Cornell Law Review

Volume 62
Issue 2 *January 1977*

Article 6

Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power

Earl H. Doppelt

John A. Karaczynski

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Earl H. Doppelt and John A. Karaczynski, *Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power*, 62 Cornell L. Rev. 364 (1977)
Available at: http://scholarship.law.cornell.edu/clr/vol62/iss2/6

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

STANDARDS FOR THE SUPPRESSION OF EVIDENCE UNDER THE SUPREME COURT'S SUPERVISORY POWER

The sole justification for suppressing evidence in a criminal prosecution is that the exclusion of trustworthy but illegally obtained evidence will deter future illegal police activity.[1] Although considerable dispute rages over the feasibility of deterrence,[2] there

---

[1] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) ("[t]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); Kaufman v. United States, 394 U.S. 217, 229 (1969); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966). *See also* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 671 (1970).

Judge Friendly has observed that

> [a] defendant is allowed to prevent the reception of evidence proving his guilt not primarily to vindicate his right of privacy, since the benefit received is wholly disproportionate to the wrong suffered, but so that citizens generally, in the words of the amendment, may be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."

Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965). In his dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971), Chief Justice Burger discussed the various theories that have been advanced to justify the suppression sanction and concluded:

> It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the exclusionary rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.

Id. at 415.

[2] Professor LaFave has pointed out that three requirements are necessary in order to deter unlawful police behavior through an exclusionary rule:

> (a) that the requirements of the law on arrest, search and seizure, and in-custody investigation be developed in some detail and in a manner sufficiently responsive to both the practical needs of enforcement and the individual right of privacy; (b) that these requirements be fashioned in a manner understandable by the front-line lower-echelon police officer and that they be effectively communicated to him; and (c) that the police desire to obtain convictions be sufficiently great to induce them to comply with these requirements.

LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 395-96 (1965) (footnotes omitted).

Although LaFave has explored the enormous problems involved in training the police to respond to subtle legal rules, without damning the sanction entirely (LaFave, *id.—Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 593-609 (1965)), other commentators have not been so restrained. In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), in which the Court created a cause of action where federal

is unanimous agreement that to accomplish this goal, courts must at least propound clear and consistent standards to guide the officer in the field.[3] For if law enforcement officials cannot determine beforehand the pertinent standard of conduct, the sanction forfeits its only defense.

When neither the federal constitution nor act of congress mandates the remedy of suppression, a federal court must consider several factors in deciding whether to admit tainted evidence. This Note will discuss the proper exercise of federal supervisory power where evidence has been obtained in violation of state law and a federal court must rule upon a motion to suppress.

---

agents violate the fourth amendment, Chief Justice Burger mounted an all-out attack on the exclusionary rule. Writing in dissent, the Chief Justice argued persuasively that the rule is incapable of attaining its deterrent objective, and that the price of the rule—"the release of countless guilty criminals"—is far too great for society to pay. *Id.* at 416. Instead, the Chief Justice urged Congress to take the lead and provide a remedy against the government for persons whose fourth amendment rights have been violated. *Id.* at 422-24.

There has also been substantial opinion in favor of the rule. For instance, in Wolf v. Colorado, 338 U.S. 25 (1949), Justice Murphy argued in dissent that "[i]f proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in-service courses provided the police in states which follow the federal rule." *Id.* at 44. *See also* Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145-64 (1959).

The empirical evidence does not resolve the issue. *See* United States v. Janis, 96 S. Ct. 3021, 3030-32 (1976). The most comprehensive study undertaken, that of Professor Oaks (*see* note 1 *supra*), has led Chief Justice Burger to conclude that "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials." 403 U.S. at 416. Professor Amsterdam, however, has argued that the survey indicates "nothing more than that the evidence so far gathered is a standoff, and that the hopes of gathering better evidence in the future are very slim." Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 475 n.593 (1974). For now, each observer's view may well depend, as Professor Dworkin has put it, on where he puts the burden of proof. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973).

[3] Clear and precise standards are necessary because "[i]t is ludicrous . . . to speak of meaningful deterrence when there is no preexisting ascertainable standard of conduct." Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 552 (1964). Deterrence presupposes the existence of norms that officers can readily perceive and react to; if these norms are vague, or the product of sophisticated and intricate case-by-case interest balancing by the courts, then the end result will be suppression without security. *See* LaFave, *Warrantless Searchs and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULL. 9, 30 n.76 (1972). Moreover, society can tolerate an exclusionary rule only "if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142. And as Justice Clark has emphatically stated: "It is the duty of [the Supreme] Court to lay down those rules with such clarity and understanding that [an officer] may be able to follow them." Chapman v. United States, 365 U.S. 610, 622 (1961) (dissenting opinion).

At present, this area of the law is thoroughly confused; consequently, the rationale behind the exclusionary rule has disappeared. The Supreme Court must accept primary responsibility for this situation. In two major decisions, *United States v. Di Re* (1948)[4] and *Elkins v. United States* (1960),[5] the Court established standards for suppression that differ according to the meaningless distinction between the act of arrest and that of search and seizure. This Note will argue that a more rational scheme would distinguish between state and federal law enforcement activity, and that by making this distinction the goals of deterrence, federalism, and effective crime control can best be achieved.

I

SOURCES OF THE FEDERAL COURTS' POWER TO SUPPRESS

A. *Suppression Under the Federal Constitution*

Historically, the fourth amendment restricted police behavior without excluding evidence gathered in an unreasonable search and seizure.[6] In *Weeks v. United States* (1914),[7] the Supreme Court rejected this common-law position and ruled that evidence obtained by federal agents in violation of the fourth amendment was inadmissible in a federal criminal prosecution.[8] Simultaneously, the

---

[4] 332 U.S. 581 (1948).

[5] 364 U.S. 206 (1960).

[6] *See, e.g.*, Adams v. New York, 192 U.S. 585 (1904); Chastang v. State, 83 Ala. 29, 3 So. 304 (1887); People v. Alden, 113 Cal. 264, 45 P. 327 (1896); Gindrat v. People, 138 Ill. 103, 27 N.E. 1085 (1891); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841). Courts in England and the United States were reluctant to suppress evidence of probative value. Instead, common-law jurists suggested a civil penalty against officers responsible for an unreasonable search and seizure. *E.g.*, Entick v. Carrington, 95 Eng. Rep. 807 (1765).

[7] 232 U.S. 383 (1914).

[8] *Id.* at 398. Prior to *Weeks*, the Supreme Court had utilized the fifth amendment, in conjunction with the fourth amendment, as grounds for excluding evidence. Boyd v. United States, 116 U.S. 616 (1886). *Boyd* involved an information filed by the United States against 35 cases of plate glass, alleging their fraudulent importation. At trial, the United States Attorney offered into evidence an order made by a district judge pursuant to a federal statute (Act of June 22, 1874, ch. 391, § 5, 18 Stat. 187), requiring Boyd to produce the invoice for the shipment of glass. Boyd produced the invoice, but objected to the constitutionality of the order. The Supreme Court excluded the evidence, finding the statute "obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth." 116 U.S. at 632. Noting the "intimate relation between the two amendments" (*id.* at 633), the Court stated:

> [W]e are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amend-

Court ruled that the fourth amendment did not preclude federal prosecutors from introducing evidence seized by *state* agents in violation of the federal constitution. Thus, in *Weeks* the Court mandated a suppression sanction of constitutional dimension and gave birth to the "Silver Platter" doctrine.[9]

In 1959, the Supreme Court in *Wolf v. Colorado*[10] made fourth amendment guidelines applicable to state police behavior, but left the individual states free to experiment with modes of enforce-

---

> ment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.

Id. at 634-35. Courts have regarded the *Boyd* decision as the starting point in search and seizure cases.

[9] This phrase, the "Silver Platter" doctrine, was coined in Lustig v. United States, 338 U.S. 74, 78-79 (1949), and described the practice approved by the dual holdings of *Weeks*. The essence of the doctrine was the different treatment accorded evidence seized unconstitutionally by federal, as opposed to state, agents. Unconstitutional federal activity resulted in suppression. *E.g.*, United States v. Jeffers, 342 U.S. 48 (1951); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Unconstitutional state activity with no federal involvement furnished federal prosecutors with potent evidence. *E.g.*, Byars v. United States, 273 U.S. 28, 33 (1927) (dictum); Shelton v. United States, 169 F.2d 665 (D.C. Cir.), *cert. denied*, 335 U.S. 834 (1948); *In re* Milburne, 77 F.2d 310 (2d Cir. 1935).

Difficulties arose when state officers performed searches and seizures in aid of federal law enforcement, for this forced the federal courts to undertake time-consuming scrutiny into the permissible quantum of federal participation in state law enforcement ventures. In Gambino v. United States, 275 U.S. 310 (1927), where state troopers found liquor in a car during an unlawful search and seizure, the Court held the evidence inadmissible in the ensuing federal prosecution, since the troopers had acted "solely on behalf of the United States." *Id.* at 316. *Accord*, United States v. Butler, 156 F.2d 897 (10th Cir. 1946). This rationale was expanded in Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937), where the court stated that conducting a search and seizure "solely on behalf of the United States" was not the determining factor in *Gambino* (*id.* at 308); rather, a fourth amendment violation occurred when there was "general co-operation between state and federal officers and where the federal officers in fact adopted the prosecution which the state officers had begun as a result of their search." *Id.*

In addition, the federal judiciary was faced with a reverse "Silver Platter" problem. Although *Weeks* clearly imposed an exclusionary restriction on federal activity vis-a-vis federal criminal prosecutions, federal activity was not circumscribed vis-a-vis state courts. States that rejected the exclusionary rule of *Weeks* as to evidence unlawfully seized by state officials (*e.g.*, State v. Chin Gim, 47 Nev. 431, 224 P. 798 (1924); Commonwealth v. Dabbierio, 290 Pa. 174, 138 A. 679 (1927)), also rejected it as to evidence unlawfully seized by federal officials (*e.g.*, Terrano v. State, 59 Nev. 247, 91 P.2d 67 (1939), Commonwealth v. Colpo, 98 Pa. Super. Ct. 460 (per curiam), *cert. denied*, 282 U.S. 863 (1930)). States that applied an exclusionary rule to evidence unconstitutionally seized by state officials split as to evidence unconstitutionally seized by federal officials. Some sported their own version of the "Silver Platter" doctrine. *E.g.*, State *ex rel.* Kuhr v. District Court, 82 Mont. 515, 268 P. 501 (1928). Others did not. *E.g.*, State v. Rebasti, 306 Mo. 336, 267 S.W. 858 (1924).

In Elkins v. United States, 364 U.S. 206 (1960), the Supreme Court, exercising its supervisory power over the federal courts, overruled the "Silver Platter" doctrine. *See* notes 67-84 and accompanying text *infra*.

[10] 338 U.S. 25 (1949).

ment. Despite subjecting state police to the same constitutional standards as those governing federal agents, the Court did not require state courts to exclude unconstitutionally obtained evidence nor did it prohibit federal prosecutors from introducing evidence obtained unconstitutionally by state agents.

Mapp v. Ohio,[11] decided by the Warren Court in 1961, marked the culmination of judicial acceptance of the exclusionary rule. Dismayed by the lack of compliance with constitutional safeguards and the failure of alternative sanctions,[12] the Supreme Court mandated suppression as the primary constitutional remedy in federal and state courts.[13]

Recent Supreme Court cases, however, evidence a growing discontent with the exclusionary rule and signal a major challenge to its constitutional vitality.[14] In *United States v. Calandra* (1974),[15] the Court rejected the argument that a witness can avoid federal grand jury interrogation on the ground that the questions derive from information procured in an unconstitutional search and seizure. The Court's opinion stressed that the suppression sanction is a remedial deterrent, rather than a personal constitutional right.[16] If this characterization prevails, states may once again be given latitude to devise alternative deterrents to police misconduct.[17]

B. *Suppression Based on Federal Statutes*

Section 605 of the Communications Act of 1934[18] was the initial congressional contribution to the exclusionary rule. Prior to the Act's passage, wiretap evidence had been admissible in federal court under the logic of *Olmstead v. United States*.[19] In *Olmstead*, decided in 1928, the Court held that wiretaps were not constitutionally prohibited since a trespassory invasion and a tangible tak-

---

[11] 367 U.S. 643 (1961).

[12] *See id.* at 651-52.

[13] *Id.* at 655.

[14] *Compare* the majority opinion of Justice Brennan in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389-98 (1971), *with* the dissenting opinion of Chief Justice Burger, *id.* at 411-27.

[15] 414 U.S. 338 (1974).

[16] *Id.* at 348.

[17] *See* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-8 (1975).

[18] Pub. L. No. 73-416, § 605, 48 Stat. 1104 provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

[19] 277 U.S. 438 (1928).

ing were essential components of any unconstitutional search and seizure.[20] Thus, even though a wiretap might have been illegal under state law, exclusion was not mandated in federal court since the suppression sanction, as established in *Weeks*, related solely to constitutional violations.

Regardless of original legislative intentions,[21] by 1939 the federal judiciary had interpreted the Communications Act to support a multifaceted exclusionary rule, applicable to evidence obtained from interstate[22] and intrastate[23] telephone communications. In addition, the Act was interpreted to prohibit the use of evidence obtained in investigations prompted by illegally intercepted communications.[24]

In *Benanti v. United States*,[25] decided in 1957, the Court applied this legislative suppression sanction to state wiretap investigations. As a result, federal prosecutors were prohibited from introducing illegally obtained evidence, whether state or federal agents initiated the surveillance.[26]

---

[20] *Id.* at 465-66.

[21] The legislative history of the Federal Communications Act of 1934 does not indicate that Congress intended to enact an exclusionary rule. In fact, *Olmstead*, which might have aroused congressional concern about the problem of electronic surveillance, was not mentioned in the discussion of the proposed Act. *See* 78 CONG. REC. 4138-39, 8822-37, 8842-54, 10,304-32 (1934). The accompanying reports were equally silent on the electronic surveillance problem. *See* S. REP. No. 781, 73d. Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934). *See also* Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 172-74 (1952).

[22] Nardone v. United States, 302 U.S. 379 (1937).

[23] Weiss v. United States, 308 U.S. 321 (1939).

[24] Nardone v. United States, 308 U.S. 338 (1939).

Although the Communications Act did have a wide scope, it was not all-inclusive. The Department of Justice, placing heavy emphasis on the conjunction "and" in § 605 (*see* note 18 *supra*), argued that the act permitted interception provided no disclosure was made outside the department. *See* Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 197-200 (1954).

The Supreme Court, in Rathbun v. United States, 355 U.S. 107 (1957), held that monitoring a conversation on an extension telephone, provided one party gave his consent, was not a prohibited "interception." Moreover, state courts blunted the impact of the Communications Act by holding it inapplicable to state initiated wiretapping. *E.g.*, Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E.2d 854 (1946).

[25] 355 U.S. 96 (1957).

[26] From the time *Benanti* was decided until the "Silver Platter" doctrine was overruled in Elkins v. United States, 364 U.S. 206 (1960) (*see* notes 67-84 and accompanying text *infra*), the following anomaly existed: evidence obtained by state agents in violation of a federal statute was inadmissible in federal court, while evidence obtained by state agents in violation of constitutional standards was admissible in the same federal court. As a further permutation, in Schwartz v. Texas, 344 U.S. 199 (1952), the Court ruled that the Communications Act did not prohibit the introduction in state court of evidence obtained through electronic surveillance. And even after *Mapp* was decided in 1961, announcing an

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[27] is the latest legislative effort to control electronic surveillance. Although Title III authorizes tactical wiretapping pursuant to judicial authorization, it also requires the suppression of illegally obtained evidence.[28]

C. *Suppression Based on the Supervisory Power of the Supreme Court*

From the beginning of its history, the Supreme Court has formulated evidentiary rules to be applied in federal criminal prosecutions.[29] Since *McNabb v. United States*,[30] decided in 1943, this supervisory power has provided a third basis for a federal exclusionary rule.

In *McNabb* federal agents conducted a prolonged custodial interrogation of five murder suspects in violation of a federal statute that required arresting officers to take any person charged with a crime or offense to the nearest judicial officer.[31] Incriminating statements made during the interrogation were used to convict three of the defendants of second degree murder. Although the statute did not expressly require suppression, the *McNabb* Court decided that use of the incriminating statements in federal court would frustrate the policy behind the statute.[32]

The roots of the *McNabb* decision can be traced back to Justice Brandeis' classic dissent in *Olmstead*.[33] In that dissent, Brandeis argued that the successful conviction of criminals could not justify

---

exclusionary rule premised on constitutional requirements (*see* notes 11-13 and accompanying text *supra*), illegally obtained wiretap evidence continued to be admissible in state courts. However, in Lee v. Florida, 392 U.S. 378 (1968), decided prior to the passage of Title III, the Court finally overruled *Schwartz*. In view of the Communications Act's express language prohibiting divulgence, the Court held that recorded conversations, illegally intercepted by state agents, were no longer admissible in state courts.

[27] 18 U.S.C. §§ 2510-20 (1970 & Supp. V 1975).

[28] Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 (1970).

[29] *See* McNabb v. United States, 318 U.S. 332, 341 (1943); C. WRIGHT, 2 FEDERAL PRACTICE AND PROCEDURE § 402, at 62 (1969).

[30] 318 U.S. 332 (1943).

[31] Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. 416 (repealed by Act of June 25, 1948, ch. 646, § 39, 62 Stat. 994.

[32] 318 U.S. at 345.

[33] 277 U.S. at 471. For a comparison of the relevant language of the two opinions, see Kamisar, *supra* note 2, at 1133-34 n.180.

official lawlessness. In *McNabb*, Justice Frankfurter similarly refused to accept the notion that the end justifies the means. By sanctioning a "flagrant disregard of the procedure which Congress had commanded," the courts would become "accomplices in willful disobedience of law."[34]

Anderson v. United States,[35] decided the same day as *McNabb*, further developed supervisory suppression. Although the case involved state, rather than federal, agents who illegally detained and interrogated the defendants in violation of state law, the Court, relying on the reasoning of *McNabb* and pointing out the close cooperation between state and federal agents, reversed the convictions.[36]

In addition to framing a remedy for statutory violations, the Supreme Court has utilized its supervisory power to exclude evidence obtained in violation of the Federal Rules of Criminal Procedure,[37] and to enjoin federal agents from transmitting unconstitutionally seized evidence to state authorities or testifying with respect to that evidence in state courts.[38] As the Court announced in *Rea v. United States* (1956),[39] federal guaranties of individual privacy are compromised if federal agents can ignore those guaranties and "use the fruits of [their] unlawful act either in federal or state proceedings."[40]

Both Justice Brandeis in *Olmstead* and Justice Frankfurter in *McNabb* premised the exclusion of evidence on the imperative of judicial integrity. Their opinions demonstrated a greater concern

---

[34] 318 U.S. at 345.

[35] 318 U.S. 350 (1943).

[36] The detention of the petitioners by state officers in *Anderson* violated a Tennessee statute similar to the federal statute violated in *McNabb*: "No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate." *Quoted in id.* at 355.

Federal officers had not arrested the defendants until after they had confessed their guilt during the illegal state detention. Although the federal officers were not formally guilty of illegal conduct, the Court found that "[t]here was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record." *Id.* at 356. This investigation into the extent of federal involvement in a state detention was similar to the Court's treatment of federal-state searches and seizures vis-a-vis the fourth amendment. *See* note 9 *supra*.

[37] *E.g.*, Mallory v. United States, 354 U.S. 449 (1957). *See also* United States v. Hanson, 469 F.2d 1375 (5th Cir. 1972); Navarro v. United States, 400 F.2d 315 (5th Cir. 1968).

[38] Rea v. United States, 350 U.S. 214 (1956).

[39] *Id.*

[40] *Id.* at 218. Subsequent cases, however, have confined *Rea* to its facts. *See* Cleary v. Bolger, 371 U.S. 392 (1963); Wilson v. Schnettler, 365 U.S. 381 (1961); United States v. Navarro, 429 F.2d 928 (5th Cir. 1970); Comment, *The Federal Rules of Criminal Procedure and Joint Searches*, 28 WASH. & LEE L. REV. 501 (1971).

with preventing the debasement of the judicial process, than with deterring police officers from violating the constitution.[41] Yet even their eloquent voices cannot refute the argument that deterrence is the only legitimate justification for suppression.[42] Moreover, the possession of supervisory power requires the Court to exercise it with responsibility and discretion, and the mere invocation of majesterial phrases does not meet this standard.[43] If "[t]he criminal is to go free because the constable has blundered,"[44] the Court must have reason to believe that by its decision it reduces the possibility of the constable blundering again. Nothing less can be accepted.

II

Supervisory Suppression for Warrantless Arrests

The *McNabb* decision demonstrated the expansive scope of the

---

[41] In *McNabb*, Justice Frankfurter actually stated:

> We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here.

318 U.S. at 347. *See generally* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L.J. 1 (1958). The authors assert that "[b]y formulating rules such as that found in *McNabb v. United States*, the Court is not trying to punish the executive department for illegality. It is simply avoiding contamination by plunging into the cesspool itself." *Id.* at 33. Borrowing this handy metaphor, one may question whether preserving the Court's hygiene is worth the cost to society of suppressing probative evidence of criminal guilt. If the decision in *McNabb* is to be commended, there must be more to it than judicial cleanliness. Professor Kamisar has supplied a possible justification by asserting that the foremost consideration underlying *McNabb* was the "desire to check resort by officers to improper measures during pre-commitment detention and to avoid the difficulties of proof over what occurred behind the closed doors." Kamisar, *supra* note 2, at 1133 n.178.

[42] The conclusion that deterrence provides the true impetus for the exclusionary rule suggests a re-examination of *Anderson*. Because the illegality there had been committed by state officers, it might be questioned whether the refusal of the federal court to admit the tainted evidence could sufficiently shape local police behavior to justify suppression. However, the Court found that Tennessee exacted "scrupulous observance of [the] prohibition by its law officers" (318 U.S. at 355), and that there was a "working arrangement" between state and federal officers (*id.* at 356). Hence, exclusion of the illegally obtained confessions did further the policy of deterrence.

[43]

> Whatever may be said for the courts "preserving the judicial process from contamination" or against the government playing "an ignoble part" or about it being the "omnipresent teacher," I, for one, would hate to have to justify throwing out homicide and narcotic and labor racket cases if I did not believe that such action significantly affected police attitudes and practices.

Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. Crim. L.C. & P.S. 171, 179 (1962) (footnotes omitted).

[44] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (Cardozo, J.), *cert. denied*, 270 U.S. 657 (1926).

federal suppression sanction. By extending the exclusionary rule beyond violations of the Constitution and federal statutes, the Supreme Court recognized a supervisory suppression doctrine premised on the duty to maintain "civilized standards of procedure and evidence."[45] The Court, however, did not provide standards to guide the federal judiciary in implementing this bold directive. Nor did the Court indicate the extent to which state constitutions, statutes, and decisions should influence the exercise of this federal supervisory power.[46] In *United States v. Di Re*,[47] decided in 1948, the Court addressed these issues and held that "in [the] absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity."[48]

Di Re involved an investigation conducted jointly by federal agents and New York State officers. After receiving a tip concerning counterfeit gasoline ration coupons, these agents and officers arrested Di Re and two other men. A search of Di Re revealed one hundred counterfeit gasoline coupons, which provided the basis for Di Re's conviction under the Second War Powers Act of 1942.[49]

On appeal to the United States Supreme Court, the Government contended that since the initial arrest of Di Re had been properly based on probable cause, the ensuing search was permissible as a search incident to lawful arrest.[50] In support of this argument the Government urged that "the validity of an arrest without a warrant for a federal crime is a matter of federal law to be determined by a uniform rule applicable in all federal courts."[51]

The Supreme Court, finding state law to be "an equally appropriate standard by which to test arrests without a warrant," rejected the call for a uniform federal standard, except in those cases where Congress had enacted a federal rule.[52] The presence

---

[45] 318 U.S. at 340.

[46] In *Anderson*, the Court noted that the Tennessee judiciary demanded "scrupulous observance" of the governing Tennessee statute. 318 U.S. at 355. Except for this remark, the Court did not set forth specific guidelines to aid the lower courts in deciding whether to suppress evidence obtained by state agents.

[47] 322 U.S. 581 (1948).

[48] *Id.* at 589.

[49] Act of Mar. 27, 1942, ch. 199, § 301, 56 Stat. 176 (repealed).

[50] 332 U.S. at 587.

The Government also contended that the search of Di Re was justified as incident to the search of a vehicle reasonably believed to be carrying contraband. *Id.* at 584. The Court rejected this argument because it was "not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

[51] *Id.* at 589.

[52] *Id.* at 590.

of federal rules in certain specific situations, not encompassing the situation at hand, demonstrated to the Court the absence of a general federal law of arrest.[53] Since the arrest and search of Di Re exceeded the lawful authority of officers under the applicable New York statute, the evidence was suppressed and the conviction reversed.[54]

Unfortunately, the *Di Re* Court failed to address the crucial policy considerations that the case presented. *Di Re* presented the question whether a federal court acting in an area of federal competence should enunciate a uniform rule governing the validity of arrests without warrant, or whether it should adopt as the federal standard the laws of the individual states.[55] Three factors strongly militated against the Court's choice of the latter alternative.[56] The first was the very nature of the proceeding—an action brought by the United States for the violation of its criminal law. In this area

---

[53] *Id.* The existence of a federal law of arrest for specific circumstances conclusively demonstrated the absence of an explicit general law of arrest. It does not necessarily follow, however, that Congress intended that there be no such general law. The failure of Congress to act affirmatively in other areas has not prevented the Supreme Court from establishing uniform federal rules where the circumstances have warranted it. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943); note 56 *infra*.

[54] Under the applicable New York law, according to the Court, "any valid arrest of Di Re, if for a misdemeanor must be for one committed in the arresting officer's presence, and if for a felony must be for one which the officer had reasonable grounds to believe the suspect had committed . . . ." 332 U.S. at 591. The Government argued that probable cause existed for believing that Di Re had committed a felony at the time he was stopped. The Court rejected the Government's position and found the arrest invalid under state law. *Id.* at 591-95.

[55] The prosecution of criminal offenses against the United States must rest upon a specific congressional statute, and the law governing such actions is, of course, federal. *See* C. Wright, Handbook of the Law of Federal Courts § 21, at 67-68 (1970). Within this area of federal competence, federal courts, purely as a matter of discretion, may adopt state law as a rule of decision. *See* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957). In *Di Re* then, the Court was not compelled to apply the New York law; rather it chose to incorporate the local rule as the *federal* law of arrest.

[56] It is important to distinguish between the "power to choose" federal law and the "exercise of that power by a choice in favor of a single, federally-created substantive rule." Mishkin, *supra* note 55, at 802. The former depends upon whether the Constitution grants to the federal government the power to make law for the particular subject. The latter, however, depends upon a number of policy considerations, including: (1) the need for a uniform federal rule (*see* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)); (2) the difficulty of framing such a federal rule (*see* Campbell v. Haverhill, 155 U.S. 610 (1895); Mishkin, *supra* note 55, at 803-04); (3) the interference of a federal rule with strong state policy interest (*see* United States v. Yazell, 382 U.S. 341 (1966); Wright, *supra* note 55, § 60, at 250-51); and (4) the effect of a federal rule upon the natural expectations of the individuals concerned (*see* DeSylva v. Ballentine, 351 U.S. 570 (1956); Mishkin, *supra* note 55, at 822-23).

of highly sensitive and important federal interests, state policy should not dictate the federal rule.[57] By adopting varying state rules, the Court made effective national enforcement of the federal criminal law hinge on the stringency of each state's procedural requirements. Moreover, in a situation in which only federal agents have acted, the *Di Re* rule frustrates federal policy without advancing state interests.[58]

A second factor which the Court failed to consider was the federal judiciary's strong interest in formulating and administering uniform rules to govern the admissibility of evidence in federal criminal proceedings. Federal Rule of Criminal Procedure 26[59] was specifically designed to promote "the development of uniform rules of criminal evidence for the federal courts,"[60] in order to ensure similar decisions from similar facts in the different district courts.[61]

---

[57] Because the federal interests in favor of a uniform rule of arrest are almost overwhelming, at least where federal officials are involved, the Court should have followed the reasoning of Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), and established a federal standard. At the very least it should not have adopted state law without a reasoned explanation for its decision.

[58] *See. e.g.*, United States v. Perez, 242 F.2d 867, 869 (2d Cir.), *cert. denied*, 354 U.S. 941 (1957); Janney v. United States, 206 F.2d 601, 604 (4th Cir. 1953); Coplon v. United States, 191 F.2d 749, 753 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

Of course, where a federal court is faced with evidence illegally obtained by state agents, different considerations arise. Where state courts exclude such evidence, the refusal of a federal court to suppress unduly frustrates the strong state interest in deterring unlawful police behavior. With a federal outlet for such evidence, state officers need only drop their illegal baggage at the federal prosecutor's office, rather than at the state's. Although a federal court should not bind federal agents to state standards, this does not imply that state agents should be free to disregard the law they have sworn to uphold. Indeed notions of federalism press for the opposite result. *See* notes 79-84 and accompanying text *infra*.

[59] At the time the Court decided *Di Re*, Rule 26 stated:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

18 U.S.C. app. § 4502 (1970).

Concurrent with the adoption of the new Federal Rules of Evidence, Congress amended Rule 26 and renamed it "Taking of Testimony": "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

[60] 8A MOORE'S FEDERAL PRACTICE ¶ 26.02 (2d ed. 1975).

[61] The original Advisory Committee note 2 to Rule 26 stated:

> This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a) . . .), in that this rule contemplates a uniform body of

Since the *Di Re* rule undermines this policy,[62] there is a strong argument that the court simply erred.[63]

The most serious defect in the *Di Re* decision, however, was that the Court excluded probative evidence without asking whether suppression would deter official misconduct. Had the Court focused on this issue, it surely would have realized that its decision did not meet the most basic requirement for the sanction—that the standard be as clear and consistent as possible.[64] The deterrence of unlawful police conduct presupposes the existence of an understandable rule. *Di Re*, however, subjects a federal agent who works in more than one state to a different code of behavior within each, thereby imposing upon him an unreasonable and unattainable obligation to learn and observe the law of each.[65] This result obviously frustrates the policy behind the exclusionary rule. In short, the Court in *Di Re* had an ideal opportunity to establish a clear and uniform standard to govern federal arrests. Instead, it opted for a rule that, by incorporating state standards, results in greater confusion and inefficiency.[66]

> rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship, the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.

18 U.S.C. app. § 4502 (1970).

[62] After *Di Re* the lawfulness of an arrest by federal officers, and thus of a search incident to the arrest, has been governed by different rules according to the particular state within which the action took place. Equivalent evidence may be admissible in the federal courts of one jurisdiction, while inadmissible in another. Consequently, convictions or acquittals based upon identical facts may vary from state to state.

[63] *See* Eichner, *The "Silver Platter"—No Longer Used for Serving Evidence in Federal Courts*, 13 FLA. L. REV. 311, 325 (1960). *But see* Parsons, *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L.Q. 346, 348-49 (1957).

[64] *See* notes 2-3 *supra*.

[65] A basic premise behind the exclusionary rule is that police will heed the legal standards governing their behavior, and that this adherence will result in acceptable law enforcement activity. *See* notes 1-2 *supra*. Given this basic assumption, a court is not justified in unnecessarily increasing the difficulty of police compliance. Subjecting federal officers to a different rule for each jurisdiction in which they operate stretches an initially doubtful proposition to the point of sheer absurdity. That an officer act in accordance with one clear standard when he contemplates the arrest of a suspected criminal is all that we should demand of him. *See* note 3 *supra*.

[66] In United States v. Watson, 423 U.S. 411 (1976), the Supreme Court reaffirmed the

III

Supervisory Suppression for Search and Seizure

In *Elkins v. United States*,[67] decided in 1960, the Supreme Court rejected the "Silver Platter" doctrine[68] and held that federal courts must suppress evidence obtained as the result of an unconstitutional search by state police. Focusing on the logic of its prior decision in *Wolf*,[69] the Court reasoned that since the foundation of the "Silver Platter" doctrine—that unreasonable state searches did not violate the federal constitution—had disappeared in 1949,[70] the "Silver Platter" doctrine was no longer justifiable.[71] Under the

---

holding of *Di Re* that the law of the state where a warrantless arrest occurred determines its validity. *Id.* at 420-21 n.8.

Nevertheless, *Di Re* does not control the entire field of warrantless arrests. Congressional enactments establish standards in a number of specific situations: 18 U.S.C. § 3052 (1970) (FBI Agents); 18 U.S.C. § 3053 (1970) (United States Marshals); 18 U.S.C. § 3056(a) (Supp. V 1975) (Secret Service Agents); 18 U.S.C. § 3061 (1970) (Postal Officers); 21 U.S.C. § 878 (1970) (Agents of Drug Enforcement Administration); 26 U.S.C. § 7607 (1970) (Customs Service Agents).

[67] 364 U.S. 206 (1960). The exact issue in *Elkins* was whether articles obtained as the result of an unreasonable search and seizure by state officers, without any federal involvement, could be introduced in a federal court over a defendant's timely objection.

[68] *See* note 9 *supra*.

[69] 338 U.S. 25 (1949). In *Wolf* the Court held that although the fourteenth amendment prohibited unreasonable searches and seizures by state officers, it did not forbid the admission of such unconstitutionally seized evidence in state courts. *See* note 10 and accompanying text *supra*.

[70] 364 U.S. at 213.

[71] In *Elkins*, Justice Stewart maintained that the Supreme Court had demonstrated an "awareness that the constitutional doctrine of *Wolf* [had] operated to undermine the logical foundation of the *Weeks* admissibility rule . . . from the very day that *Wolf* was decided." *Id.* at 214. As proof of this awareness, Justice Stewart pointed to the case of Lustig v. United States, 338 U.S. 74 (1949), decided the same day as *Wolf*. In *Lustig* the Court had to decide whether an illegal search had been "federal," with the evidence barred by *Weeks*, or "state," with the evidence admissible under the "Silver Platter" doctrine. The Court concluded that "[w]here 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 state officers." 338 U.S. at 79. On this basis Justice Stewart argued that doctrinal support for the "Silver Platter" doctrine had been eroded. 364 U.S. at 214.

Justice Stewart's reliance on *Lustig* was misplaced. The *Lustig* Court did not reject the "Silver Platter" doctrine. Instead, the Court reaffirmed the doctrine's vitality by scrutinizing the facts of the case in order to determine whether the search had been "federal" or "state." 338 U.S. at 75-78. Finding federal participation, the Court suppressed the evidence under *Weeks*. *Id.* at 79. If the "Silver Platter" doctrine had been tarnished, the Court would have focused on the nature of the search, rather than on its participants. Regardless of the "awareness" of the Supreme Court, the lower federal courts continued to admit evidence illegally seized by state officers without even mentioning the impact of *Wolf*. *See* 364 U.S. at 213-14.

rubric of the Court's supervisory power over the administration of justice in the federal courts,[72] Justice Stewart announced that henceforth the admissibility of evidence seized by state officers would be governed by a federal constitutional standard.[73]

While the demise of the "Silver Platter" doctrine was long overdue,[74] the Court's promulgation of an identical rule for both federal and state activity created problems of its own.[75] Justice Frankfurter recognized this in a brilliant dissent, in which he

---

[72] 364 U.S. at 216.

[73] The Court stated:

> [W]e hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

Id. at 223-24 (footnote omitted).

[74] The Court rested its decision upon principles of both logic and policy. Regarding the former, Justice Stewart stated that "no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth," for "[t]he Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215. The stronger view, however, is that the suppression of evidence does not rest upon the constitutional right of the individual, but upon the general right of the populace to be free from future fourth amendment violations. *See* note 1 *supra*. Nevertheless, the policy arguments advanced by the Court were far more telling: namely, that the willingness of federal courts to admit evidence unconstitutionally obtained by state police unduly frustrated state efforts to deter official misconduct and seriously impeded free and open cooperation between federal and state officers. 364 U.S. at 221-22. Predictably enough, the Court could not resist invoking the fabled "imperative of judicial integrity" as additional support for its decision. *Id.* at 222-23.

[75] There is, however, an extremely subtle argument that *Elkins* really provides for the exclusion of evidence obtained in violation of state law. If, as the Court maintained, *Elkins* was an exercise of the Court's supervisory power over the administration of criminal justice in the federal courts (*see* 364 U.S. at 216), then by definition the Court was not faced with constitutionally compelled suppression. If the suppression of evidence obtained by state officers in a search and seizure violative of the federal constitution was constitutionally mandated—as the case of Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958), cited with approval in *Elkins*, 364 U.S. at 214, held it was—then the *Elkins* Court must have been concerned with illegally seized, as opposed to unconstitutionally seized, evidence. If not, the Court's invocation of its supervisory power was superfluous.

The danger with such an analysis is that it may read far more into Justice Stewart's choice of words ("[w]hat is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts") and into the citation of the *Hanna* case than was intended. In any event, Justice Frankfurter's criticism of the new standard on the very ground that it would not suppress evidence obtained by illegal but not unconstitutional means (*see* note 79-84 and accompanying text *infra*) settles the issue.

pointed out three serious difficulties with a uniform standard. First, Frankfurter argued, the holding in *Elkins* introduced a "troublesome and uncertain new criterion, namely, the 'unconstitutionality' of police conduct, as distinguished from its mere illegality under state or federal law."[76] Second, the "new rule potentially frustrate[d] and create[d] undesirable conflict with valid and praiseworthy state policies which attempt to protect individuals from unlawful police conduct."[77] And third, Frankfurter warned of the conflicts certain to arise between federal and state courts if the former could "hold state officers blameless after a state court ha[d] condemned their conduct, or . . . hold them to have been at fault after the State ha[d] absolved them."[78] The latter two objections, based upon notions of comity and federalism, strike at the heart of *Elkins*' shortcomings.

The thrust of Frankfurter's dissent was that by allowing federal courts to admit the spoils of illegal state searches and seizures, the Court unjustifiably frustrated the valid state policy of deterring unlawful police behavior.[79] In those states that would suppress

[76] 364 U.S. at 243. Frankfurter's concern, and it is a valid one, was with the problems introduced by transforming each exercise of supervisory power into a constitutional adjudication based upon the "wholly hypothetical question" whether the state search, if conducted by federal officers, would have violated the fourth amendment. *Id.* at 243-44. Irrelevant to the operation of the Court's new rule were violations of state law, or "hypothetical violations of federal statutes, had the search been 'conducted by federal officers.' " *Id.* at 244. Instead, the *Elkins* opinion invited repeated contravention of the settled rule that the Court refrain from deciding constitutional issues if alternative dispositive grounds are available. *See* the famous concurring opinion of Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345 (1936).

[77] 364 U.S. at 245.

[78] *Id.* at 248.

[79] "State law seeking to control improper methods of law enforcement is frustrated by the Court's new rule whenever a State which enforces an exclusionary rule places restrictions upon the conduct of its officers not directly required by the Fourth Amendment with regard to federal officers." *Id.* at 245.

Justice Frankfurter posed a splendid illustration of the potential problems with the new rule. Consider, he hypothesized, a case where blood is taken from a suspect without his consent and then admitted into evidence against him. Although such a practice would not violate the Constitution (Breithaupt v. Abram, 352 U.S. 432 (1957)), a state may decide that this practice is so reprehensible that the blood-test evidence must be suppressed in state prosecutions in order to discourage such police activity (*e.g.*, Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958)). Under *Elkins*, a federal court would not he similarly precluded from utilizing the results of such a test because the police conduct, while illegal, is not unconstitutional. Analogous problems would arise if federal and state positions on search differed significantly. 364 U.S. at 246-47.

Indeed, as Frankfurter noted, the two cases before the Court, *Elkins* and Rios v. United States, 364 U.S. 253 (1960), both involved a prior state determination that the relevant police conduct was illegal under state law. Yet the Court remanded the cases for an independent determination of the constitutionality of the same actions. 364 U.S. at 247.

such evidence in their own courts, the *Elkins* rule gave a new and powerful incentive to state officers to disregard local law and simply turn over their evidence to federal prosecutors who remained free to utilize it.[80] Moreover, in those states that would admit unconstitutionally seized evidence, the Court's rule could not possibly influence police conduct.[81] Frankfurter's solution was that the federal courts should exclude only that evidence seized by state officers that the state judiciary would likewise exclude.[82] The result would be a federal standard far more responsive to valid state interests and much more likely to minimize conflict between state and federal courts within a single jurisdiction.[83] Since in *Elkins*

---

[80] 364 U.S. at 245-46. This result is not unlikely. Because a considerable amount of criminal activity is punishable under both state and federal statutes (*see* Parsons, *supra* note 63, at 348-49), it takes little imagination to conceive a situation in which state police illegally obtain evidence while preventing a local crime and then simply turn the evidence over to their federal counterparts for a federal criminal prosecution based on the same facts. Since the majority opinion stressed that "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts" (364 U.S. at 221), it is anomalous that the strong possibility of federal interference with state attempts to deter unlawful police behavior should have gone unheeded. *See id.* at 248-49.

[81] 364 U.S. at 248.

Because Mapp v. Ohio, 367 U.S. 643 (1961), applying the federal suppression sanction to the states, had not yet been decided, state courts remained free to admit unconstitutionally seized evidence in their own courts. *See* notes 11-13 and accompanying text *supra*. Nevertheless, at the time *Elkins* was decided more than half of the states did not permit the introduction of such evidence. *See* 364 U.S. at 219, 224-25. In the other states, meanwhile, federal suppression could not possibly deter unconstitutional behavior by state officers when those officers' own courts willingly admitted such evidence. Frankfurter aptly summarized the anomalous result of the *Elkins* opinion:

> With regard to evidence from States which have not adopted exclusionary rules, the Court's innovation of today deprives the federal courts of relevant evidence through hazardous constitutional determinations without any significant or legitimate compensating effect upon state or federal law enforcement. In States which do apply an exclusionary rule, the Court's new formulation accords no respect to valid state policies and is a source of conflict with state courts.

Id. at 248-49.

[82] 364 U.S. at 249. Similarly, Frankfurter would accept in federal court that evidence which the state courts would accept. *Id.* However, no other Justice adopted Frankfurter's proposal. In a memorandum written by Justice Harlan and concurred in by Justices Clark and Whittaker, the three other dissenters supported Frankfurter's criticism of the rule forged by the majority, but observed that "the arguments which he [Frankfurter] has so convincingly set forth likewise serve to block the more limited inroads which he would make on the so-called 'silver platter' doctrine." *Id.* at 251-52.

[83] Because Frankfurter's suggestion would allow different results on the same set of facts in federal prosecutions in different states (*see The Supreme Court, 1959 Term*, 74 HARV. L. REV. 95, 151 (1960)), it would run afoul of Federal Rule of Criminal Procedure 26 in the same way that the *Di Re* rule did. *See* notes 59-63 and accompanying text *supra*. There is a crucial distinction between the two, however, for Frankfurter did not argue that a state standard should apply to federal officials, as *Di Re* held, but only that it should apply to state officers acting under state authority.

itself a state court had excluded the evidence on the basis of state statutory violations, Frankfurter argued that the federal courts should have accorded respect to state policy by similarly suppressing the evidence.[84]

United States v. Scolnick,[85] decided in 1968, illustrates precisely the problem that Frankfurter's dissent recognized. In *Scolnick* the Government conceded that the local police had not complied with a state statute prescribing the manner in which safe-deposit boxes could be searched. Nevertheless, the Government argued that this violation was insignificant, since the test for admissibility was purely one of federal law.[86] After discussing both the majority opinion and the principal dissent in *Elkins*,[87] the Third Circuit concluded that "[t]hese Supreme Court cases show that the fact that evidence is illegally obtained exclusively by state officers does not automatically preclude its use in federal criminal trials."[88] Instead, a federal court must make its own independent determination as to the validity of the search under the federal constitutional requirement of "probable cause."[89] Since the warrant in *Scolnick* met federal standards, and since the Pennsylvania statute imposed only an additional procedural requirement, the court held the

---

[84] 364 U.S. at 247.

[85] 392 F.2d 320 (3d Cir.), *cert. denied*, 392 U.S. 931 (1968). Pursuant to a valid warrant, Philadelphia police officers arrested Scolnick on a charge of burglarizing jewelry. As a result of a search made incident to the arrest, a safe-deposit box key was found. The legality of these actions was not challenged. The police then sought a warrant to search the box in which the jewelry was believed to be hidden. A state magistrate issued the warrant despite a Pennsylvania statute that prohibited the issuance of a warrant to search a safe-deposit box until at least 48 hours after notice and a copy of the petition had been served upon the holder of the box. The purpose of this requirement was to give the holder an opportunity to appear in court to show cause why the box should not be opened. *See* 392 F.2d at 324.

The ensuing search revealed $100,000 in cash, but no jewelry. The state officers immediately notified the Internal Revenue Service of the $100,000. The Service then levied upon and sealed the box after first serving Scolnick with a notice of termination of tax year as well as a demand for unpaid taxes. To prevent the Service from removing the contents of the box, Scolnick secured a temporary injunction in federal district court prohibiting the bank from turning over the box or its contents. He then unlawfully removed the box from the bank and consequently was charged with federal crimes. 392 F.2d at 322-24.

[86] 392 F.2d at 325.

[87] *Id.* at 325. The court also pointed out that the *Elkins* rule had been applied in Rios v. United States, 364 U.S. 253 (1960), and "has been quoted with apparent approval by a unanimous Court in Preston v. United States, 376 U.S. 364 (1964)." 392 F.2d at 325 (parallel citations omitted).

[88] 392 F.2d at 325.

[89] *Id.* at 325-26.

search valid and the evidence admissible.[90]

The *Scolnick* dissent argued that there was no reason for a federal court to disregard a state policy protecting the privacy of its citizens' safe-deposit boxes. Accordingly, the court's decision encouraged state officers to violate the very laws that controlled their conduct; it promoted the view that the end justifies the means.[91] Invoking Justice Brandeis' dissent in *Olmstead*, the dissent concluded that the evidence from the illegal search should have been suppressed.[92]

IV

Di Re AND *Elkins* TOGETHER

The Court decided *Di Re* in 1948 and *Elkins* in 1960. On a superficial level the cases are not inconsistent. The former held that state law is to govern arrests; the latter that federal law is to

[90] *Id.* at 326. The court also indicated that had federal agents been involved, they certainly would not have been bound by the state statute since the 48-hour notice requirement was inconsistent with Federal Rule of Criminal Procedure 41(c), which requires the officer to whom a warrant is issued to make the search "forthwith." *Id.* at 326 n.4.

[91] *Id.* at 328.

[92] *Id.* A Case Note in 82 HARV. L. REV. 1563 (1969) agreed with the dissent's argument and concluded that "since at least some relation, however debatable, with fourth amendment rights can be adduced, the *Scolnick* court ought, in the interest of healthy federalism, to have given full weight to state interests and to have excluded the illegally obtained evidence." *Id.* at 1568. The Note, in effect, proposed an interest-balancing test whereby the effect federal courts would give to a state statute would depend upon the relationship of the statute to fourth amendment rights. For example, if the police illegality did not infringe upon the defendant's fourth amendment rights, exclusion of the evidence would not be necessary. In contrast, violation of a statute directly protecting fourth amendment rights, such as a state law imposing strict controls on wiretapping and eavesdropping, would result in exclusion of the evidence. *Id.* at 1566.

The Note correctly placed the *Scolnick* statute between those two extremes, since the statute, although dealing with the issuance of a search warrant, may have required the 48-hour delay merely as a procedural matter of convenience, unrelated to the protection of substantive rights. Nevertheless, the Note concluded that because "[c]ontrol of local police and the general responsibility for law enforcement are usually considered to embody [substantial state] interests" (*id.* at 1568), and because "[f]ederal courts defer in general to state rules of decision where a substantial state interest is perceived" (*id.* at 1567), the *Scolnick* court should have recognized the Pennsylvania statute and suppressed the evidence obtained in violation thereof. The Note did concede that federal courts should ignore the illegality of a search where state courts themselves would not suppress, since a federal court should not be compelled to accord greater deference to a state statute than does the state itself. *Id.* at 1568.

The Note's proposal that courts engage in a balancing process in every case to determine whether the state rule is integrally related to fourth amendment protection is theoretically a very satisfying one. Unfortunately, in the context of the fourth amendment, decision-making through an ad hoc balancing technique is patently out of place. *See* note 3 *supra*.

govern searches and seizures. Closer analysis, however, reveals that the two cases demonstrate irreconcilable views of the proper scope of federal law enforcement activity and of the meaning of federalism itself.

For the purpose of deciding which sovereign's law shall control, the distinction between police conduct as "arrest" and police conduct as "search and seizure" is meaningless.[93] The labels embody no policy content; they are descriptive rather than evaluative terms.[94] To make the choice of law depend upon this arbitrary classification ignores the existence of competing federal and state interests and may result in the mechanical and unwarranted suppression of probative evidence. In addition, it is highly unlikely that a court can make an accurate after-the-fact evaluation whether there was sufficient probable cause for an arrest, thus permitting the officer to conduct a search incident to arrest, as opposed to a search and seizure proper.[95] To compel courts to draw these distinctions in individual cases wastes an extraordinary amount of judicial time. Real life behavior, especially police behavior, does not fit so easily into neat legal pigeonholes. Nor, in this context, is there any reason for courts to be concerned with such a classification.

Once the false distinction between arrest and search breaks down, the inconsistency between *Di Re* and *Elkins* becomes evident. If federal law determines the legality of a search made by *state* officers, then a fortiori it would seem that federal law should also control the legality of an arrest made by *federal* officers. If state officials are to be judged by federal standards in an *Elkins* situation,

---

[93] To meet the requirements of probable cause for arrest, an officer must demonstrate that he possessed probable cause to believe that a crime had been committed and that the person he sought to arrest had committed that crime. Probable cause to obtain a search warrant necessitates a finding of probable cause to believe that a crime has been committed and that the evidence sought is located within the area to be searched. *See* Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

[94] In the context of varying state and federal standards these terms are merely descriptive. In a single jurisdiction, however, valid policy reasons may call for differences between arrest and search and seizure in terms of the requirements for probable cause or the kind of police procedure to be followed. Nevertheless, in a cross-jurisdictional context (federal versus state) the choice of the applicable standard should be governed by the jurisdictions' interests in having their own law applied, and not by an examination of the content of the laws themselves. Thus, the particular state interest that might prompt adoption of a stringent standard for night-time arrests is irrelevant. The true issue is whether, considering the justification for the exclusionary rule and notions of federalism, state or federal law should govern.

[95] *See* LaFave, *"Case-by-Case Adjudication," supra* note 3, at 138-40.

then it is illogical for federal officials to be bound by state standards in a *Di Re* situation. Changing the perspective, there appears no legitimate reason why a federal court should defer to state policy when federal agents arrest without a warrant, yet ignore that policy when the state's own agents conduct a search in violation of local law.

The confusion that *Di Re* and *Elkins* together engender stems from the Court's mandating separate tests based on a distinction between the kind of law enforcement activity involved—arrest or search—instead of establishing a test founded upon the suppression sanction's true rationale and a proper respect for federal-state relations. With regard to these latter considerations, the holding in *Di Re* was clearly deficient, for its deference to state law unduly frustrates the federal policies of crime prevention,[96] uniformity of result,[97] and deterrence of unlawful police conduct.[98] Similarly, the rule set forth in *Elkins* excessively expands the scope of federal law at the expense of valid state interests.[99] In order to arrive at a proper balance, there must be a synthesis of the two cases, and courts must develop a new standard based upon the jurisdictional affiliation—state or federal—of the officer or officers involved.

This standard would represent the optimal accommodation of competing state and federal interests, while furthering the policy behind the exclusionary rule. When federal officers conduct the arrest or search and seizure, a uniform federal rule should clearly govern their actions.[100] When state officers act, the balance is an extremely close one, but the conclusion here is that the state rule should apply.[101] Nevertheless, it is only by making this factual dis-

---

[96] *See* notes 56-58 and accompanying text *supra*.

[97] *See* notes 59-63 and accompanying text *supra*.

[98] *See* notes 64-65 and accompanying text *supra*.

[99] *See* notes 79-84 and accompanying text *supra*.

[100] On the federal side of the balance are the previously mentioned factors of crime prevention, uniformity of result, and increased deterrence through the existence of a clear, uniform standard for all federal officers. On the state side is the state interest in protecting its citizens from certain kinds of law enforcement activity that, although constitutional, may represent a greater invasion of individual privacy than the state deems tolerable. When the respective interests are weighed, the federal rule comes out far ahead. Although a state may wish to protect its citizens from particular police behavior, these restrictions are legitimate only when applied to local officers and nonfederal crimes. Within the sphere of federal police and offenses, federal policies and the rationale behind the suppression sanction press for a federal standard.

[101] Supporting a federal rule are the federal interests in uniformity of result and prevention of crime. The federal interest in deterrence is minimal, however, since only state officers are involved. In fact, the goal of deterrence shifts the balance to the other side, for if federal courts admit evidence seized by state officers in violation of state law, those

tinction between state and federal activity, rather than between arrest and search, that courts can finally begin to formulate realistic and responsive legal rules in this significant[102] and heretofore chaotic area of the law.

The following categories present four common factual situations that arise in federal criminal proceedings. Each section sets forth *(1)* current law under *Di Re* and *Elkins*, and (2) what the law, according to the normative principles previously discussed, should be.

A. *Search and Seizure of Evidence by Federal Officers*

This category is the most settled of the four. Both case law and the normative resolution coincide. *Elkins* directs that a federal standard shall govern the admissibility of evidence seized by federal officers; considerations of federalism and the rationale of the suppression sanction compel the same result. Thus, when federal agents obtained evidence in violation of an Illinois law prohibiting the taping of conversations without consent or judicial authorization, the court in *United States v. Infelice*[103] correctly admitted the evidence and held that "[f]ederal law governing the admissibility of evidence in federal criminal trials permits the introduction of such tape recordings."[104] Other cases are in accord.[105]

B. *Search and Seizure of Evidence by State Officers*

Here case law compels application of a federal constitutional standard, while the normative principles dictate application of a state standard. The courts uniformly adhere to the interpretation

officers will then have a genuine incentive to act unlawfully. *See* note 80 *supra*. Moreover, a healthy respect for federalism—that the federal sovereign will defer to a state's attempt to limit the power of its *own* police—militates towards a state, rather than a federal, rule.

[102] Because searches incident to arrest are far more prevalent than warranted searches (*see* LaFave, *"Case-By-Case Adjudication," supra* note 3, at 143), the *Di Re* rule may often frustrate valid federal law enforcement policies where there is no applicable federal statute giving federal agents power to arrest without a warrant. *See* note 66 *supra*. Thus, in a state like California, which refuses to allow the kind of automobile search sanctioned as constitutional by the Supreme Court in United States v. Robinson, 414 U.S. 218 (1973), the admissibility of evidence in federal court will depend upon whether the activity is characterized as an arrest and search incident to arrest (*Di Re* controlling), or as a search and subsequent arrest based upon the results of that search (*Elkins* controlling).

[103] 506 F.2d 1358 (7th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975).

[104] *Id.* at 1365.

[105] *E.g.*, United States v. Keen, 508 F.2d 986, 989 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); United States v. Green, 446 F.2d 1169 (5th Cir. 1971); United States v. Vespe, 389 F. Supp. 1359, 1372 (D. Del.), *aff'd sub nom.* United States v. Shaffer, 520 F.2d 1369 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

of *Elkins* set forth in *Scolnick*—that evidence seized by state officers in violation of state law is admissible in federal court if consistent with constitutional standards. The Supreme Court has reaffirmed this principle.[106] Indeed, most courts mechanically apply the rule without even discussing the important issues involved.[107] The district court in *United States v. King*,[108] however, recognized the policy question at stake and spoke directly to it:

> It appears to this Court that the more pertinent question raised here, irrespective of *Elkins*, might have been whether, as a matter of respect for state law and policy, a federal court would refuse to accept into evidence the products of a seizure which, if conducted exclusively by federal officers, would have been perfectly proper, but was in fact assisted in by state officers who were thus violating their own state statute.[109]

Instead of deciding this question, however, the court retreated and found that under the facts it could avoid the issue.[110]

The result is that case law squarely accords with the interpretation of *Elkins* that a federal constitutional standard is to govern the admissibility of evidence seized by state officers.[111] The normative

---

[106] Preston v. United States, 376 U.S. 364, 366 (1964).

[107] *E.g.*, United States v. Rael, 467 F.2d 333, 335 (10th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973); United States v. Hopps, 331 F.2d 332, 340 (4th Cir.), *cert. denied*, 379 U.S. 820 (1964); United States v. Sorenson, 330 F.2d 1018, 1020 n.1 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965); Smith v. United States, 321 F.2d 427, 429 (9th Cir. 1963).

[108] 335 F. Supp. 523 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974). In *King*, federal agents set up a duly authorized wiretap under Title III, 18 U.S.C. § 2518 (1970). The defendants, however, moved to suppress on the basis of a San Diego County Deputy Sheriff's participation in the wiretap. Since California law prohibited such wiretapping without consent, the defendant contended that the state officer's involvement violated state law and, under *Elkins*, precluded the United States from utilizing the intercepted communication. The court correctly held that *Elkins* meant to exclude from federal court only evidence obtained in violation of the Constitution, and thus the evidence here, although in violation of state law, was nevertheless admissible. 335 F. Supp. at 546-47.

[109] 335 F. Supp. at 547.

[110] *Id.* Apparently the court decided the case on two independent grounds: First, it refused to decide whether the state officer's participation in the tap necessitated suppression on the ground that the officer was present at the surveillance site on only one occasion and that "[i]t was never revealed whether his presence on that occasion was necessary or even helpful to the progress of the tap." *Id.* The supremacy clause furnished the second ground for the decision. The court explained that *Di Re* applied only to the limited situation in which there were both an arrest without warrant and no federal statute on the subject. *Id.* at 547-48.

[111] In fact, one case has even implied that a state officer may have greater leeway under the Constitution "to search and seize" than a federal officer would under the same circumstances. Frye v. United States, 315 F.2d 491, 494 (9th Cir), *cert. denied*, 375 U.S. 849 (1963).

resolution that federal courts should defer to state policy considerations whenever federal policy is unexpressed, finds little support in the case law. Rather, the courts have mechanically followed *Elkins*.[112]

---

[112] *See* cases cited in note 107 *supra*.

In a recent case, the Supreme Court ruled that evidence unconstitutionally obtained by a state criminal law enforcement officer is admissible in civil proceedings by or against the United States. United States v. Janis, 96 S. Ct. 3021 (1976). In *Janis*, a state court issued a search warrant pursuant to which local police seized $4,940 in cash and wagering records. The police then advised the Internal Revenue Service that Janis had been arrested for bookmaking activity. Using a calculation based upon the seized evidence, the Service assessed Janis for wagering excise taxes and levied upon the $4,940 in partial satisfaction. In the subsequent state criminal proceeding against Janis, the trial court held the police affidavit defective, quashed the warrant, and ordered that, with the exception of the $4,940, all items be returned to the defendant. Janis then filed a refund claim for the money and eventually brought an action in federal court. The district court and the court of appeals concluded that Janis was entitled to the $4,940 because the assessment had been based upon unconstitutionally obtained evidence.

The Supreme Court first reaffirmed the principle that "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct'" (*id.* at 3028 (quoting United States v. Calandra, 414 U.S. 338, 347 (1974))), although Justice Blackmun observed that the empirical evidence supporting the deterrence argument remained inconclusive. *Id.* at 3030-31 & n.22. *See* note 2 *supra*. Since in the present instance a state officer was the "primary object of the sanction" (96 S. Ct. at 3029), the Court considered the extent to which exclusion of the evidence in a federal civil proceeding would result in increased deterrence of unlawful state activity. Because "the local law enforcement official is already 'punished' by the exclusion of the evidence in the state criminal trial," and because "the evidence is also excludable in the federal criminal trial," Justice Blackmun concluded that the additional deterrence, if any, that might result from suppression failed to "outweigh the societal costs imposed by the exclusion." *Id.* at 3029, 3032.

It can be argued that *Janis* cuts against the normative standard advocated by this Note, in that it demonstrates the Court's obvious reluctance to extend the exclusionary rule to improprieties committed by agents of another sovereign. Indeed, since the Court refused to suppress evidence *unconstitutionally* seized by state agents, then a fortiori the Court would not exclude evidence that is merely the product of an *illegal* search under state law. Such an analysis, however, does not represent an accurate reading of *Janis*.

In *Janis*, Justice Blackmun emphasized the civil nature of the tax proceeding, stating at one point that "[i]n the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." *Id.* at 3029. Moreover, the Court stressed the continued vitality of *Elkins* as central to its argument that suppression in *Janis* would result in minimal deterrence because the evidence was already inadmissible in *both* state and federal criminal prosecutions, thereby frustrating "the entire criminal enforcement process, which is the concern and duty of these officers." *Id.*

In dissent, Justice Stewart argued that *Janis* was inconsistent with the reasoning of *Elkins* in light of the dual purpose of the federal wagering laws—to raise revenues and "to 'assist the efforts of state and federal authorities to enforce [criminal] penalties.'" *Id.* at 3035 (quoting Marchetti v. United States, 390 U.S. 39, 47 (1968)). Nevertheless, the majority opinion's emphasis of the good-faith nature of the state police action (*id.* at 3032), and its recognition of the "Silver Platter" problem (*id.* at 3033 n.31), reveal that the Court was not retreating from the *Elkins* disapproval of "subterfuge and evasion with respect to federal-state cooperation in criminal investigation." 364 U.S. at 222.

C. *Arrest and Seizure of Evidence by Federal Agents*

The admissibility of evidence obtained by a federal officer pursuant to a warrantless arrest depends upon the extent to which *Elkins* is read as rendering the *Di Re* rule inapplicable. Unfortunately, the Supreme Court has recently reaffirmed *Di Re*, apparently without giving much thought to the question.[113] As a general matter, then, state law continues to govern warrantless arrests made by federal officers. Within this general rule, however, the federal judiciary has developed a uniform standard to regulate the narrow issue of the manner in which federal officers enter the suspect's home. Nonetheless, an analysis of the case law in this area reveals the uncertainty and inefficiency that result when courts apply rules based on the artificial distinction between arrest and search, and lends support to the normative conclusion reached in this Note that a federal standard should control federal agents.

The story starts with *Miller v. United States*,[114] decided in 1958, where the Supreme Court considered the admissibility of evidence obtained in a warrantless arrest at the defendant's home.[115] The Government contended that since there had been probable cause for the defendant's arrest, the marked currency found in his home was properly admitted as evidence seized incident to a lawful arrest.[116]

The Court held that under *Di Re* the lawfulness of a warrantless arrest for a federal crime "is to be determined by reference to state law," in this case "by reference to the law of the District of

---

In any event, the Court never asked the question that would be crucial to this Note's analysis: namely, whether a California court would have suppressed the evidence in a civil proceeding by or against the state. If not, then surely a federal court need not exclude more. If yes, then considerations of deterrence and federalism might well have suggested a contrary result in *Janis*.

This is not to imply that a federal court must suppress in every situation in which a state court would suppress. A federal court is free in each instance to make an independent determination as to the effect that suppression would have on the state goal of deterrence.

[113] United States v. Watson, 423 U.S. 411, 420-21 n.8 (1976).

[114] 357 U.S. 301 (1958).

[115] In *Miller*, federal and District of Columbia agents forcibly entered an apartment in the District of Columbia. Initially, the officers knocked on the defendant's door and identified themselves. The defendant opened the door on its chain and asked the officers to state their purpose. Before any response was forthcoming, he attempted to close the door; at that point the officers broke the chain and entered. In the apartment they found marked currency which formed the basis of the defendant's conviction. The police officers possessed neither a search nor an arrest warrant. *Id.* at 303-04.

[116] *See id.* at 304-05.

Columbia."[117] Accordingly, the Court found that the defendant "could not [have been] lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose."[118] Since these conditions had not been met, the Court suppressed the evidence.[119]

More important than the substantive holding in *Miller* was the theoretical foundation of the Court's decision. One commentator has pointed out that the Court had four options in choosing the source of the controlling law.[120] First, the Court could have dealt with the question of entry as part of the "reasonableness" requirement of the fourth amendment.[121] Second, the Court could have applied the federal statute prescribing the manner of entry to execute a search warrant, 18 U.S.C. § 3109,[122] to the arrest situation, thereby "creat[ing] a uniform standard applicable to federal arrests made anywhere in the United States and eliminat[ing] the distinction between the execution of search warrants and the making of an arrest."[123] Third, even if the Court had refused to apply section 3109, Rule 57(b) of the Federal Rules of Criminal Procedure could have provided a similar basis for a uniform federal standard of arrest.[124] In the end the Court chose to apply the fourth alterna-

---

[117] *Id.* at 305-06.

[118] *Id.* at 313.

[119] *Id.* at 313-14.

[120] Blakey, *supra* note 3, at 519.

[121] *Id.*

[122] The statute provides in relevant part:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a searcb warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1970).

[123] Blakey, *supra* note 3, at 522. The advantage of this choice is obvious. In addition to creating a uniform standard, a decision based upon statutory construction "would leave Congress the opportunity of enacting comprehensive legislation based on further experience." *Id.* Furthermore, there would be no disruption of state procedure or problem of retroactivity, as there is in constitutional adjudication. *Id.*

Although § 3109 by its terms applies only to the execution of search warrants, it would not have been difficult for the Court to hold warrantless arrests within the statute's purview. In fact, the defendant's attorney argued that "it would be 'illogical and unreasonable' to suppose that Congress had intended a lesser standard to obtain when an entry was made without a warrant, albeit to arrest." *See id.* at 517.

[124] *Id.* at 522. Rule 57(b) states: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Professor Blakey observes that prior to the adoption of the Federal Rules of Criminal Procedure, federal procedure conformed to state standards, but that Rule 57(b) "was designed to guarantee that such a practice would no longer prevail." Blakey, *supra* note 3, at 522. Although it is arguable whether the rule was indeed intended

tive, the rule of *Di Re*, that the controlling law is that of the place of arrest.[125]

Although *Miller* decided that the validity of a warrantless *arrest* is to be determined on the basis of local law, the Court confusingly intermingled its discussion of section 3109 with that of District of Columbia law.[126] Hence, lower federal courts differed as to whether *Miller* truly dictated that a state standard should control,[127] and no clear and consistent rule existed to guide law enforcement officials.

In *Ker v. California*,[128] decided in 1963, the Supreme Court once again attempted to establish guidelines for police entry into a home, but this time in the context of state officers' arresting and searching for state criminal activities. The case is relevant, however, for dicta in Justice Clark's opinion further obscured the question whether section 3109 was to apply to federal officers conducting warrantless arrests.

The actual holding of the Court was that the state conduct in question did not violate the fourth amendment.[129] Unfortunately, in the course of his opinion Justice Clark gave two conflicting interpretations of *Miller*. In drawing a valid distinction between constitutional and supervisory suppression, Justice Clark at one point observed: "[I]nsofar as violation of a federal statute required the exclusion of evidence in *Miller*, the case is inapposite for state prosecutions, where admissibility is governed by constitutional stan-

---

to cover the situation before the Court, there was some support in the treatises for this view. *See id.* at 522 n.180. In any event, such a construction would certainly be consistent with the policy behind the rule.

[125] *See* Blakey, *supra* note 3, at 523.

[126] *See* 357 U.S. at 306. District of Columbia law is local not federal. The precise holding in *Miller* was that the validity of the arrest was to be determined by local law, and that local law as expressed in Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949), required an announcement of notice and purpose. The Court's justification in reviewing a purely local question was that the District of Columbia law was "substantially identical" to 18 U.S.C. § 3109 (1970). Since this statute is not limited to the District of Columbia, the Court reasoned that by discussing local law the opinion would lay down proper guidelines for all federal officers who enter homes in the execution of search warrants. 357 U.S. at 306. *See also* Blakey, *supra* note 3, at 524-25.

[127] *Compare* Williams v. United States, 273 F.2d 781, 792-93 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960), *and* United States v. Macri, 185 F. Supp. 144, 147-49 (D. Conn. 1960) (state law controls), *with* Munoz v. United States, 325 F.2d 23, 26-27 (9th Cir. 1963), *and* United States v. Barrow, 212 F. Supp. 837, 844-45 (E.D. Pa. 1962), *aff'd*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967) (federal law controls). For a discussion of the relevant federal and state decisions post-*Miller*, see Blakey, *supra* note 3, at 527-36.

[128] 374 U.S. 23 (1963).

[129] *Id.* at 37-43.

dards."[130] In *Miller*, however, it was not the violation of section 3109 that necessitated suppression, but rather the violation of a local law having standards "substantially identical" to those of section 3109. Moreover, this statement contradicted Justice Clark's earlier statement that *Miller* was decided according to local law.[131] As one commentator has noted: "The difference is crucial when federal arrests occur outside the District of Columbia."[132]

The utter confusion of the *Ker* dicta becomes clear when Justice Clark's statements are applied to a *Miller*-type situation. If federal officers had arrested a defendant in the same manner as the state agents in *Ker*, but for a federal crime, the evidence would have been admissible under Justice Clark's earlier and correct reading of *Miller*, but inadmissible under his second interpretation. That is, if state law controlled the manner of arrest, then the federal agents' conduct would be judged under California law, which permitted such an entry;[133] if, however, federal law governed, then *Miller* indicated that section 3109 would forbid such an entry. In short, *Ker* not only failed to clarify *Miller*, but actually increased the confusion by misreading the earlier case.

Just as lower federal courts had differed in their reading of *Miller*, *Ker* also inspired inconsistent interpretations. In *Jackson v. United States*,[134] four Massachusetts policemen and two FBI agents armed with an arrest warrant entered the defendant's apartment and discovered a revolver. Without discussing whether the arrest was state or federal action, the First Circuit, citing *Ker*, agreed with the Government's contention that state law controlled on the issue of arrest.[135] In *Sabbath v. United States*,[136] however, the Ninth Circuit reached the opposite result, holding that the effect of *Miller* was to make section 3109 applicable to arrests by federal officers for federal offenses.[137] In an attempt to eliminate the confusion,

---

[130] *Id.* at 39.

[131] "This Court . . . has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution." *Id.* at 37. *See also* Blakey, *supra* note 3, at 541.

[132] Blakey, *supra* note 3, at 541.

[133] *See* 374 U.S. at 37-38; People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956).

[134] 354 F.2d 980 (1st Cir. 1965).

[135] *Id.* at 981.

[136] 380 F.2d 108 (9th Cir. 1967), *rev'd on other grounds*, 391 U.S. 585 (1968).

[137] *Id.* at 111. The court first observed that "[i]t is not clear just what law sets the standards which govern an officer's entry into a dwelling for the purpose of making an arrest." *Id.* at 110. Although no statute expressly provided the method of entry for federal

the Supreme Court granted certiorari and decided the *Sabbath* case.[138]

Justice Marshall, writing for the Court, proceeded to demonstrate that right things are often done for the wrong reasons. In one short paragraph, Justice Marshall misread *Miller* and, at least for certain situations, laid down a clear and ascertainable federal standard to guide federal law enforcement behavior.[139] The result is that federal officers are now subject to the uniform standard of section 3109, at least for arrests and searches covered by that section. Absent coverage by section 3109, however, *Di Re* remains good law. Hence, the proper resolution of the issue—that a federal standard ought to govern federal arrests—has achieved only partial acceptance in the courts.

D. *Arrest and Seizure of Evidence by State Officers*

This category poses the greatest difficulties. The problem is that the normative resolution advanced in this Note—that state law should govern state conduct—conflicts with the proper reading of *Elkins* and *Di Re* together—that federal law shall control. An analysis of the cases reveals that only a few courts actually recognize this issue, that a large number of courts mechanically cite either *Elkins* or *Di Re* and hold accordingly,[140] and that a sizeable number are unaware of the legal significance of the distinction between search and arrest.[141]

The two cases that most intelligently discussed the relationship between *Di Re* and *Elkins* are *United States v. Miller*[142] and *United*

---

officers making a warrantless arrest, the court decided that the Supreme Court's intention in *Miller* was to have § 3109 apply in this situation.

[138] 391 U.S. 585 (1968).

[139] The statute here involved, 18 U.S.C. § 3109, deals with the entry of federal officers into a dwelling in terms only in regard to the execution of a search warrant. This Court has held, however, that the validity of such an entry of a federal officer to effect an arrest without a warrant "must be tested by criteria identical with those embodied in" that statute. . . . We therefore agree with the parties and with the court below that we must look to § 3109 as controlling.

Id. at 588-89 (footnotes and citations omitted).

[140] *See, e.g.*, United States v. Joyner, 492 F.2d 655, 656 (D.C. Cir. 1974); United States v. Day, 455 F.2d 454, 455 (3d Cir. 1972); United States v. Morris, 445 F.2d 1233, 1235 (8th Cir.), *cert. denied*, 404 U.S. 957 (1971); Hart v. United States, 316 F.2d 916, 919 (5th Cir. 1963) (all citing *Di Re*, with no mention of *Elkins*); United States v. McDowell, 475 F.2d 1037, 1039 (9th Cir. 1973); United States v. Sims, 450 F.2d 261, 262-63 (4th Cir. 1971) (both citing *Elkins*, with no discussion of *Di Re*).

[141] *See* United States v. McDowell, 475 F.2d 1037, 1039 (9th Cir. 1973); United States v. Sims, 450 F.2d 261, 262-63 (4th Cir. 1971).

[142] 452 F.2d 731 (10th Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

States v. Alberty,[143] both decided by Judge Barrett of the Tenth Circuit. The facts in each case were strikingly similar: local police were alerted to be on the lookout for a certain car; the officers located and stopped the car; and the suspect was put under arrest after the officers noticed a sawed-off shotgun lying on the front floorboard.[144] The court in both cases held that the illegality of the arrest under state law was irrelevant; federal law controlled.[145] In *Alberty*, the court analyzed the holding in *Elkins* and the remand in *Rios v. United States*[146] and concluded that these decisions "clearly vitiated the Court's holding in *United States v. Di Re*."[147] Similarly, in *Miller* Judge Barrett stated that "[t]he *Di Re* rule was rejected, by implication, in *Elkins v. United States*."[148] A careful analysis of the two Supreme Court cases fully supports Judge Barrett's conclusion.[149] Of course, while Judge Barrett's analysis of the controlling precedents was unimpeachable, his conclusion—that a federal standard should govern state arrests—conflicts with the normative resolution advocated in this Note.

Other federal courts have managed to reach the same result, either by ignoring the applicability of *Di Re* and focusing on *Elkins*, or by concentrating on the rationale supporting Rule 26 of the Federal Rules of Criminal Procedure. In *United States v. Sims*[150] and *United States v. McDowell*,[151] each court rested its decision solely on the holding of *Elkins*—federal law is to control the validity of a search and seizure in a federal prosecution.[152] Moreover, neither court recognized the distinction between search and arrest which *Di Re* and *Elkins* demonstrated may be crucial. For instance, in *McDowell* the basic question was whether the local officer had

---

[143] 448 F.2d 706 (10th Cir. 1971).

[144] 452 F.2d at 732; 448 F.2d at 707.

[145] 452 F.2d at 733; 448 F.2d at 708.

[146] 364 U.S. 253 (1960).

[147] 448 F.2d at 708.

[148] 452 F.2d at 733. The court pointed out the inconsistency of the two cases by comparing their holdings as follows: "*Di Re* applied state law governing arrests in the absence of a controlling federal *statute*; *Elkins* held that federal courts must apply federal *law*, i.e., a combination of federal statutes and federal common law, in federal prosecutions." *Id.* (emphasis in original).

[149] In these decisions Judge Barrett recognized that the Supreme Court's reasoning in *Elkins* was at substantial odds with that in *Di Re*, and that a federal standard should therefore control even for state conduct. The Tenth Circuit thus implicitly rejected the notion that the distinction between arrest (*Di Re*) and search (*Elkins*) is a meaningful one. *See* notes 93-102 and accompanying text *supra*.

[150] 450 F.2d 261 (4th Cir. 1971).

[151] 475 F.2d 1037 (9th Cir. 1973).

[152] 450 F.2d at 262-63; 475 F.2d at 1039.

probable cause to *arrest* the defendant, thereby validating the incidental search which produced the incriminating evidence. After first correctly citing *Elkins* as mandating a federal standard for *search and seizure*, the court stated that "[w]hether a warrantless arrest, made by a state or federal officer, is constitutionally valid depends upon whether, at the moment of arrest, the officers had probable cause to make it."[153] Likewise, in *Sims* the trial judge had determined that the actions of the West Virginia officers in arresting without a warrant were illegal under state law.[154] The court of appeals, however, cited *Elkins* and held that federal law controlled;[155] *Di Re* was not considered. Although the choice of federal law may indeed be defensible, neither court provided adequate reasons for its decision.

In *Oberg v. United States*[156] the court did not attempt to reconcile *Di Re* and *Elkins*; instead it used Rule 26 of the Federal Rules of Criminal Procedure to admit evidence obtained as a result of an allegedly illegal arrest by state officers: "This being a federal prosecution, there would be no occasion to look to the state law for a rule of evidence merely because it might be favored in the courts of a particular state."[157]

Only one case clearly confronted the *Di Re-Elkins* issue before ruling that state law (*Di Re*) controlled the validity of the arrest and thus the admissibility of the evidence obtained.[158] The majority of cases, contrary to those examined above, have simply applied *Di Re* without mentioning *Elkins*.[159]

Although the *Elkins* opinion did not cite *Di Re*, the cases are

---

[153] 475 F.2d at 1039. Actually, the court's statement was technically correct in that the *constitutional* validity of an arrest does depend upon whether probable cause exists, regardless of the arresting officer's jurisdictional affiliation. The error was in equating the question of constitutionality with that of *admissibility*. This, of course, was the exact issue that confronted the Court in *Di Re*. The court in *McDowell*, however, failed to mention *Di Re* and erroneously grouped the two situations (arrest and search) under the single *Elkins* test.

[154] *See* 450 F.2d at 262.

[155] *Id.* at 262-63.

[156] 353 F.2d 204 (5th Cir. 1965).

[157] *Id.* at 206. The court first concluded that state law had not been violated by the local officer's failure to warn the defendant that he did not have to make a statement and that any statement made could be used against him. The court then concluded that even if state law had been violated, Rule 26 mandated that the evidence be admissible.

For the use of Rule 26 to justify the admissibility of evidence obtained as a result of an allegedly illegal *search* conducted by local police, see United States v. Melancon, 462 F.2d 82, 92 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972).

[158] United States v. Turner, No. 73-2740 (9th Cir. July 24, 1975). *See* notes 160-74 and accompanying text *infra*.

[159] *See* cases cited in note 140 *supra*.

sufficiently related that no federal court should rest its holding upon one of the two without distinguishing the other. Yet, often the same fact pattern will be dealt with by one court under *Elkins* and by another under *Di Re*. Because this confusion destroys the effectiveness of the suppression sanction and because so many federal courts remain unaware of the problem, the responsibility ultimately rests with the Supreme Court to provide a clear and definitive answer.

V

THE HYPOTHETICAL CASE OF *United States v. Turner*[160]

In *United States v. Turner* federal officials applied for and obtained federal authorization to wiretap the phones of suspected narcotics dealers in California.[161] The Ninth Circuit upheld the validity of the wiretap order and sustained, with one exception, the convictions obtained as a result of the surveillance. This exception, however, represents the crucial aspect of the decision. For by initially reversing the conviction of Clara Bell Hall,[162] the court failed

[160] No. 73-2740 (9th Cir. July 24, 1975), *reported in* 17 CRIM. L. REP. (BNA) 2449 (copy on file at *Cornell Law Review*). The Ninth Circuit initially decided the case on July 24, 1975. The case was published as a slip decision and circulated accordingly. On December 31, 1975, however, the court, without explanation, withdrew that portion of its opinion reversing the conviction of Clara Bell Hall and affirmed the lower court decision. *Reported in* 18 CRIM. L. REP. (BNA) 2420 (1976). The withdrawn portion of the original opinion thus has no precedential value, although it demonstrates the confusion that the *Di Re* rule, unchecked, still generates. It is thus helpful to discuss the withdrawn opinion from this perspective, with the realization that a similar decision might be handed down in the future. The remainder of the *Turner* opinion, dealing with the other defendants, was published in 528 F.2d 143 (9th Cir. 1975). The Ninth Circuit subsequently affirmed the conviction of Ms. Hall in a full opinion. United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), *discussed in* note 162 *infra*.

[161] *See* United States v. Turner, No. 73-2740, slip op. at 34 (9th Cir. July 24, 1975).

[162] On August 31, 1976, the Ninth Circuit, sitting en banc, confirmed the withdrawal of the original panel decision in *Turner* by affirming the conviction of Ms. Hall. United States v. Hall, 543 F.2d 1229 (9th Cir. 1976). The eight member majority rested its decision upon two grounds: first, that Title III governed the arrest and did not incorporate state standards, and second, that the *Di Re* rule was inapplicable. *Id.* at 1232-33. In reaching the former conclusion, the majority relied heavily upon an analysis similar to that set forth in note 170 *infra*. With respect to the latter conclusion, the court simply stated that "[t]he issue in *Di Re* concerned the quantity of evidence necessary for a warrantless arrest, not the source or admissibility of that evidence." 543 F.2d at 1233. Because Ms. Hall merely attacked the *source* of the evidence leading to probable cause—the wiretap—and did not assert "that the state agents lacked 'reasonable cause' to detain her as required by California law," *Di Re* was of no concern. *Id.* at 1234. Accordingly, under the authority of United States v. Keen, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975), evidence obtained in violation of state law was nevertheless admissible in federal court. 543

to recognize the impact of *Elkins* upon *Di Re* and drastically misread Title III, thereby jeopardizing the statute's effectiveness.

As a result of the duly authorized federal wiretap, federal narcotics agents obtained information about the activities of Ms. Hall. The agents relayed this information to California narcotics agents, who began surveillance and subsequently arrested Hall. The state agents had no warrant for the arrest. In Hall's purse they discovered the heroin that led to her conviction in federal district court.[163]

The Government conceded that the wiretap had not been conducted in accordance with section 631 of the California Penal Code and that any evidence derived from the tap would have been inadmissible in state court.[164] Hall therefore contended that under *Di Re* the heroin should have been suppressed on the ground that the arrest, search, and seizure were conducted by state officers in violation of local law. The court agreed, pointing out that because *Di Re* controlled in the Ninth Circuit, the law of the state must govern.[165]

F.2d at 1235. *See* note 165 *infra*.

Two judges concurred in the judgment on the ground that the defendant was not herself a victim of the wiretap and so lacked standing to question her arrest and search. A third judge agreed with this view, but joined the majority after this standing argument was rejected. 543 F.2d at 1235-37, 1246. The three member dissent, written by Judge Koelsch (who also wrote the relevant part of the original panel decision), argued that Title III incorporated state restrictions on local agents' use of wiretap data (*id.* at 1237-43), and that Hall, "[h]aving been charged with possession of the heroin at the time it was seized from her own purse, . . . clearly had standing to move to suppress it." *Id.* at 1238 n.4. In addition, the dissent refused to accept the majority's purported distinction of *Di Re*. The dissent stated:

> Where a state chooses to prohibit certain conduct by its law enforcement officers (*e.g.*, the use of information obtained by prohibited means), that prohibition stands as a limitation on the state officer's power to arrest just as effectively as other statutory limitations on the arrest power. Indeed, the California courts have indicated that a finding of probable cause to search, seize, or arrest may not be predicated on illegally obtained evidence . . . and I venture that those courts would declare the instant arrest unlawful because no probable cause existed.

Id. at 1246 (footnote and citation omitted).

Although the majority opinion has the better of the argument over Title III, the dissent's reading of *Di Re* appears more accurate than the majority's strained interpretation. The dissent's fatal weakness, however, is that it fails to recognize the inroads made upon *Di Re* by *Elkins*. *See id.* at 1245 n.15; notes 93-102 and accompanying text *supra*. Moreover, the dissent ignores the fact that the state had no valid interest in suppressing the evidence at hand. *See* notes 172-74 and accompanying text *infra*.

[163] *See* United States v. Turner, slip op. at 34.

[164] *See id.* at 34-35; People v. Jones, 30 Cal. App. 3d 852, 106 Cal. Rptr. 749, *appeal dismissed for lack of substantial federal question*, 414 U.S. 804 (1973).

[165] The court cited a string of Ninth Circuit cases that stood for this proposition, along with *Ker*, *Miller*, and Johnson v. United States, 333 U.S. 10, 15 n.5 (1948). United States v. Turner, No. 73-2740, slip. op. at 36 (9th Cir. July 24, 1975). The court, however,

Although the court recognized that a "few other circuits appear to have adopted a contrary rule based on the oft-quoted dictum of *Elkins*,"[166] it perceived no inconsistency between the two cases.[167] Indeed, the opinion declared that even if a federal constitutional standard were applicable, "an arrest and seizure of evidence by state officers acting in violation of state law would be violative of the Fourth and Fourteenth amendments."[168]

Turner presents the most troublesome factual situation in which to formulate a normative standard to accomplish the goal of deterrence while accommodating differing state and federal interests and encouraging federal and state law enforcement cooperation.[169] Nevertheless, a standard must be devised to govern combined federal and state police action without frustrating the aforementioned goals.[170] Lurking in the background, of course,

---

failed to mention United States v. McDowell, 475 F.2d 1037, 1039 (9th Cir. 1973), or Boyle v. United States, 395 F.2d 413, 415 (9th Cir. 1968), *cert. denied*, 393 U.S. 1089 (1969), both of which applied a federal standard to state searches and seizures. Nor did the court meet the contention raised by the dissent that the case was controlled by United States v. Keen, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975) (wiretap evidence obtained in violation of neither federal constitution nor federal law admissible, despite being obtained in violation of state law). United States v. Turner, slip. op. at 42-43.

In relying on *Ker*, the court cited exactly that part of Justice Clark's opinion that had been so confusing in its interpretation of *Miller*. *See id.* at 36. In addition, any support in *Ker* for the proposition that state law controlled the validity of a warrantless federal arrest was pure dictum. *See* notes 128-33 and accompanying text *supra*. Moreover, *Miller* and *Johnson* were hardly dispositive for they were decided before *Elkins*.

[166] United States v. Turner, slip op. at 36 n.15.

[167] *Id.* The court perceived no inconsistency because the holdings of the two cases are superficially reconcilable. *See* notes 93-95 and accompanying text *supra*. The court recognized that the Circuits that had failed to follow *Di Re* had reasoned that *Elkins* "somehow 'vitiated' the holding of *Di Re*" (United States v. Turner, slip op. at 37 n.15), but the court argued that *Ker* "strongly suggests otherwise." *Id.* As previously discussed, the meaning of *Ker* is seriously open to question. *See* notes 128-33 and accompanying text *supra*.

[168] United States v. Turner, slip op. at 36 n.15. This is an incredible statement in view of the Supreme Court's remands of *Elkins* and *Rios* for an independent determination whether the illegal conduct of the state officials violated the Constitution and therefore required suppression. *See* note 79 *supra*.

[169] One commentator has spoken approvingly of the "new system of cooperative federalism" that the complex of state, local, and federal power has brought about, and has stressed the importance of such devices as federal training programs for state officers and the maintenance of comprehensive fingerprint files by the Federal Bureau of Investigation. He concludes that "[t]he net result of these federal activities has been to render wholly inadequate the traditional concept of rigid separation of federal and state powers in criminal-law enforcement." Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 214 (1959). *See also* Comment, *supra* note 40, at 502 n.9 (1971).

[170] The alternative holding of *Turner*, relying upon Title III, seriously misinterpreted the statute, thereby threatening the congressional goal of federal-state cooperation in wiretapping investigations. Under the logic of *Di Re*, state law governs an arrest only in the

are the major problems associated with the "Silver Platter" doctrine and the Supreme Court's futile attempts at characterization.[171]

The best resolution is that federal courts should admit all evidence constitutionally obtained by state officers, provided the officers *have not acted illegally* in the process. A federal court should not invalidate an arrest or search based upon undisputed probable cause solely because the local officers have received information from federal agents utilizing investigative techniques unavailable to

---

absence of an applicable federal statute. In *Turner*, the court assumed *arguendo* that Title III was an applicable federal statute. Nevertheless, the court applied state standards by reading Title III to incorporate state law. United States v. Turner, slip op. at 34-38.

As a matter of statutory construction, the alternative holding cannot be justified. Moreover, the decision would have stymied the use of tactical wiretapping as part of a comprehensive and cooperative law enforcement effort to counter organized crime. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 99, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2188; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 68-79 (1967). In the words of the *Turner* dissent: "The majority brands as illegal the friendly cooperation between state and federal officers which is one of the keystones of the Act." United States v. Turner, slip op. at 39.

The court founded its decision on the disclosure and use provisions of Title III. 18 U.S.C. § 2517(1)-(2) (1970). Under these sections, a state law enforcement officer is authorized to receive and utilize wiretap information only to the extent that receipt and use is appropriate to the proper performance of his official duties. Because the scope of a state officer's official duty is defined by state, not federal, law and because the use of "unauthorized" wiretap evidence is inappropriate to the proper performance of a California law enforcement officer's official duties (CAL. PENAL CODE § 631 (West 1970), *construed in* People v. Jones, 30 Cal. App. 3d 852, 106 Cal. Rptr. 749, *appeal dismissed*, 414 U.S. 804 (1973)), the court ruled that the conviction had been obtained in violation of Title III. United States v. Turner, slip op. at 37-38.

In drafting Title III, however, Congress did not intend to incorporate state standards. Instead, § 2517 merely restricts the exchange of wiretap information to proper law enforcement objectives. The thrust of the section is to prohibit personal or commercial espionage use of intercepted communications. Legislative history supports this interpretation: "Only use that is appropriate to the proper performance of official duties may be made. The proposed provision envisions use of the contents of intercepted communications, for example, to establish probable cause for arrest . . ., to establish probable cause to search . . . ., or to develop witnesses." S. REP. No. 1097, *supra*, at 99, *reprinted at* 2188 (citations omitted). Thus, since the wiretap had been duly authorized and implemented, the federal agents should have been allowed to disclose their information to the state agents and the state agents then use the information within the confines of an ongoing criminal investigation.

[171] *See* note 9 *supra*. *Turner* presents a reverse "Silver Platter" situation. Instead of the historical problem of federal standards being more restrictive than state standards, here California law was more restrictive than Title III. And instead of federal officers tainting a state arrest or search by their participation, here state officers jeopardized the legality of federal activity. One distinction, however, is crucial. In the typical "Silver Platter" situation, a federal court would not have admitted the evidence if it had been obtained (hypothetically) by federal, rather than state, officers. That was the incongruity of the doctrine. In *Turner*, however, the state activity was perfectly lawful under federal law, and a federal court would surely have received the evidence if federal officers had obtained it.

state agents under state law.[172] This situation differs significantly from one in which state police themselves act illegally by conducting an unauthorized wiretap. Thus, in *Turner* the court should have admitted the heroin as evidence because the state officers made a perfectly legal arrest, based upon unchallenged probable cause, which was established through an admittedly valid federal wiretap.

Analysis of the competing federal and state interests at stake clearly justifies the adoption of such a standard. The relevant federal interest in *Turner* was the successful enforcement of federal narcotics laws. By suppressing the heroin, the Ninth Circuit frustrated this interest. On the other hand, admitting the evidence would not have abridged any valid state interests. Although California may well have a legitimate interest in preventing unauthorized wiretapping by state officials, state officers did not wiretap in *Turner*. Federal agents did, and California cannot prevent that. California does not want to deter lawful and effective police work; it wants to deter unlawful wiretapping. California does not want people with heroin walking the streets; it wants all people secure from electronic intrusion. Because of Title III, however, California cannot absolutely guarantee that protection. Once federal officers receive information through a tap, the "damage," in a sense, has already been done, and it serves no legitimate state purpose to invalidate the subsequent arrest. Had state officers conducted the wiretapping, the considerations would of course be different, for then California's interest in protecting the privacy of its citizens would become relevant.[173] Thus, a standard focusing upon the legality of the local officers' conduct would accommodate both state and federal interests and would be clear enough to fulfill the purpose of the exclusionary rule.[174]

---

[172] This would be in accordance with the federal-state cooperation envisioned by Title III. *See* note 170 *supra*.

[173] *Turner* smacks of a "false conflict," a choice-of-law term referring to a situation in which analysis of the policies and interests behind the laws of two states reveals that only one state has a true interest in having its law applied. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 91-92 (1965); Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

[174] The rule would satisfy the clarity requirement of the suppression sanction because local police would still be subject to only one standard—that of their state. On the other hand, they would know that they were not precluded from acting on the basis of information given to them by federal agents, as long as they themselves were not involved in activity that violated state law. Furthermore, "Silver Platter" problems would not arise because a federal court would not have to characterize an entire law enforcement operation as state or federal, but would only have to focus on the conduct of the state agents in order to determine whether they had violated state law in procuring the evidence in question.

Conclusion

The distinction drawn by the Supreme Court in *Di Re* and *Elkins* between arrest on the one hand, and search and seizure on the other, has engendered great confusion among the lower federal courts and law enforcement agents. The Court must announce new standards to remedy this problem.

There is no doubt that federal standards should control the conduct of federal agents. The difficult question is what rule should govern the behavior of state officers. Rule 26 of the Federal Rules of Criminal Procedure supports a purely federal standard, as does the strong federal interest in successfully apprehending and prosecuting violators of federal law. On the other hand, notions of comity and the possibility of deterring state officers from breaking state law argue for a state standard.

The conclusion that state standards should govern rests on the judgment that the increased measure of deterrence resulting from application of state law outweighs the opposing federal interests. In combined federal-state ventures, however, federal courts must be careful to suppress evidence obtained by state officers only where there is *identifiable unlawful conduct* by the state officers, and only where suppression will deter such conduct.

Earl H. Doppelt
John A. Karaczynski