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Off the Mapp: Parole Revocation Hearings and the Fourth Amendment

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OFF THE *MAPP*: PAROLE REVOCATION HEARINGS AND THE FOURTH AMENDMENT

Pennsylvania Board of Probation & Parole v. Scott, 118 S. Ct. 2014 (1998).

I. INTRODUCTION

In *Pennsylvania Bd. of Probation & Parole v. Scott*,[1] the Supreme Court held that the exclusionary rule prohibiting the introduction of illegally obtained evidence does not apply to parole revocation proceedings.[2] The Pennsylvania Supreme Court had proposed that the federal exclusionary rule should apply when the officers conducting a search know that the suspect is a parolee, on the grounds that excluding evidence in those situations would deter deliberate Fourth Amendment violations.[3] The Supreme Court rejected that proposal, arguing that the deterrence value was slight.[4] The Court reasoned that courts should not apply the rule when the social costs of excluding inculpatory evidence outweigh the deterrence benefits.[5] Under the Court's analysis, parole revocation hearings are not sufficiently similar to criminal prosecutions to warrant exclusion as a remedy for illegal searches or seizures.[6]

This Note will first argue that the Court's rejection of the Pennsylvania Supreme Court's rule represents another step in its limitation of Fourth Amendment rights. The Court has turned to cost-benefit principles in weighing the reach of the exclusionary rule, ignoring the constitutional arguments that led to its adoption, and has thereby produced an exclusionary

[1] 118 S. Ct. 2014 (1998).
[2] *Id.* at 2022.
[3] *Id.* at 2018-19.
[4] *Id.* at 2021-22.
[5] *Id.* at 2019.
[6] *See id.* at 2021.

rule based solely on the Court's policy preferences. Second, this Note will argue that the Court's cost-benefit analysis of Pennsylvania's rule, which minimized deterrence benefits and exaggerated social costs, was faulty. Likewise, the Court missed the parallels between parole revocation proceedings and criminal trials. Third, this Note will argue that the Court broke with its own precedent to strike down the rule, since the Court has repeatedly held that the good faith of the law enforcement officer plays a part in determining whether courts should exclude evidence. Yet the Court rejected a Pennsylvania test that hinged on the officer's knowledge about whether the suspect was a parolee, a criterion that mirrors the good-faith exception that the Court has upheld elsewhere. Finally, this Note will argue that the fundamental limitation on parolees' Fourth Amendment rights lies in *Griffin v. Wisconsin*[7] and other decisions regarding the rights of probationers and parolees, and that applying the exclusionary rule to remedy Fourth Amendment violations, even if theoretically appealing, would be largely futile when parolees have almost no substantive Fourth Amendment rights anyway.

II. BACKGROUND

A. THE EXCLUSIONARY RULE

The Fourth Amendment[8] to the U.S. Constitution provides for security against unreasonable searches and seizures, setting out warrant and probable cause requirements as restraints on law enforcement. As with the rest of the Constitution, however, the amendment specifies no remedies in the event of a violation, and legislatures have not, in the view of many commenta-

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[7] 483 U.S. 868 (1987).

[8] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. IV.

tors, effectively filled that void.[9] Courts have accordingly developed the doctrine that evidence seized in violation of the Fourth Amendment's prohibitions is inadmissible in subsequent criminal prosecutions. A recurring debate regarding the application of the rule concerns whether the Constitution itself mandates exclusion, or whether the rule as it stands is merely a judicial remedy with no constitutional backing.

A strong belief that the Constitution requires the exclusionary rule animated the Supreme Court's first statement on the subject in *Weeks v. United States*,[10] when it ruled that "prejudicial error" occurs when a federal court allows evidence illegally seized by a federal officer to be introduced at trial.[11] Justice Day wrote that, if courts admit illegally seized evidence at trial, the Fourth Amendment's protections are "of no value,"[12] meaning that the Constitution mandates rather than merely suggests the rule. The Court's statement that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution" likewise suggests that the Constitution requires the rule and implicitly sets out a notion of judicial complicity.[13] The *Weeks* decision

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[9] A dissent in one pivotal exclusionary rule case observed that "[a]lternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all." Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting). *See also* People v. Cahan, 282 P.2d 905, 913 (Cal. 1955) (stating that "experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures.")

[10] 232 U.S. 383 (1914).

[11] *Id.* at 398.

[12] *Id.* at 393.

[13] *Id.* at 394. The Court's analysis referred several times to the holding in *Boyd v. United States*, 116 U.S. 616 (1886)). *Boyd* had merged the theories of the Fourth and Fifth Amendments to rule that a defendant could not be compelled to incriminate himself with his own property. 116 U.S. at 630. The *Boyd* Court called the offending search "the invasion of [the] indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense." 116 U.S. at 630. In *Weeks*, the Court likewise invoked the sanctity of private property, holding that "if letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense," the Fourth Amendment's protections are empty. 232 U.S. at 393. *Boyd*'s expansive theory of privacy and property rights eventually lost favor, however: decisions like *Schmerber v. California*, 384 U.S. 757, 766-72 (1966), which upheld the extraction of a blood

was silent regarding the deterrent value of the rule and its potential to prevent police misconduct via the threat of exclusion, but it clearly believed that the terms of the Fourth Amendment demand that federal courts apply the rule.

Several decades passed before the Court considered the rule's effect on the states, but in *Wolf v. Colorado*,[14] the Court held that the exclusionary rule did not apply to state prosecutions.[15] Integral to the *Wolf* holding was the Court's insistence that the exclusionary rule is a remedy for Fourth Amendment violations, not mandated by the Constitution itself; the Court insisted that states should remain free to develop their own means of deterring illegal searches and seizures.[16] Since the Constitution requires no single remedy, states need not apply the exclusionary rule, as long as "equally effective" remedies to accomplish the same end are in place.[17] That requirement, in theory, could have radically altered Fourth Amendment rights; had states been forced to devise some system of police deterrence to head off illegal searches and seizures (or face the prospect of having evidence excluded), criminal procedure would have changed overnight. But the real effect of the decision was simply to continue to allow the admission of illegally seized evidence in state prosecutions.[18] The landscape changed slightly in

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sample without consent, suggest that the Court no longer finds those principles compelling. *See also* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (a suspect's "(subjective) expectation of privacy" defines his Fourth Amendment rights, so long as that expectation is "reasonable"); Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that a reasonableness calculus, rather than probable cause, governs stop-and-frisk cases). The advent of the exclusionary rule coincided, therefore, with an era in the Court's jurisprudence when notions of individual privacy held rather more sway than they do today.

[14] 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[15] *Id.* at 33 (1949). *Wolf* came at a time when the Court was grappling with the extent to which the Due Process Clause of the Fourteenth Amendment incorporates the provisions of the Bill of Rights; the holding in *Wolf* arguably speaks more to the Court's Fourteenth Amendment jurisprudence than to its view of the Fourth Amendment.

[16] *See generally id.* at 28-33.

[17] *Id.* at 31.

[18] The *Wolf* holding also led to a practice in federal prosecutions known as the "silver platter" doctrine, under which state agents would obtain evidence illegally and then give it to federal agents. Craig Hemmens & Rolando V. Del Carmen, *The Exclusionary Rule in Probation and Parole Revocation Hearings: Does It Apply?*, 61 FED.

1952, however, when the Court ruled that evidence gathered in a manner that "shock[ed] the conscience" must be excluded from state prosecutions.[19] A shift back in the direction of *Weeks* occurred in *Elkins v. United States*,[20] which rested in part on the "imperative of judicial integrity"[21] and quoted Justice Brandeis's dissent in *Olmstead v. United States*: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . If the Government becomes a lawbreaker, it breeds contempt for law."[22] *Elkins* therefore reaffirmed the theoretical constitutional basis for the exclusionary rule, and set the stage for *Mapp v. Ohio*.[23]

Mapp applied the exclusionary rule to the states via the Due Process Clause of the Fourteenth Amendment.[24] Justice Clark, writing for the Court, found that the factual bases for the *Wolf* decision had vanished, and with them the reasoning for applying the Fourth Amendment to federal but not state prosecutions.[25] For example, while most states at the time of the *Wolf* decision had declined to adopt the rule, several states had since changed position and applied the rule, enough that the majority now favored exclusion.[26] The *Mapp* majority also rejected the argument in *Wolf* that other remedies, such as a civil damages remedy or internal police discipline proceedings, could adequately safeguard Fourth Amendment rights.[27] The Court relied

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PROBATION 32, 32 (Sept. 1997). The practice was eventually overruled in *Elkins v. United States*, 364 U.S. 206 (1960), which held that illegally seized evidence could not be used in federal prosecutions even if state officials performed the search and seizure.

[19] Rochin v. California, 342 U.S. 165, 172-73 (1952). Police officers forced a tube into the suspect's stomach and poured an emetic solution through the tube to induce vomiting. *Id.* at 161. They found morphine capsules in the vomited matter and used them as evidence in the subsequent prosecution. *Id.* at 166.

[20] 364 U.S. 206 (1960).

[21] *Id.* at 223.

[22] *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting)).

[23] 367 U.S. 643 (1961).

[24] *Id.* at 655.

[25] *See id.* at 653.

[26] *See id.* at 651.

[27] *See id.* at 652-53.

in part on the decision in *People v. Cahan*,[28] in which the California Supreme Court adopted the exclusionary rule.[29] That holding rested in part on the finding that "civil actions against police officers are rare" and "successful criminal prosecutions against officers are nonexistent,"[30] meaning that two other primary avenues for protection of Fourth Amendment rights are largely ineffective. The *Mapp* Court echoed the argument in *Weeks* that those rights are meaningless without an adequate remedy, stating that the rule is "an essential ingredient of the Fourth Amendment."[31] The Court in *Mapp* also recognized the deterrent aspect of the exclusionary rule, and argued that allowing states to ignore the rule "encourage[d] disobedience to the federal Constitution."[32]

The Court's subsequent decisions restricted the principle, articulated in *Weeks* and reiterated in *Mapp*, that Fourth Amendment rights required exclusion of illegally obtained evidence.[33] The Court ruled in *United States v. Calandra*[34] that the exclusionary rule does not apply to grand jury proceedings, reasoning in part that the deterrent value of excluding such evi-

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[28] 282 P.2d 905 (Cal. 1955).

[29] *Id.* at 911.

[30] *Id.* at 913.

[31] *Mapp*, 367 U.S. at 651.

[32] *Id.* at 657.

[33] *Id.* at 655. *Mapp* had not, of course, explicitly applied the rule to proceedings other than criminal prosecutions, but the principle set down in its holding addresses general constitutional requirements rather than details specific to that context:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Id. As the Court's decisions in *Calandra*, *Stone* and *Leon* all distanced themselves from the language in *Mapp* that identified the source of the rule as the Fourth Amendment itself, they effectively restricted the scope of that decision.

[34] 414 U.S. 338 (1974).

dence is slight, and that applying the rule would unacceptably disrupt the grand jury process.[35] The Court reasoned further that admitting illegally seized evidence is "only a derivative use of the product" of a prior illegal act, and as such "work[s] no new Fourth Amendment wrong."[36] That argument led to the holding that the rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[37] The *Calandra* court looked to *Elkins* for support of its argument that the function of the rule is to deter,[38] even though *Mapp*, which succeeded *Elkins*, had emphasized judicial integrity over deterrence, and even though *Elkins* had relied on the language in *Weeks* that articulated the integrity of the judiciary as a basis for the exclusionary rule.[39] Justice Brennan's *Calandra* dissent noted the majority's clear conflict with *Mapp*'s reasoning, and argued that the "imperative of judicial integrity" articulated in *Elkins* demands that the judiciary avoid endorsing police misconduct.[40] The Court later ruled in *Stone v. Powell*,[41] relying on *Calandra*,[42] that federal courts, in reviewing habeas corpus petitions, need not undertake collateral review of Fourth Amendment claims, on grounds that the deterrent effects of

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[35] *Id.* at 349-52.

[36] *Id.* at 354.

[37] *Id.* at 348. *Mapp*'s majority had included Justice Black, who wrote separately to argue that the *Boyd* merger of the Fourth and Fifth Amendments is necessary to bar the introduction of illegally seized evidence, and that the Fourth Amendment standing alone does not justify the rule. 367 U.S. at 661-66 (Black, J., concurring). Arguably, that might weaken the basis for *Mapp*, since the *Boyd* approach is no longer followed, and give credence to an argument that *Mapp*'s holding does not bind later courts. In fact, however, neither *Calandra* nor its progeny referred to Justice Black's opinion or argued that point, so the Court seems to have accepted the *Mapp* plurality as a majority.

[38] 414 U.S. at 347.

[39] Elkins v. United States, 364 U.S. 206, 208-10 (1960). The *Elkins* Court quoted as support for its decision the reasoning in *Weeks* that the Fourth Amendment's protections, without the safeguard of the exclusionary rule, are "of no value." *Id.* at 209 (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)).

[40] *Calandra*, 414 U.S. at 360-61 (Brennan, J., dissenting) (quoting *Elkins*, 364 U.S. at 222).

[41] 428 U.S. 465 (1976).

[42] *Id.* at 486-87.

such a review are insignificant.[43] Pragmatic considerations of administrative efficiency rather than substantive Fourth Amendment concerns again carried the day. Justice Brennan in dissent again criticized the majority for ignoring the constitutional basis for *Mapp*.[44]

Elkins's "imperative of judicial integrity" received even shorter shrift in *United States v. Leon*,[45] which modified the exclusionary rule to allow for reliance in good faith on a defective search warrant.[46] *Leon*, following *Calandra* and *Stone*, emphasized the rule's deterrent objectives and held that courts should not suppress evidence produced by a search for which there is an objective good-faith basis.[47] *Leon* relied on decisions denying retroactive application of Fourth Amendment watershed cases;[48] included in that analysis was *Linkletter v. Walker*,[49] which refused to apply *Mapp* retroactively.[50] Justice Brennan's dissent observed that the deterrent effects of the exclusionary rule are supposed to operate throughout the institution of government, not merely on those officers who are carrying out searches.[51] Excluding the illegally obtained evidence might have encouraged the police department to ensure that a future warrant would be legitimate.[52] *Leon* therefore signaled that the deterrence calcu-

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[43] *Id.* at 493-95.

[44] *Id.* at 509-510 (Brennan, J., dissenting).

[45] 468 U.S. 897 (1984).

[46] *Id.* at 905.

[47] *Id.* at 922-23. An officer had carried out an illegal search in reliance on a defective warrant. *Id.* at 903-04. Eighteen states have refused to apply *Leon* on grounds that it conflicts with state statutes or state constitutions, however. *See* Kevin J. Heller & John P. Reichmuth, 22 CHAMPION 18, 18 (Feb. 1998).

[48] 468 U.S. at 912.

[49] 381 U.S. 618 (1965).

[50] *Id.* at 640.

[51] *Id.* at 953-54 (Brennan, J., dissenting).

[52] *Id.* at 955 (Brennan, J., dissenting). Justice Brennan referred to an article by former Justice Stewart, which argued in part:

> [T]he exclusionary rule is not designed to serve a "specific deterrence" function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a "systematic deterrence": the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system—bringing crimi-

lus hinges on the conduct of the individual officer, not on the costs to the system as a whole.

B. PROBATION AND PAROLE

Black's Law Dictionary defines parole as a "release from jail, prison or other confinement after actually serving part of sentence," or a "conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order."[53] The Supreme Court has called parole an "established variation on imprisonment of convicted criminals" and emphasized the conditions that the parolee must observe once released from prison.[54] Moreover, parolees are not entitled to the "full panoply of rights" available to a defendant in a criminal prosecution, because a convicted criminal does not have the same rights as an ordinary citizen.[55] Parole revocation deprives a parolee "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."[56] Parolees do, however, retain due process rights: both the parolee's interests in having a fair hearing and the state's rights in effecting rehabilitation require that procedural guarantees be observed.[57] Probation revocation, which the Court has repeatedly described as analogous to parole revocation,[58] results in a "loss of liberty" and therefore requires due process.[59] Likewise, parole boards must provide counsel in some situations:

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nals to justice—can be achieved only when evidence of guilt may be used against defendants.

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, 1400 (1983).

[53] BLACK'S LAW DICTIONARY 1116 (6th ed. 1990).

[54] Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

[55] *Id.* at 480.

[56] *Id.*

[57] *Id.* at 483-84.

[58] *See, e.g.*, Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014 (1998); Griffin v. Wisconsin, 483 U.S. 868 (1987); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[59] *Gagnon*, 411 U.S. at 782.

Mempa v. Rhay[60] stipulated that an indigent must have counsel at sentencing even when the process is part of a probation revocation proceeding,[61] and *Gagnon v. Scarpelli*[62] found that there are some cases in which "fundamental fairness" requires the appointment of counsel.[63]

Several theories have guided the Court's holdings on parolees' and probationers' rights.[64] One theory is the "constructive custody" concept, elaborated in *People v. Hernandez*,[65] which held that the parolee, although technically free, is "constructively a prisoner," and probable cause for searches is hence unnecessary.[66] Since the parolee is still legally a prisoner, he may be returned to prison without notice or hearing.[67] Commentators have criticized this theory as justifying excessive intrusions into parolees' privacy, and as ignoring the rehabilitative goals of parole that expect parolees to live normal lives, not those of prisoners on a long leash.[68] *Morrissey* rejected constructive custody, saying that "the argument cannot even be made here" that supervising parolees presents the same exigent circumstances as controlling actual prisoners.[69] Other notions include the "act of grace" theory, under which the probationer cannot object to intrusions into his privacy because parole is a gift of the state,[70] and the "waiver" theory, which supposes that probationers waive their constitutional protections when they accept parole, depending on the nature of the conditions of the parole agreement.[71] *Morrissey* rejected the "act of grace" theory as well,

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[60] 389 U.S. 128 (1967).

[61] *Id.* at 137.

[62] 411 U.S. 778 (1973).

[63] *Id.* at 790.

[64] *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10, at 758 (3rd ed. 1996).

[65] 40 Cal. Rptr. 100 (Cal. Dist. Ct. App. 1964).

[66] *Id.* at 103-05.

[67] *Id.* at 103.

[68] *See generally* Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167 (1969); William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129 (1969).

[69] Morrissey v. Brewer, 408 U.S. 471, 483 (1972).

[70] 4 LAFAVE, *supra* note 64, § 10.10(b), at 761.

[71] 4 *id.* § 10.10(b) at 763-64.

noting that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."[72] *Hernandez* likewise observed that the "act of grace" theory raises the possibility that the state is attaching unconstitutional conditions to a grant of state privileges.[73] Courts have not raised the same concern regarding the waiver theory, though, despite the implications of a far-reaching waiver of rights in exchange for a benefit.[74] The Court's ruling in *Zap v. United States*[75] provided for waivers of Fourth Amendment rights,[76] and no subsequent decision has questioned whether those waivers are valid.[77]

The parole revocation process involves first, a "preliminary hearing" to determine whether there is probable cause or reasonable grounds to believe that the parolee has violated the parole conditions.[78] Due process under *Morrissey*'s analysis requires that an independent adjudicator, or panel of adjudicators, examine the facts and make the revocation decision, though the adjudicator need not be a judge; another parole officer could serve adequately.[79] *Morrissey* also required that the parole board give the parolee notice of the hearing, so that he can testify, produce witnesses, and offer evidence.[80] Moreover, the board must allow a parolee the opportunity to cross-examine adverse witnesses.[81] Should the adjudicator find prob-

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[72] Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

[73] People v. Hernandez, 40 Cal. Rptr. 100, 103 (Cal. Dist. Ct. App. 1964).

[74] 4 LAFAVE, *supra* note 64, § 10.10(b), at 763-64.

[75] 328 U.S 624 (1946).

[76] *Id.* at 628, *vacated by* Zap v. United States, 330 U.S. 800 (1947). Though the judgment in the first *Zap* decision was vacated one year later, it has been cited as controlling law many times since then by the Supreme Court and by lower courts. It therefore appears to remain good law. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 736 (1983); United States v. Edwards, 415 U.S. 800, 806 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); United States v. Picariello, 568 F.2d 222, 225 (1st Cir. 1978); United States v. Griffin, 555 F.2d 1323, 1325 (5th Cir. 1977).

[77] 4 LAFAVE, supra note 64, § 10.10(b), at 764.

[78] Morrissey, 408 U.S. 471, 485 (1972).

[79] *Id.* at 485-86.

[80] *Id.* at 486-87.

[81] *Id.* at 487.

able cause to revoke parole at the initial hearing, an impartial body such as a parole board must then evaluate all the contested relevant facts and consider whether those facts warrant revocation.[82] The board must produce a written statement detailing the evidence upon which it relied and its reasons for revoking parole.[83] Though the *Morrissey* opinion emphasized that this hearing is not equivalent to a criminal prosecution, the due process requirements—written notice to the parolee of the grounds for the proposed revocation, disclosure of the evidence against him, the opportunity to testify and to present witnesses on his behalf, the opportunity to confront adverse witnesses, an independent judicial body—suggest several parallels.[84] The Court also noted, however, that the proceedings are flexible enough to accommodate evidence that would normally violate the hearsay rule.[85]

The rights of parolees and probationers have been scaled back since *Morrissey*. The Court ruled in *Griffin v. Wisconsin*[86] that a warrantless search of a probationer's residence with "reasonable grounds" for suspicion rather than probable cause is permissible as long as it is conducted under a regulation that satisfies Fourth Amendment "reasonableness" standards.[87] The *Griffin* majority relied on dicta in *Morrissey* to reinforce its claim that probationers and parolees have inferior rights, and that a state need satisfy only a relatively low standard to justify infringing those rights.[88] The Court drew on a concurrence in another case that had allowed exceptions to warrant and probable-cause

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[82] *Id.* at 488.

[83] *Id.* at 489.

[84] *Id.*

[85] *Id.*

[86] 483 U.S. 868 (1987).

[87] *Id.* at 872. *See also* Thomas J. Bamonte, *The Viability of* Morrissey v. Brewer *and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U.L.J. 121, 148-49 (1993).

[88] *Griffin*, 483 U.S. at 873-74. The *Griffin* majority also noted that since probation represents one point on a continuum of punishments, from fines or community service to permanent imprisonment, the state can restrict the probationer's freedom as needed. *Id.* at 874. That reasoning recalls the assumption that constitutional protections in this context are privileges rather than rights, which *Morrissey* had taken pains to reject. *Morrissey*, 408 U.S. at 482.

requirements on grounds of "special needs" of the law enforcement system in question.[89] The "special needs" of the Wisconsin probationary system, as articulated by the Wisconsin Supreme Court, therefore controlled and made the warrant requirement impracticable.[90] For example, according to the Court, supervision of a probationer is a "special need" requiring that parole officers be permitted to impinge on probationers' privacy.[91] The theory underlying *Griffin*'s analysis was therefore an "administrative search" rationale, under which, following the standards of *Camara v. Municipal Court*,[92] a search is permissible if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[93] Since the *Griffin* search was conducted pursuant to rather draconian state regulations, notably that no consent is needed for a home search of a parolee or probationer as long as there are "reasonable grounds,"[94] it is unclear what that case implies for searches performed without such regulations. Most jurisdictions have interpreted *Griffin* as holding that the conditions of parole or probation define "reasonable cause" for any given search, though a few have made "reasonable cause" a standard in itself, independent of the parole conditions.[95]

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[89] *Griffin*, 483 U.S. at 873 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

[90] *Id.* at 875-76.

[91] *Id.* at 876.

[92] 387 U.S. 523 (1967).

[93] *Id.* at 538.

[94] *Griffin*, 483 U.S. at 870-71. The Court ruled that the regulation "satisfies the Fourth Amendment's reasonableness requirement under well-established principles," though it did not hypothesize regulations that would run afoul of that requirement. *Id.* at 873. It is worth wondering whether, given the decline of substantive due process, the Court would be inclined to overrule any state regulations regarding parole conditions.

[95] *See* Hemmens & Del Carmen, *supra* note 18, at 34. The *Griffin* approach reflected a trend in the Court's decisions that looked to state law to define parolees' and probationers' liberties. For example, *Greenholtz v. Inmates of Neb. Penal & Correctional Complex* defined prisoners' liberty interests by language in a state statute that mandated that prisoners eligible for parole be released barring specific findings to the contrary. 442 U.S. 1, 11 (1979). Likewise, *Olim v. Wakinekona* found that states do not infringe constitutionally protected liberty interests by failing to set limits on a state's authority to transfer a prisoner out of state. 461 U.S. 238, 244-48 (1983). *See* Bamonte, *supra* note 87, at 142-43.

At the time of the Court's *Scott* decision, lower courts were split among several alternatives regarding the application of the exclusionary rule to parole and probation hearings, and the Court had denied certiorari in several cases that addressed this issue. Eleven states and four circuits had ruled that the exclusionary rule does not apply to parole and probation revocation hearings.[96] Five states and two circuits had ruled that the exclusionary rule does apply to those proceedings,[97] though eighteen more states and four circuits had applied the rule with exceptions. For example, Alaska, Massachusetts, Michigan, North Carolina, Pennsylvania, and the Ninth Circuit had ruled that the exclusionary rule does not apply if a police officer is unaware that the suspect is a parolee.[98] Alabama, Arkansas, Colorado, Connecticut, the District of Columbia, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Oklahoma, Virginia, Washington, and the Fifth and Sixth Circuits had ruled that the rule applies when the search is conducted in bad faith, for example when officers conduct a search expressly to find cause for revocation, or

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[96] *See* United States v. Finney, 897 F.2d 1047 (10th Cir. 1990); United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983), *cert. denied sub nom.* Mollica v. United States, 465 U.S. 1078 (1984); United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); State v. Alfaro, 623 P.2d 8 (Ariz. 1980); *In re* Tyrell J., 876 P.2d 519 (Cal. 1994), *cert denied sub nom.* Tyrell J. v. California, 514 U.S. 1068 (1995); Dulin v. State, 346 N.E.2d 746 (Ind. Ct. App. 1976); Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky. Ct. App. 1987); State v. Thorsness, 528 P.2d 692 (Mont. 1974); Stone v. Shea, 304 A.2d 647 (N.H. 1973); State *ex rel.* Wright v. Ohio Adult Parole Authority, 661 N.E.2d 728 (Ohio 1996), *cert. denied,* 117 S. Ct. 127 (1996); State v. Spratt, 386 A.2d 1094 (R.I. 1978); Barker v. State, 483 S.W.2d 586 (Tenn. Crim. App. 1972); Hughes v. Gwinn, 290 S.E.2d 5 (W.Va. 1982); Gronski v. State, 700 P.2d 777 (Wyo. 1985).

[97] *See* United States v. Rea, 678 F.2d 382 (2d Cir. 1982); United States v. Workman, 585 F.2d 1205 (4th Cir. 1978); State v. Cross, 487 So.2d 1056 (Fla. 1986), *cert dismissed,* 479 U.S. 805 (1986); Amiss v. State, 219 S.E.2d 28 (Ga. Ct. App. 1975); People *ex rel.* Piccarillo v. New York State Bd. of Parole, 397 N.E.2d 354 (N.Y. 1979); State *ex rel.* Juvenile Dep't v. Rogers, 836 P.2d 127 (Or. 1992) (holding that the exclusionary rule applies to violations of a state constitutional provision that exactly duplicates the Fourth Amendment); Mason v. State, 838 S.W.2d 657 (Tex. App. 1992).

[98] *See* U.S. v. Winsett, 518 F.2d 51 (9th Cir. 1975); State v. Sears, 553 P.2d 907 (Alaska 1976); Commonwealth v. Olsen, 541 N.E.2d 1003 (Mass. 1989); People v. Perry, 505 N.W.2d 909 (Mich. Ct. App. 1993); State v. Lombardo, 295 S.E.2d 399 (N.C. 1982); Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32, 32 (Pa. 1997), *rev'd,* 118 S. Ct. 2014 (1998).

is intended to harass a suspect.[99] The case law in eight states was unsettled, [100] and eight states (Hawaii, Minnesota, North Dakota, Nevada, South Carolina, South Dakota, and Vermont), and three circuits (the First, Eleventh, and D.C.) had not ruled on the issue.

III. FACTS AND PROCEDURAL HISTORY

After pleading *nolo contendere* to a charge of third-degree murder and serving ten years in a Pennsylvania prison on a ten- to twenty-year term, Keith Scott was released on parole on September 1, 1993.[101] His parole agreement provided that he would not own or possess firearms or other weapons, and subjected him to warrantless searches of his person and property.[102] It also stipulated that any evidence of a violation was subject to seizure and admission as evidence in a parole revocation hearing.[103]

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[99] *See* United States v. Farmer, 512 F.2d 160 (6th Cir. 1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); *Ex parte* Caffie, 516 So.2d 831 (Ala. 1987); Harris v. State, 606 S.W.2d 93 (Ark. Ct. App. 1980); People v. Ressin, 620 P.2d 717 (Colo. 1980); State v. Jacobs, 641 A.2d 1351 (Conn. 1994); Thompson v. United States, 444 A.2d 972 (D.C. 1982); People v. Stewart, 610 N.E.2d 197 (Ill. App. Ct. 1993); Kain v. State, 378 N.W.2d 900 (Iowa 1985); State v. Turner, 891 P.2d 317 (Kan. 1995); State v. Davis, 375 So.2d 69 (La. 1979); State v. Caron, 334 A.2d 495 (Me. 1975) (declining to apply the rule, but suggesting in a footnote that evidence of harassment by law enforcement would signal a need for a change in policy); Chase v. State, 522 A.2d 1348 (Md. 1987); Richardson v. State, 841 P.2d 603 (Okla. Crim. App. 1992); Anderson v. Commonwealth, 470 S.E.2d 682 (Va. 1995); State v. Lampman, 724 P.2d 1092 (Wash. Ct. App. 1986).

[100] *See* Brown v. State, 249 A.2d 269 (Del. 1968) (a revocation must rest on admissible evidence); State v. Pinson, 657 P.2d 1095 (Idaho Ct. App. 1983) (warrantless searches are permissible only if based on reasonable grounds); Brandt v. Percich, 507 S.W.2d 951 (Mo. Ct. App. 1974) (failure to observe probationer's due process rights overturns revocation); State v. Aulrich, 308 N.W.2d 739 (Neb. 1981) (exclusionary rule operates for probationers upon violation of a wiretap statute); State v. Reyes, 504 A.2d 43 (N.J. Super. Ct. App. Div. 1986) (revocation of probation must be based on competent and credible evidence); State v. Vigil, 643 P.2d 618 (N.M. Ct. App. 1982) (inadmissible hearsay insufficient to justify revocation of probation); Layton City v. Peronek, 803 P.2d 1294 (Utah Ct. App. 1990) (due process denied when a probation revocation did not rest on competent evidence); State v. West, 517 N.W.2d 482 (Wis. 1994) (evidence is admissible if the search is based on reasonable cause), *cert. denied*, 513 U.S. 955 (1994).

[101] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2018 (1998).

[102] *Id.*

[103] *Id.* The language of the agreement, in pertinent part, was as follows:

Scott resided with his mother and stepfather following his release.

Five months later, Pennsylvania parole officers arrested Scott on a warrant charging, among other claims, that he possessed two handguns in violation of his parole.[104] Scott gave the keys to his residence to an officer, who gave them to Scott's companion, Dorothy Hahn, and the parole officers followed Hahn to Scott's residence.[105] On the officers' instructions, she unlocked the door, and the officers entered.[106] Hahn then called Scott's mother and waited for her to arrive.[107] When she did, the officers told her that they were conducting a search of Scott's bedroom; they did not request consent, and she did not give it, though she did show them where the bedroom was.[108] When they found no evidence of a violation in the bedroom, they searched the mother's sitting room, without requesting her permission, and found several weapons, though none of them matched the descriptions of the weapons named in the warrant.[109]

At Scott's parole revocation hearing, the guns found in the sitting room were admitted into evidence despite Scott's argument that the search of the sitting room violated his Fourth Amendment rights.[110] Additionally, Scott's stepfather testified that they belonged to him, and Scott denied knowing that the guns were there.[111] An officer asserted the right to search common areas as well as Scott's room, based on a tip about weapons

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> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

668 A.2d 590, 597 (Pa. Commw. Ct. 1995).

[104] Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32, 33 (Pa. 1997), *rev'd*, 118 S. Ct. 2014 (1998).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* n.2.

[110] Scott v. Pennsylvania Bd. of Probation & Parole, 668 A.2d 590, 593-94 (Pa. Commw. Ct. 1995), *aff'd*, 698 A.2d 32 (Pa. 1997), *rev'd*, 118 S. Ct. 2014 (1998).

[111] *Id.* at 593.

concealed in the house, but could not identify the source of that information.[112] The parole board sentenced Scott to serve the remainder of his sentence along with three years' back time, and denied his initial appeal.[113]

Scott then successfully appealed to the Pennsylvania Commonwealth Court: the court found the seizure of the weapons unconstitutional and ruled that the evidence, as the fruit of a warrantless and nonconsensual search, should have been suppressed.[114] The court reasoned that, since the officers did not tell Scott's mother that they intended to search common areas as well as his bedroom, there was no consent.[115] Moreover, absent a reasonable "statutory or regulatory framework" granting the officer authority to search the common areas without consent, such a search is unconstitutional.[116] An *en banc* review of a separate case overruled the decision on grounds that the exclusionary rule did not apply to parole revocation hearings.[117] The Pennsylvania Supreme Court affirmed the original decision, holding that Scott had a protected privacy expectation in his home,[118] that his consent was only to reasonable searches,[119] and that there was insufficient evidence to warrant the search.[120] Though the court ordinarily did not apply the exclusionary rule to parole revocation proceedings, it ruled that situations where officers know that a suspect is a parolee call for application of the rule and exclusion of illegally seized evidence.[121] The United States Supreme Court granted certiorari to determine

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[112] *Scott*, 698 A.2d at 33-34.

[113] *Id.* at 34.

[114] *Id.*

[115] *Scott*, 668 A.2d at 597.

[116] *Id.*

[117] Kyte v. Pennsylvania Bd. of Probation & Parole, 680 A.2d 14, 16-17 (Pa. Commw. Ct. 1996) (en banc), *overruled by* Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32, (Pa. 1997), *rev'd*, 118 S. Ct. 2014 (1998).

[118] *Scott*, 698 A.2d at 35.

[119] *Id.* at 35-36. The court ruled that "reasonable" searches must be based on reasonable suspicion and be reasonably related to the officer's duty. Applying that test, it found that the search of Scott's home was based on mere speculation rather than reasonable suspicion. *Id.* at 36.

[120] *Id.*

[121] *Id.* at 37-39.

whether the Fourth Amendment exclusionary rule applied to parole revocation hearings.[122]

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

The United States Supreme Court reversed the decision of the Pennsylvania Supreme Court, holding that parole boards are not required by the Constitution to exclude illegally obtained evidence.[123] In addition, the Court refused to adopt the approach proposed by the Pennsylvania Supreme Court, under which police officers who know that a suspect is a parolee or probationer would be bound by the exclusionary rule.[124]

Writing for the majority, Justice Thomas began his analysis by emphasizing that, when illegally obtained evidence is used against a defendant, the constitutional violation lies in the unlawful search rather than in the use of such evidence.[125] Hence, according to the Court, excluding illegally obtained evidence cannot cure the violation and should be considered only as a means of deterrence.[126] The Court looked for support to *Calandra,* in which the Court had noted that the exclusionary rule applies only when "its remedial objectives are thought most efficaciously served."[127] As such, the rule should operate only where it would significantly deter illegal searches and seizures, and when such deterrence benefits would outweigh its social costs.

The Court briefly reviewed other settings in which it has ruled that the exclusionary rule does not apply.[128] For instance, *Calandra* established that the rule does not apply to grand jury

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[122] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2017-18 (1998).

[123] *Id.* at 2020. Scott had argued that the Pennsylvania Supreme Court's decision regarding Scott's consent to warrantless searches dealt only with state law and therefore fell outside the Court's jurisdiction. *Id.* at 2019 n.3. The Court, however, ruled only on the applicability of the exclusionary rule and declined to consider whether Scott's consent was sufficient to justify the search. *Id.*

[124] *Id.* at 2022.

[125] *Id.* at 2019.

[126] *Id.*

[127] United States v. Calandra, 414 U.S. 338, 348 (1974).

[128] *Scott,* 118 S. Ct. at 2019-20.

hearings because of the unique role of those proceedings in the law enforcement process.[129] Civil tax proceedings and civil deportation proceedings likewise need not exclude illegally obtained evidence.[130] In those decisions, the Court focused on the high societal costs of excluding pertinent evidence.[131]

The Court then argued that applying the exclusionary rule to parole and probation revocation hearings would likewise burden them unacceptably. First, the Court contended that the costs associated with excluding evidence in parole revocation proceedings are significant.[132] Quoting *Morrissey*, which called parole a "variation on imprisonment of convicted criminals,"[133] the Court posited that the state has a strong interest in ensuring that parolees do not violate the terms of their parole.[134] Excluding evidence that would demonstrate a parole violation would hamper the enforcement of those terms, an especially serious consequence, the Court reasoned, since parolees are more likely to commit crimes than are ordinary citizens.[135]

Second, argued the Court, parole revocation proceedings are administrative processes incompatible with the assumptions of the exclusionary rule.[136] In the Court's view, parole revocation deprives the parolee of a "conditional" freedom, as opposed to the ordinary citizen's freedom.[137] Moreover, parole boards are not composed of judges, and traditional rules of evidence do not apply.[138] In that light, applying the rule would turn the parole revocation process into "trial-like proceedings" that would neglect the needs of the parolee and encourage pa-

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[129] *Calandra*, 414 U.S. at 349.

[130] *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that civil deportation proceedings are insufficiently similar to criminal prosecutions to require the exclusionary rule); United States v. Janis, 428 U.S. 433 (1976) (holding that where there is no federal participation in illegal activity, a federal civil tax proceeding need not exclude illegally obtained evidence).

[131] *Scott*, 118 S. Ct. at 2020.

[132] *Id.*

[133] Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

[134] *Scott*, 118 S. Ct. at 2020.

[135] *Id.*

[136] *Id.* at 2020-21.

[137] *Id.* at 2020 (quoting *Morrissey*, 408 U.S. at 480.)

[138] *Id.* at 2021.

role boards to reincarcerate parolees rather than tolerate marginal infractions.[139] Alternatively, the Court noted, in light of the increased social and financial costs of the revocation process, states might be reluctant to allow paroles at all.[140] Drawing on *Morrissey*'s holding that states have an "overwhelming interest" in maintaining informal, administrative parole revocation procedures,[141] the Court stated that it is "simply unwilling so to intrude into the States' correctional schemes" by declaring the rule applicable.[142]

Finally, the Court claimed that the deterrence value of the rule in this context was minimal.[143] The Court agreed with the Pennsylvania Supreme Court that the rule would make little difference in situations where the officer was unaware that the suspect was a parolee, but then argued against making distinctions based on the officer's knowledge.[144] A police officer is focused on "obtaining convictions of those who commit crimes,"[145] the Court reasoned, so deterrence will be effective even when a revocation hearing rather than a criminal prosecution awaits.[146] When a parole officer performs a search, on the other hand, the Court decided that other deterrents, such as departmental discipline and the possibility of damages suits, suffice to deter illegal searches.[147] Since a parole officer's relationship with a parolee is "more supervisory than adversarial,"[148] concluded the Court, there is little need to introduce the Fourth Amendment's safeguards.[149]

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[139] *Id.*
[140] *Id.*
[141] *Morrissey*, 408 U.S. at 483.
[142] *Scott*, 118 S. Ct. at 2021.
[143] *Id.* at 2021-22.
[144] *Id.* at 2022.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*

B. JUSTICE SOUTER'S DISSENT

Justice Souter[150] dissented from the Court's judgment, arguing that the Court misunderstood the function of the revocation process, and hence the necessity of effective deterrence of illegal searches and seizures in that context.[151] Justice Souter began his dissent by noting that the basis for deciding whether the exclusionary rule should apply to a proceeding lies in its potential deterrent effect, and in the likelihood that the marginal deterrent benefit would outweigh the costs.[152]

Justice Souter next observed that the Court's analysis of the marginal deterrence benefits of applying the exclusionary rule to parole revocation hearings rested on "erroneous views of the roles of regular police and parole officers in relation to revocation proceedings."[153] Justice Souter argued that police more often than not know a parolee's status when they conduct a search, and that such knowledge is significant in several respects.[154] If police officers know that evidentiary restrictions are in force, they will hesitate to conduct illegal searches and seizures for fear of "jeopardizing" a parolee's reincarceration.[155] Since a formal trial is often far less likely than a revocation hearing in those situations, police officers need not worry about endangering a prosecution.[156] In response to the Court's argument that the respective functions of parole and police officers differ, Justice Souter referred to several theorists who see the parole officer as filling the role of a policeman for a parolee.[157] Finally, Justice Souter observed that the other mechanisms supposedly in place to deter overzealous parole officers are not, in fact, used: the Court mentioned no instances in which parole officers were disciplined for abusing their discre-

[150] Justices Ginsburg and Breyer joined Justice Souter's dissent.
[151] *Id.* at 2023 (Souter, J., dissenting).
[152] *Id.* (Souter, J., dissenting).
[153] *Id.* at 2024 (Souter, J., dissenting).
[154] *Id.* at 2024-25 (Souter, J., dissenting).
[155] *Id.* (Souter, J., dissenting).
[156] *Id.* (Souter, J., dissenting).
[157] *Id.* at 2025-26 (Souter, J., dissenting).

tion, or any lawsuit for damages brought by a parolee against a parole officer.[158]

Justice Souter then argued that the Court's cost-benefit analysis was flawed, in that it both exaggerated the cost of applying the rule to revocation hearings and minimized the potential benefits to the parolee.[159] He rejected the view that enhancing the adversary nature of the parole revocation process was a significant detriment to applying the rule.[160] He explained that "any revocation hearing is adversary to a degree" in that counsel must be appointed whenever there are complicated factual issues.[161] In a short footnote, Justice Souter admitted that the state does have a strong interest in ensuring that parolees comply with the conditions of their parole, but pointed out that such an interest is analogous to the state's interest in convicting criminals in prosecutions, and should therefore defer to the Fourth Amendment in the same way.[162] As for the benefits of applying the rule to the parole revocation process, Justice Souter argued that the state often pursues parole revocation in lieu of a new criminal prosecution, since such an approach avoids procedural complications.[163] For example, the state need not demonstrate proof beyond a reasonable doubt to obtain a recommitment.[164] Justice Souter portrayed the suppression remedy of the exclusionary rule as the sole deterrent to Fourth Amendment violations in the parole-revocation context.[165]

Justice Souter ended by observing that Scott's consent to the search of his "person, property and residence" was insufficient to waive the requirement that searches be based on a reasonable suspicion, and that Scott's Fourth Amendment rights were

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[158] *Id.* at 2026 (Souter, J., dissenting).
[159] *Id.* (Souter, J., dissenting).
[160] *Id.* at 2026-27 (Souter, J., dissenting).
[161] *Id.* at 2027 (Souter, J., dissenting).
[162] *Id.* at 2027 n.2 (Souter, J., dissenting).
[163] *Id.* at 2027 (Souter, J., dissenting).
[164] *Id.* (Souter, J., dissenting).
[165] *Id.* (Souter, J., dissenting).

therefore violated.[166] He would have affirmed the Pennsylvania Supreme Court's decision.[167]

C. JUSTICE STEVENS' DISSENT

Justice Stevens dissented from the Court's judgment. He agreed with Justice Souter's analysis of the benefits of the exclusionary rule in the parole revocation context.[168] However, he wrote separately to endorse former Justice Stewart's conclusion that the exclusionary rule is "constitutionally required, not as a 'right' explicitly incorporated in the Fourth Amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact."[169]

V. ANALYSIS

A. WHOSE EXCLUSIONARY RULE?

In one respect, the *Scott* decision differs significantly from the Court's previous decisions regarding the exclusionary rule: neither briefed nor argued nor mentioned in the Court's opinions (other than an indirect reference in Justice Stevens's dissent) is a dispute about the function of the rule. The *Weeks* opinion responsible for the origin of the rule viewed it as mandated by the Fourth Amendment, as a necessary corollary of constitutional protections: "to sanction [illegal police conduct] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution."[170] Subsequent opinions likewise regarded the rule as implicit in the Fourth Amendment: for example, *Silverthorne Lumber Co. v. United States*[171] argued that failing to apply the rule reduced the Fourth Amendment to "a form of words,"[172] and *Byars v. United States*[173] stated that "the assurance against [misuse of power] is

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[166] *Id.* at 2028 (Souter, J., dissenting).
[167] *Id.* (Souter, J., dissenting).
[168] *Id.* at 2022-23 (Stevens, J., dissenting).
[169] *Id.* at 2023 (Stevens, J., dissenting (quoting Stewart, *supra* note 52, at 1389)).
[170] Weeks v. United States, 232 U.S. 383, 394 (1914).
[171] 251 U.S. 385 (1920).
[172] *Id.* at 392.
[173] 273 U.S. 28 (1927).

not to be impaired by judicial sanction" of illegal conduct.[174] *Mapp* drew extensively on these theories, stating that "[n]othing can destroy a government more quickly than its failure to observe its own laws,"[175] and referred to the theoretical basis of *Weeks* as justification for the rule.[176] *Mapp* also referred to the "imperative of judicial integrity" of *Elkins*, which argued that the federal courts should not be "accomplices in the willful disobedience of [the] Constitution."[177] Later decisions shifted the basis for applying the rule to deterrence, though: *Calandra* called the rule a "judicially created remedy,"[178] and *Stone* and *Leon* followed suit.[179] The new deterrence analysis eliminated judicial complicity by arguing that the wrong to the defendant is "fully accomplished" by the original search and seizure;[180] admitting the evidence therefore raises no concerns about a fresh violation of a defendant's rights. All three cases featured vigorous dissents by Justice Brennan, who argued each time that the Court was ignoring the real basis of the exclusionary rule and watering down its protections by confining its value to deterrence.[181] The accumulated precedent from those cases seems to have overruled the reasoning of *Mapp*, but preserved the substance of the decision.

It is far from clear that the Court's "fully accomplished wrong" analysis actually addresses the real problem. For one thing, in some situations, the wrong is *not* fully accomplished

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[174] *Id.* at 33.

[175] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

[176] *Id.* at 653.

[177] Elkins v. United States, 364 U.S. 206, 223 (1960).

[178] United States v. Calandra, 414 U.S. 338, 348 (1974).

[179] One commentator has wondered if the loss of the constitutional basis for the rule in these decisions has cast it into the realm of federal common law. *See* Arthur G. LeFrancois, *On Exorcising the Exclusionary Demons: An Essay on Rhetoric, Principle, and the Exclusionary Rule*, 53 U. CIN. L. REV. 49, 79-80 (1984). If so, it is possible that the exclusionary rule as it stands could be overruled entirely by statute, and the Court's analysis regarding the "fully accomplished wrong" would mean that victims of illegal searches would have no recourse.

[180] *Calandra*, 414 U.S. at 354.

[181] *See* United States v. Leon, 468 U.S. 897, 931-32 (1984) (Brennan, J., dissenting); Stone v. Powell, 428 U.S. 465, 510-11 (1976) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 359-60 (1974) (Brennan, J., dissenting). *See also* 1 LAFAVE, *supra* note 64, § 1.6(a), at 158-59, commenting on the *Calandra* holding.

when an officer seizes evidence illegally; the defendant's possessory interests have been infringed, and as long as the government retains that material, the wrong continues.[182] That is, admitting the evidence *does* work a new Fourth Amendment wrong: it compounds the original violation of the defendant's possessory rights by using the illegally seized materials to convict him.[183] If the officers draw on that evidence in order to violate privacy interests, a wrong which is "fully accomplished" in the sense that nothing can reverse it, then the state is using one violation of the Fourth Amendment to make another possible.[184] If courts allow the use of evidence so long as the wrong is complete—i.e., the police have returned it—then that constitutes derivative use under *Silverthorne Lumber Co. v. United States.*[185] In *Silverthorne,* the government seized documents, then returned them pursuant to court order—but it photocopied them before returning them and issued subpoenas based on the photocopies.[186] The Court ruled that the government cannot profit by its own wrong in those circumstances, fully accomplished or not.[187] It is possible, of course, to draw a distinction for Fourth Amendment purposes between fully accomplished wrongs and ongoing violations, but that would leave the law in an even more incoherent state.[188] A more sensible approach would draw an analogy from the government's derivative use of illegally seized evidence in *Silverthorne* to use of information obtained from a violation of privacy, since the invasion is "fully accomplished" in both situations, and find that admitting illegally seized evidence is itself a violation of a defendant's rights.[189] But theoretical co-

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[182] William C. Heffernan, *On Justifying Fourth Amendment Exclusion,* 1989 WIS. L. REV. 1193, 1212.

[183] *Id.*

[184] *Id.* at 1222.

[185] 251 U.S. 385, 392 (1920).

[186] *Id.* at 390-91.

[187] *Id.* at 392.

[188] Heffernan, *supra* note 182, at 1239-40.

[189] *See, e.g.,* Thomas S. Schrock & Robert S. Welsh, *Up From* Calandra*: The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251, 299 (1974) (noting that "the 'accomplishment' of the 'original search' does not exhaust the category of constitutional wrongs that can occur in the course of the whole unconstitutional transaction"); Stewart, *supra* note 52, at 1383-86. *See also* United States v. Leon, 468 U.S. 897,

herence in the exclusionary rule context does not seem to be the order of the day.[190]

In light of its willingness to blur distinctions like the above, the Court seems to have abandoned judicial integrity, as articulated in *Elkins* and elsewhere, as a basis for Fourth Amendment decisionmaking. *Calandra* signaled the Court's direction when it dismissed the integrity argument in one sentence: "Illegal conduct is hardly sanctioned . . . by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced."[191] The "important and historic values" consisted, in the *Calandra* case at least, of the continued efficiency of the probationary system; while efficiency is important, it is not clear why it necessarily trumps the integrity of the judiciary. *United States v. Peltier*[192] mentioned the principle, but mostly in order to characterize it as a thing of the past and confine the permissible basis for the Court's decisions to deterrence.[193]

The notion of "judicial integrity" has itself come under attack in some circles. *United States v. Janis*[194] relied on *Calandra*'s "judicially created remedy" theory, pointing to deterrence benefits as the sole justification for the rule, but went further still in suggesting that courts overstep their bounds by applying the rule: "there comes a time at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."[195] The dicta in *Janis* therefore implied that judicial integrity has come full circle in the Court's analysis: rather than mandating

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941 (Brennan, J., dissenting) (arguing that the Fourth Amendment itself is the source of the costs associated with the exclusionary rule).

[190] Justice Rehnquist once observed that "the decisions of this Court dealing with the constitutionality of warrantless searches . . . suggest that this branch of the law is something less than a seamless web." *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973).

[191] United States v. Calandra, 414 U.S. 338, 356 n.11 (1974).

[192] 422 U.S. 531 (1975).

[193] *Id.* at 536.

[194] 428 U.S. 433 (1976).

[195] *Id.* at 459.

that courts strike down illegally seized evidence, lest the judiciary implicitly endorse misconduct, the principle now means that courts should avoid interfering in the executive branch process whenever possible. Another reverse integrity argument is that exclusion of valid evidence "undermines the reputation of and destroys the respect for the entire judicial system,"[196] implying that the court of public opinion should prevail over Fourth Amendment protections in this arena. *Calandra* and other decisions suggest that judicial integrity is merely another factor to consider in the balancing-test analysis.[197] But the function of the judiciary is to interpret the Constitution, and the point of insulating that branch from political pressures is to prevent the Constitution from being swept aside by the whims of the day. Whose version of judicial integrity is it that endorses official misconduct for fear of becoming unpopular?

Shifting the justification for the rule from substantive Fourth Amendment protections to a deterrence basis casts the Court in a somewhat uncomfortable role. Policy decisions regarding what best serves the purposes of law enforcement are better made by legislatures, or by the administrative agencies serving the law enforcement systems; courts making such decisions raise the "counter-majoritarian difficulty"[198] of an unelected branch of government writing its preferences into law. The arguments in *Scott* illustrate those problems: much of the Court's opinion is given over to weighing the rule's benefits to parolees' constitutional protections against its costs to society, arguably not a decision the Court is well equipped to make.[199]

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[196] Malcolm Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 223 (1978).

[197] LeFrancois, *supra* note 179, at 91 (quoting Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129, 1153 (1973)). *But see* Jeffrey Cole, *The Exclusionary Rule in Probation and Parole Revocation Proceedings: Some Observations on Deterrence and the "Imperative of Judicial Integrity,"* 52 CHI.-KENT L. REV. 21 (arguing that *Elkins*' principle was actually merely a policy argument).

[198] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962). *See also* William T. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 375 (1939) (questioning the propriety of courts tying the hands of legislatures and executives via the exclusionary rule).

[199] Justice Brennan argued as much:

In *Scott*, the Court told the Pennsylvania Supreme Court that, in fashioning a new doctrine which applied the rule in the context of parole revocation, it had weighed those costs and benefits incorrectly.[200] The reasoning of the *Scott* decision raises particular

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> In addition, the Court's decisions over the past decade have made plain that the entire enterprise of attempting to assess the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly or accurately. Although the Court's language in those cases suggests that some specific empirical basis may support its analyses, the reality is that the Court's opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data.

United States v. Leon, 468 U.S. 897, 942 (1984) (Brennan, J., dissenting). *See also* United States v. Havens, 446 U.S. 620, 633-34 (1980) (Brennan, J., dissenting) (arguing that "this balancing effort is completely freewheeling" and that the deterrence approach "treats the Fourth and Fifth Amendments as mere incentive schemes"); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 274 (1998) (arguing that "in operation the path that the Court has set out on can only be described as adjudication by empirical hunch"). The usual paradigm of judicial activism supposes a Court intent on taking power for itself in order to turn its own policy preferences into law; the line of cases, continued in *Scott*, that requires judges to decide whether the policy background of each situation mandates the exclusionary rule certainly involves judges in the process more than would a categorical rule favoring exclusion. Many commentators have criticized judicial activism, usually defined as judges going beyond the text of statutes or of the Constitution to make policy judgments, as usurping the role of the legislature; *see, e.g.*, Charles B. Blackmar, *Judicial Activism*, 42 ST. LOUIS L.J. 753 (1998); Lina A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767 (1998); Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178 (1997); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

[200] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2022 (1998). At the very least, this approach sits uneasily with *Griffin*'s deference to state regulations, since the Court was willing to intervene in a state's decision—and overrule the decisions of many states—here. The Court claimed in *Scott* that it granted certiorari "to determine whether the Fourth Amendment exclusionary rule applies to parole revocation proceedings," *id.* at 2019, but its analysis focused exclusively on the proceedings and barely mentioned the Constitution. Moreover, the Court struck down a discretionary application of the rule to a specific context—those situations where the investigating officer knew the suspect's status—saying that "we decline to adopt" such an approach. That raises the question whether it was necessary to grant certiorari in order to decline to adopt one state's rule, and whether this decision is compatible with Justice Thomas's judicial restraint. Since a majority of state courts and federal circuits have adopted the rule in some form, many on a basis similar to Pennsylvania's, the Court's decision arguably conflicts with the general consensus on this issue. On the other hand, the Pennsylvania Supreme Court's decision had applied its rule based on the federal Constitution (as well as the state constitution), so perhaps the

concerns: the opinion arguably rested more on the social costs analysis than on an assessment of the deterrence benefits, since the Court devoted most of its time to the argument that the parole and probationary systems would crumble beneath the weight of the Fourth Amendment. The deterrence analysis is somewhat less open-ended; a parole officer's incentives can at least be estimated. But the indeterminate nature of the social costs question—the inability of the Court to measure those costs, analyze their anticipated effects, and judge how the rule would affect different state systems—leaves the decision rather opaque.

The shifting rationale for the exclusionary rule has therefore created a problem: the judiciary enforces a restrictive rule governing executive decisions based on nothing in particular. *Calandra* and other decisions regarding the scope of the rule require only that courts apply the rule when the "potential contribution to the effectuation of the Fourth Amendment" outweighs the costs involved—i.e., on a discretionary basis.[201] Were the constitutional basis for the rule set out in *Weeks* and reiterated in *Mapp* still followed, that discretion would be unnecessary: the intent of the *Mapp* holding was to "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct."[202] The door was, in theory, closed, not closed as long as it served the purposes of deterrence. While the *Mapp* decision mentioned deterrence, it referred to that basis as an additional rationale, not as the overriding principle whose presence determines the weight of the constitutional claim. The change in the exclusionary rule's rationale has left the judiciary on thin jurisprudential ice: it usurps the legislature's policymaking role

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Court considered it worth its while to correct what it considered a mistaken perception of federal constitutional rights.

[201] Stone v. Powell, 428 U.S. 465, 487 (1976). *See also* United States v. Calandra, 414 U.S. 338 (1973), in which the Court argued that "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348.

[202] Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). The decision also referred to the rule as "part and parcel of the Fourth Amendment's limitations." *Id.* at 651.

and restricts executive action based on its own assessments of social policy.[203] In theory, if the Court decided tomorrow that the exclusionary rule does not, in fact, serve the purposes of deterrence, it could consign it to that very crowded dustbin of history. Since admission of illegally obtained evidence does not implicate the Constitution, Congress or any other legislature could likewise dispose of the rule on the same basis.

Undoubtedly, many resist the exclusionary rule on principle: detractors object to a rule that more often than not allows, in Justice Cardozo's words, "the criminal to go free because the constable has blundered."[204] One critic of the rule calls it an "outrage to common sense [that] . . . often results in the freeing of someone convicted of a vicious criminal act for what strikes the crime-conscious public as finicking or trivial reasons,"[205] an objection that, as one scholar says, seems "visceral rather than cerebral."[206] But public resentment is not a sound basis for constitutional decisionmaking; some say that most of the American public would reject, if given the choice, many of the provisions of the Bill of Rights.[207] In that many decisions regarding the rule's extension have simply stated the results of a supposed cost-benefit balancing analysis, without explanation, visceral

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[203] Of course, the Court has created remedies elsewhere. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that a suspect be given specific warnings before custodial interrogation can take place). But *Miranda* stipulated also that the remedy applies only insofar as no "other fully effective means are devised to inform accused persons" of their various rights; an alternative approach would obviate the Court's system for ensuring Fifth Amendment protections. *Id.* at 444. *See also* Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26 (1974) (defending the Court's creation of remedies to protect individual liberties, so long as the Court does not construe the rules it creates as necessary components of due process). The Court's decisions regarding the exclusionary rule contain no such caveat. Moreover, whereas *Miranda* relied on a finding that the Fifth Amendment requires substantive protection despite inherent costs, *Calandra* and *Stone* hold that social costs define the scope of the rule, and therefore the Fourth Amendment's protections. *Scott* is explicit on this point: "the rule is prudential rather than constitutionally mandated" and "imposes significant costs . . . although we have held these costs worth bearing in certain circumstances." 118 S. Ct. 2014, 2019-20.

[204] People v. Defore, 150 N.E. 585, 587 (1926).

[205] Wilkey, *supra* note 196, at 223 n.2 (quoting Editorial, THE WASHINGTON STAR, July 7, 1975, at A16).

[206] LeFrancois, *supra* note 179, at 69.

[207] *Id.* at 68.

feelings may play a part in the jurisprudence in this area as well. Many of those claims rest on mistaken assumptions, though: the rule that the above critic claimed "often" frees criminals actually excluded evidence, in one federal study, in 1.3% of arrests.[208] Due process concerns, all told, were responsible for dismissing 2% of the arrests in another study.[209] Most of the cases involve victimless crimes, such as firearms, immigration, and narcotics violations:[210] one critic of the rule acknowledged that it "rarely allows dangerous defendants to go free."[211] The popular antipathy to the rule may not, therefore, rest on considered judgment in any sense.

The *Scott* decision represents the culmination of a long process: the Court has moved from a highly theoretical defense of Fourth Amendment rights, and an argument that "judicial integrity" itself demands the exclusion of illegally seized evidence, to an argument that looks entirely to the rule's value for law enforcement and not at all to the language or purpose of the Fourth Amendment.[212] The facts of the *Scott* case illustrate that evolution: there was no dispute over whether Fourth Amendment rights were violated, but the Court was not interested in that as long as the violation was "fully accomplished" by the illegal search and not augmented by the admission of the evidence.[213] At this point, evidently, that is sufficient to satisfy the Court.

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[208] Report by the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 11, April 19, 1979, GGD-79-45 [hereinafter Report].

[209] The Exclusionary Rule Bills: Hearings on S.101, S.751, and S.1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 105 (1981) (statement of William W. Greenhalgh, Chairperson, Criminal Justice Section, Legislative Committee, American Bar Association).

[210] Report, *supra* note 208, at 7.

[211] John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036 (1974).

[212] For another view on how courts should consider the basis of the exclusionary rule, see Norton, *supra* note 199 (arguing for restoration of the status quo ante as the rule's theory).

[213] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2019 (1998) (quoting United States v. Leon, 468 U.S. 897, 906 (1984)).

B. EVALUATING DETERRENCE

The deterrence analysis in *Scott* illustrates many of the problems mentioned above. The Court argued that the deterrence to law enforcement officers provided by Pennsylvania's rule was not sufficient to outweigh the social costs of complicating the process.[214] The Court's reasoning was questionable, though: it dismissed the benefits as "minimal" and asserted with little analysis that law enforcement officers do not need any additional deterrence measures when investigating parolees.[215]

While the Court's holding in *Scott* is consistent with its line of cases restricting operation of the exclusionary rule, it takes a distinctly different tack on deterrence issues. As noted elsewhere,[216] the Court has increasingly disregarded arguments that the Fourth Amendment requires application of the rule, and has instead regarded it as a judicially created remedy to be applied in those situations where the benefits would outweigh its costs.[217] *Leon*'s adoption of a good-faith reliance standard fits that model,[218] as does *Calandra*'s refusal to apply the rule to the grand jury process, since such an exclusion would reduce the possibility of bringing indictments.[219] But *Scott*'s rejection of the deterrence benefits of the rule followed no obvious logic, certainly not the reasoning of *Leon* or *Calandra*: the Court reasoned that, "even when the officer knows the subject of his search is a parolee, the officer will be deterred from violating Fourth Amendment rights by the application of the exclusionary rule to criminal trials."[220] Officers who know that suspects are parolees also know that those suspects ordinarily face parole revocation hearings, rather than criminal trials as such. After all, why

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[214] *Id.* at 2022.

[215] *Id.*

[216] *See supra* notes 174-77 and accompanying text.

[217] The "efficiency" argument in this context could, some argue, mean a revival of the silver platter doctrine, in that parole officers could serve as "a front for police who are thus saved the nuisance of getting a warrant." Ellen A. Schwartz, *Do Illegal Searches Warrant Exclusion from Probation Revocation Hearings?*, 49 BROOK. L. REV. 1013, 1032 (1983) (quoting Abel v. United States, 362 U.S. 217, 242 (1960) (Douglas, J., dissenting)).

[218] *Leon*, 468 U.S. at 920-21.

[219] United States v. Calandra, 414 U.S. 338, 349-50 (1974).

[220] *Scott*, 118 S. Ct. at 2022.

would a prosecutor expend resources to try a parolee on the substantive offense when a revocation hearing can send him to prison far more cheaply?[221] Parolees are particularly unlikely to face prosecution when the offenses include noncriminal parole violations, such as possessing a firearm. The Court's finding that a parole proceeding is "outside the offending officer's zone of primary interest"[222] misses the point of Pennsylvania's rule: officers who know that the ordinary Fourth Amendment restrictions will not disrupt the suspect's hearing may feel free to disregard limits on search and seizure.

The Court's analysis regarding the deterrence benefits with respect to searches conducted by parole officers is similarly unpersuasive. The Court assumes categorically that parole officers feel benevolence and goodwill for parolees—"their relationship . . . is more supervisory than adversarial"[223]—and it is "unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality."[224] It is no doubt unfair to assume that in every instance; it is no more fair to assume that the parole officer bears no hostility toward the parolee and on that basis entrust to him absolutely the parolee's Fourth Amendment rights. Recognizing that the parole officer must play both roles—policeman and counselor/social worker—might allow for a more realistic perspective: it seems less than fair to expect those officers to both carry out investigative work and retain a mentoring relationship with the parolee. In that light, the Court should have considered parole officers similar to police officers for deterrence purposes.

Several lower court decisions have recognized the necessity of deterrence in this context. In *State v. Burkholder*,[225] the court described as "myopic" the view that suppression of illegally seized evidence secures Fourth Amendment rights sufficiently, contending that the "potential for abuse" inherent in the coop-

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[221] 1 LAFAVE, *supra* note 64, § 1.6(g), at 180.

[222] *Scott*, 118 S. Ct. at 2022 (quoting United States v. Janis, 428 U.S. 433, 458 (1976)).

[223] *Id.*

[224] *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972)).

[225] 466 N.E.2d 176 (Ohio 1984).

erative effort between police and parole officers demands stringent protections.[226] Likewise, *United States v. Rea*[227] relied on the *Calandra* balancing requirement and found that the deterrence value of applying the rule in probation revocation hearings outweighs injury to the process, since the burden of a warrant requirement is relatively minor.[228]

The *Scott* majority also found that other approaches to deterring illegal activity by parole officers will suffice, but the evidence for that appears to be thin. The Court suggested "departmental training and discipline and the threat of damages actions,"[229] to which Justice Souter responded:

> The same, of course, might be said of the police, and yet as to them such arguments are not heard, perhaps for the same reason that the Court's suggestion sounds hollow as to parole officers. The Court points to no specific departmental training regulation; it cites no instance of discipline imposed on a Pennsylvania parole officer for conducting an illegal search of a parolee's residence; and, least surprisingly of all, the majority mentions not a single lawsuit brought by a parolee against a parole officer seeking damages for an illegal search. In sum, if the police need the deterrence of an exclusionary rule to offset the temptation to forget the Fourth Amendment, parole officers need it quite as much.[230]

The Court's analysis in *Irvine v. California*[231] reflects the same concern. The *Irvine* Court found that other remedies for Fourth Amendment violations are "of no practical avail," since "the police are unlikely to inform on themselves or each other" and hence any claim against the police will likely be brought by convicted criminals.[232] *Mapp* went so far as to call reliance on

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[226] *Id.* at 178.

[227] 678 F.2d 382 (2d. Cir 1982).

[228] *Id.* at 389-90. Some commentators endorse this deterrence-based approach on the part of lower courts over Fourth Amendment absolutism. *See, e.g.*, Mark E. Opalisky, Note, *The Applicability of the Exclusionary Rule to Probation Revocation Proceedings*, 17 MEM. ST. U. L. REV. 555, 580 (1987).

[229] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2022 (1998).

[230] *Id.* at 2026 (Souter, J., dissenting).

[231] 347 U.S. 128 (1954).

[232] *Id.* at 137.

other remedies "worthless and futile."[233] As criminal suspects are unlikely to have the resources for a civil suit, and are likewise unlikely to win much sympathy from a jury, there is little reason to think that civil remedies are an adequate substitute for the exclusionary rule.[234] The interests harmed by Fourth Amendment violations are often nebulous enough that proving damages in court would be difficult.[235] And whether or not in-

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[233] Mapp v. Ohio, 367 U.S. 643, 652 (1961). The *Wolf* holding had rested on the Court's hesitation to condemn states' "reliance upon other methods which, if consistently enforced, would be equally effective." Wolf v. Colorado, 338 U.S. 25, 31 (1949). Integral to *Mapp*'s overruling of *Wolf* was the recognition of the "obvious futility" of entrusting Fourth Amendment rights to remedies other than the exclusionary rule. 367 U.S. at 652. Many states had, in the interim between *Wolf* and *Mapp*, adopted the exclusionary rule for themselves. *Id.* The *Scott* Court's airy assumption that unspecified other remedies will remedy Fourth Amendment violations in the parole context seems, at this late date, rather quaint.

[234] *See* Stewart, *supra* note 52, at 1384-88; Bivens v. Six Unknown Agents, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting). Chief Justice Burger advocates creating a right of action against the government itself to redress illegal seizures of evidence, which addresses the problem of juries' sympathy for the police but not the more fundamental problem of scarce resources on the part of criminal defendants. One commentator criticized Chief Justice Burger's suggestion as follows:

> Where are the lawyers going to come from to handle these cases for the plaintiffs? *Gideon v. Wainwright* and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on "cover" charges? The opportunity to represent his client without fee in these resulting criminal matters?

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 430 (1974).

[235] Justice Murphy's dissent in *Wolf* criticized the idea of a damages action for trespass as a substitute for the exclusionary rule:

> But what an illusory remedy this is, if by "remedy" we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances. In those that do, the plaintiff must show the real ill will or malice of the defendant, and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. If that burden is carried, recovery may yet be defeated by the rule that there must be physical damages before punitive damages may be awarded. . . . And even if the plaintiff

ternal disciplinary measures would accomplish the desired end, those are administrative proceedings that the courts cannot legislate or require that police departments implement.[236] Law enforcement officers would justifiably consider any attempt along those lines judicial overreaching.[237] There is little evidence, in short, that other means of deterring abuses by law enforcement are effective.

The Court's badly flawed deterrence analysis in *Scott* suggests that its decision rests more on an assessment of the presumed costs of applying the rule than on an accurate estimation of its benefits. And since the Court offers no empirical assessment of those costs, and provides no evidence to support the assertion that other available remedies can adequately protect Fourth Amendment interests in this context, it is difficult to see its claims about deterrence as anything other than a statement of its conclusion.

C. WHAT IS PAROLE REVOCATION?

Integral to the decision in *Scott* was the argument that never before has the Court applied the exclusionary rule to contexts other than criminal prosecutions. Past decisions in which the

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> hurdles all these obstacles, and gains a substantial verdict, the individual officer's finances may well make the judgment useless—for the municipality, of course, is not liable without its consent. Is it surprising that there is so little in the books concerning trespass actions for violation of the search and seizure clause?

Wolf v. Colorado, 338 U.S. 25, 42-44 (1949) (Murphy, J., dissenting) (citations omitted), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[236] Justice Murphy noted this problem as well:

> Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass.

Id. at 41 (Murphy, J., dissenting).

[237] Courts could, of course, require that officers conduct searches in compliance with departmental rules, and that such rules conform to Fourth Amendment requirements. *See* Amsterdam, *supra* note 234, at 416-17. But the incentive to write such rules vaguely is strong, and courts cannot rewrite the rules should they find that officers acting under their guidance violated suspects' rights.

Court declined to broaden the rule to grand jury proceedings, civil deportation proceedings, and civil tax proceedings led the *Scott* Court to argue that the parole revocation process should likewise be exempt.[238] Those analogies ignored the substantial similarities between the parole revocation process and criminal prosecutions, however, and once again assumed what they set out to prove.

Past decisions indicate that parallels between parole revocation hearings and criminal proceedings are not so obscure. The *Scott* Court characterized parole revocation as "flexible, administrative" and not "adversarial," but its holding in *Morrissey* suggests that the adversarial process plays a substantial part. Requiring that the parolee be permitted to call witnesses of his own and cross-examine adverse witnesses, as *Morrissey* does, draws a certain parallel to criminal proceedings.[239] Likewise, the provision for counsel for indigent parolees in *Gagnon*, though it required only that "fundamental fairness" govern the question of appointment of counsel, suggested that the parole revocation process can have an adversarial flavor.[240] Several of the lower court decisions applying the rule to revocation proceedings have done so on this theory:[241] in *United States v. Workman*,[242] for example, the court found that a probation revocation hearing bears a stronger resemblance to a criminal trial than to a grand jury proceeding or civil trial, since the defendant's liberty is not endangered in the latter contexts.[243] Likewise, in *Amiss v. State*,[244] the court concluded that the use of illegally seized evidence in a probation revocation hearing is "no less an invasion of the con-

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[238] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2020 (1998).

[239] Morrissey v. Brewer, 408 U.S. 471, 489 (1972). It is true, of course, that prisoners are entitled to due process rights but not to Fourth Amendment protections, under *Sandin v. Conner*, 515 U.S. 472 (1995). However, two more recent circuit court decisions have restricted the logic of *Sandin* to prisoners rather than extending it to parolees, suggesting that the *Morrissey* analysis remains good law. Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996); Orellana v. Kyle, 65 F.3d 29, 32 (5th Cir. 1995).

[240] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[241] Opalisky, *supra* note 228, at 573.

[242] 585 F.2d 1205 (4th Cir. 1978).

[243] *Id.* at 1210-11.

[244] 219 S.E.2d 28 (Ga. Ct. App. 1975).

stitutional rights" of the defendant than use in a criminal trial would be.[245]

The other contexts that the Court mentioned do not support its analysis. Grand jury proceedings have a special status under law because the target of the investigation generally does not testify; the purpose of the process is to weigh the evidence, not to determine ultimate liability.[246] Additionally, any charges brought as a result of grand jury proceedings are subject to exclusion in a subsequent criminal prosecution, so there is no real danger associated with the relaxing of evidentiary restrictions.[247] Civil deportation proceedings are only minimally related to criminal prosecutions: they do not determine criminal liability, traditional protections such as Miranda warnings do not apply, and the hearing may proceed in the absence of the potential deportee.[248] The decision in *United States v. Janis*[249] did not address the applicability of the rule to civil tax proceedings *per se*; the *Janis* holding turned on the deterrence rationale, since the officer had acted in good faith,[250] and on the "intersovereign" nature of the case, since the evidence in the federal proceeding had been seized by a state officer.[251] The pronounced movement on the part of state courts and federal circuits toward applying the rule in probation and parole hearings also suggests that the parallels are more compelling than the Court's analysis acknowledged.

Moreover, the Court has already extended the exclusionary rule beyond criminal prosecutions: in *One 1958 Plymouth Sedan v. Pennsylvania*,[252] the Court applied the rule to forfeiture proceedings, calling them "quasi-criminal."[253] The *Plymouth Sedan*

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[245] *Id.* at 30.

[246] United States v. Calandra, 414 U.S. 338, 343-44 (1973).

[247] *Id.* at 351.

[248] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).

[249] 428 U.S. 433 (1976).

[250] *Id.* at 447.

[251] *Id.* at 455-56. Indeed, the Court explicitly declined to decide whether the rule should apply to "intrasovereign" cases, where the agent in question and the court hearing the case were under the same government. *Id.* at 456.

[252] 380 U.S. 693 (1965).

[253] *Id.* at 700.

Court reasoned, relying on *Boyd*, that since the target of a forfeiture hearing is charged with the commission of a crime and the purpose of the proceeding is to determine whether he has violated the law, the exclusionary rule must apply.[254] Parole revocation hearings likewise adjudicate guilt or innocence, though not all violations are actual crimes, and the parolee's liberty hangs in the balance. The subjects of forfeiture proceedings, like parolees, must be afforded due process rights of notice and an opportunity to be heard;[255] the consequences for violations of the law are loss of property in the one instance and loss of liberty in the other. The Court, conveniently, did not mention *Plymouth Sedan* in *Scott*, but the parallels between the two contexts are striking.

Parole officers serve much the same purpose as police officers, and treating them differently ignores the realities of the process.[256] Parole officers are permitted to investigate alleged violations, by searching the parolee's person and residence. Though they play a "supervisory" function, they are also required to enforce the restrictive conditions governing parole and take the parolee into custody should he violate the conditions. Moreover, as Justice Souter observed, even though parole officers sometimes play the role of counselor and social worker, the expectation that they monitor parolees and take them into custody should they violate their parole conditions means that they must play adversary as well.[257] Viewing parole revocation as an administrative rather than adversarial process, because parole officers are in charge, is therefore unrealistic. It also ignores that ordinary police officers often assist parole officers in their enforcement duties, police officers who are not necessarily tuned to the supposedly nonadversarial process of parole revocation.[258] Learning about and seizing evidence of alleged violations is a crucial element in the revocation process, after all.

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[254] *Id.* at 701.

[255] United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993).

[256] Pennslyvania Bd. of Probation and Parole v. Scott, 118 S. Ct. 2014, 2025 (1998) (Souter, J., dissenting).

[257] *Id.* at 2026 (Souter, J. dissenting).

[258] *Id.* at 2025 (Souter, J., dissenting).

D. GOOD FAITH?

The *Scott* Court, along with fumbling its factual analysis, looked past its own precedent on one important point. The rule that the Court rejected in *Scott* mirrored, in several significant respects, the "good faith" exception upheld in *United States v. Leon*, and the Court ignored the obvious parallels in striking down Pennsylvania's proposal.

The similarities between *Leon* and Pennsylvania's rule are evident. Under the *Leon* Court's analysis, "[w]here the police officer's conduct is objectively reasonable . . . 'excluding the evidence can in no way affect his future conduct.'"[259] In some circumstances, however, "the officer will have no reasonable grounds to believe that the warrant was properly issued," and the Court's deterrence calculus required that evidence produced by those searches be excluded.[260] The Pennsylvania Supreme Court's rule likewise looked to situations where there was specific evidence of bad faith—for example, where a law enforcement officer, knowing that a suspect was unlikely to face a criminal prosecution, violated his Fourth Amendment rights.[261] Such evidence would be objectively assessable; no inquiring into motivations would be necessary.

The parole revocation context particularly recommends itself to a good-faith standard. Much of the process, as the *Scott* Court acknowledged, is not subject to the constraints of ordinary criminal proceedings: the "flexible" standards applicable to revocation hearings would seem to demand the likewise "flexible" requirement that officers show good-faith compliance with the Fourth Amendment. Since Scott had waived the warrant requirement—and since, under *Griffin*, he was probably not entitled to a warrant anyway—his rights were subject to the whims of the officers; *Leon* looked to the "detached scrutiny of a neutral magistrate"[262] and declared that good faith reliance on a de-

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[259] *United States v. Leon*, 468 U.S. 897, 919-20 (quoting *Stone*, 428 U.S. at 539-40 (White, J., dissenting)).

[260] *Id.* at 922-23.

[261] Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32, 38 (Pa. 1997).

[262] *Leon*, 468 U.S. at 913 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).

fective warrant justifies admitting the evidence,[263] but Scott had no such safeguard. Given the extent of parolees' waivers of their rights, an officer who nonetheless manages to violate Fourth Amendment protections in the case of a parolee has likely crossed the bounds that *Leon* set, namely whether a "reasonably well trained" officer could execute a defective warrant without noticing that anything was amiss.[264] Again, Scott's case is illustrative: extending a search of a bedroom to the common areas of a home transgresses obvious and well-known limitations on the scope of a search, suggesting that the officers extended that search because they knew that parolees have diminished privacy protections. The very nature of the search, in short, suggests bad faith—but not for the Court.

In one sense, the Pennsylvania rule represented the obverse of the *Leon* condition: it sought to exclude evidence where there was clear evidence of bad faith, rather than seeking to include evidence when the officer acted in good faith. Arguably, though, the former is less constitutionally troubling, in that it compromises the courts less, makes them less an accomplice to official misconduct. Moreover, bad faith is, in this case, more objectively discernible than good faith: knowledge of a parolee's status will be obvious in the case of a parole officer's violation, and scarcely less obvious if a police officer has cooperated with or contacted the parole board regarding a parolee's alleged violations. In either case, the deterrence argument is clear: mandating exclusion of illegally seized evidence discourages officers from crossing Fourth Amendment boundaries. The Pennsylvania rule would make the officer's knowledge paramount, admittedly a potentially troublesome complication, but the Court seemed willing enough to take on such a complication in *Leon*. In fact, the *Scott* Court worried about the "additional layer of collateral litigation" that the Pennsylvania rule would add,[265] as if establishing that a parole officer knew about a parolee's status actually represents something *more* complicated than determin-

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[263] *Id.* at 908.

[264] *Id.* at 923.

[265] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2022 (1998).

ing, under *Leon*, whether a warrant was defective and whether a well-trained officer would have recognized as much.[266]

The Court missed the parallels in the Pennsylvania rule to its own decision in *Leon*, failing to assess adequately the relative value of deterrence. The Court did not consider, in either case, the notion of systemic deterrence that Justice Brennan raised in his *Leon* dissent, meaning the necessity to deter not only violations by individual officers, but also to forestall indifference to parolees' rights on the part of magistrates who issue warrants, for example.[267] Nor, apparently, did it understand the irony of dismissing as "marginal" the deterrence benefits of a rule that mirrored almost exactly its own precedent.[268] Rather than applying the *Leon* analysis consistently, therefore, the Court used its analysis of parolees' and probationers' Fourth Amendment rights to trump the deterrence arguments regarding the utility of the exclusionary rule.

E. PAROLEES AND THE FOURTH AMENDMENT

Dubious as the analytical basis of *Scott* seems, the decision does reflect prevailing trends in the Court's jurisprudence regarding the Fourth Amendment rights of probationers and parolees. Moreover, it is likely, in light of precedent, that the Court would have found the search of Scott's residence constitutional had it reached that issue, even without explicit consent or a law clearly authorizing the officers to search common areas of the residence. In short, Scott was likely to lose either way.

The precise extent of parolees' and probationers' rights has been debated in recent years. *Mempa* stated, and *Morrissey* affirmed, that defendants in revocation hearings are not entitled

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[266] *Leon*, 897 U.S. at 923. *See also* 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 (1981), noting that implementing a good faith exception could be a major drain on court resources: "If [a police officer] is permitted to call these witnesses [to make the case for good faith], then present suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time, will seem positively fleeting by comparison." *Id.* at 448.

[267] *Leon*, 468 U.S. at 956-58 (Brennan, J., dissenting).

[268] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2021 (1998).

to the rights guaranteed ordinary citizens:[269] instead, the liberty deprived is "conditional."[270] But the *Morrissey* opinion did not go on to declare that parolees' rights are defined by the parole agreement they sign; instead, the opinion set out due process restrictions on the revocation process, detailing the procedures required for such a process to be constitutional.[271] Though *Morrissey* took pains to note that "there is no interest on the part of the State in revoking parole without any procedural guarantees at all,"[272] its opinion regarding those guarantees was not simply advisory: the argument made it clear that these are constitutional requirements, not conditional on anything.[273]

The holding in *Griffin v. Wisconsin*, though it superficially relied on *Morrissey*'s theory and addressed a separate area of the law, in fact changed the landscape significantly. By abandoning the warrant and probable cause requirements as inconsistent with Wisconsin's "special needs,"[274] the *Griffin* majority subordinated Fourth Amendment rights to efficiency. Supervision of parolees is a state interest, and giving substance to parolees' Fourth Amendment rights by requiring warrants and probable cause for a search might, fretted the *Griffin* court, hamper that interest.[275] The new standard required only "reasonable grounds" for suspicion, and left unresolved what grounds were reasonable: it established a balancing test between the requirements of the probation system and the probationer's Fourth Amendment rights.[276] The dangers of the Court's approach to "reasonableness" are twofold. First, as the dissent argues hap-

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[269] Mempa v. Rhay, 389 U.S. 128 (1967); Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

[270] *Morrissey*, 408 U.S. at 480.

[271] *Id.* at 483-44.

[272] *Id.* at 483.

[273] *Id.* at 482.

[274] Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

[275] *Id.* at 876-78.

[276] *Id.* at 873. *Griffin*'s creation of a highly nebulous balancing test—weighing the interests of a state's probation system is difficult—is ironic, since Justice Scalia, author of the majority opinion, has elsewhere criticized overreliance on such tests. *See, e.g.*, Printz v. United States, 521 U.S. 98 (1997); Board of Cty. Commissioners v. Northlake, 518 U.S. 668 (1996) (Scalia, J., dissenting); United States v. Virginia, 518 U.S. 515 (1996) (Scalia, J., dissenting).

pened in *Griffin*, officers may carry out a search "pursuant to" regulations that satisfy the Fourth Amendment, but not actually satisfy the requirements of those regulations.[277] Second, many courts have responded to *Griffin*'s "reasonableness" requirement by defining the terms of the parole agreement as setting the bounds for reasonableness,[278] which in turn encourages parole boards to require that parolees consent to warrantless searches, whether based on reasonable suspicion or not. It takes no great imaginative leap to suppose that parolees and probationers will consent to conditions that dramatically reduce their rights, since such agreements are hardly subject to negotiation.[279] The argument that the probation system would be unacceptably disrupted by the application of the rule suggests that the probationary and parole systems are so fragile that only through illegal methods can they function effectively.[280] Moreover, it proves too much to argue that the societal costs of failing to incarcerate parole violators are too great to justify exclusion. The costs of applying the rule to criminal prosecutions are far greater, after all, considering the relative numbers of parole

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[277] *Id.* at 887 (Blackmun, J., dissenting).

[278] Hemmens & Del Carmen, *supra* note 18, at 34. *See* People v. Reyes, 961 P.2d 984 (Cal. 1998) (when involuntary search conditions are properly imposed, reasonable suspicion is not required); State v. Zeta Chi Fraternity, 696 A.2d 530 (N.H. 1997) (probation condition allowing a probation officer to perform unannounced warrantless searches is constitutional), *cert. denied*, 118 S. Ct. 558 (1997); State v. Benton, 695 N.E.2d 757 (Ohio 1997) (random searches are constitutionally permissible if included in the agreement).

[279] The Court has, of course, developed a doctrine of unconstitutional conditions, under which no state can require that a citizen waive his constitutional rights in order to receive a discretionary benefit, such as public employment, when those rights are unrelated to the benefit. *See, e.g.*, Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648 (1981); Sherbert v. Vertner, 374 U.S. 398 (1963); Perry v. Sindermann, 408 U.S. 593 (1972). But *Griffin* held that reasonableness alone governs probationers' rights because the state has "special needs" at stake and because supervision of probationers is an important state interest. If states may require a parolee or probationer to submit to warrantless searches without probable cause, that suggests that protesting a parole agreement under the unconstitutional conditions doctrine is unlikely to impress the Court. There may be an outer limit—there may be conditions that a state cannot impose on parolees—but it is not obvious where that limit lies.

[280] 1 LAFAVE, *supra* note 64, §1.6(g), at 183.

revocations and criminal proceedings, but courts still apply the rule to evidence seized in a criminal prosecution.[281]

The implications of the Court's rejection of the Pennsylvania rule are troubling. If the exclusionary rule is not to be applied in revocation hearings in settings where the offending officer knew the suspect's status, there is a tacit acknowledgment that police may apply two different standards in conducting investigations, depending on whether or not the target is a parolee. Law enforcement uses the tools given to it; explicitly removing Fourth Amendment protections effectively gives police *carte blanche* to infringe on those rights. Illuminating in this regard is this quote by New York City Deputy Police Commissioner Leonard Reisman after the *Mapp* decision:

> The Mapp case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?[282]

Likewise, the officer who ordered the search of Scott's residence, when asked about the guidelines under which he conducted the search, replied that "any individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission,"[283] which suggests that parole officers are quite aware of the Supreme Court's jurisprudence on parolees' rights. The claim that the rehabilitative process must be preserved is likewise unimpressive: the Court has already acknowledged, in *Morrissey* and *Gagnon*, that parole and probation revocation proceedings have an adversary element.[284]

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[281] *Id.* at 182.

[282] Stewart, *supra* note 52, at 1386 (quoting N.Y. TIMES, April 28, 1965, at 50).

[283] Scott v. Pennsylvania Bd. of Probation & Parole, 668 A.2d 590, 597 (Pa. Commw. Ct. 1995), *aff'd*, 698 A.2d 32 (Pa. 1997), *rev'd*, 118 S. Ct. 2014 (1998).

[284] 1 LAFAVE, *supra* note 64, § 1.6(g), at 183-84.

Under *Griffin*, the *Scott* search would likely be constitutional. Scott consented to a warrantless search by probation officers, making any evidence seized thereby admissible.[285] There was no mention of "reasonableness" in the parole conditions: the Pennsylvania Supreme Court's decision drew on prior Pennsylvania decisions that set independent standards for reasonableness, specifically that the search must be based on reasonable suspicion and be reasonably related to the parole officer's duty.[286] The court went on to say that an officer's knowledge that a suspect is a parolee mandates the exclusionary rule, since the balance of interests favors exclusion in those circumstances.[287] That approach conflicts with *Griffin*'s "reasonable grounds" test, however, since an officer's reasonable or unreasonable basis for suspicion is unaffected by his knowledge of a parolee's status. Specifically, the court introduced an absolute bar to admission of evidence into an area where the Court had implicitly ruled against such restrictions; moreover, since *Griffin* had looked to Wisconsin state regulations for reasonableness, the Pennsylvania Supreme Court's decision in *Scott* raised the possibility that upholding that decision would disrupt state probationary and parole systems whose regulations, under the Court's *Griffin* analysis, were presumptively reasonable.[288] Though the search exceeded the bounds of the parole agreement somewhat, the officers did conduct it "pursuant to" the

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[285] Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32, 32-33 (Pa. 1997), *rev'd*, 118 S. Ct. 2014 (1998). The search of the home's common areas as well as Scott's bedroom violated the scope of the agreement, to be sure, but broadening the scope of the parole conditions would eliminate that problem. *Griffin* had already established that a parole board can demand that a parolee sign away his rights; the *Scott* holding means that, in the event that the agreement leaves some rights intact, officers need not worry about violating them.

[286] *Id.* at 35.

[287] *Id.* at 38.

[288] Some find the decline of *Morrissey*, as indicated in *Griffin*, *Olim*, and now *Scott*, a worrisome trend. As one scholar put it:

> The fundamental question, then, is whether a society in which the state has the power to summarily reimprison several million conditional releasees without a meaningful hearing is one that is compatible with civilized norms of democracy and equal citizenship and is justifiable on policy grounds.

Bamonte, *supra* note 87, at 158.

reasonable agreement that Scott consent to warrantless searches of his home, following the *Griffin* logic. Not bound by Pennsylvania's precedents governing the reasonableness of searches, the Court might well have simply found that Scott consented to a search of the common areas as well as his own room.[289] The "waiver" theory of parole, though not a part of *Griffin*'s analysis, reemerged somewhat in *Scott* when the Court reasoned that excluding evidence would permit a parolee "to avoid the consequences of his noncompliance" with the parole conditions.[290] That reasoning suggests that, as far as the Court is concerned, the parolee may perfectly well waive his Fourth Amendment rights.[291] (Not considered, however, and particularly relevant in *Scott*, was the effect on others living with a parolee: has the parolee waived their Fourth Amendment rights too?)[292] The Pennsylvania Supreme Court's decision declared that the federal Constitution sets a definite limit on searches conducted on parolees and probationers, reversing the reasoning established in *Morrissey* and *Griffin* that states' asserted needs trump individual rights in this area. As such, it defied the Court's precedent.

The reach of the exclusionary rule mirrors the reach of procedural rights in general. It would be futile to continue to apply a constitutional provision designed to enforce the Fourth Amendment in a context where, by implication, the Fourth Amendment's protections are not fully applicable. The Court's rulings on the low level of constitutional protections owed to probationers and parolees therefore led to the holding in *Scott*.

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[289] The Court's decisions have upheld as "reasonable" warrantless searches incident to lawful searches. *See, e.g.*, New York v. Belton, 453 U.S. 454 (1981).

[290] Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2020 (1998).

[291] *Id.* at 2020. The Court also says that "the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements," presumably meaning consent to warrantless searches. *Id.* This again raises the specter of a bargaining process where all the leverage is on one side.

[292] *See, e.g., The Supreme Court 1997 Term—Leading Cases: Fourth Amendment—Exclusionary Rule—Parole Revocation Hearings*, 112 HARV. L. REV. 182, 191 (1998) (observing that "suspicionless searches would trench upon the rights of citizens residing with the conditionally released individual.")

VI. CONCLUSION

In *Pennsylvania Bd. of Probation & Parole v. Scott*, the Court once again chose to narrow the scope of the exclusionary rule, concerned about the potential social costs inherent in barring the introduction of illegally obtained evidence. Brushed aside were concerns that the rule is needed to deter abuses by law enforcement, and overruled was a state's approach that had substantial support both in the decisions of other jurisdictions and in the Court's own rulings. The result not only fits uncomfortably with some of the Court's past decisions, but also seemed to misunderstand the very nature of the parole revocation process. Yet, given already-existing restrictions on parolees' privacy rights that the Court could not justifiably overrule in this case, the holding in *Scott* was perhaps inevitable, and raised hard questions about whether the Court's decisions give law enforcement too much latitude in the interest of allowing states to supervise parolees.

Duncan N. Stevens