a critical eye on the prevailing *modus operandi*.<sup>45</sup> In the first and most important decision, *Byars v. United States*, local police secured a search warrant for Byars’s home, which failed to satisfy federal Fourth Amendment standards, and invited a federal prohibition agent to

effectively as it does without the full co-operation of state and local agencies; and its officials believe that it would require a field personnel ten times as great as the present Secret Service force if it were to operate without the assistance rendered by local agencies”).

39. See R.J.S., Comment, *Prohibition Searches by New York State Police*, 37 YALE L.J. 784, 785 (1928) (noting that because of the “advantage[s] of basing a case . . . upon a search beyond the condemning reach of the federal rule,” federal prosecutors routinely used “evidence secured by local police. Indeed, it has been said that, because of the rigidly narrow grounds upon which a federal search will be deemed reasonable, the activity of the state officers is indispensable”); *id.* (“[I]t is now the admitted policy, of the federal authorities to rely wherever possible upon the activity of the local peace officers for the arrest and prosecution of the typical bootlegger and inland rumrunner.”).

40. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (“What remedies the defendant may have against [state and local officers] we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies.”).

41. *United States v. Falloco*, 277 F. 75, 78, 82 (W.D. Mo. 1922).

42. See Statement of Thomas E. Dewey, in 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 372 (1938).

43. John B. Wilson, *Attempts to Nullify the Fourth and Fifth Amendments to the Constitution*, 32 W. VA. L. Q. 128, 133–34 (1926); see also Chamberlain, *supra* note 38, at 392 (“One way of giving effect to the famous remark, ‘What is the Constitution between friends,’ has developed where there is friendly cooperation between state and federal officers.”).

44. See Post, *supra* note 33, at 171.

45. The Court’s decision to intervene was also likely influenced by widespread concern over “lawless” police behaviors more generally, soon to be the subject of scrutiny by the Wickersham Commission. See NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

accompany them to the residence.<sup>46</sup> The agent and local police found counterfeit revenue stamps used to imitate those on whiskey bottled in bond, resulting in the defendant's conviction in federal court.<sup>47</sup>

By a unanimous vote, the Court held that the search "in substance and effect was a joint operation of the local and federal officers," triggering application of the federal exclusionary rule.<sup>48</sup> The Court acknowledged that the federal government could "avail itself of evidence improperly seized by state officers operating entirely upon their own account," but added that "the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure."<sup>49</sup> The Court concluded, in similarly unequivocal terms:

To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action. The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures . . . ; and the assurance against any revival of it . . . is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.<sup>50</sup>

Later that same year, in *Gambino v. United States*, the Court, again by a unanimous vote, applied the federal exclusionary rule when, unlike in *Byars*, federal agents were not physically present during an illegal search.<sup>51</sup> In *Gambino*, New York state troopers unlawfully searched defendant's car, seized liquor, and provided the contraband to federal prosecutors. Because at the time New York had suspended enforcement of its state anti-liquor law,<sup>52</sup> the "cooperating" troopers seized the evidence "solely on behalf of the United States."<sup>53</sup> According to the Court, the federal prosecution "was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States."<sup>54</sup> The Court emphasized that

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46. *Byars v. United States*, 273 U.S. 28, 29–30 (1927).

47. *Id.* at 28–29.

48. *Id.* at 33.

49. *Id.*

50. *Id.* at 33–34.

51. *Gambino v. United States*, 275 U.S. 310 (1927).

52. In New York, the legislature initially passed a state enforcement statute in the wake of the Eighteenth Amendment's ratification, but repealed it shortly thereafter. *Id.* at 314–16. The governor signed the repeal measure, advising the legislature that state troopers would continue to enforce the federal law in New York. *Id.*

53. *Id.* at 316.

54. *Id.* at 316–17.

rights “may be invaded as effectively by such cooperation, as by the state officers’ acting under direction of the federal officials.”<sup>55</sup>

Roughly two decades later, in 1949, came *Lustig v. United States*.<sup>56</sup> In *Lustig*, local police alerted a federal Secret Service agent of alleged currency counterfeiting taking place at a hotel.<sup>57</sup> After peering through the keyhole of Lustig’s room and questioning a chambermaid, the agent called local police to inform them that while he saw no evidence of counterfeiting, he “was confident that ‘something was going on.’”<sup>58</sup> Local police thereafter obtained a search warrant, itself invalid under the Fourth Amendment, and searched the room while the federal agent remained off premises.<sup>59</sup> Upon discovering counterfeiting materials, police notified the agent who returned to the hotel to examine the evidence. The agent departed the scene with some of the materials, and the balance was later turned over to him.<sup>60</sup>

In a five-member plurality opinion, rendered the same day as *Wolf v. Colorado* (also authored by Justice Frankfurter),<sup>61</sup> the *Lustig* Court held that the federal agent’s involvement sufficed to trigger application of the exclusionary rule.<sup>62</sup> The plurality noted that it was not dispositive that the agent neither requested nor instigated the search.<sup>63</sup> Rather, a search is “a functional, not merely a physical, process”:

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55. *Id.* at 316. Summarizing the pair of cases several years later, one commentator offered the following:

Constant application of [the *Weeks*] exception . . . threatened to deprive the principal rule of any practical importance. If state and federal officers faced with probable disputes as to the legality of searches can escape such issues by exchanging evidence, little is accomplished by it. Hence the exception to the exception, which met the problem half way: If the federal government participates, either by requesting active state cooperation, as in *Gambino v. United States*, or by joining through its officers in the search, as in *Byars v. United States*, the evidence is inadmissible unless it is secured according to the standards set by the federal Constitution.

J.A.C. Grant, *Circumventing the Fourth Amendment*, 14 S. CAL. L. REV. 359, 367 (1941) (footnotes omitted).

56. *Lustig v. United States*, 338 U.S. 74 (1949).

57. *Id.* at 75–76 (plurality opinion).

58. *Id.* at 76.

59. *Id.* at 76–77.

60. *Id.* at 77.

61. *Wolf v. Colorado*, 338 U.S. 25, 25 (1949).

62. *Lustig*, 338 U.S. at 79–80 (plurality opinion). The four dissenters, in an opinion by Justice Reed, agreed that *Byars* controlled but believed that its standard was misapplied. *Id.* at 81–83 (Reed, J., dissenting). According to the dissent, the federal agent had merely “looked at the evidence secured by the state police before it was removed from the room” and “did not ‘share in the critical examination of the uncovered articles as the physical search proceeded.’” *Id.* (quoting plurality opinion).

63. *Id.* at 78 (plurality opinion).

It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes the articles out of a bag. It would trivialize law to base legal significance on such a differentiation. . . . To differentiate between participation from the beginning of an illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment as interpreted in *Byars v. United States* . . .<sup>64</sup>

After noting that “[t]he crux of [the *Byars*] doctrine is that a search is a search by a federal official if he had a hand in it,”<sup>65</sup> the plurality emphasized that:

The decisive factor . . . is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. . . . Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by [nonfederal] officers.”<sup>66</sup>

While *Lustig* is significant because it reaffirmed and amplified the *Byars* participation standard,<sup>67</sup> it assumed particular importance at the century’s

64. *Id.*

65. *Id.*

66. *Id.* at 79.

67. State courts, to a considerably lesser extent due to their then-more modest limits on police behavior, also addressed participation questions during the era, relying on *Byars*. For instance, in *Johnson v. State*, 299 S.W. 800 (Tenn. 1927), the Supreme Court of Tennessee held that evidence of “the connivance or aid of officers of the state” in a search under a federal warrant required that the state adduce the actual search warrant, as required by Tennessee law. *Id.* at 801. The *Johnson* court wrote in full:

In the case at bar it appears that the evidence upon which the search warrant was issued was furnished to the United States commissioner by an officer of the state, who subsequently participated actively in the search, with the sheriff of the county standing by, ready to render assistance if required. This participation by the state officers at least rendered the enterprise a joint undertaking of the state and federal officers, and, following the analogy of the holding in *Byars v. United States* . . . we think the trial judge should have required the state to justify the search by the production of the . . . warrant.

*Id.*

The Mississippi Supreme Court’s decision in *Little v. State*, 159 So. 103 (Miss. 1935) illustrates a different take on state court treatment of federal agents during the Prohibition Era. In suppressing evidence of a liquor “still” seized by federal agents—acting alone—in violation of the state constitution, the *Little* court distanced itself from *Byars*. Writing that “[f]or the sake of uniformity of decision between the Supreme Court and the courts of this state, we would resolve any doubt in favor of the holding of that court,” the court concluded that “decidedly the better and sounder reasoning is that federal officers making an illegal search” should be subject to state court oversight. *Id.* at 104. After noting that “[m]any acts in common are denounced as

mid-point for its contemporaneous endorsement of the *Weeks* tenet that the Fourth Amendment regulated only federal searches, not those undertaken by state or local police.<sup>68</sup> Indeed, *Lustig* is best known today for the statement following the plurality's enunciation of its "hand in it" standard: "a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."<sup>69</sup> In *Lustig*, the Court's finding of federal participation avoided application of what came to be known as the "silver platter" doctrine, which allowed federal courts to admit evidence acquired by state or local officers, acting alone, in contravention of federal constitutional law.<sup>70</sup>

The silver platter doctrine became the target of major criticism in subsequent years,<sup>71</sup> as federal prosecutors successfully cast searches as state in character, thereby avoiding application of the exclusionary rule.<sup>72</sup> In 1960, the Court at last addressed the doctrine in *Elkins v. United States*.<sup>73</sup> Adverting to the "practical difficulties" the *Weeks* carve-out presented for non-federal actors "in an era of expanding federal criminal jurisdiction,"<sup>74</sup> the five-member *Elkins* majority held that evidence unconstitutionally

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crimes both by the Congress and the Legislatures of the states," the court stressed that practical concern over nullification of rights obliged it to adjudge federal agent conduct:

If the fruits of an illegal search under federal authority can be used in the state courts, and vice versa, the constitutional guaranty would be to a large extent nullified. Federal authority within its sphere operates in all the states, while state authority is bound down by state lines. In a large sense federal officers are state officers as well; they have the right to act in the states, while state officers cannot go beyond the state lines.

*Id.*

68. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) ("[T]he Fourth Amendment is not directed to individual misconduct of [state and local] officials. Its limitations reach the Federal Government and its agencies.").

69. *Lustig*, 338 U.S. at 78-79.

70. See *supra* notes 9-10 and accompanying text.

71. For examples of critical commentary during the period, see Gerald H. Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 455 (1959); J.A.C. Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1 (1961); Alan C. Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U. L.Q. 229; Judson A. Parsons, Jr., *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L.Q. 346 (1957).

72. See, e.g., *Traffic in, and Control of, Narcotics, Barbiturates, and Amphetamines: Hearing Before the Subcomm. on Narcotics of the H. Comm. on Ways & Means*, 84th Cong. 707 (1956) [hereinafter *Narcotics Hearing*] (statement of Thomas C. Lynch, District Attorney of San Francisco) ("[T]he district attorney's office has been used very liberally by the Federal agents for their cases which might not necessarily stand the legal test required in a Federal court.").

73. *Elkins v. United States*, 364 U.S. 206 (1960).

74. *Id.* at 211.

secured by state and federal law enforcement agents alike is inadmissible in a federal criminal trial.<sup>75</sup>

Writing for the majority, Justice Stewart reasoned that it no longer made doctrinal sense to distinguish state from federal searches given that *Wolf v. Colorado*, decided eleven years before, prohibited state officers from conducting unreasonable searches and seizures (yet refrained from imposing the exclusionary rule).<sup>76</sup> Withholding application of the exclusionary rule to state actors would undercut the salutary goal of fostering “[f]ree and open cooperation between state and federal law enforcement officers.”<sup>77</sup> “If . . . it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation.”<sup>78</sup>

Viewed in retrospect, *Elkins* occupies a curious place in the Warren Court pantheon. Often conceived as delivering the death-blow to the silver platter doctrine, its doctrinal stature was largely overtaken a year later by *Mapp v. Ohio*,<sup>79</sup> which overruled *Wolf* and applied the federal exclusionary rule to state criminal justice actors in state trials.<sup>80</sup> Much like *Elkins*, *Mapp* discerned a tension with *Wolf*, which applied the Fourth Amendment to the actions of state officers, yet did not require evidentiary exclusion in state trials, thus “grant[ing] the right but in reality . . . withhold[ing] its privilege and enjoyment.”<sup>81</sup>

*Mapp*, however, was predicated on more than what Justice Douglas referred to in his concurrence as “put[ting] an end to the asymmetry which

75. *Id.* at 223–24.

76. *Id.* at 213 (citing *Wolf v. Colorado*, 338 U.S. 25 (1949)); *see also id.* (“The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949.”).

77. *Id.* at 221.

78. *Id.* at 222.

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

80. For a seminal recounting of the Court’s evolution in the area, see Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983). Reflecting on the development of the exclusionary rule, not long after his retirement from the Court, Justice Stewart offered the following comments:

Looking back, the exclusionary rule seems a bit jerry-built—like a roller coaster track constructed while the roller coaster sped along. Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing, but without the opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that inevitably lay ahead.

*Id.* at 1366.

81. *Mapp*, 367 U.S. at 656.

*Wolf* imported into the law.”<sup>82</sup> The *Mapp* majority made clear that its decision was driven by the practical concern that failing to extend the exclusionary rule to state criminal trials provided an “inducement to evasion.”<sup>83</sup> Without the exclusionary rule looming, federal officers—“being human”—were “invited to and did . . . step across the street to the State’s attorney with their unconstitutionally seized evidence.”<sup>84</sup> Citing *Byars* and *Lustig*, the majority reasoned that “[d]eny[ing] shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of ‘working relationships’ whose results are . . . tainted.”<sup>85</sup> Echoing the chief opinion’s animating concern over intergovernmental evasion and deceit, commonly voiced in other opinions of the era,<sup>86</sup> Justice Douglas condemned the “unseemly shopping around” that *Wolf*’s double standard enabled and its attendant allowance for “‘working arrangements’ that undercut federal policy and reduce some aspects of law enforcement to shabby business.”<sup>87</sup>

*Mapp*, however, did not really “close the only courtroom door remaining open to evidence secured by official lawlessness.”<sup>88</sup> Doorstops in courthouse doors remain in place nationwide. This is because *Mapp*, no less than the Court’s renunciation of the Fourth Amendment silver platter doctrine in *Elkins*, did not address the many other state and federal standards that regulate law enforcement nationwide, creating opportunities

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82. *Id.* at 670 (Douglas, J., concurring).

83. *Id.* at 658 (majority opinion).

84. *Id.*

85. *Id.* (citing *Lustig v. United States*, 338 U.S. 74 (1949); *Byars v. United States*, 273 U.S. 28 (1927)); *see also id.* at 660 (“The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.”).

86. *See, e.g.,* *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 102 (1964) (White, J., concurring) (singling out for concern possible “collusion by federal officers” with their state counterparts in securing compelled witness testimony); *Bartkus v. Illinois*, 359 U.S. 121, 122–24 (1959) (expressing concern over possible “sham prosecutions” undertaken by state and federal government to avoid the Fifth Amendment’s Double Jeopardy Clause); *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958) (“[T]he Federal Government may not take advantage of this recognition of the States’ autonomy in order to evade the Bill of Rights. If a federal officer should be a party to the compulsion of testimony by state agencies, the Fifth Amendment would come into play. Such testimony is barred in a federal prosecution.”); *Anderson v. United States*, 318 U.S. 350, 356 (1943) (excluding confessions because of a “working arrangement” between federal agents and sheriff’s office and stating that “the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers”); *see also* Recent Development, *Federal Injunction Bars Federal Agent’s Illegally Procured Evidence in State Prosecution*, 56 COLUM. L. REV. 940, 943 (1956) (noting “the Court’s distaste for evasory tactics by federal officers”).

87. *Mapp*, 367 U.S. at 671–72 (Douglas, J., concurring).

88. *Id.* at 654–55 (majority opinion).

for evasion.<sup>89</sup> As a consequence, as one court later observed, the silver platter doctrine has “changed from its pristine form, exemplified by *Byars* and *Lustig*,” necessitating continued judicial oversight as law enforcement seeks “to sanitize evidence.”<sup>90</sup>

As discussed next, this vacuum has been filled with a tangle of often conflicting and less exacting standards, as state and lower federal courts have struggled in their efforts to address the various modern-day silver platter permutations.

## II. MODERN APPROACHES

It is fair to say that the effort to regulate evasion, like the search and seizure doctrine it principally implicates, “has not . . . run smooth.”<sup>91</sup> Even during the heyday of Supreme Court efforts, from Prohibition through the early 1960s, federal courts evinced a range of views on how to assess evasion. For instance, courts at times generously interpreted *Gambino* to condemn police practices when state and federal law alike (not the latter alone) was allegedly violated,<sup>92</sup> and when there existed “an established practice”<sup>93</sup> or a general understanding that a case would “go federal.”<sup>94</sup> As the Eighth Circuit noted in 1942: “Th[e] practice was so well understood by the [state and federal] officers that an agreement among them prior to any particular arrest was wholly unnecessary.”<sup>95</sup> In other instances, as in the Second Circuit case of *Flagg v. United States*, the court cast a jaundiced eye toward federal

89. See *supra* note 19 and accompanying text.

90. *State v. Mollica*, 554 A.2d 1315, 1326 (N.J. 1989).

91. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

92. See, e.g., *United States v. Cotter*, 80 F. Supp. 590, 591–92 (E.D. Va. 1948).

93. See, e.g., *United States v. Haywood*, 208 F.2d 156, 157 (7th Cir. 1953).

94. See, e.g., *Gilbert v. United States*, 163 F.2d 325, 327 (10th Cir. 1947); *Lowrey v. United States*, 128 F.2d 477, 478–80 (8th Cir. 1942); *Sutherland v. United States*, 92 F.2d 305, 307 (4th Cir. 1937); *United States v. Irwin*, 86 F. Supp. 362, 364–65 (W.D. Ark. 1949). The Seventh Circuit described such an “understanding” as follows:

It had for years been the general understanding and practice between the local police and the federal prohibition officers that when the police squad made seizures of liquor or arrests they would submit the cases to the prohibition department, which had the first option of prosecuting such of them as it desired. . . . It was not the general practice for both the police squad and the federal officers actually to participate in the making of the same raid or seizure; but the raid would be made in the light of the above understanding . . . [and] the case was customarily turned over to [federal authorities] for prosecution. . . .

. . . .

. . . . [T]he federal taking over of the prosecution in accordance with such long-existing understanding and practice can be deemed a ratification by the federal authority of the means whereby the contemplated searches and seizures were undertaken and made.

*Fowler v. United States*, 62 F.2d 656, 656–57 (7th Cir. 1932).

95. *Lowrey*, 128 F.2d at 478.



government representations of non-participation, which “make[] too severe a demand upon the imagination.”<sup>96</sup>

Such scrutiny, however, was not to last. In later years, as Professor Yale Kamisar put it in 1959, despite evidence of continued evasion,<sup>97</sup> scrutiny among lower federal courts became “begrudging,”<sup>98</sup> a shift he attributed “in good measure [to] the unwillingness of federal judges to show the same tenderness for the procedural rights of say, dope peddlers and counterfeiters, than for prohibition violators.”<sup>99</sup> A year later, in *Elkins*, the Supreme Court noted the “difficult and unpredictable” line-drawing enterprise entailed in ascertaining federal participation,<sup>100</sup> seemingly emitting a sigh of relief that repudiation of the Fourth Amendment silver

96. *Flagg v. United States*, 233 F. 481, 483 (2d Cir. 1916). Awkwardness associated with federal efforts to downplay involvement of state or local police was exhibited in an instance involving future Supreme Court Justice John Marshall Harlan (the Second), who headed the Prohibition Division in the U.S. Attorney’s Office in the Southern District of New York in 1926. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 19 (1992). Harlan, in a case in which the defense challenged a warrantless speakeasy raid by city officers, sought to avoid suppression by testifying that cooperation had not been “nearly so good” as it had been under a predecessor local chief of police. *Id.* (internal quotation marks omitted).

While prevailing in the suppression hearing, Harlan managed to incense the then-serving New York City Police Commissioner, requiring Harlan to later issue a press release explaining that:

When I talked about cooperation in my testimony, I used that word in the sense of a centralized and coordinated activity between the United States Attorney’s Office and the police in the enforcement of prohibition, a meaning which the counsel for the defense relied upon as establishing their proposition [that] the police in enforcing national prohibition were in all cases acting as Federal agents. By way of illustration I pointed out that since the abolition of the special service division by [the new police commissioner], in which were at one time centered all the prohibition enforcement activities of the New York City Police Department, the contact between the police and the United States Attorney’s office had become less centralized and more diffuse.

*Id.* at 19–20 (first alteration in original). Harlan went on to stress that the U.S. Attorney’s office “at all times had the fullest measure of cooperation from [the new commissioner] and all his subordinates.” *Id.* at 20 (internal quotation marks omitted).

97. See, e.g., *Narcotics Hearing*, *supra* note 72, at 1190, 1197 (statement of Warren Olney III, Assistant Att’y Gen.) (noting that “frequently Federal and local officers work in close cooperation, and the cases, when completed, are presented in the State or Federal Court, depending” *inter alia* on “the manner in which the evidence was acquired”).

98. Kamisar, *supra* note 21, at 1171; see also *id.* at 1175 (“It is fairly clear that in most circuits a general understanding or practice no longer serves as a substitute for proof of federal participation in the particular state search.”).

99. *Id.* at 1173. Analysis of state caselaw from the era seems to confirm this assessment. See Laurence A. Benner et al., *Social-Network Theory and the Diffusion of the Search-and-Seizure Exclusionary Rule Among State Courts Between Weeks and Wolf*, 27 BYU J. PUB. L. 97, 120 (2012) (noting significantly higher incidence of state adoption of state exclusionary rule in cases concerning Prohibition enforcement).

100. *Elkins v. United States*, 364 U.S. 206, 212 (1960).

platter doctrine would obviate the need.<sup>101</sup> As noted, however, the silver platter doctrine did not meet its end in *Elkins*; rather, it persists in a variety of contexts, obliging continued need to assess what the New Jersey Supreme Court termed “the etiology of evidence.”<sup>102</sup> This part examines how federal and state courts go about doing so.

#### A. FEDERAL COURTS—SEARCH WARRANTS

Today, in contrast to the formative years of modern criminal procedure, state law often imposes more exacting requirements on law enforcement than federal law. A significant exception lies, however, with the securing and execution of search warrants, under Federal Rule of Criminal Procedure 41.<sup>103</sup> Because the rule contains requirements that can be more specific and stringent than counterpart state rules (e.g., limiting nighttime searches), the context affords a ready parallel to pre-*Elkins* silver platter cases with the federal government doing its best to characterize events as state-dominated, evading application of federal requirements and possible exclusion of evidence.<sup>104</sup>

Courts over time have exhibited markedly different degrees of scrutiny,<sup>105</sup> with only a handful of decisions (usually of earlier vintage, citing to *Byars* and *Lustig*) deeming such searches federal in character.<sup>106</sup> Courts

101. See *id.* (“[C]ases kept arising in which the federal courts were faced with determining whether there had been such participation by federal officers in a lawless state search as to make inadmissible in evidence that which had been seized. And it is fair to say that in their approach to this recurring question, no less than in their disposition of concrete cases, the federal courts did not find themselves in complete harmony . . . .”); see also *United States v. Moses*, 234 F.2d 124, 126 (7th Cir. 1956) (stating that “courts have not been in complete agreement as to just how closely federal officers have to be connected”).

It warrants mention that the negative sentiment was not shared by Justice Frankfurter (joined by Justices Clark, Harlan, and Whitaker), who in dissent in *Elkins* and its companion case *Rios v. United States* averred that he was “not aware of evidence to sustain the view that the distinction between federal and state searches has been particularly difficult of application. Individual cases have merely presented the everyday issue of evaluating testimony and testimony touching an issue relatively easy of ascertainment.” *Elkins*, 364 U.S. at 242 (Frankfurter, J., dissenting); *id.* at 233 (noting that Justice Frankfurter’s opinion also applies to *Rios v. United States*, 364 U.S. 253 (1960)).

102. *State v. Mollica*, 554 A.2d 1315, 1324 (N.J. 1989).

103. FED. R. CRIM. P. 41.

104. See *United States v. Moore*, 956 F.2d 843, 847 n.3 (8th Cir. 1992) (“Federal agents may not circumvent more restrictive federal requirements by arranging for state officers to search under state law.”).

105. See *Criminal Procedure: Procurement of Evidence and Witnesses*, 7 FED. PROC. FORMS § 20:527 (2012) (noting that the “issue often arises” and that “there is a wide divergence of opinion in the circuits as to what level of federal involvement in a search triggers the application of” Rule 41).

106. See, e.g., *United States v. Crawford*, 657 F.2d 1041, 1046 (9th Cir. 1981) (calling federal involvement “minimal on its face” but citing *Lustig* for the view that “relevant case law indicates that we should treat the search as federal in character”); see also, e.g., *United States v. Schoenheit*, 856 F.2d 74 (8th Cir. 1988); *United States v. Pennington*, 635 F.2d 1387 (10th

typically require “significant federal involvement”<sup>107</sup> or proof of an explicit “working arrangement” designed to evade federal procedural rights.<sup>108</sup> Representative of the more relaxed view, one federal trial court averred the following:

[T]he essential part of the spawning ground for abuse of cooperation between state and federal investigative agencies has disappeared. . . . The climate for full cooperation in connection with searches is now complete and the courts should not continue to look askance each time such cooperation takes place. . . .

. . . .

. . . The court . . . believes that to become bogged down in the morass of attempting to classify a search as a federal search or a state search is not helpful, and that the thrust of the inquiry should be directed to whether either federal or state officer violated the Constitution in the course of the search.<sup>109</sup>

Courts also regularly discount the effect of state and local officers being federally deputized to serve in joint task forces,<sup>110</sup> and, in stark contrast to earlier judicial sensitivity to “general understandings,”<sup>111</sup> downplay the existence of long-term, institutionalized working arrangements.<sup>112</sup> Moreover, in contrast to the functionalist approach of *Lustig*, some courts atomistically focus only on the pre-warrant acquisition stage,<sup>113</sup> others on the execution of the warrant,<sup>114</sup> and others still on the securing of evidence.<sup>115</sup> And one court, the Fourth Circuit, disregards federal involvement in the investigative

Cir. 1980); *United States v. Harrington*, 504 F.2d 130 (7th Cir. 1974); *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973); *United States v. Hanson*, 469 F.2d 1375 (5th Cir. 1972).

107. *United States v. Brewer*, 588 F.3d 1165, 1171 (8th Cir. 2009) (quoting *United States v. Tavares*, 223 F.3d 911, 915 (8th Cir. 2000)); *see, e.g., United States v. Slater*, 209 F. App'x 489, 494–95 (6th Cir. 2006).

108. *See United States v. Medearis*, 775 F. Supp. 2d 1110, 1119 (D. S.D. 2011) (internal quotation marks omitted).

109. *See United States v. Benford*, 457 F. Supp. 589, 594–95 (E.D. Mich. 1978); *cf. United States v. Johnson*, 707 F.2d 317, 321 n.6 (8th Cir. 1983) (“The discussion in *Byars* of the type of federal involvement necessary to render a search a joint state-federal undertaking would have been unnecessary but for the silver platter doctrine. This discussion is now of little precedential value since the silver platter doctrine has long been discredited.”).

110. *See, e.g., United States v. Chastain*, 387 F. App'x 914 (11th Cir. 2010); *United States v. Marshall*, 192 F. App'x 504 (6th Cir. 2006).

111. *See supra* note 94 and accompanying text.

112. *See, e.g., United States v. Claridy*, 601 F.3d 276, 280 (4th Cir. 2010).

113. *See, e.g., United States v. MacConnell*, 868 F.2d 281, 284 (8th Cir. 1989).

114. *See United States v. Tavares*, 223 F.3d 911, 915 (8th Cir. 2000).

115. *See United States v. Bookout*, 810 F.2d 965, 967–68 (10th Cir. 1987).

phase altogether, focusing instead solely on whether a state warrant was secured at the express “direction or urging” of a federal agent.<sup>116</sup>

### B. STATE COURTS

State courts, with at least equal frequency, have been asked to address defendant claims of improper working arrangements. Such claims typically concern the applicability of state constitutional and wiretapping provisions, which can vary both among states and between state and federal governments.

#### 1. State Constitutional Law

The New Jersey Supreme Court’s decision in *State v. Mollica* is the seminal case vis-à-vis application of forum constitutional law.<sup>117</sup> In *Mollica*, FBI agents, without a search warrant, obtained room telephone records of a patron of an Atlantic City, New Jersey hotel allegedly involved in illegal bookmaking.<sup>118</sup> The records confirmed the FBI’s suspicions and they provided the records to the New Jersey State Police, who secured state search warrants leading to the filing of state gambling charges against Mollica and a co-defendant.<sup>119</sup>

The *Mollica* court first concluded that the initial warrantless search and seizure of the phone records violated the defendants’ right to privacy under the New Jersey Constitution,<sup>120</sup> and then turned to whether the violation could be forgiven under the silver platter doctrine, because it was effectuated by federal government agents operating under a less exacting constitutional regime.<sup>121</sup> Application of the doctrine, the court emphasized, was “subject to a vital, significant condition”: that the action of federal agents “not be alloyed by any state action or responsibility.”<sup>122</sup> The material

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116. See *United States v. Moore*, 775 F. Supp. 2d 882, 899–90 (E.D. Va. 2011) (summarizing the rule of *United States v. Clarity*, 601 F.3d 276 (4th Cir. 2010)), *aff’d*, 498 Fed. App’x 195 (4th Cir. 2012). A similar standard was adopted by the Fifth Circuit in *United States v. Shaw*, 920 F.2d 1225 (5th Cir. 1991).

117. *State v. Mollica*, 554 A.2d 1315 (N.J. 1989).

118. *Id.* at 1319.

119. *Id.*

120. *Id.* at 1322–23.

121. See *id.* at 1328 (“In this case, the telephone toll records relating to the use of [defendant’s] hotel-room telephone were obtained by federal agents exercising federal authority in a manner that was in conformity with federal standards and consistent with federal procedures.”). The court endorsed the silver platter principle that federal officers are not subject to higher state constitutional norms and thus can “turn over to state law enforcement officers incriminating evidence, the seizure of which would have violated state constitutional standards.” *Id.*

122. *Id.* at 1328–29.

question, the court explained, is “whether in any legally significant degree the federal action can or should be considered state action.”<sup>123</sup>

The “key element” in the analysis, the court stated, citing *Lustig* and *Gambino*, is the existence of “intergovernmental agency”—“the agency [relationship] *vel non* between the officers of the respective jurisdictions.”<sup>124</sup> Because state standards can only govern state agents and those acting on their behalf<sup>125</sup> the question was “whether for constitutional purposes the federal agents can be said to be acting under the ‘color of state law.’”<sup>126</sup> According to the *Mollica* court:

[A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency.<sup>127</sup>

After noting that the inquiry “will always pose a fact-sensitive exploration that is influenced greatly by the surrounding circumstances,” and finding the record insufficient to draw a conclusion, the court remanded the matter for further factual development and analysis.<sup>128</sup>

The *Mollica* court’s “intergovernmental agency” standard has proved enormously influential.<sup>129</sup> *Pena v. State*, a Texas Court of Appeals decision, provides a noteworthy example.<sup>130</sup> Officials discovered Pena at the U.S.–Mexico border carrying drugs; he was detected during a vehicle inspection arising out of “Operation Gate,” undertaken by U.S. Customs and the Texas Department of Public Safety (“DPS”).<sup>131</sup>

DPS agents were looking for stolen vehicles, while Customs agents were after weapons, ammunition, or currency in excess of \$10,000 being taken across the border.<sup>132</sup> Customs Agent Rivera initially stopped the vehicle Pena was in, and upon learning that Pena had been previously convicted of auto

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123. *Id.*

124. *Id.* at 1329.

125. *Id.* at 1327.

126. *Id.* at 1329.

127. *Id.*

128. *Id.* at 1329–30.

129. *See, e.g.*, *State v. Hudson*, 849 S.W.2d 309, 310–12 (Tenn. 1993) (relying upon *Mollica*’s “key element” of “intergovernmental agency” (internal quotation marks omitted)); *State v. Brown*, 940 P.2d 546, 576–78 (Wash. 1997) (assessing whether non-forum police were “agents” of forum police based on participation that is extensive in nature).

130. *Pena v. State*, 61 S.W.3d 745 (Tex. App. 2001).

131. *Id.* at 750.

132. *Id.*

theft, he alerted DPS Sergeant Garcia.<sup>133</sup> Garcia began questioning Pena and asked him if he had anything in his pockets.<sup>134</sup> After Pena did not respond, federal agent Rivera asked him what he had in his left pocket, and upon seeing Pena “go limp in resignation,” reached into Pena’s pocket, finding aluminum packets containing cocaine and heroin that resulted in his state court conviction.<sup>135</sup>

On appeal, the central question was whether the non-consensual, warrantless seizure of Pena was permissible based on the broad authority enjoyed by federal Customs agents in their policing of border areas.<sup>136</sup> Noting that the “critical element” is whether “agency *vel non*” existed between DPS and Customs,<sup>137</sup> the *Pena* court found no agency relationship to exist. Even though DPS Sergeant Garcia’s questioning of Pena and Pena’s consequent attempt to conceal were the “catalyst” of the drug seizure, this “did not convert Rivera into an agent for the State of Texas.”<sup>138</sup>

One final case, recently decided by the Connecticut Supreme Court, arising in the state-state rather than the state-federal context, will suffice to highlight state variability and the generous standard courts use today. In *State v. Boyd*, the court addressed whether evidence secured by a search in New York, linking Boyd to a murder carried out in Connecticut, was admissible in a Connecticut murder prosecution.<sup>139</sup>

The search in question occurred after New York police, investigating Boyd for illegal drug activity, learned that Norwalk, Connecticut police were looking into his involvement in the murder.<sup>140</sup> A New York officer invited two Connecticut police detectives to attend the search of defendant’s Mamaroneck, New York apartment.<sup>141</sup> The Connecticut detectives were in the apartment, and while they did not physically participate in the search, they hoped to discover evidence of the Connecticut murder in plain view.<sup>142</sup> After evidence of drug activity but no murder-related evidence was discovered in the search, the Connecticut detectives left the apartment in the company of their New York colleagues, who had learned that other Mamaroneck police had arrested Boyd on drug charges in a car nearby.<sup>143</sup>

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133. *Id.* at 750–51.

134. *Id.* at 751.

135. *Id.*

136. *See id.* at 753 (“It has long been recognized that Customs agents have virtually unfettered authority to search incoming persons at the border.”).

137. *Id.* at 754 (quoting *State v. Mollica*, 554 A.2d 1315, 1326 (N.J. 1989)).

138. *Id.* at 758.

139. *State v. Boyd*, 992 A.2d 1071 (Conn. 2010).

140. *See id.* at 1076–77.

141. *Id.* at 1077.

142. *Id.*

143. *Id.*

Upon their arrival at the arrest scene, one of the Connecticut detectives and a New York officer noticed a cell phone located on the front passenger seat of Boyd's car.<sup>144</sup> While the record did not indicate who seized the phone or when it was seized,<sup>145</sup> New York police, while in the company of the Connecticut detectives, thereafter read to the detectives numbers stored on the cell phone, which were used to implicate Boyd in the Connecticut murder.<sup>146</sup>

The *Boyd* court thus had to address which state's law should apply: Connecticut's, which would bar the cell phone evidence because it was unconstitutionally secured under state law, or New York's, which would adopt the contrary position.<sup>147</sup> Citing and discussing *Byars*, *Gambino*, and *Lustig*, and noting their continued relevance,<sup>148</sup> the Connecticut Supreme Court offered that it need not decide "what level of participation" by its state law enforcement agents was required to trigger the more demanding state standard.<sup>149</sup> Nevertheless, the court proceeded to assess and downplay the role of Connecticut police,<sup>150</sup> and it ignored the critical question of their role in the seizure of the defendant's cell phone.<sup>151</sup> The Court then cursorily added—without having developed agency analysis in its opinion—that "under any standard, the Mamaroneck police were not acting as agents for the Norwalk police."<sup>152</sup>

## 2. Eavesdropping

State courts have also addressed improper working arrangements in the eavesdropping context, another area with significant legal variation.<sup>153</sup> The

144. *Id.*

145. *Id.* at 1077 n.6.

146. *See id.* at 1077–78.

147. *See id.* at 1083 (citing *State v. Miller*, 630 A.2d 1315 (Conn. 1993); *People v. Blasich*, 541 N.E.2d 40 (N.Y. 1989)).

148. *Id.* at 1086–87 & n.13.

149. *Id.* at 1087.

150. The court acknowledged that the Connecticut detectives were present when the defendant's cell phone was searched and the incriminating information was revealed but opined, without any record evidence, that their presence was not motivated by a desire to get the phone information. *Id.* at 1087–88.

151. *Id.*

152. *Id.* at 1088.

153. Since 1968, with enactment of Title III of the Omnibus Crime Control and Safe Streets Act, federal law has imposed only minimum standards for electronic intercepts undertaken by state and federal law enforcement. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801–804, 82 Stat. 197, 211–25 (codified as amended at 18 U.S.C. §§ 2510–2520 (2012) and 47 U.S.C. § 605 (2006 & Supp. V 2011)). The law affords states the option of enacting electronic surveillance statutes of their own, which almost all states have done, with several imposing requirements more stringent than Title III (for example, requiring that both recorded parties consent to monitoring). *See* Jeffrey E. Nicoson, Note, *A Case for Certiorari: Whether Federal Courts Should Consider State Law When Admitting State-Collected Electronic Surveillance Evidence*, 46 U. LOUISVILLE L. REV. 335, 349–50 & n.142 (2007).

Illinois Supreme Court's 2008 decision, *People v. Coleman*, provides a helpful illustration.<sup>154</sup> In *Coleman*, a joint task force consisting of federal Bureau of Alcohol, Tobacco, Firearms, and Explosives agents and Illinois law enforcement embarked on a drug investigation implicating the defendant.<sup>155</sup> State and federal officers arranged for an informant to use a recording device during telephone conversations with the defendant, which the state police had taped.<sup>156</sup> The recordings complied with federal law but were contrary to state law prohibiting audio recordings in the absence of a warrant or consent by all parties involved.<sup>157</sup>

After noting that a recording secured by federal agents alone would not be problematic,<sup>158</sup> the *Coleman* court addressed whether the state–federal undertaking enjoyed similar immunity. The court concluded that suppression would be proper only if there existed evidence of a “secret agreement [or] secret cooperation for a fraudulent or deceitful purpose.”<sup>159</sup> Thus, rather than having admissibility turn on the extent of Illinois agents’ participation, what was important was evidence of subjective intent on the part of state and federal actors, support for which was absent from the record.<sup>160</sup>

Massachusetts, however, does not look to the existence of a “secret agreement,” but requires quite substantial state involvement.<sup>161</sup> In *Commonwealth v. Brown*, the Massachusetts Supreme Judicial Court addressed whether a taping that was illegal under Massachusetts law, yet not federal law, warranted suppression.<sup>162</sup> Officials believed Brown, a physician, was illegally prescribing medication. Brown was targeted by a joint task force that included local police deputized as “special DEA agents.”<sup>163</sup> One local officer, however, was not deputized, and “[t]hrough [him], the task force convinced one of the defendant’s patients to participate in a ‘sting’ operation,” which federal authorities taped.<sup>164</sup> Faced with these facts, the *Brown* court concluded that the more demanding Massachusetts law did not control because “[t]he participation of local law enforcement was not sufficient,

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154. *People v. Coleman*, 882 N.E.2d 1025 (Ill. 2008).

155. *Id.* at 1026.

156. *Id.* at 1026–27.

157. *Id.* at 1031 (citing 720 ILL. COMP. STAT. § 5/14-2(a) (2000)).

158. *Id.* at 1032.

159. *Id.* (internal quotation marks omitted).

160. *Id.* The Kentucky Supreme Court has adopted a similar standard. *See Basham v. Commonwealth*, 675 S.W.2d 376, 381–83 (Ky. 1984).

161. *Commonwealth v. Brown*, 925 N.E.2d 845 (Mass. 2010).

162. *Id.* at 847, 849–50.

163. *Id.* at 850.

164. *Id.*



‘either in quantity or quality, to alter the essentially Federal nature of the investigation.’”<sup>165</sup>

### III. THE CONSEQUENCES OF JUDICIAL LAXITY

As the foregoing makes clear, courts today show little of what the *Byars* Court called the necessary “vigilant . . . eye to detect and . . . hand to prevent” intergovernmental investigative illegality.<sup>166</sup> Before proceeding, it is worthwhile to reflect upon what is at stake when governments work to evade legal restrictions and courts fail to intercede.

First and perhaps foremost, judicial failure to regulate evasion sends a troubling signal that what the *Elkins* Court called “subterfuge and evasion”<sup>167</sup> is permissible. Courts, with their failure, add to the already large array of judicially sanctioned forms of police “gamesmanship,”<sup>168</sup> including use of trickery and deceit in securing confessions,<sup>169</sup> stopping and arresting individuals on the basis of pretext,<sup>170</sup> indulging in the “dirty business” of using informers and false friends,<sup>171</sup> allowing criminal misconduct by informants,<sup>172</sup> and engaging in “hand-offs” whereby police illegally secure information and provide it to compatriots who then conduct an

165. *Id.* (quoting *Commonwealth v. Gonzalez*, 688 N.E.2d 455, 457 (Mass. 1997)). In *Gonzalez*, local police assisted federal agents with surveillance and intelligence gathering, provided facilities to field test the cocaine secured from defendant, and monitored and transmitted recordings in conjunction with a DEA agent. *Gonzalez*, 688 N.E.2d at 456. Despite the compelling evidence of their involvement, the court concluded that local police were “merely assisting a Federal investigation.” *Id.* at 457.

166. *Byars v. United States*, 273 U.S. 28, 32 (1927).

167. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

168. See Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407 (2011); Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483 (2007). For a rare instance of the Court stepping in to stamp out a police end-run, see *Missouri v. Seibert*, 542 U.S. 600, 616 (2004) (invalidating “question-first,” *Mirandize*-later interrogation tactic, deeming it “a police strategy adapted to undermine the *Miranda* warnings”).

169. See Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996).

170. *Arkansas v. Sullivan*, 532 U.S. 769, 771–72 (2001) (per curiam) (condoning pretextual arrest); *Whren v. United States*, 517 U.S. 806, 813 (1996) (condoning pretextual traffic stop).

171. On *Lee v. United States*, 343 U.S. 747, 757 (1952). On the use of informants more generally, see ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009).

172. See Elizabeth A. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 167 (2009); Brad Heath & Kevin Johnson, *Crimes by ATF and DEA Informants Not Tracked by Feds*, USA TODAY (Oct. 7, 2012, 9:12 PM), <http://www.usatoday.com/story/news/2012/10/07/informants-justice-crime/1600323/>.

“independent” search.<sup>173</sup> As the growing literature on procedural justice attests,<sup>174</sup> and as Justice Brandeis’s “teacher” concept foretold,<sup>175</sup> when the public perceives law enforcement agents as acting improperly, there can come a corresponding diminution in the public’s sense of governmental legitimacy and their willingness to be law-abiding.<sup>176</sup> When courts fail to critically assess working arrangements, they signal, in the public forum of suppression hearings, with their educative and expressive function,<sup>177</sup> that evasion is acceptable.<sup>178</sup>

173. See Micah G. Block, Note, *The Hand-Off Procedure or the New Silver Platter: How Today’s Police Are Serving Up Potentially Tainted Evidence Without Even Revealing the Search that Produced It to Defendants or to Courts*, 62 STAN. L. REV. 863 (2010).

For other examples of what might be seen as tactical investigative overreach by police, condoned by courts, see, for example, *Oliver v. United States*, 466 U.S. 170, 183–84 (1984) (finding no Fourth Amendment violation when police purposely violated state trespass law to secure evidence on defendant’s property); *United States v. Payner*, 447 U.S. 727, 731, 733 (1980) (refusing to find standing yet noting that “[n]o court should condone the unconstitutional and possibly criminal behavior” entailed in theft of a briefcase containing incriminating evidence used to prosecute the defendant). Courts have also backed hard-edged tactics by police in contexts other than motions to suppress. One area concerns “sentence manipulation,” whereby police (typically in drug cases) encourage defendants to engage in particular conduct that risks exposure to longer and perhaps mandatory prison sentences. See Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401 (2013).

174. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255 (2010); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

175. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”); *id.* at 470 (Holmes, J., dissenting) (“[I]t [is] a less[er] evil that some criminals should escape than that the Government should play an ignoble part.”). For an earlier albeit less famous invocation of the same principle, see *Atz v. Andrew*, 94 So. 329, 332 (Fla. 1922) (“Better the mob and the Ku-Klux, than a conviction obtained in a temple of justice by testimony illegally acquired by agents of the government and officers of the law.”).

176. See Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 363 (2011) (“Justice Brandeis’s reasoning presciently expresses the best current understanding of the connections between legitimacy, procedural justice, and the control of crime.”).

177. See Scott E. Sundby, *Mapp v. Ohio’s Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255 (2010).

178. See *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence.”); *cf.* *Rea v. United States*, 350 U.S. 214, 218 (1956) (stating, in exercise of its supervisory authority to forbid state court testimony by a federal agent who violated Rule 41 in acquiring evidence, that the rules are “designed to protect the privacy of the citizen . . . . That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings”).

The institutional failure is thus doubly problematic: not only do citizens feel that police are evading a legal limit; they also come away with the impression that the deprivation results from a broader collusive effort of government (*writ large*).<sup>179</sup> And here again findings from the procedural justice literature lend cause for concern. Research has shown that perceptions of legitimacy are often independent of outcome,<sup>180</sup> and in this regard it is important to recognize that a finding of government agent involvement need not result in exclusion of evidence.<sup>181</sup>

A second major concern relates to the rule of law. As Professor Jerome Skolnick has written, law enforcement agents “in a democracy are not merely bureaucrats. They are also . . . legal officials, that is, people belonging to an institution charged with strengthening the rule of law in society.”<sup>182</sup> When agents evade limits imposed on their search and seizure authority, they flout this core expectation,<sup>183</sup> and the preconditions on which such authority is predicated.<sup>184</sup> The upshot of this regulatory vacuum can be that no limit—other than one based on the federal constitution—operates to constrain law enforcement,<sup>185</sup> a development assuming greater importance as the Supreme Court has decreased the exclusionary rule’s applicable scope.<sup>186</sup>

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179. *Cf.* *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (noting that Fourth Amendment protections are “a constraint on the power of the sovereign, not merely on some of its agents”).

180. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 5–6 (1990); Tyler & Fagan, *supra* note 174, at 240–41.

181. *See, e.g., United States v. Bieri*, 21 F.3d 811, 816 (8th Cir. 1994) (finding federal participation in a search violating Rule 41 but refusing to exclude evidence due to lack of defendant’s showing of prejudice).

182. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 233 (3d ed. 1994).

183. *See* FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944) (“Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances . . .”).

184. *See* JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 138–39 (1997) (defining rule of law as “a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority”).

185. This can be so even when the law regulating non-forum agents parallels that regulating forum agents. *See, e.g., United States v. Kelley*, 652 F.3d 915 (8th Cir. 2011) (refusing to find federal participation, resulting in Rule 41 not being applicable, when evidence in prior state case was excluded based on the court’s holding that a nearly identical state rule was not satisfied by state actors).

186. A prime example is *Hudson v. Michigan*, 547 U.S. 586 (2006), where the Court held that violation of the federal “knock and announce” requirement, 18 U.S.C. § 1801 (2012), is not subject to the exclusionary rule. Prior to *Hudson*, the Court opined that “the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry.” *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995). The coupling of the statutory knock and

Third, weak judicial oversight negatively affects federalism, throwing out of kilter basic state–federal allocations of sovereign authority.<sup>187</sup> Limits deliberately prescribed by sovereigns are not respected and enforced, but rather are avoided and nullified. As a consequence, governmental accountability<sup>188</sup> and transparency<sup>189</sup> are significantly undermined. As Professor Dan Richman has observed:

If, given the choice, a State’s citizenry would adopt the substance of a particular Federal rule, the ability of State enforcement authorities to freely circumvent the State rule will not offend the electorate, but will inappropriately permit State legislators to avoid facing the political costs of their enactments (or inertia). If, on the other hand, those enactments actually reflect the citizenry’s preferences, then State enforcement officials ought not have the freedom to nullify them.<sup>190</sup>

Laxity also has significant practical impact for federalism on the ground. When forum courts fail to subject their law enforcement agents to forum law, they deny citizens the protection afforded by the legal rule in

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announce requirement with Fourth Amendment reasonableness prompted the Eighth Circuit in a pre-*Hudson* case to conclude that it need not determine whether federal agents were a “significant part of [the] search” because the question had become “immaterial.” *United States v. Scroggins*, 361 F.3d 1075, 1080 (8th Cir. 2004) (internal quotation marks omitted); *see also id.* (stating that “[a]fter these cases” (*Wilson* and other decisions containing similar statements by the Court), “we know that a defendant need not show ‘federal involvement’ to invoke protections against unreasonable no-knock searches”). On the increasingly diminished scope of the exclusionary rule more generally, see Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI-KENT L. REV. 191, 200–07 (2010) (surveying the many limits imposed on the rule in recent years).

187. *See* *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.”).

188. *See* *New York v. United States*, 505 U.S. 144, 183 (1992) (noting that when governments combine their efforts to disguise respective responsibility, “federalism is hardly being advanced”); *cf.* *United States v. Belcher*, 762 F. Supp. 666, 670 (W.D. Va. 1991) (noting that the “sham” exception to the dual sovereignty principle in double jeopardy doctrine is “best understood and applied in a situation where the principles of federalism are blurred and ‘the power of the centralized government’ works to deprive a citizen of fundamental rights”).

189. *See* *Smith v. Doe*, 538 U.S. 84, 99 (2003) (stating that “[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused”); *see also* Jerome H. Skolnick, *On Democratic Policing*, IDEAS AM. POLICING, Aug. 1999, at 1, 4–5, available at <http://www.policefoundation.org/pdf/62.pdf> (emphasizing the important role of transparency in regulating police).

190. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 CRIMINAL JUSTICE: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 97 (Charles M. Fried ed., 2000).

question.<sup>191</sup> Perhaps less obvious, but no less important, a crucial federalism-enforcing limit is displaced, one that operates on the charging discretion of prosecutors. Historically, prosecutorial discretion on whether to “go” federal or state has gone unconstrained by constitutional limit,<sup>192</sup> and it is widely acknowledged that forum shopping occurs based on significant comparative advantages, which can afford major plea-negotiation leverage.<sup>193</sup> When courts fail to regulate the evasory tactics of front-line law enforcement agents, prosecutors are allowed to exercise their enormous filing discretion without fear that evidence might be excluded,<sup>194</sup> a key factor in prosecutorial decision making.<sup>195</sup>

Fourth and finally, judicial laxity allows for creation of an outsized law enforcement apparatus, freed from legal controls designed to limit the power and reach of its constituent parts. Since its origin in the mid-1800s, American policing has been notable for its consciously disaggregated

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191. See *Bond*, 131 S. Ct. at 2364 (noting that “[s]tates are not the sole intended beneficiaries of federalism” and that individuals have an interest in maintaining the protections afforded by federalism’s “constitutional balance”).

192. See, e.g., *United States v. Pforzheimer*, 826 F.2d 200, 204 (2d Cir. 1987) (“The initiation of a federal prosecution depends entirely on the discretion of the federal prosecutor.”).

193. Such advantages are most pronounced in the state–federal context. See Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1270 (2010). However, it is not unheard of for states to be more substantively demanding and punitive than the federal government, such as with gun purchase and possession laws. See Jay Buckley, Note, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957, 963–65 (2011).

194. Typically, the threat of exclusion emanates from violation of a substantively distinct legal norm, examples of which have been surveyed in the text. It is not unusual, however, for two jurisdictions to be subject to an ostensibly identical provision, but one that is subject to varied interpretation. For instance, while state courts must follow U.S. Supreme Court mandates on federal constitutional matters, they need not follow federal circuit court caselaw and can resolve open interpretive questions as they see fit. See, e.g., *State v. Burnett*, 755 N.E.2d 857, 860 (Ohio 2001) (noting that lower federal court decisions enjoy only “some persuasive weight” in state court determinations of federal constitutional law matters). When prosecutorial discretion is exercised in favor of federal court, a double evasion can in effect occur: a more generous state position on a federal constitutional provision is avoided, along with one based on state constitutional law. Evasion can also occur when a case is filed in state court and a more rights-protective position has been adopted by a federal circuit court.

195. See George C. Thomas III, *Judges Are Not Economists and Other Reasons to Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 51 (2001). Importantly, moreover, it is often the case that forum choice is not always counterbalanced by another government’s desire to retain jurisdiction over a criminal matter. As Professor Rachel Barkow has observed, “[l]ocal prosecutors are typically quite happy to have federal prosecutors take on local cases so that defendants receive longer sentences, and they often willingly use the prospect of federal prosecution to gain leverage in their own plea negotiations with defendants. Local police officers also often prefer the federal option for the same reasons.” Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 577 (2011) (footnotes omitted).

quality,<sup>196</sup> in theory permitting a greater degree of democratic accountability<sup>197</sup> and lessening the threat of concentrated excessive power.<sup>198</sup> In recent decades, however, law enforcement has become increasingly aggregated, driven in significant part by the practical advantages of intergovernmental cooperation,<sup>199</sup> affording resource and expertise benefits,<sup>200</sup> and significant data collection and storage advantages.<sup>201</sup> Indisputably as well, money has fueled aggregation, as federal “equitable sharing” policy regarding asset forfeiture has resulted in a dramatic increase in joint operations.<sup>202</sup> Laxity, in tandem with these developments, undercuts the prospect that law enforcement of “different governments,” as Madison would have it, will “controul [sic] each other.”<sup>203</sup>

196. The sheer number and varied forms of policing entities is testament to this fragmentation. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 tbl.1 (2011), available at <http://www.bjs.gov/content/pub/pdf/csleao8.pdf>.

197. See GEORGE E. BERKLEY, THE DEMOCRATIC POLICEMAN 21–35 (1969); John Edgar Hoover, *The Basis of Sound Law Enforcement*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40–42 (1954).

198. See JOHN D. BREWER ET AL., THE POLICE, PUBLIC ORDER AND THE STATE 115 (2d ed. 1996).

199. See *supra* notes 91–97 and accompanying text.

200. It is important to note that aggregation is also facilitated by laws explicitly allowing for intergovernmental investigative piggybacking. In the state context, see, for example, MD. CODE ANN., CRIM. PROC. § 2-104(b)(1)(ii) (West 2012) (granting federal officers the power to “execute arrest and search and seizure warrants issued under the laws of the State”). In the federal context, see, for example, 18 U.S.C. § 3105 (2012) (allowing state and local officers to act “in aid of” federal agents in execution of federal search warrants); *United States v. Garcia*, 496 F.3d 495, 508–09 (6th Cir. 2007) (specifying when a federal agent can “tag along” in execution of state search warrants). In addition, it has long been the case that governments can use evidence generated by one another. See *United States v. Lester*, 647 F.2d 869, 875 (8th Cir. 1981) (“Evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken.”).

201. See generally Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441 (2010–2011) (discussing “information fusion” centers that combine data collected by state, local, and federal authorities).

202. See JIMMY GURULÉ ET AL., THE LAW OF ASSET FORFEITURE § 2-2, at 33–38 (2d ed. 2004) (surveying effect of the policy on “domestic multijurisdictional cooperation”). As the authors note, “[e]quitable sharing gives each participating agency the opportunity to receive an equitable share of forfeited assets based on its level of participation in the investigation yielding the forfeited assets.” *Id.* at 37 n.36. In such operations, moreover, the financial pot is sweetened by the federal government paying for overtime, travel, training equipment, and other costs incurred by non-federal agents in an operation. *Id.* at 37 n.38. Finally, state and local police often prefer that a case “go federal” because doing so allows them to keep forfeiture proceeds, whereas state law might require that proceeds be directed to a non-law enforcement-related use, such as education. *Id.* § 13-1, at 404. For a discussion of the powerful influence the foregoing factors have on the strategic behavior of state and local police, see John L. Worrall & Tomislav V. Kovandzic, *Is Policing for Profit? Answers from Asset Forfeiture*, 7 CRIMINOLOGY & PUB. POL’Y 219 (2008).

203. See THE FEDERALIST NO. 51, *supra* note 1, at 350–51; see also *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state

They are permitted to seamlessly act as a unified force, in the process evading otherwise applicable legal controls.

#### IV. A PROPOSED RESPONSE

Although the approaches surveyed in Part II take shape in varied legal contexts, ranging from wiretaps to constitutional law, they each fall short in policing improper working arrangements and avoiding their negative consequences. The state of affairs is highlighted by the common tendency to require existence of an agency relationship between law enforcement actors of different governments, “agency *vel non*” as the New Jersey Supreme Court put it in *State v. Mollica*.<sup>204</sup> Such a standard, while perhaps appropriate in the context of evidence secured by private parties,<sup>205</sup> private police,<sup>206</sup> and foreign agents<sup>207</sup> is inapt in the context of actors who enjoy formal governmental authority. Moreover, if anything, agency speaks only to the *Gambino* branch of analysis,<sup>208</sup> not the “participation” concern of *Byars* and *Lustig*,<sup>209</sup> and ignores the existence of more subtle “understandings” among repeat-player domestic law enforcement agencies, acknowledged by the *Gambino* Court itself.<sup>210</sup>

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governments for the protection of individuals. . . . ‘[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”)

204. *State v. Mollica*, 554 A.2d 1315, 1326 (N.J. 1989); see also *supra* notes 117–28 and accompanying text (discussing *Mollica*).

205. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971); *Viridin v. State*, 780 A.2d 1024, 1030 (Del. 2001); *State v. Wall*, 910 A.2d 1253, 1257–58 (N.H. 2006); *Commonwealth v. Corley*, 491 A.2d 829, 831 (Pa. 1985). In this regard, it is interesting to note that the Texas Legislature in 1925 extended the exclusionary rule to evidence seized by police or any “other person,” including private citizens. *Miles v. State*, 241 S.W.3d 28, 35–36 (Tex. Crim. App. 2007). The Legislature was motivated, the Texas Court of Criminal Appeals has observed, by a desire to “avoid the prospect of implicitly encouraging or condoning vigilante action by [anti-liquor] citizen groups.” *Id.* at 35.

206. See, e.g., *United States v. Day*, 591 F.3d 679, 687 (4th Cir. 2010); *State v. Madsen*, 760 N.W.2d 370, 381 (S.D. 2009). On the test used more generally, which is informed by state action/public function analysis, see Cooper J. Strickland, Recent Development, *Regulation Without Agency: A Practical Response to Private Policing in United States v. Day*, 89 N.C. L. REV. 1338 (2011). As Elizabeth Joh has pointed out, private police also usually operate under a business-related incentive structure in executing their duties, justifying a distinct regulatory regime. See Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 118–23 (2004).

207. See, e.g., *United States v. Lee*, 723 F.3d 134, 139 (2d Cir. 2013); *United States v. Ferguson*, 508 F. Supp. 2d 1, 4–5 (D.D.C. 2007).

208. See *Gambino v. United States*, 275 U.S. 310, 317 (1927) (referring to federal prosecution as “in effect a ratification of the arrest, search and seizure made by the [state] troopers on behalf of the United States”).

209. See *supra* notes 46–50, 62–66 and accompanying text.

210. See *Gambino*, 275 U.S. at 316 (“It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such

At the same time, courts applying the participation standard really do so in name only. In contrast to *Lustig's* “hand in it” orientation, with its functionalist focus on the “actuality of a share . . . in the total enterprise of securing and selecting evidence,”<sup>211</sup> modern courts require proof of far more government involvement.<sup>212</sup> Again, while a more demanding approach might be justified elsewhere, such as when courts are asked to examine U.S.–foreign agent involvement,<sup>213</sup> it is ill-suited to the workaday context of domestic law enforcement,<sup>214</sup> with its greater opportunities and incentives for strategic manipulation.<sup>215</sup> Furthermore, while reason exists to be dubious of privileging the legal norms of foreign nations, which can be the upshot of a judicial finding of a U.S.–foreign agent “joint venture,”<sup>216</sup> it goes without

[functional] cooperation, as by the state officers' acting under direction of the federal officials.”).

211. *Lustig v. United States*, 338 U.S. 74, 78–79 (1949); *see also* *Elkins v. United States*, 364 U.S. 206, 236 (1960) (“[The] question has always been whether the offending search or seizure was conducted in any part by federal officials or in the interest of the Federal Government, or whether it was conducted solely by state officers acting exclusively for state purposes.”); *Euziere v. United States*, 266 F.2d 88, 90 (10th Cir. 1959) (“The test in all cases is did the federal authorities participate in any way in the search?”).

212. *See supra* Part II.

213. *See* *United States v. Angulo-Hurtado*, 165 F. Supp. 2d 1363, 1371 (N.D. Ga. 2001) (deeming it a “purposefully limited exception” with a “high threshold for a defendant to invoke it”); Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329, 376 (1994) (noting that the exception “has been construed extremely narrowly”); Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 VA. J. INT'L L. 821, 832–36 (2002) (surveying caselaw applying the “much more stringent standard”).

214. As Professor Wayne LaFave has observed:

While a “Federal officer in the United States has the authority to make searches without any assistance from state officers,” in a foreign country “the Federal officer ordinarily has no [such power]; he must depend on cooperation from the local authorities.” The fact that he has sought such assistance, therefore, should not be inherently suspect.

WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(h), at 453 (5th ed. 2012) (quoting W.J.A., Note, *The New International “Silver Platter” Doctrine: Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country*, 2 N.Y.U. J. INT'L L. & POL. 280, 312 (1969)); *see also id.* at 451 (positing that U.S. agent requests for assistance from foreign agents should not be viewed with a “jaundiced eye”). It is also worth noting that while domestic and foreign investigation analyses share a doctrinal grounding in *Byars*, foreign analysis long ago became more exacting, based at least in part on an undue reading of *Byars* and its progeny. *See* *Stonehill v. United States*, 405 F.2d 738, 748–49 (9th Cir. 1968) (Browning, J., dissenting) (noting that *Byars's* use of the phrase “joint operation” was “simply a description of the facts,” not a standard, a view later confirmed in *Lustig*).

215. Indeed, such advantages are often overtly acknowledged in government publications. *See, e.g.*, NAT'L INST. OF JUSTICE, *supra* note 26, at 3 (noting *inter alia* less onerous federal standards for obtaining search warrants and conducting wiretaps).

216. *See* *United States v. Ferguson*, 508 F. Supp. 2d 1, 5–7 (D.D.C. 2007) (stating that in assessing the constitutional reasonableness of a “joint venture” a reviewing court must assess whether the contested search satisfied foreign law, and if not, whether U.S. agents reasonably



saying that the norm-setting authority of domestic sovereigns is deserving of respect and recognition.

Equally inapt is the approach requiring explicit proof of subjective intent to evade, what the Illinois Supreme Court termed a “secret agreement.”<sup>217</sup> As with Fourth Amendment doctrine more generally,<sup>218</sup> the main difficulty of such a standard concerns the typical absence of overt manifestation of governmental intent.<sup>219</sup> It cannot be expected that agents will readily acknowledge evasive intent or design, and while such acknowledgement should not be discounted as an evidentiary matter, it should not be required.

Rather, consistent with *Byars* and *Lustig*, courts should focus on government participation and the functional existence of a working arrangement. In support of a threshold allegation, a defendant–movant might be able to point to existence of an intergovernmental “Memorandum of Understanding,”<sup>220</sup> being targeted by a joint task force,<sup>221</sup> or the deputization of agents.<sup>222</sup> Because such arrangements often are not committed to writing,<sup>223</sup> however, courts should also be amenable to considering informal intergovernmental practices,<sup>224</sup> as in the Prohibition Era.<sup>225</sup> At the same time, *Gambino*-like situations, when the evidence in

and in good faith relied on a representation by foreign officials that the law enforcement action was authorized by their law); *see also* Nathan & Man, *supra* note 213, at 836–37; Caitlin T. Street, Note, *Streaming the International Silver Platter Doctrine: Coordinating Transnational Law Enforcement in the Age of Global Terrorism and Technology*, 49 COLUM. J. TRANSNAT’L L. 411, 433–34 (2011).

217. *See supra* notes 154–60 and accompanying text.

218. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 812 (1996) (noting that the Court has “repeatedly” held that officer motive has no bearing on Fourth Amendment analysis); *Horton v. California*, 496 U.S. 128, 138 (1990) (eschewing “standards that depend upon the subjective state of mind of the officer”).

219. *See* Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1600–01 (2012) (surveying a variety of law enforcement contexts in which such proof is typically unavailable).

220. *See* RUSSELL-EINHORN ET AL., *supra* note 24, at apps. B, D.

221. *See, e.g.*, *State & Local Task Forces*, *supra* note 24 (“In 2013, the DEA State and Local Task Force Program managed 259 state and local task forces . . .”); *Violent Gang Task Forces*, FBI, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/gangs/violent-gangs-task-forces](http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/violent-gangs-task-forces) (last visited Sept. 15, 2013) (“The FBI’s Safe Streets and Gang Unit administers 160 Violent Gang Safe Streets Task Forces nationwide . . .”).

222. *See supra* note 110 and accompanying text.

223. *See* *United States v. Andersen*, 940 F.2d 593, 597 (10th Cir. 1991) (“Although we agree that the [state–federal] Strike Force would be well served by written policies addressing referral decisions, such guidelines are not constitutionally mandated.”).

224. *See, e.g.*, *Kamisar*, *supra* note 21, at 1188 (noting common lack “of any formal agreement . . . . It is a kind of relationship that cannot be statistically measured and it is not advertised; but it is said to be accorded to Secret Service agents everywhere whenever requested” (quoting ARTHUR C. MILLSPAUGH, *CRIME CONTROL BY THE NATIONAL GOVERNMENT* 118–19 (1937))); *see also* Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 159 (1948) (“Routine acceptance and use of tainted evidence secured by another agency encourages illegal search to the same extent as would a prior agreement.”).

225. *See supra* notes 33–55 and accompanying text.

question is of interest only to forum agents, although rare as a practical matter,<sup>226</sup> should also trigger concern.

It will often be the case, however, that details will not be readily available to a defendant–movant. While forum law enforcement agents might at times freely acknowledge participation, or witnesses might provide helpful information, critically important factual matters often will remain obscured.

Such obscurity is made all the more likely as a result of at least two modern realities. The first is that advances in technology have radically enhanced opportunities for less visible involvement,<sup>227</sup> certainly relative to the era of *Byars* and *Lustig*, when it was typically manifested by officers' physical presence.<sup>228</sup> The second concerns federal asset forfeiture law, which as noted earlier figures centrally in contemporary law enforcement operations.<sup>229</sup> Federal “equitable sharing” policy in particular gives state and local agents strong incentive to play up their role in an operation, as their share of proceeds is directly tied to their “degree of direct participation.”<sup>230</sup> Meanwhile, federal agents have a natural institutional incentive to downplay their participation to ensure admission of evidence.

As a result, much like in the context of similar areas involving collusion in the absence of direct proof, such as price-fixing,<sup>231</sup> the proof regime should allow for consideration of circumstantial evidence.<sup>232</sup> If a defendant–

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226. Such as might occur with the federal government's criminalization of marijuana in the face of state decriminalization efforts. See Kate Linthicum & Andrew Blankstein, *U.S. Raids L.A. Marijuana Shops*, L.A. TIMES (Sept. 26, 2012), <http://articles.latimes.com/2012/sep/26/local/la-me-medical-marijuana-20120926>. On the phenomenon of the federal government criminalizing conduct not the subject of state prohibition more generally, see Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541 (2002).

227. See, e.g., Susan W. Brenner, *Law, Dissonance, and Remote Computer Searches*, 14 N.C. J. L. & TECH. 43 (2012) (discussing increasing frequency of “remote” computer searches by governments across physical jurisdictional boundaries).

228. See *supra* notes 46–50, 62–66 and accompanying text.

229. See *supra* note 202 and accompanying text.

230. See 21 U.S.C. § 881(e)(3)(A) (2006).

231. Under the Sherman Act, the plaintiff must allege the existence of a “contract, combination . . . or conspiracy” that unreasonably restrains trade. 15 U.S.C. § 1 (2012). In such situations, plaintiffs must resort to circumstantial evidence, resulting in common dismissal of claims, as illustrated by the Supreme Court's *Twombly* decision. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (dismissing on Rule 12(b)(6) grounds an antitrust complaint where plaintiff alleged “parallel conduct and a bare assertion of conspiracy”). *Twombly*'s heightened pleading standard has prompted criticism for placing an undue burden on plaintiffs “where the needed supporting facts lie within the exclusive possession of the defendants.” A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 481 (2008); see also *Twombly*, 550 U.S. at 586–87 (Stevens, J., dissenting) (noting difficulty of proving violation where “the proof is largely in the hands of the alleged conspirators” (internal quotation marks omitted)).

232. One possible route, helpfully suggested by Professor Scott Sundby, would be to allow triggering of a rebuttable presumption akin to that used to determine whether a state agent “deliberately elicited” information from a charged defendant in violation of the Sixth

movant makes a showing by a preponderance of evidence of a working arrangement,<sup>233</sup> the burden should shift to the prosecution to rebut the claim,<sup>234</sup> based on particular evidence, not mere denials.<sup>235</sup> If the government is unsuccessful, the reviewing court should apply the more demanding rule or standard that the prosecuting government seeks to avoid.

When assessing the evidentiary record, courts should exhibit the kind of sensitivity evidenced in *Byars* and its progeny, seasoned by an awareness of the far more technologically sophisticated means by which working arrangements can occur today.<sup>236</sup> In the late 1950s, Professor Yale Kamisar published interview findings highlighting the reluctance of state and federal agents to judicially “reconstruct a ‘silver platter’ raid.”<sup>237</sup> No reason exists to think the incentive structure is any different today, and courts must remain cognizant of this reality.

Ultimately, it must be acknowledged, the success of any institutional fix very much depends on the broader context in which oversight will occur. Suffice it to say, judicial rulings seen as “pro-defendant” can prove publicly unpopular.<sup>238</sup> Even so, it bears emphasis that an affirmative judicial finding

Amendment. See *Maine v. Moulton*, 474 U.S. 159, 176 n.12 (1985) (noting that “direct proof” of government intent to circumvent the counsel right “will seldom be available to the accused” and prescribing proof standard that government “must have known” that its agent was likely to obtain incriminating statements from the accused”). Here, the “likely to obtain” standard could apply based on an inquiry along the lines of: “Were the circumstances such that a reasonable agent would have realized at the outset of the operation that it was likely to yield evidence serving as a basis for prosecution in a court within this jurisdiction?”

233. Cf. *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978) (holding that a defendant is entitled to an evidentiary hearing if, based on a preliminary showing, preponderance of evidence exists that a search warrant affidavit contains a knowingly and intentionally false statement by officer); *Gonzalez v. Wong*, 667 F.3d 965, 992 (9th Cir. 2011) (discussing the government’s discovery obligation in response to an allegation that an individual acted as a government agent in the Sixth Amendment *Messiah* context).

234. Such a burden shifting approach is used in any number of similar situations, including “*Kastigar*” hearings when the government must establish that evidence it seeks to use is independent of any immunized statements provided by a defendant. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995). Burden shifting also occurs in the context of alleged “sham” prosecutions in the double jeopardy context. See *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996) (noting shift of burden to government to show “that one sovereign did not orchestrate both prosecutions, or, put another way, that one sovereign was not a tool of the other”).

235. Such evidence could take the form of live testimony or affidavits by investigating agents and/or supervisors. See *United States v. Montoya*, 45 F.3d 1286, 1297–98 (9th Cir. 1995). Details concerning sensitive intergovernmental workings might require in camera review by the court, as is the custom with confidential informants, the verity and accuracy of whom the court must establish on its own. *Id.*

236. See *supra* notes 41–90 and accompanying text.

237. Kamisar, *supra* note 21, at 1179–80.

238. Among the most compelling examples is that involving U.S. District Judge Harold Baer who prompted a firestorm of criticism in the late 1990s when he suppressed evidence in a New York City drug case. See Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 32 (2010).

in this context differs from that in a typical suppression hearing. Not only will it often be the case that another government can prosecute a defendant,<sup>239</sup> but the policy goal served should be seen as beyond reproach: forum government agents should not be permitted to evade and neutralize limits on their investigative authority.<sup>240</sup>

The foregoing obviously envisions a continued role for courts as the chief bulwark against intergovernmental investigative illegality. Reason for this lies not so much in the judiciary's superior institutional competency in principle. Rather, it is because, compared to the alternatives, courts offer the most realistic promise of addressing the problem.

Guidelines, self-imposed by law enforcement, might be one option. As courts have signaled on occasion, a best practices-oriented agency could adopt a policy specifying *ab initio* that any intergovernmental investigative effort adhere to the more demanding legal norm of one of the governments.<sup>241</sup> Adoption of such a policy, in addition to providing clarifying guidance to agents, might have appeal because it would allow agencies to avoid judicial scrutiny of their practices.<sup>242</sup> The likelihood of such a policy being adopted, however, is significantly undercut by the strong antipathy law enforcement agencies are known to have for guidelines that limit or condition their investigative prerogative.<sup>243</sup>

Alternatively, prosecutorial rule-making might hold promise. The federal "Petite Policy," employed in the Double Jeopardy-successive prosecutions context,<sup>244</sup> represents perhaps the best-known example of prosecutorial self-regulation. However, prosecutors no less than police bridle against guidelines,<sup>245</sup> and the effectiveness of prosecutor guidelines

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239. See, e.g., *United States v. Navarro*, 429 F.2d 928, 929 (5th Cir. 1970) (noting that defendant, after prevailing in federal court on the basis of federal agents not satisfying Rule 41, was later prosecuted in Texas state court).

240. See *United States v. Searp*, 586 F.2d 1117, 1121 (6th Cir. 1978) ("While it is important not to stifle cooperation between federal and state officers, we think it clear that federal officers, investigating a federal crime, must comply with the federal rules governing their conduct.").

241. See, e.g., *State v. Minter*, 561 A.2d 570, 578 (N.J. 1989) (suggesting in the context of wiretap investigation that "a state officer, who anticipate[s] working with federal agents, obtain[] prior approval for the wiretap from the Attorney General or county prosecutor," as required by state law).

242. I am indebted to Professor Mary Fan for this suggestion.

243. See generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 661-62 (1997).

244. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (2009), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/2mcrm.htm#9-2.031](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031). The policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)" unless the prior prosecution has left a "substantial federal interest . . . demonstrably unvindicated." *Id.*

245. See generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 912 (2009); Ronald F. Wright, *Sentencing*

has been consistently questioned.<sup>246</sup> Moreover, it is one thing for prosecutors to self-regulate in the comparatively rare instance of successive prosecution.<sup>247</sup> It is quite another to expect them to embrace a rule that removes a fundamental litigation advantage and regulates their ongoing relationship with law enforcement agents (including those of other governments).

Finally, little prospect exists for a legislative solution. As a formal matter, legislative effort to regulate and condition investigations could raise separation-of-powers concerns, amounting to meddling with what Professor Dan Richman has referred to as the “explicit or tacit negotiation among enforcement agencies.”<sup>248</sup> Of greater practical importance are the political realities militating against legislative action. Even though regulation would be susceptible of positive public portrayal, as noted earlier,<sup>249</sup> the public choice literature underscores why any legislated limit on law enforcement wherewithal is unlikely to come to pass.<sup>250</sup> Furthermore, as Professor William Stuntz famously observed, legislators are natural allies of prosecutors,<sup>251</sup> and they are generally disinclined to take the lead on initiatives that limit prosecutorial authority.

#### CONCLUSION

As a consequence of the “metaphysics” of the nation’s decentralized governmental structure,<sup>252</sup> it has long been accepted that lines of responsibility must be drawn when assessing the legality of law enforcement investigative practices. While the imperative receded in visibility in 1960 with *Elkins* and the demise of the Fourth Amendment’s “silver platter” doctrine, it remains the case today that agents of one sovereign, when acting independently of those of another, can hand over evidence on a silver platter obtained in contravention of non-federal constitutional law. While modern-day silver platter doctrine has been the subject of considerable

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*Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1019–22 (2005).

246. See Erik Luna, *Rage Against the Machine: A Reply to Professors Bierschbach and Bibas*, 97 MINN. L. REV. 2245, 2246–47 (2013) (noting structural and substantive reasons for the inefficacy of prosecutorial guidelines).

247. See Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 77 (1996) (noting that there are roughly 150 dual prosecutions annually). Moreover, it appears that the Petite Policy itself is rarely invoked. Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 179–80 (2004).

248. Richman, *supra* note 190, at 92.

249. See *supra* notes 241–43 and accompanying text.

250. See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2068 (2006) (surveying literature).

251. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–57 (2001).

252. Kamisar, *supra* note 21, at 1180.

scholarly attention,<sup>253</sup> this Essay has shifted focus and addressed the sole caveat attaching to the doctrine's application: government agents who do not act alone but rather work with agents of another sovereign, resulting in neutralization of otherwise applicable legal restrictions.

In the past, with the U.S. Supreme Court in the lead, courts were prone to critically examine intergovernmental investigative efforts, on vigilant guard against "circuitous and indirect methods" by law enforcement.<sup>254</sup> As late as 1968, the Fifth Circuit averred that it did not want to discourage cooperation among law enforcement but warned that "such cooperation should comply with the rules."<sup>255</sup> Judicial vigilance, however, has long since waned, a problematic development assuming heightened importance amid the ever-expanding growth and sophistication of intergovernmental investigative activity. This Essay has highlighted the need for increased judicial oversight and sought to pick up where mid-twentieth century courts left off, providing a reinvigorated framework to combat "working arrangements" and the evasion of legal norms that they permit.

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253. See *supra* note 16 and accompanying text.

254. *Byars v. United States*, 273 U.S. 28, 32 (1927).

255. *Navarro v. United States*, 400 F.2d 315, 319 n.6 (5th Cir. 1968), *overruled by* *United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990).