PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 23 | Issue 1 Article 2

12-15-1995

State Searches, Federal Cases, and Choice of Law: Just a Little Respect

John B. Corr

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the Conflict of Laws Commons, Criminal Procedure Commons, and the Evidence Commons

Recommended Citation

John B. Corr *State Searches, Federal Cases, and Choice of Law: Just a Little Respect*, 23 Pepp. L. Rev. Iss. 1 (1995)
Available at: https://digitalcommons.pepperdine.edu/plr/vol23/iss1/2

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

State Searches, Federal Cases, and Choice of Law: Just a Little Respect

John B. Corr*

I. INTRODUCTION 33
II. THE PROBLEMS 34
III. STATE-GATHERED EVIDENCE IN FEDERAL COURTS: TWO RESULTS 35
A. *When State Law Controls* 36
B. *When Federal Law Controls* 39
IV. FACTORS COURTS CONSIDER 41
A. *Good Faith/Reasonable Reliance* 42
B. *Uniformity of Federal Procedure* 43
C. *Reluctance to Decide Uncertain Questions of State Law* 43
D. *Comity* 44
E. *Concerns about Forum Shopping* 44
F. *Availability of Other Sanctions for Police Misconduct* 45
G. *Reluctance to Expand Exclusionary Rules* 45
H. *Characterization of Law as Merely Procedural* 46
I. *Joint Operations by Federal and State Police* 46
J. *State Courts as Laboratories for Criminal Procedure* 46

* Professor of Law, American University, Washington D.C. This Article owes a great deal to my former research assistant, Adam Kaufman, J.D., American University. Adam did the grunt work associated with this kind of Article with enthusiasm and skill. But his unique contribution was a question he asked me, upon learning that a co-authored book was in the hands of the printers. He congratulated me on the book, and asked, innocently, what had happened to the Article he had worked on before the book. Good question, Adam.

V. EVALUATING THE FACTORS 47
A. *Good Faith/Reasonable Reliance* 48
B. *Uniformity of Federal Procedure* 49
C. *Reluctance to Decide Uncertain Questions of State Law* 50
D. *Comity* 51
E. *Concerns about Forum Shopping* 52
F. *Availability of Other Sanctions for Police Misconduct* 55
G. *Reluctance to Expand Exclusionary Rules* 57
H. *Characterization of Law as Merely Procedural* 59
I. *Joint Operations by Federal and State Police* 60
J. *State Courts as Laboratories for Criminal Procedure* 62
VI. THE NEED FOR RESPECT 63
A. *Respect for State Law* 63
B. *Respect for Rules of Law* 63
VII. CONCLUSION 64

I. INTRODUCTION

> In the late 1960s, Ruth Bader Ginsburg was a little-known law professor, expert in such abstruse subjects as "conflict of laws" and the Swedish legal system. A decade later, she had a place in American constitutional history, and was being touted for the Supreme Court.
>
> Washington Post, July 19, 1993[1]

"Abstruse"? Well, I don't know how the King of Sweden feels, but in my old neighborhood a word like that could get you into real trouble.

But that was then, and this is now. In any case, many conflict of laws professors, irrespective of the kinds of neighborhoods from which they originally sprung, may feel that the utility of our work may be underappreciated. While few of us aspire to the heights Justice Ginsburg has scaled, all of us know that conflict of laws can nourish other legal specialties. In fact, our different perspective on the legal environment may offer insights—even solutions—to problems that resist conventional approaches. But we need to demonstrate more frequently how we can help and how our approaches are already at work. Then, perhaps, we'll get a little more respect.[2]

The purpose of this Article, then, is twofold. First, as the title suggests, the Article will address an important problem in criminal procedure that arises along the boundary where federal and state courts meet. Second, it will demonstrate the potential that an understanding of conflict of laws can assist in an interdisciplinary approach to such a problem. In gaining an insight on the real-world utility of the choice of law doctrine as ap-

1. David Von Drehle, *Redefining Fair With a Careful Assault; Step-by-Step Strategy Produced Strides for Equal Protection*, WASH. POST, July 19, 1993, at A1.

2. Some years ago Professor James Martin tackled this problem in an imaginative way. In the first edition of his casebook on Conflict of Laws, Professor Martin inserted Scott v. Sandford, 60 U.S. 393 (1857), at the very beginning of the book. *See* JAMES A. MARTIN, CONFLICT OF LAWS: CASES AND METHODS 5-20 (1978). By demonstrating that this case, so notorious and so significant in American history, could potentially be defused by applying conflicts principles, Martin apparently hoped to make clear how relevant conflicts ideas can be. I suspect that the success of this approach was muted by the volatility of the underlying issues of human freedom in the case. In my own class, I found that some students understandably found it difficult to discuss such a case in the detached framework of choice of law. For that reason, much of the value of the case was lost. Thus, when Professor Lea Brilmayer took over the casebook for the third edition, *Scott v. Sanford* was removed. *See* JAMES A. MARTIN & LEA BRILMAYER, CONFLICT OF LAWS: CASES AND METHODS (3d ed. 1990). It was a good try, but it was also good to recognize that the price of the lesson may have been too high in this case.

plied to another body of law, we will also have a chance to see the consequences that follow when judges do not apply judicial doctrine consistently.

II. THE PROBLEMS

The criminal procedure/choice of law problems this Article will address go to the interplay between federal and state police officers, on the one hand, and conflicting federal and state criminal procedures on the other. Specifically, the Article considers what law should apply in a federal court if a state police search turns up evidence in a way that violates applicable state law, but not federal law. May a federal court admit that evidence when a state court might be obligated to suppress it? Even if a federal court may admit the evidence, should it do so? Conversely, what is an appropriate result in federal court if state police obey their own law, but fail to meet a nonconstitutional requirement that is applicable to federal officers?

Those basic questions lead to other uncertainties. For example, if there are circumstances in which federal courts should accommodate the interests and concerns behind the search-and-seizure law of a state, what should be the standards for identifying the interests that might deserve such deference? And what if the evidence is the product of a joint federal/state investigation?

Current law addresses such questions, but not always satisfactorily. Thus, as we shall see shortly, federal courts have two tendencies: (1) they generally apply federal law to issues of admissibility, irrespective of the applicable state law, the interest behind that law, or the identity of the police—federal or state—who gather the evidence;[3] and (2) they are inclined to defer to state procedure if application of that procedure results in the admissibility of inculpatory evidence.[4] Those two tendencies might at first appear to contain a fundamental contradiction. As we shall see, however, there is less friction than meets the eye. Recognition of that fact will help us to a possible resolution of these knotty conflicts problems.

This Article will demonstrate the tendencies identified above and offer approaches to resolution of these problems that improve on the current analyses. Such approaches will draw on ideas about competing judicial

---

3. *See, e.g.*, United States v. Scolnick, 392 F.2d 320, 323-36 (3d Cir.) (admitting evidence obtained by Philadelphia police in violation of a state statute), *cert. denied*, 392 U.S. 931 (1968).

4. *See, e.g.*, Jackson v. United States, 354 F.2d 980, 981 (1st Cir. 1965) (applying state law that admitted evidence, rather than federal "no-knock" law that would have required suppression).

systems that have developed in the area of conflict of laws. In some measure, adoption of these proposals for improved methods may require significant adjustment by federal courts.

At the same time, we should understand what this Article will *not* address. First, it is not about whether state law can or should constrain federal police officers when they investigate potential federal crimes. There may well be circumstances in which federal officers should at least try to conduct themselves in a manner consistent with the criminal law of the state in which they work. It is not the purpose of this Article, however, to identify either the constitutional or prudential considerations that might guide federal courts in determining when federal police should obey state law. Instead, this Article is more concerned about when, if ever, federal courts themselves should defer to state criminal procedure rules relating to searches by state police.

Second, the Article is not about the federal constitutional safeguards available to defendants in all federal and state criminal proceedings. Indeed, it is important to keep in mind that the problems we shall examine come with an underlying thesis that state police officers conducting a search have already complied with the bedrock requirements of the Fourth Amendment. Even with such constitutional concerns aside, however, we have more than enough to explore and uncover.

III. STATE-GATHERED EVIDENCE IN FEDERAL COURTS: TWO RESULTS

When defendants in federal prosecutions move to suppress evidence obtained by state officers in an unlawful, but constitutionally valid, search, the motion rests on the supposition that the search violated either state law, federal law, or both. If the search violated both state and federal laws, and an exclusionary rule applies, the evidence should normally be excluded. If the search violated only one body of law, however, then the decision to admit or suppress the evidence will only be made after the court decides which law—state or federal—to apply. The cases discussed in this Article exemplify the results and reasoning of federal courts when choosing between the two bodies of law. The decisions thus provide insights into the weaknesses present in current approaches, as well as the keys to improved analysis.

A. *When State Law Controls*

In *United States v. Moore*,[5] an Omaha, Nebraska police officer obtained a state warrant to search the defendant's residence for controlled substances.[6] The warrant specifically permitted the authorities to "'enter the premises described above without knocking or announcing their authority.'"[7] Although the original plan was to prosecute the defendant in state court, a federal proceeding was later substituted because "[f]ederal law calls for twice the maximum punishment" available under state law.[8] The defendant moved to suppress the evidence obtained in the course of the state search.[9] The stated ground was that the search violated the standards of 18 U.S.C. § 3109, which restricts the circumstances in which federal searches may be initiated through forced entry of a house.[10]

The court first held that the police officers' search of the residence did not violate the requirements of the Fourth Amendment in a way that would have produced a constitutional mandate to suppress evidence.[11] Had it been otherwise, of course, no choice of law issue would have arisen. With the constitutional issue aside, there remained the troubling question of the applicability of § 3109 to a search by state police officers.

The United States Court of Appeals for the Eighth Circuit held that § 3109 was inapplicable to a state search conducted "totally without federal involvement."[12] The court noted that the Omaha police did not intentionally violate the federal statute governing their conduct.[13] In-

---

5. 956 F.2d 843 (8th Cir. 1992).

6. *Id.* at 845.

7. *Id.* (quoting the "no knock" search warrant issued by a Nebraska County Court judge).

8. *Id.* The defendant lived within 1,000 feet of a school, triggering the higher sentence under federal law. *Id.*

9. *Id.*

10. *Id.* at 846; *see* 18 U.S.C. § 3109 (1988). In *Moore*, the prosecution agreed that if § 3109 applied to the state search, the statute was violated. *Moore*, 956 F.2d at 846. Further, the prosecution conceded that the appropriate remedy then would be to exclude evidence obtained in the search. *Id.* The threshold question, of course, was whether § 3109 applied to the state search.

11. *Moore*, 956 F.2d at 849-51. Actually, the court danced around this point a little bit. The court seemed to consider that the state warrant was based upon an insufficient showing of probable cause to enter without knocking. *Id.* at 850-51. Nevertheless, even if the showing was insufficient, the police had reasonable ground for believing that the showing was sufficient, thus satisfying the "good faith" exception to the exclusionary rule laid down in United States v. Leon, 468 U.S. 897 (1984). *Moore*, 956 F.2d at 851.

12. *Moore*, 956 F.2d at 847. The Eighth Circuit noted that a search in which federal police participated in a significant way alongside state officers "must comply with federal law." *Id.* at 847 n.3. As we shall see shortly, however, the law may not be quite that clear. *See infra* notes 13-27 and related text.

13. *Moore*, 956 F.2d at 847.

stead, § 3109 was "irrelevant to [the state police] and the County Court judge at the time the warrant issued."[14] Thus, the state police, relying on the only bodies of law, state law and the federal constitution, that they could be expected to follow, acted in good faith when they executed the state warrant.[15]

Moore contains an interesting dissent,[16] but the case is more significant for the interplay of two factors identified as the basis for the court's decision. The first is the federal interest underlying § 3109. *Moore* found that the purpose behind the "no-knock" prohibition in § 3109 was to deter police misconduct.[17] In assessing the applicability of deterrence to the facts of *Moore*, the court explained that, because the evidence obtained in the search was probative and reliable, it merited exclusion only if the deterrence benefit of exclusion was more than a mere hypothetical possibility.[18] That conclusion led the court to its second consideration, as well as the interplay between the two considerations.

Second, the court noted that *Moore* did not contain facts suggesting any sort of malice on the part of the police.[19] To the contrary, it was clear that the police did not set out to violate § 3109.[20] In fact, the officers had reason to believe that the only applicable constraints on their behavior were those of the federal constitution and state law.[21] As the court put it, § 3109 was "irrelevant" to the police.[22] That meant the officers were acting in reasonable reliance on state law, not § 3109.

The court's approach is thus rather easy to follow. First, the court identified the two factors decisive to its holding and examined their interplay with one another. The court could then conclude, reasonably,

14. *Id.*
15. *Id.* at 850-51.
16. *Id.* at 851-55 (Beam, J., dissenting). Judge Beam reasoned, *inter alia*, that the majority misapplied Nebraska law. *Id.* (Beam, J., dissenting). According to Judge Beam, the Omaha police violated the state statute as well as § 3109. *Id.* at 854 (Beam, J., dissenting). This is, of course, an example of the important, if apparently mundane, lesson mentioned *infra* note 24: In conflicts matters, it is always wise, as a threshold matter, to ensure that the laws in question really conflict with one another. If they do not conflict, there is no reason to address the choice of law issue.
17. *Moore*, 956 F.2d at 847 (quoting United States v. Peltier, 422 U.S. 531, 542 (1975)).
18. *Id.* at 848.
19. *Id.* at 847.
20. *Id.*
21. *Id.* at 848-49.
22. *Id.*

that if deterrence requires police to consult bodies of law not familiar to them, and whose application to their activities they had little reason to anticipate, the deterrent benefit that might be achieved is speculative at best. In other words, because the court believed that a federal deterrent interest underlying § 3109 is not usually transgressed in cases like *Moore*, where state police act in good faith reliance on state law and the federal constitution and without help from federal officers, state law should control.

The *Moore* majority reported that most federal decisions addressing the applicability of § 3109 to state searches have declined to impose § 3109 on state police activity,[23] and this observation is probably accurate.[24] Apart from the relatively narrow spectrum of § 3109, however,

---

23. *Id.* at 847.

24. Five of the cases cited in *Moore* probably support the court's conclusion. In United States v. Mitchell, 783 F.2d 971 (10th Cir.), *cert. denied*, 479 U.S. 860 (1986), the court held that a search by Oklahoma city police in execution of a state warrant had to meet the standard of the Federal Fourth Amendment, but not § 3109. Curiously, however, the court also suggested that potentially relevant state law did not apply. *Id.* at 973. The court in United States v. Andrus, 775 F.2d 825 (7th Cir. 1985), refused to apply § 3109 to a search by Bakersfield, California police in execution of a state warrant. *Id.* at 844 (stating that "because the California statute provides a standard equivalent to" § 3109, the court need not decide the issue). Similarly, in United States v. Jefferson, 714 F.2d 689 (7th Cir. 1983), *appeal after remand*, 760 F.2d 821 (7th Cir.), *cert. granted and judgment vacated*, 474 U.S. 806 (1985), the United States Court of Appeals for the Seventh Circuit refused to apply § 3109 to a state search in Milwaukee, Wisconsin authorized by a state court. Interestingly, *Jefferson* applied § 3109 to a second search in Wisconsin undertaken jointly by federal and state officers pursuant to a federal warrant. *Id.* at 694. The court held, however, that the requirements of § 3109 were met in that second search. *Id.* The United States Court of Appeals for the Ninth Circuit also measured a search by California police in execution of a state warrant by the standard of state law, not § 3109. United States v. Valenzuela, 596 F.2d 1361 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979). *Valenzuela* also held, however, that the search met the requirements of § 3109. *Id.* at 1365. The final case to support *Moore* is a federal district court decision holding that § 3109 was inapplicable to a search by Maine police officers in execution of a state warrant. United States v. Daoust, 728 F. Supp. 41, 47 (D. Me. 1989), *aff'd*, 916 F.2d 757 (1st Cir. 1990).

The sixth case, however, seems distinguishable from *Moore* for a reason that deserves some attention. Simons v. Montgomery County Police Officers, 762 F.2d 30 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), was a civil suit for alleged violations of the defendant's federal civil rights by several Maryland police officers in the course of a search of the plaintiff's house. After the court found that the search met constitutional standards, it also held that § 3109 and state common law imposed identical duties on police officers. *Id.* at 33. To that extent, there was no need for the court to make a ruling as to the applicability of § 3109 to a search by state officers, because there was no choice of law decision to make. In such circumstances it is probably a good practice to avoid the choice of law decision entirely.

other courts have reported that the clear preponderance of federal decisions favor the application of federal, rather than state, law.[25]

If *Moore* is a little unconventional because it applies state law rather than federal law, it is highly conventional in another sense. After choosing state law, the ultimate product was the admission of inculpatory evidence and affirmance of a trial court's determination of guilt. As we shall see, the decision to admit inculpatory evidence adheres to a pattern followed by almost all the cases we will discuss, irrespective of whether the initial decision was to apply state or federal law.[26] As a general rule state criminal procedure will apply in federal prosecutions, if at all, only when police conduct meets the standard of that law, and the result is therefore to admit the inculpatory evidence. *Moore* identified two useful factors[27] to apply in making the choice of law decision, but the case is also useful as an indicator of a judicial predilection in favor of admitting evidence and convicting defendants.

B. *When Federal Law Controls*

Aside from *Moore* and other cases dealing with the applicability of 28 U.S.C. § 3109 to state searches, it is generally easier to find federal decisions that choose federal, rather than state, law. Some of these decisions follow reasoning similar to that of *United States v. Combs*.[28] That case arose from a police search of a vehicle during which the Kentucky police found a sack containing a large quantity of counterfeit twenty-dollar bills.[29] Both the prosecution and defendants apparently agreed that the search satisfied the requirements of the Fourth Amendment, but the defendants suggested that the search did not meet the higher standard imposed by the Kentucky constitution.[30]

---

25. *See infra* notes 28-38 and accompanying text.

26. *See infra* notes 63-132 and accompanying text.

27. The two factors are whether state officials who violated federal statute had an objectively reasonable basis to believe they were complying with state law and the Fourth Amendment and whether the state officials acted without federal involvement. *Moore*, 956 F.2d at 847-48.

28. 672 F.2d 574 (6th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

29. *Id.* at 577.

30. *Id.* The defendants relied on § 10 of the Kentucky Constitution: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. KY. CONST. § 10.

The court swept away this argument by affirming the conviction. In fact, the United States Court of Appeals for the Sixth Circuit summarized its view in a single sentence: "The present case concerns a Federal crime; states are not free to impose on Federal courts requirements more strict than those of the Federal laws or Constitution."[31]

With little subtlety but substantial accuracy, the Sixth Circuit identified an assumption that is central to understanding the rationale federal courts use when trying to determine the applicability of state procedure in federal prosecutions. Federal courts often hold that in criminal cases the Supremacy Clause[32] insulates them from any affirmative duty to apply state criminal procedure that conflicts with federal law.[33]

Sometimes the Supremacy Clause is only implicit in a court's reasoning,[34] but it is always a consideration. For example, in *United States v. One Parcel of Real Property*,[35] a claimant sought to recover property that had been seized after a drug search.[36] The claimant alleged that the search by state officers violated state law.[37] Yet, the court held that argument irrelevant to a federal case.[38] The court reasoned that federal officers could have collected the evidence without regard to state law.[39]

---

31. *Combs*, 672 F.2d at 578.

32. U.S. CONST., art. VI, cl. 2.

33. *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1232 (9th Cir. 1976) (en banc) (stating that federal law prevails in a federal criminal proceeding when federal and state law are in conflict), *cert. denied*, 429 U.S. 1075 (1977). Older Supreme Court dicta supports this use of the Supremacy Clause. Byars v. United States, 273 U.S. 28, 33 (1927) ("We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.").

34. *See, e.g.*, United States v. Singer, 943 F.2d 758, 761 (7th Cir. 1991) (stating that, without explicit reference to Supremacy Clause, violation of state law is irrelevant in federal prosecution). In United States v. Sutherland, 929 F.2d 765, 769 (1st Cir.), *cert. denied*, 502 U.S. 822 (1991), the court made no explicit reference to the Supremacy Clause, but explained that "[the court] begin[s] with the proposition that federal law governs federal prosecutions in federal court." *Id.* at 769. Other courts share this philosophy, and although the Supremacy Clause may not be explicitly mentioned, it informs the courts' analysis. *See* United States v. Jorge, 865 F.2d 6, 10 n.2 (1st Cir.) ("We reject the contention that state law governs suppression issues in a federal criminal trial."), *cert. denied*, 490 U.S. 1027 (1989); United States v. Little, 753 F.2d 1420, 1434 (9th Cir. 1984) ("Evidence obtained in violation of neither the Constitution nor federal law is admissible in federal court proceedings·*without regard to state law*.") (emphasis in original).

35. 873 F.2d 7 (1st Cir.), *cert. denied*, 493 U.S. 891 (1989).

36. *Id.* at 8.

37. *Id.* The claimant alleged that the warrant was executed at night without good cause, yet he conceded that it was still "daytime" by federal definition. *Id.*

38. *Id.*

39. *Id.*

Although the decision never mentioned the Supremacy Clause, the foundation of the decision seems apparent.

The power federal courts enjoy under the Supremacy Clause to disregard otherwise applicable state law seems clear, and it is not the purpose of this Article to challenge that particular feature of our federal system. Nonetheless, agreement that federal courts enjoy the power to disregard state criminal procedure does not necessarily end the analysis. We still must consider whether federal courts *should* always exercise such power. In other words, supremacy at its best is probably a lot like good rich chocolate ice cream: both give the greatest satisfaction only when they are indulged in in moderation. Moreover, a substantial number of federal decisions agree, in principle at least, that prudential considerations may appropriately constrain supremacy. Accordingly, such cases identify factors that help the courts decide when they may or should exercise their discretion to apply state law.

IV. FACTORS COURTS CONSIDER

Unlike *United States v. Combs*,[40] the reasoning in many other cases suggests a disinclination to wield the Supremacy Clause like a blunt instrument. Certainly for the opinions that follow, supremacy remains the ultimate device for protecting federal interests. Yet, it does not inevitably rule out the possibility of applying state law to state police searches—even if the courts ultimately choose federal law more often than state law.[41]

---

40. 672 F.2d 574 (6th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

41. The United States Court of Appeals for the First Circuit believes that applying state rules for admissibility of evidence in a federal criminal prosecution may exist, if at all, only "in an extreme case of flagrant abuse of the law by state officials, where federal officials seek to capitalize on that abuse." United States v. Sutherland, 929 F.2d 765, 770 (1st Cir.), *cert. denied*, 502 U.S. 822 (1991). The *Sutherland* court also concluded that, at least in the area of evidence developed through electronic surveillance of communications, it preferred no exception at all. *Id.* at 771. In doing so, the court characterized the alternative as one that forced federal courts "into intricate analytical maneuvers to escape a poorly conceived exception." *Id.*

The United States Court of Appeals for the Second Circuit asserted that "all other circuits that have been presented with this issue have concluded that 'evidence admissible under federal law cannot be excluded because it would be inadmissible under state law.'" United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (quoting United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985)). In the course of this Article we will see enough cases to indicate that the Second Circuit's assertion describes most of the decisions in this area, but certainly not all.

While pondering the application of state law, cases identify a range of factors courts should weigh in determining when to apply state criminal procedure law over its federal counterpart. The factors are: good faith/reasonable reliance, uniformity of federal procedure, reluctance to decide uncertain questions of state law, comity, concerns about forum shopping, availability of other sanctions for police misconduct, reluctance to expand exclusionary rules, characterization of law as merely procedural, joint operations by federal and state police, and state courts as laboratories for criminal procedure. At the outset, it is important to remember two points. First, the weight given each factor varies substantially from one case to another, depending on the facts of the individual cases. Second, there is substantial overlap among these factors. I shall discuss each of the factors that the courts seem to prefer.

A. *Good Faith/Reasonable Reliance*

When police officers behave in "good faith" reliance on a particular body of law, courts generally weigh that factor in favor of applying the law upon which police rely.[42] Because state police are more likely to rely on state procedure rather than its federal counterpart, this factor, when considered, tends to weigh in favor of the application of state law.

In most cases the concepts of "good faith" and "reasonable reliance" are symbiotic. That makes sense because, in the absence of an unusual situation, one is more likely to give credence to an officer's assertion of good faith when it rests upon his or her expectation that the law normally guiding that officer is operative. But one court separated the two concepts. By doing so, it permitted subjective good faith to overcome the requirements of the state law upon which state police should have relied, but which they failed to obey. In *United States v. Dudek*,[43] the United States Court of Appeals for the Sixth Circuit disregarded a failure by state police to meet state requirements for returning a warrant and recording the inventory of items seized in the search.[44] The court held "that nonconstitutional, nonprejudicial *and inadvertent* failures to follow

42. *See, e.g.*, United States v. Moore, 956 F.2d 843, 847-48, (8th Cir. 1992) (applying state law to search by state police who relied on it); United States v. Mitro, 880 F.2d 1480, 1485 (1st Cir. 1989) (holding that good faith reliance by federal and state officers on state law justified admission of evidence derived from a Canadian wiretap); United States v. Crawford, 657 F.2d 1041, 1047 (9th Cir. 1981) (involving a state search and finding a violation of Federal Rule of Criminal Procedure 41 irrelevant unless defendant can demonstrate prejudice or "evidence of intentional and deliberate disregard of the Rule").

43. 530 F.2d 684 (6th Cir. 1976), *appeal after remand*, 560 F.2d 1288 (6th Cir. 1977), *and cert. denied*, 434 U.S. 1037 (1978).

44. *Id.* at 688.

the *post*-search and seizure requirements of Ohio's rule which are involved here do not require application" of an exclusionary rule.[45]

B. *Uniformity of Federal Procedure*

The desirability of permitting courts in the same judicial system to process cases in uniform ways is an obvious benefit, both to those courts and to efforts to apply just principles uniformly. Thus, it is not surprising that a federal court would weigh this factor in favor of applying federal law over state law.[46]

C. *Reluctance to Decide Uncertain Questions of State Law*

An important federal judicial doctrine rests on the belief that, when federal courts are faced with difficult and uncertain questions of state law, the courts should consider the possibility of referring the case to state courts.[47] This "abstention" doctrine developed in the context of civil litigation. It does not directly apply to federal criminal prosecutions, because the appropriate courts to hear such cases are federal courts. Thus, in federal criminal cases, unlike diversity cases, federal courts do not have the ability to defer to state courts by dismissing the federal action to allow a state action to commence.[48] Yet, the federal courts' uneasiness about deciding unresolved questions of state criminal procedure reflects the same policy considerations underlying the abstention doctrine in civil cases. The key difference—and it is an important difference, indeed—is that, in federal criminal litigation, the result has been to favor application of federal criminal procedure, rather than dismissal.[49]

---

45. *Id.* at 691 (emphasis added).

46. *See* United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) ("Clearly, it is important that there be uniformity of evidentiary rules among the federal courts."). On a related point, the United States Court of Appeals for the Ninth Circuit expressed concern that the adoption of an approach that might permit application of state procedure in at least some circumstances would create too much variety among the circuits. United States v. Chavez-Vernaza, 844 F.2d 1368, 1371-74 (9th Cir. 1987), *cert. denied*, 114 S. Ct. 1324 (1994).

47. *See, e.g.*, United Serv. Life Ins. Co. v. Delaney, 328 F.2d 483, 484-85 (5th Cir.) (en banc), *cert. denied*, 377 U.S. 935 (1964).

48. *See Pforzheimer*, 826 F.2d at 204 (refusing to apply state constitutional protection in part because the extent of that protection was uncertain).

49. Federal courts confronted with controlling and uncertain questions of state civil law often have access to a certification statute, which permits the federal court to "certify" such a question to the high court of the state whose law is at issue. *See*,

D. *Comity*

As applied in the context of competing federal and state criminal procedure, comity might sometimes cause a federal court to "defer to a state's more stringent exclusionary rule with respect to evidence secured without federal involvement."[50] In other words, to the extent that principles of comity apply, they probably weigh in favor of applying state criminal procedure rather than its federal counterpart.

E. *Concerns about Forum Shopping*

Defendants may argue that when state police violate state law in the course of a search that does not violate federal law, federal and state authorities may be tempted to cooperate in the use of that evidence in a federal prosecution.[51] To the extent that such forum shopping is identified, should courts not deny the federal prosecutor the use of such state-supplied evidence? One court rejected that argument, claiming that consideration is insignificant.[52] Generally, the paucity of discussion on this issue has encouraged application of federal procedure.

---

e.g., KAN. STAT. ANN. § 60-3201 (1994); MINN. STAT. ANN. § 480.061 (1990). Interestingly, neither the Kansas nor the Minnesota statute restricts the questions that may be certified to noncriminal questions. Although it would be highly unusual, a federal court inclined to apply state criminal procedure, but reluctant to do so because it is uncertain how to apply that state law, could conceivably use a certification statute like those cited above to ask the state high court to address such questions. Assuming such a course of action is open, the federal court would then have to wait until it received an answer before proceeding with the case.

Alternatively, a federal court might simply make an educated assessment as to what a state's law might be. This is probably the most common approach in civil cases because it avoids the delay and expense associated with abstention and certification. Yet, it produces its own uncertainties about the quality of the law that the federal courts apply. For an extreme example of the problem, see Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir.) ("Our principal task . . . is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."), *cert. denied*, 363 U.S. 836 (1960), *and judgment set aside*, 365 U.S. 293 (1961).

50. United States v. Henderson, 721 F.2d 662, 665 (9th Cir. 1983), *cert. denied*, 467 U.S. 1218 (1984); *see also Chavez-Vernaza*, 844 F.2d at 1372 (weighing the value of comity, but rejecting it in favor of uniformity of law achieved by using federal procedure); *cf.* United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) ("We are not insensitive to the claim that we should not encourage state officials to violate principles central to the state's social and governmental order.").

51. *See, e.g.*, *Pforzheimer*, 826 F.2d at 204.

52. *Id.* at 204 (holding risk of such forum to be minimal).

F. Availability of Other Sanctions for Police Misconduct

More than a few cases refer to the possibility of controlling state police misbehavior by means other than excluding the evidence in federal prosecutions.[53] When this factor is weighed, federal courts generally conclude that they should reject the application of state criminal procedure in federal prosecutions.[54]

G. Reluctance to Expand Exclusionary Rules

Sometimes courts note that the exclusion of probative inculpatory evidence, however necessary it may be in some circumstances, is not a remedy to be applied promiscuously.[55] Although it may appear that the court has already decided in favor of federal law when it begins to explain itself in such a manner, that is not inevitably the result. We should recall that in *United States v. Moore*,[56] the court's reluctance to apply federal law was based in part on its skepticism that doing so would effectively deter police misconduct.[57] When a court has a policy to limit the expansion of the exclusionary rules, it is likely that the court will choose the law—state or federal—that results in admission the evidence.

---

53. *See, e.g.*, United States v. One Parcel of Real Property, 873 F.2d 7, 8 (1st Cir.) (stating that exclusion of evidence in state court only is a more "close fitting" deterrent), *cert. denied*, 493 U.S. 891 (1989); *Rickus*, 737 F.2d at 364 (explaining that the exclusion of evidence in a state prosecution is a possible "sanction," as is the possibility of a civil suit against police).

54. *See, e.g.*, United States v. D'Antoni, 874 F.2d 1214, 1218-19 (7th Cir. 1989) (refusing to apply state exclusionary rule and citing the possibility of "other sanctions" as means of deterring police misconduct). The court in United States v. Dudek, 530 F.2d 684 (6th Cir. 1976), *appeal after remand*, 560 F.2d 1288 (6th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978), held that, when state police violate a state duty to promptly return a warrant and verify an inventory of items seized, federal law applies. *Id.* at 691. In these cases, using federal law is appropriate because, *inter alia*, there are "many possible methods of vindicating the inventory and return sections of the rule other than suppression of the lawfully seized evidence." *Id.*

55. *See, e.g.*, *Rickus*, 737 F.2d at 364 (stating that the exclusionary rule is a necessary remedy, but should be rarely applied).

56. 956 F.2d 843 (8th Cir. 1992).

57. *Id.* at 847. Explaining its decision not to apply federal law to a search by state police, the United States Court of Appeals for the Eighth Circuit noted the "high social costs of the exclusionary rule." *Id.* The court quoted with approval Justice Cardozo's remark that exclusionary rules produce the unsatisfactory result that "[t]he criminal is to go free because the constable has blundered." *Id.* (quoting People v. Defore, 150 N.E. 585, 587 (N.Y.), *cert. denied*, 270 U.S. 657 (1926)).

H. *Characterization of Law as Merely Procedural*

If the state law at issue goes merely to matters of pure procedure and does not implicate the deep-seated, fundamental values of a state, refusal to apply state law may be perceived as having a less corrosive effect on the federal/state relationship.[58] To the extent that federal courts identify a state law as essentially procedural, they will typically apply federal law.

I. *Joint Operations by Federal and State Police*

Some cases suggest that the absence of federal officers at the scene of a state search justifies the application of state law.[59] Other decisions indicate that the presence or absence of federal officers at the scene of a search conducted under state law has little relevance to the court's decision to choose federal or state law.[60]

J. *State Courts as Laboratories for Criminal Procedure*

The Supreme Court has long held that states may, as a matter of state law, impose standards on police searches and seizures not required by the Fourth Amendment.[61] Many states have taken advantage of the opportunity to expand their protections for persons accused of crimes and

---

58. United States v. Sotomayor, 592 F.2d 1219, 1225-26 (2d Cir.), *cert. denied*, 442 U.S. 919 (1979).

59. *See, e.g.*, Moore, 956 F.2d at 847 (citing fact that state police "act[ed] totally without federal involvement" as part of reasoning for applying state law); *cf.* United States v. Krawiec, 627 F.2d 577, 579-80 (1st Cir. 1980) (finding participation of federal officers not relevant when all involved in search believed it was conducted under state warrant and for purposes of state prosecution).

60. *See, e.g.*, United States v. One Parcel of Real Property, 873 F.2d 7, 8 (1st Cir.) (stating that evidence is admissible without regard to state law if state police were doing what federal law would have permitted federal officers to do), *cert. denied*, 493 U.S. 891 (1989); United States v. Jorge, 865 F.2d 6, 10 n.2 (1st Cir.) (explaining that federal forum is the central issue, not whether search was exclusively under state control), *cert. denied*, 490 U.S. 1027 (1989); United States v. Aiudi, 835 F.2d 943 (1st Cir. 1987) (holding that even though there was a state search and a federal prosecution, violation of state law was irrelevant), *cert. denied*, 485 U.S. 978 (1988); United States v. Pforzheimer, 826 F.2d 200, 202-03 (2d Cir. 1987) (applying federal law without regard to fact that "evidence in question was solely the product of a state investigation"); Jackson v. United States, 354 F.2d 980 (1st Cir. 1965) (applying state law without weighing fact that both federal and state officers participated in a joint warrantless search).

61. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975) (allowing states to impose greater police restrictions); Sibron v. New York, 392 U.S. 40, 60-61 (1968) (letting states "develop its own law of search and seizure to meet the needs of local law enforcement"); Cooper v. California, 386 U.S. 58, 62 (1967) (allowing states to "impose higher standards on searches and seizures").

thus have served as laboratories for the rest of the country. Federal courts addressing the applicability of such laws, in cases where the evidence was developed by state police officers, might have been expected to defer to state law as a means of encouraging the experiments. In doing so, they might also strengthen the bonds of comity that should exist between the two judicial systems. Nonetheless, the desirability of experimentation in the state laboratories appears to carry very little weight when it is raised as a ground for applying state law in federal prosecutions. Thus in *United States v. Combs*,[62] the court acknowledged the "general applicability" of such laws in state prosecutions, but also held that "states are not free to impose on Federal courts requirements more strict than those of the Federal laws or Constitution."[63]

V. Evaluating the Factors

The ten above considerations might be valuable tools for federal courts that are not inclined automatically to swing the supremacy hammer only if the considerations, and the courts using them, meet two fundamental requirements. First, a consideration must make good sense in its own right. That is, the factor must address real concerns and provide a basis for solving conflicts between state and federal law. If it addresses a concern that looks good on paper, but does not arise in the real world of federal or state law enforcement, it will be irrelevant to courts' analyses. Similarly, if applying a factor affords no foundation for principled, predictable results, it will have little practical value to courts that are struggling with a difficult problem.

Second, a factor should provide a universal standard that guides courts, so that courts choose law without regard to results in individual cases. If, instead, a factor is only a tool for manipulating results to satisfy individual judges' views of justice, it may provide highly individualized justice at the expense of principled rules of law to which all of us—federal and state police, legislators, and judges, as well as defendants and other citizens—should be bound. Thus, if a factor is too flexible, lending itself readily to results-oriented maneuvers, it may be almost too "practical."

62. 672 F.2d 574 (6th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

63. *Id.* at 578; *cf.* United States v. D'Antoni, 874 F.2d 1214, 1218-19 (7th Cir. 1989) (rejecting argument that applying federal law to state search "would be encouraging state officials to violate state law").

With those cautions in mind, we may now return to our list of ten prudential factors that courts weigh when deciding which law to choose. Each factor adds to the ultimate choice of law decision, but not necessarily to the same degree.

A. *Good Faith/Reasonable Reliance*

In a related context, the Supreme Court issued directions with some applicability to our problems. *United States v. Leon*[64] denied application of the Fourth Amendment's exclusionary rule to situations where police conduct a search with a good-faith belief in their authority under a warrant that later proves to be invalid.[65] The Court reasoned that if the primary purpose of the exclusionary rule is to deter police misconduct, it has little relevance to situations where police sensibly, but erroneously, believe they have complied with the law.[66]

The Court's rationale in *Leon* implicates choice of law concerns. If police who make an innocent mistake are entitled to *Leon*'s good-faith exception to the exclusionary rule, why should federal courts not apply state criminal procedure in situations where state police reasonably relied on that state law? Indeed, the argument for using the state law on which state police rely is stronger than the case *Leon* makes for excusing mistakes. After all, state police who rely on and comply with state law *have made no mistake.* It should take a strong federal interest to overcome that kind of reliance.

If state police fail to meet their standards but comply, perhaps by chance, with the federal standard, state law should still be applied. Absent a strong federal interest in applying federal law, state police should be penalized under state law for violation of state exclusionary rules. The only exception to this might be when state officers reasonably anticipate that federal procedure displaces state law because federal and state police conduct a joint search-and-seizure operation.[67]

The only decisions that seem to value good faith reliance on state law by state officers are cases in which the conduct of the state police can meet those standards. When state police can meet the standards of federal law, but perhaps not their own state law, most courts are noticeably silent about the importance of "good faith" reliance on state law. Additionally, those courts tend to apply the standard of federal law, which, by happy circumstance, the police in those cases are able to meet.[68]

---

64. 468 U.S. 897 (1984) (creating limited "good faith" exception to application of exclusionary rule to searches conducted under warrants later found to be flawed).

65. *Id.*

66. *Id.* at 908-13.

67. *See supra* notes 58-59 and accompanying text.

68. *See, e.g.*, United States v. Chavez-Vernaza, 844 F.2d 1368, 1373 (9th Cir. 1987)

This use of the good faith factor raises at least a suspicion that courts apply it selectively, with the result of admitting inculpatory evidence in mind. Thus, while considering the good faith of police officers makes a lot of sense, its apparently selective use suggests that the second test of a factor mentioned above—choosing law without regard to results in a particular case—has not been met.

This apparent manipulation of good faith may achieve justice in individual cases. Even those who acknowledge the deterrent value of exclusionary rules may not enjoy the suppression of probative inculpatory evidence in cases involving heinous crimes. It is also understandable that judges do not like to free defendants by suppressing probative evidence that establishes guilt. Nonetheless, it is precisely such manipulation of an otherwise legitimate consideration that hinders the development of principled guidelines for the prudential application of state criminal procedure in federal prosecutions.

B. *Uniformity of Federal Procedure*

Obviously, federal courts have a legitimate interest in routinely applying a body of federal procedure that is reasonably uniform across the country. To think otherwise suggests that federal courts should apply some kind of local procedure that would produce dissimilar results in otherwise similar cases. That is clearly undesirable. It is not surprising that the Supreme Court has long held that federal criminal procedure will normally apply in federal prosecutions.[69]

Thus, considerations of uniformity will usually operate in favor of applying federal law even to state searches, particularly when the conflicting state procedure is unclear or otherwise difficult to apply. This is not the same, however, as concluding that federal procedures should always apply in the kinds of cases we are discussing in this Article. To reach that conclusion, one would have to give little or no weight to

---

(admitting evidence of state search of bank records, but alleged violation of state law is irrelevant because federal law controls), *cert. denied*, 114 S. Ct. 1324 (1994); United States v. Rickus, 737 F.2d 360, 363-64 (3d Cir. 1984) (admitting evidence from state search arguably violating state constitution, but citing "general rule" that federal law controls); *see also* United States v. Mitchell, 783 F.2d 971, 973-74 (10th Cir.) (admitting evidence from state search that arguably violated state law restrictions but focusing only on whether Fourth Amendment was violated), *cert. denied*, 479 U.S. 860 (1986).

69. Olmstead v. United States, 277 U.S. 438, 469 (1928) (upholding the importance of a uniform federal approach to admitting evidence in federal prosecutions).

proper evaluations of such factors as good faith reliance on state law, comity, and well-founded concerns about police and prosecutorial forum shopping. This approach seems unacceptable if state interests are to get any consideration at all.

C. *Reluctance to Decide Uncertain Questions of State Law*

Federal courts handling civil cases have a number of techniques to help them identify uncertain state law. Unfortunately, some of those techniques are less effective when a federal court hears a criminal case. Abstention is unavailable because state courts cannot hear federal criminal matters. Certification of criminal procedure questions, although theoretically useful, runs into some of the same obstacles of cost and delay that have impeded its effectiveness in civil cases, but the problems are more acute in criminal cases.[70] Delay in getting answers to questions certified from criminal cases could have high human costs, with defendants incarcerated for longer periods while the courts consider which law applies. Such delay could even run afoul of speedy trial requirements for incarcerated defendants.[71] Few would be comfortable with the notion of releasing, on their own recognizance or on bond, defendants who are charged with serious offenses while the court obtains an answer to a certified question. If a defendant who is accused of a serious crime is free while trial is pending, the merits of the case should allow such treatment. Choice of law issues should never postpone a defendant's day in court.

In conclusion, when the court is genuinely uncertain about the substance of a material element of state law, the court should favor applying federal procedure rather than state procedure. Nonetheless, this preference for federal procedure in this circumstance must be limited. Before indulging it, the court should have genuine uncertainty as to what the state law is. Conversely, if the court can ascertain state law with a reasonable degree of probability, the court should not consider this factor at all.[72]

---

70. *See, e.g.*, John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 418-44 (1988) (describing a variety of reasons why certification is used less in civil cases than its proponents once anticipated).

71. The Federal Speedy Trial Act requires that incarcerated defendants be brought to trial within 70 days of either filing an indictment or first appearance before a judicial officer, whichever date is later. 18 U.S.C. § 3161 (1988 & Supp. IV 1992).

72. The reader may wonder why the same federal courts that are so willing, and even eager, to construe the meaning of state law in civil cases would be so timid about intruding in matters of state criminal procedure. *See, e.g.*, McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir.) (construing the law of a state outside the Third Circuit), *cert. denied*, 449 U.S. 976 (1980). One possible answer is that these courts are already predisposed, by and large, not to apply state procedure in

D. Comity

There are many good reasons why one sovereign's judiciary should show sensitivity toward the concerns of other judicial systems. In our own federal structure of government, the reasons for courts to tread lightly around one another seem even more pronounced. After all, federal and state courts function concurrently in America, and society as a whole benefits when the courts work well together. Comity, then, is a powerful reason to reject an "in-your-face" approach to invoking the Supremacy Clause. In short, federal, as well as state, courts benefit when warm cooperation replaces frosty co-existence.[73]

It is possible, of course, to overstate the utility of comity, or to underappreciate the costs comity may impose on courts that subordinate their forums' interests to the interests of another judicial system. For that reason, even courts that try to accommodate their judicial neighbors will typically do so only within a limited sphere that does not cut too deeply into the forums' needs. In the area of federal prosecutions that implicate the possible application of some state criminal procedure, however, quite a bit of state interest can probably be accommodated without striking any sensitive federal nerves.

Concrete examples of federal courts accommodating state interests require fact-specific analyses of particular cases. It can generally be said, however, that the relative importance of a state interest must weigh heavily in the comity balance. For example, if the state procedure at issue arises from a fundamental state constitutional right, or if the state has a particularly powerful reason for using its criminal procedure to control its own police in a particular setting, then a federal court should probably think twice before it blithely cites its own supremacy, or a very modest conflicting federal interest, as a ground for rejecting state law. Simply because the Supremacy Clause gives federal courts virtually unconstrained power to reject state law does not mean the federal courts

---

criminal cases. A more likely explanation is that, in civil cases, principles developed in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and related cases require that state law be used, no matter how it is found. *Id.* at 78. Examples might include abstention, certification, or speculating what the state law is. In federal criminal cases, by contrast, principles underlying the Supremacy Clause provide an alternative body of applicable law—federal criminal procedure—and affirmatively encourage the use of this alternative.

73. As just one example of how federal courts may also benefit from good relations with their state counterparts, consider again the ability of federal courts to certify uncertain questions of state law to state supreme courts. *See supra* note 48.

must exercise that power. Instead of invoking this power, federal courts should carefully consider the benefits of true comity—judicial harmony, good public policy, and justice.

It should be an unnecessary postscript to add that giving meaning to comity in this context of federal and state criminal procedure requires more than incanting the word solemnly and then ignoring the interests that the word should evoke. At a minimum, comity seems to suggest that sometimes federal courts should apply state law even when doing so would result in an outcome distasteful to the federal court. Unfortunately, if that is the standard for comity, federal courts may have some ground to cover before they meet it.[74]

E. *Concerns About Forum Shopping*

Courts and legislatures always seem a little ambivalent about forum shopping. The Supreme Court, for example, has created new rules designed to suppress forum shopping.[75] On the other hand, the Supreme Court quietly accepts that some decisions will enhance opportunities for resourceful lawyers to forum shop.[76] For its part, Congress often encourages forum shopping when it believes that it might increase the chances for a party to get a fair hearing in court.[77] A lawmaking body encourages, or at least does not discourage, forum shopping, because the lawmakers believe, rightly or wrongly, that forum shopping either serves some important legal goal or is at least a necessary byproduct of reach-

---

74. *See infra* notes 101-22 and accompanying text (suggesting that federal courts seem much more interested in admitting inculpatory evidence—under whichever law would admit it—than in deferring to state interests).

75. *See, e.g.*, *Erie*, 304 U.S. at 76-80 (disapproving old rule, in part because it encouraged inappropriate forum shopping); Hanna v. Plumer, 380 U.S. 460, 468 (1965) (reiterating that one of the aims of the *Erie* doctrine is discouragement of forum shopping).

76. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (easing due process constraints on assertions of personal jurisdiction and thereby expanding opportunities for forum shopping by plaintiffs).

77. *See* 28 U.S.C. § 1441 (1988 & Supp. V 1993) (permitting some cases to be "removed" on a defendant's initiative from a state trial court to a federal district court).

ing such a goal.[78] Conversely, whenever courts cannot identify such a desirable goal, they look unfavorably on forum shopping.

Federal courts that have confronted questions about the applicability of state criminal procedure in federal criminal cases follow that pattern. None of the decisions used in this study expressly approved of prosecutors shopping for the most favorable forum, and one—*United States v. Pforzheimer*[79]—even indicated disapproval of the practice.[80] So far, so good, but there is more.

The defendant in *Pforzheimer* sought the application of state criminal procedure because, *inter alia*, "a state prosecutor who is faced with evidence that might be suppressed in a state court prosecution may fo-

---

78. My favorite example of the conundra courts can create for themselves around forum shopping arises in the context of *Erie*. In 1964, the Supreme Court held that, when a diversity case in federal district court—diversity cases being a manifestation of constitutionally encouraged forum shopping—is transferred from one federal judicial district to another, the case should be tried according to the substantive law of the original federal district. Van Dusen v. Barrack, 376 U.S. 612, 635-37 (1964); *see* 28 U.S.C. § 1404 (1988) (creating forum shopping). The *Van Dusen* Court intended to discourage turning § 1404 into a "forum-shopping instrument." *Van Dusen*, 376 U.S. at 635-37. Considering that the express language of § 1404 seems intended to encourage forum shopping, although admittedly not necessarily forum shopping intended to change the law applicable to a case, the Court appears to be overstepping its bounds.

In any event, *Van Dusen* was exploited by a particularly resourceful attorney, who used it in the following way. His client, injured in Pennsylvania, waited too long to file suit under the applicable state statute of limitations. That might have been the end of it, but the lawyer did not give up. Instead, the lawyer filed suit in a federal district court in Mississippi, where there was personal jurisdiction over the defendant and where the statute of limitations had not yet expired. Then the lawyer used 28 U.S.C. § 1404 to transfer the case from Mississippi to a federal district court in Pennsylvania. When the defendant moved to dismiss the suit as time-barred by the Pennsylvania statute, the attorney cited *Van Dusen* for the applicability of Mississippi law. The Supreme Court agreed with the resourceful attorney. Thus, in Ferens v. John Deere Co., 494 U.S. 516 (1990), the Supreme Court held that *Erie's* goal of discouraging forum shopping was achieved by applying *Van Dusen* to the instant facts, thereby requiring the application of Mississippi law.

Personally, I never tire of noting that *Ferens* encouraged a Pennsylvania plaintiff to shop for a Mississippi forum (first example of forum shopping) and, particularly, a Mississippi federal district court (second example of forum shopping) that would apply a Mississippi statute of limitations. Thus, when the plaintiff moved successfully to transfer the case to a federal district court in Pennsylvania (third example of forum shopping), the Mississippi limitation period would still apply. The Court approved all that in the name of discouraging forum shopping under *Erie*.

79. 826 F.2d 200 (2d Cir. 1987).

80. *Id.* at 204.

rum shop and instead use the federal courts."[81] Indeed, speaking from the point of view of a law-abiding citizen[82] concerned about our national problem of crime, I might applaud a group of law enforcement authorities who had the relatively small amount of resourcefulness necessary to think up that tactic themselves. Nevertheless, we should all recognize that the tactic represents a rather brazen strain of forum shopping that, if successful, might produce the suppression of an important state interest.[83]

Yet, the United States Court of Appeals for the Second Circuit saw things a bit differently. Pronouncing itself "unpersuaded" by the defendant's argument, the Second Circuit offered the following explanation: "A state prosecutor whose case relies on evidence that may be inadmissible in a state court trial has no power or authority to effect a prosecution in federal court. The initiation of a federal prosecution depends entirely on the discretion of the federal prosecutor."[84] Well, that's true. Is it necessary to say that it is also irrelevant to the concern the defendant raised?[85]

In any event, the Second Circuit notwithstanding, evidence and experience indicate that prosecutors and police *do* forum shop, for a variety of reasons. In *United States v. Moore*,[86] for example, the court explained that what prosecutors planned as a state prosecution was instead pursued in federal court because "[f]ederal law calls for twice the maximum punishment otherwise allowed."[87] Moreover, the particular kind of motivation for forum shopping rejected as implausible in *Pforzheimer*—state and federal prosecutors collaborating to get a federal conviction when a state conviction is unobtainable—is seen in cases as well. The Second

---

81. *Id.*

82. The days in the old neighborhood, to which I alluded at the beginning of this Article, are now securely tucked away behind the firm veneer of middle-aged respectability.

83. For whatever it may be worth, the state law whose applicability in *Pforzheimer* would arguably have resulted in suppression of evidence obtained in the search was a matter of state constitutional law. *Pforzheimer*, 826 F.2d at 202.

84. *Id.* at 204.

85. This is too obvious even for me, but I'll say it anyway: It is elementary that state prosecutors do not decide which cases get prosecuted in federal courts. Yet, failing to recognize that state and federal prosecutors might cooperate with one another to achieve a federal conviction when a state conviction is unobtainable is extremely unrealistic. In an opinion that otherwise has a lot to contribute to the subject that this Article addresses, the Second Circuit really missed the boat on this particular point.

86. 956 F.2d 843 (8th Cir. 1992).

87. *Id.* at 845. The federal law took into consideration the proximity to an elementary school in order to heighten the punishment. *Id.*

Circuit decided *United States v. Magda*[88] eleven years before it considered *Pforzheimer*. The court reported that police uncovered the evidence at issue in the case through a state search,[89] and the state trial court suppressed the evidence under state law.[90] Thereafter, "[t]he state prosecution was . . . discontinued."[91] The federal prosecution that was under consideration in the *Magda* opinion followed.

Perhaps we can imagine explanations for *Magda* that do not implicate the kind of forum shopping that *Pforzheimer* disregarded. Yet, alternative explanations challenge our imagination. The truth is that, when federal courts choose federal law over state law, they invite even moderately resourceful and determined state police and prosecutors to cooperate with their federal counterparts.[92] In other words, those state officials will be sorely tempted to forum shop for the court that will admit the evidence. If this kind of forum shopping is undesirable, and it is neither defended on its own merits nor justified as an acceptable cost of some higher legal good,[93] then cases like *Magda*, where state officers appear to have forum shopped to evade their own state law, should result in state law being applied in the federal litigation.

F. Availability of Other Sanctions for Police Misconduct

As was mentioned earlier, federal courts that refer to "other sanctions" for controlling state police have probably already decided against apply-

88. 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977).
89. *Id.* at 757.
90. *Id.* at 760.
91. *Id.* at 757 n.2.
92. This is not to say, of course, that cooperation between law enforcement personnel from different jurisdictions is a bad thing. Normally, it is a very good thing indeed. I think it is fair to wonder, however, if it is a good thing when the cooperation occurs as a kind of forum shopping, which the federal courts generally do not encourage. *But see* United States v. Aiudi, 835 F.2d 943, 946 (1st Cir. 1987) ("Where . . . no incentive exists for federal officials to encourage misconduct by state police, exclusion of state-seized evidence is inappropriate without first considering whether the benefit obtained from excluding the evidence outweighs the resulting costs."), *cert. denied*, 485 U.S. 978 (1988). Later in the *Aiudi* opinion, however, the United States Court of Appeals for the First Circuit acknowledged that "exclusion of this evidence may deter the Woonsocket police from future unlawful conduct." *Id.*
93. Even *Pforzheimer* does not defend this kind of forum shopping. Instead, the decision implicitly criticizes it by denying that it will or can occur when federal courts reject the application of state procedure. United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987).

ing a state exclusionary rule.[94] Yet, all too often this reference to other sanctions is disingenuous. The history of the federal courts' own Fourth Amendment exclusionary rule shows that courts recognize that exclusion is justifiable precisely because "other sanctions," such as administrative punishment of police officers or civil suits by criminal defendants seeking relief for alleged prior police misconduct, were ineffective deterrents.[95] There appears to be no basis for an assertion that such deterrents are any more effective at the state level. If federal courts intend to suggest otherwise, they are being less than candid.[96] Of course, federal courts that hold this view may consider the federal exclusionary rule in the list of other sanctions that make the application of state law unnecessary.[97]

In the context of the choice of law problem addressed by this Article, there is one additional sanction available: the exclusion of evidence in a state court proceeding when state police violate state criminal procedure. The United States Courts of Appeals for the First and Third Circuits referred to this additional sanction as reducing the need to apply a state exclusionary rule in a federal proceeding.[98]

There is a basic problem with this assertion, which is clarified when accepting the assumption that exclusionary rules actually deter police misconduct.[99] A case that succeeds in federal court on the basis of evidence inadmissible in state court does little to cool the excessive ardor

94. *See supra* notes 52-53 and accompanying text.

95. Mapp v. Ohio, 367 U.S. 643, 652-53 (1961) ("The obvious futility of relegating the Fourth Amendment to the protection of other [non-exclusionary] remedies has, moreover, [long] been recognized by this Court.").

96. One federal court acknowledged that there may be some deterrent benefit to be derived from excluding evidence gathered by state officers in violation of state law from federal trials. United States v. One Parcel of Real Property, 873 F.2d 7, 8 (1st Cir.) (admitting evidence in spite of concerns because excluding evidence from state court proceeding is a better tailored deterrent), *cert. denied*, 493 U.S. 891 (1989).

97. *See supra* notes 11-15 and accompanying text.

98. *One Parcel of Real Property*, 873 F.2d at 8 (stating that exclusion of evidence from state court only is a more "close fitting" deterrent); United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) (explaining that exclusion of evidence in a state prosecution is a possible "sanction").

99. If exclusionary rules that apply to searches subsequently deemed unlawful do not deter such searches in the future, there is little point to those exclusionary rules. The Supreme Court had occasion to question the effectiveness of the Fourth Amendment's exclusionary rule. *See* United States v. Janis, 428 U.S. 433, 452 n.22 (1976) ("No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."). I accept the assumption put forward regularly by courts that have adopted exclusionary rules that such rules may have a significant deterrent effect on police behavior.

of state police who might have been deterred by application of an exclusionary rule in federal court. When the police lose in their own state court, they may lose some cachet with supervisors. A police officer may be overzealous, not only because she likes her work, but also because she hopes to advance within the system. The prospect of locking up the a defendant in federal, rather than state, jail with a longer sentence,[100] may satisfy an officer's sense of justice, as well as improving his or her status within the police department. Given the motivation for the police to test the limits of their enforcement powers, the loophole that federal courts often provide when they reject application of a state exclusionary rule encourages police misconduct. Further, the loophole may also be a motive for the kind of forum shopping that occurred in *United States v. Magda.*[101]

To summarize, the glimmer of "other sanctions" on a distant horizon is simply not a good reason for rejecting state law in a federal proceeding that is relying on evidence from state searches. Federal courts especially, with their own history of developing exclusionary rules because other sanctions did not effectively protect defendants' basic rights, should know better than to suggest otherwise.

G. *Reluctance to Expand Exclusionary Rules*

Federal judicial concerns about undue expansion of exclusionary rules are undoubtedly genuine.[102] In *United States v. Shaffer*,[103] the United States Court of Appeals for the Third Circuit gave one reason for the cautious approach to expansion. "[I]f the states could require federal courts to exclude evidence in federal criminal cases, some convictions would undoubtedly be lost, and the enforcement of congressional policy would be weakened."[104] Speaking about potential expansion of exclusionary rules in areas distantly related to this Article, the Supreme

---

100. These days, federal convictions often produce substantially more jail time than state convictions. *See, e.g.*, United States v. Moore, 956 F.2d 843, 845 (8th Cir. 1992) (demonstrating that federal punishment can double state punishment).

101. 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977).

102. *See, e.g.*, United States v. Aiudi, 835 F.2d 943, 945 (1st Cir. 1987) ("It is well recognized that the costs of the [exclusionary] rule may in some instances outweigh the benefits it provides in terms of deterring police misconduct."), *cert. denied*, 485 U.S. 978 (1988); United States v. Rickus, 737 F.2d 360, 364 (3d Cir. 1984) ("Proposed extensions in the scope of the exclusionary rule are approached cautiously.").

103. 520 F.2d 1369 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

104. *Id.* at 1372.

Court adopted the admonition that exclusionary rules are a "needed, but grudgingly taken, medicament . . . [of which] no more should be swallowed than is needed to combat the disease."[105]

The Court expresses a valid concern, but ignores other important considerations. In the first place, the Third Circuit's concern in *Shaffer* that federal courts might be required to apply state law in derogation of congressional policy only could occur if federal courts chose to impose such a requirement upon themselves. Perhaps that is a pretty good idea. If federal courts generally deferred to state law, the courts would reserve the right to use discretion to follow federal law in individual cases. Within this context, when federal courts applied state exclusionary rules, they could do so only when they were confident that such an application would not undermine important congressional policy in the way the Third Circuit feared.

Secondly, we should not lose sight of the fact that it is not only state *exclusionary* rules that courts could apply. As our earlier discussion of *United States v. Moore*[106] demonstrated, the application of state criminal procedure is not necessarily identical to the application of state exclusionary rules.[107] *Moore* applied a state "no-knock" rule, which resulted in the admission of evidence that would have been excluded under the comparable federal rule.[108]

Finally, and most importantly, applying state criminal procedure—even just state exclusionary rules—in federal cases where the search was subject to state law should not be characterized as an expansion of state law. An event in the evolution of Fourth Amendment exclusionary law makes this point.

Until 1961, Fourth Amendment exclusionary requirements did not apply to state criminal prosecutions based on evidence obtained in searches by state police.[109] Yet, a year earlier the Supreme Court had eliminated one loophole in the exclusionary rules applicable to federal searches. *Elkins v. United States*[110] held that if state police obtained evidence in a way that would have violated the Fourth Amendment if federal police

105. United States v. Janis, 428 U.S. 433, 454-55 n.29 (1976) (quoting Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964)). The *Janis* Court refused to suppress evidence seized by state officers in violation of the Fourth Amendment when the evidence was introduced in a federal civil tax proceeding. *Id.* at 460. The evidence had already been suppressed for purposes of state and federal criminal proceedings. *Id.* at 439.

106. 956 F.2d 843 (8th Cir. 1992); *see supra* notes 5-18 and accompanying text.

107. *Moore*, 956 F.2d at 854.

108. *Id.*

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

110. 364 U.S. 206 (1960).

had made the search, the evidence was to be excluded from federal prosecutions.[111]

The reasoning of *Elkins* helps explain that the Court was not seeking to extend the exclusionary rule to state proceedings, as it would do a year later in *Mapp v. Ohio*.[112] Instead, *Elkins* explained that a number of states already apply the rule of exclusion to state searches that violate the Fourth Amendment.[113] To permit a state's evidence to be used in a federal court would "defeat the state's effort to assure obedience to the Federal Constitution."[114] Additionally, *Elkins* made clear that the Court intended to discourage federal and state officers from working cooperatively to evade Fourth Amendment requirements.[115] As Justice Stewart stated, federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold."[116]

However well-founded, a commitment to limit the expansion of the exclusionary rule is a bit misplaced when it results in limited use of state criminal procedure law in federal courts. Rather than being concerned about the expansion of the exclusionary rule, courts should focus on ensuring that state police will not be allowed to take evidence suppressed in state court to federal prosecutors, thereby evading state law and the values attendant to it.

H. *Characterization of Law as Merely Procedural*

The nature and importance of a state's interest behind its criminal procedure are relevant factors federal courts should consider. Clearly, it is reasonable to reject the application of state law if the state interest implicated is not strong, or at least is not seriously harmed by nonapplication. *United States v. Dudek*[117] illustrates this principle. In

111. *Id.* at 223 (altering old rule allowing admission of evidence).
112. *See Mapp*, 367 U.S. at 660.
113. *Elkins*, 364 U.S. at 219-20.
114. *Id.* at 221-22.
115. *Id.*
116. *Id.* at 223. Federal judges may have a lesser duty to uphold state law because they have not explicitly sworn to uphold that law. Thus, there is a difference between a federal judge's duty to uphold federal law and his duty to uphold state law. I do not believe, however, that the distinction is significant enough to provide much justification by itself for a rejection of state law.
117. 530 F.2d 684 (6th Cir. 1976), *appeal after remand*, 560 F.2d 1288 (6th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978).

Dudek, state police lawfully obtained a valid search warrant.[118] Their mistake was that they did not return the warrant promptly or properly verify the inventory of the search, as required by a state rule of criminal procedure.[119] The United States Court of Appeals for the Sixth Circuit was uncertain whether, in that circumstance, a state court would suppress the evidence.[120] In any event, it held that federal law should control, in part because the violations at issue did not damage fundamental state interests.[121]

Dudek seems to be a reasonable decision, in which the violation of state law was simply not severe enough to merit applying a state exclusionary rule in federal court. Implicitly, the converse of this is also true. If the extent of the state interest is the determinative factor, so that weak state interests, as in *Dudek*, hold little sway, then should not important state interests get special treatment? In particular, if the state interest originates in the state constitution or otherwise reflects a fundamental state value, the federal interest should defer to it. Nonetheless, federal courts do not regularly defer to strong state interests.[122] Moreover, the practice of disregarding fundamental state interests, even as they may be reflected in state constitutions, supports my earlier assertion that federal courts have a strong predisposition toward the application of federal procedure.[123] More importantly, this practice is inappropriate in a federal system based on mutual respect among the various sovereigns.

I. Joint Operations by Federal and State Police

The general public and the courts approve cooperation among police from differing jurisdictions,[124] and this cooperation has practical implications for choice of law issues.

A fair number of cases conclude that choice of law decisions should not turn on whether federal officers participated in a search with state police.[125] Others reach the same conclusion as long as federal participa-

---

118. *Id.* at 685.

119. *Id.* at 686.

120. *Id.* at 687.

121. *Id.* at 691.

122. *See, e.g.*, United States v. Aiudi, 835 F.2d 943 (1st Cir. 1987) (rejecting application of arguable protection under Rhode Island constitution), *cert. denied*, 485 U.S. 978 (1988); United States v. Pforzheimer, 826 F.2d 200, 202-04 (2d Cir. 1987) (rejecting application of arguable protection under Vermont constitution); United States v. Combs, 672 F.2d 574, 578 (6th Cir.) (rejecting application of arguable protection under Kentucky constitution), *cert. denied*, 458 U.S. 1111 (1982).

123. *See supra* notes 28-38 and accompanying text.

124. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 221-23 (1960) (enthusiastically approving joint efforts by federal and state police).

125. *See, e.g.*, United States v. Jorge, 865 F.2d 6, 10 n.2 (1st Cir.), *cert. denied*, 490

tion did not mean that federal officers were in charge of the search.[126] Still other cases hold that the absence of federal officers is a reason for applying state law.[127]

I have to confess my own uncertainty about how to weigh this factor, but a few points seem fundamental. First, if state police participate in a joint search, they are on the scene only because a state government provides badges that give them authority not vested in ordinary citizens. Even if, in some unusual circumstances, state officers receive the status of special federal deputies, that status is probably conferred only because the recipients were state officers in the first place. Thus, if agents participate in a search because the foundation of their authority derives from state law, the state has an interest in regulating how those agents behave. Yet, the strength of that state interest may vary substantially from one circumstance to another.

An important variable in determining the strength of the state interest is the degree to which the state police are making on-the-scene decisions, in which case the state's responsibility for police behavior is greater than when officers act under strict guidelines. Further, if police behave inappropriately, the state's interest in preventing improper searches is affected more than if the state police merely supplied personnel who are deployed under federal control. Thus, in mixed searches where state police significantly control the operation, the state's interest in what happens in the course of a search is strong, and the case for applying state criminal procedure in subsequent prosecutions is compelling.

Even if state police are only pawns in the search, the state still has a responsibility for their behavior. Some state interest attaches even to circumstances in which federal control of a joint search is nearly absolute. If there are other reasons that weigh in favor of applying state law, such as the search implicating a strongly held state constitutional value,

---

U.S. 1027 (1989) (finding that whether search was entirely under state control not relevant to choice of law decision); Jackson v. United States, 354 F.2d 980, 981 (1st Cir. 1965) (applying state law without regard to fact that both federal and state officers participated in a joint search).

126. *See, e.g.*, United States v. Krawiec, 627 F.2d 577, 580 (1st Cir. 1980) (holding that substantial participation by federal officers is not relevant when all involved in search believed it was conducted under state warrant and for purposes of state prosecution).

127. *See, e.g.*, United States v. Moore, 956 F.2d 843, 847 (8th Cir. 1992) (stating that state police "act[ing] totally without federal involvement" helps justify application of state law).

even a minimal participation of state police in a search might tip the choice of law decision in favor of state law.

Weighing the strength of interests applies to federal interests as well. Obviously, where federal officers control a search or provide the bulk of the personnel, a strong federal interest may be found. Other considerations being equal, this works in favor of applying federal law to subsequent prosecutions in federal court.

The difficulty for choice of law purposes is to determine who controlled various aspects of a joint search. The range of factual possibilities and scenarios is limitless, providing almost endless possibilities for the kind of police "subterfuge and evasion" that trouble courts.[128] Cases involving joint investigations apparently follow a simple rule: if federal officers participate, federal law will control.[129] This rule circumvents the difficulty of determining who did what and under whose control. It is understandable that federal courts prefer a bright-line rule to avoid "intricate analytical maneuvers to escape a poorly conceived exception" to the practice of applying federal law.[130]

That's good enough for me, at least in many cases. When the facts of a joint federal and state search are unclear, courts should apply federal law in a federal prosecution. Nonetheless, the creation of a few narrow exceptions to this rule seems wise. If the court is persuaded that the police either undertook a joint search with the purpose of escaping their own sovereign's law, or if there are grounds for believing that the police deliberately muddied the waters so that it is unclear who did what, a court should justly weigh such factors in favor of applying whichever law the police disfavored.

This proposal carries a high price—the loss of probative evidence. At the same time, however, it serves the important interest, in both federal and state courts, of discouraging police from exploiting the law.

J. State Courts as Laboratories for Criminal Procedure

Where this factor has weight, it favors application of state law. Whether it should have weight depends on whether one believes the state's role as a laboratory, which is manifestly useful, is significantly undermined when federal courts do not use state law, and the prosecution presents evidence supplied by the state. Reasonable people may believe that little is lost in such circumstances and that therefore this factor should have

128. Elkins v. United States, 364 U.S. 222 (1960).

129. *See, e.g.*, United States v. Sutherland, 929 F.2d 765, 770 (1st Cir.) (considering application of federal law whenever federal officers participate in a search), *cert. denied*, 502 U.S. 822 (1991).

130. *Id.* at 771.

little weight.[131] I am inclined to agree, but the issue here is not whether the state can serve as a laboratory after federal courts reject state law. Rather, the greater issue is whether a strong state interest developed in a state laboratory will get the respect it deserves in a federal court.

VI. THE NEED FOR RESPECT

A. *Respect for State Law*

So far, the bulk of this Article has addressed the need for federal courts to respect state interests. In practical terms, such respect would probably result in applying state law somewhat more often than normally occurs in the cases examined in this Article. Federal courts must also demonstrate a little more respect for state laws, as well as their underlying interests.

B. *Respect for Rules of Law*

At the beginning of this Article, I suggested that federal courts confronting questions about the applicability of state criminal procedure in federal courts display two tendencies: (1) to apply their own law of criminal procedure, and (2) to apply the law that will admit the inculpatory evidence produced by a police search.[132] The two tendencies generally operate in harmony in most of the cases examined in this Article. They collide, however, when federal courts choose state law that admits inculpatory evidence over federal law that would suppress the evidence.[133]

The inescapable conclusion, reached from exploring the cases cited in this Article, is that federal courts are reluctant to suppress evidence that is crucial, probative, and inculpatory. Yet, such a conclusion may not be completely accurate for two reasons. First, most of the cases discussed above are appellate decisions in which a defendant has already been found guilty. In other words, it is the defendants who are appealing rulings relating to the application or preclusion of state law. Considering that, by and large, more appeals fail than succeed, courts may seem dis-

---

131. *Cf.* United States v. Combs, 672 F.2d 574, 578 (6th Cir.) (rejecting this argument because states have no power to force their criminal procedure on federal courts), *cert. denied*, 458 U.S. 1111 (1982).

132. *See supra* notes 28-38, 101-22 and accompanying text.

133. *See, e.g.*, United States v. Moore, 956 F.2d 843 (8th Cir. 1992) (admitting evidence under state law that federal law would have suppressed); Jackson v. United States, 354 F.2d 980 (1st Cir. 1965) (same).

inclined to overturn the fact finder's decision for procedural reasons. Thus, a tendency to choose state or federal law at the appellate level may not completely reflect the choices of lower courts. The possibility lingers that appeals may fail not so much because they are appeals, but because the appellate courts appear predisposed to use probative inculpatory evidence to convict.

Second, our sense of justice is offended when guilty defendants go free due to police misconduct. Our sense of decency requires that the guilty be punished. Federal judges, who deal with criminals and their victims daily, probably feel that way too. For that reason, they may be inclined to seek techniques that admit evidence in particular cases. How many of us would act differently?

Of course, a judicial proceeding should be conducted with the detachment that characterizes a fair process. Indeed, when federal courts manipulate discretionary factors that they themselves developed in order to produce particular results, they show diminished respect, not only for state law, but also for their own rules. Courts thus risk diminishing the moral grounding on which judicial authority rests. For the most part, courts have created basic, workable instruments for making necessary choices between state and federal criminal procedure, but the instruments need refining. More importantly, courts must resist temptations to bend their own rules to produce particular results in individual cases. Courts should show a little more respect for themselves.

VII. CONCLUSION

I began this Article with a complaint that conflicts do not get enough respect, the general view being that conflicts are impractical, indeed, "abstruse." Perhaps that is so. Yet, when resolving conflicts of law, courts are beginning to recognize the usefulness of standards that conflicts scholars have discussed for many years. Courts' acknowledgement that conflicts may offer factors and principles to aid in the courts' analyses may reassure those who have contributed to the development of those factors. Yet, only when courts actually use the tools in their decisions, will conflicts—and conflicts scholars—finally get true respect.