THE SUPREME COURT'S CONTEMPORARY SILVER PLATTER DOCTRINE

David Gray[ϕ]

Meagan Cooper[χ]

David McAloon[μ]

91 TEXAS L. REV. ___ (2012)

[ϕ] Associate Professor, University of Maryland Francis King Carey School of Law.

[χ] University of Maryland Francis King Carey School of Law.

[μ] University of Maryland Francis King Carey School of Law. The authors thank those who have offered comments and suggestions and those who endured presentations at Law and Society, Maryland, Utah, Ohio State, and Case Western. Particular thanks are due to Fabio Arcila, Doug Berman, Dave Bogen, Robert Bloom, Richard Boldt, Teneille Brown, Paul Cassell, Sharon Davies, Joshua Dressler, Martha Ertman, Kim Ferzan, Chad Flanders, Barry Friedman, Lauryn Gouldin, Mark Graber, Deborah Hellman, Leslie Henry, Orin Kerr, Lee Kovarsky, Dan Markel, Alan Michaels, Dan Medwed, Amanda Pustilnik, Peter Quint, Brian Sawers, Chris Slobogin, Max Stearns, Carol Steiker, Maureen Sweeney, Kathy Vaughns, Urska Velikonja, and Jonathan Witmer. Frank Lancaster and Jamie Tansey provided valuable research assistance.

THE SUPREME COURT'S CONTEMPORARY SILVER PLATTER DOCTRINE

ABSTRACT

In a line of cases beginning with United States v. Calandra*, the Court has created a series of exceptions to the Fourth Amendment exclusionary rule that permit illegally seized evidence to be admitted in litigation forums collateral to criminal trials. This "collateral use" exception allows the government to profit from Fourth Amendment violations in grand jury investigations, civil tax suits, habeas proceedings, immigration removal procedures, and parole revocation hearings. In this essay we argue that these collateral use exceptions raise serious conceptual and practical concerns. The core of our critique is that the collateral use exception reconstitutes a version of the "silver platter doctrine." In the days before the Fourth Amendment and the exclusionary rule were incorporated to the states, the silver platter doctrine allowed federal courts to admit evidence seized by state law enforcement agents during "unreasonable" searches and seizures. The silver platter doctrine was rejected by the Court in 1960 out of concern that it was compromising states' efforts to guarantee constitutional protections because it created incentives for state law enforcement officers to violate the Fourth Amendment. By recreating the silver platter doctrine, the Court's collateral use cases have recreated some of those incentives. Our research indicates that these incentives have been successful in altering police practices in ways that threaten the Fourth Amendment rights of all citizens.*

TABLE OF CONTENTS

INTRODUCTION

At its inception in 1886,[1] and through its incorporation to the states in 1961,[2] the Supreme Court regarded the Fourth Amendment exclusionary rule as a remedy required by constitutional principle.[3] It was designed to nullify violations,[4] to prevent the government from benefitting by its wrongdoing,[5] and to preserve the moral integrity of the courts and the government as constitutional torchbearers.[6] On this view, the exclusionary rule was bound to the Fourth Amendment itself. The remedy defined the right;[7] or, as Justice Holmes put the point in *Silverthorne Lumber Co. v. United States*, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that . . . it shall not be used at all."[8] The alternative, he wrote, "reduces the Fourth Amendment to a form of words."[9]

The contemporary Court has abandoned all of the principled justifications of the Fourth Amendment exclusionary rule and the conceptual link between that remedy and Fourth Amendment

---

[1] Boyd v. United States, 116 U.S. 616 (1886).

[2] Mapp vs. Ohio, 367 U.S. 643 (1961).

[3] *See, e.g.*, Agnello v. United States, 269 U.S. 20, 35 (1925) ("The admission of evidence obtained by [an illegal] search and seizure was error and prejudicial to the substantial rights of [the defendant]."); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (holding that allowing the government to profit from illegally seized evidence "reduces the Fourth Amendment to a form of words"); Weeks vs. United States, 232 U.S. 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution."). *See also* Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 808 (2000); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372–77 (1983).

[4] *Weeks*, 232 U.S. at 393

[5] *Id.*

[6] *Id.* at 394.

[7] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("[E]very right, when withheld, must have a remedy . . . .").

[8] 251 U.S. 385, 392 (1920).

[9] *Id. See also Weeks*, 232 U.S. at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution.").

rights. It has instead adopted what William Heffernan calls the "severance principle," which holds that the exclusionary rule is a punitive sanction, not a personal remedy, and that it is justified solely by its ability to deter government agents from violating the Fourth Amendment and not by its potential to vindicate harms suffered by citizens whose rights are violated.[10] The severance principle was on prominent display last term in *Davis v. United States*.[11] In that case the Court held that Davis's Fourth Amendment rights were violated when his car was searched secondary to his lawful arrest and the officers could claim neither emergency nor independent probable cause to believe that evidence of a crime would be found in the car.[12] The Court nevertheless held that Davis could not avail himself of the exclusionary rule because the officers who effected that search relied to their detriment on federal law established in their circuit, which, following *New York v. Belton*,[13] permitted police to perform automobile searches as a matter of right incident to a lawful arrest of the driver. That rule was revoked by the Court in *Arizona v. Gant*,[14] but only after the search of Davis's car. Given this course of events, the Court reasoned that inflicting the exclusionary rule would serve no purpose because it could not have deterred the officers who searched Davis's car or any similarly situated officer who abides the established federal law of her circuit.[15]

As one of us argues at length elsewhere, the Court's logic in *Davis*, and other cases where it has developed and applied this "good faith" exception, is deeply flawed and threatens to degrade substantive Fourth Amendment rights.[16] Jennifer Laurin has reached a similar conclusion on different grounds by critically engaging the Court's decisions limiting the access of citizens to civil

[10] Heffernan, *supra* note 3, at 825.

[11] 131 S. Ct. 2419 (2011). For an argument that *Davis* should have been decided differently see Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 Geo. L.J. 1077, 1084–85 (2011).

[12] *Davis*, 131 S. Ct. at 2431.

[13] 453 U.S. 454 (1981).

[14] 556 U.S. 332 (2009).

[15] *Davis*, 131 S. Ct. at 2428–29.

[16] *See* David Gray, A Spectacular Non Sequitur (February 27, 2012) (unpublished manuscript on file with authors).

remedies under 18 U.S.C. §1983.[17] In this essay we advance this critique by engaging in a close analysis of another far-reaching exception to the Fourth Amendment exclusionary rule that has grown out of the severance principle: the collateral use exception.

In a line of cases beginning with *United States v. Calandra*,[18] the Court has created a series of exceptions to the Fourth Amendment exclusionary rule that allow illegally seized evidence to be admitted in litigation forums collateral to criminal trials. This "collateral use" exception permits the government to profit from Fourth Amendment violations in grand jury investigations,[19] civil tax suits,[20] habeas proceedings,[21] immigration removal procedures,[22] and parole revocation hearings.[23] In this essay we argue that the collateral use exception raises serious conceptual and practical concerns. The core of our critique is the fact that the collateral use exception reconstitutes a version of what was once known as the "silver platter doctrine," which allowed evidence seized illegally by state and local police to be admitted in federal court as long as the local officials were not acting as agents of federal law enforcement. The silver platter doctrine was rejected by the Court in *Elkins vs. United States*[24] out of concern that it was compromising states' efforts to guarantee constitutional protections for their citizens by creating incentives for state and local police officers to violate the Fourth Amendment.[25] By recreating the silver platter doctrine, the Court's collateral use cases have reconstituted these incentives, encouraging law enforcement officers at all levels to engage in illegal searches and seizures. These are not abstract concerns. Our research indicates that these incentives

---

[17] *See* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011).

[18] 414 U.S. 338 (1974).

[19] *Id.*

[20] United States v. Janis, 428 U.S. 433 (1976).

[21] Stone v. Powell, 428 U.S. 465 (1976).

[22] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[23] Penn. Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998).

[24] 364 U.S. 206 (1960).

[25] *Id.* at 222.

are altering police practices in ways that threaten the Fourth Amendment rights of all citizens, and particularly those whose economic circumstances or ethnic identities make them all too frequent targets for abuse.[26] We begin with a brief history of the silver platter doctrine.

THE BIRTH OF THE SILVER PLATTER DOCTRINE

Weeks v. United States, decided in 1914, established the exclusionary rule as the primary mechanism to enforce Fourth Amendment rights against federal officers in federal court proceedings.[27] There the Court committed to the exclusionary rule as a matter of constitutional principle.[28] Specifically, the Court held that the constitutional imperative that government officials not engage in "unreasonable" searches and seizures would be violated and the Fourth Amendment effectively nullified if those who are "intrusted under our Federal system with the enforcement of the laws" could be "aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[29] In addition to its concerns with fundamental principle, the Court in *Weeks* also worried about the integrity of the federal judiciary and the government more generally, which would be compromised if federal prosecutors were allowed to exploit at trial Fourth Amendment violations perpetrated by their investigative colleagues.[30]

Although the Court in *Weeks* held that exclusion was the only remedy for Fourth Amendment violations sufficient to maintain the integrity of the Constitution and the courts, it did

---

[26] For example, according to the 2010 Census, fourteen percent of the population identified themselves as "black" and seventy-five percent identified as "white." However, a disproportionate thirty-nine percent of the parole population in 2010 was black while only forty-two percent were white. Almost by definition, then, the collateral use exception for parole revocation hearings will impact black citizens disproportionately. As we point out below, these raw numbers only begin to tell the full story.

[27] 232 U.S. 383 (1914).

[28] *Id.* at 392.

[29] *Id.* at 392.

[30] *Id.* at 394.

not impose either the Fourth Amendment or the exclusionary rule on state courts. The Fourth Amendment was not incorporated to the states until *Wolf v. Ohio* in 1949,[31] and the exclusionary rule was not incorporated until *Mapp vs. Ohio*[32] in 1961. The intervening years gave rise to a practice known as the "silver platter doctrine," which allowed federal courts to admit evidence seized in violation of the Fourth Amendment by state law enforcement agents if those state officials neither acted at the direction nor with the foreknowledge of federal agents.[33] *Byars v. United States*[34] shows the doctrine's basic operation.

Byars involved an investigation by state law enforcement into the manufacture of intoxicating liquors. Despite their failure to show that there was probable cause to believe that the fruits and instrumentalities[35] of a crime would be found on the premises, local law enforcement officers secured a warrant from a local magistrate granting them authority to search Byars's home for "intoxicating liquors and instruments and materials used in the manufacture of such liquors."[36] On their way to conduct the search, the local officers recruited a federal revenue agent named Adams to assist them. Adams participated in the search, which resulted in the discovery of "strip stamps" used to prove the provenance and tax status of whiskey. Adams took custody of the stamps, which were later introduced at trial when Byars was prosecuted for violating federal liquor laws. There was no dispute that the stamps were the product of an illegal search. Nevertheless, the Court pointed out that the United States Attorney was at liberty under the silver platter doctrine "to avail [himself] of evidence improperly seized by state officers operating entirely upon their own account."

---

[31] 338 U.S. 25 (1949).

[32] 367 U.S. 643 (1961).

[33] *Elkins*, 364 U.S. at 213-15.

[34] 273 U.S. 23 (1927).

[35] Before 1967, the Court took the position that warrants should not issue if the proposed search was for "mere evidence" rather than the "fruits and instrumentalities" of a crime. The Court abandoned that view in *Warden v. Hayden*, 387 U.S. 294, 301 (1967).

[36] *Id.* at 33.

Unfortunately for the government, the state agents did not act entirely on their own account when conducting the search of Byars's home. Rather, the Court found, Adams was a principal in the "wrongful search and seizure," which barred application of the silver platter doctrine.[37] Therefore, while affirming the silver platter doctrine itself, the Court held that the facts in *Byars* fell outside its scope because the illegal search was conducted in part by a federal official.

The Court's recognition of the silver platter doctrine during the first half of the Twentieth Century is easy to understand. After all, the Fourth Amendment had not been incorporated to the states and, therefore, it was literally impossible for a state agent to violate the Fourth Amendment, no matter how unreasonable his conduct. Absent a violation, the principled concerns that animated the Fourth Amendment exclusionary rule in *Weeks* and *Silverthorne* simply did not arise. What is surprising is that nothing much changed in 1949 when the Court incorporated the Fourth Amendment to the states in *Wolf v. Ohio*.[38] Despite limiting state agents to the compass of the Fourth Amendment in *Wolf*, the Court declined to incorporate the exclusionary rule.[39] The Court instead left it to each of the various states to develop its own enforcement regime. Over the next decade or so about half of the states adopted the exclusionary rule.[40] Those decisions had no bearing on what happened in federal court, however. As a consequence, in states where the exclusionary rule was adopted as a matter of state law, officers who faced exclusion in state court could simply hand illegally seized evidence off to their federal colleagues, who could use it at will in federal court.

---

[37] *Id.*

[38] 338 U.S. 25 (1949).

[39] *Wolf*, 338 U.S at 27, 33. *See also* United States v. Wallace & Tiernan Co., 336 U.S. 793, 798 (1949) (indicating in dicta that the exclusionary rule is an "extraordinary sanction devised by this Court to prevent violations of the Fourth Amendment.").

[40] *Elkins*, 364 U.S. 206 at 218-20.

THE DEMISE OF THE SILVER PLATTER DOCTRINE

The silver platter doctrine survived for more than a decade after *Wolf* until *Elkins v. United States*.[41] Writing for the Court in *Elkins*, Justice Stewart first pointed out that, in the wake of *Wolf*, the silver platter doctrine constituted a bit of a contradiction in that it suggested that there was a substantive difference between the Fourth Amendment as enforced directly on federal agents and as enforced indirectly through the Fourteenth Amendment due process clause.[42] In addition to this problem of "logical symmetry,"[43] Justice Stewart also took account of the damage that the silver platter doctrine was doing to efforts by state courts to secure the protections of the Fourth Amendment for their citizens against state law enforcement officers. The Court in *Elkins* was particularly persuaded by the experience of states, like California, that had first rejected and then accepted the exclusionary rule in the years after *Wolf*.[44]

Like many of its sister states, California took advantage of the discretion afforded to it after *Wolf* to experiment with different ways to secure Fourth Amendment protections for its citizens. The Supreme Court of California, led by the legendary jurist Roger J. Traynor, was initially quite skeptical of the exclusionary rule and declined to follow the Supreme Court's example, even after *Wolf*.[45] That court instead left enforcement of the Fourth Amendment to administrative, criminal, and civil remedies.[46] The views of Judge Traynor and his brethren changed dramatically in subsequent years as they assessed the results of their experiment. By 1955 it was clear to them that local and state agents in California were routinely violating the Fourth Amendment and that

---

[41] 364 U.S. 206 (1960).

[42] *Id.* at 215.

[43] *Id.* at 216.

[44] *Id.* at 221-22.

[45] Judge Traynor later recounted his personal conversion from exclusionary rule critic to supporter in a thoughtful essay. *See* Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22 (1962).

[46] *People v. Cahan*, 44 Cal. 2d. 434, 447 (1955)

"experience ha[d] demonstrated" that "neither administrative, criminal, nor civil remedies [we]re effective in suppressing lawless searches and seizures."[47] Writing for his court in *People v. Cahan*, Judge Traynor therefore reversed course and held that, henceforth, evidence seized in violation of the Fourth Amendment would not be admissible in trials conducted in California courts, no matter who paid the salaries of the offending officers.[48]

The effect of the exclusionary rule on California law enforcement agents was immediate and dramatic. Less than two years after *Cahan*, California's highest-ranking law enforcement officer reported that adopting the exclusionary rule had improved dramatically the professionalism of state law enforcement officers and had brought about a much closer working relationship between police officers and prosecutors.[49] In the face of these successes, the *Elkins* Court expressed concern that the silver platter doctrine not only interposed a logical contradiction in substantive Fourth Amendment law, but also "frustrate[d] state policy [designed to secure Fourth Amendment rights] . . . in a particularly inappropriate and ironic way" by providing a collateral forum for the admission of evidence seized illegally by state agents.[50] The Court's straightforward concern was that existence of the silver platter doctrine preserved significant incentives for state law enforcement agents to violate the Fourth Amendment. These officers knew, after all, that even if the evidence could not be used at a state trial, it could still be used to prosecute federal crimes. In addition to these practical concerns, the Court also held that preserving the silver platter doctrine in the face of increasing acceptance of the exclusionary rule by state courts compromised the integrity of the state

---

[47] *Id.*

[48] *Id.*

[49] *Elkins*, 364 U.S. at 221-22.

[50] *Id.* at 222 ("Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution.").

governments, the federal government, and the federal courts when federal courts endorsed by implication the unlawful conduct of state agents.[51]

The Court confirmed the views expressed in *Elkins* a year later in *Mapp v. Ohio*, which incorporated the exclusionary rule to the states.[52] *Mapp* was based on the proposition that "the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is 'part and parcel' of the Fourth Amendment."[53] In making its case, the Court reprised the experiences of various states and concluded that remedies other than exclusion had proved to be "worthless and futile" as means to punish and deter law enforcement misconduct.[54] The Court also confirmed that the exclusionary rule is "an essential part of the right to privacy" embodied in the Fourth Amendment and that failing to require exclusion when state agents violate the Fourth Amendment would be "to grant the right but in reality to withhold its privilege and enjoyment."[55] Emphasizing that rules matter, the *Mapp* Court held categorically that "no man is to be convicted on unconstitutional evidence."[56] Finally, following Justice Stewart in *Elkins* and Justice Holmes in *Silverthorne*, the Court pointed out that exclusion is required by both "the imperative of judicial integrity" and the principle that governments must obey the rules that govern them in order to maintain their own moral authority.[57]

Elkins and *Mapp* leave no doubt about the Court's view that the silver platter doctrine offended the Fourth Amendment itself by allowing officers to exploit illegally seized evidence in collateral proceedings. In addition to these principled concerns the Court also had before it

---

[51] *Id.* at 222-25.

[52] 367 U.S. 643 (1961).

[53] *Id.* at 678 (Harlan, J., dissenting).

[54] *Id.* at 651-53, 657-58. *See also id.* at 669-72 (Douglas, J., concurring).

[55] *Id.* at 656.

[56] *Id.* at 657.

[57] *Id.* at 659 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

persuasive evidence that the exclusionary rule was a singularly effective tool for securing Fourth Amendment protections, but that its effectiveness was compromised by opening the door to admission of illegally seized evidence in collateral forums. This practical concern was particularly salient, the Court noted, given the close working relationships between state and federal law enforcement officers,[58] which highlighted for each paths by which they could readily circumnavigate the Fourth Amendment. The only solution, the Court held, was to block those collateral channels.[59] Unfortunately, those dams have not held.

THE RISE OF THE CONTEMPORARY SILVER PLATTER DOCTRINE

In a series of cases beginning with *United States v. Calandra*,[60] the Court has declined to enforce the exclusionary rule when government officials seek to introduce illegally seized evidence during collateral proceedings including grand jury investigations,[61] civil tax suits,[62] habeas proceedings,[63] immigration removal procedures,[64] and parole revocation hearings.[65] By creating these exceptions to the Fourth Amendment exclusionary rule the Court has incrementally rehabilitated the silver platter doctrine that it condemned in *Elkins*. In the process the Court has also recreated the same kinds of systemic incentives to violate the Fourth Amendment that the *Elkins* Court found had "frustrate[ed]" "in a particularly ironic way" efforts to curb unreasonable searches and seizures.

---

[58] *Elkins*, 364 U.S. at 211.

[59] *Id.* at 222.

[60] 414 U.S. 358 (1974).

[61] *Id.*

[62] United States v. Janis, 428 U.S. 433 (1976).

[63] Stone v. Powell, 428 U.S. 465 (1976).

[64] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[65] Penn. Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998).

The question for the Court in *Calandra* was whether evidence seized in violation of the Fourth Amendment could be admitted directly or by implication in a grand jury investigation.[66] Federal agents had conducted a search of Mr. Calandra's place of business under authority of a warrant granting leave to search for evidence relating to an alleged gambling operation. The agents found no such evidence, but did find promissory notes issued in Calandra's favor. Despite the fact that these debt instruments were neither within the scope of of the warrant nor obviously criminal in nature, the agents seized them.

Calandra subsequently sought return of the promissory notes alleging that the warrant was not supported by probable cause and that, at any rate, the officers exceeded the scope of the warrant when they seized the promissory notes. That motion was granted. In the meantime the United States Attorney impaneled a special grand jury to investigate allegations of loan sharking. Calandra was subpoenaed to testify. Although he planned to invoke his Fifth Amendment privilege against compelled self-incrimination, Calandra feared that he would be forced to testify under a limited grant of immunity. He therefore sought to bar the United States Attorney from soliciting during grand jury proceedings any testimony based on the illegally seized evidence. The district court agreed and the Sixth Circuit Court of Appeals affirmed. The Supreme Court reversed; and in doing so contradicted the core holding in *Elkins*.

As Justice Holmes wrote decades before *Elkins* and *Mapp*, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[67] *Elkins* and *Mapp* in turn stand for the proposition that consistency in enforcement among forums is essential as a matter of both principle and practicality. To allow any government agent to use illegally seized evidence in some

---

[66] *Calandra*, 414 U.S. at 338.

[67] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

proceedings while excluding it in others cuts the Fourth Amendment at root and leaf by compromising both the integrity of the right and the capacity of the exclusionary rule to deter by "removing the incentive to disregard [the Fourth Amendment]."[68]

Calandra and subsequent collateral use cases recreate what *Elkins* forbade. Specifically, by allowing illegally seized evidence to be admitted in collateral proceedings, the Court has created powerful incentives for law enforcement officers and other government agents to violate the Fourth Amendment. It has done so without even acknowledging its departure from *Elkins*. Worse still, the Court has repeatedly relied upon *Elkins* for the proposition that the primary purpose of the exclusionary rule is to deter law enforcement officers by removing incentives to violate the Fourth Amendment without acknowledging or addressing the fact that these considerations were precisely those which led the Court to reject the original silver platter doctrine in the first place.[69] That omission is particularly galling because the collateral use exceptions have constructed a series of contemporary silver platter doctrines in various forums that individually and collectively provide significant incentives for government agents to ignore fundamental Fourth Amendment rights.

It might be objected at this point that we are being wholly unfair to the Court by suggesting that its holdings in *Calandra* and subsequent collateral use cases create contemporary silver platter doctrines and therefore contradict the Court's holding in *Elkins*.[70] Then-Professor Easterbrook gave voice to the concern three decades ago in *Ways of Criticizing the Court*.[71] There, Easterbrook argued that the fundamental dynamics of the Court's institutional structure make inconsistent decisions inevitable.[72] His case was built upon insights from public choice theory, and in particular on

---

[68] *Elkins*, 364 U.S. at 217.

[69] *See, e.g.*, *Calandra*, 414 U.S. at 347-48; *Janis*, 428 U.S. at 445.

[70] We are in debt to Orin Kerr for pressing this concern.

[71] Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

[72] *Id.* at 811-32.

Kenneth Arrow's groundbreaking Impossibility Theorem, for which Arrow won the Nobel Memorial Prize in Economics.[73] Easterbrook's conclusions, and the application of public choice theory to the Court, have since been topics of hot debate among public choice theorists.[74] Although fascinating, those contests are beyond the scope of this essay. For present purposes we will accept Easterbrook's conclusion *arguendo* because it provides an opportunity to clarify and deepen our objection to the Court's creation of contemporary silver platter doctrines. We take up this task in the next section.

THE CONTEMPORARY SILVER PLATTER DOCTRINE'S SPECTACULAR NON-SEQUITUR

Although Easterbrook argues that it is unfair and unproductive to accuse the Court of inconsistency among decisions, he maintains that it is completely within bounds to object if the Court's logic within a given case is incoherent or if its reasons are insufficient to justify its conclusions.[75] Although we are uncomfortable with the contradiction between *Elkins* and the cases that create contemporary silver platter doctrines, that discomfort is derivative. Our core concerns, which we explore in this section and those that follow, are that the Court's reasons in *Calandra* and other collateral use cases are insufficient to support its conclusions and that, as a consequence, the Court has created pathological incentives for law enforcement officers to violate the Fourth Amendment. Our argument gets traction by taking seriously the Court's insistence that the sole justification of the exclusionary rule is its capacity to deter law enforcement officers.[76]

---

[73] For a concise and available explanation of the Arrow Theorem see MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS, 107-09, 138-51 (2009).

[74] *See, e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION-MAKING (2000); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy; Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992); John M. Rogers, *"I Vote this Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439 (1991).

[75] Easterbrook, *supra* note 71, at 830.

[76] This is a relatively recent commitment and represents a shift from the Court's focus on constitutional principle and institutional integrity in *Weeks* and *Mapp*. For a brief history of this shift see Gray, *supra* note 16.

Writing for the Court in *Calandra*, Justice Powell cites *Elkins* for the foundational premise that the "[exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment."[77] Given the threat of exclusion at a criminal trial, Justice Powell asserts that "extension" of the rule to grand jury proceedings "would deter only police investigation consciously directed toward the discovery of evidence solely for use in the grand jury investigation."[78] The Court's logic here indulges what H.L.A. Hart described in different circumstances as a "spectacular non sequitur"[79] and as a consequence claims too much.

Hart leveled his charge against Jeremy Bentham's attempts to reconstruct common law culpability excuses based solely on utilitarian grounds.[80] The common law's interest in culpability, and its complementary willingness to excuse based on infancy, insanity, and mistakes of fact, is a consequence of the dominant role played by moral considerations and retributivist theories of punishment in its development.[81] Bentham rejected retributivism but nevertheless wanted to preserve these excuses. He therefore attempted to reconstruct them on deterrence grounds.[82] His argument is built on a straightforward insight: by virtue of their infancy, insanity, or mistake, inculpable offenders are not aware that they are breaking the law and therefore do not fear punishment. Because the threat of punishment plays no role in their decision making, Bentham

---

[77] *Calandra*, 414 U.S. at 347-48 (citing *Elkins*, 364 U.S. at 217). As is pointed out below, this selective citation to *Elkins* ignores that decision's further reliance on constitutional principles, including the "imperative" of preserving judicial and governmental integrity. *Elkins*, 364 U.S. at 222.

[78] *Calandra*, 414 U.S. at 350. The Court has yet to make good on Justice Powell's threat to inflict exclusion in cases where officers violate the Fourth Amendment with a specific design on advancing a grand jury investigation. Given the Court's willingness to turn a blind eye to law enforcement policies and practices that exploit exceptions to the exclusionary rule to license Fourth Amendment violations in *United States v. Payner*, 447 U.S. 727 (1980), decided a mere six years after *Calandra*, there is little reason to believe that it ever will. *See supra* notes 187-193 and accompanying text.

[79] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 19 (1968). For a more extensive exegesis and explanation of how Hart's critique applies to other components of the Court's Fourth Amendment exclusionary rule jurisprudence, see Gray, *supra* note 16.

[80] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Chap. 13, § 3 (1789).

[81] For a brief sketch of these retributivist commitments *see* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1656-72 (2010).

[82] BENTHAM, *supra* note 80, at Chap. 13, § 3.

argues that it would be "inefficacious" to punish them.[83] Because punishing offenders who are undeterrable serves no crime-control purpose, Bentham concludes that there is no justification for inflicting punishment in cases where culpability is absent.

Hart's charge of non sequitur is meant to show that Bentham's efforts fall well short of justifying general culpability excuses. Rather, Hart writes,

> . . . all that [Bentham] proves is the quite different proposition that the *threat* of punishment will be ineffective so far as the class of persons who suffer from these conditions is concerned. Plainly it is possible that though (as Bentham says) the *threat* of punishment could not have operated on them, the actual *infliction* of punishment on those persons may secure a higher measure of conformity to the law on the part of normal persons than is secured by the admission of excusing conditions.[84]

It is a straightforward but powerful point along at least two dimensions. The first is temporal. Although it is absolutely true that punishing an inculpable offender will not have deterred him from his past offense, it does not follow that inflicting punishment now will not deter him from future offenses, particularly if his past offense was a function of ignorance or mistake that can be avoided in the future. The second dimension draws on the distinction between specific and general deterrence. Punishing an inculpable offender may not serve to deter him, but that does not mean that utility would not be served because punishing him will have a deterrent effect on other potential offenders.[85] Furthermore, as Hart points out, a punitive regime uncomplicated by excuses may provide greater deterrence precisely because potential offenders cannot entertain the possibility of escaping punishment by malingering.[86]

The Court's logic in *Calandra* follows Bentham's reconstruction of common law defenses and is therefore equally vulnerable to Hart's critique. Recall that the Court starts with the

---

[83] *Id.*

[84] HART, *supra* note 79, at 19.

[85] Gary Becker suggests a similar conclusion in *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

[86] *Id.*

proposition that the only reason to inflict the exclusionary rule in any given case is its potential to deter the offending officer and other similarly situated officers from perpetrating Fourth Amendment violations in the future. Because, by hypothesis, officers who engage in searches are primarily interested in securing evidence that will be admissible at trial, the Court concludes that enforcing the exclusionary rule in grand jury proceedings "would deter only police investigation consciously directed toward the discovery of evidence solely for use in the grand jury investigation." As Hart's critique of Bentham suggests, this conclusion does not follow. First, it is not necessary that an officer be interested "solely" in grand jury proceedings. He may well be deterred if grand jury proceedings are among a series of law enforcement goals. Second, and following Hart, although it might be true in any given case that the *threat* of exclusion in the grand jury context may not deter an officer who is neither aware of nor interested in grand jury proceedings, exclusion in the grand jury context surely would add to the general deterrent threat against all officers.[87]

This is a narrow point to be sure. It is nevertheless revelatory. Recall that our initial concern with *Calandra* was that it creates a contemporary silver platter doctrine. Our objection is not simply that doing so contradicts the Court's holding in *Elkins*. Rather, our concern is that the Court's field of vision in *Calandra* and its progeny is artificially constrained by the spectacular non sequitur, blinding it both to the deterrence potential of the exclusionary rule in these cases and to the positive incentives it is creating for police to violate the Fourth Amendment. In the remainder of this essay we argue that the Court has routinely indulged the spectacular non sequitur when justifying the collateral use doctrine. As a result, the Court has routinely misidentified the constituents of its deterrence calculation. As a consequence of this miscalculation, the Court has created a series of powerful incentives for a whole range of government agents to violate Fourth Amendment rights.

[87] This is essentially the same point endorsed by the Court in its investigative use cases, where it has barred officers from exploiting illegally seized evidence to advance their investigations, without regard to whether their intentions when violating the Fourth Amendment was to seize evidence for later admission at trial. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 484-91 (1963).

The Court's primary concern in *Elkins* was to eliminate these incentives out of respect for general deterrence goals lest the Court promote Fourth Amendment violations. Although we would prefer to see consistency in the Court's jurisprudence, our core objection here is not that the Court has serially contradicted the holding in *Elkins*. Rather, our concern is that the Court has ignored the wisdom of *Elkins*. We begin with grand jury proceedings, the collateral forum at stake in *Calandra*.

THE PATHOLOGICAL CONSEQUENCES OF THE CONTEMPORARY SILVER PLATTER DOCTRINE PART 1: GRAND JURY PROCEEDINGS

Calandra established an exception to the exclusionary rule for grand jury proceedings and thereby initiated a series of cases reconstituting the silver platter doctrine. The Court justified opening a collateral avenue for the use and admission of illegally seized evidence on the ground that officers are engaged in detecting and securing evidence for criminal trials, and that, therefore, suppressing evidence in grand jury proceedings would only deter officers who are "solely" interested in obtaining evidence for a grand jury proceeding.[88] This reasoning marks a clear instance of the spectacular non sequitur. Although it may well be true that the threat of exclusion in grand jury proceedings does not threaten officers who are not thinking about the grand jury when they violate the Fourth Amendment, this does not mean that actual enforcement of the exclusionary rule in the grand jury will not secure a higher measure of conformity with the Fourth Amendment in general, particularly given the central role of the grand jury in many law enforcement officers' lives. As we will argue in this section, taking note of the role of the spectacular non sequitur in the Court's logic in *Calandra* reveals that its deterrence calculations are artificially constrained, naïve, and that its holding therefore incentivizes Fourth Amendment violations.

[88] Calandra v. United States, 414 U.S. 338, 350 (1974).

Although the grand jury is technically not an adversarial proceeding and does not engage in determinations of guilt or innocence,[89] it has a long history in our criminal justice system as a check on law enforcement.[90] In this role the grand jury's task in felony cases is to decide whether evidence arrayed by the government demonstrates probable cause sufficient to justify prosecution.[91] The Fifth Amendment provides a right to a grand jury indictment in the federal courts.[92] That right has not been incorporated to the states,[93] but just under half of the states nevertheless require a grand jury indictment for serious crimes.[94] Where it is in use, the grand jury also serves critical law enforcement functions during investigations.[95] Because it has expansive subpoena powers, the grand jury can make demands on witnesses that police and prosecutors cannot. As a consequence, law enforcement investigations often are conducted in conjunction with the grand jury. When this is the case, the grand jury stands not between arrest and indictment, but as the gatekeeper on arrest and is therefore a primary forum of concern for law enforcement officers.

By creating a silver platter doctrine for grand jury proceedings, *Calandra* gives officers license to violate the Fourth Amendment in order to achieve their immediate professional goals. Whether wearing its investigator or its guardian hat, the grand jury figures prominently in the immediate interests of law enforcement agents—and often looms much larger than a criminal trial. Police

---

[89] John C, Erb, *An Unexcited View of* United States v. Calandra, 51 Chi. Kent L. Rev. 212, 214 (1974).

[90] *Id.* at 213 (citing Hale v. Henkel, 201 U.S. 43, 59 (1906), and Wood v. Georgia, 370 U.S. 375, 390 (1962).

[91] *See* RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 303-04 (2008) (explaining the grand jury's function as a "shield" to protect a citizen's unfounded prosecution).

[92] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury ….).

[93] *See* Hurtado v. California, 110 U.S. 516 (1884).

[94] *See supra* note 91, at 304.

[95] Erb, *supra* note 89, at 213.

officers usually are rated and compensated based on arrests rather than convictions.[96] As a consequence, securing a grand jury indictment is an end in itself from an officer's point of view. This is obviously the case where the grand jury is conducting an original investigation and its decision to return a true bill stands between the officer and a closed case file. It is also true in cases where the grand jury is acting as a gatekeeper between arrest and indictment. Should the grand jury decline to indict, the case will remain open, a red mark on the officer's record waiting to go black. As a consequence, police officers have an immediate interest in obtaining evidence sufficient to support an indictment. By contrast, criminal trials frequently do not go forward for months or years after an arrest; and acquittals seldom result in a closed case's being reopened unless there is evidence that the person put on trial was actually innocent. It follows that, from a deterrence point of view, law enforcement officers care a great deal about the outcome of grand jury proceedings, even if it is not their "sole" concern.

By creating a blanket silver platter doctrine under which illegally seized evidence can be admitted during grand jury proceedings, the *Calandra* Court introduced powerful and immediate incentives for officers to violate the Fourth Amendment.[97] That incentive is even more compelling given the significant role of plea bargaining in our justice system. The vast majority of criminal prosecutions are resolved by plea bargain rather than at trial.[98] In 2009 alone, over 95% of judgments entered in federal courts were based on guilty pleas.[99] An indictment, or the threat of an indictment, gives prosecutors incredible bargaining power during plea negotiations. The prospect of

---

[96] Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 377 (1999). Slobogin cited sociological literature about both Philadelphia and New York police officers to reach this conclusion. According to these studies, the primary goal of law enforcement is to get a "collar." *Id.*

[97] William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 385-88 (1981).

[98] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464-66 (2004).

[99] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231674, PROBATION AND PAROLE IN THE UNITED STATES 40 (2009) (Appendix Table 19).

having this leverage not only provides officers with an immediate incentive to violate the Fourth Amendment in order to secure evidence that can be presented to the grand jury, it encourages prosecutors to look the other way and provides them with explicit license to exploit the fruits of Fourth Amendment violations. The silver platter doctrine created in *Calandra* therefore goes beyond encouraging police officers to violate the Fourth Amendment; it also threatens the moral integrity of prosecutors as agents of justice by creating incentives for them to exploit and therefore endorse illegal searches and seizures.

The incentive for police officers and prosecutors to violate the Fourth Amendment is particularly strong in organized crime and conspiracy cases.[100] Here the dominant investigative and prosecutorial strategy is to leverage relatively minor participants with the threat of lengthy sentences in order to secure their cooperation and testimony.[101] These are not cases on the margin. The investigation and prosecution of drug conspiracies dominate contemporary law enforcement practice.[102] With the grand jury silver platter doctrine in place, beat cops and detectives have daily incentives to commit routine Fourth Amendment violations as they troll for the small fish needed to catch the bigger fish.[103]

This iteration of the contemporary silver platter doctrine has a further consequence, which is to draw a veil over the actual conduct of law enforcement. In his *Calandra* dissent, Justice Brennan expressed his unease with the prospect that the majority's opinion left the door ajar for law enforcement officers to violate the Fourth Amendment at will.[104] The institutional analysis we have presented gives considerable weight to his concerns. Perhaps more worrisome is that the inability of

---

[100] Joseph J. Barone, Calandra—*The Present Status of the Exclusionary Rule*, 4 CAP. L. REV. 95, 105 (1974).

[101] *See* Neal Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1309-20 (2003).

[102] Welsh S. White & Robert S. Greenspan, 118 U. PA. L. REV. 333, 351 (1969).

[103] *See* Katyal, *supra* note 101, at 351.

[104] *Calandra*, 414 U.S. at 365 (Brennan, J., dissenting).

defendants to litigate Fourth Amendment issues at the grand jury stage and the prominent role of plea bargaining in our system combine to make it impossible to discover the extent of the epidemic. That mystery is discomfiting of itself, but also bespeaks a broad abdication of the judiciary's role as a Fourth Amendment guardian and check on law enforcement officers engaged in the "competitive enterprise of ferreting out crime."[105]

THE PATHOLOGICAL CONSEQUENCES OF THE CONTEMPORARY SILVER PLATTER DOCTRINE PART 2: IMMIGRATION PROCEEDINGS

The Court placed immigration removal hearings outside the scope of the exclusionary rule in *INS v. Lopez-Mendoza*.[106] The Court's reasoning in that case is built around the same spectacular non sequitur introduced in *Calandra*. Specifically, the Court argued that law enforcement officers are primarily interested in criminal law enforcement, not immigration enforcement, and that imposing the exclusionary rule in immigration proceedings therefore offers little or no additional deterrence benefit beyond that provided by the threat of suppression in criminal trials.[107] To paraphrase Hart, although it may well be true that the threat of exclusion in removal proceedings does not threaten officers who are not thinking about removal proceedings when they violate the Fourth Amendment, this does not mean that actual enforcement of the exclusionary rule in removal hearings will not secure a higher measure of conformity with the Fourth Amendment in general. Hart's point takes on particular weight here because, in addition to indulging a non sequitur, the Court in *Lopez-Mendoza* ignored the large cadre of government officials whose primary duty is to pursue removal and also rested its holding on a naïve view of the deep relationships between law enforcement and

---

[105] Johnson v. United States, 333 U.S. 10, 14 (1948); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 396-97 (1981).

[106] 468 U.S. 1032 (1984). That rule has been modified slightly by the Board of Immigration Appeals, which will inflict the exclusionary rule in "egregious" cases that implicated "fundamental fairness." *See, e.g.*, United States v. Almeida-Amaral, 461 F.3d 231 (2nd Cir. 2006); United States v. Gonzalez-Rivera, 22 F.3d 1441 (9th Cir. 1994). Cases in which that rule has been applied are few and far between, however, and do little to alter the core shift in incentives accomplished by *Lopez-Mendoza*.

[107] *Id.* at 1040-44.

immigration enforcement. As the Court pointed out in *Padilla v. Kentucky*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[108] Moreover, prosecuting removal is often a primary goal of law enforcement officers. That is certainly true of immigration enforcement agents, to whom the Court effectively grants a license to violate the Fourth Amendment; but it is also increasingly true of law enforcement officers in general.

In the years since *Lopez-Mendoza* was decided in 1984, immigration enforcement and removal have become an increasingly central law enforcement obsession. Political pressure and demagoguery about immigration has a long history in America,[109] but contemporary passions have their roots in the late decades of the twentieth century and the terrorist attacks of September 11, 2001.[110] In 1996, Congress passed a law empowering state and local authorities to enforce some federal immigration laws.[111] The year that law went into force 50,000 aliens were removed from the United States.[112] A year later that number had more than doubled to 114,462.[113] It continued to rise in subsequent years, reaching 174,813 per year by 1998. Those numbers alone provide substantial evidence that

---

[108] 130 S.Ct. 1473, 1480 (2010).

[109] *See generally* HUMPHREY JOSEPH DESMOND, THE KNOW NOTHING PARTY: A SKETCH (1905).

[110] *See, e.g.*, Thomas Farragher, *Immigration Debate Nears Boiling Point: A Hot Issue on Super Tuesday, It Will Burn in California*, San Jose Mercury News, March 12, 1996 at A1 (reporting on the immigration debate between Pat Buchanan and Bob Dole during the Republican primary season).

[111] *See* 8 U.S.C. § 1252(c) (authorizing state and local authorities to arrest and detain illegal aliens who have previously been convicted of a felony or who reenter without permission of the Attorney General after deportation).

[112] *Aliens Removed or Returned*, 1892–2010, available at http://www.dhs.gov/files/statistics/publications/YrBk10En.shtm.

[113] As Maureen Sweeney explains, the history of current immigration law is far more complex and no one change or development can be tagged with responsibility for the dramatic rise in immigration removals since the mid-1990's. *See* Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. REG. 47 (2010). It is beyond our means or purposes here to offer a contrary reductivist explanation. Rather, our point is that the rise both signifies and engenders heightened focus on immigration enforcement among law enforcement officers at all levels.

immigration enforcement, and therefore removal, had become a central focus for law enforcement by the late 1990's.[114] Then came the terrorist attacks of September 11, 2001 (9-11).

The creation of new agencies and passage of new federal and local laws in the wake of 9-11 made immigration matters an even more central feature of law enforcement consciousness at the federal, state, and local levels. Created in 2003, Immigration and Customs Enforcement (ICE) is the principal investigative unit of the Department of Homeland Security where it holds a diverse brief of criminal and immigration matters.[115] With over 20,000 employees, ICE is also the second largest investigative unit in the federal government behind the Federal Bureau of Investigation (FBI).[116] For these officers, immigration enforcement and removal is a primary investigative goal. After *Lopez-Mendoza*, it is a goal that they are free to pursue beyond effective Fourth Amendment review.[117]

As the federal government has expanded its primary commitment to immigration enforcement it has also developed extensive cooperative relationships with local and state law enforcement agencies, bringing removal proceedings closer to the front of the minds of state and local law enforcement. Soon after 9-11, President George W. Bush's administration announced plans to integrate local police as a massive "force multiplier" to assist overburdened federal immigration agencies.[118] The explicit goal was to expand the scope of state and local authorities to enforce civil immigration laws.[119] The Immigration and Naturalization Service and then its

---

[114] *Id.*

[115] *See About ICE*, U.S. Dept. of Homeland Sec., http://www.ice.gov/about/overview/.

[116] *Id.*

[117] *Cf.* United States v. Calandra, 414 U.S. 338, 366 (1974) (Brennan, J., dissenting) ("The advantage of the exclusionary rule . . . is that it provides an occasion for judicial review").

[118] Hannah Gladstein et. al., *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Criminal Information Center Database, 2002–2004*, prepared for the Migration Policy Institute at New York University School of Law, available at http://www.migrationpolicy.org/pubs/287g-divergence.pdf at 6 (quoting a letter from then White House Counsel Alberto Gonzalez to the president of the Migration Policy Institute).

[119] This marked a change in position from the belief that Congress preempted state and local police from enforcing civil immigration laws and was circulated by an Office of Legal Counsel Memo, available at www.aclu.org/FilesPDFs.ACF27DA.pdf. The government initially refused to release the memo, but was ultimately

successor, the Department of Homeland Security, advanced this goal by several means. To start, these agencies began entering civil immigration information into the National Crime Information Center, which is a crime and offender database maintained by the FBI.[120] This allowed every "local police officer writing a traffic ticket to determine [whether] a violator is subject to a deportation order."[121] In 2008, that arrangement become reciprocal through the federal "Secure Communities" program, which allows ICE to screen automatically arrest data from 1,595 communities in forty-four states for potential immigration violators and then to issue "detainers" that authorize local law enforcement to seize and hold any suspected violators.[122] Federal officials also began attending local law enforcement meetings to encourage state and local officers to make enforcing federal immigration law a part of ordinary policing.[123]

In 2002, pursuant to Section 287(g) of the Immigration and Nationality Act,[124] federal agencies began entering into explicit agreements with state and local agencies to enforce federal immigration laws. These "287(g) programs" enable local agencies to combine law enforcement with the "functions of an immigration officer in relation to investigation, apprehension, or detention of aliens in the United States."[125] The 287(g) programs also provide extensive training for local law

---

forced to do so under the Freedom of Information Act. *See* National Council of La Raza v. Department of Justice, 411 F.3d 350, 353 (2d. Cir. 2005).

120 Mary Beth Sheridan, *INS Seeks Law Enforcement in Aid in Crackdown; Move Targets 300,000 Foreign Nationals Living in U.S. Despite Deportation Orders*, Washington Post, Dec. 6, 2001, at A25.

121 *Id. See also*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (2004) (noting that this strategy was central to the "war on terror" after the 9/11 attacks).

122 *See* Aarti Kohli, Peter L. Markowitz, & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, Chief Justice Earl Warren Institute on Law and Social Policy (October, 2011), available at *http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf* . This program is presently the target of a legal challenge mounted by students at the Yale Law School. *See* http://www.nhregister.com/articles/2012/02/22/news/doc4f45623a99923180233858.txt.

123 *See* Wishnie, *supra* note 121, at n.16 (citing statements from Kris Kobach, Office of the Attorney General, for statements made at the Criminal Justice Information Services Division, Advisory Policy Board Meeting 45-48 (June 4-5, 2003)).

124 Codified at 8 U.S.C. §1357(g) (2006).

125 8 U.S.C. 1357(g)(7)(8) (2006). This would seem to further damn the notion that alternate remedies would be available for a victim of Fourth Amendment violations as a result of immigration enforcement. *Cf.* United States v. Lopez-

enforcement officers on immigration enforcement matters.[126] Part of this training enables use of "*Blackie*" warrants,[127] which sanction immigration searches based on less than probable cause and also do not require a particularized description of the place to be searched.[128] These warrants fall well short of basic Fourth Amendment standards, and are now at the disposal of local law enforcement agencies that accept co-responsibility for enforcing federal immigration laws.[129] As of 2011, ICE had entered into 287(g) agreements with sixty-nine law enforcement agencies in twenty-four states.[130]

These federal outreach programs have been very successful in bringing the prospect of removal to the front of local law enforcement consciousness during their normal engagements with citizens. For example, one recent study showed that eighty-three percent of the immigrants arrested in Gaston County, North Carolina, through their 287(g) program were only charged with traffic violations. This suggests that, even at the most routine level of engagement between citizens and

---

Mendoza, 468 U.S. 1032, 1045 (1984) (arguing that a civil remedy would still be available for victims even absent the exclusion remedy).

[126] A copy of this agreement is available at http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf. While the agreement can be modified around the edges to suit the specific agency, it is a fairly standard form.

[127] These warrants are named for the case that approved them, *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981). Although the federal government does not publish its 287(g) training manuals, a copy of the manual followed by officers in Frederick County, MD, is available at http://www.scribd.com/doc/21968724/ICE-287-g-Participant-Workbook-Search-and-Seizure.

[128] *Blackie's*, 659 F.2d at 1222 (reasoning that, since the warrant request arose from administrative functions of civil immigration enforcement, the more stringent standards of a criminal search warrant were unnecessary).

[129] For example, an administrative search warrant was used in *INS v. Delgado*, 466 U.S. 210 (1984). The 287(g) training manual does draw a distinction between the requirements for criminal warrants and administrative warrants. *See supra* note 127. In practice, however, broader power to enforce civil immigration through arrest and detention means local law enforcement can pick and choose whether they are acting as police investigating crime or administrative agents looking for aliens. Ingrid V. Eagly, *Prosecuting Immigration*, 104 N.W. L. REV. 1281, 1342 (2010). This framework for immigration enforcement has enabled law enforcement to skirt basic constitutional rules governing criminal procedure. Adam Cox & Eric. A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN L. REV. 809, 840 n.114 (2007). *See also* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996) (suggesting that the government's natural incentive is "to evade or exploit the procedural civil-criminal line by changing the substantive civil-criminal line.").

[130] Data available at http://www.ice.gov/news/library/factsheets/287g.htm.

law enforcement officers, immigration is a primary focus.[131] If there was any doubt, officers in Colorado are now advised as a matter of policy to run immigration checks during traffic stops.[132] This increased focus on the prospect of removal by police has been remarkably effective. In the nine years since 287(g) went into effect, removals have more than doubled, from 165,100 in 2002 to 387,242 in 2010.[133]

Anxious to be of additional service, many states have reacted to continuing complaints about illegal immigration[134] by enacting laws that require local law enforcement officers to enforce federal immigration policy. Among the most notable are Alabama,[135] Arizona,[136] Georgia,[137] Indiana,[138] South Carolina,[139] and Utah,[140] each of which has passed stringent laws in recent years requiring state and local authorities to expend time and resources detecting and detaining illegal immigrants.[141]

---

131 *The Policies and Politics of Local Immigration Enforcement Laws* (American Civil Liberties Union of North Carolina Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina, Feb. 9, 2009), at 8.

132 *See, e.g.*, Report on the Governor's Working Group on Law Enforcement and Illegal Immigration, 15–16, available at http://cdpsweb.state.co.us/immigration/documents/FINAL%20Report%202%20for%20Eservice.pdf (detailing Colorado state police process for contacting various databases during a traffic stop to determine if a suspect is an alien).

133 To add some perspective, only 3,000 aliens were removed in 1892. That number rose slowly to reach 50,000 in 1995. The seven-fold increase in the last sixteen years is historically unprecedented.

134 *See, e.g.*, Julia Preston, *Agents' Union Stalls on Deportation Training Rules*, NY Times, January 7, 2012 (chronicling the debate between President Obama and the Immigration and Customs Enforcement agents' union on how best to enforce immigration laws), available at http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html?_r=1&scp=5&sq=obama%20immigration%20enforcement&st=cse; Jim Rutenberg and Jeff Zeleny, *Romney Stays on the Offense With Gingrich*, NY Times, January 26, 2012 (noting the debate over immigration policies in a Republican primary debate in Florida), available at http://www.nytimes.com/2012/01/27/us/politics/a-grueling-day-on-the-stump-then-a-debate.html?pagewanted=2&sq=romney%20immigration%20enforcement&st=cse&scp=5.

135 Al. Code § 31-13.

136 A.R.S. § 11-1051.

137 Ga. Code Ann. § 17-5-100.

138 In. Code Ann. § 5-2-18.2.

139 SC ST § 17-13-170.

140 Ut. Code Ann. § 76-9-10. Other states have enacted laws that work at a different link on the law enforcement food chain. Tennessee amended their public safety code, requiring a procedure to verify the citizenship status of any individual who is arrested, booked, or confined for any period in any county or municipal detention facility. TN Code Ann. § 40-7-123(1).

141 Several of these codes are presently the subject of legal challenges. *See, e.g.*, Arizona v. United States, No. 11-182, 564 U.S. __ (Dec. 12, 2011); United States v. Alabama, No. 11-14532, (11th Cir. 2011); Hispanic Interest Coalition of

Many more plan to follow suit. In 2011 alone, state legislatures introduced a combined 1,607 bills related to immigration.[142] Most of these laws require that state and local law enforcement officers verify citizenship during any "lawful stop, detention, or arrest."[143] Some also empower private citizens to void without recourse any contracts made with those who cannot prove lawful immigration status, even if consideration has already been given and received.[144] As a result, private citizens feel empowered to enforce their own brand of "ad hoc immigration justice," by, for example, refusing to sell groceries to individuals who cannot prove their immigration status.[145] Some laws also include provisions granting citizens standing to bring civil suits against officials who fail to seek full enforcement of these provisions.[146]

Given the current status of the law and law enforcement practice, it is simply implausible to suggest, as the Court did in *Lopez-Mendoza*, that police do not prioritize immigration enforcement or pursue it as an end in itself.[147] These developments have solidified immigration enforcement's place in the professional consciousness of every police officer in the nation. As a consequence, it can no longer be said, if it ever could be, that the silver platter doctrine created by the Court in *Lopez-Mendoza* does not provide significant incentives for police officers across the nation to take

---

Alabama v. Bentley, No. 11-14535 (11th Cir. 2011); Georgia Latino Alliance for Human Rights v. Deal, No. 11-01804 (11th Cir. 2011).

142 Alex Dobuzinski, *States Introduce More Immigration Laws, Enact Fewer*, Reuters, December 13, 2011, available at http://www.reuters.com/article/2011/12/13/us-immigration-states-idUSTRE7BC23620111213.

143 Ut. Code Ann. § 76-9-1003(1). *See also* A.R.S. § 11-1051(B) (requiring law enforcement to make a reasonable attempt to determine the citizenship status of an individual during any lawful stop, detention or arrest when reasonable suspicion exists that the suspect may be an alien); Ga. Code Ann. § 17-5-100(b) (authorizing law enforcement to verify immigration status when an officer has probable cause to believe the suspect has committed a criminal violation);

144 Because the Alabama provision makes contracts with illegal aliens unenforceable in court, some immigrant workers have been told they will not be paid for work they have already done. *See This American Life: Reap What You Sow*, Chicago Public Radio (Jan. 27, 2012) (transcript available at http://www.thisamericanlife.org/radio-archives/episode/456/transcript).

145 *Id.*

146 Al. Code § 31-13-6(d); A.R.S. § 11-1051(H).

147 In fact, the increasing integration of criminal law and immigration law has given birth to a whole literature on "crimmigration," which even has its own blog. *See* http://crimmigration.com; *see also supra* note 129.

significant liberties with the Fourth Amendment. For officers acting on legislative directives to enforce immigration laws the exclusionary rule serves no deterrent purpose at all. The whole point, after all, is that the exclusionary rule does not apply. Any evidence they seize will be admissible in a subsequent immigration hearing regardless of Fourth Amendment concerns.[148] After *Lopez-Mendoza* officers are therefore encouraged to stop for any reason or for no reason at all and to engage in all manner of intrusive and unreasonable searches on little or no suspicion if there is the possibility that removal might be in the offing. In fact, this sort of systematic violation of Fourth Amendment rights may be required by laws demanding that police officers enforce federal immigration law "to the full extent permitted."

The incentive structure created by the synergy between *Lopez-Mendoza* and contemporary immigration law and policy raises obvious equal protection concerns.[149] Others have given powerful voice to the worries about racial profiling that bubble from this witches' brew of federal law, local statute, and the silver platter doctrine.[150] Allegations of racial targeting have never been remediable by the exclusionary rule, of course.[151] We are not suggesting it should be. There is a substantial difference between remedy and reward, however. Our concern here is that the combination of *Lopez-Mendoza* and changes in the priorities of local law enforcement has created affirmative

---

[148] For that matter, it might also be admissible in a criminal trial. After all, any officer who is primarily interested in enforcing immigration policy will not be deterred by the remote threat of suppression at a criminal trial. Such are the vagaries of the spectacular non sequitur.

[149] *See* Jane Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553 (2008).

[150] *See* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L. J. 1005, 1007 (2010) (suggesting that racial profiling, while frowned upon in the criminal context, has long been a feature of immigration enforcement).

[151] Whren v. United States, 517 U.S. 806 (1996). Despite this general limitation, some courts have found that the fruits of searches motivated by racial bias may be suppressed where the violation is sufficiently "egregious" to implicate "fundamental fairness." *See, e.g.*. United States v. Almeida-Amaral, 461 F.3d 231 (2nd Cir. 2006); United States v. Gonzalez-Rivera, 22 F.3d 1441 (9th Cir. 1994).

incentives for officers to engage in disparate treatment of racial minorities.[152] These concerns have been realized throughout the country. For example, the Department of Justice ("DOJ") recently concluded that the East Haven, Connecticut, police department engages in biased policing against Latinos in violation of the Fourteenth Amendment.[153] Likewise, the DOJ concluded that the Maricopa County, Arizona, police department routinely engages in unconstitutional policing, including profiling of Latinos and unlawful stops, arrests, and detentions.[154]

These concerns have taken on more weight in the wake of recent decisions by some circuit courts allowing law enforcement to admit illegally seized evidence at a criminal trial if the evidence is the fruit of a Fourth Amendment violation motivated by an interest in civil removal rather than criminal investigation.[155] For example, in *United States v. Oscar-Torres*, North Carolina police officers working in concert with ICE agents arrested Oscar-Torres without any reasonable, particularized suspicion of illegal activity.[156] Agents took Oscar-Torres to ICE headquarters, where he was fingerprinted. When his fingerprints were run through an FBI database, officers discovered that Oscar-Torres had previously been deported.[157] At a subsequent criminal trial, where he was charged with illegal reentry under 18 U.S.C. §1326(a),[158] Oscar-Torres moved to suppress his fingerprints as the fruits of an illegal arrest. The Fourth Circuit Court of Appeals, relying in part on *Lopez-Mendoza*,

---

[152] This is not at all far-fetched. For example, Alabama police arrested a Japanese auto executive, who was on assignment at a local Honda plant, at a roadblock even though he had his passport and an international driver's license. Arian Campo-Flores & Miriam Jordan, *Alabama Immigration Law Ensnares Auto Workers*, WALL ST. J., Dec. 1, 2011, http://online.wsj.com/article/SB10001424052970204397704577070811936737218.html.

[153] A summary of these findings is available at http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf.

[154] http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

[155] *See, e.g.*, United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007); United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009); United States v. Olivares-Rangel, 458 F.3d 1104, 1116 (10th Cir. 2006); United States v. Bowley, 435 F.3d 426, 430 (3d Cir. 2006); United States v. Garcia-Beltran, 389 F.3d 864, 868 (9th Cir. 2004).

[156] *Oscar-Torres*, 507 F.3d at 227.

[157] *Id.*

[158] Prosecutions for violation of 1326(a) are far and away the most common in the federal system, comprising fully 23% of the criminal docket in federal courts. *See* http://trac.syr.edu/immigration/reports/251/. http://trac.syr.edu/immigration/reports/271/.

held that the identification evidence should be suppressed if the law enforcement officers' primary purpose in gathering that evidence was to investigate possible criminal conduct but should not be suppressed if their primary purpose was to gather evidence of civil immigration violations.[159] The court then remanded for further fact finding on the motivations of the offending officers.[160] "If," the court wrote, "illegally obtained evidence that law enforcement officers intend to use in civil removal hearings cannot be suppressed because exclusion will not effectively deter unlawful arrests, as *Lopez–Mendoza* holds, then suppressing that evidence in an unanticipated and unforeseen criminal prosecution surely cannot provide any additional *ex ante* deterrence."[161]

Oscar-Torres, and similar precedents, layer one silver platter doctrine upon another. The Supreme Court in *Lopez-Mendoza* created a new silver platter doctrine that allows the government to make free use of illegally seized evidence in civil removal proceedings. In the years since that case was decided, civil immigration enforcement has increasingly become a primary concern for law enforcement officers at all levels. Because the exclusionary rule does not bar admission of illegally seized evidence from civil removal proceedings, officers interested in detecting immigration violations have every motivation to routinely effect illegal searches and seizures because they know that the Fourth Amendment exclusionary rule will not frustrate their primary interests. Furthermore, they now know that if they violate the Fourth Amendment out of an apparent interest in civil immigration enforcement and happen upon evidence of criminal activity in the process, then the combination of the *Lopez-Mendoza* silver platter doctrine, the spectacular non-sequitur, and the *Oscar-Torres* silver platter doctrine will allow them to use that illegally seized evidence at a subsequent criminal trial. *Lopez-Mendoza* therefore not only incentivizes Fourth Amendment violations by providing an alternate venue for tainted evidence, circuit cases decided in its wake have now opened

[159] *Oscar-Torres*, 507 F.3d at 231–32.

[160] *Id.*

[161] Id. at 231.

a backdoor for admitting that evidence in criminal forums. We cannot imagine a more chilling example of the pathological potential of the incentives created by the silver platter.

The policies and practices encouraged by this perfect storm of silver platter doctrines and enforcement policy take little imagination to picture but certainly shock the conscience. If an officer sees anyone who looks to her like someone who could be foreign because of complexion, phenotype, accent, comportment, clothing, or demeanor, then she has no incentive not to stop him, arrest him, fingerprint him, and inventory his possessions as part of an administrative process to confirm his immigration status. If nothing turns up, then she can release him with apologies. However, she also knows that any evidence she discovers will be admissible not only at a removal hearing, but also at a criminal trial as long as she can plausibly show that her conduct constituted reasonable steps taken to enforce civil immigration laws. There is always the threat of a lawsuit, of course, but our officer knows that these suits are vanishingly unlikely to be filed and that, if they are, then qualified immunity and insignificant damages awards make them unlikely to come to much.[162] She has, in short, little or no reason to respect the Fourth Amendment. In some respects, to do so would be irrational given her goals and incentives. In our view, the only way to resolve this absurd state of the law, and to prevent inevitable injustices, is to follow the Court's lead in *Elkins* by revoking the silver platter doctrine and thereby reducing incentives to violate the Fourth Amendment.

THE PATHOLOGICAL CONSEQUENCES OF THE CONTEMPORARY SILVER PLATTER DOCTRINE PART 3: PAROLE REVOCATION PROCEEDINGS

Misunderstandings of the pathological law enforcement incentives created by contemporary silver platter doctrines continued to plague the Court in *Pennsylvania Board of Probation v. Scott*,[163]

---

[162] *See generally* Laurin, *supra* note 17.

[163] 524 U.S. 357 (1998).

where it held that the exclusionary rule does not bar admission of illegally seized evidence in probation and parole revocation hearings.[164] Scott pleaded *nolo contendere* in 1983 to a charge of third degree murder and was released on parole in 1993.[165] Five months later, parole officers searched his home without a warrant, consent, or a claim of emergency.[166] During that search they discovered several firearms, possession of which constituted a violation of Scott's terms of release. At a subsequent revocation hearing Scott objected on Fourth Amendment grounds to admission of the guns into evidence. His request was denied and his parole was revoked. He appealed to the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court, which granted him relief, holding that the scheme for regulating searches of parolees and probationers administered by the Pennsylvania Board of Probation and Parole failed to provide sufficient protections for even the limited Fourth Amendment rights afforded to parolees under its supervision. Justice Thomas, writing for the Court, reversed.

According to the *Scott* Court, enforcing the exclusionary rule in parole hearings would serve no deterrent purpose because offending officers are generally "unaware that the subject of [their] search[es] [are] parolee[s]."[167] In this circumstance, Justice Thomas wrote, "the officer will likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial."[168] "The likelihood," he continued "that illegally obtained evidence will be excluded

---

[164] To clarify terms, "probation" usually refers to a constraint on freedom enforced as a sentence in itself. "Parole" usually refers to constraints on freedom enforced as a condition of early release from a prison term. Although the Court in *Scott* was confronted with a parolee, subsequent courts have assumed that *Scott* applies equally to probation revocation hearings. *See, e.g.*, United States v. Armstrong, 187 F.3d 392 (4th Cir. 1999). *But see*, State v. Scarlet, 800 So.2d 220 (Fla. 2001) (holding that the exclusionary rule applies to probation revocation hearings because they are very different from parole revocation hearings); Logan v. Commonwealth, 666 S.E.2d 346 (Va. 2008) (holding that the exclusionary rule applies to probation revocation hearings when an officer acts in bad faith).

[165] *Scott*, 524 U.S. at 359-60.

[166] *Id.* 360. Immediately following his arrest, Scott gave the law enforcement officers keys to his home, which was owned by his mother. The officers waited for his mother to arrive before searching. While the officers did not request or receive consent to search, Scott's mother did show them to her son's bedroom. *Id.*

[167] *Id.* at 368.

[168] *Id.*

from trial provides deterrence against Fourth Amendment violations, and the remote possibility that the subject is a parolee and that the evidence may be admitted at a parole revocation proceeding surely has little, if any, effect on the officer's incentives."[169] Because parole revocation is "outside the zone of interest" for most police officers, the Court could not see any reason to think that enforcing the exclusionary rule in parole hearings would result in appreciable deterrence of law enforcement. As for parole officers who do know parolees' statuses, the Court saw no reason to believe that the exclusionary rule would affect them because parole officers are not "engaged in the often competitive enterprise of ferreting out crime."[170] Both views indulge the spectacular non sequitur and therefore misunderstand law enforcement officers' motives[171] and the effects on general deterrence wrought by creating a silver platter doctrine.

First, to again paraphrase Hart, it may be true that the threat of excluding evidence from a parole revocation hearing may not deter an officer entirely ignorant of the possibility that his investigation might lead to that forum. It does not follow, however, that actually inflicting suppression in such a circumstance would not result in greater overall compliance with the Fourth Amendment by that officer and other officers than is accomplished by creating this exception.

Second, it is demonstrably wrong that law enforcement officers are not motivated by an interest in prosecuting parole and probation violations. In fact, police and prosecutors in many jurisdictions focus on parole and probation violations as a primary law enforcement goal while others have designated special task forces that target parole and probation violators.[172] It is easy to

---

[169] *Id.*

[170] *Id.* (citations and internal quotation marks omitted).

[171] *Cf.* Bloom & Fentin, *supra* note 3, at 59.

[172] *See, e.g.*, Jordan Guin, *Eight Law Enforcement Agencies Conduct Parole and Probation Searches*, LODI NEWS-SENTINEL, May 21, 2011, http://www.lodinews.com/news/article_34eaea0d-bdcc-584e-9790-a5bcfc7dc5c8.html (detailing a task force performing parole and probation sweeps). *See also* STATE OF NEW JERSEY, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT FY 2011 FORMULA PROGRAM (2011), http://www.state.nj.us/lps/crimeplan/pdfs/JAG-2011_Program-Narrative_Attachement-1.pdf (reporting on a New Jersey program targeting parolees and probationers); HAWAI'I STATE JUDICIARY,

see why they would.[173] After all, the burden of proof in revocation hearings is much lower and there are fewer procedural safeguards.[174] By contrast, the terms of incarceration at stake are often quite long.[175] Just as was the case in *Elkins*, these incentives to violate the Fourth Amendment undermine the efforts to secure Fourth Amendment protections in a "particularly ironic way."[176] In particular, the silver platter doctrine created by *Scott* licenses policies that encourage officers to routinely violate the Fourth Amendment with the goal of prosecuting parole violations.[177] This bête noire is all the darker for the likelihood that such policies almost certainly target poor and minority populations in practice.[178]

---

http://www.courts.state.hi.us/special_projects/hope/about_hope_probation.html (last visited August 6, 2011) (describing Hawai'i's high-intensity supervision program); *Attorney General Cooper Calls for Giving Probation Data to Law Enforcement*, ISLAND GAZETTE, May 6, 2008, http://www.islandgazette.net/news-server1/index.php?option=com_content&view=article&*id*=4621:attorney-general-cooper-calls-for-giving-probation-data-to-law-enforcement&catid=18:crime&Itemid=70 (North Carolina's Attorney General sets policy keeping closer track of parolees). *See also* WISCONSIN DEPT. OF CORRECTIONS, THE 2008/2009 STUDY OF PROBATION AND PAROLE REVOCATION (2009), http://www.wi-doc.com/PDF_Files/Revocation%20Study_Full%20Report%20-%20FINAL.pdf. (examining parole enforcement policy).

[173] As Christopher Slobogin has pointed out, "In a large number of cases involving questionable stops and searches, the police do not make an arrest, either because they never intended to do so or because they find nothing." Slobogin, *supra* note 96, at 374-75. With the promise that any evidence seized will at least be admissible in a parole hearing, officers have every incentive to engage in patently illegal searches in neighborhoods and among populations where their targets are statistically more likely to be on parole or probation.

[174] Morissey v. Brewer, 408 U.S. 471, 479 (1972).

[175] In 2009, 658,800 parolees were on parole for one year or more, while only 33,579 were on parole for less than one year. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231674, PROBATION AND PAROLE IN THE UNITED STATES 40 (2009) (Appendix Table 19). This means that over 80% of parolees had a year or more sentence left to serve in prison if their parole was violated.

[176] Elkins v. United States, 364 U.S. 206, 221-22 (1960).

[177] Justice Jackson, fresh from his stint as chief prosecutor at Nuremberg, pointed out the consequences of such police practices, noting that: "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, personas and possessions are subject at any hour to unheralded search and seizure by the police." Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

[178] *See, e.g.*, Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 297. As Carol Steiker has pointed out, the fact of historical and contemporary racial bias in law enforcement has played a central role in the courts' treatment of the Fourth Amendment and the exclusionary rule. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824, 838-44 (1994). The simple fact that Fourth Amendment violations are a matter of routine for poor and minority citizens puts the lie to claims made by Richard Posner and others that "the typical [Fourth Amendment] violation consists not of harassment of the innocent but of overzealous enforcement against the guilty." Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 59. *See also infra* notes 209-10 and accompanying text.

Third, it is wrong to suggest that parole officers are not engaged in detecting and prosecuting crime. Quite to the contrary, as the Court pointed out in *Samson v. California*, one of parole officers' primary duties is to detect, document, and prosecute through the parole system crimes committed by their charges.[179] In *Minnesota v. Murphy*, the Supreme Court also pointed out that parole officers are "peace officer[s], and as such [are] allied, to a greater or lesser extent, with [their] fellow peace officers."[180] Given their aligned interests, it is no surprise that parole officers routinely cooperate with police and other law enforcement officials.[181] Although admirable in the abstract, these close working relationships raise serious Fourth Amendment concerns after *Scott*. The original silver platter doctrine was limited. If the state agents worked with or at the direction of federal agents when violating the Fourth Amendment, then the silver platter doctrine did not apply and the evidence would be excluded in federal court. There is no such limitation on the silver platter doctrine created by the Court in *Scott*. The Court therefore left the door open for police and other law enforcement agents to recruit parole officials to an ever greater degree into their "competitive enterprise of ferreting out crime," where there are powerful incentives for them to proceed without regard to, or even with contumacious disregard of, Fourth Amendment rights.[182] Here again, the only remedy is the one prescribed by the Court in *Elkins*: to revoke the silver platter doctrine.

One might respond to these concerns by pointing to the Court's contention in *Scott* that parole revocation cannot be a primary driver for law enforcement because police do not know *ex*

---

[179] 547 U.S. 843, 849 (2006).

[180] 465 U.S. 420, 432 (1984).

[181] *See Scott*, 524 U.S. 373-74 (Souter, J., dissenting) (citing United States *ex rel.* Santos v. New York State Bd. of Parole, 441 F.2d 1216, 1217 (2d Cir.1971)); Grimsley v. Dodson, 696 F.2d 303, 304 (4th Cir. 1982); State *ex rel.* Wright v. Ohio Adult Parole Auth., 661 N.E.2d 728, 730 (Ohio 1996); People v. Stewart, 242 Ill.App.3d 599, 611–12 (1993); People v. Montenegro, 173 Cal.App.3d 983, 986 (4th Dist. 1985)).

[182] *See, e.g.*, Alaska Dept. of Corrections, Probation Officer and Private Person Searches (2009), available at http://www.dps.state.ak.us/APSC/docs/legalmanual/NPROBATIONOFFICERSANDPRIVATEPERSONSEARCHES.pdf ("As a condition of parole or probation, the Court may order that the defendant subject his person, residence or vehicle to searches that will be conducted by his/her probation officers." The bulletin does not discuss the need for a warrant in these parolee searches.)

ante that a citizen whose rights are being violated is a parolee or probationer. This is naïve. "[L]ocal police know local felons."[183] They also know where the centers of criminal activity are in their jurisdictions, and therefore can place pretty good bets that a substantial proportion of citizens found on some street corners or in some bars are on parole or probation.[184] It is also an unfortunate truth that, due to a host of social factors, a higher proportion of citizens who live in poor and minority neighborhoods are on parole or probation than those who live in affluent white neighborhoods.[185] Therefore, even where a police officer's first-line goal is to detect and prosecute a crime rather than to revoke parole or probation, the collateral pathway for admission of illegally seized evidence created by the Court in *Scott* provides police with a critical safety net for a general practice of aggressive searches that cross the Fourth Amendment line if the victims are poor, minorities, or both.

This last concern cannot be overstated. Although the targets of unreasonable searches may sometimes be parolees and probationers, the incentives created by *Scott* are indiscriminate. It is therefore easy to imagine police adopting a de facto or even explicit strategy of routine Fourth Amendment violations in many urban centers or along many rural byways. Take New York City as an example. According to official records, New York City police officers conducted a record 684,000 "stops and frisks" in 2011. Only six percent of these stops resulted in arrest, raising serious

---

[183] *See, e.g.*, People v. Stewart, 242 Ill.App.3d 599, 611–12 (detailing police officer's knowledge that victim of an illegal traffic stop and search was on probation). The electronic monitoring industry has continued to expand since the mid-1980's making it all the more likely that local police know the whereabouts of local felons. By 2003, Texas, Florida, and New Jersey all used global positioning satellites (GPS) to track parolees' moves. JOAN PETERSILIA, WHEN PRISONERS COME HOME 194 (2003).

[184] For another plausible solution, see Martha Worner, *Pennsylvania Parole Bd. v. Scott: The Taking of Parolee's Fourth Amendment Right to Privacy*, 51 BAYLOR L. REV. 1115, 1144-48 (1999). Worner argues for the awareness standard, under which an officer's illegal search and seizure would be subject to exclusion if he was aware that the suspect was on parole. This would further the Court's deterrence objective, while maintaining integrity in parole search practices.

[185] In the 2010 Census, 14 percent of the population identified themselves as "black." However, a disproportionate 39 percent of the parole population in 2010 was black. Although whites constituted 75 percent of the entire United States population in 2010, they only make up 42 percent of the parole population.

concern for the constitutionality of the remainder. More disturbing still is eighty-seven percent of those stopped were black or Hispanic.[186]

As was made clear in *United States v. Payner*,[187] the contemporary silver platter doctrines remove any aversion the Court might have to these kinds of policies. According to facts accepted by the Court in *Payner*, the Internal Revenue Service (IRS) was frustrated with its inability to arrest and prosecute American citizens who were hiding income in offshore banks.[188] Agents therefore decided to employ a prostitute and a burglar to assist them in stealing bank records. According to plan, the prostitute seduced an employee of one of the suspect banks while he was in the United States on business. She then persuaded him to leave his hotel room so that the burglar could steal his briefcase. Once the briefcase was secure, the burglar worked with IRS agents to have a key fabricated and then waited while they made photocopies of its contents. Among the documents they copied were papers showing that Payner had deposited unreported income.

This operation was not the work of rogue agents. To the contrary, the agents involved sought and received prior approval from their supervisors and in-house attorneys.[189] Although illegal, the operation received approval because the agents and their legal advisors knew that they were violating the Fourth Amendment rights of the bank employee, not his clients, and that, therefore, the clients would not have "standing" to object to admission of the illegally seized evidence if they were subsequently prosecuted.[190]

Faced with these facts the district found that:

---

[186] *See* Sean Gardiner, *Stop-and-Frisks Hit Record in 2011*, WALL ST. J. (Feb, 12, 2012).

[187] 447 U.S. 727 (1980).

[188] *Id.* at 729-31; *id.* at 739-43 (Marshall, J., dissenting).

[189] *Id.* at 739.

[190] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83 (1998); United States v. Padilla, 508 U.S. 77 (1993); Minnesota v. Olson, 495 U.S. 91 (1990); United States v. Payner, 448 U.S. 911 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960).

> It is evident that the Government and its agents . . . were, and are, well aware that, under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties [whose] own privacy expectations are not subject to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties. This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares, the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel.[191]

Based on its finding that the rule on standing was being affirmatively exploited by government agents to engage in searches they knew to be illegal, the district court granted Payner's motions to suppress in order "to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."[192]

Given its deterrence concerns and frequent condemnation of flagrant Fourth Amendment violations, one would have expected the Supreme Court to affirm. It did not. Rather, it reversed on the ground that the bank employee was the only person with standing to raise a Fourth Amendment claim and that, as a general rule, granting the remedy of exclusion only to parties with standing is sufficient to deter law enforcement officers from violating the Fourth Amendment.[193] Leaving aside the fact that *Payner* itself demonstrated the folly of that hope,[194] the Court's holding in that case, combined with its holding in *Scott*, opens the door for law enforcement officers to adopt policies of routinely violating the Fourth Amendment in neighborhoods inhabited by our most vulnerable

[191] United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977).

[192] Id. at 130-31.

[193] Payner, 447 U.S. at 739-42.

[194] *See* Gray, *supra* note 16.

citizens knowing that, even if illegally seized evidence is not admissible in a criminal trial, it will be available to pursue the revocation of someone's parole or probation.[195]

There is good evidence that many of these fears have come to pass and that law enforcement increasingly is pursuing parole violations as a primary law enforcement objective in order to circumnavigate the Fourth Amendment. The Bureau of Justice Statistics publishes annual bulletins regarding probation and parole statistics in the United States. In 2009 there were 819,308 people on parole in the United States.[196] That same year 185,550 parolees returned to prison via revocation, while only 47,882 returned on new convictions.[197] This marks a dramatic shift from 1980 when only 27,000 parolees were revoked.[198] Part of this increase is a consequence of an extraordinary increase in background incarceration rates—the number of parolees who returned to prison in 2000 is roughly equal to the total number of state prisoners in 1980.[199] But the trend toward parole revocation as a primary law enforcement strategy is evident even in relative terms. For example, in 1980 only seventeen percent of the prison population consisted of parole violators, but that proportion had risen to thirty-five percent by 1999.[200] During that same twenty-year span, the number of parolees who returned to prison on new convictions tripled, but the number of parolees who returned to prison after revocation increased a staggering seven-fold.[201] That trend has

---

[195] There is, of course, the possibility that such a policy might be the target of a civil action. Unfortunately, as Jennifer Laurin has recently pointed out, the threat of civil sanction in Fourth Amendment cases against individual officers or their agencies is far too weak to provide much discouragement. *See*, Laurin, *supra* note 17.

[196] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231674, PROBATION AND PAROLE IN THE UNITED STATES 35 (2009) (Appendix Tables 14 and 19).

[197] Id. While this is less than the total in 2000, the overall parole population decreased in 2009. Id. at 6. The total number of adults on parole since 2000 steadily increased until 2007, when the number reached a plateau, and then decreased from 2008-2009. Id.

[198] *See* Jeremy Travis & Sarah Lawrence, Urban Inst., *Beyond the Prison Gates: The State of Parole in America* (2002), *available at* http://www.urban.org/UploadedPDF/310583_Beyond_ prison-gates.pdf.

[199] *Id.* at 21.

[200] *Id.* at 21.

continued apace in subsequent years,[202] encouraged as it has been by the contemporary silver platter doctrine.[203]

The results of a recent investigation of the Oakland Police Department[204] offer a disturbing case study documenting the consequences of the silver platter doctrine created by *Scott*. One anecdote tells the story. According to facts recounted in the report, officers conducting a narcotics investigation found out that a subject who allegedly sold drugs to a confidential informant was on probation.[205] The officers were aware that the subject was not listed as a probationer in another database. Although the investigation likely produced ample information to establish probable cause for a warrant, the investigating officers elected to conduct a warrantless search of the subject's residence instead.[206] When asked why they did not seek a search warrant, the sergeant in charge replied that "the use of the probation search granted the officers broader scope to search within the residence."[207] The subject filed a claim alleging illegal search, excessive force, and evidence planting.[208]

This account was published in a report by Robert Warshaw, the Independent Monitor for the Oakland Police Department, who is charged with observing the department's compliance with

---

[201] *See id.* at 21, 24 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NPS-1 SERIES, NATIONAL PRISONER STATISTICS) (emphasizing the explosive growth in parole violations from 1980 to 2000). For a full list of Bureau of Justice Statistics sources used in this report, see *id.* at 3. Based on Figure 15 of this report, approximately 25,000 prisoners returned to prison in 1980, and just under 200,000 returned in 2000.

[202] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236096, PRISONERS IN 2010 (Dec. 2011) (Appendix Table 11).

[203] For an illustration, see Worner, *supra* note 184, at 1138-40.

[204] ROBERT S. WARSHAW, EIGHTH QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE OAKLAND POLICE DEPARTMENT, DOC. NO. 673 (Jan. 17, 2012).

[205] *Id.* at 88-89.

[206] *Id.* at 89.

[207] *Id.*

[208] *Id.*

fifty-one reform measures mandated by a consent decree.[209] Although it is not part of his core reporting responsibilities, in his most recent report, Warshaw added an appendix on his own initiative analyzing searches and seizures of parolees and probationers.[210] Warshaw reported that a disproportionate number of blacks were represented in these samples. For example, ninety-one percent of the parolees or probationers stopped or arrested were black.[211] Another set of statistics suggested that law enforcement was scouring the city and confronting people in the hopes that they were on parole or probation. In one sample, sixty-nine percent of approached subjects either acknowledged that they were on probation or parole when asked or the officers already knew the subject's status.[212] Eighty-six percent of these subjects were searched, but only a very few were arrested. Of these stops, nine percent led to warrantless searches of residences.[213]

Based on his study, Warshaw concluded that Oakland police officers were relying excessively on searches of parolees or probationers and that racial minorities were too frequently the targets. He in fact found that officers routinely asked citizens about their status as parolees or probationers during casual encounters and stops without obvious justification save for an interest in searching.[214] Although this is but one example, there is no reason to believe that these practices are not occurring across the United States. A central problem, of course, is a lack of oversight and accountability. Because the exclusionary rule does not apply, Fourth Amendment issues are not litigated in parole

---

[209] *See* Aaron Sankin, *Oakland Police Department Only Weeks Away From Being Placed in Federal Control*, http://www.huffingtonpost.com/2012/01/27/oakland-police-department_n_1237785.html (Jan. 27, 2012, 7:20 PM) ("In 2000, a group rogue of Oakland police officers, calling themselves the "Rough Riders," were found to have planted evidence, used excessive force and falsified police reports. As part of a negotiated settlement three years later, the city was ordered to take 51 specific steps toward reform or else lose operational control of the department.")

[210] ROBERT S. WARSHAW, EIGHTH QUARTERLY REPORT OF THE INDEPENDENT MONITOR FOR THE OAKLAND POLICE DEPARTMENT, DOC. NO. 673, at 85-91 (Jan. 17, 2012) (Appendix B).

[211] *Id.* at 85-86.

[212] *Id.* at 86.

[213] *Id.*

[214] *Id.* at 90. Warshaw opined that "[these] practice[s] can have a chilling effect on police-community relations, and resentment over these inquires can—and does—result in citizen complaints."

proceedings and the circumstances of searches are therefore not published or made available to the public. Only because of the extreme nature of the violations in Oakland do we have a window in at all.

CONCLUSION

In addition to the grand jury, removal proceedings, and parole revocation hearings, the Court has established two other silver platter doctrines, one for civil tax suits[215] and the other for habeas corpus petitions.[216] Neither need delay us very long here. *United States v. Payner*, the facts of which are set forth in the previous section, give lie to any claim that providing a silver platter doctrine allowing illegally seized evidence to be admitted in civil tax proceedings will not encourage Fourth Amendment violations. Quite to the contrary, as the facts in *Payner* show, IRS agents frequently will go to great lengths, even to the point of engaging in criminal conduct, in order to secure evidence of tax violations. Habeas corpus petitions, because they lie behind criminal prosecutions as a procedural matter, probably are comparatively more remote for most law enforcement officers, but the Court nevertheless does indulge the spectacular non sequitur when arguing that suppression in these proceedings will not add to the general deterrent effect of the exclusionary rule.

This, then, is where we will rest our provocations in this essay: each of the new silver platter doctrines created by the Court since *Calandra* is built on the spectacular non sequitur and therefore creates perverse incentives. They also have a cumulative effect that dramatically diminishes the force and efficacy of the exclusionary rule. As Professors Mertens and Wasserstrom have pointed out, exploitation of these opportunities by law enforcement need not be conscious in order to put Fourth Amendment rights at risk. "Although the police may not be thinking about any particular

[215] United States v. Janis, 428 U.S. 433 (1976).

[216] Stone v. Powell, 428 U.S. 465 (1976).

one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off."[217]

Those incentives are likely to have greater salience and to grant broader latitude if the citizens targeted are vulnerable. Just as an example, imagine an officer who sees two Hispanic men driving through a low-income, inner-city neighborhood with a reputation as a drug market. Without appealing to racial profiling, the officer cannot justify a stop, but he has a gut feeling and stops the car anyway. During a subsequent search he discovers a small amount of marijuana. To borrow from Justice Marshall, in his "worst case scenario," our officer "avoids a major expenditure of time and effort, ensures that the suspect will not escape, and procures" evidence that will be admissible in a subsequent grand jury proceeding, parole hearing, removal hearing, tax suit, or habeas litigation,[218] even if it "cannot be used in the prosecution's case in chief."[219] Not only is that not a bad outcome, it comes quite close to making respect for Fourth Amendment rights look irrational from a police officer's point of view by "creat[ing] powerful incentives for police officers to violate the Fourth Amendment."[220]

In the halcyon days of the exclusionary rule, when principled concerns reigned supreme, Justice Holmes wrote that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[221] The principles underlying that conclusion are as valid now as they were then. The Court rejected the original silver platter doctrine in *Elkins* on both utilitarian and principled grounds. The current Court ought to draw a lesson from its forebears and abandon its

---

[217] Mertens & Wasserstrom *supra* note 97, at 388.

[218] New York v. Harris, 495 U.S. 14, 32 (1990) (Marshall, J., dissenting).

[219] *Id.*

[220] *Id. See also* Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1319 (2000).

[221] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

experimentation with modern-day silver platter doctrines, if not out of a commitment to consistency, then out of a commitment to logic, coherency, reasonableness, good sense, and the Fourth Amendment itself.