IS THERE A BORDER EXCEPTION TO THE EXCLUSIONARY RULE?*

I. INTRODUCTION

On the morning of April 6, 2007, Howard Cotterman and his wife drove across the U.S.-Mexico border into Arizona.[1] At the border, officials detained Cotterman upon learning that he was a convicted sex offender and may be involved in child sex tourism.[2] Cotterman was permitted to leave the border crossing at six o'clock that night, but his laptop remained with the officials.[3] The following day, a border agent conducted a forensic search of Cotterman's laptop and discovered dozens of images of child pornography.[4] All of the images were located in the unallocated space on his computer,[5] where deleted data is temporarily stored before it is overwritten.[6] Officials later obtained access to password-protected files on the laptop, which contained over three hundred more images of child pornography.[7] Facing a likely conviction, Cotterman moved to suppress the images.[8] Cotterman argued that the forensic search of his laptop violated the Fourth Amendment and thus should be excluded at trial.[9] Addressing this novel issue, the en banc Ninth Circuit ultimately upheld the constitutionality of the forensic search.[10] Accordingly, the images would be admissible at his trial.[11]

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1. United States v. Cotterman, 709 F.3d 952, 957 (9th Cir.) (en banc), *cert. denied*, 134 S. Ct. 899 (2013), *reh'g denied*, 134 S. Ct. 1512 (2014).

2. *Id.*

3. *Id.* at 958.

4. *Id.*

5. *Id.*

6. *Id.* at 958 n.5.

7. *Id.* at 959.

8. *Id.*

9. United States v. Cotterman, No. CR 07-1207-TUC-RCC, 2009 WL 465028, at *3 (D. Ariz. Feb. 24, 2009) (granting Cotterman's suppression motion because the search was a "non-routine border search requiring reasonable suspicion," and in the absence of reasonable suspicion "a search warrant should have been obtained prior to conducting the forensic exam of the laptops").

10. *Cotterman*, 709 F.3d at 957.

11. *Id.* The district court granted Cotterman's motion to suppress. *Id.* at 959. The government filed an interlocutory appeal from that order. A divided Ninth Circuit panel reversed the district court, holding that reasonable suspicion was not required for the search. The Ninth Circuit voted for a

Cotterman moved to suppress the evidence based on the exclusionary rule. Over fifty years ago, the United States Supreme Court proclaimed that evidence obtained in violation of the Fourth Amendment cannot be used in state court to sustain a criminal conviction.[12] The outgrowth of this proclamation has stimulated divisive arguments[13] and a wealth of literature.[14] Commentators continue to debate the merits of the exclusionary rule,[15] and some have argued for limiting the rule[16] or abandoning it altogether.[17] Although the Supreme Court has carved out some exceptions to the rule, it still remains a part of Fourth Amendment jurisprudence.[18]

Although there were two initial justifications for the rule,[19] the Court has since consistently proclaimed that the sole purpose of the rule is to deter police misconduct.[20] Commentators disagree as to whether the rule in fact deters officials from obtaining evidence in violation of the Fourth Amendment.[21]

rehearing en banc. The en banc Ninth Circuit held that suspicionless forensic searches violated the Fourth Amendment, but ultimately concluded that the forensic search of Cotterman's laptop was supported by reasonable suspicion. *Id.* at 957.

12. Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states through the Fourteenth Amendment). Nearly fifty years earlier the Court held that the Fourth Amendment applied to the federal government, but not states. Weeks v. United States, 232 U.S. 383, 398 (1914).

13. *See* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 111 (2003) (discussing how conservatives and liberals disagree about the necessity of the exclusionary rule).

14. *See* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 119 n.1 (2003) (compiling an extensive list of journal articles and a treatise that discuss the exclusionary rule).

15. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (5th ed. 2012).

16. *See, e.g.*, John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (arguing that outside of shocking violations, the exclusionary rule should not apply in the case of "treason, espionage, murder, armed robbery, and kidnaping by organized groups").

17. *See, e.g.*, Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1058 (1996) (arguing that the exclusionary rule should be replaced with a damages remedy).

18. *See* Hudson v. Michigan, 547 U.S. 586, 599 (2006) (creating an exception to—but not eliminating—the exclusionary rule, while questioning much of the rule's foundation).

19. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 656, 659–60 (1961) (asserting that "the purpose of the exclusionary rule is to deter" Fourth and Fourteenth Amendment violations, and that exclusion is justified by "the imperative of judicial integrity"); Jessica Natali, *Criminal Procedure—the Supreme Court Gives Parole Officers Carte Blanche to Invade Parolees' Fourth Amendment Privacy Rights*—Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998), 73 TEMP. L. REV. 451, 463 (2000) ("The *Mapp* Court enunciated two equally fundamental justifications for its new rule: (1) deterrence of future Fourth Amendment violations and (2) the doctrine of judicial integrity.") (footnotes omitted).

20. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (stating that the sole purpose of the exclusionary rule is to deter Fourth Amendment violations). *But see* INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) (stating that the rule's "prime purpose" is to deter unlawful police conduct).

21. *Compare* Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 227–28 (2012) (citing various scholars who have highlighted the lack of empirical evidence supporting the "myth" that the exclusionary rule deters police misconduct), *with* Kamisar, *supra* note 14, at 123–26 (discussing the "dramatic and traumatic" effect of the application of the exclusionary rule to the states on law enforcement practices), *and* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 448 (1997)

Consequently, some argue for delineated exceptions to the exclusionary rule.[22] Others have proposed dispensing with the rule in its entirety and adopting an alternative rule that more adequately balances the benefits of deterrence against the social costs of excluding incriminating evidence.[23]

The Supreme Court has declined to exclude evidence illegally[24] seized by certain non–law enforcement officials.[25] It has not, however, considered whether the rule is appropriate in the context of searches by border officials at the border.[26] Rather, courts have reflexively presumed the exclusionary rule applies to such evidence without significant discussion.[27] In light of the dearth of case law on this issue,[28] it does not appear that any federal prosecutor has argued that the exclusionary rule is always inapplicable at the border.

(arguing that the rule is responsible for some deterrence, pointing to anecdotal evidence of interviews with police officers).

22. *See, e.g.*, Kaplan, *supra* note 16, at 1046 (proposing a "serious cases" exception to the exclusionary rule).

23. *See, e.g.*, Calabresi, *supra* note 13, at 116–17 (proposing scheme where defendants challenge use of illegally seized evidence at sentencing, making length of sentence and extent to which officials are punished dependent on the willfulness of officials' conduct).

24. For the purpose of this Comment, references to evidence that is seized "illegally" refer to evidence acquired in violation of the Fourth Amendment.

25. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (holding that the exclusionary rule does not require the exclusion of evidence illegally obtained as the result of the conduct of court clerks); Illinois v. Krull, 480 U.S. 340, 352–53 (1987) (asserting that the exclusionary rule does not require the exclusion of evidence illegally obtained pursuant to a legislative enactment subsequently declared unconstitutional); United States v. Leon, 468 U.S. 897, 917 (1984) (declaring that the exclusionary rule does not require the exclusion of evidence illegally obtained as the result of the conduct of judges).

26. For the purpose of this Comment, references to "the border" include locations that are the functional equivalent of the border, including airports, waters providing access to international waterways, and border checkpoints. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983) (discussing the border search doctrine in the context of a search in waterways); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (discussing the border search doctrine in the context of a search in the airports and border checkpoints); *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (noting that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior").

27. *See, e.g.*, United States v. Cortez-Rivera, 454 F.3d 1038, 1043 n.2 (9th Cir. 2006) (upholding a border search as constitutionally permissible, but stating that the court was "presented only with the question of whether the border search violated the [C]onstitution, which would trigger the exclusionary rule for evidence obtained from the search"); United States v. Laich, No. 08-20089, 2010 WL 259041, at *4–5 (E.D. Mich. Jan. 20, 2010) (excluding evidence obtained from a forensic search of a laptop that was illegally seized by border officials); United States v. Modes, Inc., 16 C.I.T. 189, 193-94 (Ct. Int'l Trade 1992) (reasoning that the exclusionary rule applies to searches by customs officials because they would be deterred from committing future Fourth Amendment violations); United States v. Mirmelli, 421 F. Supp. 684, 690 (D.N.J. 1976), *aff'd,* 556 F.2d 569 (3d Cir. 1977) (reasoning that the exclusionary rule applies to customs inspectors because they are government agents—not private persons). This may be partially due to the Supreme Court's initial failure to dissociate the Fourth Amendment analysis from the exclusion analysis. *See Evans*, 514 U.S. at 13 (noting that, as late as 1971, "the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule").

28. See *infra* notes 210–21 and accompanying text for a discussion of the cases addressing the propriety of the exclusionary rule at the border and for a discussion of the possible reasons why the Supreme Court has not addressed this issue.

Now is an appropriate time to analyze the applicability of the exclusionary rule to searches at the border.[29] Such an analysis of the applicability of the exclusionary rule may impact the current debate regarding the level of cause required for certain invasive searches at the border. Additionally, nonexclusion would have significant consequences for law enforcement practices at the border.[30] The U.S. Customs and Border Protection (CBP) agency employed over sixty thousand workers in 2012.[31] Together, these employees admit almost one million passengers and pedestrians into the United States per day.[32] In 2012, they apprehended almost one thousand suspects, discovered nearly five thousand harmful agricultural products and pests, and seized over five tons of illegal drugs.[33] Finding the exclusionary rule inapplicable to border searches would effectively grant license to border officials to conduct more invasive or constitutionally questionable searches because evidence obtained from such searches would be admissible during a criminal trial.[34]

Nonexclusion, however, would have some benefits. In cases like *Cotterman*, where the court had to discuss the constitutionality of the forensic search of the laptop, courts could avoid conducting difficult Fourth Amendment analyses.[35] This is because criminal defendants would have no incentive to challenge the constitutionality of a search if the evidence would be admissible at trial regardless of the result. Accordingly, nonexclusion would effectively decrease the administrative burden on the courts and decrease the likelihood that contraband could be smuggled across the border. On the other hand, exclusion may be the only effective bulwark against unconstitutional border searches because border officials already have substantial discretion to conduct suspicionless searches.[36]

The issue of the exclusionary rule's applicability to searches at the border is even more relevant in light of the Supreme Court's trend toward limiting the

29. *Id*. This Comment does not address the issue of whether the exclusionary rule should apply to aliens. *See* Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1674 (1989) (discussing the two competing approaches of federal courts regarding the applicability of the exclusionary rule to nonresident aliens).

30. See *infra* notes 292–304 and accompanying text for a discussion of the failures of existing CBP policies to adequately protect Fourth Amendment rights.

31. U.S. CUSTOMS AND BORDER PROT., U.S. DEP'T OF HOMELAND SECURITY, ON A 1L DAY IN FISCAL YEAR 2012 2 (2012), *available at* http://www.cbp.gov/sites/default/%20files/documents/typical_day_fy12_2.pdf.

32. *Id.* at 1.

33. *Id.*

34. For border officials, if the exclusionary rule did not apply to border searches, the only constitutionally based deterrent against conducting such searches would be the threat of a civil lawsuit brought by the victim of the search. See *infra* notes 289–91 and accompany text for a discussion of why civil remedies do not adequately deter border officials from conducting illegal searches.

35. United States v. Cotterman, 709 F.3d 952, 961–67 (9th Cir. 2013) (en banc) (analyzing the constitutionality of forensic searches on laptops), *cert. denied*, 134 S. Ct. 899 (2013), *reh'g denied*, 134 S. Ct. 1512 (2014).

36. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . . .").

applicability of the exclusionary rule.[37] Over the past few decades, the Court has created numerous categorical exceptions to the exclusionary rule.[38] Justice Anthony Kennedy, the Court's notorious swing voter on criminal justice issues,[39] has also expressed a willingness to consider arguments limiting the applicability of the exclusionary rule in the border context.[40] Accordingly, it is both helpful and timely to anticipate and address this issue now—before the suppression issue is thrust upon courts in criminal proceedings where it will have real consequences to the liberty of criminal defendants.

This Comment argues in favor of continuing to exclude evidence at trial that was uncovered by an illegal search or seizure at the border. Part II.A reviews the relevant case law and commentary on the exclusionary rule. As Part II.A.1.a illustrates, these authorities demonstrate that the "primary concern" of the offending official's conduct is a significant consideration when determining whether application of the exclusionary rule would deter misconduct. Part II.B includes a brief discussion of the relaxed standard for searches at the border and relevant authority regarding the applicability of the exclusionary rule at the border. Part II.C follows with a short discussion of CBP policies and procedures for searches at the border. Section III presents various arguments for application of the exclusionary rule at the border in light of the authority discussed in Section II. Section III argues that the exclusionary rule should apply in the context of illegal border searches because doing so would serve the rule's purpose of deterring Fourth Amendment violations by law enforcement.

II. OVERVIEW

A. The Exclusionary Rule

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[41] The exclusionary rule, which provides that unconstitutionally obtained evidence cannot be used at trial to convict a criminal defendant whose rights were violated, is not mandated by the terms of the Fourth Amendment.[42] Rather, the exclusionary rule is a "prudential doctrine"

37. See *infra* notes 115–58 and accompanying text for a discussion of *Herring v. United States, Hudson v. Michigan,* and *Davis v. United States*, recent Supreme Court decisions creating exceptions to the exclusionary rule.

38. Wesley MacNeil Oliver, *Toward A Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 208 (2005) ("The Burger Court did little more than litter the landscape of Fourth Amendment jurisprudence with a series of exceptions.").

39. Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the 2011–2012 United States Supreme Court Term*, 14 FLA. COASTAL L. REV. 239, 245 (2013).

40. *See* Transcript of Oral Argument at 50–51, United States v. Flores-Montano, 541 U.S. 149 (2004) (No. 02-1794), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/02-1794.pdf (questioning the propriety of applying the exclusionary rule at the border). See *infra* note 227 and accompanying text for Justice Kennedy's comments during oral argument in *Flores-Montano*.

41. U.S. CONST. amend. IV.

42. Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (explaining that the Fourth Amendment "says nothing about suppressing evidence obtained in violation" of the Constitution).

that was created by the Court to compel respect for the constitutional right to be free from unreasonable searches and seizures.[43]

Originally, the exclusionary rule only applied to evidence illegally seized by the federal government.[44] The original rule also permitted federal officials to use evidence that was illegally seized by state officials.[45] This loophole became known as the "silver platter" doctrine.[46]

In *Elkins v. United States*,[47] the Supreme Court invalidated the silver platter doctrine altogether.[48] The *Elkins* Court reasoned, "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."[49] Soon after *Elkins*, in *Mapp v. Ohio*,[50] the Court held that the exclusionary rule applies to the states.[51]

The exclusionary rule applies to evidence obtained as a result of an illegal search or seizure.[52] The assumption underlying the rule is it will deter police from conducting illegal searches and seizures because they know that such evidence may be inadmissible at trial.[53] The Supreme Court uses the shorthand term "deterrence benefits" when discussing this deterrent value of the rule.[54]

The exclusionary rule does not apply in every instance where evidence is obtained in violation of the Fourth Amendment.[55] Instead, the Supreme Court has carved out categorical exceptions to the exclusionary rule.[56] The Court

43. *Id.* (internal quotation marks omitted); Michael J. Zydney Mannheimer, *Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1155 (2007) (describing the exclusionary rule as a "judge-made remedial device").

44. Wolf v. Colorado, 338 U.S. 25, 28–29 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914).

45. Elkins v. United States, 364 U.S. 206, 210 (1960).

46. *Id.* at 208.

47. 364 U.S. 206 (1960).

48. *Elkins*, 364 U.S. at 208.

49. *Id.* at 215.

50. 367 U.S. 643 (1961).

51. *Mapp*, 367 U.S. at 660.

52. Segura v. United States, 468 U.S. 796, 804 (1984).

53. *See* Shenequa L. Grey, *Revisiting the Application of the Exclusionary Rule to the Good Faith Exceptions in Light of* Hudson v. Michigan, 42 U.S.F. L. REV. 621, 634 (2008) (explaining that the rule is intended to discourage police from engaging in unlawful conduct by eliminating incentives for such conduct).

54. Hudson v. Michigan, 547 U.S. 586, 596 (2006).

55. Herring v. United States, 555 U.S. 135, 141 (2009) (stating that the Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation"); *see, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2434 (2011) (holding that unconstitutional searches conducted in reasonable reliance on binding appellate precedent are not subject to the exclusionary rule).

56. *See* Oliver, *supra* note 38, at 206–07 (critically analyzing the good faith exception and characterizing the existing exceptions as a "hodgepodge of exceptions"); Zachary H. Johnson, Comment, *Personal Container Searches Incident to Execution of Search Warrants: Special Protection*

conducts a balancing test when determining whether to create such an exception. It weighs the deterrence benefits against the social costs of excluding incriminating evidence.[57] Illegally acquired evidence is excluded only if the deterrence benefits outweigh the social costs of exclusion.[58] Recently, the Court has factored into this balance what it has called "extant deterrences."[59] These deterrent forces decrease the deterrent value of the rule, and thus support allowing the use of illegally acquired evidence at trial.[60]

1. Evaluating the Deterrence Benefits

The Supreme Court considers two primary factors when deciding whether the exclusionary rule would deter illegal police activity: (1) the role the government actor conducting the illegal search or seizure plays in the criminal justice system and the primary concern of his or her job, and (2) that actor's culpability when conducting the illegal search or seizure.[61] The benefits of deterrence are most palpable when the actor's primary concern is obtaining convictions and when his or her misconduct is intentional.[62]

a. The Primary Concern of the Government Actor

An assessment of the deterrence benefits of exclusion varies based on the type of government actor sought to be deterred.[63] When the "primary concern" of the actor is to obtain a criminal conviction, the threat of exclusion would theoretically deter future Fourth Amendment violations.[64] But the same cannot be said where the actor's conduct is directed at some other goal.[65]

for Guests?, 75 TEMP. L. REV. 313, 340–41 (2002) (explaining that, in *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court carved out a good faith exception to the rule).

57. *See, e.g.*, *Davis*, 131 S. Ct. at 2427; *Herring*, 555 U.S. at 141; *Leon*, 468 U.S. at 906–07; INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984).

58. *Davis*, 131 S. Ct. at 2427 ("For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.").

59. *Hudson*, 547 U.S. at 599.

60. *See id.* at 598–99 (discussing how the practices and professionalism of present-day police forces make it less likely that law enforcement will be deterred by the exclusion of illegally acquired evidence).

61. See *infra* Part II.A.1.a and Part II.A.1.b for a discussion of the Court's treatment of these two factors. *But see* Grey, *supra* note 53, at 657 (noting that in *Hudson* the Court considered all relevant factors when evaluating the deterrence benefits of exclusion).

62. *See Herring*, 555 U.S. at 135 (noting that the extent to which the exclusionary rule is justified by its deterrent effect varies based on the degree of law enforcement culpability, with intentional unconstitutional conduct being the core concern that led to the adoption of the exclusionary rule).

63. United States v. Janis, 428 U.S. 433, 448 (1976) (asserting that the individual sought to be deterred must first be identified prior to assessing the necessity of a deterrent sanction).

64. *See, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368 (1998) (noting that the application of the exclusionary rule to criminal trials deters police officers from violating defendants' Fourth Amendment rights); Illinois v. Krull, 480 U.S. 340, 352 (1987) (explaining that the deterrent effect of the exclusionary rule will be less pronounced on legislatures because they enact laws for "broad, programmatic purposes," and not to procure evidence to obtain criminal convictions); United States v. Leon, 468 U.S. 897, 917 (1984) (asserting that the exclusionary rule has a weaker effect on judges than law enforcement officers because judges have no stake in the outcome of a particular

For this reason, the Supreme Court has explained that the exclusionary rule is geared toward excluding evidence illegally acquired by law enforcement.[66] A police officer's focus is obtaining convictions in criminal trials.[67] In practice, police will search and seize what they can. The exclusionary rule serves to deter officers from overreaching the bounds of the Fourth Amendment.

The deterrence purpose of the exclusionary rule would not, however, be served if applied to unconstitutionally obtained evidence due to actions taken by government actors not involved in law enforcement—such as when legislators enact an unconstitutional statute that leads to illegally obtained evidence—because the purpose of their conduct is not obtaining convictions. For example, when legislators enact statutes, they do so "for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations."[68] The exclusionary rule's goal of deterrence would not necessarily be served when legislators enact unconstitutional statutes because "the greatest deterrent to the enactment of unconstitutional statutes by a legislature is" not exclusion, but rather "the power of the courts to invalidate such statutes."[69] Similarly, judges and magistrates, as neutral judicial officers, have no stake in the outcome of particular prosecutions.[70] Thus, when they engage in conduct inconsistent with requirements of the Fourth Amendment, as when they issue warrants without

criminal investigation). To clarify, the relevant focus is the *act* sought to be deterred, not necessarily whether the *actors* are likely to be deterred. Peter J. Gardner, Comment, *Arrest and Search Powers of Special Police in Pennsylvania: Do Your Constitutional Rights Change Depending on the Officer's Uniform?*, 59 TEMP. L.Q. 497, 537–38 n.235 (1986). Identifying the actor, however, is important because it aids in identifying the relevant conduct. At least one Justice has explicitly considered the primary purpose of the search when assessing the exclusionary rule's deterrence value. United States v. U.S. Dist. Court (*Plamondon*), 407 U.S. 297, 325 (1972) (Douglas, J., concurring) ("Moreover, even the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions.").

65. *See Scott*, 524 U.S. at 363–64 (discussing the "minimal" deterrence benefits that can be achieved from applying the exclusion rule in civil or administrative proceedings).

66. *Leon*, 468 U.S. at 916–17.

67. *Scott*, 524 U.S. at 367–68 ("[T]he officer will likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial.").

68. *Krull*, 480 U.S. at 352. In *Krull*, an Illinois statute permitted police to conduct warrantless searches of the business premises of a licensed car dealer. *Id.* at 343. Pursuant to this statute, a police officer searched Krull's business and discovered stolen vehicles, leading to Krull's arrest. *Id.* Krull argued that the evidence obtained at his business should be excluded because courts determined that the statute permitting warrantless searches was unconstitutional. *Id.* at 344. The trial court suppressed the evidence. *Id.* The Illinois Supreme Court affirmed, holding "that good-faith reliance upon that statute could not be used to justify the admission of evidence under an exception to the exclusionary rule." *Id.* at 346. The Supreme Court reversed, explaining that the good faith exception applies because the officer "relied, in objective good faith, on a statute that appeared legitimately to allow a warrantless administrative search of [Krull's] business." *Id.* at 360.

69. *Id.* at 352.

70. *Leon*, 468 U.S. at 917 (asserting that because "[j]udges and magistrates are not adjuncts to the law enforcement team . . . they have no stake in the outcome of particular criminal prosecutions . . . . [t]he threat of exclusion thus cannot be expected significantly to deter them").

probable cause, applying the exclusionary rule does not serve the purpose of deterring them from issuing defective warrants in the future.[71]

The Court applied this same reasoning in refusing to exclude evidence obtained as a result of clerical errors by court employees.[72] In *Arizona v. Evans*,[73] a court employee failed to inform the sheriff's office that a warrant had been quashed.[74] The defendant argued that the exclusionary rule should apply to evidence seized from him during his arrest because doing so would deter future clerical errors.[75] The Court disagreed, explaining that court employees have no stake in the outcome of a particular criminal prosecution.[76] Accordingly, the Court reasoned that "[t]he threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed."[77]

There is only one Supreme Court case discussing how exclusion may deter a government actor whose role within the criminal justice system could arguably be characterized as both law enforcement and non–law enforcement.[78] In *Pennsylvania Board of Probation and Parole v. Scott*,[79] respondent Keith Scott was released from prison on parole on the condition that he consent to warrantless searches of his home by parole officers.[80] Five months later, parole officers arrested Scott based on evidence that he violated conditions of his parole.[81] After obtaining the keys to the home owned by Scott's mother, the parole officers entered the mother's home and conducted a warrantless search in

71. In *Leon,* the Court also explained that the rule was inapplicable because (1) it was not designed to deter judicial errors, (2) there was "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion," and (3) there was no reason to "believ[e] that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Id.* at 916.

72. Arizona v. Evans, 514 U.S. 1, 15–16 (1995).

73. 514 U.S. 1 (1995).

74. *Evans*, 514 U.S. at 5.

75. *Id.*

76. *Id.* at 15.

77. *Id.* The Court also noted that (1) the rule "was historically designed as a means of deterring police misconduct, not mistakes by court employees," and (2) there was "no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Id.* at 14–15.

78. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368 (1998); *see also*, Cabell v. Chavez-Salido, 454 U.S. 432, 443–44 (1982) (suggesting that parole officers have a sufficient connection to the "traditional police functions of law enforcement"); NEW YORK DRIVING WHILE INTOXICATED § 9:21 (2d ed. 2013) (stating that a parole officer is a law enforcement official for the purpose of Miranda v. Arizona, 384 U.S. 436 (1966)). *But see* Wilson v. United States, 959 F.2d 12, 15 (2d Cir. 1992) (concluding that "parole officers lack arrest powers that would qualify them as investigative or law enforcement officers under the FTCA" (Federal Tort Claims Act)).

79. 524 U.S. 357 (1998).

80. *Scott*, 524 U.S. at 359–60.

81. *Id.* at 360.

the mother's presence, but without any consent.[82] The parole officers found incriminating evidence.[83]

At the parole violation hearing, the hearing examiner—over Scott's objection—admitted the evidence discovered in the house.[84] The Commonwealth Court of Pennsylvania remanded on the grounds that the search violated Scott's Fourth Amendment rights.[85] The Supreme Court of Pennsylvania affirmed.[86]

The United States Supreme Court reversed, holding that "parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment."[87] In so doing, the Court observed that the deterrent purpose of the rule would not be served when the conduct of parole officers offends the Fourth Amendment.[88] The Court reasoned that exclusion would provide only limited deterrence benefits because the "primary concern" of a parole officer is determining whether parolees should remain on parole, not obtaining evidence to sustain a criminal conviction.[89] Unlike police officers, parole officers "are not 'engaged in the often competitive enterprise of ferreting out crime.'"[90] Rather, a parole officer's relationship with a parolee is primarily nonadversarial.[91]

Justice Souter's dissent argued that "[p]arole officers wear several hats," and that they sometimes play an adversarial role.[92] Specifically, parole officers perform a benevolent role akin to that of a counselor or social worker in addition to policing parolees.[93] The Court, however, implicitly rejected this argument and determined that parole officers are not primarily concerned with obtaining convictions.[94]

Consistent with the Supreme Court's approach, lower courts—in dictum—and some commentators have also considered the primary purpose of the government actor's conduct when assessing the deterrence benefits of exclusion. These authorities suggest that the deterrence benefits are weak with respect to

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 361.

86. *Id.*

87. *Id.* at 369.

88. *Id.* at 368.

89. *Id.* The Court ultimately created an exception to the exclusionary rule in the context of evidence introduced in parole revocation hearings. *Id.* at 369. In so doing, the Court noted that the increase in deterrence of police misconduct occasioned by exclusion at such hearings was negligible since police officers were already deterred by exclusion at the criminal trial. *Id.*

90. *Id.* at 368 (quoting United States v. Leon, 468 U.S. 897, 914 (1984)).

91. *Id. But see* Fare v. Michael C., 442 U.S. 707, 720 (1979) ("[T]he probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers.").

92. *Scott,* 524 U.S. at 375 (Souter, J., dissenting).

93. *Id.*

94. *Id.* at 368 (majority opinion).

public school officials, administrative government workers, and prison officials because their primary concern is not obtaining convictions.

For example, the Alaska Court of Appeals considered the role of a public school official when determining whether exclusion would yield adequate deterrence benefits.[95] It explained that physical education teachers and principals, unlike police officers, are not "employed to ferret out criminals."[96] The purpose of their employment is to educate and maintain "an environment conducive to learning."[97] Any searches they conduct are "merely incidental" to their employment as educators.[98]

This same reasoning was employed in a case involving an administrative worker for a federal program. In *United States v. Coles*,[99] the searcher was an administrative officer at a job-training center for men in the Job Corps.[100] He was responsible for the conditions at the center and for supervising the corpsmen in his charge.[101] Shortly after the defendant arrived at the center, the administrative officer searched his suitcase and found marijuana.[102] The district court held that the officer's conduct did not violate the Fourth Amendment.[103] In doing so, the court employed an analysis that resembled the exclusionary rule balancing test.[104] It explained that "the object of the search was to determine whether contraband was being brought to the [c]enter."[105] The court viewed this purpose as distinct from the purpose of procuring evidence of a crime.[106] Exclusion would do little to deter future violations in this type of scenario because the officer was not a law enforcement officer, and because he conducted his search for the purpose of excluding contraband, not for the purpose of acquiring evidence to sustain a conviction.[107]

95. D. R. C. v. Alaska, 646 P.2d 252, 259–60 (Alaska Ct. App. 1982) (distinguishing between members of law enforcement and a physical education teacher, the latter of which is not employed to ferret out crime, and ultimately concluding that the Fourth Amendment does not apply to non–law enforcement government officials).

96. *Id.*

97. *Id.*

98. *Id.* In *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985), the state of New Jersey employed a similar argument. Unlike searches by law enforcement—which are conducted for the purpose of obtaining convictions—searches by school officials are conducted for a different purpose: maintaining an institutional environment conducive to instruction. School officials are simply not concerned with obtaining criminal convictions. *See id*. at 340 (observing that the school has a "legitimate need to maintain an environment in which learning can take place").

99. 302 F. Supp. 99 (D. Me. 1969).

100. *Coles*, 302 F. Supp. at 101–02.

101. *Id.*

102. *Id.* at 100–01.

103. *Id.* at 103.

104. *See id.* (determining that finding the administrative officer's search unconstitutional would not affect his future conduct since as a non–law enforcement officer he has little concern for the outcome of criminal prosecutions).

105. *Id.* at 102.

106. *Id.* at 103.

107. *Id.*

Additionally, one commentator has argued that searches by prison officials are less likely to deter misconduct compared to searches by normal law enforcement.[108] This commentator explained, "The exclusionary rule also assumes that the police conduct a search for the purpose of securing a criminal conviction; yet, this is often not the goal of a prison search."[109] Prison searches are conducted primarily to obtain contraband.[110] Thus, prison officials are less likely than police officers to be concerned about the possibility of exclusion at a criminal trial.[111]

b. The Culpability of the Government Actor

In addition to the primary concern of the offending official, the official's culpability is also a significant factor in assessing the deterrent value of the rule.[112] The exclusionary rule only applies where police conduct is "sufficiently deliberate" such that "exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[113] If police conduct is not sufficiently culpable—e.g., is only negligent—then the threat of exclusion cannot yield sufficient deterrence benefits.[114]

For example, in *Herring v. United States*,[115] a police officer requested a neighboring county's warrant clerk to search for outstanding warrants for Bennie Dean Herring.[116] The clerk found an outstanding warrant and faxed a copy to the police officer.[117] The officer relied on this warrant to arrest Herring, and upon conducting a search incident to Herring's arrest, the officer discovered incriminating evidence.[118]

It turned out, however, that the warrant was recalled months earlier, but the computer database failed to indicate the recall.[119] Herring moved to suppress the incriminating evidence discovered as a result of the invalid arrest warrant.[120] The District Court for the Middle District of Alabama denied the motion, and the Eleventh Circuit affirmed.[121] The Eleventh Circuit assumed that whoever caused the database error was a law enforcement official, but noted that this official's conduct was not sufficiently deliberate to warrant exclusion.[122] The Supreme

108. 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 9:40, at 399 (4th ed. 2009).
109. *Id.*
110. *Id.*
111. *Id.*
112. Herring v. United States, 555 U.S. 135, 143 (2009).
113. *Id.* at 144. The exclusionary rule can also apply where negligence is recurring or systemic. *Id.*
114. *Id.*
115. 555 U.S. 135 (2009).
116. *Herring,* 555 U.S. at 137.
117. *Id.*
118. *Id.*
119. *Id.* at 137–38.
120. *Id.* at 138.
121. *Id.*
122. *Id.*

Court agreed, holding that the exclusionary rule is inapplicable to evidence obtained through a search based on an invalid warrant that a police employee negligently fails to remove from a police department's computer records.[123]

In line with the rule announced in *Herring*, the exclusionary rule does not apply when an officer acts in objective good faith that his or her conduct is constitutional.[124] In *Davis v. United States*,[125] police arrested car passenger Willie Davis at a routine traffic stop for providing a false name.[126] Police also arrested the driver for driving under the influence.[127] Pursuant to binding precedent in effect at the time, the police searched the passenger compartment of the car and found a revolver in Davis's jacket pocket.[128] The district court, relying on the binding circuit precedent, refused to suppress the revolver.[129]

While Davis's case was on appeal, the Supreme Court issued a decision that effectively overruled the precedent that the police relied upon as authority for searching the vehicle.[130] The Eleventh Circuit refused to exclude the evidence despite the change in the law because "'penalizing the arresting officer' for following binding appellate precedent would do nothing to 'deter . . . Fourth Amendment violations.'"[131]

The Supreme Court agreed. When an officer conducts an unconstitutional search or seizure in reasonable reliance on binding appellate precedent that is later overturned, the officer's good faith negates the deterrence benefits of the rule.[132] The Court explained that when binding precedent authorizes certain police practices, officers are expected to conduct their practices accordingly.[133] Excluding evidence in such cases would overdeter the police officer, effectively discouraging the officer from performing his or her duties.[134]

In sum, the deterrence benefits of exclusion are most palpable when the primary purpose of the offending official's conduct is obtaining convictions, and when the official is sufficiently culpable.

123. *Id.* at 136–37.

124. *See id.* at 142–43 (discussing the various good faith exceptions to the exclusionary rule); *see also* United States v. Katzin, 769 F.3d 163, 171 (3d Cir. 2014) (en banc) (same), *cert. denied*, 135 S. Ct. 1448 (2015).

125. 131 S. Ct. 2419 (2011).

126. *Davis,* 131 S. Ct. at 2425.

127. *Id.*

128. *Id.* at 2425–26.

129. *Id.* at 2426.

130. *Id.* The precedent upon which the officers relied in conducting their search was *New York v. Belton*, 453 U.S. 454 (1981). The Court in *Belton* held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 459–60. In 2009, the Court in *Arizona v. Gant*, 556 U.S. 332 (2009) limited *Belton* to apply only where an "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343.

131. *Id.* (quoting United States v. Davis, 598 F.3d 1259, 1265–66 (11th Cir. 2010)) (ellipses in original) (bracketing omitted).

132. *Id.* at 2428–29.

133. *Id.* at 2429.

134. *Id.*

2. Evaluating the Social Costs of Exclusion

The exclusionary rule analysis also requires the Court to consider the social costs of excluding incriminating evidence. When assessing the social costs of exclusion, the Supreme Court has considered the costs associated with (1) the release of guilty defendants into society, (2) the increased administrative burden on the courts, and (3) overdeterrence. All of these social costs weigh in favor of permitting the use of illegally acquired evidence at trial.[135]

In all cases, the immediate and primary cost of excluding evidence is the risk of releasing guilty and dangerous defendants into society.[136] In this respect, exclusion "offends basic concepts of the criminal justice system,"[137] inhibits truth-seeking,[138] and may "generat[e] disrespect for the law and administration of justice."[139]

Another social cost that weighs in favor of permitting the use of illegally acquired evidence at trial is the administrative burden on the courts by incentivizing defendants to litigate difficult cases.[140] For instance, in *Hudson v. Michigan*,[141] the Court declined to extend the exclusionary rule to violations of the "knock-and-announce" rule because the rule was difficult to assess in practice.[142] The knock-and-announce rule requires that police announce their presence and provide the occupants a reasonable opportunity to open the door before entering a home.[143] The rule does not apply, however, if the officer reasonably suspects that evidence would be destroyed or that violence would occur if he or she does not enter promptly.[144] The rule is "necessarily vague" and is intended to accommodate the varying factual circumstances that arise in such cases.[145]

In *Hudson*, police executed a warrant on Booker Hudson's home.[146] Before entering the unlocked front door of Hudson's home, the police knocked on the door and announced their presence. They waited only about three to five seconds before entering the house. The search yielded a trove of incriminating evidence.[147]

135. *Id.* at 2427 ("For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.").

136. Herring v. United States, 555 U.S. 135, 141 (2009).

137. *Id.* (quoting United States v. Leon, 468 U.S. 897, 908 (1984)) (internal quotation marks omitted).

138. *Id.*

139. Stone v. Powell, 428 U.S. 465, 491 (1976).

140. Hudson v. Michigan, 547 U.S. 586, 595 (2006).

141. 547 U.S. 586 (2006).

142. *Hudson*, 547 U.S. at 594–95.

143. *Id.* at 589.

144. *Id.* at 589–90.

145. *See id.* at 590 (explaining how a wait time of fifteen to twenty seconds may be required in some cases while less time could be justifiable in other cases, depending on the facts known by the officers).

146. *Id.* at 588.

147. *Id.*

The trial court excluded the evidence on the grounds that the premature entry was unconstitutional.[148] The Michigan Court of Appeals reversed, reasoning that a violation of the knock-and-announce rule is not grounds for exclusion.[149] The Michigan Supreme Court denied review.[150]

The United States Supreme Court affirmed the Michigan Court of Appeals.[151] The Court reasoned that permitting an exclusionary remedy for knock-and-announce violations would deluge courts with suppression motions and create a unique administrative burden.[152] Determining what constitutes a "reasonable wait time" or "reasonable suspicion . . . is difficult for the trial court to determine and even more difficult for an appellate court to review."[153]

Courts may also consider the costs of overdeterrence—a cost that is particularly relevant when it is less clear whether conduct offends the Fourth Amendment.[154] For example, in *Hudson* the cost of overdeterrence was disproportionately harsh. Because the "reasonable wait time" rule is vague, officers may refrain from entering homes in a timely manner out of concern that the evidence they seize would be excluded.[155] If the officer waits too long, society pays because evidence may be destroyed or violence might occur.[156]

The cost of overdeterrence also bore out in *Davis*, where the Court held that the exclusionary rule does not apply to evidence obtained in good faith reliance on binding appellate precedent.[157] In refusing to apply the exclusionary rule, the Court explained that application of the rule would only discourage the police from engaging in "conscientious police work."[158]

3. Extant Deterrent Forces that Mitigate Against Exclusion

The Supreme Court has also considered the effect of "extant deterrences," including (1) the availability of civil lawsuits for Fourth Amendment violations, (2) the increasingly professional state of law enforcement, and (3) the extent to which a law enforcement agency is structured to comply with Fourth Amendment requirements. All of these extant deterrences weigh against excluding illegally obtained evidence.

148. *Id.*

149. *Id.* at 588–89.

150. *Id.* at 589.

151. *Id.* at 602.

152. *Id.* at 595.

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

154. *See id.* at 595–96 (reasoning that excluding evidence seized as a result of knock-and-announce violations would create an incentive for police to wait to enter a home since the necessary wait time is inherently uncertain).

155. *Id.* at 595 (internal quotation marks omitted).

156. *Id.* at 595–96.

157. Davis v. United States, 131 S. Ct. 2419, 2425–26; *see also* Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 837 (2013) (explaining that in *Davis* the Court discussed overdeterrence and determined that the exclusionary rule would only serve to deter "conscientiousness" in already diligent police investigations).

158. *Id.* at 2429. See *supra* note 125–34 and accompanying text for a discussion of *Davis*.

The Court first introduced the concept of extant deterrences in *Hudson*.[159] Presumably, when the Court characterized these deterrence forces as "extant," it did so because these forces exist in the typical exclusionary rule case, regardless of the specific factual circumstances. At any rate, the Court considered these extant deterrences "substantial."[160]

Hudson challenged the assumptions underlying the circumstances that led to the creation of the exclusionary rule in *Mapp*.[161] *Hudson* suggested that the present state of civil remedies may provide an additional deterrent to Fourth Amendment violations.[162] *Mapp* was premised on the assumption that the threat of civil suit would not adequately deter police misconduct.[163] *Hudson* explained that *Mapp*-era civil litigants could not obtain meaningful relief for constitutional violations, thus making the deterrent effect of civil suits minimal.[164] Case law and statutes decided and enacted after *Mapp*, however, expanded the scope of available remedies.[165] For example, the Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[166] created a federal judicial remedy for constitutional violations by federal actors.[167] In contrast to litigants in the *Mapp* era, current litigants can now obtain attorney's fees for constitutional violations by state actors.[168] Such a provision, however, does not exist for *Bivens* lawsuits against federal actors.[169]

The Court also noted that "we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously."[170] In particular, the Court explained, there is a new emphasis on internal police discipline and educational training concerning individual constitutional rights.[171]

Finally, the value of deterrence is lessened when a law enforcement agency employs a comprehensive scheme aimed at deterring Fourth Amendment

159. *Hudson*, 547 U.S. at 598–99.

160. *Id.* at 599.

161. *See id.* (explaining that the "extant deterrences against [knock-and-announce violations] are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided").

162. *See id.* 598–99 (examining past and present civil remedies and reforms in law enforcement that operate to deter police misconduct, even in cases not involving knock-and-announce violations).

163. *Id.* at 597 (explaining that the risk § 1983 was not yet available at the time of *Mapp*, so the Court could not consider it as a means to effectively deter police misconduct).

164. *Id.*

165. *Id.* at 597–98; *see also* 42 U.S.C. § 1983 (2012).

166. 403 U.S. 388 (1971).

167. *Bivens,* 403 U.S. at 397 (holding that federal agents who arrested a man on narcotics charges without probable cause violated the Fourth Amendment, entitling the man to monetary damages).

168. *Hudson*, 547 U.S. at 597; *see* 42 U.S.C. § 1988(b) (2012) (authorizing courts discretion to award "reasonable attorney's fees" for prevailing parties in § 1983 claims).

169. Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 FORDHAM URB. L.J. 743, 754 (2010).

170. *Hudson*, 547 U.S. at 599.

171. *Id.* at 598–99.

violations.[172] For instance, in *Immigration and Naturalization Service v. Lopez-Mendoza*,[173] respondents Adan Sandoval-Sanchez and Elias Lopez-Mendoza both admitted to entering the United States illegally.[174] During Immigration and Naturalization Service (INS) deportation proceedings, the respondents argued that their admissions should be excluded as fruits of their illegal arrests.[175] The Supreme Court ultimately concluded that "evidence derived from [unlawful] arrests need not be suppressed in an INS civil deportation hearing."[176]

In so doing, the Court acknowledged that "the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers."[177] Specifically, the INS "developed rules restricting stop, interrogation, and arrest practices."[178] Under those rules, an individual cannot be detained unless there is reasonable suspicion that he or she is an illegal alien, and arrests cannot occur absent an admission or strong evidence of illegal alienage.[179] INS officers are initially trained and periodically reeducated in Fourth Amendment law.[180] Department of Justice policy requires the exclusion of evidence "seized through intentionally unlawful conduct."[181] Additionally, the INS has a procedure in place for investigating and punishing officers who violate the Fourth Amendment.[182] The Court explained that this comprehensive scheme was "perhaps [the] most important" factor in its decision to not exclude evidence in deportation proceedings.[183]

In sum, courts may properly consider whether extant deterrences—including the deterrent threat of civil suit, the increase in police discipline and training, and the extent to which a law enforcement agency is designed to comport with the Fourth Amendment—weigh in favor of not applying the exclusionary rule. As *Hudson* noted, the deterrent force of these extant deterrences is "incomparably greater than the factors deterring warrantless entries when *Mapp* was decided."[184]

B. Border Searches

The United States Congress that proposed the Fourth Amendment also enacted the first customs statute.[185] "[T]his statute granted customs officials 'full power and authority' to enter and search 'any ship or vessel, in which they shall

172. INS v. Lopez-Mendoza, 468 U.S. 1032, 1044–45 (1984).
173. 468 U.S. 1032 (1984).
174. *Lopez-Mendoza*, 468 U.S. at 1035, 1037.
175. *Id.*
176. *Id.* at 1051.
177. *Id.* at 1044.
178. *Id.*
179. *Id.*
180. *Id.* at 1045.
181. *Id.*
182. *Id.*
183. *Id.* at 1044.
184. Hudson v. Michigan, 547 U.S. 586, 599 (2006).
185. United States v. Ramsey, 431 U.S. 606, 616 (1977).

have reason to suspect any goods, wares or merchandise subject to duty shall be concealed.'"[186] According to the Court, because the same Congress that proposed the Fourth Amendment also passed this customs statute, the congressmen did not regard certain invasive, warrantless border searches and seizures as unreasonable.[187]

As a result, the Fourth Amendment's prohibition against unreasonable searches and seizures is significantly relaxed in the context of searches at the border.[188] According to the Court, such searches are reasonable in light of the legislative history of the customs statute and "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country."[189] Thus, the Court has held that no suspicion is required for "routine" searches at the border.[190] Nonroutine searches, however, generally require reasonable suspicion of criminal activity in order to be valid under the Fourth Amendment.[191]

In general, routine searches are less invasive than nonroutine searches. Routine searches may include patdowns, emptying of pockets, or vehicle inspections.[192] Nonroutine searches may include "prolonged detentions, strip searches, body cavity searches, and x-ray searches."[193] If a border official conducts one of these nonroutine searches without reasonable suspicion of criminal activity, the search violates the Fourth Amendment.[194] Thus, finding the exclusionary rule inapplicable to border searches would effectively incentivize border officials to conduct unreasonable strip searches, body cavity searches, and x-ray searches because the evidence they acquire as a result of those unreasonable searches would be admissible at trial. For border officials, the only constitutionally based deterrent against conducting such searches would be the threat of a civil lawsuit that the victim of the search brings against the government.[195]

186. *Id.* (quoting Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (1789)).

187. *Id.* at 617.

188. United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

189. *Ramsey*, 431 U.S. at 616.

190. *Montoya de Hernandez*, 473 U.S. at 538 ("Routine searches of the persons and effects of the entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause."). In *United States v. Flores-Montano*, the Court held that the suspicionless disassembly and reassembly of a gas tank was not unconstitutional. 541 U.S. 149, 155 (2004). After discussing what constitutes a "routine" search, the Court did not expressly call this search "routine." *Id.* at 153–56.

191. *See* Jerrold R. Dennis, *Crossing the Line: Border Searches at Florida's International Airports*, FLA. B.J., Nov. 2013, at 9, 10 (explaining that "once a reasonable suspicion of criminal activity exists at the border, government officials may generally conduct what is classified as a nonroutine search").

192. *Id.*

193. *Id.*

194. *See id.* at 14 (citing *United States v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984), in which the Eleventh Circuit found that "an x-ray search is tantamount to a strip search, and, therefore, requires reasonable suspicion" in order to be valid).

195. See *supra* notes 165–69 and accompanying text for a discussion of *Bivens* suits and the availability of damages for constitutional violations.

Border searches may occur at any international point of entry, by land, air, or sea.[196] Most things that cross the border are subject to some sort of search, including a person, his or her luggage, and international cargo.[197] Border officials have the statutory authority to seize merchandise that they have reasonable cause to believe is subject to duty or unlawfully introduced into the United States.[198] The present customs statute specifically requires that the official "seize and secure the same for trial."[199]

The circuit courts disagree on basic predicate issues regarding border searches, including the level of cause required for certain types of searches. For instance, the circuits are split as to the level of cause required for a border patrolman to search a laptop.[200] The Ninth Circuit in *Cotterman* held that the Fourth Amendment requires a patrolman to have reasonable suspicion of criminal activity to conduct a forensic search of a laptop.[201] The search in that case was "forensic" in that it involved the use of software that could copy a hard drive and analyze it for incriminating information.[202] The court contrasted the forensic search that occurred with a "manual review of files on an electronic device," but did not otherwise explain what constitutes a forensic search.[203] As some commentators have already noted, the forensic-manual distinction creates line-drawing problems.[204] Other circuits, including the Third Circuit and Fourth

196. Dennis, *supra* note 191, at 10.

197. *Id.*

198. 19 U.S.C. § 482(a) (2012).

199. *Id.*

200. *Compare* United States v. Cotterman, 709 F.3d 952, 967 (9th Cir. 2013) (concluding that reasonable suspicion of criminal activity is required for a forensic search of a laptop at the border), *cert. denied*, 134 S. Ct. 899 (2013), *reh'g denied*, 134 S. Ct. 1512 (2014), *with* United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005) (concluding that no suspicion is required for a search of a laptop at the border). *See also Cotterman*, 709 F.3d at 983 (M. Smith, J., dissenting) (explaining that *Cotterman* created a circuit split "regarding the application of reasonable suspicion to border searches of electronic devices").

201. *Cotterman*, 709 F.3d at 967 (majority opinion). See *supra* notes 1–11 and accompanying text for the facts of *Cotterman*.

202. *Cotterman*, 709 F.3d at 958, 963 n.9.

203. *Id.* at 967.

204. Louisa K. Marion, *Borderline Privacy: Electronic Border Searches After* Cotterman, CRIM. JUST., Summer 2013, at 1, 4 (analyzing the Ninth Circuit Court of Appeals ruling that government officials must have "reasonable suspicion" before conducting forensic searches of laptops at the U.S. border); Orin Kerr, *What is the Ninth Circuit's Standard for Border Searches Under* United States v. Cotterman?, VOLOKH CONSPIRACY (Mar. 11, 2013, 3:12 PM), http://www.volokh.com/2013/03/11/what-is-the-ninth-circuits-standard-for-border-searches-under-united-states-v-cotterman/ (raising questions concerning the application of the Ninth Circuit's holding on forensic searches of laptops at the border). For instance, could a manual search of a computer by computer-savvy customs agent—if accomplished in a short amount of time—become so intrusive so as to require reasonable suspicion? Marion, *supra*, at 4. Additionally, circuit courts have not had the occasion to consider the role of login passwords during searches of electronic devices at the border. Nicolette Lotrionte, Note, *The Sky's the Limit: The Border Search Doctrine and Cloud Computing*, 78 BROOK. L. REV. 663, 679 (2013). For instance, if a customs agent opens up a laptop and is prompted to enter a password to log into the computer—which the traveler refuses to provide—would the agent be precluded by the Fourth Amendment from conducting any further search absent reasonable suspicion?

Circuit, have avoided the forensic-manual distinction and instead have held more generally that reasonable suspicion is not required for a customs official to search a laptop seized at the border.[205]

Like police officers, border officials serve "an investigative law enforcement role."[206] Border officials, however, arguably serve another role as well: protecting the country from people and the harmful things they import.[207] In this capacity, border officials conduct searches for purposes distinct from the typical purposes of law enforcement.[208] Generally speaking, a typical law enforcement officer is more likely to be concerned with obtaining convictions, while a border official is more likely to be concerned about excluding undesired persons and contraband from the country.[209]

United States v. Montoya de Hernandez[210] presents an insightful example of how searches and seizures by border officials serve a distinct purpose beyond obtaining convictions. In *Montoya de Hernandez*, the defendant flew into the

205. *See Cotterman*, 709 F.3d at 983 (M. Smith, J., dissenting) (citing *Ickes*, 393 F.3d at 501); United States v. Linarez-Delgado, 259 F. App'x 506, 508 (3d Cir. 2007)).

206. United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985).

207. *Id.*; People v. LePera, 197 A.D.2d 43, 47 (N.Y. App. Div. 1994) (citations omitted) (explaining that "[c]ustoms officials have special limited powers to enforce the [c]ustoms laws," and that the "purpose in conducting a border search is to ascertain whether merchandise is being unlawfully imported").

208. *See Montoya de Hernandez*, 473 U.S. at 544 (explaining that customs officials conduct searches in order to detect and exclude harmful things, like disease and drugs); United States v. Soto-Soto, 598 F.2d 545, 549 (9th Cir. 1979) (distinguishing between a search conducted for general law enforcement purposes and a search conducted to enforce customs laws); Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973) (explaining that the primary purpose of a customs search is to look for dutiable or unlawful items, which is distinct from the "usual search conducted in criminal investigations"); United States v. Ader, 520 F. Supp. 313, 321 (E.D.N.C. 1980) (making the distinction between a search conducted for general law enforcement purposes and a search conducted to enforce customs laws); *LePera*, 197 A.D.2d at 47–48 (distinguishing the authorized scope of customs searches from the scope of searches by normal law enforcement officers); Thomas E. Miller, Annotation, *Who May Conduct Border Search Pursuant to 19 U.S.C.A. § 482, 1401(i), 1581(a, b), and 1582*, 61 A.L.R. FED. 290, 295 (1983) ("The rationale behind allowing such officers more freedom than is provided the police, and others, when acting for general law enforcement purposes is said to be that the basic purpose of a 'border search' is not to apprehend persons but to seize contraband unlawfully brought into the United States . . . .").

209. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368 (1998) (explaining that a police officer's focus is "upon obtaining convictions of those who commit crimes"); *Montoya de Hernandez*, 473 U.S. at 544 (describing the objective of customs officials to detect harmful things, like disease and drugs, in the course of customs searches). Some commentators, however, argue that the role of customs officials is expanding into the role of normal law enforcement. *See* Ashley H. Verdon, Comment, *International Travel with a "Digital Briefcase": If Customs Officials Can Search a Laptop, Will the Right Against Self-Incrimination Contravene This Authority?*, 37 PEPP. L. REV. 105, 110 (2009) (arguing that "the current proliferation of drug trafficking and terrorism has resulted in the expansion of customs officials' roles in protecting U.S. borders"); Victoria Wilson, Note, *Laptops and the Border Search Exception to the Fourth Amendment: Protecting the United States Borders from Bombs, Drugs, and the Pictures from Your Vacation*, 65 U. MIAMI L. REV. 999, 1016 (2011) (arguing that "[t]he role of the customs officer seems to be expanding and is becoming more difficult to distinguish from general law enforcement").

210. 473 U.S. 531 (1985).

United States from Colombia.[211] A customs official suspected Rosa Elvira Montoya de Hernandez was smuggling drugs in her alimentary canal.[212] Instead of detaining her indefinitely, the customs official gave her the option of undergoing an x-ray, staying at the airport until she produced a bowel movement, or returning to Colombia on the next available flight.[213] Thus, as far as the customs official was concerned, his role would have been satisfied if Montoya de Hernandez left the country with the contraband concealed in her body.

On the other hand, other Supreme Court cases suggest that border officials serve an important law enforcement role geared toward obtaining convictions. For instance, in *Illinois v. Andreas*,[214] a customs official found marijuana concealed inside a table shipped from overseas.[215] Rather than confiscate the drugs, the official contacted the Drug Enforcement Administration (DEA).[216] The DEA official then coordinated with local law enforcement to stage the delivery of the table to the addressee.[217] Although the customs official was not personally involved in the staged delivery, his act of permitting the staged delivery reasonably suggests that he acquired a stake in obtaining a conviction. The official's conduct is consistent with CBP's current goal of "bring[ing] each event to a satisfactory law enforcement resolution" because he helped other law enforcement agencies obtain a conviction.[218]

There are very few reported decisions that directly analyze the propriety of the exclusionary rule in the border context. Most of the lower courts that discuss the issue appear to take for granted that the exclusionary rule should apply in this context.[219] One court, however, has concluded that the exclusionary rule does not apply to evidence illegally seized by customs officials for use at a parole revocation hearing. The court explained in dicta that customs officials have "no particular incentive . . . to purposely abuse the Fourth Amendment rights of persons they detain," so the deterrence benefits of exclusion would be "insubstantial."[220] Unlike other law enforcement agents, who often engage in extensive investigations of a suspect before detaining him or her, "custom[s]

211. *Montoya de Hernandez*, 473 U.S. at 532.

212. *Id.* at 534.

213. *Id.* at 534–35.

214. 463 U.S. 765 (1983).

215. *Andreas*, 463 U.S. at 767.

216. *Id.*

217. *Id.*

218. OFFICE OF POLICY AND PLANNING, U.S. CUSTOMS AND BORDER PROT., CBP PUB. NO. 0401-0809, SECURE BORDERS, SAFE TRAVEL, LEGAL TRADE: U.S. CUSTOMS AND BORDER PROTECTION FISCAL YEAR 2009–2014 STRATEGIC PLAN, 13–14 (2009), *available at* https://www.hsdl.org/?view&did=29986.

219. See *supra* note 27 for cases in which courts have addressed the exclusion of evidence illegally seized by customs officials.

220. United States v. Allen, 349 F. Supp. 749, 754 (N.D. Cal. 1972) (internal quotation marks omitted).

officials are not likely to have independent knowledge of prior illegal activities of persons they detain."[221] No other courts appear to have followed this reasoning.

The Supreme Court has not addressed whether the exclusionary rule should apply to Fourth Amendment violations at the border.[222] However, Justice Kennedy—a notorious swing voter[223]—questioned the propriety of the exclusionary rule in the border search context during oral argument in *United States v. Flores-Montano*.[224] The case concerned the constitutionality of a suspicionless border search of an automobile's gas tank for drugs.[225] The Court ultimately upheld the constitutionality of the suspicionless search, avoiding the exclusionary rule analysis altogether.[226] During oral argument, however, Justice Kennedy questioned whether the exclusionary rule should apply in this context in light of the fact that such searches were highly effective:

> If 85 percent of the people with the gas tanks that were searched have the contraband, what you're asking us to do is to protect the expectation of the other 15 percent. . . . [W]hen the percentages get these high, it—it seems to me to put the exclusionary rule somewhat into question with reference to the border. Suppose it was 95 percent. Do we still have to protect the 5 percent of the people? I mean, I guess that's the law.[227]

In other words, Justice Kennedy suggested that the exclusionary rule should not apply to border searches if it is very likely that the searches are effective. The attorney was largely nonresponsive to Justice Kennedy's question.[228] In light of

221. *Id.*

222. Every Supreme Court case presenting a Fourth Amendment challenge to a border search has ultimately held that the offending conduct did not violate the Fourth Amendment, so the Court has never had the opportunity to conduct an exclusionary rule balancing test. *See* United States v. Flores-Montano, 541 U.S. 149, 155 (2004) (holding that the suspicionless disassembly and reassembly of a gas tank at the border to search for contraband was reasonable); United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (holding that detaining an individual reasonably suspected to have drugs in her alimentary canal was reasonable); United States v. Villamonte-Marquez, 462 U.S. 579, 581, 593 (1983) (stopping and searching of vessel located in waters providing ready access to the open sea was reasonable); United States v. Ramsey, 431 U.S. 606, 624–25 (1977) (holding that opening of letter at the border to search for contraband inside the letter was reasonable); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 273–75 (1973) (holding in a plurality opinion that a search conducted absent probable cause by border patrol violated the Fourth Amendment, but concluding the search did not constitute a "border search" because it was conducted twenty miles north of the border).

223. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 243 (2013) (describing Justice Kennedy as "a conservative Justice who sometimes sides with liberals").

224. 541 U.S. 149 (2004); Transcript of Oral Argument, United States v. Flores-Montano, *supra* note 40, at 50–51.

225. *Flores-Montano*, 541 U.S. at 155.

226. *Id.*

227. Transcript of Oral Argument, United States v. Flores-Montano, *supra* note 40, at 50–51.

228. *See id.* at 51 (responding that there was no evidence in the record that a standard permitting suspicionless search of automobiles would yield more contraband than an alternative standard requiring some level of suspicion).

Justice Kennedy's pivotal role on criminal justice issues,[229] this glimpse into his state of mind is probative because it suggests that he is willing to hear arguments limiting applicability of the rule in the context of border searches.

C. Relevant CBP Policies and Procedures

In light of the Supreme Court's broad grant of authority to conduct suspicionless border searches, CBP has issued many internal policies defining the bounds of acceptable search practices. For instance, one directive permits officers to search electronic devices absent reasonable suspicion of criminal activity.[230] The directive permits the search to take place at an "off-site" location.[231] The directive provides, however, at least some limitations and protections regarding such searches. The search must be documented.[232] It also must be conducted in the presence of a supervisor, if practicable.[233] Additionally, the individual whose information is being searched should be present "unless there are national security, law enforcement, or other operational considerations that make it inappropriate to permit the individual to remain present."[234]

This directive also attempts to protect privacy interests implicated by searches of electronic devices. In the event the official believes that attorney-client privileged information contains evidence of a crime, he or she must seek advice from CBP counsel before conducting a search of the material.[235] The directive provides that "[o]ther possibly sensitive information, such as medical records and work-related information carried by journalists, shall be handled in accordance with any applicable federal law and CBP policy."[236] Additionally, officials must treat business information as confidential and "protect that information from unauthorized disclosure."[237] Privileged or sensitive information can only be shared with other federal agencies "that have mechanisms in place to protect appropriately such information."[238] Finally, electronic devices must be detained for a "brief, reasonable period of time" which should normally not exceed five days.[239]

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229. McCall et. al., *supra* note 39, at 245–46 (noting that Kennedy was a member of the majority in all of the five-four splits in the Court's criminal justice decisions during the 2011–2012 Term, and authored three of the five "liberal" opinions).

230. U.S. CUSTOMS AND BORDER PROT., CBP DIRECTIVE NO. 3340–049, BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION 5.1.2 (2012), *available at* http://foiarr.cbp.gov/streamingWord.asp?i=465. The definition of electronic device "[i]ncludes any devices that may contain information, such as computers, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players, and any other electronic or digital devices." *Id.* at 3.2.

231. *Id.* at 5.3.1.

232. *Id.* at 5.1.3.

233. *Id.*

234. *Id.* at 5.1.4.

235. *Id.* at 5.2.1.

236. *Id.* at 5.2.2.

237. *Id.* at 5.2.3.

238. *Id.* at 5.2.4.

239. *Id.* at 5.3.1.

There are also limitations on other types of searches. For instance, an official cannot pat down an individual without first having at least one fact in support of his or her decision.[240] Additionally, "[s]upervisory approval is required for all patdown and partial body searches, except immediate patdown for weapons or dangerous objects."[241] Officials must conduct personal searches in a private area out of the general public's view, and a witness must be present except during a patdown for weapons.[242] Only medical personnel may conduct body cavity searches.[243]

CBP employees receive training in Fourth Amendment law when they begin their employment.[244] This training continues during the official's employment.[245] Part of the initial curriculum includes classes in professionalism and courtroom testimony.[246] On the whole, these CBP policies demonstrate that border officials are required to conduct searches within the confines of the Fourth Amendment. Reasonable minds, however, may disagree as to whether these internal requirements adequately protect Fourth Amendment rights.[247]

III. DISCUSSION

The exclusionary rule should apply to evidence illegally acquired at the border. When border agents illegally acquire evidence, the deterrence benefits of exclusion at the border are significant because border officials—as law enforcement officers—acquire a stake in obtaining criminal convictions.[248] Additionally, the social costs of exclusion in the context of illegal border searches are no greater than they are in the context of illegal searches by normal

240. OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROT., CIS HB 3300-04B, PERSONAL SEARCH HANDBOOK 1 (2004), *available at* http://foiarr.cbp.gov/streamingWord.asp?i=7.

241. *Id.* at 5.

242. *Id.* at 6.

243. *Id.* at 35.

244. *See* U.S. CUSTOMS AND BORDER PROT., BASIC TRAINING ACADEMY CURRICULUM SUMMARY OF SELECT COURSES 2 (2010), *available at* http://foiarr.cbp.gov/streamingWord.asp?i=186 (indicating that border patrol agents "are taught to perform their law enforcement duties in a manner consistent with the protection of basic rights and liberties guaranteed in the U.S. Constitution").

245. *See* U.S. CUSTOMS AND BORDER PROT., INSPECTOR'S FIELD MANUAL 2.6(f) (2006), *available at* http://foiarr.cbp.gov/streamingWord.asp?i=910 (indicating that INS officials receive periodic training updates).

246. *See* BASIC TRAINING ACADEMY CURRICULUM SUMMARY OF SELECT COURSES, *supra* note 244, at 4–5 (indicating that border patrol agents must take a four-hour course entitled "Professionalism and Core Values" and a two-hour course entitled "Courtroom Testimony"); *see also id.* (requiring courses that prepare CBP officials "to perform their enforcement activities effectively and in accordance with the fundamental ideals and rules of law established in the U.S. Constitution").

247. For example, one commentator has argued that "the *CBP Policy* allowing suspicionless searches of laptop data violates the Fourth Amendment." Ari B. Fontecchio, Note, *Suspicionless Laptop Searches Under the Border Search Doctrine: The Fourth Amendment Exception that Swallows Your Laptop*, 31 CARDOZO L. REV. 231, 235 (2009) (alteration in original).

248. See *infra* Part III.A for a discussion of the deterrence benefits of excluding evidence obtained in violation of the Fourth Amendment at the border.

law enforcement.[249] Finally, the extant deterrent forces recognized in *Hudson* do not weigh in favor of finding the exclusionary rule inapplicable at the border.[250]

A. The Deterrence Benefits of Exclusion Apply with Equal Force to Evidence Illegally Acquired During a Border Search

The Supreme Court has explained that the purpose of the exclusionary rule is to deter Fourth Amendment violations by law enforcement.[251] Because border officials are law enforcement officers, the deterrence benefits of exclusion weigh in favor of excluding illegally acquired evidence.

As stated earlier, in weighing the deterrence benefits, courts must analyze the role that a government actor plays in the criminal justice system in order to determine whether that actor objectively has a stake in obtaining a criminal conviction.[252] Border officials are law enforcement officers. They have the statutory authority to seize certain property that they have "reasonable cause to believe" is subject to duty or unlawfully introduced into the United States.[253] They are also statutorily required to "seize and secure [such contraband] for trial."[254] Like police officers, border officials "will likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial."[255] Accordingly, border officials have a stake in obtaining convictions, and the deterrence benefits of exclusion weigh in favor of retaining the exclusionary rule in border search cases.

Moreover, exclusion will help deter violations of the Fourth Amendment because the primary concern of a border official's search is obtaining a conviction.[256] When the Supreme Court considered the applicability of the exclusionary rule to the illegal conduct of parole officers, it highlighted the fact that parole officers have a primarily nonadversarial relationship with parolees.[257] In light of this nonadversarial relationship, exclusion would not sufficiently deter parole officers from violating the Fourth Amendment.[258]

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249. See *infra* Part III.B for a comparison between the social costs of excluding illegally obtained evidence at the border and the social costs of exclusion in other law enforcement contexts.

250. See *infra* Part III.C for a discussion of the existence of extant deterrent forces that apply in the border search context and an argument that those deterrent forces do not counsel against applying the exclusionary rule to evidence illegally seized at the border.

251. Arizona v. Evans, 514 U.S. 1, 10 (1995).

252. See *supra* notes 66–94 and accompanying text for a discussion of cases indicating a correlation exists between the deterrence benefits of exclusion and a government actor's stake in obtaining a criminal conviction.

253. 19 U.S.C. § 482(a) (2012).

254. *Id.*

255. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 367 (1998).

256. See *supra* Part II.A.1.a and accompanying text for a discussion of case law that suggests courts must consider the primary concern of a government actor when determining whether exclusion would deter future Fourth Amendment violations.

257. *See, e.g.*, *Scott*, 524 U.S. at 368 (concluding that parole officers serve a supervisory role, not an adversarial role).

258. Patrick Alexander, Note, Pennsylvania Board of Probation & Parole v. Scott*: Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup*, 31 LOY. U. CHI.

The same is not true with regard to border officials. Although border officials arguably wear two hats—one of a law enforcement official and the other of an official whose goal is to exclude contraband from the country—the latter role cannot be characterized as nonadversarial. In this latter role, assuming it exists, the foremost interest of border officials is preserving the welfare of the country, even at the expense of an individual's privacy interests. In contrast, the relationship between a parole officer and parolee is more akin to that of a benevolent counselor or social worker.[259] In this respect, the role of a parole officer is substantially less adversarial than the role of a border official—who does not have such a benevolent relationship with the individual being searched. Additionally, the distinction between the two roles of a border official is unwarranted because they are essentially the same. To say that border officials are primarily concerned with protecting the country from contraband is simply another way characterizing their law enforcement role.

If the "nonadversarial" argument ruled the day, this would create many difficult problems in practice. Presumably, border officials would share their illegally acquired evidence with other law enforcement agencies, perhaps the Federal Bureau of Investigation (FBI). Although the exclusionary rule would generally apply if the FBI acquired the same evidence illegally, there would be no risk of exclusion if border officials provided the illegally seized evidence to the FBI. To further complicate this situation, the FBI could presumably use illegally acquired evidence to elicit a confession or acquire more evidence—evidence that would normally be excluded under the "fruit of the poisonous tree" doctrine.[260]

This practice is akin to the practice condoned by the now-rejected silver platter doctrine.[261] Under the original exclusionary rule, evidence that was unconstitutionally acquired from state officials could be used in federal prosecutions, even though such evidence, if unconstitutionally acquired by federal officials, would not be admissible.[262] In *Elkins*, the Court rejected this doctrine, reasoning that "[i]t would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."[263]

This reasoning holds true in the border context as well. In light of the ability of border officials to share evidence with other federal law enforcement officers,

L.J. 69, 91 n.165 (1999) ("With parole officers, the Court seems to suggest that the absence of any motivation to obtain evidence for convictions at criminal trials makes the possible benefit from the exclusionary rule marginal.").

259. *Scott*, 524 U.S. at 375 (Souter, J., dissenting).

260. Segura v. United States, 468 U.S. 796, 804 (1984) (explaining that in accordance with precedent, "the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure . . . but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree'").

261. See *supra* notes 44–51 and accompanying text for a discussion of *Elkins* and the Supreme Court's subsequent rejection of the silver platter doctrine.

262. Elkins v. United States, 364 U.S. 206, 208, 210 (1960).

263. *Id.* at 215.

differentiating between the two for exclusionary rule purposes is a distinction without a practical difference. Excluding evidence illegally obtained at the border would avoid this "silver platter" problem altogether.[264]

Finally, the good faith exception espoused in *Davis* does not support the use of illegally acquired evidence at trial in a border search case.[265] Under the good faith exception, the exclusionary rule does not apply where an official conducts a search in objective good faith that his or her conduct is constitutional under binding precedent.[266] The Supreme Court has broadly authorized border officials to conduct *routine* searches, which generally would not be permissible outside of the border context.[267] Thus, in light of this broad allocation of discretion to border officials, one could argue that a border official that conducts an illegal search was acting in good faith upon the Court's broad grant of authority to conduct routine searches at the border. This argument fails, however, because *nonroutine*, suspicionless searches remain unconstitutional.[268] Therefore, in conducting a *nonroutine* search without suspicion, a border official is not acting in objective good faith that his or her conduct is constitutional.[269] A category of unconstitutional border searches still remains. Accordingly, border officials cannot rely on their existing routine-search authority to avoid the exclusion of evidence that they illegally seize during suspicionless, nonroutine searches at the border.

In sum, the deterrent benefits of exclusion are strong because border officials are law enforcement and acquire a stake in obtaining convictions. It follows that the deterrence benefits weigh in favor of retaining the exclusionary rule at the border.

B. The Social Costs of Exclusion in the Border Context Are Not Sufficiently Different from the Social Costs of Exclusion in Other Contexts

Because the deterrent benefits are strong, exclusion would be warranted unless the social costs of exclusion are sufficiently greater at the border, or extant deterrent forces weigh in favor of inclusion. The social costs do not outweigh the deterrence benefits.

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264. *Cf.* Gardner, *supra* note 64, at 540 (arguing that application of the exclusionary rule to special police officers would ensure that the state does not employ such officers to avoid exclusion).

265. See *supra* notes 125–34 and accompanying text for a discussion of the good faith exception to the exclusionary rule announced in *Davis*.

266. Davis v. United States, 131 S. Ct. 2419, 2428–29 (2011); *see also* United States v. Katzin, 769 F.3d 163, 171 (3d Cir. 2014) (en banc) (analyzing the *Davis* good faith exception and applying it to hold that evidence obtained through GPS monitoring of a defendant was admissible at trial), *cert. denied*, 135 S. Ct. 1448 (2015).

267. *See, e.g.*, United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (acknowledging the historical significance of the congressional grant of executive plenary authority to conduct *routine* searches at the border).

268. See *supra* notes 192–95 and accompanying text for an explanation of the difference between routine and nonroutine border searches.

269. *Davis*, 131 S. Ct. at 2428–29.

The social costs attendant to exclusion in the border context are essentially the same as the social costs that accompany exclusion in the typical exclusionary rule case. There are three primary costs of exclusion: increasing the administrative burden of the courts by permitting exclusionary rule challenges to border searches, overdeterrence, and releasing guilty defendants into society.[270] These costs, however, are already accounted for in the exclusionary rule balancing test.[271] When courts weigh these social costs against sufficiently strong deterrence benefits, the scales generally weigh in favor of exclusion unless an exception applies. Accordingly, the social costs attendant to permitting exclusionary rule challenges at the border support the retention of the exclusionary rule in this context.

Excluding illegally acquired evidence in the border context would not impose the same type of administrative burden on the courts that was present in *Hudson*.[272] *Hudson* explained that a social cost of permitting exclusionary rule challenges to alleged knock-and-announce violations is that defendants would have an incentive to litigate difficult Fourth Amendment claims.[273] *Hudson* suggested that courts lack the institutional competence to determine *factual* issues attendant to knock-and-announce violations.[274] These factual issues were whether an officer waited a sufficiently long period of time before entering a home, and whether an officer's premature entry was supported by reasonable suspicion that evidence would be destroyed or that violence would occur.[275] Because these situations involve quick judgments in the field, reliable factual determinations as to, for example, the number of seconds the police waited before entry, are impracticable.[276]

In contrast, Fourth Amendment determinations in the context of border searches would not produce the same type of administrative burden because of the generally controlled and structured nature of a border search.[277] There are two difficulties associated with analyzing a border search under the Fourth

270. *See* Hudson v. Michigan, 547 U.S. 586, 595 (2006) (asserting that allowing the use of the exclusionary rule leads to more litigation in hopes of suppressing probative evidence in criminal trials); United States v. Leon, 468 U.S. 897, 907–08 (1984) (explaining that the primary cost of the exclusionary rule is letting potentially dangerous, guilty defendants go free).

271. *See* Herring v. United States, 555 U.S. 135, 141 (2009) (asserting that "the benefits of deterrence must outweigh the costs" and the primary cost of exclusion in any case is releasing guilty and dangerous defendants into society).

272. See notes 141–56 and accompanying text for a discussion of the Supreme Court's decision in *Hudson*.

273. *See Hudson*, 547 U.S. at 595 (noting that application of the exclusionary rule to knock-and-announce violations would create a flood of litigation involving difficult Fourth Amendment issues).

274. *See id.* (discussing the difficult factual determinations associated with determining "reasonable wait time" or "reasonable suspicion" in this context) (internal quotation marks omitted).

275. *See id.* (noting that the answers to these questions cannot be readily determined in a particular case).

276. *See id.* (observing the indeterminable problem of determining "how many seconds the police in fact waited").

277. *See, e.g.*, PERSONAL SEARCH HANDBOOK, *supra* note 240, at 4 (providing a flowchart describing the process for authorizing and conducting a patdown).

Amendment: (1) the level of suspicion, if any, that should be required to conduct a particular search;[278] and (2) what constitutes reasonable suspicion of criminal activity. Neither of these difficulties involves the same type of difficulties encountered by *Hudson*. The first difficulty—the level of suspicion—is a question of law, which does not involve the difficult factual determinations that concerned the Court in *Hudson*, such as the number of seconds that elapsed after police announce their presence. The second difficulty—what constitutes reasonable suspicion of criminal activity—is present in every reasonable suspicion case and has been described as a relatively easy test to apply in practice.[279] Accordingly, the unique administrative costs of permitting exclusionary rule challenges to knock-and-announce violations that were present in *Hudson* do not exist in border search cases.

Additionally, excluding illegally acquired evidence at the border would not result in overdeterrence. *Hudson* explained that analyzing the exclusionary rule in knock-and-announce cases would deter police officers from entering homes in a timely manner out of concern that evidence obtained would be excluded.[280] As a consequence of this delay, evidence in the house could be destroyed or preventable violence could occur.[281]

The "delay costs" present in *Hudson*, however, are simply not present in the context of searches at the border. A border official may very well refrain from conducting a more intrusive search out of concern that the resulting evidence would be excluded. The consequence of this decision, however, is not an immediate social cost to society. In *Hudson*, the immediate social cost of delaying entry was the destruction of evidence and violence. But in the border context, contraband would not be destroyed; it would simply not be discovered.[282] Additionally, if a border official refrains from searching, violence is not an immediate foreseeable result, at least not to the extent that it is foreseeable in knock-and-announce cases.

278. *See, e.g.*, United States v. Cotterman, 709 F.3d 952, 961 (9th Cir. 2013) ("The difficult question we confront is the reasonableness, without a warrant, of the forensic examination that comprehensively analyzed the hard drive of the computer."), *cert. denied*, 134 S. Ct. 899 (2013), *reh'g denied*, 134 S. Ct. 1512 (2014). *But see, e.g.*, *id.* at 984 (M. Smith, J., dissenting) (explaining that "the majority's holding requires border patrol agents to determine on a case-by-case and moment-by-moment basis whether a search of digital data remains 'unintrusive,' . . . or has become 'comprehensive and intrusive'").

279. *See, e.g.*, *Cotterman*, 709 F.3d at 966 (majority opinion) (describing the reasonable suspicion test as "a modest, workable standard"). *But see Cotterman*, 708 F.3d at 980 n.13 (Callahan, J., concurring in the judgment) ("The majority insists that reasonable suspicion is a 'modest, workable standard' that is applied in domestic stops of automobiles 'and other contexts,' and that still allows 'agents to draw on their expertise and experience.' The majority is wrong for at least three reasons.").

280. Hudson v. Michigan, 547 U.S. 586, 595–96 (2006).

281. *Id.*

282. Granted, there is a social cost associated with permitting contraband to remain undiscovered. Unlike in *Hudson*, however, this social cost is not accompanied with the immediate threat of violence, injury, and death. Thus, the immediate social costs in *Hudson*—violence and the destruction of evidence—are much stronger and more likely to be realized than the social cost of letting contraband slip through the cracks.

More importantly, border officials could still conduct less intrusive, routine, suspicionless searches for evidence and weapons.[283] Border officials can scan a traveler's luggage and subject the traveler to a body scan without any individualized suspicion.[284] In other words, the relaxed standard for searches at the border, which already authorizes border officials to conduct routine searches, readily compensates for any potential overdeterrence costs.

In sum, the social costs associated with analyzing the exclusionary rule in the border search context are no greater than the social costs present in the mine-run exclusionary rule case. Accordingly, the exclusionary rule should apply unless it can be demonstrated that extant deterrent forces warrant an exception to exclusion.

C. Extant Deterrent Forces Do Not Weigh Against Exclusion of Evidence Illegally Acquired at the Border

As a general matter, extant deterrent forces weigh in favor of permitting the use of illegally acquired evidence at trial.[285] It is not clear, however, when extant deterrent forces would affect the outcome of the exclusionary rule balancing test. Even so, the extant deterrent forces present in border cases do not weigh in favor of using illegally acquired evidence at trial.

The exclusionary rule balancing test has never explicitly hinged on the existence of extant deterrent forces. The Court introduced the concept of extant deterrent forces in *Hudson*.[286] Although it noted that these forces were "substantial," the Court already explained that the social costs were "considerable" and "the incentive to [commit] such [knock-and-announce] violations is minimal to begin with."[287] If extant deterrent forces were alone sufficient to warrant the use of illegally acquired evidence at trial, then the bulk of *Hudson*'s analysis would have been unnecessary. In other words, the Court would not have needed to assess and weigh the additional social costs present in knock-and-announce cases. Nor would the Court have needed to assess the incentive to commit such violations. Instead, the Court could have held simply that these extant deterrent forces were sufficient to warrant the use of illegally acquired evidence at trial. Accordingly, in the typical case where a police officer acquires evidence illegally, it appears that the extant deterrent forces alone would not be sufficient to warrant an exception to the exclusionary rule.

Even assuming that extant deterrent forces can tip the scales in favor of using illegally acquired evidence at trial, the extant forces present in border search cases are too weak to have such an impact. Two extant deterrent forces,

283. United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

284. *See id.* ("Routine searches of persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant."); Dennis, *supra* note 191, at 10, 14.

285. See *supra* Part II.A.3 for a discussion of extant deterrences that were not present when the Supreme Court created the exclusionary rule, which now weigh against excluding illegally acquired evidence.

286. *Hudson*, 547 U.S. at 599.

287. *Id.*

both recognized in *Hudson*, are present in border search cases. First, federal officials are more deterred from violating Fourth Amendment rights because they know they are subject to *Bivens* lawsuits for their constitutional violations.[288] Second, law enforcement agencies currently operate in a manner that is more professional than in the past, and thus law enforcement officers are more deterred from conducting illegal searches and seizures.[289]

In the border context, civil remedies do not adequately deter border officials from conducting illegal searches. An individual could theoretically bring a *Bivens* claim against a federal officer, including a border official, if that officer violated the individual's Fourth Amendment rights.[290] Unlike individuals who sue *state* officials, individuals who sue *federal* officials are not entitled to attorney's fees.[291] This decreases the incentive for potential claimants to bring claims against border officials. Without such an incentive, the costs of litigating a *Bivens* claim will often outweigh the potential recovery because the harm in such cases—the invasion of an individual's intangible interest in his or her privacy—would likely be unquantifiable and difficult to predict. Coupling these two factors together—the unlikelihood and uncertainty of a large damages award and the unavailability of attorney's fees—potential claimants have less of an incentive to sue border officials for Fourth Amendment violations. Without this incentive, potential claimants will probably not sue (because lawyers will not take their cases), and border officials would not bear any legal consequences for their unconstitutional conduct—either through civil liability or through suppression of unconstitutionally seized evidence at trial. Accordingly, to a border official, a *Bivens* claim does not pose much of a threat, and would probably not deter that official from acquiring evidence illegally.

Additionally, the increased professionalism of border officials has not eliminated the threat of illegal searches and seizures at the border. In light of the increase in police professionalism discussed in *Hudson*, it is safe to assume that border officials are more deterred than they were in the past from committing Fourth Amendment violations.[292] Border officials receive training and education in constitutional rights.[293] Moreover, although border officials have broad constitutional latitude to conduct suspicionless searches, the CBP procedures in

288. See *supra* notes 166–69 and accompanying test for a discussion of *Bivens* actions.

289. *Hudson,* 547 U.S. at 599 ("[M]odern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.").

290. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 814 (2010) (stating that a private right of action against individual officers who violated the Constitution was one of the aspects of the Court's decision in *Bivens*).

291. Dripps, *supra* note 169, at 754.

292. *See Hudson*, 547 U.S. at 597–99 (comparing generally the present and past state of civil remedies and police forces and assessing the extent to which these factors deter police misconduct).

293. *See* BASIC TRAINING ACADEMY CURRICULUM SUMMARY OF SELECT COURSES, *supra* note 244, at 2 (indicating that border patrol agents "are taught to perform their law enforcement duties in a manner consistent with the protection of basic rights and liberties guaranteed in the U.S. Constitution").

place provide a structural safeguard to protect Fourth Amendment rights.[294] For instance, a border official cannot conduct a patdown of someone without first having at least one fact in support of his or her decision.[295] Additionally the official must obtain approval by a supervisor before conducting a patdown or body search, except with regard to immediate searches for weapons and other dangerous objects.[296] Body searches must be conducted in a private area out of the general public's view, and a witness must be present in most cases.[297] Finally, only medical personnel are permitted to conduct body cavity searches.[298]

The existence of these policies and practices suggests that border officials operate in a manner consistent with constitutional rights. There are two reasons, however, why these policies and practices do not sufficiently deter border officials from violating Fourth Amendment rights. First, policies can and do change. CBP could issue a new policy tomorrow authorizing a search practice that it currently prohibits. Second, the policies in their present form may not be adequate to deter border officials from committing Fourth Amendment violations because they authorize very intrusive practices. Commentators argue that the policy authorizing the suspicionless searches of electronic devices violates the Fourth Amendment.[299] The Ninth Circuit has abrogated the policy to the extent that it permits border officials to conduct suspicionless searches of a laptops utilizing forensic software.[300] Thus, current CBP policy may not adequately protect Fourth Amendment rights, or, in some cases, may be unconstitutional. Although it is safe to assume that border officials are more professional than they were in the past, we cannot readily assume that the current safeguards in place adequately deter border officials from committing Fourth Amendment violations.

Additionally, the current policies grant border officials much discretion, which leaves room for them to violate Fourth Amendment rights. For instance, the procedures permit border officials to conduct suspicionless searches of electronic devices.[301] They also approve the seizure of an electronic device for a

294. See *supra* Part II.C for an overview of the CBP's search procedures.

295. PERSONAL SEARCH HANDBOOK, *supra* note 240, at 1.

296. *Id.* at 5.

297. *Id.* at 6.

298. *Id.* at 35.

299. *See, e.g.*, Wilson, *supra* note 209, at 1001 (contending that "the border exception to the Fourth Amendment does not justify the suspicionless search of information contained within computer files"); Fontecchio, *supra* note 247, at 235 (arguing that such searches are unconstitutional because the privacy interests implicated outweigh the government's interests because laptop searches are time consuming and ultimately hinder border security).

300. United States v. Cotterman, 709 F.3d 952, 968 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2013), *reh'g denied*, 134 S. Ct. 1512 (2014). The court held that forensic searches utilizing the "application of computer software to analyze a hard drive" require reasonable suspicion of criminal activity. *Id.* at 967. The "manual review of files on an electronic device," however, does not require any suspicion. *Id.*

301. BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION, *supra* note 230, at 5.1.2.

relatively long time—five days.[302] Although searches of electronic devices must be conducted in the presence of a supervisor, this provision only applies if it is "practicable" to do so.[303] Additionally, the individual whose information is being searched does not have the right to be present if "there are national security, law enforcement, or other operational considerations that make it inappropriate to permit the individual to remain present."[304] The searching border official presumably has discretion to make this determination on a case-by-case basis. With so many discretionary, fact-bound exceptions, it seems inevitable that unconstitutional searches or seizures will occur.

To conclude, the extant deterrences do not tip the scales in favor of adopting an exception to the exclusionary rule in the context of border searches. Attorneys have little incentive to bring civil *Bivens* claims against federal officials because they cannot be rewarded fees, thus decreasing the deterrent impact of such suits on border officials. Additionally, the increase in police professionalism and training does not negate the fact that current CBP practices may be insufficient by themselves to safeguard Fourth Amendment rights. Accordingly, the "substantial" extant deterrent forces that were present in *Hudson* are not as strong in the context of border searches.

IV. CONCLUSION

The exclusionary rule should continue to apply where evidence is illegally seized by border officials. According to the Supreme Court, the exclusionary rule applies unless the social costs of exclusion outweigh the deterrence benefits of the rule. Employing this balancing test in the context of an illegal border search, the scales tip in favor of excluding illegally acquired evidence at trial. Like other law enforcement officials, the primary concern of a border official is obtaining convictions. There are no extant deterrence forces that would sufficiently decrease the deterrent value of exclusion in this context. Additionally, the social costs of exclusion are the same in the border context as they are in the typical exclusionary rule case.

This conclusion has enormous consequences for present law enforcement practices at the border. Requiring the exclusion of evidence that is illegally acquired during a border search will incentivize border officials to continue conducting searches under existing Fourth Amendment limitations. Border officials will have an incentive to refrain from conducting invasive, nonroutine searches (such as strip searches and x-ray searches) unless they have reasonable suspicion of criminal activity. Retention of the exclusionary rule at the border will ensure that courts continue to debate Fourth Amendment issues, such as whether the forensic search of Howard Cotterman's laptop is constitutional—with or without reasonable suspicion of illegal activity. Ultimately, retaining the exclusionary rule in the context of border searches will ensure that the Fourth

302. *Id.* at 5.3.1.

303. *Id.* at 5.1.3.

304. *Id.* at 5.1.4.

Amendment has some teeth at the border, and that one's Fourth Amendment rights are not virtually forfeited by merely crossing an international line.