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D. Anthony

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ABSTRACT

In the face of expanding U.S. Border Patrol operations across the country, that agency often acquires evidence during its searches that is unrelated to immigration or other federal crimes but may involve state crimes. States are then faced with the question of whether to accept such evidence for state prosecutions when it was lawfully obtained by federal agents consistent with federal law but in violation of the state's own search and seizure provisions. Sometimes referred to as "reverse silver platter" evidence, states have come to widely varying conclusions as to the admissibility of federally-obtained evidence that would clearly have been inadmissible had it been obtained by state actors. This Article explores the approaches and rationales employed by states on this question and the legal implications thereof, particularly in light of sometimes constitutionally dubious Border Patrol activities, the "border search exception" to the Fourth Amendment to the U.S. Constitution, and the broader significance of states choosing to sacrifice their own constitutional principles and rights of their citizens in the interest of prosecutorial convenience.

AUTHOR'S NOTE

* Professor of Legal Studies, University of Illinois Springfield. Special recognition is due to the unflagging, formidable and brilliant attorneys and staff at the Dilley Pro Bono Project, the Center for Human Rights and Constitutional Law, and the ACLU. Thank you for allowing me to learn from and work alongside you in your powerful efforts on the ground.

INTRODUCTION

In the fall of 2017, the United States Border Patrol set up a vehicle checkpoint in Woodstock, New Hampshire. Ostensibly, the primary purpose for the checkpoint was border enforcement, but part of that border enforcement process involved drug detection dogs. Aware that the federal government had no intention of prosecuting low-level drug crimes and that its own charge was border security, Border Patrol collaborated with local law enforcement prior to and during the checkpoint stops. This collaboration ensured local police were present at the checkpoint and could be provided with any drug evidence obtained, allowing for state charges to be brought against those who had drugs confiscated as a result of the federal searches.[1] The problem was that Article 19 of the New Hampshire Constitution protects against unreasonable search and seizure, and the use of drug detection dogs without reasonable suspicion of wrongdoing violated that protection.[2] In the resulting legal challenge brought by the individuals charged with drug crimes based on evidence found during the searches, the state claimed that state civil liberties do not constrain federal authorities acting within its boundaries, no state action was involved in the checkpoint, and that state prosecutors were free to use the evidence obtained by federal authorities and provided to state law enforcement who were present.[3] The defendants argued that this amounted to an illegal end-run around state law; had the state done what Border Patrol did, the evidence obtained would have been clearly inadmissible.[4] They claimed that acting in concert with federal authorities does not cure that illegality, so the evidence should be excluded.[5]

This scenario raises the question of how a state court can, and should, deal with the admissibility of evidence obtained by a federal official consistent with federal law, but in violation of state law. This Article will explore the legal implications of a case such as this, including the overlap of federal and state authority and the sometimes-blurred boundaries of each within the context of federalism. It will investigate the increasingly expansive activities of Border Patrol, the

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1 State v. McCarthy, No. 469-2017-CR-01888, 2018 WL 2106769, at *1–2 (N.H. Super. May 1, 2018).

2 *Id.* at *3; N.H. CONST. pt. I, art. XIX.

3 *McCarthy*, 2018 WL 2106769, at *2.

4 *Id.* at *6–7.

5 *Id.* at *7.

"border search exception" to the Fourth Amendment to the U.S. Constitution, and the conflicts with state civil liberties provisions when the exception leads to evidence in state prosecutions generally impermissible under state law. The analysis of appropriate boundaries and limits of law enforcement activities in this context will be informed by legal provisions, constitutional jurisprudence, and practical considerations. Whether Border Patrol may collaborate with state or local law enforcement using methods that violate state—but not federal—constitutional rights is an increasingly relevant question, as is whether Border Patrol may deliver evidence to the state in the absence of collaboration. Several state courts have refused to accept this evidence, concluding that such cooperation is not legally permissible, while others have gone further by holding that *any* evidence obtained by federal agencies in violation of state constitutional rights will be excluded from state courts. As this Article will demonstrate, the arguments for rejecting such evidence are convincing.

I. THE SILVER PLATTER DOCTRINE

Until nearly the middle of the 20th Century, Fourth Amendment jurisprudence applied only to the federal government and not to the states.[6] In practice, this meant that while state law enforcement could take action that violated both the letter of the Amendment and federal court interpretations of it, federal law enforcement action was bound by both. However, this divergence led to an important question: what would happen if state law enforcement acted in violation of the Fourth Amendment, but then handed the resulting evidence over to federal officers to use in federal prosecutions, where the evidence would have otherwise been inadmissible if federal agents had procured it? The federal government did put forth such stat-gathered evidence, and the federal courts continuously admitted it.[7]

In 1949 the Supreme Court officially endorsed the "silver platter doctrine" in *Lustig v. United States*.[8] The doctrine was so named because state officials were said to hand over evidence to federal authorities on a figurative silver platter, allowing federal law enforcement to use the evidence that was obtained by states in a

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6 In *Wolf v. Colorado* the Supreme Court expressly held that the Fourth Amendment of the U.S. Constitution was "enforceable against the States through the Due Process Clause." 338 U.S. 25, 27–28 (1949).

7 *See, e.g.*, Weeks v. United States, 232 U.S. 383, 388 (1914).

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

federally unconstitutional manner.[9] So long as the federal authorities had no hand in securing the evidence, they could use it as they wished. For the next decade, the silver platter doctrine was applied by federal courts to circumvent the Fourth Amendment, as it did not yet apply to state actors. The doctrine's official acceptance, however, was short-lived. Eleven years later, the Court overturned the silver platter doctrine in *Elkins v. United States*, holding that evidence that would have been inadmissible had the search been conducted by federal officials is also inadmissible when provided by state officers for use in a federal trial.[10] Such a practice, the Court decided, violates the Fourth Amendment protection against unreasonable search and seizure.[11]

Just a year later, the question became partially moot. The exclusionary rule has applied to the federal government since 1914.[12] The rule dictated that evidence obtained in violation of Fourth Amendment protections was not admissible in court, under the theory that the prohibition of unreasonable searches and seizures would be meaningless if the evidence obtained illegally were nevertheless admissible.[13] However, the exclusionary rule applied only to the federal government; state law enforcement operated under no such restrictions. While the Court determined that Fourth Amendment protections also apply to state actions in *Wolf v. Colorado*, it declined to acknowledge the exclusionary rule as essential to safeguard the rights guaranteed under the Amendment.[14] That finally changed in 1961 with *Mapp v. Ohio*, where the Court held that the exclusionary rule applied to the states.[15] Consequently, both the federal government and the states operated under identical Fourth Amendment restrictions and remedies after 1961; any evidence illegally obtained by a state would be inadmissible in either court system. Thus, the silver platter doctrine became partially irrelevant because there could be no circumstance under which law enforcement actions would violate the Fourth

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9 *Id.*

10 Elkins v. United States, 364 U.S. 206, 208, 223 (1960).

11 *Id.* at 223.

12 *E.g.*, *Weeks*, 232 U.S. at 398.

13 *Id.* at 393.

14 Wolf v. Colorado, 338 U.S. 25, 27–28, 33 (1949).

15 Mapp v. Ohio, 367 U.S. 643, 655–56 (1961).

Amendment yet remain permissible by state actors. Evidence obtained from an illegal search would be inadmissible in either court system.[16]

II. REVERSE SILVER PLATTER

The "reverse silver platter" is the analogue of the silver platter issue but working in the opposite direction. It involves a situation wherein federal law enforcement acts in a way that is consistent with federal constitutional requirements but violates state constitutional protections.

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[16] While a full examination of it is outside of the scope of this Article, a different kind of silver platter case persists. Occasionally there are cases where evidence obtained by state actors in *violation* of state law, but consistent with federal law, is then provided to federal authorities for prosecution. Federal courts have held that evidence gathered in compliance with federal law is admissible in federal court, even if obtained by *state* authorities under a *state* warrant in violation of *state* law. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 224 (1960) (holding that evidence obtained by state actors in violation of the Fourth Amendment would be inadmissible in federal court); United States v. Sutherland, 929 F.2d 765, 770–71 (1st Cir. 1991) (while a federal court may choose to exercise its discretion in excluding ill-gotten evidence the general rule is that evidence gathered in compliance with the Fourth Amendment will be admissible in a federal proceeding); United States v. Mitro, 880 F.2d 1480, 1485 n.7 (1st Cir. 1989) ("Federal law governs the admissibility of evidence in federal criminal trials, even when it is obtained pursuant to a state search warrant or in the course of a state investigation." (citation omitted)); United States v. Sheehan, 406 F. Supp. 3d 178, 180 (D. Mass. 2019) ("evidence gathered under a state warrant is admitted in federal proceedings if the warrant substantially complies with federal law"). In other words, patent illegality in the gathering of the evidence would not necessarily require exclusion of the evidence in federal court. Even a state court order to suppress the same evidence in state court based on state law (or the state court's interpretation of federal law) would not render the evidence inadmissible in federal court. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 177–78 (2008); United States v. Charles, 213 F.3d 10, 19 (1st Cir. 2000). Interestingly, the reverse scenario leads to the opposite result: a federal agent who obtained evidence illegally under federal law was enjoined from testifying in a state court prosecution concerning the illegally obtained evidence. Rea v. United States, 350 U.S. 214, 217 (1956). This doctrine is controversial. It arguably incentivizes state and local law enforcement to ignore the protections states provide their citizens and federal law enforcement to encourage these state actors to do so. This potentially abrogates the very protections that state legislatures intended to provide and allows for the circumvention of otherwise applicable protections. The issue could be framed in this way: as a requirement for evidence to be admissible in their courts, federal courts require it be obtained consistent with federal law, regardless of the laws of the jurisdiction in which it was obtained. States can, and should, do the same by holding that to be admissible in state courts, evidence must have been obtained consistent with state law.

State officials—in a state prosecution—would then proffer evidence they received on a "silver platter" from federal officials, which would have been inadmissible had it been obtained by state officials due to the violation of state constitutional provisions. A "reverse silver platter doctrine" would hold that the gathering of evidence by federal actors that was illegal under the state constitution would not require the evidence to be excluded in the state trial.

While the reverse silver platter issue is relevant to a number of federal agencies, it is particularly salient with Border Patrol. Courts have construed the Fourth Amendment to allow the Border Patrol to operate under reduced restrictions, which permit the agency to conduct searches without a warrant and with little suspicion of wrongdoing under circumstances which other federal agencies may not.[17] The justification for such allowance is to permit the agency to carry out its important charge of immigration and customs enforcement at the border.[18] Yet Border Patrol operations do not take place exclusively at the border—they actually extend far inside the U.S. and have become increasingly expansive in recent years.[19] Given the reduced constitutional protections and a lower required standard of suspicion, searches conducted by Border Patrol agents frequently yield evidence of crimes unrelated to immigration violations. This evidence often would not have been obtained had ordinary search and seizure standards

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[17] Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973). The constitutional leeway given to Border Patrol is controversial. *See, e.g.*, *id.* However, the U.S. Supreme Court has established that exceptions to the warrant requirement apply to Border Patrol operations. *See id.* at 274–75 (quoting Carroll v. United States, 267 U.S. 132, 153–54 (1925)).

[18] *Id.* at 272.

[19] Daniel E. Martínez et al., *Border Enforcement Developments Since 1993 and How to Change CPB*, CTR FOR MIGRATION STUD. N.Y. (Aug. 24, 2020), http://doi.org/10.14240/cmsesy082420 [https://perma.cc/Y2MD-NFY6] (From 1992 the number of U.S. Border Patrol agents "has swelled more than five-fold, peaking at 21,444 in 2011 before leveling off to 19,648 by 2019 . . . [and b]y 2019, its budget had ballooned to nearly $4.7 billion, increasing year-over-year since the beginning of the Trump administration."); *Border Patrol Overview*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/border-security/along-us-borders/overview [https://perma.cc/K26U-D34D] ("An increase in smuggling activities has pushed the Border Patrol to the front line of the U.S. war on drugs. Our role as the primary drug-interdicting organization along the Southwest border continues to expand.").

applied, but it is frequently handed over for use in prosecution by state courts. Furthermore, Border Patrol has a lengthy and troubled history of violating even the more circumscribed constitutional rights it is meant to operate under, raising additional concerns about the use of such evidence in state proceedings. This is corroborated by the fact that many of the reverse silver platter legal challenges involve Border Patrol. Apart from the Border Patrol, the constitutional analysis below also includes relevant cases from other federal agencies.

A. State Privacy Rights Provisions

Under what circumstances might a federal action violate a state constitution? It is a longstanding principle of constitutional law that the rights provided in the U.S. Constitution provide a minimum level of protection beneath which state actors may not venture. That is to say, states are free to go beyond the civil liberties laid out in the federal Constitution and provide additional protections to their own citizens. Likewise, when a state constitutional provision is similar or identical to a federal one, state courts are not obligated to interpret the meaning of their state provisions in the same manner as the U.S. Supreme Court. For example, the high court has held that even in the face of an illegal search and seizure, the illegally obtained evidence will still be admissible—and the exclusionary rule will not apply—if the officer had a reasonable, good faith belief that they were acting legally at the time.[20] However, Connecticut,[21] New Jersey,[22] New Mexico,[23] North Carolina,[24] and Pennsylvania[25] do not recognize this "good faith" exception to the exclusionary rule. In those states, any evidence

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[20] Herring v. United States, 555 U.S. 135, 147–48 (2009) (when a search is unlawful due to police negligence in procuring the warrant, that negligence alone does not require the exclusion of the evidence procured by the search); Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (evidence ruled admissible when officers reasonably relied on invalid warrant due to clerical error of court employee); United States v. Leon, 468 U.S. 897, 922 (1984) (evidence admissible when obtained in reasonable reliance on an invalidated warrant).

[21] *See* State v. Miller, 630 A.2d 1315, 1324 (Conn. 1993) (in the context of the automobile exception in Connecticut).

[22] *See* State v. Novembrino, 519 A.2d 820, 856–57 (N.J. 1987).

[23] *See* State v. Gutierrez, 863 P.2d 1052, 1053 (N.M. 1993).

[24] *See* State v. Carter, 370 S.E.2d 553, 562 (N.C. 1988).

[25] *See* Commonwealth v. Edmunds, 586 A.2d 887, 891–92 (Pa. 1991).

obtained illegally will be inadmissible in a state case regardless of whether the officer acted in "good faith."[26]

When faced with a question of interpreting a state constitutional provision that is analogous to the Fourth Amendment, states typically take one of several approaches. One approach is known as "lockstep," whereby a state court interprets a state constitutional provision in "lockstep" with the U.S. Supreme Court interpretation of the analogous federal provision.[27] With new Court decisions the federal interpretation of provisions change, and state courts apply those new interpretations to their own analogous provisions. A similar approach might be called "lockstep-lite," meaning the state court reserves the *right* to interpret analogous provisions differently, but in practice does so rarely or not at all.[28] Alternatively, a state may take a "primacy" approach, and resolve questions of civil liberties by relying on state provisions and the state courts' independent interpretations thereof; Supreme Court jurisprudence may or may not be considered presumptively persuasive.[29] The result, therefore, is that the full scope of any individual citizen's civil liberties depends upon which state they are in.

Given the practical implications involved, it is worth exploring how many states provide greater search and seizure protections than the federal government. A thorough analysis undertaken in 2007 found that at least 28 states have provided heightened protections against unreasonable searches and seizures than what exist at the federal level.[30] Since that survey, additional developments have taken place: Iowa, for example, abandoned its lockstep approach in 2010[31] by issuing several holdings that expanded the scope of search and seizure protections

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26 In other states, and in federal court, the same evidence obtained under the same facts would be admissible. *See* cases cited *supra* note 20.

27 Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 418, 426 (2007).

28 *See, e.g., id.* at 418.

29 Eric M. Hartmann, Note, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 IOWA L. REV. 2265, 2272–73 (2017).

30 *See* Gorman, *supra* note 27.

31 Stave v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010) (holding that "while United States Supreme Court cases are entitled to respectful consideration, we will engage in independent analysis of the content of our state search and seizure provisions").

beyond Supreme Court decisions.[32] In 2014, Missouri voters approved a state constitutional amendment explicitly protecting electronic communications and data from unreasonable search and seizure, making it the first state in the nation to do so.[33]

Searches of motorists and their vehicles are the most common type of Border Patrol search.[34] Of the states that are not in "lockstep" and have vested citizens with increased privacy protections, several provisions are directly applicable to searches of motorists. Idaho,[35] Michigan,[36] Minnesota,[37] Oregon,[38] Rhode Island,[39] and Washington[40] prohibit sobriety checkpoints under state constitutional provisions.

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[32] *See, e.g.*, State v. Ingram, 914 N.W.2d 794, 798–99 (Iowa 2018) (holding that warrantless inventory search of impounded car violates state constitution); State v. Coleman, 890 N.W.2d 284, 285 (Iowa 2017) (holding that a traffic "stop must end when reasonable suspicion is no longer present" and a further search contravenes state constitutional protections); State v. Gaskins, 866 N.W.2d 1, 3 (Iowa 2015).

[33] MO. CONST. art. I, § 15. The new language reads

> That the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, or access electronic data or communication, shall issue without describing the place to be searched, or the person or thing to be seized, or the data or communication to be accessed, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

Id.

[34] *See* United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975) (discussing how most illegal entrants "leave the border area in private vehicles").

[35] State v. Henderson, 756 P.2d 1057, 1063 (Idaho 1988) (holding that police roadblocks are unconstitutional under Article I, § 17 of the Idaho Constitution).

[36] Sitz v. Dept. of State Police, 506 N.W.2d 209, 210 (Mich. 1993) (holding that police "sobriety checklanes violate art. 1, § 11 of the Michigan Constitution").

[37] Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183,183–84 (Minn. 1994) (holding that temporary police "roadblocks violate Minn. Const. art. I, § 10").

[38] Nelson v. Lane Cty., 743 P.2d 692, 694 (Or. 1987) (affirming the holding of the appeals court that sobriety checkpoints are unreasonable per Article I, section 9 of the Oregon Constitution).

[39] Pimental v. Dep't of Transp., 561 A.2d 1348, 1352–3 (R.I. 1989) ("police roadblocks for drunk driving are so violative of our citizen's rights that they must be declared unconstitutional" under article I, section 6 of the Rhode Island Constitution).

[40] City of Seattle v. Mesiani, 755 P.2d 775, 777 (Wash. 1988) (en banc) ("sobriety checkpoint program therefore violated petitioners' rights under article 1, section 7" of the Washington Constitution).

Statutes in Iowa, Montana, and Wyoming[41] list permissible purposes of law enforcement checkpoints, and sobriety checks are not included. The U.S. Supreme Court held these checkpoints to be constitutional in 1990.[42] Despite this holding, Texas courts have held sobriety checkpoints to be illegal under the *federal* Fourth Amendment, "unless and until a politically accountable [state] governing body sees fit to enact constitutional guidelines" for their operation.[43] A different kind of vehicle search, using drug detection dogs, is prohibited in New Hampshire without an articulable reasonable suspicion of illegal activity involving controlled substances,[44] which again, exceeds federal requirements.[45] Colorado prohibits the warrantless, suspicion-less use of drug detection dogs if the dog is trained to detect marijuana.[46] Minnesota requires a heightened level of "individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop."[47] Nevada also sets a higher standard than what is federally required before a warrantless vehicle search incident to arrest is permissible.[48] Finally, Iowa has additional restrictions on the legality of vehicle searches.[49]

The fact that these states and others provide more extensive privacy rights than those provided federally creates the potential for federal law

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41 *See* IOWA CODE § 321K.1 (2021); MONT. CODE ANN. § 46-5-502 (2021); WYO. STAT. ANN. § 7-17-102 (2020). Other states while not explicitly referencing sobriety checkpoints do prohibit vehicle stops unless police officers have probable cause thereby excluding sobriety roadblocks. *See e.g.*, WIS. STAT. § 349.02 (2020).

42 Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990).

43 Holt v. State, 887 S.W.2d 16, 19 (Tex. Crim. App. 1994) (en banc).

44 State v. Pellicci, 580 A.2d 710, 717 (N.H. 1990) (canine search satisfies state constitutional requirements when it is, among other requirements, "based on a reasonable and articulable suspicion that the property searched contains controlled substances").

45 Illinois v. Caballes, 543 U.S. 405, 409–10 (2005) (warrantless and suspicion-less drug dog sniffs are constitutional under federal law).

46 People v. McKnight, 2019 CO 36, ¶ 7.

47 Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183, 187 (Minn. 1994).

48 Camacho v. State, 75 P.3d 370, 374 (Nev. 2003) ("We now conclude that, under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest.").

49 *See* State v. Gaskins, 866 N.W.2d 1, 3, 12–13 (Iowa 2015) (holding that the warrantless search of a safe in defendant's vehicle after his arrest violated the state constitution).

enforcement to act in ways that run afoul of state constitutional rights. Federal officials are ordinarily bound only by federal Fourth Amendment provisions. This means that state protections that are analogous to the Fourth Amendment are not applicable to federal officials acting on behalf of the federal government within the geographic boundaries of any given state. Yet, what happens when federal officials move to deliver evidence to state law enforcement for state prosecution, when that evidence would be inadmissible had it been obtained by those same state actors?

This question introduces the general "reverse silver platter" dilemma: federal law enforcement obtains evidence legally under the U.S. Constitution and hands it to a state for use in a prosecution where state officials would ordinarily have been prohibited from obtaining and using that same evidence. In the context of Border Patrol activity, such a scenario is especially likely when states like Nevada[50] and New Hampshire[51] provide additional privacy protections to motorists and their vehicles. Reverse silver platter issues also arise when Border Patrol conducts a search without a warrant, or without the level of suspicion that would have otherwise been required under either the Fourth Amendment or the state's Fourth Amendment analogue.

B. State Cases Adopting Reverse Silver Platter

Of the states that have been faced with the reverse silver platter question, several have adopted the doctrine, and will admit evidence in a state court prosecution which would have been excluded had it been obtained by state actors. In a 1973 Maine case, Customs officers turned over evidence to state police, and the Supreme Judicial Court of Maine held that there was no constitutional violation in doing so.[52] The court stated that it did not "perceive any policy . . . which would lead us to forbid this cooperation between federal and state officials."[53]

Florida has also admitted reverse silver platter evidence. In *Morales v. State*, border officials searched the defendants' sea-going vessel without a warrant and discovered marijuana.[54] Federal officials declined to prosecute and instead provided the evidence to local police for state

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50 *Camacho*, 75 P.3d at 374.

51 State v. Pellicci, 580 A.2d 710, 717 (N.H. 1990).

52 State v. Allard, 313 A.2d 439, 451 (Me. 1973).

53 *Id.*

54 Morales v. State, 407 So. 2d 321, 324 (Fla. Dist. Ct. App. 1981).

prosecution.[55] The Florida Court of Appeals held that because the evidence was obtained in compliance with federal law, it was admissible in either a federal or state court.[56] However, the court did not provide an analysis or a rationale for its holding on this issue.[57] In another case involving Border Patrol, Vermont endorsed the reverse silver platter doctrine when it held that evidence seized by Border Patrol agents at a checkpoint 97 miles from the border could not be challenged by reference to search and seizure provisions of the state constitution.[58] The evidence was therefore admissible in state court.[59]

C. State Cases Adopting Conditional Reverse Silver Platter

A number of states have declined to accept a categorical reverse silver platter doctrine and instead have adopted a conditional one. These states have held that the doctrine will apply only if certain conditions are met. Those conditions typically involve the extent to which state actors were involved in the search that produced the evidence in violation of the state constitution.[60] If state actors were involved in the search to a certain threshold degree, or if state and federal actors were working so closely together that the federal actors might be viewed as state agents, then state constitutional law applies to determine the admissibility of evidence. Unfortunately, the level of involvement that will trigger inadmissibility of the evidence varies and at times is unclear.

The Supreme Court of New Jersey, for example, took such a position in 1989 when it admitted evidence seized by federal officials that would have violated state constitutional provisions.[61] In that case,

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55 *Id.* at 329.

56 *Id.*

57 *Id.*

58 State v. Rennis, 2014 VT 8, ¶ 2, ¶ 16, 195 Vt. 492, 90 A.3d 906.

59 *See id.* at ¶ 11 (citing State v. Dreibelbis, 511 A.2d 307, 308 (Vt. 1986) ("stating that so long as evidence seized by federal customs officials during routine customs inspection meets federal standards for such searches, that evidence is admissible in state prosecution")). In *Rennis* the Supreme Court of Vermont used the reasoning of the Dreibelbis Court to uphold the trial court's denial of Rennis' motion to suppress. *Id.* at ¶ 15.

60 *See, e.g.*, Commonwealth v. Jarabek, 424 N.E.2d 491, 493 (Mass. 1981); State v. Mollica, 554 A.2d 1315, 1326 (N.J. 1989); Pena v. State, 61 S.W.3d 745, 754–55 (Tex. Crim. App. 2001); Lockett v. State, 879 S.W.2d 184, 190 (Tex. Crim. App. 1994); State v. Bradley, 719 P.2d 546, 549 (Wash. 1986) (en banc) (absent involvement by state actors, the state constitution did not require the exclusion of evidence obtained entirely through the efforts of federal actors).

61 *Mollica*, 554 A.2d at 1318.

federal officers seized the defendant's hotel telephone records without a warrant.[62] The court nevertheless admitted the evidence, holding that when "federal officers act[] independently of state authorities and in conformity with federal law," the evidence is admissible despite state law.[63] Activities such as "antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between" agencies may eliminate the necessary independence, but "mere contact, awareness of ongoing investigations, or the exchange of information may not[.]"[64] Further, in determining whether a threshold agency relationship was present, the New Jersey court in *State v. Minter* looked, in part, to the purpose of the search: "If a purpose of the investigation is for a State prosecution, the federal agents can, in effect, be deemed agents of the State[.]"[65]

The New Jersey Appellate Court applied this agency standard in a subsequent case involving the admissibility of a statement to a federal officer in a state murder prosecution.[66] In applying the "vital, significant condition"[67] that the federal agents must have "acted independently and without cooperation or assistance of our own state officers,"[68] the court addressed whether the federal action could be considered state action to "any legally significant degree."[69] Because this case involved a "joint, cooperative effort" between federal and state agencies to investigate the murder charge, the court found state constitutional protections applied, and the evidence was excluded.[70]

Texas appears to have initially taken a similarly skeptical view of the reverse silver platter doctrine, noting that "[t]he use by state officials of evidence obtained through a search that did not comport with state constitutional protections would be problematic," particularly in the event of "[s]tate participation in the federal search."[71] Such a scenario may prevent the admissibility of the evidence in Texas courts, and may

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62 *Id.*

63 *Id.* at 1318, 1328–29.

64 *Id.* at 1329.

65 State v. Minter, 561 A.2d 570, 577 (N.J. 1989).

66 State v. Knight, 661 A.2d 298, 309 (N.J. Super. Ct. App. Div. 1995).

67 *Id.* at 307 (quoting *Mollica*, 554 A.2d at 1329).

68 *Id.* at 308 (quoting *Mollica*, 554 A.2d at 1330).

69 *Id.* at 307 (quoting *Mollica*, 554 A.2d at 1329).

70 *Id.* at 309.

71 Lockett v. State, 879 S.W.2d 184, 190 (Tex. Crim. App. 1994).

also invalidate a state search warrant obtained on the basis of that evidence.[72]

In *Pena v. State*, the Texas Court of Appeals again addressed a fact scenario raising similar questions.[73] There, Border Patrol was participating in a joint operation with the Texas Department of Public Safety ("DPS") at an international bridge in Brownsville.[74] While Customs agents were looking for individuals illegally transporting weapons, ammunition, or excessive currency across the border into Mexico, the DPS was searching for stolen vehicles and vehicles with altered VIN plates.[75] Both federal and state agents involved in the operation questioned and detained suspects.[76] The court held that "[e]vidence that is obtained by federal agents acting lawfully and in conformity with federal authority is admissible in state proceedings,"[77] thereby recognizing the reverse silver platter doctrine. The court qualified this holding by noting that the question turned on the nature of the relationship and agency between federal and state officers.[78] In other words, if Customs agents are, in effect, acting as *agents for the state police* and doing so *under color of state law*, then "the border search exception 'may not be used to circumvent the constitutional requirement of probable cause placed on police officers.'"[79] Consistent with other conditional reverse silver platter jurisdictions, the court determined that "[e]vidence of antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance"[80] were central to the inquiry, all of which suggest an agency relationship. Awareness of investigations or communication between the agencies alone would not be enough.[81]

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72 *Id.* In this case, the evidence was admissible because the search complied with the terms of *both* the Fourth Amendment and the Texas Constitution. *Id.* at 192. The admissibility of the federally-obtained evidence in state court was thus not an endorsement of reverse silver platter; indeed, the court's discussion of that issue offers a rejection of it. *Id.* at 190.

73 Pena v. State, 61 S.W.3d 745, 750–51 (Tex. Crim. App. 2001).

74 *Id.* at 750.

75 *Id.*

76 *Id.* at 751.

77 *Id.* at 754 (citing Gutierrez v. State, 22 S.W.3d 75, 84 (Tex. Crim. App. 2000)).

78 *Id.* (citing State v. Mollica, 554 A.2d 1315, 1326–27 (N.J. 1989)).

79 *Id.* at 755 (quoting People v. Esposito, 332 N.E.2d 863, 865–66 (N.Y. 1975)).

80 *Id.* (quoting State v. Toone, 823 S.W.2d 744, 748 (Tex. Crim. App. 1992)).

81 *Id.*

The court appears to then relax this standard, pronouncing that "[n]ot every joint operation" would trigger an agency relationship.[82] In fact, the operation in this case did not, because "there is no reason that the limited forces of the Customs Service cannot enlist the aid of other law enforcement entities in forming task forces to meet their needs."[83] This *no reason why not* approach was further clarified by a standard that in order for evidence to be admissible in state court in violation of state law, the search conducted during a federal-state collaboration merely had to be conducted "under the aegis of and in cooperation with Customs agents."[84] This applies even where the two agencies were operating with distinct purposes, as they were in this case.[85] However, the "under the aegis of and in cooperation with Customs agents" standard is not only vague, but appears to be exceptionally weak, as nearly every joint operation would likely fit this criterion. Under this standard, even with significant involvement by state actors, if federal agents are involved at all, federal rules will apply. The result is that nearly every joint operation between federal agents and state officers would only be subject to federal law. Federal gathering of evidence is in fact the entire premise of reverse silver platter; it cannot also function as a standard by which to conditionally accept it. Doing so amounts to an elimination of any agency criterion whatsoever.

The *Pena* Court's standard is all the more problematic when one considers that Texas law enforcement is constitutionally prohibited from conducting checkpoint stops to locate stolen cars under *both* federal and state law.[86] The cooperative efforts between Texas law enforcement officers and Border Patrol enabled the Texas officers to utilize prohibited "general crime control" checkpoints under the guise of Border Patrol's border search exception. The same checkpoints, if conducted without Border Patrol agents, would be explicitly prohibited by both state and federal law.[87] The standard laid out by the Texas court is fundamentally at odds with that same court's acknowledgement that "[t]he 'core evil' to be prevented is the 'misconduct of local law enforcement agents in *using* Federal Customs agents to conduct a local

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82 *Id.*

83 *Id.* (citing United States v. Alfonso, 759 F.2d 728, 735 (9th Cir. 1985)).

84 *Id.* (quoting *Alfonso*, 759 F.2d at 735).

85 *Id.* at 756 (citing United States v. Odneal, 565 F.2d 598, 602 (9th Cir. 1977)).

86 Holt v. State, 887 S.W.2d 16, 19 (Tex. Crim. App. 1994).

87 *See generally* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

investigation by unlawful means.'"[88] Determining that a federal-state operation was conducted under federal auspices and with their cooperation does nothing to address this risk of illegal state conduct. Unsurprisingly, the court determined that the facts of this case did not rise to the level of impermissible agency and admitted the evidence.[89]

Massachusetts also appears to employ a conditional reverse silver platter doctrine. In *Commonwealth v. Jarabek*, the Supreme Judicial Court addressed the admissibility of evidence of a defendant's conversations that had been recorded in violation of state law pursuant to a joint state-federal operation.[90] The court held that even in the face of "heavy Federal presence," where the recordings in question were made by federal agents and pursuant to federal law, a combined state-federal operation necessitates the application of state privacy protections provided by Massachusetts statute.[91] More than a decade later, the same court admitted evidence where the investigation was "essentially" federal in nature, with "minimal" assistance provided by state actors.[92] However, apparently acknowledging the broad potential implications of the holding, the court stated that "[n]othing in this opinion should be read as endorsing a 'reverse silver platter' doctrine."[93] Given that the court was in fact accepting reverse silver platter evidence, it is unclear how it understood the doctrine it was refusing to endorse. The primary issue for the court in both cases appears to turn on the degree of state versus federal participation in the operation in question, though there is a distinct lack of clarity in identifying the threshold degree of prohibited participation.

The Washington Supreme Court endorsed a conditional reverse silver platter doctrine in 1986 when it held that evidence obtained in a manner that would have violated state law was nevertheless admissible if it was obtained by federal officials according to federal standards.[94]

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88 *Pena*, 61 S.W.3d at 756 (quoting People v. Desnoyers, 705 N.Y.S.2d 851, 856 (2000)).

89 *Id*. at 758.

90 Commonwealth v. Jarabek, 424 N.E.2d 491, 492 (Mass. 1981).

91 *Id.* at 493.

92 Commonwealth v. Gonzalez, 688 N.E.2d 455, 457–58 (Mass. 1997). The court declined to hold that "the slightest level of assistance from local law enforcement" to federal agents triggered state protections. *Id.* at 457.

93 *Id.* at 457.

94 State v. Bradley, 719 P.2d 546, 549 (Wash. 1986) (en banc). Oddly, the case did not mention a state Supreme Court decision from six years prior coming to the opposite conclusion: that the state privacy act applied to evidence used in state

In Washington, the conditional reverse silver platter doctrine only applies when: (1) the evidence was lawfully obtained in the alternate jurisdiction; and (2) the state actors did not "act as agents or cooperate with . . . the foreign jurisdiction." [95] This appears to be a broad exclusion that is not dependent upon the degree of cooperation, but whether any existed at all. In the absence of such cooperation, the federally obtained evidence would be accepted in state courts.[96]

D. State Cases Rejecting Reverse Silver Platter

New York state has taken a critical view of the reverse silver platter doctrine. In several cases involving Border Patrol searches, its courts

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court, even when it was obtained by federal agents consistent with federal law, rendering the evidence inadmissible in state court. *See* State v. Williams, 617 P.2d 1012, 1018 (Wash. 1980) (en banc).

95 State v. Vance, 444 P.3d 1214, 1219 (Wash. Ct. App. 2019). *See also* State v. Brown, 940 P.2d 546, 577 (Wash. 1997) (en banc) ("[A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law." (quoting State v. Gwinner, 796 P.2d 728, 731 (Wash. Ct. App. 1990)); *In re* Teddington, 808 P.2d 156, 163 (Wash. 1991) (en banc) ("searches conducted by federal officers pursuant to federal law are admissible in Washington courts notwithstanding the dictates of our state constitution"); State v. Johnson, 879 P.2d 984, 988–89 (Wash. Ct. App. 1994) ("evidence that is lawfully obtained by federal officers" admissible in state court even if state constitution would have required its exclusion, provided that federal officers acted without the cooperation or assistance of state officers); *Gwinner*, 796 P.2d at 731–32 (evidence obtained by "federal officers who were not acting in cooperation with or at the request of state officers[,]" was admissible in state criminal trial).

96 A number of other Washington decisions have endorsed a reverse silver platter with respect to federal actions. *See, e.g.*, State v. Mezquia, 118 P.3d 378, 385–86 (Wash. Ct. App. 2005) (lawfully obtained evidence of defendant's DNA test results from a cheek swab conducted in Florida deemed admissible in state murder trial even though the evidence, if obtained in Washington, would violate Washington law). Tennessee and Alaska have taken a similar approach to that of the Washington courts. *See* State v. Cauley, 863 S.W.2d 411, 416 (Tenn. 1993) (Tennessee constitutional provisions applied where a Kentucky search warrant was obtained at the request of Tennessee authorities pursuant to a state agent's affidavit); State v. Hudson, 849 S.W.2d 309, 312 (Tenn. 1993) (if federal agents act "wholly independently" from state agents, federal law governs; when federal agents act in cooperation with state officers, state law applies); *See also* Pooley v. State, 705 P.2d 1293, 1303 (Alaska Ct. App. 1985) ("[T]he Alaska Constitution was not implicated" when evidence was seized in Alaska by agents acting pursuant to a warrant lawfully issued in California as there was no evidence of an ongoing joint effort between the two jurisdictions).

have excluded evidence obtained by federal agents which was subsequently provided to the state for prosecution. In *People v. LePera*, a Customs inspector conducted a search of the defendant, and seized gambling records which were later provided to state prosecutors.[97] The court held that, even when the legality of the initial stop and search under federal law is unquestioned, the evidence was not admissible in state court.[98] The search was conducted pursuant to the border search exception.[99] The limited purpose for the border search exception, the court noted, was to "effectively enforce the Customs laws."[100] Actions that are permitted under this exception would be unreasonable and prohibited if undertaken for other purposes. The court emphasized that the "special limited powers" of border officials did not include general law enforcement or criminal investigation.[101] Therefore, the federal official in *LePera* "exceeded his authority" by seizing the defendant's gambling records on behalf of local law enforcement because the records were only relevant to state criminal law.[102] In excluding the evidence, the court noted that the border search exception "may not be used to circumvent the constitutional requirement of probable cause placed upon police officers."[103] It is noteworthy that the court drew this conclusion even in the absence of any local police involvement or wrongdoing at the time of the search and seizure.

Similarly, an earlier New York trial court held that evidence of a stolen credit card seized by a border agent in the course of a border search was inadmissible in a state prosecution.[104] The court noted that "the purpose of the [customs] statute was to prevent smuggling of aliens, contraband, or merchandise subject to duty."[105] "Since a credit card is not contraband or merchandise subject to duty," it would not be within

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97 People v. LePera, 611 N.Y.S.2d 394, 395–96 (N.Y. App. Div. 1994).

98 *Id.* at 398.

99 *Id.* at 396. The border search exception permits warrantless searches without probable cause in circumstances in which they would not otherwise apply, i.e., away from the border or if performed by other agencies. *Id.*

100 *Id.* at 397.

101 *Id.*

102 *Id.* at 398.

103 *Id.* (quoting People v. Esposito, 332 N.E.2d 863, 865–66 (N.Y. 1975)).

104 People v. Regnet, 443 N.Y.S.2d 642, 645, 647 (Sup. Ct. 1981) (granting defendant's motion to suppress the credit card evidence).

105 *Id.* at 645.

the proper jurisdiction of customs agents,[106] thus rendering the search improper and inadmissible in the state's prosecution. A few years later the scope of the issue was presented even more expansively. In *People v. Griminger*, the state's highest court rejected the prosecution's argument that only federal law should apply to the admissibility of evidence in state court where a federal warrant was "executed by Federal agents."[107] The court stated, "[s]ince defendant has been tried for crimes defined by the State's Penal Law, we can discern no reason why he should not also be afforded the benefit of our State's search and seizure protections."[108] However, a trial court in that state later held when the subject of the search was properly within Customs' purview (i.e., there is a "significant Federal interest" in the subject of the search, such as the international "transport of hazardous medical materials"), then the evidence obtained from it may be used in a state prosecution.[109]

The Supreme Court of Oregon likewise rejected the reverse silver platter doctrine in 1992 when it decided *People v. Davis*. Although the evidence in question was obtained in another state rather than by the federal government, the court held that the emphasis on individual rights within the Oregon Constitution necessitated the conclusion that its search and seizure provisions apply to any evidence proffered in state court.[110] The court reasoned that the holding applied no "matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it."[111] The court acknowledged that this holding may mean that evidence will be excluded even when out-of-state agents act in good faith.[112] The court ultimately held this possibility to be peripheral to the central issue: state constitutional rights are guaranteed to the individual defendant in state courts, and the only way to effectuate those rights is by applying them in state trials.[113] As a result, the exclusionary rule applies to all evidence in Oregon state trials, and it cannot be overcome by reference to *where* or *by whom* it was obtained.[114] The same court affirmed this ruling a

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106 *Id.*

107 People v. Griminger, 524 N.E.2d 409, 412 (N.Y. 1988).

108 *Id.*

109 People v. Desnoyers, 705 N.Y.S.2d 851, 857 (Sup. Ct. 2000).

110 State v. Davis, 834 P.2d 1008, 1012–13 (Or. 1992).

111 *Id.* at 1012.

112 *Id.* at 1013.

113 *Id.*

114 *Id.* at 1012–13.

year later in *State v. Rodriguez*, where evidence legally obtained by a federal agent under federal law was excluded from the state trial because it violated Oregon's constitutional provisions.[115] The court "[saw] no reason why the factual distinction between a state officer and a federal officer has any legal significance in determining whether certain evidence is admissible in an Oregon criminal prosecution."[116] The holding was reaffirmed by the court once again in 2017.[117]

The New Mexico Supreme Court followed Oregon's lead and dealt a solid blow to the reverse silver platter doctrine in 2001 with *State v. Cardenas-Alvarez*.[118] The motorist defendant in that case encountered a permanent Border Patrol checkpoint.[119] After initial questioning, the federal agent "ordered the [d]efendant to a secondary inspection area" for further questioning and a vehicle search, during which marijuana was found.[120] The New Mexico Supreme Court held that (1) the agent's actions did not violate the federal constitution; (2) the agent's actions did violate the state constitution; and (3) the evidence must be excluded from state court as a result of that violation.[121] Similarly, the Indiana Supreme Court applied the state constitution when determining whether a state prosecutor should be permitted to base a conviction upon evidence that was the product of a federal warrant.[122] More recently, in 2011 the Hawaii Supreme Court decided *State v. Torres*, and overturned state precedent from 1996 by holding that evidence obtained in another jurisdiction should be subject to admissibility review under Hawaii law.[123]

A reverse silver platter issue was raised in New Hampshire in a case stemming from events that occurred in August and September of 2017. Border Patrol set up a temporary checkpoint in the town of Woodstock, New Hampshire, approximately 90 miles south of the Canadian

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115 State v. Rodriguez, 854 P.2d 399, 403 (Or. 1993).

116 *Id.*

117 State v. Keller, 396 P.3d 917, 922 (Or. 2017).

118 State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001).

119 *Id.* at 227.

120 *Id.*

121 *Id.* at 228. The court held that prolonging a border stop beyond "questions regarding citizenship and immigration status" required reasonable suspicion of criminal activity under the New Mexico Constitution. *Id.* at 231. No such suspicion existed in this case, rendering the search illegal under state law. *Id.*

122 Moran v. State, 644 N.E.2d 536, 542 (Ind. 1994).

123 State v. Torres, 262 P.3d 1006, 1021 (Haw. 2011).

border.[124] Border Patrol used drug detection "dogs to monitor the vehicles passing through the checkpoints[,]" and those that elicited an alert from the dog were searched by Border Patrol officers without a warrant.[125] Local law enforcement was present at these checkpoints, and any illegal controlled substances discovered as a result of these searches were provided to the local police for prosecution in state court.[126] The operation resulted in forty-four people being charged "with possession of small amounts of controlled substances – mostly marijuana."[127]

The defendants argued that the warrantless searches violated both the federal and state constitutions.[128] The court appeared to acknowledge this divergence in protections with respect to using drug detection dogs, surmising that the evidence in question would be admissible in federal court before discussing its admissibility in the state court.[129]

Both the state and Border Patrol agents argued that "the primary purpose of the . . . checkpoints was to maintain the integrity of the [country's] international borders."[130] The court was highly skeptical of this assertion, noting that the number of arrests for immigration violations was significantly less than number of arrests for drug possession.[131] Furthermore, of the twenty-five immigration-related arrests, none had illegally crossed the Canadian border; rather, "most of the individuals arrested for immigration violations had entered the United States legally but had overstayed visas."[132] The court found that

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124 State v. McCarthy, No. 469-2017-CR-01888, 2018 WL 2106769, at *1 (N.H. Super. May 1, 2018).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at *2. For purposes of this Article, it will be presumed that the vehicular searches were consistent with federal law, but not with state constitutional provisions. The legality of Border Patrol actions in this case was also in dispute; indeed, the trial court ultimately held that federal constitutional provisions were also violated, stating that "the primary purpose of a motor vehicle checkpoint cannot be the random detection of criminal activity such as drug detection. As such, the checkpoints were unconstitutional under both State and federal law." *Id.* at *8.

129 *Id.* at *3.

130 *Id.* at *8.

131 *Id.* & n.15.

132 *Id.* at *8.

the primary purpose of the checkpoints was not immigration-related, but drug interdiction.[133]

The court determined that evidence uncovered through the use of drug dogs without reasonable suspicion is clearly inadmissible under state constitutional provisions.[134] It then turned to the question of whether the admissibility analysis changes by virtue of the fact that the evidence was first obtained by federal Border Patrol officers rather than state agents.[135] This is the essence of the reverse silver platter question. The court rejected that doctrine and excluded all of the evidence obtained in this fashion, holding that "the inadmissibility of the evidence does not change based on the fact that it was seized by federal officers and then handed over to the State."[136]

III. ANALYSIS OF REVERSE SILVER PLATTER ARGUMENTS

A. The Issue of "Control"

State courts adopting the reverse silver platter doctrine have done so by relying on several arguments. First, courts often focus on the issue of "control"—in essence, the question is whether state law or courts may control the actions of federal officials.[137] When framed this way, the answer is undisputedly negative. Federal law enforcement officers operate independently from the states in which they are located and are bound only by federal rules rather than the particular laws of the state in which they are acting.[138] Accordingly, no state may properly "control" the actions of federal agents.

For example, the Vermont Supreme Court held that "the Vermont Constitution does not apply to the conduct of federal government officials acting under . . . exclusive federal authority."[139] Courts in New Jersey, Texas, and Washington also focused on whether the state could "control" the actions of federal agents. In *State v. Mollica*, the New

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133 *Id.* This would render the checkpoint unconstitutional under federal law, too. *See supra* note 128 and accompanying text.

134 *McCarthy*, 2018 WL 2106769, at *7.

135 *Id.*

136 *Id.*

137 *See* State v. Mollica, 554 A.2d 1315, 1327 (N.J. 1989); *see also* State v. Coburn, 683 A.2d 1343, 1347 (Vt. 1996).

138 *See Mollica*, 554 A.2d at 1330; *See also* State v. Toone, 823 S.W.2d 744, 748 (Tex. App. 1992).

139 *Coburn*, 683 A.2d at 1347.

Jersey court noted that "state constitutions do not control federal action"[140] in its rationale for accepting the evidence proffered. In *State v. Toone*, the Texas Court of Appeals held that "protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity."[141] As a result, state constitutional provisions did not apply to the actions of those federal agents nor, by extension, to the evidence resulting therefrom. The Supreme Court of Washington also focused on the inability of the state constitution to "control federal officers' conduct" when it held in *State v. Bradley* that the Border Patrol agents' actions complied with the federal requirements, thus rendering the evidence admissible.[142]

These courts declined to acknowledge that the defendants' arguments were focused on actions of the *state* entity, not the federal, in their claim that the state's prosecutorial apparatus should not be permitted to use evidence that was obtained illegally according to state law. The issue is presented as a question of *who* may control federal agents. This, however, misstates the fundamental question. State law cannot dictate federal operations, and the defendants did not argue that it should. Rather, the issue is whether state prosecutors may use evidence obtained by federal actors in violation of state rules, or should state protections require the exclusion of evidence so obtained.

The New Mexico Supreme Court responded to the "control" argument advanced by state prosecutors, who asserted that the state constitution "cannot apply to federal agents."[143] In rejecting this argument, the court held:

> We find no mandate in the text of [the state constitution], nor in our jurisprudence interpreting this clause, to selectively protect New Mexico's inhabitants from intrusions committed by state but not federal governmental actors. Nor do we believe such a limitation is appropriate . . . . [F]ederal agents exercise jurisdiction over New Mexicans and possess the authority to systematically subject our inhabitants to searches, seizures and other interferences. A federal agent who wields these powers unreasonably commits precisely the sort of "unwarranted governmental intrusion" against which the New Mexico Constitution ensures.[144]

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140 *Mollica*, 554 A.2d at 1327.

141 *Toone*, 823 S.W.2d at 748 (citing Burdeau v. McDowell, 265 U.S. 465, 475 (1921)).

142 State v. Bradley, 719 P.2d 546, 549 (Wash. 1986) (en banc).

143 State v. Cardenas-Alvarez, 25 P.3d 225, 231–32 (N.M. 2001).

144 *Id.* at 232.

As for the concern that such a result makes legal federal actions *illegal*, the court noted that federal agents remain able to vigilantly enforce federal law.[145] The court's decision does not impact that ability, nor does it attempt to constrain what evidence is used in federal court. But "[w]hen such vigilance violates the protections guaranteed by our state constitution . . . we will not abandon our guard of those protections in order to accommodate evidence thereby yielded . . . . [W]e do possess the authority—and indeed the duty—to insulate our courts from evidence seized in contravention of our state's constitution."[146] The U.S. Supreme Court acknowledged the solvency of this analysis in *Wilson v. Schnettler*.[147] That case involved an injunction prohibiting federal narcotics agents from testifying against the defendant in a state criminal trial.[148] The original search was legal under federal law, but the Court's analysis remains applicable to a case involving an illegal initial search.[149] In his dissent, Justice Douglas writes "[i]n the state trial the issue will not be whether the federal agents have acted within the limits of their federal authority, but whether, under the state constitution, the search was a reasonable one."[150] This captures the crux of the analysis undertaken in reverse silver platter cases.

B. The Foregone Conclusion: A 'Legal' Search Equals Admissible Evidence

It is also commonly argued that if the search was legal in the jurisdiction in which it was conducted (including federally), it should be admissible in the state court trial. Courts employing this argument state it as a foregone conclusion, rarely explaining *why* such a conclusion is warranted. The Tennessee Supreme Court provided some additional rationale related to this claim in *State v. Cauley*.[151] In that case, two brothers committed a murder in Tennessee and were convicted using evidence uncovered pursuant to a valid Kentucky search warrant.[152] The court noted that there will inevitably be occasions where a state's law enforcement efforts require the assistance of another jurisdiction,

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145 *Id.*

146 *Id.* at 233.

147 Wilson v. Schnettler, 365 U.S. 381, 385 (1961).

148 *Id.* at 382.

149 *Id.* at 387.

150 *Id.* at 391 (Douglas, J., dissenting).

151 State v. Cauley, 863 S.W.2d 411, 416 (Tenn. 1993).

152 *Id.* at 413–414.

leading to cooperation between the jurisdictions.[153] It is perhaps unreasonable to expect the agents of one state to be familiar with another state's particular constitutional provisions, and even if they were, they may be uncomfortable with applying standards and procedures that deviate from their own.[154] The Tennessee Supreme Court recognized these concerns but upheld the application of the Tennessee Constitution despite them, as they were insufficient to override the fundamental rights of state citizens.[155] That case involved state-to-state cooperation; it is less clear whether those concerns would apply to the same degree when considering federal-to-state cooperation. Nearly all the cases discussed here involved federal agents acting *within* the boundaries of the state in question, meaning that the state already had jurisdiction over the defendant and was free to act on its own volition consistent with state constitutional provisions. When the state enlists the assistance of the federal government, or vice-versa, it is often a matter of convenience or an attempt to circumvent the protections afforded by state law rather than as a matter of necessity. Unlike a situation where a Tennessee suspect has relocated to Kentucky, a state suspect cannot "relocate" to a federal jurisdiction wherein the federal government must be enlisted to search and apprehend him.

C. The Question of Acting in "Good Faith"

It may also be argued that rejecting reverse silver platter evidence punishes law enforcement even when they act in good faith. Although it is probable that bad faith does exist in some cases, it is also true that in at least some of the cases, both federal and state law enforcement acted reasonably and in good faith according to applicable law in obtaining the evidence. Why, then, should law enforcement be penalized when they did not intentionally do wrong?

This focus misconstrues the fundamental nature of search and seizure provisions. Those provisions are not, at their core, about punishing law enforcement for misdeeds—or even about upholding rules for law enforcement in general. Rather, they are about the rights of the *individual* to be free from unreasonable searches and seizures.[156] As such, it does not matter to the individual *who* violated that right, or by what legal jurisdiction the violation was accomplished, or whether it

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153 *Id.* at 416.

154 *Id.*

155 *Id.*

156 U.S. CONST amend. IV.

was done out of good will or ill. What matters is whether a given state has determined that a particular right is central to state citizenship. In that situation it would be improper for the courts of that state to welcome and use evidence obtained in contravention of rights the legislature deems sacrosanct. As stated by the U.S. Supreme Court in *Elkins*,

> To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution.[157]

Indeed, the issue in *Elkins* was that states were operating under fewer restrictions, with more ability to violate privacy rights, and then handing over evidence to the federal government.[158] In rejecting this, the Supreme Court was saying that the dual-jurisdiction mechanism cannot be used as an end-run around fundamental constitutional protections. There is no logical reason why this same principle should not operate when the evidence is being transferred from federal to state rather than vice versa.

In New Jersey, the *Mollica* court asserted that the reverse silver platter doctrine is acceptable because "no state official or person acting under color of state law has violated the State Constitution" therefore, "no citizen's individual constitutional rights fail of vindication."[159] The court is taking an illogically narrow conception of what it looks like when individual rights "fail of vindication." When the court seemingly disregards the fact that the state court is *endorsing* the violation of the New Jersey Constitution, the individual's state constitutional rights most certainly do fail of vindication. Surely a given right would be a hollow one—and would not be vindicated—if the very state that guarantees the right is unwilling to protect it in its own courts. The fact that the state's own agents cannot be blamed (or entirely blamed) for the violation does not vitiate the violation. Selectively nullifying state

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157 Elkins v. United States, 364 U.S. 206, 215 (1960).

158 *Id.* at 210.

159 State v. Mollica, 554 A.2d 1315, 1328 (N.J. 1988). *See also* People v. Blair, 602 P.2d 738, 748 (Cal. 1979) (holding that accepting reverse silver platter evidence does not impair the vindication of individual state rights), *superseded by constitutional amendment,* CAL. CONST. art. I, § 28 (as amended by the 1982 Proposition 8), *as recognized in* People v. Lissauer, 215 Cal. Rptr. 335, 336 n.1 (Ct. App. 1985).

protections simply because the evidence was gathered by federal agents would impose an arbitrary distinction that "reflect[s] an indefensibly selective evaluation of the provisions of the [state] Constitution."[160] Fundamentally, if a state has determined that certain rights are central to state citizenship, then those rights should be protected in state trials.

D. The Implications of Judicial Integrity

Another element discussed in reverse silver platter evidence arguments is that of judicial integrity. Judicial integrity as a principle is meant to "relieve the courts from being compelled to participate in illegal conduct."[161] While a few courts that have accepted the reverse silver platter doctrine mention judicial integrity, they have rejected its salience, primarily by reasoning that if the evidence was obtained by federal agents according to federal law, then judicial integrity is not implicated in a decision to admit the evidence in state court.[162] For example, in *People v. Blair* the California Supreme Court held that because there was no illegal conduct in the evidence seizure itself, concerns of judicial integrity did not apply to the state's use of the evidence.[163] The *Mollica* court similarly asserted that reverse silver platter evidence did not implicate judicial integrity concerns because it involves no "misuse or perversion of judicial process."[164]

However, this too is an unduly narrow conception of judicial integrity. In taking a broader view, the Massachusetts Supreme Judicial Court has asserted that the purpose of judicial integrity is the "dissociation of the courts from unlawful conduct."[165] Yet it is difficult to argue that the integrity of the judiciary is upheld when courts admit evidence gathered in clear violation of state constitutional protections. It is inconsistent for a state to demand that citizens obey the law while condoning the violation of constitutional rights by state actors. Indeed, "[o]ut of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.'"[166]

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160 *Elkins*, 364 U.S. at 215.

161 *Blair*, 602 P.2d at 748.

162 *See, e.g.*, *id.*; State v. Ramirez, 895 N.W.2d 884, 898 (Iowa 2017) ("[W]e do not believe deterrence or judicial integrity necessarily require a reexamination of the search under standards that hypothetically would have prevailed if the search had been performed by state authorities."); *Mollica*, 554 A.2d at 1328.

163 *Blair*, 602 P.2d at 748.

164 *Mollica*, 554 A.2d at 1328.

165 Commonwealth v. Brown, 925 N.E.2d 845, 851 (Mass. 2010).

166 People v. Cahan, 282 P.2d 905, 912 (Cal. 1955) (in banc).

Though a court may not be participating in illegal conduct at the outset or placing a "judicial imprimatur on lawlessness"[167] with respect to the initial search, it would be participating in the abrogation of the rights of its own citizens, by placing a judicial imprimatur on their violation. The Hawaii Supreme Court recognized this in *Torres*, holding that "if state courts admitted evidence in a state prosecution that was obtained in a manner that would be unlawful under our constitution, our courts would necessarily be placing their imprimatur of approval on evidence that would otherwise be deemed illegal, thus compromising the integrity of our courts."[168] Therefore, rejecting the reverse silver platter doctrine would uphold the judicial integrity of state courts. It would also serve to maintain consistent standards informed by the state constitution in all criminal cases within those courts.

E. Deterrence and Disincentivizing Police Misconduct

The acceptance of the reverse silver platter doctrine directly compromises state efforts to guarantee constitutional protections to citizens. It creates perverse incentives for federal agents to bypass state protections. Because the fruit of that violation can still be used in a state criminal trial, state actors also have reason to encourage it. Indeed, agents of different jurisdictions will have clear motive to work together in order to avoid legal proscriptions placed on the state.[169] Those incentives were part of the *Elkins* Court's rationale in rejecting the silver platter doctrine.[170] The U.S. Supreme Court noted their obvious existence in state-to-federal cases; it would be naïve to assume the same incentives do not work in the reverse direction. The New Jersey Supreme Court noted this concern in *Minter*: "Certainly we would not permit State investigators to circumvent the law by merely calling the federal agents and asking them to tap a phone."[171] Yet accepting reverse silver platter evidence invites such misconduct.

A corollary of the incentives issue is deterrence of police misconduct. Several courts have asserted that, since one of the primary purposes of the exclusionary rule is to prevent law enforcement from

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167 Pooley v. State, 705 P.2d 1293, 1303 (Alaska Ct. App. 1985).

168 State v. Torres, 262 P.3d 1006, 1019 (Haw. 2011).

169 *See, e.g.*, Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 293, 297 (2013) (examining how the unlawful "working arrangements" of law enforcement agencies infringe upon citizens' individual rights).

170 *See* Elkins v. United States, 364 U.S. 206, 217 (1960).

171 State v. Minter, 561 A.2d 570, 577 (N.J. 1989).

violating individual rights, that purpose is inapplicable in the case of reverse silver platter evidence because the initial search was legal in the jurisdiction in which it was obtained.[172] For if the state did not itself obtain the evidence, and the federal officers who conducted the search acted legally according to federal law, then there is no deterrence to be expected or desired from excluding the evidence. Indeed, the *Mollica* court centered its analysis of the New Jersey Constitution's protections against unreasonable search and seizure entirely around the issue of deterrence of police misconduct.[173] The court suggested that if state police did nothing wrong, and therefore would not be deterred by excluding reverse silver platter evidence, then there is no reason to reject it.[174] The Maine Supreme Court echoed that of New Jersey when it made the sweeping assertion that "[t]he turning over of evidence does not promote improper conduct by either local police or Customs agents."[175]

This logic frames the issue too narrowly. In the face of incentives and rewards for cooperating with, enlisting the help of, or even simply welcoming ill-gotten evidence, precisely what might be deterred by a rejection of reverse silver platter evidence are cooperative schemes that ignore state constitutional rights. Whether law enforcement actions are deliberate and premeditated or not, the circumvention of those rights is certainly something worth avoiding. Prohibiting this evidence encourages law enforcement to operate within the boundaries and restrictions laid out within their own jurisdictions and discourages the curtailing of individual liberties.

Advocates of the reverse silver platter doctrine may point out that rejecting this evidence will mean that some state criminal cases will be precluded from prosecution despite clear evidence of wrongdoing, and some criminals may, as a result, go free. This is undoubtedly true. Yet without more, it is an exceptionally weak argument in a discussion of constitutional rights and civil liberties. Certainly, all law enforcement limitations provided by search and seizure protections will preclude some criminal cases and will likely result in some criminals going free.

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172 *See, e.g.*, People v. Blair, 602 P.2d 738, 748 (Cal. 1979) (accepting reverse silver platter evidence does not impair objectives of deterring police misconduct); State v. Ramirez, 895 N.W.2d 884, 898 (Iowa 2017) ("[W]e do not believe deterrence or judicial integrity necessarily require a reexamination of the search under standards that hypothetically would have prevailed if the search had been performed by state authorities.").

173 State v. Mollica, 554 A.2d 1315, 1328 (N.J. 1989).

174 *Id.*

175 State v. Allard, 313 A.2d 439, 451 (Me. 1973).

But maximum efficiency in apprehending criminals is not the purpose of search and seizure protections and should not be a basis for upholding or rejecting them. These protections inherently limit the methods by which law enforcement may investigate crimes, and this was considered an appropriate trade-off in protecting the rights of all citizens.[176] Indiscriminately searching the homes of all citizens would undoubtedly lead police to uncovering more criminal actors. It is also true that some criminals will escape prosecution if the state is not allowed to use evidence gathered by federal officers in violation of state rights. Neither of these possibilities operate as sound reasoning for permitting these searches.

F. The Problems with Adopting a *Conditional* Reverse Silver Platter Doctrine

Adopting the conditional reverse silver platter doctrine is also rife with concerns. The standard is vague and difficult to apply. It can be construed as applying to advance knowledge, request,[177] participation,[178] assistance,[179] cooperation,[180] mutual planning[181] or

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176 *See, e.g.*, New Jersey v. T. L. O., 469 U.S. 325, 337 (1985) ("On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."); *see also Fourth Amendment*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourth_amendment [https://perma.cc/QKB3-H4SF].

177 State v. Minter, 561 A.2d 570, 577 (N.J. 1989) ("Certainly we would not permit State investigators to circumvent the law by merely calling the federal agents and asking them to tap a phone.").

178 *See* Lockett v. State, 879 S.W.2d 184, 190 (Tex. Crim. App. 1994) ("[s]tate participation in the federal search could prevent the state from accepting the 'silver platter' of evidence from the federal search").

179 *See* Pena v. State, 61 S.W.3d 745, 755 (Tex. Crim. App. 2001) ("mutual assistance between state and federal officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law").

180 *See* State v. Knight, 661 A.2d 298, 308 (N.J. Super. Ct. App. Div. 1995) (federal agents must have "acted independently and without cooperation or assistance of our own state officers" (quoting State v. Mollica, 554 A.2d 1315, 1330 (N.J. 1989))); State v. Mezquia, 118 P.3d 378, 385 (Wash. Ct. App. 2005) (condition for the admissibility of reverse silver platter evidence is that state actors "did not act as agents or cooperate or assist the foreign jurisdiction" (citing State v. Fowler, 111 P.3d 1264, 1265 (2005)).

181 *See* Mollica, 554 A.2d at 1329 ("antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may" eliminate the necessary independence).

formal joint operations.[182] It could also apply when federal agents are acting "under the color of state law,"[183] or when their presence is so "heavy"[184] or involved as to turn the local efforts into "essentially a Federal investigation."[185] Some courts have set the standard as whether federal action could be considered state action to "any legally significant degree,"[186] despite the fact that a "legally significant degree" sets both a vague and subjective measure. Other courts have even required evidence of a deliberate intent to evade the forum state's provisions in order to find an agency relationship.[187] For instance, in a case involving federal-state cooperation and a wiretap that was patently illegal under state law, the Illinois Supreme Court held that in order for the evidence to be suppressed, there must be evidence of a "secret agreement; secret cooperation [between the federal and state agency] for a fraudulent or deceitful purpose."[188] Thus, even in the presence of a cooperative enterprise and agency relationship, the suppression of the evidence turns on whether the actors had a subjective intent to deceive. Such evidence will be exceptionally difficult to secure.

These standards make it difficult to ascertain—prospectively or retrospectively—at what point state participation will tip the scales in favor of the application of state law. Such an approach also "ignores the existence of more subtle 'understandings' among repeat-player domestic law enforcement agencies,"[189] where clear evidence of cooperation may not be available despite the fact that there was a cooperative understanding of some sort. This standard also overlooks

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182 *See* Commonwealth v. Jarabek, 424 N.E.2d 491, 493 (Mass. 1981) (when state and federal officials engage in a "combined operation" the stricter constitutional protections of the two jurisdictions involved governs the admissibility of evidence seized).

183 *Pena*, 61 S.W.3d at 755.

184 *Jarabek*, 424 N.E.2d at 493 (in the face of "heavy Federal presence," where the recordings in question were made by federal agents and pursuant to federal law, a state-oriented investigation necessitates the application of state privacy protections provided by Massachusetts statute).

185 Commonwealth v. Gonzalez, 688 N.E.2d 455, 457 (Mass. 1997) (where the investigation was "essentially" federal in nature, the "minimal" assistance provided by state actors did not alter the federal standards applicable to the case).

186 *See, e.g.*, State v. Knight, 661 A.2d 298, 307 (N.J. Super. Ct. App. Div. 1995).

187 *See, e.g.*, People v. Coleman, 882 N.E.2d 1025, 1032 (Ill. 2008).

188 *Id.* (quoting People v. Burnom, 790 N.E.2d 14, 26 (Ill. App. Ct. 2003).

189 Logan, *supra* note 169, at 322.

the opportunity for "strategic manipulation"[190] of jurisdictional rules, while leaving cases open to inconsistent application and overly-rigid interpretation of what conduct amounts to agency.

Just as the silver platter doctrine subverts the protections of the Fourth Amendment, the reverse silver platter doctrine subverts the independent protections of state constitutions. States that have interpreted their constitutions as providing more protection than the Federal Constitution would in many cases instead be reduced to applying only the minimum protections of federal law.

IV. REVERSE SILVER PLATTER AND U.S. CUSTOMS AND BORDER PROTECTION ("CBP")

Unique concerns arise when states use evidence obtained by Border Patrol specifically, as opposed to other federal agencies. The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[191] Probable cause is defined as an objectively reasonable belief, based on the circumstances, that an immigration violation or crime has likely occurred; it is a higher standard to meet than reasonable suspicion.[192] In effect, this means that before conducting a search of a person or her belongings, law enforcement officers must first obtain a warrant from a judge, based on probable cause that evidence of a crime will be found. Failing to do so runs afoul of the federal Constitution and violates the rights of the individual.

Border Patrol, however, has been jurisprudentially granted exceptions to the Fourth Amendment warrant requirement.[193] The U.S. Supreme Court has held that the government's interest in monitoring and controlling entrants outweighs the privacy interest of the individual,

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190 *Id.* at 323; *see also* JOHN ASHCROFT ET AL., FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL-LOCAL COLLABORATION 2–3 (2003), https://www.ojp.gov/pdffiles1/nij/197040.pdf [https://perma.cc/466F-DG75] (discussing less restrictive federal standards for obtaining search warrants and conducting wiretaps, while recognizing that inter-governmental collaboration is likely to expand, and noting "operational incentives" for collaboration).

191 U.S. CONST. amend. IV.

192 *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 175–76 (1949).

193 *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973).

thus reducing the expectation of privacy at the border.[194] As a result, routine searches without a warrant, probable cause, or reasonable suspicion are inherently reasonable and automatically justified in this specific context.[195] Fourth Amendment rights are therefore significantly circumscribed at the border, and CBP is given expansive authority to randomly and without suspicion search, seize, and detain individuals and property at border crossings.[196] As a result, the circumstances under which a Border Patrol agent can conduct a warrantless search without probable cause are broader than exists for any other law enforcement agency.

Although nothing in the Fourth Amendment or elsewhere in the Constitution provides for such a principle, this doctrine has become known as the "border search exception" to the warrant requirement of the Fourth Amendment.[197] The precise scope of this exception is in dispute and continues to be tested considering that Border Patrol now engages in searches not only of suitcases and bags, but also electronic devices such as cell phones and laptops—sometimes confiscating them without cause.[198] Agents have also detained entrants for long periods of time without any apparent or stated reason,[199] even engaging in invasive body searches with no legal justification.[200]

A federal regulation from 1953 authorizes Border Patrol to extend their range of jurisdiction beyond just borders and ports of entry, to include everything within "100 air miles from any external

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194 *Id*.

195 *Id*. at 273.

196 *E.g.*, Doe v. El Paso Cty. Hosp. Dist., EP-13-CV-406-DB, 2015 WL 11598706, at *1 (W.D. Tex. Feb. 11, 2015) (detailing the extensive scope of the measures available to search the defendant).

197 United States v. Ramsey, 431 U.S. 606, 621 (1977).

198 *See* Esha Bhandari, *The Government's New Policy on Device Searches at the Border: What You Need to Know*, ACLU: FREE FUTURE (Jan. 9, 2018, 12:45 PM), https://www.aclu.org/blog/privacy-technology/privacy-borders-and-checkpoints/governments-new-policy-device-searches [https://perma.cc/LTV2-D2RL] (noting that "searches of electronic devices rose by about 60 percent in 2017 relative to 2016").

199 *See* Sophia Cope, *Law Enforcement Uses Border Search Exception as Fourth Amendment Loophole*, ELECTRONIC FRONTIER FOUND. (Dec. 8, 2016), https://www.eff.org/deeplinks/2016/12/law-enforcement-uses-border-search-exception-fourth-amendment-loophole [https://perma.cc/DL5L-TAUG].

200 Susan Ferriss, *In Horrifying Detail, Women Accuse U.S. Customs Officers of Invasive Body Searches*, WASH. POST (Aug. 19, 2018, 7:00 AM), https://wapo.st/2kD6V6O [https://perma.cc/6754-7FPT].

boundary."[201] As a result of interpreting "external boundary" to include oceans and all other waterways, the entire eastern seaboard is covered, along with most of California, the most highly populated areas of Oregon and Washington, the entire states of Florida and Michigan, many of the northeastern states, and most of the nation's other large cities.[202] Such a wide-ranging authority undoubtedly implicates many individuals' rights considering that approximately 200 million people—over 65% of the U.S. population—live within the "100-mile zone."[203] In addition to regular operations at the border and ports of entry, CBP operates approximately 32 permanent interior border checkpoints throughout the country, and another 39 temporary internal or "tactical" checkpoints.[204]

When a search is conducted at any border or port of entry (including international airports), searches are allowed even in the absence of any particularized suspicion.[205] At Border Patrol's internal, non-border checkpoints, stops and brief questioning may be conducted without suspicion,[206] and more intrusive "secondary inspections" may be conducted with minimal levels of suspicion.[207] In practice, this minimal standard is rife with abuse. There are many reports of invasive searches conducted with no articulable suspicion of wrongdoing, some of which are motivated by race or ethnicity alone.[208] Unfortunately, victim

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201 8 C.F.R. § 287.1(a)(2) (2021).

202 *See, e.g.*, AM. CIVIL LIBERTIES UNION, *Know Your Rights: 100 Mile Border Zone*, ACLU.ORG, https://www.aclu.org/know-your-rights/border-zone/ [https://perma.cc/9BMC-JB96].

203 AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION'S (CBP'S) 100 MILE RULE 1 (2014), https://www.aclu.org/sites/default/files/field_document/14_9_15_cbp_100-mile_rule_final.pdf [https://perma.cc/MV8L-ND9J].

204 U.S. GOV'T ACCOUNTABILITY OFF., *Border Patrol Checkpoints Contribute to Border Patrol's Mission, but More Consistent Data Collection and Performance Measurement Could Improve Effectiveness* 8, 34 n.44 (2009), https://www.gao.gov/new.items/d09824.pdf [https://perma.cc/XD23-RYD9] (stating that there are 71 total checkpoints, and 39 of them are tactical as of fiscal year 2008).

205 Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973).

206 United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (stops at immigration checkpoints are permissible insofar as they involve a minimally intrusive "brief detention of travelers").

207 *Id.* at 560. (these secondary inspections were for "routine and limited inquiry into residence status").

208 *See, e.g.*, Complaint for Injunctive & Declaratory Relief at 12, Sanchez v. U. S. Office of Border Patrol, No. 12-5378 (W.D. Wash. Apr. 26, 2012) (class action

recourse and agent discipline in the face of misconduct are both virtually nonexistent.[209]

These checkpoints often result in the arrest of U.S. citizens at significantly higher levels than non-citizens.[210] In a three-year period, just one non-citizen immigration apprehension was reported at a

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lawsuit settled by CBP alleged interrogations in Washington were based solely on race and ethnicity); NEW YORK CIVIL LIBERTIES UNION, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK'S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL'S INTERIOR ENFORCEMENT PRACTICES 2 (2011), https://www.nyclu.org/sites/default/files/publications/NYCLU_justicederailedweb_0.pdf [https://perma.cc/5L4G-FWMM] (reporting complaints of racial profiling); David Antón Armendáriz, *On the Border Patrol and its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553 (2012) (discussing and analyzing various instances and experiences of racial profiling by the Border Patrol); Ron Nixon, *Under Trump, Border Patrol Steps Up Searches Far From the Border*, N.Y. TIMES (Feb. 21, 2018), https://www.nytimes.com/2018/02/21/us/politics/trump-border-patrol-searches.html [https://perma.cc/3K35-WGDV] (reporting a heightened presence of CBP officers aboard buses and trains questioning passengers' immigration status); Letter from James Lyall, Staff Attorney, ACLU of Arizona, to Charles K. Edwards, Deputy Inspector General, Dep't of Homeland Sec., and Tamara Kessler, Officer for Civil Rights and Civil Liberties, Dep't of Homeland Sec. (Jan. 15, 2014) (on file with the UMass Law Review) ("Border Patrol continues to rely on race and ethnicity as factors in subjecting certain motorists to additional scrutiny and detention at checkpoints."); Imelda Mejia, *Border Patrol Check: Some Arivaca Residents Want Checkpoint Gone*, CRONKITE NEWS (Nov. 20, 2014), http://cronkitenewsonline.com/2014/11/checking-on-the-border-patrol-some-arivaca-residents-want-checkpoint-gone/ [https://perma.cc/VQG3-2Z4H] (evidence at one checkpoint suggested that vehicles with Latino passengers were disproportionately likely to be searched); Todd Miller, *The US-Mexico Border: Where the Constitution Goes to Die*, MOTHER JONES (July 15, 2014), https://www.motherjones.com/politics/2014/07/shena-gutierrez-us-mexico-border-constitution-die/2/ [https://perma.cc/4JFH-99Y7] (of all CBP arrests in Rochester, New York over four years, "[o]nly 0.9% [had a] fair complexion").

209 DANIEL E. MARTÍNEZ ET. AL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 3–5 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf [https://perma.cc/5S4G-EPNP]; *see also* Bob Ortega, *CBP: No Action Against Border Agents in Deadly-Force Cases*, AZCENTRAL (June 7, 2015, 10:16 PM), https://www.azcentral.com/story/news/politics/immigration/2015/06/08/cbp-action-agents-deadly-force-cases/28670843/ [https://perma.cc/K4C3-SXDF].

210 JAMES LYALL ET AL., RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL'S INTERIOR ENFORCEMENT OPERATIONS 14 (2015), https://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf [https://perma.cc/3KA2-CSBB].

checkpoint 75 miles within the border in the Yuma, Arizona sector.[211] "[N]ine out of 23 Tucson Sector checkpoints reported zero arrests of 'deportable subjects'" in 2013,[212] while the Yuma sector arrested eight times as many citizens as non-citizens that year and eleven times as many in 2011.[213] Further, those arrests were primarily for drug violations and not immigration violations, as all citizens were legally present in the country.[214] In the same time frame, that checkpoint also received multiple civil rights complaints.[215] U.S. citizens are often subject to search and harassment even when no drugs are present, such as in *Jane Doe v. El Paso Hospital*, where one U.S. citizen was detained at a checkpoint—without a warrant—and was patted down, strip searched, subjected to a forced and "observed bowel movement, vaginal and rectal exams, speculum exam, x-ray, and CT scan."[216] Finding nothing, Border Patrol released the woman without charges.[217]

The U.S. Supreme Court has held that the border search exception applies only to the narrow purpose of enforcing immigration and Customs laws, which entails ensuring that required duties are paid on imported goods and that harmful goods and people do not enter the country.[218] Other potential government interests—including general crime control—may not be effectuated through the border search exception. Immigration checkpoints are permissible, according to the Court, but only insofar as they involve a minimally intrusive "brief detention of travelers" with a "routine and limited inquiry into residence status"[219] that maintains a primary purpose of immigration

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211 *Id.*

212 *Id*.

213 *Id*.

214 For example, "four out of five drug-related arrests by Border Patrol involved U.S. citizens." *Id.*

215 *Id*.

216 ACLU Summary of *Jane Doe v. El Paso Hospital District, et al*, ACLU TEX., https://www.aclutx.org/en/cases/jane-doe-v-el-paso-hospital-district-et-al [https://perma.cc/A7NN-F4AL].

217 *Id.*; Doe v. El Paso Cty. Hosp. Dist., EP-13-CV-406-DB, 2015 WL 11598706, at *1 (W.D. Tex. Feb. 11, 2015).

218 United States v. Martinez-Fuerte, 428 U.S. 543, 566–67 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 883–84 (1975).

219 *Martinez-Fuerte*, 428 U.S. at 558, 560; *see also* United States v. Machuca-Barrera, 261 F.3d 425, 433 (5th Cir. 2001) ("The scope of an immigration checkpoint stop is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint.").

enforcement.[220] Immigration checkpoints may not be operated as drug checkpoints or focused primarily on broader law enforcement aims like crime control.[221] Such use would be an unconstitutional violation of Fourth Amendment protections against unreasonable searches and seizures.[222]

Individual reports and complaints would suggest that each of these premises and conditions are undermined because in practice, Border Patrol agents often appear to ignore these limitations in internal non-border operations. Agents frequently neglect to provide a reason for conducting a search. When reasons are offered, they often do not rise to the level of probable cause. Reasons such as a skunk smell emitting from the vehicle, possession of a backpack, possession of prescription medication, or a motorist refusing to consent to a search are among those used by agents to initiate a search.[223] Border Patrol enforcement activities largely appear to be aimed at drug enforcement. Checkpoints are much more likely to uncover drug offenses—particularly small amounts of marijuana— than immigration ones, and U.S. citizens are largely the ones affected.[224] The New Hampshire *McCarthy* case

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220 City of Indianapolis v. Edmond, 531 U.S. 32, 40–41 (2000) (a highway checkpoint violates the Fourth Amendment if its "primary purpose" is drug interdiction); *see also Martinez-Fuerte*, 428 U.S. at 558 (Immigration checkpoints near the southern U.S. border are permissible only if they involve a "brief detention of travelers" during which all that is required of the travelers is "a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." (quoting *Brignoni-Ponce*, 422 U.S. at 880)).

221 *Edmond*, 531 U.S. at 44 ("[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."). This primary purpose should include objectives such as gun control, deterrence of criminal activity, location of suspects, etc., yet this vague standard may nevertheless serve as a pretense in executing searches. *See* Jason Fiebig, Comment, *Police Checkpoints: Lack of Guidance from the Supreme Court Contributes to Disregard of Civil Liberties in the District of Columbia*, 100 J. CRIM. L. & CRIMINOLOGY 599, 618–620 (2010).

222 *Edmond*, 531 U.S. at 42 ("Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.").

223 Letter from James Lyall, *supra* note 208.

224 LYALL ET AL., *supra* note 210, at 3; Nixon, *supra* note 208; Tanvi Misra, *Inside the Massive U.S. 'Border Zone,'* BLOOMBERG CITYLAB (May 14, 2018, 08:17 AM), https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone [https://perma.cc/95VY-NQUP].

discussed above is one such example. Drug interdiction appeared to be the primary focus of that checkpoint; drug dogs were brought in, the state police were enlisted in advance with the specific purpose of handling drug cases, and plans were made as to how to efficiently proceed with the anticipated drug evidence and suspects so that state police could pursue prosecution. Afterwards, the local police chief lauded the operation, stating that Border Patrol has "a lot more leeway" than police do when it comes to constitutional rights, as he would have needed reasonable suspicion before conducting the drug searches that took place.[225]

Indeed, many individuals report being detained, searched, and questioned about weapons, drugs, even medical history, without being asked about immigration-related issues or residence status at all.[226] In a forceful dissent in a 1993 Ninth Circuit case, Judge Kozinski noted the significance of the fact that "[f]ifty million vehicles a year pass through" just two Border Patrol checkpoints in California.[227] The sheer amount of contraband seized there, combined with the special drug enforcement training received by agents,[228] provided Judge Kozinski with "reason to suspect the agents working these checkpoints are looking for more than illegal aliens . . . . [which] turns a legitimate administrative search into a massive violation of the Fourth Amendment."[229] As such, evidence suggests "that the Constitution is being routinely violated at these checkpoints," as they have been turned "into general law enforcement checkpoints" in violation of the Fourth Amendment.[230]

There are a number of troubling accounts of Border Patrol abuses, including unlawful searches, seizures, and detentions;[231] racial

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225 Defendants' Memorandum of Law in Support of Their Consolidated Motion to Suppress at 1, State v. McCarthy, No. 469-2017-CR-01888, 2018 WL 2106769 (N.H. Super. May 1, 2018).

226 *See, e.g.*, Letter from James Lyall, *supra* note 208 (reporting that "ten of the fifteen individuals" involved in the complaint in question "were never asked about residence status at all").

227 United States v. Soyland, 3 F.3d 1312, 1315 (9th Cir. 1993) (Kozinski, J., dissenting).

228 *Id.* at 1318.

229 *Id.* at 1316.

230 *Id.* at 1319–20.

231 *See, e.g.*, Letter from James Lyall, *supra* note 208 (citing reports where motorists were told they were detained at checkpoints for reasons such as their car smelling like a skunk or possessing prescription medications, traveling with a backpack, or not being recognized by the agent).

profiling;[232] detentions without cause, some of which are lengthy;[233] use of excessive force;[234] improper strip searches and sexual assault;[235] and a consistent lack of oversight and accountability in response to such abuses, from the lowest to the highest levels of agency authority.[236] These accounts suggest that Border Patrol agents largely act with impunity, and disciplinary action for even the most egregious of abuses is virtually nonexistent.[237] In the absence of deterrence, there is little incentive to operate within either constitutional constraints or agency guidelines.

Yet the border search exception is limited and is intended for a specific and narrow purpose: to permit Customs officials to facilitate trade, customs, and immigration laws and regulations at the border.[238]

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232 *See, e.g.*, sources cited *supra* note 208.

233 *See, e.g.*, Letter from James Lyall, *supra* note 208 (describing multiple detentions lasting 10–45 minutes and "over an hour"); NEW YORK CIVIL LIBERTIES UNION, *supra* note 208, at 6, 7, 20, 22 (discussing detentions ranging from 45 minutes, "hours" to "a few hours," to "several days").

234 LYALL ET AL., *supra* note 210, at 8.

235 Nomaan Merchant & Claudia Lauer, *Immigrants Face Hurdles to Prove Abuse by U.S. Agents*, PBS NEWS HOUR (Oct. 14, 2018, 11:29 AM), https://www.pbs.org/newshour/nation/immigrants-face-hurdles-to-prove-abuse-by-u-s-agents [https://perma.cc/6XEQ-8ASL].

236 *Id.* (noting that one study found that in a five-and-a-half-year period beginning in 2010, there were "84 complaints of coerced sexual contact against [CBP agents]"; just seven investigations were conducted, and no charges were filed for any). *See also* INT'L HUMAN RIGHTS CLINIC, NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION 2 (2018); John Washington, *"Kick Ass, Ask Questions Later": A Border Patrol Whistleblower Speaks Out About Culture of Abuse Against Migrants*, INTERCEPT (Sept. 20, 2018, 7:00 AM), https://theintercept.com/2018/09/20/border-patrol-agent-immigrant-abuse/ [https://perma.cc/TT5B-K9EE] (suggesting that the internal culture of Border Patrol promotes a "culture of dehumanization" and impunity which leads to abuse and assault on the part of agents).

237 Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov.–Dec. 2014), https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220/ [https://perma.cc/BM9H-RTKJ] (noting that Border Patrol norms strongly resist the reporting of misconduct); LYALL ET AL., *supra* note 210, at 8 (noting that the internal complaint process is dysfunctional and ineffective, resulting in a consistent lack of accountability for agent misconduct).

238 *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/about [https://perma.cc/H7WD-5MCV] ("CBP takes a comprehensive approach to border management and control, combining customs, immigration, border security, and agricultural protection . . . .").

Even if Border Patrol operations rigidly adhered to the existing standards and limitations governing their enforcement activities, it does not follow that a state court in a criminal prosecution unrelated to customs and immigration may constitutionally admit evidence obtained pursuant to the limited scope and purpose of the Border Patrol exception. To do so would amount to a circumvention of not only state constitutional protections, but the Fourth Amendment as well. The empirical evidence that Border Patrol routinely violates even the weaker constitutional restrictions placed on them makes this concern all the more pressing.

As the New York court held in *People v. Esposito*, the border search exception was granted "for a particular purpose; [and] it may not be used to circumvent" ordinary constitutional restrictions placed on law enforcement.[239] In gathering evidence of general criminal activity, Border Patrol becomes an agent of the police, thus triggering "the full panoply of constitutional provisions and curative measures."[240] This is the case regardless of the federal agent's intent to act in agency with the state. The Border Patrol operates under an exception to the Fourth Amendment by virtue of its role in enforcing immigration and customs laws. But when they exceed the scope of that role by enforcing other laws, and in places other than the border, the reason for their Fourth Amendment exception disappears. Using the evidence anyway under the rationale that Border Patrol is allowed more constitutional leeway seriously undercuts constitutional protections without justification. Therefore, the adoption of the reverse silver platter doctrine is especially concerning when applied to evidence seized by Border Patrol. Indeed, an overwhelming number of the litigated cases stem from that agency's actions.[241]

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239 People v. Esposito, 332 N.E.2d 863, 865–66 (N.Y. 1975).

240 *Id*. at 866.

241 As discussed, many, if not the majority of the litigated cases, involved evidence that originated with the agency. *See*, *e.g.*, State v. Allard, 313 A.2d 439, 451 (Me. 1973); State v. Cardenas-Alvarez, 25 P.3d 225, 227 (N.M. 2001); People v. LePera, 611 N.Y.S.2d 394, 395–96 (App. Div. 1994); People v. Desnoyers, 705 N.Y.S.2d 851, 857 (Sup. Ct. 2000); People v. Regnet, 443 N.Y.S.2d 642, 645 (Sup. Ct. 1981); Pena v. State, 61 S.W.3d 745, 754 (Tex. Crim. App. 2001); Gutierrez v. State, 22 S.W.3d 75, 84 (Tex. Crim. App. 2000); State v. Rennis, 2014 VT 8, ¶ 5, 195 Vt. 492, 90 A.3d 906; State v. McCarthy, No. 469-2017-CR-01888, 2018 WL 2106769, at *1 (N.H. Super. May 1, 2018).

V. CONCLUSION

In a strong call for protection of both civil liberties and principles of federalism, Supreme Court Justice William Brennan argued that state courts should interpret their state constitutions independently, rather than in lockstep with the high court's interpretation of the Bill of Rights.[242] A basic premise of federalism is to respect the variation of specific rights granted by democratically-enacted state constitutions. Justice Brennan was critical of the reduction in civil liberties protections provided by federal courts.[243] He argued that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."[244] In the face of reduced federal protections, state courts should step up with increased constitutional protections of their own.[245] Indeed, federalism will be "furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms."[246]

Allowing state criminal courts to ignore state constitutional rights detracts from state sovereignty and local control and favors the federal standard applicable to whatever federal law enforcement agency is acting—no matter the nature of the divergence from state-guaranteed rights. The narrower and more short-term desire to convict every defendant against whom there exists evidence, however obtained, should not overcome the importance of state autonomy, the rights and liberties granted citizens, or the long-term deference to principles of federalism and respect for constitutional rights.

The reverse silver platter doctrine has been addressed by only a handful of states. Within those states, there is a fairly even split between those endorsing the doctrine, adopting a conditional version of the doctrine, and rejecting it altogether. It is clear that state criminal courts retain the authority to decide whether to accept evidence that was obtained by federal agents in ways that violate state constitutional protections. However, the countervailing interests of vindicating individual rights and civil liberties, federalism, judicial integrity, and

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242 *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

243 *Id.* at 502–03.

244 *Id.* at 503.

245 *Id.*

246 *Id.*

encouraging proper law enforcement conduct, while discouraging improper incentives, all support the conclusion that the reverse silver platter doctrine should be rejected by states outright. In the absence of a rejection of the doctrine, it is imperative that, at a minimum, states adopt a conditional reverse silver platter doctrine. The analysis would focus on an agency relationship between federal and state agencies, and would prohibit states from collaborating with federal agencies to search individuals when the searches would otherwise violate state or federal constitutional protections. Law enforcement cannot be allowed to join forces in an effort to bypass the restrictions designed to protect the rights of the people. As it stands, by simply joining with an agency bound by fewer rules, law enforcement can flout the laws that citizens believe are protecting them. The risks attendant to this type of operation are even greater with respect to Border Patrol. That agency is granted such expansive exceptions to Fourth Amendment search and seizure requirements that the potential subversion of constitutional rights implicates federal as well as state rights. The states maintain a strong interest in upholding and safeguarding their respective constitutional provisions. By accepting reverse silver platter evidence, states sacrifice these principles and the rights of their own citizens in the interest of prosecutorial convenience and increased convictions. That is too high a price to pay.