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Abrogating the Exclusionary Rule Outside of the Criminal Trial Context? Pennsylvania Board of Probation & Parole v. Scott: One Step Closer to a Per Se Rule in Fourth Amendment Jurisprudence

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CASENOTES

ABROGATING THE EXCLUSIONARY RULE OUTSIDE OF THE CRIMINAL TRIAL CONTEXT? *PENNSYLVANIA BOARD OF PROBATION & PAROLE V. SCOTT*: ONE STEP CLOSER TO A PER SE RULE IN FOURTH AMENDMENT JURISPRUDENCE

I. INTRODUCTION

As citizens of the United States, most of us would abhor warrantless police intrusion into our homes. The Fourth Amendment[1] protects all citizens against unreasonable searches and seizures.[2] When unaccompanied by a valid search warrant, a search of a residence is presumptively unreasonable.[3] Thus, the law proscribes overly-aggressive investigatory methods that trammel the rights of American citizens. What happens, however, when the protected right belongs to a paroled felon suspected of violating the conditions of his parole? In *Pennsylvania Board of Probation & Parole v. Scott*,[4] the United States Supreme Court refused to extend to parolees the remedies which

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1. U.S. CONST. amend. IV.

2. *See id.* Specifically, the Fourth Amendment of the Constitution establishes that

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

Id.

3. *See* Payton v. New York, 445 U.S. 573, 586 (1980).

4. 118 S. Ct. 2014, 2017-18 (1998).

are offered to other citizens when illegal police conduct infringes upon their Fourth Amendment guarantees.[5]

The United States Supreme Court has long recognized the need for judicial deterrence of overzealous law enforcement officers.[6] Toward this end, the Court has generally mandated the exclusion from criminal trials of evidence obtained through illegal means, provided the exclusion deters police misconduct.[7] Thus, the fruits of police searches that violate the "reasonableness" requirement of the Fourth Amendment are often suppressed at trial. The underlying rationale is that exclusion deters police officers from conducting illegal searches because they know that any evidence seized would subsequently prove inadmissible at trial.[8]

Since first enunciating the exclusionary rule, the United States Supreme Court has striven to limit its impact and effect.[9] The Court has ruled that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence from all proceedings or against all persons."[10] Outside the criminal trial context, the Court has expressed extreme

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5. *See id.*

6. *See* Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 650 (1982). Originally, however, the Supreme Court established the exclusionary rule upon concluding that the suppression of illegally obtained evidence was mandated by the Fourth Amendment. *See* Weeks v. United States, 232 U.S. 383, 398-99 (1914). Thus, utilization of the rule was obligatory in any cases involving unreasonable searches and seizures. Subsequently, the Court ruled that the Fourteenth Amendment required the extension of the exclusionary rule to criminal proceedings in state courts. *See* Mapp v. Ohio, 367 U.S. 643, 657-58 (1961); *see also* United States v. Janis 428 U.S. 433, 443-47 (1976).

The Burger Court of the 1960s systematically stripped away the constitutional undergirdings of the exclusionary rule. *See* Morris, *supra*, at 650. Ultimately, in *United States v. Calandra*, 414 U.S. 338, 348 (1974), the Court rejected the notion that the Constitution mandated the exclusion of illegally obtained evidence. Rather, Justice Powell concluded, "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Id.* Later, the Court strengthened and solidified its deterrence justification in *United States v. Leon*, 468 U.S. 897 (1984).

7. *See* Laurence Naughton, Note, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 217 (1996).

8. *See Scott*, 118 S. Ct. at 2017.

9. *See* James A. Adams, *Search and Seizure as Seen by the Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 464-65 (1993) (describing how the policy shift to deterrence severely limits the application of the exclusionary rule).

10. *Calandra*, 414 U.S. at 348.

reluctance to apply the rule.[11] In *Pennsylvania Board of Probation & Parole v. Scott*, the Court once again declined to extend the exclusionary rule beyond the criminal trial setting.[12] Specifically, the Court ruled that a parole revocation hearing is an inappropriate venue for application of the exclusionary rule.[13] Thus, state hearing officers may justifiably refuse to suppress illegally obtained evidence at parole revocation proceedings.[14]

In evaluating the efficacy of exclusion, the Court weighed the legitimate state interest in admitting probative evidence at parole revocation proceedings against the deterrent effect of the rule upon officers.[15] The Court examined such factors as the social costs of exclusion, the nature of the proceedings, and the role of probation officers.[16] Concluding that the state interest in efficient parole revocation far outweighed the deterrent effect of applying the rule, the Court refused to mandate exclusion at revocation hearings.[17]

This note examines the *Scott* opinion and comments on its niche within the exclusionary rule jurisprudence of the United States Supreme Court. Part II traces the history of *Scott* from the initial parole revocation hearing, through the Pennsylvania courts, and to the United States Supreme Court. Part III examines the competing interests involved in applying the exclusionary rule to parole revocation proceedings. Specifically analyzed are the social costs of exclusion and the potential deterrent impact of applying the rule at parole hearings. Finally, Part IV considers the effect of the *Scott* decision upon future exclusionary rule holdings.

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11. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (habeas proceeding); United States v. Janis, 428 U.S. 433 (1976) (civil tax proceeding); *Calandra*, 414 U.S. at 338.

12. *See Scott*, 118 S. Ct. at 2020.

13. *See id.* (holding that extension of the rule to revocation hearings would change the nature of parole proceedings and provide only minimal deterrence).

14. *See id.* "We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights." *Id.*

15. *See id.*

16. *See id.* at 2020-22.

17. *See id* at 2022. "The marginal deterrence of unreasonable searches and seizures is insufficient to justify such an intrusion." *Id.*

II. *PENNSYLVANIA BOARD OF PROBATION & PAROLE V. SCOTT*: A BALANCING OF THE INTERESTS

On March 31, 1983, Keith M. Scott began serving a ten to twenty year sentence for third-degree murder.[18] Scott remained incarcerated for just over ten years in the Pennsylvania penal system. Pursuant to a parole agreement, the Pennsylvania Board of Corrections released Scott from prison on September 1, 1993.[19] Under the terms of the agreement, Scott was to refrain from "owning or possessing any firearms or other weapons."[20]

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18. *See Scott*, 118 S. Ct. at 2018. *Scott* pleaded nolo contendere on April 2, 1982, and was subsequently incarcerated with an effective date of March 31, 1983. The minimum term expiration date of Scott's sentence was March 31, 1993, and the maximum was March 31, 2003. *See* Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32, 32 (Pa. 1997).

19. *See Scott*, 118 S. Ct. at 2018.

20. *Id.* (citing the parole agreement). The Supreme Court also noted that the agreement contained a consent provision that authorized parole officers to search Scott's residence without a search warrant. Specifically, the parole agreement provided:

> 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.

Id. The Supreme Court issued no opinion on the efficacy of this consent provision or upon the constitutionality of the search performed by the parole officers. Rather, the Court concluded that it need not address these issues because it had jurisdiction to determine whether the exclusionary rule should apply to parole revocation hearings. *See id.* at 2018-19. Because the Court determined that the exclusionary rule is an inappropriate remedy at such hearings, it did not need to rule on whether the consent provision obviated the unconstitutionality of the warrantless search. *See id.*

The Pennsylvania Supreme Court, however, has recently ruled that consent provisions within parole agreements have no effect when the subsequent search is based upon "mere speculation." *See Scott*, 698 A.2d at 36. The court's decision in *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997), established that consent provisions authorized warrantless searches only when based upon "reasonable suspicion that the parolee had committed a parole violation, and . . . the search was reasonably related to the parole officer's duty." *Id.* at 1036. Under the court's analysis, the consent provision did not bar Scott from seeking to suppress the evidence at his hearing because the search was based on mere speculation that he had committed a parole violation. *See Scott*, 698 A.2d at 36. Now that the Supreme Court has declined to extend the exclusionary rule to parole revocation hearings, the effect of a consent provision means very little to the adjudication of the hearing. Even evidence obtained in gross violation of the Fourth Amendment will be admitted at the hearing.

Despite the Court's ruling, consent provisions may still have some import. In determining departmental sanctions and guidelines for its officers, the Board of Probation and Parole will undoubtedly consider the impact of consent provisions. Thus,

The agreement further provided that Scott "must not consume alcohol" or engage in any "assaultive behavior."[21]

Just five months after Scott's release, parole officers sought and were granted an arrest warrant for Scott based upon evidence that he owned firearms and other weapons, had consumed alcohol on at least two occasions, and had verbally assaulted a coworker.[22] After being arrested at a local diner on February 4, 1994, Scott provided the arresting officers with the keys to his residence.[23] Without obtaining a search warrant, the officers proceeded to Scott's home, where they performed a search of Scott's bedroom and an adjacent sitting room.[24] Al-

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warrantless searches of residences, which ordinarily would result in sanctions against the parole officers, could be allowed if the officers acted upon reasonable suspicion and the search was reasonably related to their duties. As a result, officers facing discipline for warrantless searches may exculpate themselves by showing that their search was permissible due to the consent provision.

Further, the reasonableness of the search is still very much an issue when new criminal charges are brought against a parolee based upon evidence obtained by parole officers. When brought in a criminal court, new charges must be based upon evidence obtained reasonably. Thus, the effect of the consent provision upon the actual search itself will be of paramount importance at trial. *See also infra* notes 55-58 and accompanying text.

21. *Scott*, 118 S. Ct. at 2018 (citing the parole agreement).

22. *See* Scott v. Pennsylvania Bd. of Probation & Parole, 668 A.2d 590, 592-93 (Pa. Commw. 1995). Specifically, the weapons charge alleged that Scott possessed each of the following: a .22 Magnum revolver pistol, a 10-millimeter Glock handgun, a Mossberg 12-gauge pump shotgun, a Glenfield 12-gauge bolt action shotgun, a Stevens 12-gauge single shotgun, a Harrington-Richardson 12-gauge single shotgun, a Glenfield .22 caliber semi-automatic, and a compound bow. *See id.* Except for the .22 Magnum and the Glock handgun, all of the weapons were confiscated from Scott's residence, which he shared with his mother and stepfather. *See Scott*, 698 A.2d at 33. At the parole revocation hearing, Scott's stepfather claimed ownership of the weapons found within the residence and represented that Scott had no knowledge of their existence within the home. *See id.* at 34.

The charges further alleged that Scott had consumed Zima Clear malt liquor on or about September 2, 1993, just one day following his release from prison. *See Scott*, 668 A.2d at 593. Additionally, it was alleged that he consumed Southern Comfort alcoholic beverages on or about October 18, 1993. *See id.* Finally, the charges also alleged that Scott committed assaultive conduct in violation of his parole by approaching a coworker in November 1993, and stating repeatedly, "I am going to fuckin' kill you." *Id.*

23. *See Scott*, 698 A.2d at 33.

24. *See Scott*, 668 A.2d at 593. At the parole revocation hearing, Scott testified that the adjacent room, in which the weapons were found, was a sitting room used exclusively by his mother. *See id.* This testimony was corroborated by Scott's stepfather, who additionally claimed that the weapons belonged to him and that he had hidden them under one of the couches located within the sitting room. *See id.*

though Scott's mother was in the home at the time, she did not consent to, nor did she actively oppose, the search of the residence.[25] The officers found no evidence of contraband in Scott's bedroom, but did locate numerous firearms under a couch in the sitting room.[26]

On March 30, 1994, the Pennsylvania Board of Probation and Parole brought charges against Scott in a parole revocation hearing.[27] Over the objection of Scott's counsel, the administrative law judge allowed the evidence obtained from the search of Scott's residence to be introduced against him in the hearing.[28] The judge concluded that the search was reasonable; therefore, the evidence should not be suppressed.[29] Subsequently, the Parole Board ruled against Scott on all the weapons and alcohol charges.[30] The assault charge was dismissed.[31] In a notice of decision, dated June 16, 1994, the Parole Board informed Scott that he was to be recommitted to serve the remainder of his sentence, plus an additional thirty-six months of backtime.[32]

Scott sought and was granted review of the Parole Board's administrative order by the Commonwealth Court of Pennsylva-

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25. *See id.* at 594. Scott's mother escorted the agents to Scott's bedroom, but only after the agents had threatened to go upstairs to locate and search the room themselves. *See id.*

26. *See Scott*, 698 A.2d at 33. In addition to the firearms, which were taped together under the couch, the officers found a compound bow and three arrows in a nearby closet. *See id.*

27. *See id.*

28. *See Scott*, 668 A.2d at 594. Specifically, Scott's counsel argued that the search was unreasonable under the Fourth Amendment because the homeowner (Scott's mother) did not consent to the search. *See id.*

29. *See* Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2018 (1998). The administrative law judge derived the same result as the Supreme Court of the United States (admission of the evidence seized pursuant to the search), but utilized a different approach. The judge concluded, that because the search was reasonable under Fourth Amendment analysis, no consideration of the exclusionary rule would be appropriate. *See Scott,* 698 A.2d at 33. The Supreme Court, however, ruled that the exclusionary rule is inappropriate at parole revocation hearings; therefore, the Court need not consider the reasonableness of the search. *See Scott,* 118 S. Ct. at 2018; *see also supra* note 20.

30. *See Scott*, 668 A.2d at 593-94. The Parole Board made clear that it had relied in part upon the testimony of the officer who had conducted the search of Scott's residence. *See id.* at 594.

31. *See id.* at 593-94.

32. *See id.*

nia.[33] Again, Scott argued that the search performed by parole officers was unreasonable and, therefore, the evidence obtained thereunder should have been suppressed.[34] The court recognized that "it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[35] Under certain circumstances, however, the Supreme Court of the United States has carved out exceptions to this fundamental doctrine. When "special needs" make search warrants and probable cause impracticable, the Court has allowed the introduction of evidence obtained pursuant to warrantless searches of residences.[36]

The Commonwealth Court concluded that both state and federal jurisprudence authorized warrantless searches of probationer's homes, if there was a sufficient statutory or regulatory framework in place to ensure that the search would be reasonable.[37] Given the legitimate public interest in regulating the conduct of parolees, the court concluded that a search warrant based upon probable cause was not required in order for parole officers to enter and search Scott's home.[38] Rather, the court concluded that parole officers needed only to show that they followed approved regulatory guidelines while conducting the search.[39] Despite the reduced standard, the court found

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33. *See id.* at 592.

34. *See id.* at 594. On appeal, Scott also claimed: (1) the administrative law judge erred in allowing impermissible hearsay evidence to be heard by the Parole Board; (2) the evidence relating to the weapons and alcohol charges was insufficient to justify the Parole Board's findings; (3) the thirty-six month recommitment sentence was administered without adequate notice; and (4) the notice of the hearing and the charges that were to be brought against him were impermissibly vague. *See id.* Because these claims were resolved before the case reached the Supreme Court of the United States, they are beyond the present scope of this casenote and will not be addressed further.

35. *Id.* at 595 (citing Payton v. New York, 445 U.S. 573 (1980)).

36. *See id.* The Supreme Court has expanded the "special needs" concept to include any warrantless search that would ordinarily be deemed unconstitutional provided that the government show the requisite "special need." *See, e.g.*, Chandler v. Miller, 520 U.S. 305 (1997); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Griffin v. Wisconsin, 483 U.S. 868 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985).

37. *See Scott*, 668 A.2d at 596.

38. *See id.* at 595-96.

39. *See id.* at 595-97. The court relied upon the Supreme Court's *Griffin* decision for the proposition that a search of a probationer's home is reasonable only if con-

that the search was unreasonable because there were insufficient procedural and regulatory safeguards in place to ensure the requisite degree of reasonableness.[40]

Consequently, the Commonwealth Court considered whether exclusion of the evidence derived from the unreasonable search was an appropriate remedy in a parole revocation hearing. The court noted that the majority of federal and state jurisdictions have not applied the exclusionary rule to parole revocation hearings.[41] In finding that the exclusionary rule was indeed

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ducted pursuant to a "regulation which itself satisfied the Fourth Amendment's 'reasonableness' requirement." *Id.* at 596 (quoting *Griffin*, 483 U.S. at 873). In *Griffin*, the United States Supreme Court determined that probationers "do not enjoy the absolute liberty to which every citizen is entitled, but only a conditional liberty . . . dependent upon the observance of probation restrictions." *Griffin*, 483 U.S. at 874. The Court did conclude, however, that searches of a probationer's home must still satisfy the "reasonableness" requirement of the Fourth Amendment. *See id.* at 873. One way to satisfy this requirement is to establish a statutory or regulatory framework which both grants officers the right to conduct warrantless residential searches and ensures that the searches will be conducted in a "reasonable" manner. *See id.* at 873-74.

The Pennsylvania Supreme Court took this concept even further than the *Griffin* Court envisioned. In *Commonwealth v. Pickron*, 634 A.2d 1093, 1098 (Pa. 1993), the Pennsylvania Supreme Court held that a statutory or regulatory framework is essential to justify warrantless searches of a probationer's home. Rather than merely concluding that the existence of a framework is one way to satisfy the "reasonableness" requirement, the *Pickron* court determined that it is the *only* way, absent the consent of the homeowner. *See id.* In the absence of this regulatory framework, only the consent of the homeowner would obviate the "unreasonableness" of the search. *See id.* The Commonwealth Court determined that Scott's mother had not given unequivocal, specific, and voluntary consent to the officers conducting the search, which was required if the consent was to be considered effective. *See Scott*, 668 A.2d at 597; *see also supra* note 20 and accompanying text.

40. *See Scott*, 668 A.2d at 597. "Our research has uncovered no enacted statute or regulation which would grant [an officer] the authority to conduct . . . a [warrantless] search." *Id.* Because parole officers conducted a warrantless search of Scott's residence, "without a statutory or regulatory framework authorizing such a search, we must conclude that the search was conducted in violation of Scott's limited Fourth Amendment rights." *Id.*

41. *See id.* at 599. After examining the federal circuits, the court concluded that only the Fourth Circuit had held that the exclusionary rule should be generally applicable to parole revocation hearings. *See id.* (citing United States v. Workman, 585 F.2d 1205 (4th Cir. 1978)). The majority of federal jurisdictions which have considered the issue have concluded that the exclusionary rule is not applicable to parole revocation hearings. *See, e.g.*, United States v. Finney, 897 F.2d 1047 (10th Cir. 1990); United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983); United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir. 1975); United States v. Brown, 488 F.2d 94

appropriate, however, the court applied the balancing test set forth in *United States v. Calandra*.[42] The court determined that "the deterrence factor substantially outweighs the injury which would result from the evidence obtained from [the] illegal search of Scott's approved residence."[43] Because the deterrent effect upon parole officers far outweighed the detriment done to the public interest in regulating parolees, the court concluded that the exclusionary rule was a proper remedy.[44] The court reversed and remanded the findings of the Parole Board because they were based in part upon evidence that should have been excluded.[45]

The Pennsylvania Board of Probation and Parole appealed the decision to the Pennsylvania Supreme Court.[46] After examining the issue differently than the Commonwealth Court, the Pennsylvania Supreme Court nonetheless agreed that the search of Scott's residence was unreasonable.[47] The court concluded that there were sufficient regulatory guidelines in place to justify a warrantless search.[48] However, a valid warrantless

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(5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); United States *ex. rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

Likewise, the Commonwealth Court determined that the majority of state courts have declined to extend the exclusionary rule to parole revocation proceedings. For a detailed listing of state cases for and against implementing the exclusionary rule at parole revocation hearings, see *Scott*, 668 A.2d at 599.

42. *See Scott*, 668 A.2d at 600 (utilizing the balancing of interest test set forth in United States v. Calandra, 414 U.S. 338 (1974)); *see also supra* note 6. Although the Commonwealth Court did not identify *Calandra* as its source for the test, it recognized and weighed interests identical to those set forth by the United States Supreme Court in *Calandra*. *Compare Scott*, 668 A.2d at 600, *with Calandra*, 414 U.S. at 349-51.

43. *Scott*, 668 A.2d at 600.

44. *See id.*

45. *See id.* "The hearing officer should have excluded the evidence obtained in the illegal search at Scott's parole hearing. Because this evidence was improperly admitted over Scott's objection, we must reverse and remand this case for a new revocation hearing." *Id.*

46. *See* Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32 (1997).

47. *See id.* at 36.

48. *See id.* The court stated that Scott's signing of the consent provision, although it did not obviate his Fourth Amendment right to be secure from unreasonable searches, nonetheless sanctioned warrantless residential searches, provided they were reasonable. *See id.* at 35-36. The court reiterated that:

> the parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or

search must be based upon "(1) . . . reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty."[49] Because the court found that the parole officers acted upon "mere speculation" rather than "reasonable suspicion," it ruled that the search was unreasonable.[50]

In determining whether to apply the exclusionary rule to the unreasonably obtained evidence, the Pennsylvania Supreme Court also utilized the "balancing of interests" test developed in *United States v. Calandra*.[51] The court decided, like the Commonwealth Court, to extend the exclusionary rule to parole revocation hearings.[52] Reasoning that exclusion of evidence negatively impacts the administration of the parole process, the court ruled that evidence should only be suppressed if the deterrent effects of suppression outweigh its negative impact.[53] The court found that the deterrent effect of suppression hinges upon the searching officers' knowledge of the status of the parolee.[54]

When searching officers know that the residence belongs to a parolee, there is an added incentive and temptation to conduct searches without a warrant.[55] To countervail this trend, the

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> that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct reasonable searches of his residence listed on the parole agreement without a warrant.

Id. (quoting Commonwealth v. Williams, 692 A.2d 1031, 1036 (1997)).

49. *Id.* at 36.

50. *See id.* Because the parole officers who had searched Scott's residence "could not recall the source of the information regarding the existence of the weapons . . . the agents' suspicion was based upon mere speculation and was insufficient to support a warrantless search of the room adjacent to [Scott's] bedroom." *Id.*

51. *See id.* (citing United States v. Calandra, 414 U.S. 338, 349 (1974)).

52. *See id.* at 38. "The exclusionary rule should therefore apply to [Scott's] parole revocation hearing and the evidence obtained from the illegal search of his residence should be suppressed." *Id.* at 39.

53. *See id.* at 36. "In determining whether the exclusionary rule should be extended, we must balance the potential benefits of excluding the evidence against the potential injury to the historic role and function of the proceedings in which the illegally obtained evidence is to be admitted." *Id.*

54. *See id.* at 37-38 (adopting the rationale advanced in United States v. Winsett, 518 F.2d 51 (9th Cir. 1975), and United States v. Rea, 678 F.2d 382 (2d Cir. 1982)).

55. *See id.* at 37. To explain this approach, the court quoted the Ninth Circuit's *Winsett* decision:

court ruled that any evidence obtained pursuant to an unreasonable warrantless search should be suppressed if the searching officers were aware of the parolee's status.[56] Where the officers are unaware that the residence belongs to a parolee, the court found that the officers will be sufficiently deterred from unreasonable searches by the threat that the evidence will be suppressed at a criminal trial.[57] Because in this case, however, the officers were aware of Scott's status and then proceeded to conduct an unreasonable warrantless search, the obtained evidence should have been suppressed.[58]

The Supreme Court of the United States granted certiorari to the Pennsylvania Board of Probation and Parole's appeal and reversed the decision of the Pennsylvania Supreme Court.[59] Eschewing the analysis of the Pennsylvania state courts, the Supreme Court ruled that no federal law mandates the exclusion of illegally obtained evidence at a parole revocation hear-

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> [W]hen the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to the revocation of probation. Thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards.

Id. at 37 (quoting *Winsett*, 518 F.2d at 54 n.5).

56. *See id.* at 37-38.

57. *See id.* at 38. The court further illustrated its logic by using the following example:

> [W]e first examine the instance when a police officer is unaware of the parolee's status. In that situation, the officer sees the parolee as any other citizen with full constitutional protection. The officer has no incentive to illegally obtain evidence as he is cognizant that such evidence will most likely be subject to suppression. Thus, the deterrent purpose of the exclusionary rule is adequately served by the application of the rule in the criminal trial. There is no reason to apply the rule in a parole revocation hearing because it is unlikely to act as an *additional* deterrent to illegal police behavior.

Id. The court did not address the problems associated with this approach. Specifically, a knowledge-based formula requires a great degree of collateral litigation to determine what the officers knew at the time of the search. *See id.*

58. *See id.* at 39 (holding that the officers knew of Scott's status because they had recently arrested him for parole violations).

59. *See* Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2017 (1998).

ing.[60] Written by Justice Thomas, the majority opinion cited the high costs of excluding probative evidence at hearings in order to justify the court's reticence in extending the exclusionary rule beyond its traditional use in criminal trials.[61] Rather than passing judgment upon the searching officers' conformance with Fourth Amendment "reasonableness" requirements, the Court stated that, because exclusion is not required, even the fruits of an unreasonable search may be admitted at a parole revocation hearing.[62]

In determining that the costs of exclusion outweigh its deterrent impact, the Supreme Court found two aspects of the parole revocation system compelling. First, the Court cited the State's "'overwhelming interest' in ensuring that a parolee complies with [parole] requirements and is returned to prison if he fails to do so."[63] Thus, the Court determined that exclusion would impermissibly allow parolees to avoid the repercussions of their violations.[64] Second, the Court noted that parole revocation proceedings are civil in nature and as a result the relationship between parole officers and parolees is supervisory rather than adversarial.[65] The Court reasoned that parole officers have little stake in whether or not their parolees return to prison and thus, exclusion would have no deterrent effect upon them.[66] Other means of deterrence, such as departmental discipline and

60. *See id.* at 2020.

61. *See id.* "The costs of excluding reliable, probative evidence are particularly high in the context of parole revocation proceedings." *Id.*

62. *See id.*

63. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 483 (1972)).

64. *See id.* The Court also warned that parolees, especially those who commit parole violations, have a high rate of recidivism. Thus, exclusion of evidence at parole hearings greatly enhances the likelihood of future criminal offenses. *See id.*; *see also* Griffin v. Wisconsin, 483 U.S. 868, 880 (1987).

65. *See Scott*, 118 S. Ct. at 2022 (citing *Griffin*, 483 U.S. at 879). The Court also quoted *Morrissey* for the proposition that it is "unfair to assume that the parole officer bears hostility against a parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer." *Id.* (quoting *Morrissey*, 408 U.S. at 485-86).

66. *See id.* Additionally, the Court ruled that adoption of the Pennsylvania Supreme Court's "knowledge" rationale, *see supra* note 57 and accompanying text, would result in only minimal deterrence, insufficient to justify exclusion. *See Scott*, 118 S. Ct. at 2022.

damages actions, are more appropriate than the exclusion of probative evidence.[67]

In his dissent, Justice Souter claimed that the majority's decision rested upon an inaccurate understanding of the parole revocation process.[68] Rather than conceding that a parole officer has little stake in the outcome of a revocation hearing, Souter reasoned that parole officers "often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees."[69] When parole officers learn of parole violations, they cease their administrative functions and assume an adversarial role.[70] The officers acquire a stake in the outcome of the hearing because it reflects upon their investigative abilities.[71] Thus, exclusion is appropriate because it has a highly deterrent effect upon officers who might otherwise conduct unreasonable searches.[72]

The dissent further claimed that the majority underestimated the importance of parole revocation hearings.[73] Rather than pursuing new criminal charges, parole officers often present evidence obtained from searches exclusively in revocation hearings.[74] If a parolee is found to have violated his parole conditions, the Parole Board may recommit him to serve the remainder of his sentence.[75] The dissent reasoned that "[s]ince time

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67. *See Scott*, 118 S. Ct. at 2022.

68. *See id.* at 2024 (Souter, J., dissenting). Justice Souter, joined by Justices Ginsberg and Breyer (Justice Stevens filed a separate dissenting opinion), sought to distinguish *Scott* from cases in which the court declined to extend the exclusionary rule beyond the criminal trial context. *See* cases cited *supra* note 11.

69. *Scott*, 118 S. Ct. at 2025 (Souter, J., dissenting) (quoting NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE § 11.04, at 533 (1983)).

70. *See id.* at 2026 (Souter, J., dissenting). "[A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation." *Id.* (Souter, J., dissenting) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973)).

71. *See id.* (Souter, J., dissenting).

72. *See id.* (Souter, J., dissenting). Further, Justice Souter stated that deterrents such as departmental training and discipline are hollow threats. *See id.* (Souter, J., dissenting). There was no evidence presented at any level of the litigation to support the notion that Pennsylvania had specific training programs in place, or that it had ever disciplined an officer for an unreasonable search. *See id.* (Souter, J., dissenting).

73. *See Scott*, 118 S. Ct. at 2026 (Souter, J., dissenting).

74. *See* Morrissey v. Brewer, 408 U.S. 471, 478-79 (1972); *see also* Rose v. Haskins, 388 F.2d 91, 104 (6th Cir. 1968) (Celebrezze, J., dissenting).

75. *See Scott*, 118 S. Ct. at 2027 (Souter, J., dissenting).

on the street before revocation is not subtracted from the balance of the sentence to be served on revocation, the balance may well be long enough to render recommitment the practical equivalent of a new sentence for a separate crime."[76] Due to the administrative ease of recommitment, it is often the primary tool for the incarceration of parolees.[77] Thus, because officers do not envision presenting the obtained evidence at trial, they will not be deterred from committing Fourth Amendment violations by applying the exclusionary rule solely to criminal trials.[78]

III. APPLICATION OF THE *CALANDRA* "BALANCING OF INTERESTS" TEST IN *SCOTT*

Both the majority and the dissent utilized similar methodologies in analyzing the problems posed in *Scott*. Specifically, the two sides employed the *Calandra* "balancing of interests" test in reaching contrary conclusions.[79] Each side weighed differently the multiple interests involved in excluding evidence from parole revocation hearings.[80] To assess the merits of the *Scott* opinion, it is necessary to consider the findings of the Court in light of previous *Calandra* test jurisprudence. The Court's historical treatment of the social costs of excluding evidence, the nature of parole hearings, and the role of probation officers is

76. *Id.* (Souter, J., dissenting) (citation omitted) (quoting *Morrissey*, 408 U.S. at 480) (citation omitted).

77. *See Morrissey*, 408 U.S. at 479. "Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State." *Id.*

78. *See Scott*, 118 S. Ct. at 2027 (Souter, J., dissenting). "The upshot is that without a suppression remedy in revocation proceedings, there will often be no influence capable of deterring Fourth Amendment violations when parole revocation is a possible response to new crime." *Id.*

79. *See* United States v. Calandra, 414 U.S. 338, 350 (1974). In determining whether to apply the exclusionary rule to grand jury proceedings, the Court stated, "[a]gainst [the] potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from [the] proposed extension of the exclusionary rule." *Id.*

80. *See* Note, *The Supreme Court 1997 Term: Leading Cases*, 112 HARV. L. REV. 182, 187-88 (1998) (noting that the disagreement between the majority and dissent turned on questions of fact rather than questions of law).

of tantamount importance to an analysis of the conclusions posited by both the majority and the dissent.

A. *The Social Costs of Excluding Probative Evidence at Parole Revocation Hearings*

The Supreme Court has long recognized the social costs associated with implementing the exclusionary rule. Prior to *Calandra*, the Court acknowledged, but subsequently ignored, the social ramifications of the rule.[81] Operating on the belief that the Constitution mandated the exclusion of illegally obtained evidence, the Court ruled that judicial integrity required it to uphold the Constitution, regardless of the resulting social impact.[82] The *Calandra* decision represented a shift in the Court's justification of the exclusionary rule.[83] No longer encumbered by perceived constitutional requirements, the Court was free to consider whether, in light of the social consequences of evidentiary suppression, the exclusionary rule should be invoked against all persons and in all proceedings.

The exclusionary rule often exacts a high social cost.[84] When reliable evidence is suppressed at trials and hearings, the exclusionary rule obstructs the fact-finding role of the tribunal.[85] In *United States v. Payner*,[86] the Supreme Court stated,

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81. As early as 1928, for example, the Court, in *Olmstead v. United States*, 277 U.S. 438 (1928), stated:

> A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

Id. at 468.

82. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citing Elkins v. United States, 364 U.S. 206, 222 (1960)).

83. *See* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 261 (1998) (proposing that, in recent years, the Court has moved to a restoration-based justification for the exclusionary rule).

84. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 137 (1978) ("Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights.").

85. *See* David B. Altman, *Fifth Amendment—Coercion and Clarity: The Supreme Court Approves*, 80 J. CRIM. L. & CRIMINOLOGY 1086, 1109 (1990) (comparing the ramifications of *Mapp v. Ohio* with those of *Miranda v. Arizona*, 384 U.S. 436

"our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of the judge and jury."[87] As a result of evidentiary exclusion, guilty defendants may enter into favorable plea bargains or escape punishment altogether.[88] Furthermore, the release of guilty defendants increases the likelihood that the unpunished offenders will commit substantially similar crimes in the future.[89]

Allowing ostensibly guilty defendants to go free also has a negative impact upon the societal perceptions of the justice system.[90] The release of guilty defendants based upon exclusionary rule technicalities contributes to public frustration with the courts.[91] Because the judicial system's authority rests heavily upon societal perceptions of its integrity, any degree of public frustration adversely affects the power of the courts to administer justice.[92]

Economic considerations also factor in against the universal application of the exclusionary rule. The exclusionary rule economically "overdeters" illegal searches.[93] Judge Posner theorizes that evidentiary exclusion is remarkably inefficient.[94] For example, an illegal search may cost the victim one hundred

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(1966)).

86. 447 U.S. 727 (1980).

87. *Id.* at 734 (citations omitted).

88. *See* Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2020 (1998); *see also* Stone v. Powell, 428 U.S. 465, 490 (1976) ("The disparity . . . between the error committed by the police officer and the windfall afforded a guilty defendant . . . is contrary to the idea of proportionality that is essential to the concept of justice.").

89. *See* Griffin v. Wisconsin, 483 U.S. 868, 880 (1987).

90. *See* William Patrick Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1356-57 (1992); *see also* Warren E. Burger, *Who Will Watch the Watchmen?*, 14 AM. U. L. REV. 1 (1964).

91. *See* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 872 (1997) (citing national surveys which indicated that, between the years 1970 and 1990, over 80% of Americans felt that the courts were too lenient on crime).

92. *See* William J. Genego, *Forfeiture, Legitimation and a Due Process Right to Counsel*, 59 BROOK. L. REV. 337, 371 n.96 (1993).

93. Morris, *supra* note 6, at 659.

94. *See id.* at 660 (citing R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977)).

dollars in clean up costs and related expenses.[95] When the evidence obtained from the search is later excluded at trial, however, the resulting economic loss to society due to the inability to convict the accused is far greater than the harm done by the search.[96] Thus, Posner advocates levying fines against officers for conducting illegal searches, payable directly to the victims of the search.[97] By limiting the fine to the amount of damages incurred by the victim, the goal of economic efficiency may be best served.[98]

The social costs of exclusion are particularly acute in parole revocation settings. Statistically, parolees are likelier to commit antisocial and criminal acts than are members of the general community.[99] Given the social and economic costs of crime, states have a duty to protect their citizens from paroled offenders.[100] Thus, states have a legitimate interest in a parole system which closely regulates and supervises parolees. To accomplish this end, the Supreme Court has sanctioned state practices that circumscribe parolees' rights to be free from unreasonable searches and seizures under the Fourth Amendment.

Historically, courts have limited the Fourth Amendment rights of parolees under the "contract consent" and "constructive custody" theories.[101] According to the "contract consent" theory, parolees voluntarily relinquish certain Fourth Amendment guarantees in exchange for a conditional release from incarceration.[102] Thus, parolees bargain away their constitutional

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95. *See id.*

96. *See id* at 660.

97. *See id.* at 661. *See generally* Alan Dalsass, Note, *Options: An Alternative Perspective on Fourth Amendment Remedies*, 50 RUTGERS L. REV. 2297 (1998) (describing the merits of utilizing liquidated damages in Fourth Amendment cases).

98. *See* Morris, *supra* note 6, at 666.

99. *See* Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) ("It is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law. . . ."). *But see* Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 101 (1988) (warning that treating select groups differently under the Fourth Amendment discriminates against politically powerless minorities, such as parolees).

100. *But see* Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1387-88 (1994).

101. *See* Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 708-20 (1963).

102. *See* People v. Mason, 488 P.2d 630, 634 (1971); Steven Monteforte, Note, *Ad-*

entitlements to achieve physical emancipation. In contrast, the "constructive custody" theory holds that parolees are still under the legal custody of the prison system and, therefore, are entitled only to those constitutional rights imparted to incarcerated prisoners.[103] The parolee is considered a "quasi-prisoner," whose person, home, and belongings may be searched at the discretion of the supervising officer.[104]

The United States Supreme Court rejected both the "contract consent" and "constructive custody" theories in *Morrissey v. Brewer*.[105] Specifically, the Court ruled that parolees have procedural due process rights that cannot be contracted away, nor obviated by a custodial categorization of parolees.[106] Nevertheless, the two theories meaningfully influence the Fourth Amendment standards applicable to parolees. Although the Court concluded that parolees are entitled to certain constitutional guarantees, it also tacitly incorporated elements of the two theories to assure that the societal interest in efficient regulation of the parole system is best served.[107] Towards this objective, the Court has countenanced certain abridgements of parolees' constitutional rights.

Adopting an underlying tenet of the "constructive custody" theory, the *Morrissey* Court concluded that parole is a "variation on imprisonment of convicted criminals."[108] Thus, parolees are often regarded as within the custody of the penal system, even though they are not actually incarcerated.[109] Although a

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missibility of Evidence in Probation/Parole Revocation Proceedings and in Criminal Prosecutions: Applying a Single Standard, 50 FORDHAM L. REV. 936, 942-44 (1982); Note, *supra* note 101, at 708-11.

103. *See* People v. Hernandez, 229 Cal. Rptr. 100, 104 (1964); Monteforte, *supra* note 102, at 942-44; Note, *supra* note 101, at 711-20.

104. *See* Anderson v. Corall, 263 U.S. 193, 196 (1923) (holding that although parole "is an amelioration of punishment, it is in legal effect imprisonment").

105. 408 U.S. 471 (1972).

106. *See id.* at 482 ("We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."). The Court further held that a parolee was entitled to protection under the Fourteenth Amendment and was owed due process. *See id.*

107. *See id.* at 477-82.

108. *Id.* at 477. Elaborating on the proliferation of state parole systems, the Court explained that the "purpose [of parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." *Id.*

109. *See* Jones v. Cunningham, 371 U.S. 236, 240-41 (1963) (holding that a parolee

parolee enjoys many of the same liberties as the ordinary person, he is not owed the full panoply of legal rights guaranteed to other citizens.[110] In conformance with the "contract consent" theory, the *Morrissey* Court determined that parolees are entitled to only "conditional liberty properly dependent on the observance of special parole restrictions."[111] As a condition of their release, parolees have voluntarily relinquished rights owed to other nonincarcerated citizens. Because the *Morrissey* Court found that "given [a] previous conviction . . . , the State has an overwhelming interest in being able to return [an] . . . individual to imprisonment . . . if in fact he has failed to abide by the conditions of his parole," it was willing to narrow the constitutional duties owed to parolees.[112]

The *Scott* Court harmonized the legitimate state regulatory interests expressed in *Morrissey* with the social costs of excluding probative evidence at parole revocation hearings. The majority recognized the legitimate state interest in efficient administration of parole boards.[113] Concluding that the state interest in the close supervision of parolees is based upon the high likelihood of recidivism and upon the theory that parole is an extension of imprisonment, the *Scott* Court expressed its reticence to impede state parole systems.[114] Even Justice Souter, in his dissent, conceded that the state has an "'overwhelming interest' in assuring its parolees comply with the conditions of their parole . . . ."[115]

The social costs associated with evidentiary exclusion further exacerbated the *Scott* Court's reluctance to interfere with parole board administration. The Court acknowledged that the exclusionary rule "undeniably detracts from the truthfinding

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may pursue habeas corpus proceedings because he was in the custody of the State).

110. *See* Daniel E. Post, Comment, *The Constitutionality of Parole Departments Disclosing the HIV Status of Parolees*, 1992 WIS. L. REV. 1993, 2009 (1992); *see also Morrissey*, 408 U.S. at 478 (asserting that parolees enjoy only conditional liberties).

111. *Morrissey*, 408 U.S. at 480.

112. *Id.* at 483.

113. *See* Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2020-21 (1998).

114. *See id.* at 2020 ("The costs of excluding reliable, probative evidence are particularly high in the context of parole revocation proceedings.").

115. *Id.* at 2027 n.2 (Souter, J., dissenting).

process . . . ."[116] Although the Court has "held these costs to be worth bearing in certain circumstances, [its] cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule."[117] Given the strong state interest in efficient regulation of parole systems and the social costs peculiar to the parole setting, the Court determined that parole revocation hearings are improper venues for the application of the exclusionary rule.[118]

The legitimate state interest in parole supervision, when coupled with the social costs associated with evidentiary exclusion, weighs heavily on one side of the *Calandra* balancing test. To require the exclusion of evidence at parole revocation hearings, according to *Calandra*, the deterrent effect of exclusion must outweigh the significant interest in admitting probative and reliable evidence.[119] Even before examining the deterrent impact of the exclusionary rule, the *Scott* Court constructed an insurmountable barrier to its subsequent application.

B. *The Nature of Parole Revocation Hearings*

Despite the overwhelming social costs associated with applying the exclusionary rule to parole revocation hearings, the *Scott* Court nonetheless passed judgment upon the deterrent effects of evidentiary exclusion. Historically, the Supreme Court has found that the deterrent impact of the exclusionary rule hinges upon the type of proceeding in which it is invoked.[120] The Court has held that the exclusionary rule should only be applied to adversarial proceedings.[121] In order for the

116. *Id.* at 2020.

117. *Id.* (citing United States v. Payner, 447 U.S. 727, 734 (1980)).

118. *See id.* at 2022 ("A federal requirement that parole boards apply the exclusionary rule . . . would severely disrupt the traditionally informal, administrative process of parole revocation.").

119. *See* United States v. Calandra, 414 U.S. 338, 349 (1974); *see also* United States v. Leon, 468 U.S. 897, 907 (1984).

120. *See* Matthew F. Bogdanos, *Search and Seizure: A Reasoned Approach*, 6 PACE L. REV. 543, 589 (1986). *But see Calandra*, 414 U.S. at 358 (Brennan, J., dissenting) (reasoning that rationales other than deterrence are of equal importance to any consideration of the exclusionary rule).

121. *See* Illinois v. Gates, 462 U.S. 213 (1983).

exclusionary rule to have any deterrent effect, one side must be made to suffer for its utilization of illegal fact-finding methods. Where the proceedings are purely administrative, an order of suppression will have no deterrent effect upon the offending party.[122] The rationale for this conclusion is that, in the absence of competition, the offending party will have little stake in the ultimate outcome of the proceedings.[123] Thus, the exclusion of evidence will not deter future illegal conduct, because the offending party does not suffer as a result of evidentiary suppression.

Prior to its consideration of parole revocation hearings, the Supreme Court declined to apply the exclusionary rule to a wide variety of proceedings that it characterized as purely administrative.[124] Before *Scott*, the most recent decision involving a proposed extension of the exclusionary rule was *Immigration and Naturalization Service v. Lopez-Mendoza*.[125] In this case, the Court considered extending the exclusionary rule to encompass the suppression of illegally obtained evidence at deportation hearings. Ruling that the exclusionary rule should not apply, the Court found that "a deportation proceeding is a purely civil action to determine the eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."[126] Although a deportation proceeding directly affects an individual's right to reside freely within the United States, the Supreme Court nonetheless considered it an administrative action.[127] Thus, if no criminal sanctions are to be levied, the Court will not suppress illegally obtained evidence.[128]

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122. *See* Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 539 (1997) (citing Boyd v. Constantine, 613 N.E.2d 511, 512 (N.Y. 1993)).

123. *See* Benjamin A. Swift, Comment, *The Future of the Exclusionary Rule: An Alternative Analysis for the Adjudication of Individual Rights*, 16 N. ILL. U. L. REV. 507, 528-29 (1996) (explaining the Court's requirement that both parties have a significant interest in the ultimate outcome of the litigation for the exclusionary rule to apply).

124. *See* cases cited *supra* note 11.

125. 468 U.S. 1032 (1984).

126. *Id.* at 1038 (citations omitted).

127. *See* Mitchell Barnes Davis & Kathleen B. Simon, Comment, *The Exclusionary Rule in INS Deportation Hearings*, 23 LAND & WATER L. REV. 537, 566 (1988) (asserting that, despite the purely administrative nature of deportation proceedings, the exclusionary rule should be invoked to ensure judicial integrity).

128. *See* Donald L. Doernberg, *"The Right of the People": Reconciling Collective and*

In his dissent, Justice White criticized the majority's characterization of deportation hearings. White analogized the mission of border control agents to that of police officers, finding that the role of each was to produce evidence relating to violations of the law.[129] The only discernable difference between the functions of each type of law enforcement officer is that the evidence obtained from suspects is introduced at different types of proceedings.[130] Police officers submit their findings to criminal courts, while border control agents introduce evidence at deportation hearings. White concluded, therefore, that "deportation proceedings are to [border control] agents what criminal trials are to police officers . . . ."[131] Because the goal of the border control agent is to ferret out illegal aliens, any suppression of evidence at deportation hearings will have a detrimental effect upon the performance of his duties.[132] Thus, the adversarial nature of deportation hearings is closely akin to criminal trials because the law enforcement officers have a stake in ensuring the admission of probative evidence. Accordingly, White asserted that border control agents will be deterred from conducting illegal searches by the application of the exclusionary rule at civil deportation hearings.[133]

The *Scott* decision closely resembles that of *Lopez-Mendoza*. In each case, the Court endeavored to categorize the proceed-

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Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. REV. 259, 289-90 (1983).

129. *See Lopez-Mendoza*, 468 U.S. at 1053 (White, J., dissenting).

130. *See id.* at 1053-54 (White, J., dissenting). "'[T]he primary objective' of the INS agent is to use evidence in the civil deportation proceeding," whereas the police produce evidence at criminal trials. *Id.* at 1053 (White, J., dissenting).

131. *Id.* (White, J., dissenting).

132. *See* Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 127-28 (1984).

133. *See Lopez-Mendoza*, 468 U.S. at 1060 (White, J., dissenting). Justice White advocated the application of the exclusionary rule to deportation proceedings for the same reasons for which the Court applied the rule to criminal trials:

> I believe that the costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the costs and benefits of applying the rule in ordinary criminal proceedings. Unless the exclusionary rule is to be wholly done away with and the Court's belief that it has deterrent effects abandoned, it should be applied in deportation proceedings when evidence has been obtained by deliberate violations of the Fourth Amendment or by conduct a reasonably competent officer would know is contrary to the Constitution.

Id. (White, J., dissenting).

ings at which government officials attempted to introduce illegally obtained evidence. The *Scott* Court concluded that parole revocation hearings are entirely administrative; therefore, the exclusionary rule should not apply.[134] Like the *Lopez-Mendoza* Court, the majority in *Scott* concluded that, in the absence of an adversarial criminal proceeding, the exclusionary rule will have no deterrent effect upon officer misconduct.[135]

To explain its categorization of parole revocation hearings as being "administrative proceedings," the Court described the flexible and informal qualities of Pennsylvania's parole system.[136] Specifically, the Court found that: (1) neither judges nor lawyers are required at parole revocation hearings; (2) traditional rules of evidence are relaxed or do not apply at all; and (3) there is no mechanism for collateral litigation concerning evidentiary suppression.[137] Having considered these factors, the *Scott* Court determined that "the exclusionary rule . . . is incompatible with the traditionally flexible, administrative procedures of parole revocation."[138] The majority reasoned that adoption of the rule would fundamentally change the parole revocation process from a "predictive and discretionary" hearing to an aggressively adversarial proceeding.[139] "Such a transformation ultimately might disadvantage parolees because in an adversarial proceeding, 'the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation.'"[140]

Justice Souter's dissenting opinion assailed the reasoning underlying the majority's classification of parole revocation hearings. Although Souter conceded that revocation hearings

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134. *See* Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2020-21 (1998).

135. *See id.* at 2022 ("[W]hen the officer performing the search is a parole officer, the deterrence benefits of the exclusionary rule remain limited.").

136. *See id.* at 2021.

137. *See id.* (citing Morrissey v. Brewer, 408 U.S. 471, 480, 489 (1972)).

138. *Id.* at 2020.

139. *See id.* at 2021 (citations omitted). By altering the parole revocation process, the Court warned that the application of the exclusionary rule would impose substantial amounts of collateral litigation upon already overburdened state courts. *See id.* This litigation would hinder states' interests in parole system efficiency. "Such litigation is inconsistent with the nonadversarial, administrative processes established by the States." *Id.*

140. *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).

were partially discretionary and predictive, he also asserted that the hearings contained an adversarial element sanctioning the use of the exclusionary rule.[141] To counter the majority's claim that parole revocation is an informal process, Justice Souter cited *Gagnon v. Scarpelli*[142] in which the Supreme Court required that parolees be provided with counsel under circumstances similar to *Scott*.[143] Souter concluded that lay board members were "just as capable of passing upon Fourth Amendment issues as the police, who are necessarily charged with the responsibility for the legality of warrantless arrests, investigatory stops, and searches."[144] Thus, Souter reasoned that if courts trusted police officers to determine the appropriateness of a search or seizure, then so too should courts vest parole boards with the power to determine if illegally obtained evidence should be excluded.[145]

Corroborating the dissent's reasoning is the fact that parole revocation hearings are usually the forum of choice for officers who have uncovered crimes committed by parolees.[146] Rather than pursuing new charges in a criminal court, parole officers will often bring the offender before a parole revocation board.[147] The administrative ease of recommitment, coupled with the fact that the parolees' "time on the street" (the amount of time between formal parole and parole revocation) will not be deducted from their sentence, encourages law enforcement officers to use the parole revocation process.[148] For

141. *See id.* at 2023, 2026 (Souter, J., dissenting). "The deterrent function of the exclusionary rule is . . . implicated as much by a revocation proceeding as by a conventional trial, and the exclusionary rule should be applied accordingly." *Id.* at 2023 (Souter, J., dissenting).

142. 411 U.S. 778 (1973).

143. *See Scott*, 118 S. Ct. at 2027 (Souter, J., dissenting) (citing *Gagnon*, 411 U.S. at 787) ("Any revocation hearing is adversary to a degree: counsel must now be provided whenever the complexity of the fact issues so warrant . . . .").

144. *Id.* (Souter, J., dissenting); *see also* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (authorizing the administration of parole revocation proceedings by lay persons).

145. *See Scott*, 118 S. Ct. at 2027 (Souter, J., dissenting).

146. *See* Sunny A.M. Koshy, Note, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 49, 50 & n.7 (1988).

147. *See Scott*, 118 S. Ct. at 2027 (Souter, J., dissenting).

148. *See Morrissey*, 408 U.S. at 480 ("If a parolee is returned to prison, he usually receives no credit for the time 'served' on parole.").

example, a parolee accused of drug-related offenses may receive a two-year prison sentence if convicted in criminal court. In many cases, the police will forego formally trying the accused and simply take him before a parole board. In a parole revocation hearing, the drug offender will likely be sentenced to serve the remainder of his time, plus any "time on the street." The recommitment term will often equal or exceed the sentence under a criminal conviction.[149] Because states often use parole revocation hearings in lieu of criminal trials, Souter concluded that there is an adversarial nature to the proceedings which warrants the application of the exclusionary rule.[150]

Some federal circuits have equated the process of parole revocation to the initiation of new criminal charges. Asserting that parole revocation hearings are as adversarial as criminal trials, the Fourth Circuit concluded that the exclusionary rule should be applied in "any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment."[151] Similarly, the Second Circuit ruled that "the exclusionary rule must be applied in probation revocation proceedings to bar the use of evidence illegally seized by probation officers."[152] Even prior to the *Scott* decision, however, these jurisdictions were in the minority.[153] To the extent that they label parole revocation hearings as adversarial proceedings and mandate the use of the exclusionary rule, these decisions have been overruled by *Scott*.[154]

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149. *See Scott*, 118 S. Ct. at 2027 (Souter, J., dissenting).

150. *See id.* (Souter, J., dissenting). Justice Souter further explained:

> Suppression in the revocation proceeding cannot be looked upon . . . as furnishing merely incremental or marginal deterrence over and above the effect of exclusion in criminal prosecution. Instead, it will commonly provide the only deterrence to unconstitutional conduct when the incarceration of the parolees is sought, and the reasons that support the suppression remedy in prosecution therefore support it in parole revocation.

Id. (Souter, J., dissenting).

151. United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978).

152. United States v. Rea, 678 F.2d 382, 389 (2d Cir. 1982).

153. *See* COHEN & GOBERT, *supra* note 69, § 8.06, at 386-87. The majority of federal circuits have held that the exclusionary rule is inapplicable at parole revocation hearings. *See, e.g.*, United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir. 1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971).

154. *See Scott*, 118 S. Ct. at 2022 ("We therefore hold that parole boards are not

Some critics warn that a nonadversarial categorization of parole revocation hearings produces a danger that societal interests may be subjugated to police efficiency concerns.[155] Rather than levying additional criminal charges against parole violators, officers are content to merely recommit the parolee for the remainder of his original term.[156] This approach provides a disincentive to conduct searches in a reasonable manner and creates a two-tiered system of evidentiary admissibility whereby evidence may be admitted at parole revocation but excluded at a new criminal trial.[157] An officer's unreasonable search deprives society of the ability to prosecute a parole offender on new criminal charges because the evidence, obtained illegally by the officer (who has little interest in pursuing new charges), will be excluded at any subsequent criminal trial.[158]

The *Scott* Court, nonetheless, concluded that parole revocation hearings were purely administrative.[159] The Court reasoned that any disincentive to conducting reasonable searches could be curtailed through the use of departmental disciplinary sanctions or the levying of fines.[160] According to the Court, such means would provide the necessary incentive to officers conducting searches of parolees' persons, homes, and belongings

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required by federal law to exclude evidence obtained in violation of the Fourth Amendment.").

155. *See* Monteforte, *supra* note 102, at 960 ("Courts refusing to extend the exclusionary rule to probation revocation proceedings under these circumstances, therefore, create the danger that a police officer with such knowledge will conduct a substandard search and that incriminating evidence will not be put to its maximum use for the protection of society.").

156. *See id.*

157. *See* United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d Cir. 1970). To justify its double standard for evidentiary admissibility, the court stated:

> There is no need for double application of the exclusionary rule, using it first as it was used here in preventing criminal prosecution of the parolee and a second time at a parole revocation hearing. The deterrent purpose of the exclusionary rule is adequately served by the exclusion of the unlawfully seized evidence in the criminal prosecution.

Id.

158. *See* Monteforte, *supra* note 102, at 957 ("This loss seriously impairs the ability of society to commit a criminal offender to a term of imprisonment in addition to whatever term the revocation might yield.").

159. *See Scott*, 118 S. Ct. at 2020 ("The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation.").

160. *See id.* at 2022.

and would preserve the societal interest in pursuing new criminal charges against wayward parolees.[161]

By categorizing revocation hearings as nonadversarial, the *Scott* Court sought to safeguard the flexible hearing systems in place in most states.[162] The Court downplayed or ignored the competitive elements inherent within the parole revocation system and asserted that it was "simply unwilling to intrude into the States' correctional schemes."[163] The *Scott* Court determined that a nonadversarial categorization of parole revocation hearings was essential to ensure the continued efficacy of state parole systems.[164] Such a categorization has a corresponding impact upon the role of parole officers within states' correctional programs.

C. *The Role of Parole Officers*

The nature of parole revocation hearings has a direct effect upon the duties and functions of parole officers.[165] If the proceedings are categorized as purely administrative, parole officers have little stake in the ultimate outcome of parole revocation hearings.[166] Therefore, the suppression of illegally obtained evidence will have no deterrent impact upon their future conduct.[167] If, however, there is an adversarial component of the parole hearings, then the officers do have an interest in supplying the tribunal with any and all probative evidence which may result in parole revocation.[168] By suppressing unconstitutionally obtained evidence, the exclusionary rule would deter unreasonable searches and seizures.[169]

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161. *See id.*

162. *See id.* at 2020.

163. *Id.* at 2021.

164. The *Scott* Court cited *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972), for the proposition that "States have an 'overwhelming interest' in maintaining informal, administrative parole revocation procedures." *Scott*, 118 S. Ct. at 2021.

165. *See* Note, *supra* note 80, at 186.

166. *See* David Blair-Loy, *Judicial Neglect for the Statutory Basis for the Rosario Rule: The Genesis of the Possession or Control Requirement*, 5 J.L. & POL'Y 469, 475 (1997).

167. *See Scott*, 118 S. Ct. at 2022.

168. *See id.* at 2025 (Souter, J., dissenting).

169. *See id.* (Souter, J., dissenting).

In many respects, parole officers are similar to social workers and counselors.[170] In *Morrissey v. Brewer*,[171] the Supreme Court concluded that "realistically the failure of the parolee is in a sense a failure for his supervising officer."[172] Under this view, the primary function of parole officers is to assist their assigned parolees in the transition from incarceration to freedom.[173] Thus, under the reasoning of the *Morrissey* Court, the investigatory role of the parole officer is subrogated by a more important state interest in counseling and assisting parolees.[174] Upon the failure of the parole officer to keep an assigned parolee "on the straight and narrow," however, the investigatory duties of the officer will become paramount.[175]

Recognizing the primacy of parole officers' counseling functions, many states have granted parole authority to their respective departments of social services.[176] In states where parole supervision still rests with the department of corrections, great pains are taken to eliminate the prosecutorial elements of parole enforcement.[177] The American Bar Association has even recommended that, in order to avoid any conflicts between prosecutorial and counseling functions, parole and probation officers should not be under the direction of state prosecutors.[178] Thus, in most states, efforts have been made to formally divorce parole administration from the law enforcement/prosecutorial system. States aspire to rehabilitate parolees through counseling, rather than engaging in adversarial law enforcement practices throughout the duration of parole.[179]

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170. *See* Craig Hemmens & Rolando V. Del Carmen, *The Exclusionary Rule in Probation and Parole Revocation Proceedings: Does it Apply?*, 61 FED. PROBATION, Sept. 1997, 32, 33-34 (concluding that most states consider parole officers "treatment agents" and "rehabilitation counselors").

171. 408 U.S. 471 (1972).

172. *Id.* at 485-86.

173. *See Scott*, 118 S. Ct. at 2022.

174. *See Morrissey*, 408 U.S. at 486.

175. *See Scott*, 118 S. Ct. at 2025 (Souter, J., dissenting).

176. *See* COHEN & GOBERT, *supra* note 69, § 8.01, at 373.

177. *See id.*

178. *See id.* (citing American Bar Association Project on Standards for Criminal Justice, Standards Relating to Probation § 6.1(b) (Approved Draft 1970)).

179. *See, e.g.*, N.Y. EXEC. LAW § 257(4) (McKinney 1999) which provides:

> It shall be the duty of every probation officer to furnish to each of his probationers a statement of the conditions of probation, and to instruct him with regard thereto; to keep informed concerning his conduct, habits,

In *Scott*, the majority emphasized the counseling functions of parole officers. Rather than engaging "'in the often competitive enterprise of ferreting out crime,'"[180] the Court found that parole officers' "primary concern is whether their parolees should remain free on parole."[181] The Court concluded that the relationship between the officer and the parolee is merely supervisory and not adversarial.[182] Because the relationship lacks an adversarial element, the majority held that parole officers bear no natural hostility to their assigned parolees and should be considered entirely neutral.[183] The Court conceded that parole officers may sometimes violate the Fourth Amendment by conducting unreasonable searches, but asserted that, considering their neutrality, exclusion would have no deterrent effect.[184] Rather than excluding probative evidence, the Court recommended departmental discipline and damages actions.[185]

In practice, however, an exclusive focus upon the counseling functions of parole officers ignores the basic realities underlying the parole system. A parole officer has three fundamental responsibilities: "(1) to assist the offender in the rehabilitation process; (2) to protect the public from persons whose release proves threatening to the community; and (3) to provide information and recommendations to the court or parole board so that it may make appropriate decisions regarding continued freedom for the individual released."[186] The latter two func-

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> associates, employment, recreation and whereabouts; to contact him at least once a month pursuant to rules promulgated by the state director of probation and correctional alternatives; to aid and encourage him by friendly advice and admonition; and by such other measures as may seem most suitable to bring about improvement in his conduct, condition and general attitude toward society.

Id.

180. *Scott*, 118 S. Ct. at 2022 (quoting United States v. Leon, 468 U.S. 897, 914 (1984)).

181. *Id.*

182. *See id.* ("Their relationship is more supervisory than adversarial.").

183. *See id.* "It is thus 'unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality . . . .'" *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 485-86).

184. *See id.*

185. *See id. But see* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 35 n.148 (1987) (detailing the inadequacies of alternative deterrent remedies such as civil suits, criminal prosecution, review boards, and internal discipline).

186. COHEN & GOBERT, *supra* note 69, § 8.01, at 372.

tions require parole officers to engage in investigative and supervisory capacities which are often at odds with the traditional administrative view of the parole system.

To reconcile the competing responsibilities of parole officers, most states advocate a synthetic model of parole administration.[187] Under this approach, officers balance the law enforcement interests of the community with the rehabilitative requirements of the individual parolee.[188] Each parolee's needs are assessed on a case-by-case basis and then, ideally, the parole agency develops a parole plan based both upon those needs and the individual strengths of the supervising officer.[189] In practice, however, most agencies eschew the synthetic model in favor of approaches that advocate and emphasize stauncher law enforcement methods.[190] The law enforcement model of parole administration contains adversarial elements similar to traditional police law enforcement.[191]

Justice Souter's dissent recognized the adversarial elements of the parole system and was highly critical of the majority's characterization of the relationship between officers and parolees. Conceding the existence of a counseling element to the relationship, Souter nonetheless reasoned, "[p]arole officers wear several hats; while they are indeed the parolees' counselors and social workers, they also 'often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees.'"[192] The dissent proposed a more expansive view of parole officers than had been recognized by the majority. Because of the various functions of the parole officers, their relationships to assigned parolees are subject to constant change.[193]

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187. *See id.* § 8.01, at 374; *see also* HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 254-55 (2d ed. 1982).

188. *See* COHEN & GOBERT, *supra* note 69, § 8.01, at 374.

189. *See id.*

190. *See id.* ("Although most [parole] agencies espouse the synthetic model, they often in practice lean more toward a control model.").

191. *See id.*

192. Pennsylvania Bd. of Probation & Parole v. Scott, 118 S. Ct. 2014, 2025 (Souter, J., dissenting) (quoting COHEN & GOBERT, *supra* note 69, § 11.04, at 533).

193. *See* Peter J. Gardner, Comment, *Arrest and Search Powers of Special Police in Pennsylvania: Do Your Constitutional Rights Change Depending on the Officer's Uniform?*, 59 TEMP. L.Q. 497, 532-34 (1986).

When parole officers become aware that their assigned parolees have likely committed violations, there is a fundamental change in the nature of the relationship.[194] Whereas the majority exclusively considered the supervisory aspects of the parole relationship, the dissent recognized the resulting changes which occur upon parole violations. "[A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation."[195] Indeed, once the relationship has changed from supervisory to adversarial, parole officers are likely to exhibit as much "competitive zeal" as are police officers.[196] Given the often competitive interest of parole officers in collaring wayward parolees, the dissent reasoned that the exclusion of illegally obtained evidence will have a similar effect upon parole officers as upon the police.[197] In other words, parole officers have a stake in the ultimate outcome of parole revocation hearings; therefore, the exclusion of unconstitutionally obtained evidence will likely deter future misconduct.[198] Thus, according to the dissent, the exclusion of evidence at parole revocation proceedings would have the deterrent effect required by the *Calandra* balancing test.

IV. TOWARD ABROGATING THE EXCLUSIONARY RULE

Since *Calandra*, the United States Supreme Court has narrowly circumscribed the application of the exclusionary rule.[199] The *Scott* Court further restricted the suppression of illegally obtained evidence. The rationales underlying the Court's curtailment of the exclusionary rule may foreshadow an establishment of a per se rule that bans the application of the rule outside of

194. *See Scott*, 118 S. Ct. at 2025-26 (Souter, J., dissenting).

195. *Id.* at 2026 (Souter, J., dissenting) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973)).

196. *See id.* (Souter, J., dissenting).

197. *See id.* (Souter, J., dissenting) ("In sum, if the police need the deterrence of an exclusionary rule to offset the temptations to forget the Fourth Amendment, parole officers need it quite as much.").

198. *See id.* (Souter, J., dissenting).

199. *See* Carolyn A. Yagla, Comment, *The Good Faith Exception to the Exclusionary Rule: The Latest Example of 'New Federalism' in the States*, 71 MARQ. L. REV. 166, 178 (1987).

the criminal trial context. Further, the Court's reasoning may presage a sanctioning of alternative remedies even in the criminal trial context.

The *Scott* Court recognized that the state interest in regulating parolees creates an insuperable obstacle for those advocating the exercise of the exclusionary rule at parole revocation hearings.[200] The social harm created by excluding probative evidence against parolees outweighs any deterrent impact upon law enforcement personnel.[201] Nevertheless, the *Scott* Court went to great lengths to dispel any perceived deterrent effects of evidentiary exclusion in the parole revocation setting.[202] Although it was unnecessary to disparage the deterrent effects of exclusion to justify its refusal to extend the exclusionary rule under the *Calandra* "balancing of interests" test, the *Scott* Court still clearly explained its conclusion that law enforcement officers will not be deterred by excluding evidence from parole revocation hearings. The very fact that this analysis was unnecessary in *Scott* indicates that the Court will be very reluctant to acknowledge any deterrent effect to the exclusion of evidence from similar proceedings. Thus, the *Scott* Court's dicta concerning deterrence is likely to be used in the future to deny the application of the exclusionary rule to other quasi-criminal proceedings, especially where the social interests involved are less pronounced than in *Scott*.

The *Scott* Court characterized the exclusionary rule as a "grudgingly taken medicant"[203] that would provide "marginal deterrence of unreasonable searches and seizures." In the parole revocation setting, the Court emphasized that other deterrents, such as departmental discipline and the threat of damages actions, are more effective and eliminate the need for evidentiary exclusion.[204] Under this reasoning, however, the exclusionary rule should never be invoked in legal proceedings.[205] If

200. *See Scott*, 118 S. Ct. at 2020 ("The rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule.").

201. *See id.* at 2021 ("The deterrence benefits of the exclusionary rule would not outweigh [the] costs.").

202. *See id.* at 2021-22.

203. *Id.* at 2022 (quoting United States v. Janis, 428 U.S. 433, 454 n.29 (1976)).

204. *See id.*

205. *See* Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33

the Court has determined that other deterrents are equally effective at preventing unreasonable searches, then why sanction the use of the exclusionary rule with all of its attendant social harms? The Court should not endorse the use of a "grudgingly taken medicant" when other deterrent measures are available.

Given the entrenchment of the exclusionary rule in the American criminal justice system, it seems very unlikely that the Supreme Court will discontinue using it in criminal trials. Perhaps the Court recognizes that the exclusionary rule often sets in motion the alternative remedies espoused in *Scott*. When a state or federal prosecutor is unable to use evidence at trial, those commissioned to collect the evidence will ultimately be held accountable, whether they be local police officers, state investigators, or federal agents.[206] The exclusion of evidence sets in motion a chain of accountability that extends to all those who have worked on the case and serves as the most effective deterrent to future misconduct.[207]

Reluctant to abrogate the use of exclusionary rule in criminal trials yet unwilling to extend it to administrative proceedings, the Supreme Court has struggled to rationalize and justify this dichotomy. In *Scott*, the Court's use of the *Calandra* "balancing of interests" test proves unconvincing, given the many similarities between parole revocation hearings and criminal trials. Although the Court's reasoning is suspect, its intent is quite clear: to preserve the exclusionary rule in criminal trials, while moving closer to a per se ban on its use in all other proceedings. In all likelihood, future Supreme Court decisions will also attempt to use the *Calandra* test to distinguish the deterrent effects of exclusion in criminal trials to those in quasi-criminal proceedings. The Court appears quite willing to employ strained or artificial distinctions in order to preserve its ban on the use of the exclusionary rule outside the criminal trial context.

HASTINGS L.J. 1065, 1071-72 (1982) (proposing alternatives to the exclusionary rule).

206. *See* James P. Fleissner, *Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023, 1043 (1997) (explaining that the exclusionary rule catalyzes a stronger relationship between police and prosecutor and encourages the proper training of law enforcement personnel).

207. *See id.*

V. CONCLUSION

In *Scott*, the Supreme Court moved ever closer to establishing a per se ban on the application of the exclusionary rule outside of the criminal trial context. Although the Court attempted to justify its position using the *Calandra* balancing test, it underestimated the deterrent effect of exclusion upon parole officers.[208] The dissent convincingly seized upon the inadequacies of the Court's analysis and made a strong case for the deterrent impact of the rule. Ultimately, however, despite the persuasive findings of the dissent, the state interest in regulating paroled felons outweighs the deterrent effect upon the parole officers charged with policing the released offenders.

The *Scott* Court's gross understatement of the deterrent impact of the exclusionary rule displays its absolute reluctance to extend the rule, which has characterized the Supreme Court ever since *Calandra*.[209] Most notable in the Court's holding is the length to which it attempted to minimize the importance of the exclusionary rule in deterring misconduct by law enforcement officers. Considering the "'overwhelming interest' in ensuring that a parolee complies with [the conditions of his parole],"[210] the Court's understatement of the rule's deterrent impact was unnecessary to tip the *Calandra* scales toward refraining from applying the rule. Despite the deterrent impact, the social and economic costs of applying the exclusionary rule are too high in the parole revocation context.[211] The *Scott* Court's decision may be a harbinger for a per se rule banning the exclusionary rule outside the criminal trial context. By displaying the lengths to which it will go to minimize the rule's deterrent effect, *Scott* foreshadows a progressively narrower application of the exclusionary rule.

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208. *See Scott*, 118 S. Ct. at 2025-26 (Souter, J., dissenting).

209. *See supra* notes 11, 68 and accompanying text.

210. *Scott*, 118 S. Ct. at 2020 (quoting Morrissey v. Brewer, 408 U.S. 471, 483 (1972)).

211. *See* discussion *supra* notes 41-54 and accompanying text.