

1999

Pennsylvania Board of Probation & Parole v. Scott: Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup

Patrick Alexander

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Law Commons](#)

Recommended Citation

Patrick Alexander, *Pennsylvania Board of Probation & Parole v. Scott: Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup*, 31 Loy. U. Chi. L. J. 69 (1999).

Available at: <http://lawcommons.luc.edu/lucj/vol31/iss1/4>

Note

Pennsylvania Board of Probation & Parole v. Scott: Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup

I. INTRODUCTION

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding . . . [I]t is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts.¹

“The right to be let alone,” Justice Brandeis recognized, is indispensable in any civilized society.² The Fourth Amendment to the United States Constitution secures that right by prohibiting “unreasonable searches and seizures.”³ The Amendment, however, contains no explicit remedy for violations of a person’s right to be free from unreasonable searches.⁴ Instead, the Supreme Court of the United States adopted an exclusionary rule that prohibits the government from using evidence seized in violation of the Fourth Amendment.⁵

Over the past twenty-five years, however, Supreme Court decisions have diminished the scope of the exclusionary rule.⁶ In *Pennsylvania Board of Probation & Parole v. Scott* (“*Scott III*”), the Supreme Court

1. *Olmstead v. United States*, 277 U.S. 438, 479 & n.12 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

2. *Id.* at 478.

3. U.S. CONST. amend. IV.

4. *See id.*

5. *See Weeks v. United States*, 232 U.S. 383, 398 (1914), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961). The *Weeks* Court held that “[i]f letters and private documents can thus be seized and held and used in evidence against a citizen . . . the protection of the Fourth Amendment . . . is of no value . . .” *Id.* at 393.

6. *See United States v. Calandra*, 414 U.S. 338, 354-55 (1974) (holding that the exclusionary rule did not apply to grand jury proceedings); *see also infra* Parts II.B-C (explaining the development of restrictions upon the exclusionary rule).

examined the applicability of the exclusionary rule in the context of a parole revocation hearing.⁷ The Court held that the exclusionary rule was not applicable in parole revocation hearings because its application would not deter unconstitutional searches.⁸ As a result, the protection afforded by the Fourth Amendment continued to deteriorate as the Court carved another exception to the application of the exclusionary rule.⁹

This Note examines the history of the exclusionary rule, discussing both the development of the rule as well as the implicit and explicit purposes for its application.¹⁰ This Note then categorizes the limitations that the United States Supreme Court has placed upon the exclusionary rule in the past twenty-five years.¹¹ Against this historical foundation, this Note discusses the decision in *Scott III*, which declined to apply the exclusionary rule in parole revocation hearings.¹² This Note then criticizes the logic of the majority and expands upon Justice Souter's dissent.¹³ Next, this Note analyzes the negative impact of the decision, emphasizing how its distinct limitation on the exclusionary rule curtails Fourth Amendment rights.¹⁴ This Note concludes by suggesting that future decisions should reexamine the original purposes of the exclusionary rule.¹⁵

7. See *Pennsylvania Bd. of Probation & Parole v. Scott*, 118 S. Ct. 2014, 2017-18 (1998) [hereinafter *Scott III*]. In *Scott III*, parole officers arrested Keith Scott, a recent parolee, for suspected violations of his parole. See *id.* at 2018. Without any search warrant, several of the officers then went to Mr. Scott's mother's house, where he had been staying, and searched both Mr. Scott's private quarters and the common areas of the house. See *id.*

8. See *id.* at 2022.

9. See *id.* at 2023 (holding that the exclusionary rule does not apply in the context of parole revocation hearings). The majority did not consider the officers' knowledge of Scott's parole status a salient point. See *id.* at 2021-22 (declining to adopt a "piecemeal approach" to the exclusionary rule). On the other hand, the parole officers' knowledge of Scott's parole status was an important fact in the reasoning of the Souter dissent. See *id.* at 2025 (Souter, J., dissenting); see also *infra* Part III.E (detailing the rationale of Justice Souter's dissent in *Scott III*).

10. See *infra* Part II.A.

11. See *infra* Parts II.B-C.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See *infra* Part VI.

II. BACKGROUND

The exclusionary rule emerged and developed slowly.¹⁶ Formally created, judicially, in 1914,¹⁷ it was not made applicable to the states through the Fourteenth Amendment until 1961.¹⁸ This part of the Note charts the emergence of the exclusionary rule in the early twentieth century.¹⁹ It next traces the rule's growth and expansion through the middle of the century.²⁰ Finally, it examines the restrictions placed upon the rule over the past twenty-five years.²¹ Throughout this section, there is a particular focus on the reasons, both implicit and explicit, that various Courts have used as the basis for defining the scope of the exclusionary rule.²²

A. *Development of the Exclusionary Rule*

On the heels of the Revolutionary War, James Madison expressed concern that any new government would only recreate the deplorable conditions that the war was fought to avoid.²³ The Fourth Amendment to the United States Constitution afforded some protection for Madison's concerns,²⁴ providing that "[t]he right of the people to be secure in

16. See *infra* Part II.A-B.

17. See *infra* Part II.A.; *Weeks v. United States*, 232 U.S. 383, 393 (1914).

18. See *infra* Part II.A.; *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

19. See *infra* Part II.A.

20. See *infra* Part II.B.

21. See *infra* Part II.C.

22. See *infra* Part II.A-C.

23. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). Madison wrote:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

Id.

24. See 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE xiv (3d ed. 1996) (stating that the Fourth Amendment occupies "a place second to none in the Bill of Rights") (quoting *Harris v. United States*, 331 U.S. 145 (1947) (Frankfurter, J., dissenting)); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983) (noting that the Fourth Amendment ensured that citizens' liberty interests would not be jeopardized by the post-revolution government's use of either the general warrant or the writ of assistance); Cheryl Deshaies, Note, *Vermont's Misplaced Application of the Closely Regulated Industry Exception to the Warrant Requirement Under Article Eleven*, 21 VT. L. REV. 1201, 1205-06 (1997) (discussing the Framers' primary rationale for developing the Fourth Amendment).

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”²⁵

The Fourth Amendment, however, did not provide any explicit remedy to prevent such searches.²⁶ Nevertheless, Madison, in his address to the First Congress, envisioned the judiciary as the guardians of the Bill of Rights.²⁷ Despite Madison’s plea, for more than a century after the ratification of the Bill of Rights, neither the Supreme Court nor Congress created any remedy that would prevent unreasonably seized evidence from being admitted at trial.²⁸ Indeed, through the nineteenth century, the improper seizure of evidence did not affect its admissibility.²⁹

This changed in 1914 with the Supreme Court decision *Weeks v. United States*, in which the Court held that the admission of improperly seized evidence implicates the Fourth Amendment.³⁰ Coincident to an arrest, government officials broke down the doors of Freemont Weeks’s home and seized numerous papers as evidence of the illegal sale of lottery tickets.³¹ After the trial court denied Weeks’s petition for the re-

25 U.S. CONST. amend. IV. The Fourth Amendment states in full 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.

26. See 1 LAFAVE, *supra* note 24, § 1.1(a), at 3-7; John A. Wasowicz, *Exclusionary Rule: A 20th Century Invention*, TRIAL, Feb. 1998, at 79 (noting that the exclusionary rule was an early twentieth century invention); see also U.S. CONST. amend. IV (omitting any express remedy to prevent unreasonable searches and seizures).

27. See 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789). Although the Bill of Rights had yet to be ratified, Madison’s address suggested their incorporation into the Constitution. See *id.* at 447-59.

28. See Wasowicz, *supra* note 26, at 79. In 1886, the Supreme Court decided that the government could not compel a defendant to produce papers that would incriminate him. See *Boyd v. United States*, 116 U.S. 616, 622 (1886). Although today this would have been decided under the rubric of the Fifth Amendment, the Court reasoned that compelling the production of papers was a seizure and, thus, decided the case under the Fourth Amendment. See *id.* at 630; see also Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 263 (1998).

29. See MCCORMICK ON EVIDENCE 283-84 (John William Strong ed., 1992) (stating that such evidence was admitted to accurately receive lawsuits and to avoid presumed costly and time-consuming inquiries).

30. *Weeks v. United States*, 232 U.S. 383, 398 (1914) (adopting the exclusionary rule to prevent introduction of illegally seized evidence at trial), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

31. See *id.* at 387-88. The officers “seized all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, [and] abstracts . . .” *Id.* at 387.

turn of his property, Weeks appealed to the Supreme Court.³² The Court noted that the Fourth Amendment placed limitations upon the exercise of power by federal officials.³³ In addition, the Court reasoned that the people looked to the judiciary as the body to protect their fundamental rights.³⁴ Therefore, the Supreme Court concluded that absent a judicial remedy for unwarranted government behavior, the protections of the Fourth Amendment "might as well be stricken from the Constitution."³⁵ Accordingly, the Court held that seizure of evidence in violation of the Fourth Amendment rendered that evidence inadmissible.³⁶ Thus, the exclusionary rule was born.³⁷

The subsequent development of the exclusionary rule not only filled the holes left by the *Weeks* decision but also clarified the purpose of the rule.³⁸ Although the exclusionary rule prevented the government from introducing evidence at trial, nothing prohibited the government from using illegally obtained evidence³⁹ in other ways, such as to further an investigation.⁴⁰ Justice Holmes, however, soon wrote that the exclusionary rule not only prohibited the use of illegally obtained evidence at

32. *See id.* at 389. After the seizure, Weeks petitioned for the return of his property, asserting that the seizure of his property was in violation of both the Fourth and Fifth Amendments. *See id.* Before the trial, the court directed the District Attorney to return only the property that was unrelated to the charges Weeks faced. *See id.* The District Attorney retained several papers, including a number of lottery tickets and statements with reference to the lottery. *See id.* at 388-89.

33. *See id.* at 391-92. The Court noted that Fourth Amendment protection applied to "all alike, whether accused of crime or not . . ." *Id.* at 392. In addition, the Court reasoned that even the laudable effort of imposing liability on those guilty of crimes should not override the constitutional protections provided by the Fourth Amendment. *See id.* at 393.

34. *See id.* at 392; *see also infra* note 49 and accompanying text (discussing Justice Clark's view that judicial integrity is crucial to the survival of government). Although this language provides some support that notions of judicial integrity necessitate the exclusionary rule, Justice Stewart has stated that this justification is problematic. *See Stewart, supra* note 24, at 1382-83. Rather, Justice Stewart comments that the rule is a "required constitutional remedy." *See id.* at 1384.

35. *Weeks*, 232 U.S. at 393.

36. *See id.* at 398.

37. *See id.* Nevertheless, the Court stated no explicit purpose for its introduction of the exclusionary rule. *See Stewart, supra* note 24, at 1372. Justice Stewart noted that the exclusionary rule was not the product of debate over the justification for the exclusionary rule. *See id.* Nevertheless, the language contained in the *Weeks* opinion supports both the theory that the exclusionary rule serves a deterrent purpose, and the theory that it is a necessary product of judicial integrity. *See Weeks*, 232 U.S. at 391-92. For a discussion of the underlying rationale behind the exclusionary rule, *see infra* Parts II.A-C.

38. *See* 1 LAFAVE, *supra* note 24, § 1.1(f), at 18-20 (discussing purposes behind the exclusionary rule); Stewart, *supra* note 24, at 1372-77 (tracing the development of the exclusionary rule).

39. Throughout this paper, the author uses the term "illegally obtained evidence" to refer to evidence that is seized in violation of the Fourth Amendment.

40. *See Stewart, supra* note 24, at 1375-76.

trial but also the use of illegally obtained evidence to discover other evidence—the poisonous fruits doctrine.⁴¹ The Court later extended the exclusionary rule to allow defendants to request the return of illegally obtained evidence during, rather than before, trial.⁴² The Court further expanded the role of the exclusionary rule as a Fourth Amendment safeguard when it held that a request of the actual return of illegally seized evidence was unnecessary to preserve Fifth Amendment rights; rather, one need only request the exclusion of the evidence at trial.⁴³ Thus, the exclusionary rule began to take form as the “remedy” that gave meaning to the Fourth Amendment.⁴⁴

Thirty-five years after the adoption of the exclusionary rule, thirty-one states continued to reject it.⁴⁵ In 1949, the Supreme Court concluded that the Fourteenth Amendment did not require the states to adopt the exclusionary rule, because the states could instead utilize other effective remedies, such as the threat of civil suits or interdepart-

41. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). In *Silverthorne Lumber Company*, the government illegally seized documents from a corporation. See *id.* at 390. The government copied these documents and then returned them. See *id.* at 391. In preparation for litigation, the government, arguing that Fifth Amendment protections do not apply to corporations issued a subpoena duces tecum compelling the production of the same documents it had illegally seized. See *id.* at 386-87. In response to the government's argument, Justice Holmes wrote, “[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.” *Id.* at 392; see also Mark S. Bransdorfer, *Miranda Right-to-Counsel and the Fruits of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1067-68 (1987) (attributing the creation of the poisonous fruits doctrine to Justice Holmes's opinion in *Silverthorne Lumber Company*).

42. Compare *Gouled v. United States*, 255 U.S. 298, 305 (1921) (holding that request to return illegally obtained evidence may be made at trial), *overruled in part by* *Penitentiary v. Hayden*, 387 U.S. 294 (1967), with *Weeks*, 232 U.S. at 398 (holding that a defendant may petition before trial for return of illegally obtained evidence).

43. See *Agnello v. United States*, 269 U.S. 20, 34-35 (1925). In *Agnello*, the defendant maintained that he had never seen the cocaine that was seized within his house. See *id.* at 30. Consequently, the Court reasoned that a request by the defendant for the return of the cocaine would have an incriminatory effect. See *id.* at 34. Therefore, the Court held that requiring him to make such a request, in order to exclude the evidence at trial, would violate his Fifth Amendment privilege against self-incrimination. See *id.*

44. See *id.* at 35. The *Agnello* Court stated, “[t]he admission of evidence obtained by the search and seizure was error and prejudicial to the substantial rights of Frank Agnello.” *Id.*; see also Norton, *supra* note 28, at 281. Norton contends that the constitutional underpinnings of the exclusionary rule arise from Blackstone's proposition that every right has a remedy. See Norton, *supra* note 28, at 281 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *109). Likewise, Justice Stewart noted that, while not constitutionally required, one justification for the exclusionary rule is that the rule is a “constitutional remedy.” See Stewart, *supra* note 24, at 1384.

45. See Wasowicz, *supra* note 26, at 80; see also *Mapp v. Ohio*, 367 U.S. 643, 652 n.7 (1961) (listing 23 states that had no criminal provisions to control unlawful searches). Indeed, it was not until 1949 that the Supreme Court expressly held that the due process clause of the Fourteenth Amendment imposed the Fourth Amendment limitation on the states. See *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

mental training and discipline, to deter Fourth Amendment violations.⁴⁶ In 1961, however, the Court reversed its 1949 decision and held that the Constitution did require the states to adopt the exclusionary rule.⁴⁷ In *Mapp v. Ohio*, the Court held that precisely because alternatives to the exclusionary rule were ineffective,⁴⁸ the Constitution required the states to adopt the exclusionary rule, both to preserve judicial integrity⁴⁹ and to ensure Fourth Amendment guarantees.⁵⁰

B. Limitations Upon the Exclusionary Rule: The Origins of the Balancing Test

Although the Court had presented a relatively clear statement of the purpose behind the exclusionary rule,⁵¹ the Court opened the door to a series of restrictions to the rule with its development of a balancing test in *United States v. Calandra*.⁵² In determining whether the exclusion-

46. See *Wolf*, 338 U.S. at 31. The Court noted that internal discipline of police or private action could provide equally effective remedies for Fourth Amendment violations. See *id.* But see Stewart, *supra* note 24, at 1384-89. Justice Stewart explained that the decision in *Mapp*, which overruled *Wolf*, essentially determined that no other effective remedies for government violations of the Fourth Amendment exist—then, or now. See *Mapp*, 367 U.S. at 1384-89. To some extent, the reasoning in *Wolf* marks the moment when the “right” and the “remedy” became two distinguishable entities. See *id.* at 1377-78.

47. See *Mapp*, 367 U.S. at 657, *rev'g* *Wolf v. Colorado*, 338 U.S. 25 (1949).

48. See *id.* at 652-53. The *Mapp* Court noted that other remedies were “worthless and futile.” *Id.* The Court further commented that only 23 states provided criminal provisions aimed at preventing unreasonable searches and seizures. See *id.* at 652 n.7.

49. See *id.* at 659. Justice Clark wrote that “[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” *Id.* Justice Clark concluded that the decision to extend the exclusionary rule to the states is founded on “reason and truth” and gave the courts the “judicial integrity so necessary in the true administration of justice.” *Id.* at 660.

50. See *id.* Justice Clark also noted that the decision to extend the exclusionary rule to the states gave to the individual “no more than that which the Constitution guarantees him . . .” *Id.*

51. See *supra* notes 48-49 and accompanying text (discussing judicial integrity and the preservation of Fourth Amendment guarantees as rationales for the exclusionary rule).

52. *United States v. Calandra*, 414 U.S. 338, 354 (1974). As Justice Stewart commented, *Wolf v. Colorado*, 338 U.S. 25 (1949), formed the theoretical basis for the proposition that the exclusionary rule served a deterrent purpose. See Stewart, *supra* note 24, at 1378-79. In 1968, the Court articulated a theoretical paradigm that strengthened the conceptual limitation upon the exclusionary rule. See Norton, *supra* note 28, at 270-71 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). In *Terry*, the Court reasoned that in permitting a search of a suspect whom police reasonably believe to be armed, an officer would not be deterred by the prospect of future exclusion of evidence, because his concern for his safety would override that interest. See *Terry*, 392 U.S. at 29-30. In 1969, the Court hinted at the development of the balancing test. See *Alderman v. United States*, 394 U.S. 165, 174-75 (1969); see also Stewart, *supra* note 24, at 1390 (noting that *Alderman* suggested that “the determination of whether or not to apply the exclusionary rule would turn on a balancing of the costs and benefits of exclusion”). Specifically, in *Alderman*, the Court rejected the notion that “anything which deters illegal searches is thereby commanded by the Fourth Amendment.” *Alderman*, 394 U.S. at 174.

ary rule should apply in grand jury proceedings, the *Calandra* Court explicitly stated that the exclusionary rule served as a punitive deterrent, preventing unreasonable searches, rather than as a remedy to redress governmental invasions of privacy.⁵³ The Court concluded that the admission of illegally obtained evidence is not, itself, a violation of the Constitution.⁵⁴ Thus, the Court held that the exclusionary rule is not intended to apply in every context.⁵⁵

Accordingly, the Court espoused a deterrent, rather than a remedial, philosophy for the exclusionary rule.⁵⁶ As a deterrent, the Court reasoned, the rule should be restricted to "those areas where its remedial objectives are thought most efficaciously served."⁵⁷ To comport with the exclusionary rule's purported deterrent purpose, the Court developed a balancing test. This test became the measuring stick for future limitations of the rule, weighing the high social costs of the rule⁵⁸ against the possible deterrent effects of the rule.⁵⁹ For example, in *Calandra*, the Court refused to apply the exclusionary rule in a grand jury

53. See *Calandra*, 414 U.S. at 347 (carving out an exception to the exclusionary rule in the context of grand jury proceedings). In *Calandra*, the Court stated that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348. If the purpose of the rule were to act as a remedy, the exclusionary rule would operate to restore the status quo before the unconstitutional search. See Norton, *supra* note 28, at 284. On the other hand, if the exclusionary rule served a deterrent purpose, it would operate to provide a punitive sanction upon the government to prevent unconstitutional searches. See *Calandra*, 414 U.S. at 348.

54. See *Calandra*, 414 U.S. at 354. Rather, the Court stated that "[t]he wrong condemned is the unjustified governmental invasion . . . of an individual's life." *Id.*

55. See *id.* at 348.

56. See *id.* The dissent in *Calandra* opposed the majority's characterization of the function of the exclusionary rule. See *id.* at 356-57 (Brennan, J., dissenting). Rather than serving a deterrent effect, the dissent argued that the exclusionary rule is a product of the judiciary's role as the "guardians of the Bill of Rights" designed to "give content and meaning to the Fourth Amendment's guarantees." *Id.* at 356 (Brennan, J., dissenting).

57. *Id.* at 348. The Court has frequently invoked this language from *Calandra* in subsequent exclusionary rule jurisprudence. See, e.g., *Scott III*, 118 S. Ct. 2014, 2019 (1998) (stating that the exclusionary rule is applied only "where its remedial objectives are thought most efficaciously served. . .") (citing *Calandra*, 414 U.S. at 348); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (stating that the purpose of the exclusionary rule is to deter) (citing *Calandra*, 414 U.S. at 347); *United States v. Leon*, 468 U.S. 897, 908 (1984) (citing *Calandra*, 414 U.S. at 348); *United States v. Payner*, 447 U.S. 727, 734 (1980) (citing *Calandra*, 414 U.S. at 348); *Stone v. Powell*, 428 U.S. 465, 486-87 (1976) (citing *Calandra*, 414 U.S. at 348); *United States v. Janis*, 428 U.S. 433, 446 (1976) (citing *Calandra*, 414 U.S. at 348).

58. See *Calandra*, 414 U.S. at 349. In this instance, the Court referred to the potential injury to the historic role of the grand jury. See *id.* It reasoned that the application of the rule would hinder the fact-finding function of grand juries, unnecessarily lengthen grand jury proceedings, and alter the traditionally informal nature of grand jury proceedings. See *id.* at 349-50.

59. See *id.* at 350-52.

proceeding.⁶⁰ In its decision, the Court reasoned that because the evidence would not be admissible during a criminal trial, the deterrent effect would not be jeopardized if the court declined to apply the rule in a grand jury proceeding.⁶¹ Also, the Court reasoned that application of the exclusionary rule would unduly hinder the traditional fact-finding of grand juries.⁶² Therefore, because the cost associated with application of the exclusionary rule outweighed any deterrent benefit that would be gained from its application, the Court refused to apply the rule.⁶³

C. *Restrictions upon the Exclusionary Rule*

The subsequent twenty-five years led to numerous restrictions placed upon the exclusionary rule.⁶⁴ These restrictions fall into two distinct categories: (1) decisions that failed to reach the exclusionary rule by holding either that there was no search, or that the search was reasonable,⁶⁵ and (2) decisions that created exceptions to the exclusionary

60. *See id.* at 354.

61. *See id.* at 354-55. The Court's minimization of any deterrent effect of the rule set the precedent for future limitations. *See id.* at 351-52.

62. *See id.* at 349-52.

63. *See id.* at 354-55.

64. *See, e.g.,* *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (evidence seized as a result of clerical errors fell within the good faith exception to the exclusionary rule); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (sobriety checkpoints for motorists do not violate Fourth Amendment); *James v. Illinois*, 493 U.S. 307, 308-09 (1990) (exclusionary rule does not apply to evidence used to impeach a criminal defendant); *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (diminished definition of reasonable suspicion); *Murray v. United States*, 487 U.S. 533, 537 (1988) (exclusionary rule does not apply if evidence discoverable through independent source); *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (exclusionary rule does not apply to evidence found in curbside trash, because defendant had no reasonable expectation of privacy); *United States v. Montoya de Hernandez*, 473 U.S. 531, 539-40 (1985) (diminished expectation of privacy at international border); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (public school students have diminished expectation of privacy); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (exclusionary rule does not apply in deportation hearings); *United States v. Leon*, 468 U.S. 897, 922 (1984) (exclusionary rule does not apply if officers conducted search in good faith reliance on warrant); *Segura v. United States*, 468 U.S. 796, 816 (1984) (restricting the poisonous fruits doctrine); *Nix v. Williams*, 467 U.S. 431, 448 (1984) (exclusionary rule does not apply if discovery of evidence was inevitable); *United States v. Payner*, 447 U.S. 727, 735 (1980) (exclusionary rule may not be applied to assert violation of another person's Fourth Amendment rights); *Rakas v. Illinois*, 439 U.S. 128, 149-50 (1978) (exclusionary rule may not be applied when there was no reasonable expectation of privacy); *United States v. Ceccolini*, 435 U.S. 268, 278-79 (1978) (exclusionary rule does not exclude testimony of witness discovered through illegally obtained evidence); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (roadblocks to search for illegal aliens do not violate Fourth Amendment); *United States v. Janis*, 428 U.S. 433, 459-60 (1976) (exclusionary rule does not apply in civil tax proceedings); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (exclusionary rule does not apply to evidence that would have been found without illegally obtained evidence).

65. *See Sitz*, 496 U.S. at 455 (random sobriety roadblocks do not violate Fourth Amendment); *Greenwood*, 486 U.S. at 40-41 (search of trash by the curb is not a search); *Montoya de Hernan-*

rule.⁶⁶ The effect of these two categories is markedly different.⁶⁷

1. Absence of an Unreasonable Search

As a threshold matter, before a court reaches the exclusionary rule, it must find that there was a search and that the search was unreasonable.⁶⁸ If there was no search or if the search was reasonable, then the exclusionary rule does not apply, because the government has not violated any Fourth Amendment right.⁶⁹

The Supreme Court has held that certain kinds of governmental actions are not searches at all.⁷⁰ For example, a police officer who seizes

dez, 473 U.S. at 539 (expectation of privacy at international borders diminished); *T.L.O.*, 469 U.S. at 341 (students at public schools have diminished expectation of privacy); *Payner*, 447 U.S. at 735 (exclusionary rule may not be applied to assert violation of another person's Fourth Amendment rights); *Rakas*, 439 U.S. at 149-50 (exclusionary rule may not be applied when there is no reasonable expectation of privacy).

66. See *James*, 493 U.S. at 308-09 (exclusionary rule does not apply to evidence used to impeach a criminal defendant); *Murray*, 487 U.S. at 537 (exclusionary rule does not apply if evidence discoverable through independent source); *Lopez-Mendoza*, 468 U.S. at 1051 (exclusionary rule does not apply in civil deportation hearings); *Leon*, 468 U.S. at 922 (exclusionary rule does not apply if officers conducted search in good faith reliance on warrant); *Nix*, 467 U.S. at 448 (exclusionary rule does not apply if discovery of evidence was inevitable); *Ceccolini*, 435 U.S. at 278-79 (exclusionary rule does not exclude testimony of witness discovered through illegally obtained evidence); *Janis*, 428 U.S. at 459-60 (exclusionary rule does not apply in a federal civil tax proceeding); *Wong Sun*, 371 U.S. at 491 (exclusionary rule does not apply to evidence that would have been found without illegally obtained evidence).

67. See *infra* Part II.C.1-2 (discussing the two classes of restrictions upon the exclusionary rule).

68. See 1 LAFAVE, *supra* note 24, § 2.1, at 379-81 (discussing limitations of the Fourth Amendment). Interestingly, the *Scott III* Court declined to rule on the issue of whether the search of Scott's mother's residence was a reasonable search. See *Scott III*, 118 S. Ct. 2014, 2019 n.3 (1998). As a condition of his parole, Scott had signed a consent form authorizing the parole officers to conduct a search of his person or residence at any time without a warrant. See *id.* at 2018. Justice Thomas declined to dissect the Pennsylvania Supreme Court's opinion to determine whether its holding that the consent form was invalid was based upon the Pennsylvania Constitution or the United States Constitution. See *id.* at 2019 n.3. Instead, Justice Thomas addressed only the issue of whether the exclusionary rule applied. See *id.*; see also *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 182, 188-89 (1998) [hereinafter *Harvard Article*] (criticizing the Court for failing to provide an answer to the preliminary question of whether the search was reasonable). The Pennsylvania Supreme Court, however, stated explicitly that its decision was premised "solely upon federal constitutional grounds." *Scott v. Pennsylvania Bd. of Probation and Parole*, 698 A.2d 32, 39 n.13 (Pa. 1997) [hereinafter *Scott II*].

69. See 1 LAFAVE, *supra* note 24, § 2.1(a), at 379-81 (discussing limitations of the Fourth Amendment). Included in this category are cases where the Court refused to apply the exclusionary rule, because it found that the defendant did not have standing to invoke the rule. See *Payner*, 447 U.S. at 735 (exclusionary rule may not be applied to assert violation of another person's Fourth Amendment rights); *Rakas*, 439 U.S. at 149-50; see also 5 LAFAVE, *supra* note 24, § 11.1(a), at 2-3 (discussing administration of the exclusionary rule).

70. See, e.g., *Horton v. California*, 496 U.S. 128, 137 (1990) (repudiating the "inadvertent discovery" requirement of *Coolidge v. New Hampshire*); *Coolidge v. New Hampshire*, 403 U.S. 443,

objects in his or her plain view has not conducted a search for Fourth Amendment purposes.⁷¹ Similarly, the Court has concluded that certain types of searches are not unreasonable because a diminished expectation of privacy exists in the particular context.⁷² In making such a determination, the Court often balances the Fourth Amendment liberty interest of the individual against a governmental interest.⁷³ Consequently, the analysis centers upon whether a person's liberty interests are, in fact, diminished.⁷⁴ The danger here is that the rule is difficult to apply and leaves any court the flexibility to create more exceptions.⁷⁵ Furthermore, when a court finds a search to be reasonable because of a diminished privacy expectation, the result often reduces Fourth Amendment protections for an entire class of persons—such as students or persons at international borders.⁷⁶

In addition, the Court has held that certain kinds of searches and seizures are inherently reasonable.⁷⁷ As in the cases where a diminished

465 (1971) (plurality opinion) (“[I]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant, [if discovery was inadvertent].”); *Harris v. United States*, 390 U.S. 234, 236 (1968) (stating that objects falling in plain view of officers may be seized); see also 1 LAFAVE, *supra* note 24, § 2.2, at 396-407 (discussing evolution of the plain view doctrine).

71. See *Harris*, 390 U.S. at 236; see also 1 LAFAVE, *supra* note 24, § 2.2, at 396-407.

72. See, e.g., *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (search of curbside trash is not a search for Fourth Amendment purposes because there is no reasonable expectation of privacy (citing *Katz v. United States*, 389 U.S. 347, 364 (1967)); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538-39 (1985) (expectation of privacy at international borders diminished); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (public school students have diminished expectation of privacy); see also 1 LAFAVE, *supra* note 24, § 2.1(b), at 381-86 (discussing the *Katz* test, which examines whether a governmental search violated the privacy upon which a person justifiably relied).

73. See, e.g., *T.L.O.*, 469 U.S. at 340-41 (1985). In *T.L.O.*, a teacher discovered a student smoking in a high school bathroom. See *id.* at 328. Although the student denied that she had been smoking, the principal searched her purse and found rolling papers. See *id.* On appeal from the delinquency hearing, the Court held that although the Fourth Amendment did apply to school officials, the search in question was reasonable. See *id.* at 333, 341. The Court, however, held that a balance must be struck between the student's expectation of privacy and the school's need to maintain an environment where learning could occur. See *id.* at 339. In determining this balance, the Court reasoned that students have diminished liberty interests. See *id.* at 341.

74. See, e.g., *Greenwood*, 486 U.S. at 40-41 (holding that the liberty interest was diminished because the trash was relinquished); *Montoya de Hernandez*, 473 U.S. at 539 (noting that persons at international borders have diminished liberty interests); *T.L.O.*, 469 U.S. at 340-41 (suggesting that students have diminished liberty interests).

75. See 1 LAFAVE, *supra* note 24, § 2.1(b), at 385 & n.72 (citing Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 328-29 (1981)).

76. See cases cited *supra* notes 64-66 (discussing the effect of Court decisions upon the Fourth Amendment rights of persons at international borders and students); see also *infra* notes 320-23 and accompanying text (discussing generally the justifications behind Court decisions that create a class of persons for whom Fourth Amendment protections are lowered).

77. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that random

expectation of privacy exists, the Court employs a balancing test to determine which kinds of searches are reasonable.⁷⁸ The test weighs the importance of the governmental interest that is served by the search against the extent of the deprivation of liberty.⁷⁹ Generally, these kinds of searches are minimally intrusive but serve a compelling governmental interest.⁸⁰

The important thread throughout these cases is the focus upon the liberty interest invaded.⁸¹ To comply with the terms of the Fourth Amendment, either the interest invaded is minimal or the invasion itself is minimal.⁸² Thus, when restricting the Fourth Amendment in this fashion, the Court works directly with the language of the Fourth Amendment.⁸³

2. Exceptions to the Exclusionary Rule

A second class of limitations upon the Fourth Amendment creates exceptions to the application of the exclusionary rule.⁸⁴ Some of these exceptions center on the procedural context in which the evidence was

roadblocks to check for drunk drivers do not violate the Fourth Amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (explaining that roadblocks to search for illegal aliens does not violate the Fourth Amendment); *see also* *Brown v. Texas*, 443 U.S. 47, 51 (1979) (suggesting that the reasonableness of a search must depend upon the extent to which the seizure advances the public interest).

78. *See Sitz*, 496 U.S. at 448-49. The Court examined the reasonableness of searches at roadblocks meant to check for drunk drivers. *See id.* at 450. The police randomly established roadblocks and momentarily stopped every driver passing through a designated area. *See id.* at 448. The Court balanced the minimal intrusion into the drivers' liberty interest with the magnitude of the governmental interest in preventing drunk driving. *See id.* at 451-52.

79. *See Brown*, 443 U.S. at 50-51 ("Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.").

80. *See Sitz*, 496 U.S. at 451 (noting that the governmental interest in reducing drunk driving was compelling, while the inconvenience of the momentary seizure at the roadblock was minimal).

81. *See supra* notes 64-66 and accompanying text (discussing diminished expectations of privacy and diminished liberty interests).

82. *See supra* notes 73-76 and accompanying text (discussing the Court's balancing of individual privacy interests and governmental interests).

83. *See supra* notes 73-76 (discussing the Fourth Amendment's reasonableness requirement); *see also* 1 LAFAVE, *supra* note 24, § 2.1, at 375 (discussing limitations of the Fourth Amendment).

84. *See supra* note 66 (listing several cases declining to apply the exclusionary rule).

seized.⁸⁵ Other exceptions limit the application of the exclusionary rule in particular contexts.⁸⁶

For example, the Court restricted the poisonous fruits doctrine⁸⁷ by creating an “inevitable discovery” exception to the exclusionary rule.⁸⁸ Thus, where the discovery of evidence would have been inevitable, regardless of the unconstitutional search, the exclusionary rule does not apply.⁸⁹ Likewise, the Court also created a “good faith” exception to the exclusionary rule.⁹⁰ Under the good faith exception, where an officer conducted a search in good faith reliance upon a search warrant that appeared valid on its face, the Court refused to apply the exclusionary rule, even if the warrant later proved to be invalid.⁹¹ Under these exceptions to the exclusionary rule, the Court inquired into the effectiveness of the rule.⁹² Implicit in these exceptions is the assumption that the

85. See, e.g., *Murray v. United States*, 487 U.S. 533, 537 (1988) (exclusionary rule does not apply if evidence discoverable through independent source); *United States v. Leon*, 468 U.S. 897, 922 (1984) (exclusionary rule does not apply if officers conducted search in good faith reliance on warrant); *Nix v. Williams*, 467 U.S. 431, 448 (1984) (exclusionary rule does not apply if discovery of evidence was inevitable); *United States v. Ceccolini*, 435 U.S. 268, 278-79 (1978) (exclusionary rule does not exclude testimony of witness discovered through illegally obtained evidence); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (exclusionary rule does not apply to evidence which would have been found without illegally obtained evidence).

86. See, e.g., *James v. Illinois*, 493 U.S. 307, 308-09 (1990) (exclusionary rule does not apply to evidence used to impeach a criminal defendant); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (exclusionary rule does not apply in civil deportation hearings); *United States v. Janis*, 428 U.S. 433, 459-60 (1976) (exclusionary rule does not apply in federal civil tax proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule not applicable in grand jury proceedings).

87. See *supra* note 41 and accompanying text (describing the poisonous fruits doctrine, which prohibits the use of illegally obtained evidence to discover other evidence).

88. See *Wong Sun*, 371 U.S. at 491. In *Wong Sun*, the Court restricted the fruits of the tree doctrine. See *id.* After being arrested without probable cause, Wong Sun was released. See *id.* Several days later, he returned voluntarily to make a confession. See *id.* The Court held that, while the exclusionary rule prevented the introduction of evidence that was found through the use of illegally seized evidence, the statement had “become so attenuated as to dissipate the taint.” *Id.* (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

89. See *Williams*, 467 U.S. at 448.

90. See *Leon*, 468 U.S. at 920-21. Under the good faith exception, the exclusionary rule does not bar evidence seized by police conducting searches in good faith reliance on a search warrant. See *id.*; see also 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, 1025-1032 (1997) (discussing the origins of the good faith exception and criticizing its expansion beyond the *Leon* facts).

91. See *Leon*, 468 U.S. at 920-21.

92. See *id.* at 906. The Court noted that whether the exclusionary rule should apply is “an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.” *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)). In cases where a police officer has acted in good faith reliance upon a warrant, the Court reasons “there is no police illegality and thus nothing to deter.” *Id.* at 920-21.

primary purpose of the rule is to deter unconstitutional searches.⁹³ The Court employed a balancing test in these contexts, weighing the effectiveness of the rule, rather than the liberty interests of the person aggrieved,⁹⁴ against the cost of the rule.⁹⁵

In other instances, the Court limited the application of the exclusionary rule in particular contexts or administrative fora.⁹⁶ For instance, the Court refused to apply the exclusionary rule in civil deportation hearings⁹⁷ or civil tax proceedings.⁹⁸ To determine whether to create an exception to the exclusionary rule in a particular context, the Court employs a balancing test that weighs the effectiveness of the rule against its costs.⁹⁹ Therefore, the Court appraises the costs and benefits of the rule, not the invaded liberty interest.¹⁰⁰

The recent restrictions upon the exclusionary rule embody a fundamental change in judicial philosophy.¹⁰¹ Because the *Weeks* Court never explicitly suggested a rationale explaining its creation of the exclusionary rule,¹⁰² the rule is subject to shifting judicial philosophies

93. See *id.* at 906 (describing the purpose of the rule as a deterrent, rather than as a constitutional right) (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

94. See *supra* Part II.C.1 (discussing the balancing test employed in cases where the Court found a search to be reasonable).

95. See *Leon*, 468 U.S. at 920-21. The Court balanced the deterrent effect of the exclusionary rule against the consequences of applying the rule. See *id.* at 900-01. The Court reasoned that the exclusionary rule would not deter an officer acting in good faith reliance upon a search warrant from conducting illegal searches. See *id.* at 920-21.

96. See *James v. Illinois*, 493 U.S. 307, 308-09 (1990) (exclusionary rule does not apply to evidence used to impeach); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (exclusionary rule does not apply in civil deportation hearings); *United States v. Janis*, 428 U.S. 433, 459-60 (1976) (exclusionary rule does not apply in federal civil tax proceedings); *United States v. Calandra*, 414 U.S. 338, 354 (1974) (holding that the exclusionary rule does not apply in grand jury proceedings). Indeed, the *Scott III* Court presents the argument that the parole revocation context is analogous to these noncriminal and administrative contexts in which it has refused to apply the rule. See *infra* Part III.C (discussing the high social costs and limited deterrent effect of imposing the exclusionary rule).

97. See *Lopez-Mendoza*, 468 U.S. at 1051. The Court's refusal to apply the exclusionary rule in civil deportation hearings has the troubling effect of creating a class of persons for whom Fourth Amendment protections are lessened. See *id.* at 1045-46; *supra* notes 72-76 (discussing other classes of persons for whom Fourth Amendment protections are lessened); *infra* notes 319-332 (discussing generally the justifications for decisions that impact Fourth Amendment protections of classes of persons).

98. See *Janis*, 428 U.S. at 459-60.

99. See *supra* notes 58-63 and accompanying text (describing the balancing test used).

100. See *supra* notes 58-63 and accompanying text (describing the balancing test used).

101. Compare *Calandra*, 414 U.S. at 347 (stating that the exclusionary rule serves as a deterrent), with *Mapp v. Ohio*, 367 U.S. 643, 657-59 (1961) (stating that the exclusionary rule preserves the Fourth Amendment and protects judicial integrity).

102. See *supra* notes 30-37 and accompanying text (discussing the creation of the exclusionary rule).

and models of the criminal justice system.¹⁰³ As the restrictions upon the exclusionary rule continue to mount, the theory that the rule serves only a deterrent purpose becomes more entrenched.¹⁰⁴

III. DISCUSSION

On June 22, 1998, the Supreme Court decided *Scott III*.¹⁰⁵ After arresting Keith M. Scott for alleged parole violations, parole officers, without obtaining a search warrant, searched Scott's home.¹⁰⁶ Despite the warrantless search, the Supreme Court held that the exclusionary rule would not bar evidence seized during the unconstitutional search of Scott's home because application of the exclusionary rule in parole revocation hearings would not deter future unconstitutional searches.¹⁰⁷

A. *The Factual Context*

On April 2, 1982, a Pennsylvania court sentenced Keith M. Scott to a ten to twenty year term of imprisonment for third degree murder.¹⁰⁸ On September 1, 1993, after serving slightly more than his minimum sentence, Scott was released on parole, subject to several conditions.¹⁰⁹ Condition 5(b) of Scott's parole required him to refrain from "owning or possessing any firearms or other weapons."¹¹⁰ After his release, Scott resided at the home of his mother and stepfather.¹¹¹

On February 4, 1994, pursuant to a warrant issued by the Pennsylvania Board of Probation and Parole ("Board"), three parole officers arrested Scott for violating his parole.¹¹² The alleged violations included

103. See 1 LAFAYE, *supra* note 24, § 1.1(f), at 18-24 (discussing various proposed purposes of the exclusionary rule); Fleissner, *supra* note 90, at 1025-27 (discussing Professor Packer's models of the criminal justice system and their impact upon the exclusionary rule); Norton, *supra* note 28, at 264-70 (discussing the justifications for the exclusionary rule).

104. See *supra* note 57 and accompanying text (giving examples of cases employing the *Callandra* rationale for the exclusionary rule).

105. *Scott III*, 118 S. Ct. 2014 (1998).

106. See *id.* at 2018.

107. See *id.* at 2022.

108. See *Scott II*, 698 A.2d 32, 32 (Pa. 1997).

109. See *id.* One condition of Scott's parole was to consent expressly to any search of his person, property, and residence. See *id.* Another condition of Scott's parole was that he refrain from assaultive behavior. See *id.* at 33. Finally, Scott was not to consume any alcohol. See *id.*

110. *Id.* at 32.

111. See *id.* at 33.

112. See *id.* The officers' knowledge of Scott's parole status forms one primary distinction between Justice Thomas's majority opinion and Justice Souter's dissent. See *infra* Parts III.C, III.E. Justice Thomas largely ignores the parole officers' knowledge of Scott's parole status, and Justice Souter notes that the knowledge of a parolee's status increases the deterrent effect of the rule. See *infra* Parts III.C, III.E (discussing Justice Thomas's opinion and Justice Souter's dis-

possession of a .22 Magnum revolver on September 4, 1993 and a 10-millimeter Glock handgun in September of 1993.¹¹³ At the time of his arrest, Scott had no weapons in his possession.¹¹⁴

Before being transported to the county correctional facility, Scott gave his keys to the arresting agents.¹¹⁵ When the agents arrived at Scott's residence, no one was home.¹¹⁶ Upon the return of Scott's mother, the officers informed her that they were going to search Scott's bedroom, neither requesting nor receiving consent.¹¹⁷ After they found no evidence of a parole violation in his room, the officers then searched the sitting room adjacent to Scott's room.¹¹⁸ They found five firearms underneath a sofa and a compound bow and three arrows in a closet.¹¹⁹

B. Administrative and Lower Court Decisions

On March 30, 1994, a parole violation hearing was held before an administrative law judge ("ALJ").¹²⁰ When asked to explain the legal justification for the search, Agent Mundro responded:

[A]ny individual under the supervision of the Pennsylvania Board of Probation and Parole can have his residence searched by representatives of the Board with or without the homeowner's permission if this is the parolee or probationer's approved residence. I was merely informing [Scott's] mother that we were going to search We also have the right to search any common living areas in the residence.¹²¹

sent).

113. *See Scott II*, 698 A.2d at 33. The officers also had information that Scott had consumed alcohol and been involved in a fight. *See id.* The other violations, however, were not at issue in Scott's appeal. *See id.* at 33 n.1.

114. *See id.* at 33. In *Scott II*, the court described Scott's parole violation as possession of weapons in his "approved residence," not on his person. *See id.* at 33 n.2.

115. *See id.* at 33.

116. *See id.* The officers instructed Scott's companion, Dorothy Hahn, to lead them to Scott's residence. *See id.* When they arrived, Hahn called Scott's mother. *See id.*

117. *See id.* The Pennsylvania Supreme Court held that the consent form that Scott signed was not a waiver of his Fourth Amendment rights. *See id.* at 36. Accordingly, the court held the search to be unreasonable. *See id.*

118. *See id.* at 33. Scott's mother directed the agents to his room. *See id.*

119. *See id.* The guns were not loaded and the officers did not find any ammunition. *See id.* In his defense, Scott testified that he did not know the guns were in the home because his mother had told him they had been removed. *See id.* at 34. Scott's stepfather also testified that the guns belonged to him and he had hidden them, knowing they were not permitted in Scott's approved residence. *See id.* The administrative law judge, nevertheless, held that this testimony was irrelevant under the terms of Scott's parole. *See id.*

120. *See id.* at 33.

121. *Id.* The United States Supreme Court had previously addressed the question of whether parolees retain Fourth Amendment liberty interests upon release. *See Griffin v. Wisconsin*, 483 U.S. 868, 879-80 (1987) (holding that special needs of law enforcement in the parole context

The ALJ admitted the evidence resulting from the search over the objection of Scott's counsel, ruling that the consent, though unusual, was valid.¹²² On June 6, 1994, the Board recommitted Scott to serve thirty-six months backtime.¹²³

Scott then appealed the decision of the Board to the Commonwealth Court of Pennsylvania.¹²⁴ The commonwealth court applied the *Calandra* balancing test¹²⁵ but held that the exclusionary rule was applicable in the context of a parole revocation hearing. In so holding, the commonwealth court reasoned that the deterrent effect of the rule would substantially outweigh any injury to Pennsylvania's interests that would result from an exclusion of the evidence.¹²⁶

The Commonwealth appealed the lower court's decision to the Supreme Court of Pennsylvania.¹²⁷ After concluding that the search of Scott's residence violated the Fourth Amendment,¹²⁸ the Pennsylvania

coupled with the diminished liberty of parolees justified an exception, in a particular factual context, to the traditional warrant and probable cause requirements of the Fourth Amendment); *Morrissey v. Brewer*, 408 U.S. 471, 487-90 (1972) (holding that parolees do possess liberty interests, although diminished).

122. See *Scott v. Pennsylvania Bd. of Probation & Parole*, 668 A.2d 590, 595 (Pa. Commw. Ct. 1995) [hereinafter *Scott I*]. The transcript states:

[T]he issue is on the record. My finding regarding this issue is that there were—that the consent—that the search (INAUDIBLE) was a bit unusual but within requirements so established for consent by residences of parolees by parole agents and the Commonwealth. So let's go forward having resolved the issue of the search.

Id. (citing Record at 79-80).

123. See *Scott II*, 698 A.2d at 34. The primary evidence on which the Board relied was the possession of the weapons. See *id.* The Board also noted that there was sufficient evidence to support a violation for consumption of alcohol. See *id.* On September 6, 1994, the Board modified its previous decision by adding two aggravating factors: (1) that Scott had committed multiple violations; and (2) that Scott should be considered a threat. See *id.*

124. See *Scott I*, 668 A.2d at 594. The commonwealth court held that the consent form signed by Scott was invalid and the search unreasonable. See *id.* at 597 & n.3.

125. See *supra* notes 58-63 and accompanying text (discussing the *Calandra* balancing test).

126. See *Scott I*, 668 A.2d at 600. The court noted that although many states have refused to apply the exclusionary rule, some states have applied the rule in special circumstances. See *id.* at 599. The court reasoned that the sole purpose of the search was to uncover evidence of additional violations occurring after Scott's arrest. See *id.* at 600. Therefore, the court concluded that the exclusionary rule was necessary to deter searches such as this one, despite the injury to the traditionally flexible parole system. See *id.*

127. See *Scott II*, 698 A.2d at 34. During the period pending review, the commonwealth court filed an en banc opinion in a separate case holding that the exclusionary rule was inapplicable to parole revocation hearings. See *Kyte v. Pennsylvania Bd. of Probation & Parole*, 680 A.2d 14, 18 n.8 (Pa. Commw. Ct. 1996). The court held that the deterrent effects of the rule were outweighed by its cost in the parole revocation context. See *id.* at 17-18. Therefore, in *Kyte*, the court refused to apply the exclusionary rule. See *id.* at 18.

128. See *Scott II*, 698 A.2d at 39. The court reasoned that the consent form signed by Scott pursuant to his parole merely acknowledged that the parole officer has the right to conduct rea-

Supreme Court emphasized the importance of the officer's knowledge of a suspect's parole status.¹²⁹ The court reasoned that when an officer is unaware of a suspect's status as a parolee, the officer's primary goal would be to garner evidence for a criminal trial, not a parole revocation hearing.¹³⁰ Therefore, the court conceded that when an officer is unaware of a suspect's parolee status, application of the exclusionary rule at a parole revocation hearing would be unnecessary given the deterrent effect stemming from the possible exclusion of evidence at a criminal trial.¹³¹

When an officer is aware of the suspect's status, however, the court held that the purpose of the search would be quite different.¹³² The court hypothesized that an officer aware of the suspect's parole status may seek evidence of parole violations, rather than evidence of criminal activity.¹³³ The court stressed that successful parole revocation hearings produce the same end result as a successful criminal trial—incarceration of the parolee.¹³⁴ The court concluded that the exclusion of illegally obtained evidence, in criminal trials, would have an insufficient deterrent effect upon an officer aware of the suspect's parole status.¹³⁵ The Pennsylvania Supreme Court, therefore, upheld the lower court's

sonable searches. *See id.* at 35-36. Because neither officer who conducted the search recalled the source of information, the court held the search was based on mere speculation and, thus, was unreasonable. *See id.* at 36.

129. *See id.* at 36-37. The Pennsylvania Supreme Court distinguished its decision from *Kyte*, as well as the majority of federal circuit courts that have held that the exclusionary rule did not apply in the context of parole revocation hearings. *See id.* at 34-38. The court distinguished *Scott's* case, noting that some of the federal circuit courts that had addressed the applicability of the exclusionary rule in parole revocation hearings had not been confronted with the factual scenario in which officers were aware that the suspect was a parolee. *See id.* at 37 n.9.

130. *See id.* at 37.

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

132. *See id.* The Pennsylvania Supreme Court noted decisions in both the Ninth and Second Circuits. *See id.* (citing *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975)). The Ninth Circuit wrote:

[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 revocation of probation.

Winsett, 518 F.2d at 54 n.5, quoted in *Scott II*, 698 A.2d at 37.

133. *See Scott II*, 698 A.2d at 37-38.

134. *See id.* at 38.

135. *See id.* Without the protection of the exclusionary rule, there would be "nothing to deter a parole agent from conducting an illegal search . . ." *Id.*

opinion, and the Commonwealth appealed to the United States Supreme Court.¹³⁶

C. *Opinion of the Supreme Court*

Writing for a five-justice majority, Justice Thomas reversed the decision of the Pennsylvania Supreme Court.¹³⁷ The Court initially dismissed the notion that the exclusionary rule is a remedy for the government's violation of a Fourth Amendment right.¹³⁸ Subsequently, the Court embraced the inference that the purpose of the exclusionary rule was to deter illegal searches and seizures.¹³⁹ Having concluded that the purpose behind the exclusionary rule was to serve as a deterrent, not as a remedy, the Court concluded that the rule was not constitutionally mandated.¹⁴⁰ As such, the Court concluded that the exclusionary rule is applicable only when its deterrent benefits outweigh its social costs.¹⁴¹ The Court also recognized that it had previously refused to apply the exclusionary rule in noncriminal proceedings due to the costs associated with the rule.¹⁴² Likewise, the Court recognized that it had previously

136. *See id.*; *see also Scott III*, 118 S. Ct. 2014, 2019 (1998).

137. *See Scott III*, 118 S. Ct. at 2022. Joining Justice Thomas were Chief Justice Rehnquist, Justices O'Connor, Scalia, and Kennedy. *See id.* at 2017.

138. *See id.* at 2019. The Court also noted that the use of illegally obtained evidence is not, itself, a Fourth Amendment violation. *See id.* (citing *United States v. Leon*, 468 U.S. 897, 906 (1984); *Stone v. Powell*, 428 U.S. 465, 482 (1976)). Instead, the Court reasoned that the Fourth Amendment violation is "fully accomplished" by the illegal search. *See id.* (citing *Leon*, 468 U.S. at 906). Therefore, the exclusion of evidence cannot operate as a cure for the invasion that the defendant has suffered. *See id.* (citing *Leon*, 468 U.S. at 906).

139. *See id.* The Court wrote that the "exclusionary rule is instead a judicially created means of deterring illegal searches and seizures." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). *Calandra* first articulated this purpose for the rule and, thus, became the starting point for limitations placed on the exclusionary rule. *See supra* notes 51-63 and accompanying text (discussing the purpose of the exclusionary rule and the development of the *Calandra* balancing test).

140. *See Scott III*, 118 S. Ct. at 2019. The Court stated that the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons. . . ." *Id.* (quoting *Stone*, 428 U.S. at 486). Herein lies a fundamental, but arguably misstated, assumption that the Court made about the purpose of the exclusionary rule. *See supra* Parts II.A-B (discussing the purposes behind the exclusionary rule); *see also infra* Part IV.A. (criticizing the Court's distinction between the deterrent and remedial purposes behind the exclusionary rule).

141. *See Scott III*, 118 S. Ct. at 2019 (citing *Leon*, 468 U.S. at 907; *United States v. Janis*, 428 U.S. 433, 454 (1976); *Calandra*, 414 U.S. at 348). The Court stated that the exclusionary rule should apply only in contexts "where its remedial objectives are thought most efficaciously served." *Id.* (quoting *Calandra*, 414 U.S. at 348). The Court thus sets forth the balancing test first articulated by *Calandra*. *See supra* notes 58-63 and accompanying text.

142. *See Scott III*, 118 S. Ct. at 2019-21 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (declining to apply the exclusionary rule in civil deportation hearings); *Leon*, 468 U.S. at 907 (declining to apply the exclusionary rule when officers relied in good faith upon a warrant which appears valid on its face); *Janis*, 428 U.S. at 447-48, 454 (declining to apply the exclusion-

held that the rule's effect tends to be duplicative in noncriminal proceedings.¹⁴³

After discussing the purpose behind the exclusionary rule, the Court noted that the application of the exclusionary rule in the parole revocation context may be similar to other noncriminal or administrative contexts where the Court chose not to apply the exclusionary rule.¹⁴⁴ Therefore, the Court invoked the *Calandra* balancing test.¹⁴⁵ Using the balancing test, the Court first examined the costs of applying the exclusionary rule in the context of parole revocation.¹⁴⁶ The Court declared that in this context, the rule imposes significant costs, limiting both the truthfinding process¹⁴⁷ and law enforcement objectives.¹⁴⁸ Although these social costs are identical in kind to those tolerated in application of the rule during criminal trials, the Court posited that the social costs are particularly high in the parole revocation context.¹⁴⁹ The Court first reasoned that parolees are more likely to commit future crimes than average citizens.¹⁵⁰ In the eyes of the Court, the possibility that parolees

ary rule in civil tax proceedings); *Calandra*, 414 U.S. at 343-46 (declining to apply the exclusionary rule in grand jury proceedings)).

143. *See id.* at 2019-20 (citing *Janis*, 428 U.S. at 448, 454).

144. *See id.* at 2020; *supra* notes 96-98 and accompanying text (discussing contexts in which the Court has refused to apply the exclusionary rule).

145. *See Scott III*, 118 S. Ct. at 2020; *see also supra* notes 58-63 and accompanying text (discussing the application of the *Calandra* balancing test).

146. *See Scott III*, 118 S. Ct. at 2019-21. As the Pennsylvania Supreme Court noted, the costs associated with the application of the exclusionary rule in the parole revocation context are the same, regardless of the officers' knowledge of the suspect's parole status. *See Scott II*, 698 A.2d 32, 38 (Pa. 1997).

147. *See Scott III*, 118 S. Ct. at 2020 (citing *Stone v. Powell*, 428 U.S. 465, 490 (1976)). The Court did not suggest that this particular cost is associated only with parole revocation hearings. *See id.* Instead, it reasoned that because the application of the exclusionary rule inherently exacts a "costly toll," those pressing its application must meet a high burden. *See id.* (citing *United States v. Payner*, 447 U.S. 727, 734 (1980)).

148. *See id.* (citing *Stone*, 428 U.S. at 490). The Court noted that, because of the high social costs associated with application of the rule, it has generally held the rule to apply only in the context of a criminal trial. *See id.* at 2020 n.4 (noting that, even in criminal trials, application of the exclusionary rule is limited under certain circumstances).

149. *See id.* at 2020. The Court cited no evidence indicating that application of the exclusionary rule heightens interference with truthfinding or law enforcement objectives in the parole revocation context. *See id.* Instead, the Court examined the nature of parole. *See id.* It commented that parole is a "variation on imprisonment." *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)). Like imprisonment, the parolee is given a limited degree of freedom in exchange for compliance with certain conditions. *See id.* One argument is that parole is only granted because the state can condition the release of the parolee upon compliance with parole requirements. *See id.* Therefore, the state has an "overwhelming interest" in ensuring that parolees comply with the conditions of their parole. *See id.* (quoting *Morrissey*, 408 U.S. at 483).

150. *See id.* The Court cited no empirical evidence for this conclusion. *See id.* Instead, it cited only to *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987). *See id.* (stating that "this is the very

could avoid the consequences of noncompliance with their parole increased the cost of applying the exclusionary rule.¹⁵¹

The Court also worried that application of the exclusionary rule imposed a cost upon parole revocation hearings themselves by altering the nature of the proceedings.¹⁵² The Court described parole revocation hearings as both informal and flexible.¹⁵³ Because of the flexibility and informality of parole revocation hearings, a parolee is not entitled to the “full panoply” of due process rights afforded a criminal defendant.¹⁵⁴ The Court concluded that imposition of the exclusionary rule upon parole revocation hearings would undermine the informal, administrative, and flexible nature of the proceedings.¹⁵⁵

Specifically, the Court reasoned that use of the exclusionary rule would delay parole revocation hearings.¹⁵⁶ Drawing from the presumption that the exclusionary rule would delay these hearings, the Court reasoned that application of the exclusionary rule would then lead to in-

premise behind the system of close parole supervision”).

151. *See Scott III*, 118 S. Ct. at 2020.

152. *See id.* at 2020-21. In Pennsylvania, parole boards conduct parole hearings. *See* 61 PA. CONS. STAT. ANN. § 331.2 (West 1964 & Supp. 1999). The Board is composed of nine members, appointed by the Governor. *See id.* To serve on the Board, a person must have at least six years of experience in parole, probation, social work or related areas, including at least one year of supervisory or administrative experience. *See id.* The Board has the discretion to recommit parolees for technical violations after a hearing. *See id.* at § 331.21 (West Supp. 1998). The Supreme Court has commented that most states have adopted informal and administrative hearings in order to accommodate the large number of parole hearings. *See Scott III*, 118 S. Ct. at 2021.

153. *See Scott III*, 118 S. Ct. at 2021. The Court additionally commented that parole hearings are not entirely adversarial. *See id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973)). Instead, the Court characterized parole hearings as “predictive,” “discretionary,” and “factfinding.” *Id.* (quoting *Gagnon*, 411 U.S. at 787). This flexibility and informality, to some extent, is necessary to accommodate the heavy volume of parole revocation hearings faced by most states. *See id.*

154. *See id.* at 2021 n.5 (citing *Morrissey*, 408 U.S. at 480). The Court recognized that different rules of evidence apply in parole revocation hearings than criminal trials. *See id.* at 2021 (citing *Morrissey*, 408 U.S. at 489). Likewise, the Court commented that the right to counsel does not attach to parole proceedings. *See id.* at 2021 n.5 (citing *Gagnon*, 411 U.S. at 787).

155. *See id.* at 2021.

156. *See id.* Here, the Court cited no empirical evidence to support its presumption; instead, it offered two analogies. *See id.* The Court reasoned that the exclusionary rule often requires collateral litigation to determine the admissibility of evidence. *See id.* It offered, as examples, its decision to refuse to apply the exclusionary rule to civil deportation proceedings or grand jury proceedings. *See id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048 (1984); *United States v. Calandra*, 414 U.S. 338, 349 (1974)). The Court noted that grand jury proceedings would be delayed by the exclusionary rule because “[s]uppression hearings would halt the orderly process for an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury’s primary objective.” *Id.* (quoting *Calandra*, 414 U.S. at 349). The Court, however, did not offer an explanation of why such delay is as harmful to parole revocation hearings as it is to either grand jury or deportation hearings. *See id.*

creased financial cost.¹⁵⁷ Thus, the Court concluded that the application of the exclusionary rule would transform parole revocation hearings from a flexible, fact-finding expedition that could promote the parolee's best interests to an adversarial, trial-like proceeding.¹⁵⁸

After emphasizing the social costs associated with the exclusionary rule, the Court downplayed the deterrent effect of the rule.¹⁵⁹ The Court stressed that the exclusionary rule need not apply in contexts where it provides only "marginal deterrence."¹⁶⁰ The Court separated its analysis of the potential deterrent effect of the exclusionary rule into two parts: (1) an analysis of the effect of the rule upon police;¹⁶¹ and (2) an analysis of the effect of the rule upon parole officers.¹⁶²

With respect to its analysis of the effect of the rule upon police, the Court first suggested that the focus of a police officer's search is obtaining convictions rather than ensuring compliance with parole.¹⁶³ From this suggestion, the Court concluded that even when the police officer knows of the parolee's status, the officer would be deterred from

157. *See id.* The Court even went so far as to suggest that states, knowing the possibility of protracted litigation over the admissibility of evidence, would be less likely to offer parole because of budgetary concerns. *See id.* Again, however, the Court offers no empirical, or even analytical, evidence for this conclusion. *See id.*

158. *See id.* (citing *Gagnon*, 411 U.S. at 787-88).

159. *See id.* at 2021-22. The Pennsylvania Supreme Court concluded that the cost of the exclusionary rule would be the same regardless of the officer's knowledge of a suspect's parole status, but that the benefit of applying the rule would be significantly increased when the officers were aware of their suspect's parole status. *See Scott II*, 698 A.2d 32, 38 (Pa. 1997); *see also supra* notes 128-135 and accompanying text. The majority minimized, without explanation, the distinction made by the Pennsylvania Supreme Court. *See Scott III*, 118 S. Ct. at 2021-22. Instead, the majority treated the issue simply as whether the exclusionary rule has benefits in the parole revocation context. *See id.* at 2021-22.

160. *See Scott III*, 118 S. Ct. at 2022 (citing *Calandra*, 414 U.S. at 350; *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Intertwined with the Court's analysis of the possible deterrent effect of the rule, the Court reiterated the increased cost of collateral litigation associated with the exclusionary rule. *See id.* The Court wrote that "a piecemeal approach to the exclusionary rule would add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status." *Id.* The Court did not appear to provide evidentiary support for the contention that this layer of collateral litigation would hinder the exclusionary rule's deterrent purpose. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* The Court relied only on a statement made in *United States v. Janis*, 428 U.S. 433, 458 (1976). *See id.* In *Janis*, the Court held admissible illegally seized evidence in civil tax proceedings. *See Janis*, 428 U.S. at 458 (stating that the noncriminal proceeding "falls outside the offending officer's zone of primary interest"). The Court did not further explain why gathering evidence of parole violations also falls outside the officer's zone of interest. *See Scott III*, 118 S. Ct. at 2022.

conducting illegal searches because the exclusionary rule would be applied in criminal trials.¹⁶⁴

The Court next asserted that even if a parole officer conducted the search, the deterrent effect of the rule would nonetheless, be limited.¹⁶⁵ The Court distinguished the motives of parole officers from police officers, characterizing the parole officer's role as supervisory, rather than adversarial.¹⁶⁶ The Court proposed that other remedies, such as departmental discipline or damage actions, would provide sufficient deterrence for parole officers, making the application of the exclusionary rule in parole revocation hearings unnecessary.¹⁶⁷ Finally, the Court declared that, like police officers, parole officers would be aware of the possibility of suppression of evidence in a criminal trial and that awareness provided sufficient deterrent effects.¹⁶⁸ Therefore, Justice Thomas

164. See *Scott III*, 118 S. Ct. at 2022. The Court did not provide any empirical or anecdotal evidence for this conclusory statement. See *id.* In addition, the Court did not address the Pennsylvania Supreme Court's proposition that an officer who is aware of his suspect's parole status has inherently different motivations than an officer who is unaware of his suspect's parole status. See *id.*; see also *supra* notes 128-135 and accompanying text (discussing the Pennsylvania Supreme Court's analysis of how the deterrent effect of the exclusionary rule in criminal trials could be insufficient when the officer is aware of the parolee's status).

165. See *Scott III*, 118 S. Ct. at 2022. The Court characterized the primary concern of the parole officer as determining "whether their parolees should remain free on parole." *Id.* Police officers, on the other hand, are "engaged in the often competitive enterprise of ferreting out crime." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 914 (1984)). Interestingly, the Court suggested that it is the police officer's motivation of obtaining evidence for convictions at criminal trials that makes the possible benefit from the exclusionary rule in parole revocation hearings marginal. See *id.* With parole officers, the Court seems to suggest that the absence of any motivation to obtain evidence for convictions at criminal trials makes the possible benefit from the exclusionary rule marginal. See *id.*

166. See *id.* at 2022 (relying on *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)). The Court stated that it is "unfair to assume" that the parole officer is either hostile or impartial towards his parolee. See *id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972)). The Court even suggested that a failure of the parolee translates to a failure of the supervisory officer. See *id.* (citing *Morrissey*, 408 U.S. at 485-86). The Court conceded, however, that parole officers do sometimes violate the Fourth Amendment rights of their parolees but failed to cite to any empirical evidence about the frequency of such violations. See *id.*

167. See *id.* The Court, however, did not explain why such remedies are sufficient in the context of parole revocation hearings, but not in the context of criminal trials. See *id.* Neither did the Court provide any empirical or anecdotal evidence that supported its conclusion that the remedies it proposed would be effective. See *id.* The Court did not address the conclusion in *Mapp v. Ohio* that other remedies were largely ineffective. See *supra* notes 47-50 and accompanying text (discussing the purposes behind the exclusionary rule).

168. See *Scott III*, 118 S. Ct. at 2022. The Court did not acknowledge either the dissent or the Pennsylvania Supreme Court's distinction that evidence of parole violations often leads only to a parole revocation hearing rather than a criminal trial. See *id.*; see also *supra* notes 132-136 and accompanying text (discussing the Pennsylvania Supreme Court's analysis of how the deterrent effect of the exclusionary rule in criminal trials could be sufficient when the officer is aware of the parolee's status).

concluded that neither police officers nor parole officers would be sufficiently deterred from conducting searches in violation of the Fourth Amendment by an application of the exclusionary rule in parole revocation hearings.¹⁶⁹

Justice Thomas wrote that the exclusionary rule is a “grudgingly taken medicant.”¹⁷⁰ Consistent with that philosophy, Justice Thomas concluded that the exclusionary rule would disrupt the parole revocation hearing process.¹⁷¹ Likewise, Justice Thomas minimized any possible deterrent effect the rule would have in the parole revocation context.¹⁷² Accordingly, under the *Calandra* balancing test,¹⁷³ the Court held that parole boards are not required to exclude evidence obtained in violation of the Fourth Amendment.¹⁷⁴

D. Justice Stevens’s Dissent¹⁷⁵

Justice Stevens’s dissent is but three sentences in length,¹⁷⁶ yet it challenged Justice Thomas’s opinion by arguing that the exclusionary rule is constitutionally required in parole revocation hearings.¹⁷⁷ The exclusionary rule, Justice Stevens admitted, is not an explicit constitutional right.¹⁷⁸ Instead, Justice Stevens urged that the exclusionary rule is a constitutionally mandated remedy that is necessary to ensure that the prohibitions of the Fourth Amendment are “observed in fact.”¹⁷⁹

169. See *Scott III*, 118 S. Ct. at 2022.

170. See *id.* (quoting *United States v. Janis*, 428 U.S. 433, 454 n.29 (1976)).

171. See *id.*; *supra* notes 152-158 and accompanying text (describing Justice Thomas’s analysis of how parole revocation hearings might change if the exclusionary rule applied).

172. See *Scott III*, 118 S. Ct. at 2022; *supra* notes 159-169 and accompanying text (discussing Justice Thomas’s minimization of the deterrent effects of the exclusionary rule in parole revocation hearings).

173. See *supra* notes 58-63 and accompanying text (discussing the application of the *Calandra* balancing test).

174. See *Scott III*, 118 S. Ct. at 2022.

175. There are two dissents from the majority opinion. Justice Stevens proposed that the exclusionary rule is a constitutionally required remedy. See *id.* at 2023 (Stevens, J., dissenting). Justice Souter, joined by Justices Ginsburg and Breyer, attacked the assumptions of the majority concerning the *Calandra* balancing test. See *id.* at 2023 (Souter, J., dissenting).

176. See *id.* at 2022-23 (Stevens, J., dissenting).

177. See *id.* (Stevens, J., dissenting) (quoting Stewart, *supra* note 24, at 1389) (citing *Arizona v. Evans*, 514 U.S. 1, 18-19 & n.1 (1995) (Stevens, J., dissenting); *United States v. Leon*, 468 U.S. 897, 978 n.37 (1984) (Stevens, J., dissenting); *Segura v. United States*, 468 U.S. 796, 828 & n.22 (1984) (Stevens, J., dissenting)).

178. See *id.* (Stevens, J., dissenting).

179. See *id.* (Stevens, J., dissenting) (quoting Stewart, *supra* note 24, at 1389). Stevens did not cite to language in *Weeks v. United States*, which supports this argument. See *id.* (Stevens, J., dissenting); see also *supra* notes 33-36 and accompanying text (noting language in *Weeks* that supports the proposition that the exclusionary rule is a constitutionally required remedy).

While Justice Stevens did not rehash arguments he had put forth in previous dissents, he based his dissent on a common premise—that in drafting the Bill of Rights, the Framers, “identif[ied] values that may not be sacrificed to expediency.”¹⁸⁰ In doing so, Justice Stevens endorsed a purpose for the exclusionary rule wholly separate from the deterrent purpose recognized by both Justice Thomas and Justice Souter.¹⁸¹ Justice Stevens determined that the exclusionary rule exists to preserve the right to privacy mandated by the Fourth Amendment.¹⁸²

E. Justice Souter’s Dissent

Unlike Justice Stevens, Justice Souter utilized the *Calandra* balancing test to determine whether the exclusionary rule applies in the context of parole revocation hearings.¹⁸³ Justice Souter criticized the majority’s reasoning, suggesting that it rested upon mistaken characterizations of the function of parole revocation hearings and the motives of those who gather evidence in support of petitions to revoke parole.¹⁸⁴ Consequently, Justice Souter argued that the majority both underestimated the deterrent effect the exclusionary rule would have in the parole revocation context¹⁸⁵ and overstated the social costs that would result from the application of the rule.¹⁸⁶

Justice Souter’s criticism of the majority’s reliance on the deterrent

180. *Leon*, 468 U.S. at 979-80 (Stevens, J., dissenting). Justice Stevens put forth two primary arguments in his *Leon* dissent. *See id.* at 979-80 (Stevens, J., dissenting). First, he argued that it is commonplace for courts to exclude certain kinds of evidence, even though it may be probative. *See id.* at 979 (Stevens, J., dissenting). He provided examples such as the marital privilege, attorney-client privilege, and doctor-patient privilege. *See id.* at 979 n.38 (Stevens, J., dissenting) (citing 8 JOHN HENRY WIGMORE, EVIDENCE (John T. McNaughton rev., 1961)). Second, Justice Stevens reasoned that the police would not have had the evidence but for the illegal search. *See id.* at 979 (Stevens, J., dissenting). Accordingly, the cost of applying the rule is not so great as the majority concluded. *See id.* at 979 (Stevens, J., dissenting).

181. *See supra* notes 139-140 and accompanying text (discussing Justice Thomas’s proposition that the purpose of the exclusionary rule is to deter unconstitutional searches); *infra* note 185 and accompanying text (discussing Justice Souter’s claim that the purpose of the exclusionary rule is to deter unconstitutional searches).

182. *See Leon*, 468 U.S. at 979 (Stevens, J., dissenting).

183. *See Scott III*, 118 S. Ct. at 2023 (Souter, J., dissenting). Justice Souter wrote that “[t]he exclusionary rule does not . . . mandate the exclusion of illegally acquired evidence from all proceedings or against all persons. . . .” *Id.* (Souter, J., dissenting) (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

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

185. *See id.* (Souter, J., dissenting). Justice Souter noted that the deterrent effect of the exclusionary rule in criminal prosecutions should serve as a baseline for comparing the deterrent effect the rule would have in other contexts. *See id.* at 2023-24 (Souter, J., dissenting) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984)).

186. *See id.* at 2026 (Souter, J., dissenting).

effect of the exclusionary rule began with an analysis of Justice Thomas's comparison of the parole revocation context to the contexts of the grand jury and civil tax proceedings.¹⁸⁷ The majority reasoned that the exclusionary rule was not applied in other noncriminal proceedings and, thus, should not be applied in parole revocation proceedings where the deterrent effect of the exclusionary rule would be similar.¹⁸⁸

Justice Souter, in contrast, distinguished parole revocation hearings from grand jury and civil tax proceedings.¹⁸⁹ Although Justice Souter agreed that application of the exclusionary rule in either grand jury or tax proceedings would be duplicative,¹⁹⁰ he charged that this was not the case in the context of a parole revocation hearing.¹⁹¹ Justice Souter stressed that the function of a parole revocation hearing is the same as that of a criminal trial—to return a parolee to prison.¹⁹² In addition, Justice Souter then observed that a parole revocation hearing often takes the place of a formal criminal trial.¹⁹³ The logical conclusion, Justice

187. See *id.* at 2024 (Souter, J., dissenting) (citing *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974)). Justice Thomas compared the potential deterrent benefits of the exclusionary rule, if applied in the parole revocation context, with the potential benefits, if applied in grand jury and civil tax proceedings. See *id.* at 2020 (Thomas, J., dissenting); see also *supra* notes 146-51 and accompanying text (discussing the majority's analysis of the cost of applying the exclusionary rule in parole revocation hearings).

188. Justice Thomas noted that the primary similarity was that none of the proceedings were criminal trials. See *supra* notes 144-45 and accompanying text (discussing the Court's conclusion that parole revocation hearings are similar to other noncriminal proceedings).

189. See *Scott III*, 118 S. Ct. at 2023-25 (Souter, J., dissenting).

190. See *id.* (Souter, J., dissenting). Justice Souter posited that civil tax proceedings are so attenuated from criminal proceedings that the possibility of exclusion of evidence in such proceedings provides little deterrent effect to an officer whose primary interest is state criminal prosecution. See *id.* (Souter, J., dissenting). This, Justice Souter proposed, provided the logic for the conclusion that police officers will not be motivated to gather evidence for a civil tax proceeding. See *id.* (Souter, J., dissenting). Likewise, Justice Souter recognized that an investigation that sought only to produce evidence for a grand jury would be "so unambitious" that it would be a rarity. See *id.* (Souter, J., dissenting). Therefore, Justice Souter concluded that, in the context of both civil tax proceedings and grand jury hearings, the application of the rule in the criminal trial does provide significant deterrence. See *id.* (Souter, J., dissenting) (referring to *Calandra*, 414 U.S. at 351; *Janis*, 428 U.S. at 457-58); see also *supra* note 143 and accompanying text (discussing the contexts in which application of the exclusionary rule would be duplicative).

191. See *Scott III*, 118 S. Ct. at 2024 (Souter, J., dissenting).

192. See *id.* at 2023 (Souter, J., dissenting).

193. See *id.* (Souter, J., dissenting). Justice Souter provided several examples of cases where the state sought revocation of parole when the criminal prosecution was dismissed for insufficient evidence. See *id.* at 2027 (Souter, J., dissenting) (citing *State ex rel Wright v. Ohio Adult Parole Auth.*, 661 N.E.2d 728, 730 (Ohio 1996); *Anderson v. Virginia*, 457 S.E.2d 396, 397 (Va. 1995); *Chase v. Maryland*, 522 A.2d 1348, 1350 (Md. 1987); *Gronski v. Wyoming*, 700 P.2d 777 (Wyo. 1985)). In addition, Justice Souter noted that the Supreme Court observed that a parole revocation hearing 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.* (Souter, J., dissenting) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972)). Finally, Justice Souter referred to a

Souter argued, is that an officer investigating a parolee will not always be deterred by the fear of evidentiary suppression in a criminal trial.¹⁹⁴

Justice Souter also criticized the majority's characterization of the motives of both police and parole officers.¹⁹⁵ He first attacked the factual predicate of Justice Thomas's argument—that a police officer is concerned with investigating crimes and is likely to be unaware of a suspect's parole status.¹⁹⁶ If a police officer, even in the investigation of a crime, has identified a suspect, Souter contested, he likely will be aware of the suspect's parole status.¹⁹⁷ Starting from this very different set of facts, Justice Souter reasoned that, precisely because an investigating officer knows of his suspect's parole status, he will be concerned about the outcome of a parole revocation hearing.¹⁹⁸ Therefore, Justice Souter concluded that application of the exclusionary rule during criminal trials and not during parole revocation proceedings was not sufficient to deter unconstitutional searches.¹⁹⁹

treatise that states that parole revocation hearings are used in place of criminal proceedings. *See id.* (Souter, J., dissenting) (citing N. COHEN & J. GOBERT, *LAW OF PROBATION AND PAROLE*, § 8.06, at 386) (1993)).

194. *See id.* at 2027 (Souter, J., dissenting).

195. *See id.* at 2024-25 (Souter, J., dissenting). The majority characterized police officers as concerned primarily with criminal investigation and parole officers as concerned primarily with ensuring parole compliance. *See supra* notes 163-69 and accompanying text. From this characterization, the majority concluded that police officers would be unconcerned with the possible exclusion of evidence at parole revocation hearings and parole officers would be immune from the kind of "competitive zeal" that would cause them to violate the Fourth Amendment in the first place. *See supra* notes 165-71 and accompanying text. Justice Souter commented that because police often cooperate with parole officers, it is inappropriate to characterize them differently, as did the majority. *See Scott III*, 118 S. Ct. at 2025 (Souter, J., dissenting) (citing *PENNSYLVANIA BOARD OF PROBATION AND PAROLE, POLICE PROCEDURES IN THE HANDLING OF PAROLEES* 16 (1974) (directing parole officers to inform police in the area where parolee will be living and to cooperate with the police)).

196. *See supra* notes 164-65 and accompanying text (discussing police officer awareness of the parole status of someone being searched).

197. *See Scott III*, 118 S. Ct. at 2024 (Souter, J., dissenting). Souter's dissent cited a number of court of appeals and state appellate court cases that document instances in which an investigating officer testified to awareness of a suspect's parole status. *See id.* at 2024-25 (Souter, J., dissenting) (citing *Grimsley v. Dodson*, 696 F.2d 303, 304 (4th Cir. 1982); *United States ex rel. Santos v. New York State Bd. of Parole*, 441 F.2d 1216, 1217 (2d Cir. 1971); *People v. Montenegro*, 173 Cal. App. 3d 983, 986 (4th Dist. 1985); *State ex rel. Wright v. Ohio Adult Parole Auth.*, 661 N.E. 2d 728, 730 (Ohio 1996); *People v. Stewart*, 610 N.E. 2d 197, 206 (Ill. App. Ct. 1993)).

198. *See id.* at 2025 (Souter, J., dissenting). Justice Souter noted that police officers are employed by the same sovereign that runs the parole system. *See id.* (Souter, J., dissenting) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984)) (stating that deterrence is "especially effective when law enforcement and prosecution are under one government"). Finding empirical evidence regarding parole investigations is, however, inherently difficult. *See* 1 *LAFAVE, supra* note 24, § 1.2(b), at 31.

199. *See Scott III*, 118 S. Ct. at 2025 (Souter, J., dissenting). Justice Souter reasoned that because parole revocation hearings often substitute for criminal trials, and because officers aware of

The Souter dissent next criticized the majority's characterization of the motives of parole officers.²⁰⁰ Justice Souter reasoned that a parole officer's interest in the outcome of parole revocation hearings created a motive that is far from neutral.²⁰¹ Instead of focusing solely upon the parolee's constructive return to society, a parole officer wears several hats—those of counselor, social worker, prosecutor, and law enforcement official.²⁰² Furthermore, the Souter dissent observed that a parole officer who fails to respond to a parolee's criminal behavior, or who brings a petition without sufficient evidence, jeopardizes both public safety and his career.²⁰³ Hence, as with police officers, the dissent concluded that the possibility of exclusion during criminal trials, but not parole revocation hearings, is an insufficient deterrent for parole officers.²⁰⁴

The Souter dissent disputed the majority's assertion that other deterrents would provide sufficient force to prevent parole officers from violating the Fourth Amendment.²⁰⁵ Although the majority suggested that departmental training, internal discipline, and actions brought by parolees for monetary damages provide sufficient deterrence,²⁰⁶ it offered no examples of such training or discipline and found no lawsuit seeking damages for an illegal search.²⁰⁷

the suspect's parole status develop new motivations, the possibility of exclusion at criminal trial was too remote to provide an effective deterrent for unconstitutional searches. *See id.* (Souter, J., dissenting).

200. *See id.* (Souter, J., dissenting). The majority characterized parole officers as more interested in making sure the parolee is rehabilitated than in catching parole violators. *See supra* notes 166-69 and accompanying text (discussing the majority's description of the role of parole officers).

201. *See Scott III*, 118 S. Ct. at 2026 (Souter, J., dissenting). Justice Souter contended that it is inaccurate to paint a parole officer as one "immune to such competitive zeal." *Id.* at 2025 (Souter, J., dissenting). Accordingly, parole officers are subject to a similar "temptation to cut constitutional corners." *Id.* at 2025-26 (Souter, J., dissenting).

202. *See id.* at 2025 (Souter, J., dissenting) (citing N. COHEN & J. GOBERT, *LAW OF PROBATION AND PAROLE* §11.04 (1983)) (explaining that parole officers serve as prosecutors and law enforcement officials in their relationship with parolees); *Minnesota v. Murphy*, 465 U.S. 420 (1983) (holding that a probation officer is allied with other peace officers); TIMOTHY P. WILE, *PENNSYLVANIA LAW OF PROBATION AND PAROLE* § 5.12, at 88 (1993) (noting that parole officers act as supervisors, social workers, advocates, police officers, investigators, and advisors).

203. *See Scott III*, 118 S. Ct. at 2026 (Souter, J., dissenting) (citing R. Prus & J. Stratton, *Parole Revocation Decisionmaking: Private Typings and Official Designations*, 40 FED. PROBATION 51 (Mar. 1976)).

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

205. *See id.* (Souter, J., dissenting). The majority grudgingly admitted that parole officers did not zealously adhere to the requirements of the Fourth Amendment. *See id.* at 2022.

206. *See id.*

207. *See id.* at 2026 (Souter, J., dissenting); *see also supra* notes 41-44 and accompanying text (discussing the Court's decision in *Mapp v. Ohio*, which concluded that other remedies were not

Having found that the majority opinion underestimated the deterrent effect of the exclusionary rule if applicable in parole revocation hearings, the Souter dissent next debated the majority's estimates of the social costs associated with such an application.²⁰⁸ Justice Souter did concede, as the majority argued,²⁰⁹ that the application of an exclusionary rule in the parole revocation context would tend to diminish the informality of parole revocation hearings while increasing their adversarial nature.²¹⁰ Nevertheless, Justice Souter contended that this was not a sufficient reason to abandon the exclusionary rule.²¹¹ Likewise, Justice Souter criticized the majority's conclusion that the application of the exclusionary rule would be too cumbersome for lay parole boards to apply.²¹² For these reasons, Justice Souter concluded that adoption of the exclusionary rule would not, as the majority suggested, so transform parole revocation hearings as to mandate the rejection of the rule.²¹³

Finally, Justice Souter challenged the majority's hypothesis that use of the exclusionary rule in parole revocation hearings would levy a costly toll upon the State's interest in reducing crime.²¹⁴ Justice Souter did not contest the majority's assumption that the state has an "overwhelming interest" in ensuring that its parolees comply with the conditions of their parole, given the fact that parolees are more likely to commit future crimes than average citizens."²¹⁵ Instead, Justice Souter commented that the exclusionary rule imposes a cost upon the fact-finding function of any proceeding.²¹⁶ Consequently, Justice Souter suggested that the state's interest in convicting criminals is better served

sufficient to deter unconstitutional searches).

208. See *Scott III*, 118 S. Ct. at 2026-27 (Souter, J., dissenting).

209. See *supra* notes 145-51 and accompanying text (discussing the majority's concern that the application of the exclusionary rule may make parole revocation hearings more formal and inflexible).

210. See *Scott III*, 118 S. Ct. at 2026-27 (Souter, J., dissenting).

211. See *id.* at 2027 (Souter, J., dissenting). Justice Souter noted that although parole revocation procedures are commonly held without the use of lawyers, counsel must be provided when the factual issues are complex. See *id.* (Souter, J., dissenting) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973)).

212. See *id.* at 2026-27 (Souter, J., dissenting). Justice Souter reasoned that lay board members would be just as capable of deciding Fourth Amendment issues as police, who are "charged with the responsibility for the legality of warrantless arrests, investigatory stops, and searches." *Id.* at 2027 (Souter, J., dissenting).

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

214. See *id.* (Souter, J., dissenting); see also *supra* notes 147-51 and accompanying text (discussing the social costs of the exclusionary rule).

215. *Scott III*, 118 S. Ct. at 2027 n.2 (Souter, J., dissenting) (citing the majority opinion).

216. See *id.* (Souter, J., dissenting). Accordingly, Justice Souter commented that the cost of the exclusionary rule remains the same whether the forum is a parole revocation or a criminal trial. See *id.* (Souter, J., dissenting).

by conditioning the parole on an agreement to submit to warrantless searches,²¹⁷ rather than refusing to apply the exclusionary rule in the parole revocation context.²¹⁸

Just as Justice Thomas's opinion focused on the impact that the exclusionary rules would have on the parole revocation system,²¹⁹ Justice Souter reasoned that without a suppression remedy in the parole revocation context, nothing will adequately deter parole and police officers from violating a parolee's Fourth Amendment rights.²²⁰ Accordingly, Justice Souter concluded that the exclusionary rule should apply in the parole revocation context.²²¹

IV. ANALYSIS

Scott III represents a new exception the Court has carved from the exclusionary rule.²²² The Court determined, utilizing the balancing test it formulated in 1974,²²³ that the benefits of applying the exclusionary rule in parole revocation hearings did not substantially outweigh the costs associated with the rule's application.²²⁴ The decision is troubling for two reasons.²²⁵ First, while the application of the balancing test has become commonplace in exclusionary rule jurisprudence,²²⁶ neither the

217. With this suggestion, Justice Souter raised the very issue that the majority declined to address—whether the consent form signed by Scott made the search a reasonable one. *See id.* at 2029 n.3 (Souter, J., dissenting); *see also supra* note 68 (discussing the effectiveness of search consent forms).

218. *See Scott III*, 118 S. Ct. at 2027 n.2 (Souter, J., dissenting).

219. *See supra* Part III.C (discussing the majority opinion in *Scott III*).

220. *See Scott III*, 118 S. Ct. at 2027 (Souter, J., dissenting). Justice Souter commented that the parole revocation hearing is often the only forum in which illegally obtained evidence will be used. *See id.* (Souter, J., dissenting). Thus, the exclusionary rule will provide the only deterrence to unconstitutional searches when law enforcement officers seek to re-incarcerate a parolee. *See id.* (Souter, J., dissenting).

221. *See id.* at 2028 (Souter, J., dissenting). Justice Souter also stated that the Supreme Court of Pennsylvania found the consent form signed by Scott to be inadequate. *See id.* (Souter, J., dissenting) (citing *Scott II*, 698 A.2d. 418, 426 (Pa. 1997)). Therefore, Justice Souter would have held the search to be unreasonable. *See id.* (Souter, J., dissenting).

222. *See id.* at 2022; *see also supra* note 64 and accompanying text (listing other exceptions to the exclusionary rule and limitations upon the Fourth Amendment).

223. *See United States v. Calandra*, 414 U.S. 338, 349 (1974). The balancing test weighs the cost associated with the exclusionary rule against the deterrent benefit of the rule. *See id.* The *Calandra* Court identified the injury to the role and function of the grand jury as a type of cost. *See id.* at 349-50. The benefit was the deterrence of searches in violation of the Fourth Amendment. *See id.* at 350-51.

224. *See Scott III*, 118 S. Ct. at 2022.

225. *See infra* Parts IV.A-B (discussing the Court's misstatement of the purpose of the exclusionary rule and the Court's misapplication of the *Calandra* balancing test).

226. *See United States v. Leon*, 468 U.S. 897, 908-10 (1984) (stating that the deterrence rationale was the sole justification for the exclusionary rule); Norton, *supra* note 28, at 270-80 (dis-

majority opinion²²⁷ nor Justice Souter's dissent²²⁸ fully explored the underlying proposition supporting this test—that the exclusionary rule serves only a deterrent purpose.²²⁹ On the other hand, Justice Stevens proposed, but provided no detailed analysis, that the underlying purposes of the exclusionary rule should be reexamined.²³⁰ Second, even assuming that the *Calandra* balancing test should continue to be used, the majority's application of the test is unconvincing because it both exaggerated the social costs associated with the exclusionary rule²³¹ and understated the deterrent effect of the rule.²³² The majority opinion suffers from improper analogous comparisons, assumptions grounded upon neither empirical nor anecdotal evidence, deficient considerations of the factual context of this case, and incomplete descriptions of the kind of deterrent effect the exclusionary rule could have.²³³ Moreover, the majority's framing of the issue before the Court exacerbated these flaws.²³⁴

cussing the development of the deterrence rationale for the exclusionary rule).

227. See *Scott III*, 118 S. Ct. at 2019 (citing *Calandra*, 414 U.S. at 348); see also *supra* Part III.C (detailing the majority's decision).

228. See *Scott III*, 118 S. Ct. at 2023 (Souter, J., dissenting) (citing *Calandra*, 414 U.S. at 347); see also *supra* Part III.D (explaining Justice Stevens's criticism of both the majority opinion and the Souter dissent).

229. See Fleissner, *supra* note 90, at 1027-28 (crediting *Weeks v. United States*, 232 U.S. 383 (1914) with providing a judicial integrity rationale for the exclusionary rule); Norton, *supra* note 28, at 284-86 (arguing that deterrence need not be viewed as the only justification for the exclusionary rule); Stewart, *supra* note 24, at 1381-87 (arguing that the exclusionary rule serves more than a deterrent purpose). Justice Stewart contends that the responsibility for enforcing the Constitution's limits upon government rests with the judiciary. See Stewart, *supra* note 24, at 1384. Consequently, Stewart maintains that the exclusionary rule is a constitutionally mandated judicial remedy to give effect to the Fourth Amendment's protections. See *id.*

230. See *Scott III*, 118 S. Ct. at 2022-23 (Stevens, J., dissenting).

231. See *infra* Part IV.B.1 (criticizing the majority's analysis of the exclusionary rule's cost if applied in parole revocation hearings).

232. See *infra* Part IV.B.2 (suggesting the majority underestimated the deterrent benefit of the exclusionary rule when applied in parole revocation hearings).

233. See *infra* Parts IV.B.1-2 (analyzing the flaws in the majority's application of the *Calandra* balancing test).

234. The majority chose to address the issue of whether the exclusionary rule should apply in parole revocation hearings. See *Scott III*, 118 S. Ct. at 2017-18. Justice Souter, however, framed the issue as whether the exclusionary rule should apply in parole revocation hearings where the officers conducting the search are aware of the suspect's parole status. See *id.* at 2024-25 (Souter, J., dissenting); see also *supra* notes 195-99 and accompanying text (discussing Justice Souter's criticism of the majority's choice in presenting the issue). Indeed, the Court's choice in framing the issue is reminiscent of *Bowers v. Hardwick* where the Court's framing of the issue dictated the result. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (where the Court framed the issue as whether homosexuals had a constitutional right to engage in sodomy, rather than whether sexual activity between consenting adults is within the sphere of the right to privacy); see also Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 341 n.143 (1999) (discussing the art of Constitutional issue framing and *Bowers*).

A. *The Court Misstated the Purpose Behind the Exclusionary Rule*

Underneath the surface of exclusionary rule jurisprudence lies a debate over the supposed purposes behind the rule.²³⁵ Since its inception, the reason for the creation of the exclusionary rule has never been explicitly stated.²³⁶ As such, the exclusionary rule is subject to shifting judicial philosophies and paradigms.²³⁷ The rule has been characterized as a constitutional mandate,²³⁸ a guardian of judicial integrity,²³⁹ a constitutional remedy,²⁴⁰ and a vehicle to deter unconstitutional searches.²⁴¹

Justice Stewart has argued that the rule is neither directly mandated by the Fourth and Fifth Amendments nor necessary to preserve judicial

235. See Fleissner, *supra* note 90, at 1025-27 (discussing Professor Herbert L. Packer's definition of the paradigms governing the criminal justice system); Norton, *supra* note 28, at 283-86 (summarizing the debate over the purposes of the exclusionary rule); Stewart, *supra* note 24, at 1381-87 (discussing the debate over the purposes of the exclusionary rule). Norton comments that this debate suffers from "empty assertions of deontological rights theory" and claims that are difficult to support with empirical evidence. Norton, *supra* note 28, at 283-84 (quoting Robert Weisberg, *IVHS, Legal Privacy, and Legacy of Dr. Faustus*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 75, 79-80 (1995)).

236. See *Weeks v. United States*, 232 U.S. 383, 392-94 (1914) (establishing the exclusionary rule), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961); Wasowicz, *supra* note 26, at 79 (noting the absence of any legislative or judicial debate over the efficacy of the exclusionary rule prior to its creation by Justice Day).

237. See *supra* notes 30-35, 48-50, 53-57, and accompanying text (discussing the implicit purposes of the exclusionary rule expressed in *Weeks*, *Mapp*, and *Calandra*); see also 1 LAFAVE, *supra* note 24, § 1.1(f), at 18-23 (discussing purposes behind the exclusionary rule); Fleissner, *supra* note 90, at 1025-26. Fleissner discusses Professor Herbert L. Packer's definition of the dominant paradigms—the Crime Control Model and the Due Process Model—of the criminal justice system. See Fleissner, *supra* note 90, at 1025-26. Fleissner argues that Packer's description of the Crime Control Model provided an impetus for the formation of the deterrence rationale. See *id.*

238. See Stewart, *supra* note 24, at 1380-81. Justice Stewart cites language from cases throughout the history of exclusionary rule jurisprudence to support this rationale for the exclusionary rule. See *id.* Justice Stewart, however, ultimately rejects this rationale because the Fourth Amendment contains no explicit language regarding the exclusion of evidence. See *id.* at 1381.

239. See Fleissner, *supra* note 90, at 1028; Norton, *supra* note 28, at 268-69 (discussing language in *Weeks* supporting the theory that the rationale behind the exclusionary rule is one of judicial integrity). As support for this theory, Norton quoted *Hughes v. State*: "Security from unlawful search is the right guaranteed to the citizen . . . This right we must protect, unless we may with impunity disregard our oath to support and enforce the Constitution." Norton, *supra* note 28, at 269 (quoting *Hughes v. State*, 238 S.W. 588 (Tenn. 1922) (internal quotations omitted)).

240. See Stewart, *supra* note 24, at 1384 (arguing that the exclusionary rule is a constitutionally mandated remedy). Justice Stewart contends that the responsibility for enforcing the Constitution's limits upon government rests with the judiciary. See *id.* Consequently, Stewart maintains that the exclusionary rule is a constitutionally mandated judicial remedy to give effect to the protections of the Fourth Amendment. See *id.*

241. See *United States v. Calandra*, 414 U.S. 338, 354 (1974) (stating that the purpose of the rule is to deter); see also *United States v. Leon*, 468 U.S. 897, 908-10 (1984) (stating that the deterrence rationale was the justification for the exclusionary rule).

integrity.²⁴² Instead, Justice Stewart proposed that the exclusion of evidence is a constitutionally required remedy to vest Fourth Amendment rights.²⁴³ Since 1974, however, the Supreme Court has consistently relied on the fourth justification for the rule—that it served to deter unlawful searches and seizures—to the exclusion of the other purposes.²⁴⁴ Both the majority and the Souter dissent merely accepted the rationale that the rule serves only a deterrent purpose.²⁴⁵ The issue appears to be resolved—the pendulum of jurisprudence has swung towards the fourth alternative.²⁴⁶

Yet, the issue warrants more than this casual dismissal. Both the origins and development of the exclusionary rule indicate that it served something beyond a deterrent purpose.²⁴⁷ The *Weeks* Court, in its explanation of the newly formed rule, noted that the rule should apply to “all, alike,” and if it did not, that the protections of the Fourth Amendment might as well be “stricken from the Constitution.”²⁴⁸ The Court continued to espouse this theoretical framework behind the rule through 1961, when Justice Clark stated that without the exclusionary rule the Constitution would be reduced to a mere form of words.²⁴⁹ Indeed, the Court went so far as to say that the exclusionary rule was “part and parcel” of the Fourth Amendment.²⁵⁰

242. See Stewart, *supra* note 24, at 1381-83 (rejecting both the constitutional mandate and the judicial integrity rationales for the exclusionary rule as problematic).

243. See *id.* at 1383-89 (suggesting that the exclusionary rule is a constitutionally required remedy). Justice Stewart sat on the Court when it applied the exclusionary rule to the states and provided a clearer statement of the purposes of the exclusionary rule. See *Mapp v. Ohio*, 367 U.S. 643 (1961); see also *supra* notes 48-51 and accompanying text (discussing the Court’s purpose in adopting the exclusionary rule in *Mapp*).

244. See *Calandra*, 414 U.S. at 354 (stating that the purpose of the rule is to deter); see also *Leon*, 468 U.S. at 908-10 (stating that the deterrence rationale was the justification for the exclusionary rule).

245. See *Scott III*, 118 S. Ct. at 2019 (citing *Calandra*, 414 U.S. at 348), 2023 (Souter, J., dissenting) (quoting *Calandra*, 414 U.S. at 347). On the other hand, Justice Stevens repeats his opinion that the rule should be a constitutionally required remedy. See *id.* at 2022-23 (Stevens, J., dissenting).

246. See *supra* note 57 (listing cases relying upon the *Calandra* balancing test).

247. See *supra* notes 33-37, 49-52, and accompanying text (discussing the origins and development of the exclusionary rule and implicit discussion of its purpose); see also Fleissner, *supra* note 90, at 1028 (discussing purposes of the exclusionary rule implicit in the language of *Weeks v. United States*, 232 U.S. 383 (1914)).

248. *Weeks*, 232 U.S. at 392-93.

249. See *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J., dissenting)). Justice Clark also referred to the language in *Weeks*, which stated that without the exclusionary rule, the language of the Fourth Amendment might as well be stricken from the Constitution. See *id.* (citing *Weeks*, 232 U.S. at 383).

250. See *id.* at 651.

The *Scott III* Court discussed neither *Mapp* nor *Weeks*.²⁵¹ Instead, it cited the case credited with the development of the balancing test, claiming that the exclusionary rule is a “judicially created means of deterring illegal searches and seizures.”²⁵² Even in creating the *Calandra* balancing test, however, the Court did not refer to *Mapp* or *Weeks* to support its holding that the exclusionary rule served only to deter.²⁵³

Critics argue that the *Calandra* balancing test is arbitrary.²⁵⁴ They maintain that the test creates the appearance of an objective scale upon which the empirical evidence is weighed.²⁵⁵ In the absence of empirical evidence, however, the image becomes a mirage.²⁵⁶ The *Mapp* Court concluded that other remedies were largely ineffective deterrents for unconstitutional searches.²⁵⁷ In light of *Mapp*’s conclusion, Justice Stewart’s suggestion that the rule serves as a constitutional remedy to give effect to the Fourth Amendment merits reinvestigation.²⁵⁸

B. *The Scott III Court Misapplied the Calandra Balancing Test*

Even though the *Scott III* Court determined that the *Calandra* balancing test was the appropriate standard to determine the applicability of the exclusionary rule, the Court’s use of this test rested upon unfounded assumptions and flawed logical conclusions. The Court concluded that the exclusionary rule, if applied in parole revocation hearings, would have an enormous social cost²⁵⁹ and would not deter

251. See *Scott III*, 118 S. Ct. 2014, 2018-22 (1998) (making no mention of the language of *Mapp* or *Weeks*).

252. *Id.* at 2019 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

253. See *Calandra*, 414 U.S. at 354 (making no reference to language in *Mapp* or *Weeks* when stating that the purpose of the rule is to deter, not remedy).

254. See 1 LAFAVE, *supra* note 24, § 1.3(b), at 57 (citing Justice Brennan’s comment that the exclusionary rule engenders decisions supported by “intuition, hunches, and occasional pieces of partial and often inconclusive data”) (citation omitted).

255. See *id.*

256. See *id.* § 1.3(c), at 57. LaFave quotes Justice Brennan and Justice Marshall on the subject of exaggerated costs:

we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the ‘costs’ of excluding illegally obtained evidence loom to exaggerated heights and where the ‘benefits’ of such exclusion are made to disappear with a mere wave of the hand.

Id. (citation omitted).

257. See *supra* note 48 and accompanying text (discussing the ineffectiveness of other remedies in deterring unconstitutional searches).

258. See *Scott III*, 118 S. Ct. 2014, 2022-23 (1998) (Stevens, J., dissenting) (arguing that the purpose of the rule should be to provide a constitutional remedy to give effect to Fourth Amendment guarantees); Norton, *supra* note 28, at 283-94 (advocating a reexamination of the purpose of the exclusionary rule).

259. See *supra* notes 146-58 and accompanying text (reviewing the Court’s analysis of the

unconstitutional searches.²⁶⁰ Both conclusions are erroneous.²⁶¹

1. The Court Overstated the Social Cost Associated with the Rule

The Court first contended that because parolees are more likely to commit future crimes than the average citizen, the state has an overwhelming interest in ensuring parole compliance.²⁶² While the factual predicate to this conclusion may be valid, the Court did not explain how this cost differs, either in degree or in kind, from the interest in obtaining convictions during criminal trials.²⁶³ The exclusionary rule is a bitter pill.²⁶⁴ When it is applied, those who are guilty of crimes often go free.²⁶⁵ It is inherently inconsistent with the goal of truth finding within the judicial process.²⁶⁶ Nevertheless, it has been created to safeguard the Fourth Amendment.²⁶⁷

The Court's contention that the exclusionary rule would transform the nature of parole revocation hearings suffers from similar prob-

costs of the exclusionary rule).

260. See *supra* notes 159-69 and accompanying text (examining the Court's cursory analysis of the deterrent effect of the exclusionary rule).

261. See *infra* Parts IV.B.1-2 (criticizing the Court's application of the *Calandra* balancing test).

262. See *supra* notes 150-51 and accompanying text (explaining the Court's statement regarding the state's interest in ensuring parole compliance).

263. See *supra* notes 216-18 and accompanying text (noting Justice Souter's analysis that the costs described by the Court are simply those born whenever the exclusionary rule is applied); see also 1 LAFAVE, *supra* note 24, § 1.6 (g), at 182 n.119 (citing *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978) (commenting that the costs of applying the exclusionary rule in the parole revocation context are not significantly higher than those in criminal trials)).

264. See 1 LAFAVE, *supra* note 24, § 1.2(a), at 25. LaFave writes that the exclusionary rule "makes the cost of honoring the Fourth Amendment apparent." *Id.* The exclusionary rule is only used after incriminating evidence has been illegally obtained and "'flaunts before us the cost we must pay for [F]ourth [A]mendment guarantees.'" *Id.* at 25-26 (quoting Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974)).

265. Justice Harlan wrote that "[w]e do not release a criminal from jail because we like to do so, or because we think it is wise to do so, but only because the government has offended constitutional principle in the conduct of his case." *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

266. See Stewart, *supra* note 24, at 1392-93 (discussing modern criticisms of the exclusionary rule); see also 1 LAFAVE, *supra* note 24, § 1.2 (addressing recent attacks upon the exclusionary rule).

267. See Stewart, *supra* note 24, at 1383-89 (arguing that the exclusionary rule serves to preserve the protections of the Fourth Amendment); see also Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22. Justice Traynor wrote:

[i]t was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constitution.

Id. at 322.

lems.²⁶⁸ The exclusionary rule makes any proceeding more adversarial.²⁶⁹ The Court again does not explain how this cost differs, in degree or in kind, from the cost associated with the rule in criminal trials.²⁷⁰ Rather than identify costs associated with the exclusionary rule that are particular to parole revocation hearings, the Court simply outlined the basic costs that are always associated with the rule.²⁷¹

Even if the *Scott III* Court's proposed "overwhelming State interest" in ensuring parole compliance is accepted, there exists a far less intrusive method of meeting this interest.²⁷² In the past, the Court adopted a lower Fourth Amendment standard for reasonable searches to comport with governmental interests in specific situations.²⁷³ The *Scott III* Court presented an argument to condition parole on consent to searches, not to deny the application of the exclusionary rule in parole revocation hearings.²⁷⁴

2. The *Scott III* Court Understated the Benefits Derived from Applying the Exclusionary Rule in Parole Revocation Hearings

The Court's conclusion that the benefits derived from applying the exclusionary rule in parole revocation hearings would be marginal is also unconvincing.²⁷⁵ The Court's primary contention that application

268. See *supra* notes 152-58 and accompanying text (discussing the Court's contention that the rule would destroy the informality of parole revocation hearings).

269. See *supra* notes 209-13 and accompanying text (discussing Justice Souter's argument that the effect of the rule is to make any proceeding more formal); see also 1 LAFAVE, *supra* note 24, § 1.6 (g), at 183 (stating that this argument has lost its force since parolees must be afforded due process rights in the revocation process).

270. See *supra* notes 214-16 and accompanying text (discussing Justice Souter's criticism of the majority's argument); see also 1 LAFAVE, *supra* note 24, § 1.3(c), at 58 (noting that the exclusionary rule is applied in only 0.6% to 2.35% of all criminal cases).

271. See *supra* notes 214-16 and accompanying text (discussing Justice Souter's criticism of the majority's argument).

272. See *supra* notes 217-18 and accompanying text (suggesting that one less intrusive method is to condition a grant of parole upon an agreement to submit to warrantless searches); see also *Harvard Article*, *supra* note 68, at 189-91 (suggesting that the Court should first have examined whether or not the search was reasonable because of Scott's consent).

273. See *supra* note 72 (listing cases where the Court has a diminished expectation of privacy under the Fourth Amendment).

274. See *supra* notes 217-18 and accompanying text (discussing Justice Souter's argument that the majority presents only a reason to condition parole upon consent to warrantless searches); see also *Harvard Article*, *supra* note 68, at 189-90 (criticizing the Court for not deciding this threshold issue before applying the *Calandra* balancing test). Indeed, the Court's refusal to determine whether the Pennsylvania consent form was valid seems to violate the *Ashwander* rule, which provides that a Court shall decide a case on the narrowest ground possible. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

275. See *supra* notes 159-62 and accompanying text (discussing the Court's position that the deterrence benefits of the exclusionary rule in parole revocation hearings would be marginal).

of the exclusionary rule in the parole revocation context would be duplicative and have little deterrent effect²⁷⁶ rests not upon empirical or even anecdotal evidence, but upon misplaced analogies and assumptions about the motivations of police and parole officers.²⁷⁷ The Court also failed to explore fully the factual context in which this case arose.²⁷⁸ Finally, the Court presented only a limited description of all possible manners in which the rule might deter unconstitutional searches.²⁷⁹

The Court's opinion that police officers would not be concerned with parole revocation hearings²⁸⁰ largely ignored the fact that parole revocation hearings, like criminal trials, effectuate a parolee's return to prison.²⁸¹ Furthermore, because parole revocation proceedings have lower standards of proof and are administratively more expedient than criminal trials, they are often the sole proceeding parolees receive before being returned to prison.²⁸² In addition, parole violations are rarely, in and of themselves, criminal offenses.²⁸³ Because police officers not only are aware of the parolees in their community,²⁸⁴ but also

276. See *supra* note 143 and accompanying text (discussing the Court's contention that application of the exclusionary rule in parole revocation hearings is duplicative); see also 1 LAFAVE, *supra* note 24, § 1.6 (g), at 180-81 & nn.112-13 (citing numerous instances where lower courts have held that application of the exclusionary rule is not duplicative in parole revocation hearings when the officer conducting the search is aware of the suspect's status).

277. See *supra* notes 195-204 and accompanying text (explaining Justice Souter's analysis of the majority's assumptions about police officers).

278. See *supra* notes 196-99 and accompanying text (discussing Justice Souter's criticism of the majority to fail to fully consider the officer's knowledge of Scott's parole status).

279. See *infra* notes 303-06 and accompanying text (discussing the educative deterrent effect of the exclusionary rule).

280. See *supra* notes 163-64 and accompanying text (characterizing the police officers as unconcerned with parole hearings).

281. See *supra* note 193 and accompanying text (discussing Justice Souter's observation that the effects of parole revocation and criminal trials are similar).

282. See *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972). The Supreme Court noted that a parole revocation hearing 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.* In addition, Justice Souter refers to a treatise on parole that states that parole revocation hearings are used in place of criminal proceedings. See *Scott III*, 118 S. Ct. 2014, 2027 (1998) (Souter, J., dissenting) (citing N. COHEN & J. GOBERT, *LAW OF PROBATION AND PAROLE* § 8.06, at 386 (1983)).

283. See *Scott II*, 698 A.2d 32, 33-34 (Pa. 1997). The ALJ found parole violations such as consumption of alcohol and possession of firearms—neither of which were criminal offenses. See *id.*

284. See, e.g., *Grimsley v. Dodson*, 696 F.2d 303, 304 (4th Cir. 1982); *United States ex rel. Santos v. New York State Bd. of Parole*, 441 F.2d 1216, 1218 (2d Cir. 1971); *People v. Montenegro*, 219 Cal. Rptr. 331, 332 (Cal. Ct. App. 1985); *People v. Stewart*, 610 N.E.2d 197, 205-06 (Ill. App. Ct. 1993); *State ex rel. Wright v. Ohio Adult Parole Auth.*, 661 N.E.2d 728, 730 (Ohio 1996)). Particularly illustrative is *Wright*, where police officers knew the suspect was a parolee and asked his parole officers to conduct the search of his residence. See *Wright*, 661 N.E.2d at 730. This suggests that police deliberately cut constitutional corners with respect to parolees,

cooperate with parole officers to maintain parole compliance, their motivation is not exclusively to obtain evidence in preparation for criminal trials.²⁸⁵ Consequently, because parole revocation hearings may replace criminal trials, the exclusionary rule's deterrent effect of prohibiting illegally obtained evidence to be used at a criminal trial decreases.²⁸⁶

The Court's second assumption, that parole officers would have neutral, supervisory relationships with their parolees that would insulate them from the "temptation to cut constitutional corners,"²⁸⁷ is incomplete at best.²⁸⁸ Although one role of the parole officer is, without a doubt, to supervise and assist their parolees, another role is to enforce the conditions of parole.²⁸⁹ In Pennsylvania, parole officers are considered by law to be police officers with respect to the offenders under their jurisdiction.²⁹⁰ Although the Court insisted that other remedies, such as departmental training, discipline, and the threat of damage actions, provide effective deterrents for Fourth Amendment violations, it did not provide a single citation to any internal regulations, disciplinary proceedings, or damage actions to support its assumption.²⁹¹ Indeed, the Court's decision here flies in the face of the decision in *Mapp v. Ohio*, where the Court specifically held that these kinds of deterrents

knowing that the evidence would be admissible at the parole revocation hearing. *See id.*

285. *See supra* notes 195-97 and accompanying text (discussing Justice Souter's dissent in *Scott III* in which he criticized the majority's characterization of police motives). Justice Souter cites the Pennsylvania Probation and Parole handbook, directing parole officers to cooperate with police. *See supra* note 195.

286. *See Stewart, supra* note 24, at 1389. Justice Stewart commented that officers' infringements of the Fourth Amendment are not motivated by "condemnable malice," but by "commendable zeal." *Id.* Justice Stewart concluded that a remedy is needed to ensure that an officer contains his enthusiasm and complies with the Fourth Amendment. *See id.*

287. *See supra* note 166 and accompanying text (discussing the Supreme Court's characterization of parole officers).

288. *See supra* note 201 and accompanying text (discussing Justice Souter's observation that a parole officer does not have a neutral interest in parole revocation hearings). The Supreme Court has commented that "a probation officer is a peace officer and as such is allied, to a greater or lesser extent, with his fellow police officers." *Minnesota v. Murphy*, 465 U.S. 420, 432 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 720 (1979)); *see also* 1 LAFAYE, *supra* note 24, § 1.6 (g), at 180 & n. 110 (commenting that if a parole officer made the search, deterrence is necessary because the parole officer's primary concern will be whether the parole shall be revoked, not whether the parolee will be convicted of a new offense).

289. *See supra* note 202 and accompanying text (describing the various hats that parole officers wear).

290. *See* T. WILE, PENNSYLVANIA LAW OF PROBATION AND PAROLE § 5.12, at 89; *see also* 1 LAFAYE, *supra* note 24, § 1.6 (g), at 182 (postulating that investigations of parole violations are "cooperative efforts . . . [where] . . . police and parole officers frequently work together to reimprison the suspect").

291. *See Scott III*, 118 S. Ct. 2014, 2022 (1998).

were not effective.²⁹² If internal regulations, discipline, and threats of damage actions were effective deterrents, it would seem the exclusionary rule would be entirely unnecessary for parole and police officers alike.²⁹³

The Court's contention that the exclusionary rule applies only in the context of a criminal trial²⁹⁴ is also mistaken because the Court's analogies are misplaced.²⁹⁵ A parole revocation hearing is not a civil proceeding but part of the criminal process.²⁹⁶ The comparison to civil tax and deportation hearings falls short because defendants in civil tax and deportation hearings simply do not face the same loss of liberty faced in a parole hearing.²⁹⁷

The comparison to grand jury proceedings also falls short but for different reasons. The parole revocation proceeding, unlike grand jury proceedings, occurs after a trial has concluded and is the last step before deprivation of liberty by re-incarceration.²⁹⁸ In contrast, grand jury proceedings are but one step before a trial.²⁹⁹ Consequently, the Court's

292. See *supra* notes 47-50 and accompanying text (discussing the Court's conclusion in *Mapp v. Ohio*, 367 U.S. 643 (1961), that no remedy other than the exclusionary rule would effectively deter searches). Justice Stewart commented that states have created other remedies in addition to the exclusionary rule, but "no state official has contended that the existence of these alternative remedies, many of which have been extended greatly in the years since *Mapp*, obviates the need for an exclusionary rule." Stewart, *supra* note 24, at 1388. See generally 1 LAFAVE, *supra* note 24, § 1.3(d) (discussing the understated benefits of the exclusionary rule).

293. See 1 LAFAVE, *supra* note 24, § 1.3(d), at 62 (criticizing the *United States v. Leon* Court's conclusion that the rule would not have a deterrent effect on persons other than police officers). Indeed, the ruling in *Scott III* extends the reasoning of *Leon*, which held that neutral magistrates would not be deterred by the exclusionary rule. Compare *Scott III*, 118 S. Ct. at 2022 (holding that parole officers would not be deterred by the application of the exclusionary rule), with *Leon*, 468 U.S. 897, 916-17 (1984) (holding that there is no reason to believe that neutral magistrates would be inclined to ignore the Fourth Amendment).

294. See *supra* note 142 and accompanying text (citing examples of the Court's refusal to apply the exclusionary rule in noncriminal proceedings).

295. See *supra* note 142 and accompanying text. The Court compares parole revocation hearings with grand jury, civil tax, and deportation proceedings. See *Scott III*, 118 S. Ct. at 2020-21. The Court does little more than present the analogy, engaging in no illustration of the logic connecting the cases. See *id.*

296. See 1 LAFAVE, *supra* note 24, § 1.6(g), at 179 & n.104 (listing a parole revocation hearing as a criminal proceeding).

297. Compare *Scott III*, 118 S. Ct. at 2018 (stating that the Pennsylvania Board of Probation and Parole sentenced defendant Scott to serve 36 months backtime), with *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1035-36 (1984) (ordering deportation to Mexico of defendants Lopez-Mendoza and Sandoval-Sanchez).

298. See *Scott III*, 118 S. Ct. at 2018 (effectuating the re-incarceration of defendant Scott immediately after the parole revocation hearing).

299. See *United States v. Calandra*, 414 U.S. 338, 340-42 (1974) (making no final adjudication of guilt resulting from the grand jury proceeding).

conclusion that the application of the exclusionary rule in a parole revocation hearing would be duplicative is erroneous.³⁰⁰

Finally, the Court neglected to fully consider the possible deterrent impact of the exclusionary rule.³⁰¹ The Court ascribed only one manner in which the rule would deter unconstitutional searches—through its punitive effect.³⁰² A second manner, however, has been proposed.³⁰³ The exclusionary rule deters because it alters the institutional culture of those it affects.³⁰⁴ In other words, the rule compels education about Fourth Amendment standards.³⁰⁵ Although only sparse empirical evidence exists regarding the possible educative deterrent effect of the rule, the Court neglected to even consider that the rule could serve such a purpose.³⁰⁶

300. See *supra* notes 189-94 and accompanying text (discussing Justice Souter's argument that application of the exclusionary rule at parole revocation hearings would not be duplicative); see also 1 LAFAVE, *supra* note 24, § 1.6(g), at 180-81 & nn.112-13 (citing decisions where exclusionary rule was held not to be duplicative).

301. See *Scott III*, 118 S. Ct. at 2021-22 (discussing only the deterrent effect of the exclusionary rule upon individual officers and not upon the law enforcement institution itself); see also *infra* note 321 and accompanying text (discussing the impact of *Scott III* on the Fourth Amendment).

302. See *supra* notes 160-169 and accompanying text. The Court characterized the deterrent effect of the exclusionary rule as one that deters unconstitutional searches through fear of the exclusion of evidence at trial. See *supra* notes 160-69 and accompanying text.

303. See 1 LAFAVE, *supra* note 24, § 1.3(d), at 64. LaFave argues that the exclusionary rule serves a deterrent effect by encouraging institutional reform and conformity with the Fourth Amendment. See *id.*

304. See *id.* Justice Brennan wrote:

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements. After today's decisions, however, that institutional incentive will be lost.

United States v. Leon, 468 U.S. 897, 955 (1984) (Brennan, J., dissenting).

305. See Fleissner, *supra* note 90, at 1032. "The language of deterrence tends to obscure an important result of the Exclusionary Rule, that of creating incentives for law enforcement agencies to train officers to avoid constitutional violations." *Id.*

306. See *Scott III*, 118 S. Ct. at 2018-20; see also 1 LAFAVE, *supra* note 24, § 1.2(b), at 30 (noting that evidence of increased warrants, increased efforts to educate police on search and seizure law, and the creation of working relationships between police and prosecutors support the effectiveness of the exclusionary rule as an educative deterrent).

The exclusionary rule is not popular.³⁰⁷ There are calls for both severe restrictions and its outright elimination.³⁰⁸ Nevertheless, the Court has yet to overturn the rule, and Congress has yet to legislatively eliminate it.³⁰⁹ The arbitrariness of the *Calandra* balancing test allows the Court to restrict the exclusionary rule under the guise of objectivity.³¹⁰ Thus, the *Scott III* Court had the room both to overstate the costs associated with the rule and to understate its deterrent benefit.³¹¹

V. IMPACT

At a minimum, the *Scott III* decision means that the exclusionary rule will not be used in parole revocation hearings.³¹² This, however, is only the beginning of the decision's impact.³¹³ *Scott III* limited the application of the exclusionary rule and, hence, diminished the scope of the Fourth Amendment.³¹⁴ This is not a new trend, but another step in a steady stream of Supreme Court decisions which limited the rule's application.³¹⁵ Some of the decisions that diminished the scope of the Fourth Amendment did so by restricting the category of governmental actions identified as unreasonable searches.³¹⁶ Other decisions have,

307. See 1 LAFAVE, *supra* note 24, § 1.2, at 24 (noting that the exclusionary rule is "under attack"); see also Fleissner, *supra* note 90, at 1033-42 (predicting expansion of the "good faith" exception to the exclusionary rule).

308. See Stewart, *supra* note 24, at 1397-1403 (analyzing proposals to modify the exclusionary rule). But see 1 LAFAVE, *supra* note 24, § 1.2(c), at 34-38 (criticizing suggestions for replacing the exclusionary rule); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1616-23 (1996) (criticizing arguments to abandon the exclusionary rule in favor of other remedies).

309. See Fleissner, *supra* note 90, at 1034-36 (noting the failed attempts of legislators to eliminate the exclusionary rule and replace it with monetary damage awards for Fourth Amendment violations).

310. See Norton, *supra* note 28, at 280 (citing *Arizona v. Evans*, 514 U.S. 1, 23 (1995) (Ginsburg, J., dissenting) (suggesting that the exclusionary rule allows "adjudica[tion] by hunch")).

311. See *supra* Part IV.B. (discussing the *Scott III* Court's misapplication of the exclusionary rule).

312. See *Scott III*, 118 S. Ct. 2014, 2022 (1998).

313. See *infra* notes 319-20 (discussing how the decision has created a new group of people to whom the Fourth Amendment applies differently).

314. See *Scott III*, 118 S. Ct. at 2022; see also *Harvard Article*, *supra* note 68, at 191-92 (criticizing decision for restricting Fourth Amendment protections).

315. See *supra* note 64 and accompanying text (listing cases that have restricted Fourth Amendment protections).

316. See *supra* Part II.C.1 (discussing cases lowering Fourth Amendment reasonableness standards).

instead, directly limited the application of the exclusionary rule.³¹⁷ *Scott III* falls into the second of these categories.³¹⁸

The deeper effect of *Scott III* is to create a class of persons, parolees, for whom the Fourth Amendment applies differently.³¹⁹ Because decisions of the Court have created different standards for Fourth Amendment protections for public school students, persons at international borders, and persons who are being deported, the decision in *Scott III* is not unusual.³²⁰ *Scott III*, however, used a different vehicle to create the class for whom the Fourth Amendment applies differently.³²¹

With students and persons at international borders, the Court lowered the standard for reasonable searches under the Fourth Amendment, rather than refusing to adopt the exclusionary rule.³²² In doing so, the Court provided compelling justifications for the deprivation of liberty.³²³

A state's authority under *parens patriae*,³²⁴ combined with the state's interest in creating environments conducive to learning justified lowering the Fourth Amendment standard for students in public schools.³²⁵

317. See *supra* Part II.C.2 (discussing cases restricting application of exclusionary rule).

318. Justice Thomas declined to decide whether the Pennsylvania Supreme Court's decision that the search was unreasonable was decided under state or federal law. See *Scott III*, 118 S. Ct. at 2019 n.3.

319. See *id.* at 2022 (holding that exclusionary rule does not apply in parole revocation hearing). But see 1 LAFAVE, *supra* note 24, § 1.6(g), at 182-83 (arguing that the exclusionary rule should protect parolees in parole revocation hearings).

320. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-42 (1985) (holding that searches of persons at international borders have a lower standard for reasonableness); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (holding that students have diminished liberty interests); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043-46 & 1051 (1984) (holding that the exclusionary rule does not apply in civil deportation hearings); see also *supra* notes 76 & 96 and accompanying text (discussing categories of persons with lower Fourth Amendment protections).

321. Compare *Scott III*, 118 S. Ct. at 2022 (refusing to apply the exclusionary rule in proceedings which were part of the criminal process), with *Montoya de Hernandez*, 473 U.S. at 537-42 (applying a lower standard for reasonableness for searches at international borders), *T.L.O.*, 469 U.S. at 341-42 (finding diminished liberty interests), and *Lopez-Mendoza*, 468 U.S. 1043-46 (declining to apply the exclusionary rule in a civil proceeding).

322. See *Montoya de Hernandez*, 473 U.S. at 537-42; *T.L.O.*, 469 U.S. at 341-42. Again, this raises the very issue Justice Thomas declined to reach—whether parole could be conditioned on consenting to warrantless searches. See *supra* note 69 and accompanying text.

323. Compare *Montoya de Hernandez*, 473 U.S. 537-42 and *T.L.O.*, 469 U.S. at 341-42 (examining liberty interest of students and persons at international borders), with *Scott III*, 118 S. Ct. at 2018-22 (declining to examine liberty interest of parolees).

324. Here the author refers to *parens patriae* as the state's general interest in guarding its children's well being. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

325. See *T.L.O.*, 469 U.S. at 340-43. In *T.L.O.*, the Court struck a balance between the diminished liberty interests possessed by students and the school's compelling interest in maintaining an environment conducive to learning. See *id.*

Similarly, the Court utilized the heightened need for safety at international borders as a justification for a lower Fourth Amendment standard.³²⁶ The *Scott III* Court provided no such analysis to support its decision.³²⁷

The refusal to apply the exclusionary rule in deportation hearings provides the closest analogy to the restriction created in *Scott III*.³²⁸ Even here, however, the analogy breaks down. First, persons deported do not face the same deprivation of liberty as parolees.³²⁹ Second, deportation hearings raise issues related to the seizure, rather than the kind of evidentiary issues that arise in parole revocation hearings.³³⁰ Most importantly, the *Lopez-Mendoza* Court cited internal INS regulations that are designed to safeguard the civil rights of persons who are suspects for deportation.³³¹ In *Scott III*, the Court failed to adequately examine the effect of its decision on the Fourth Amendment rights of parolees.³³²

Scott III represents a different kind of limitation: one that not only narrows the scope of the Fourth Amendment but also does so to the det-

326. See *Montoya de Hernandez*, 473 U.S. at 538-39. In *Montoya de Hernandez*, the Court struck a similar balance, weighing the diminished interest at international borders with the government's interest in maintaining the integrity of its borders. See *id.*

327. See *Scott III*, 118 S. Ct. at 2018-22.

328. Compare *Scott III*, 118 S. Ct. at 2022 (examining the applicability of the exclusionary rule in parole revocation hearings), with *Lopez-Mendoza*, 468 U.S. at 1043-46 (examining the applicability of the exclusionary rule in the deportation context).

329. Compare *Scott III*, 118 S. Ct. at 2022 (resulting in the re-incarceration of Scott after the proceeding), with *Lopez-Mendoza*, 468 U.S. at 1040, 1047 (resulting in the deportation of Lopez-Mendoza and Sanchez-Sandoval after the proceeding).

330. In *Lopez-Mendoza*, Sanchez-Sandoval sought to suppress evidence from a statement taken after an arrest that violated the Fourth Amendment. See *Lopez-Mendoza*, 468 U.S. at 1037. At a deportation hearing, the government need only prove identity and alienage. See *id.* at 1039. The Court noted that identity is non-suppressible and alienage may often be proven with independently gathered evidence. See *id.* at 1043. The Court reasoned, using empirical evidence, that the deterrent effect of the exclusionary rule would be minimal. See *id.* at 1043-45. Each INS agent, the Court stated, makes about 500 arrests per year. See *id.* at 1044. Of these arrests, only twelve proceed to some sort of hearing. See *id.* Of those, very few even challenge the circumstances of their arrest. See *id.* From this evidence, the Court concluded that the arrest record is a trivial part of the deportation hearing and exclusion of evidence related to the arrest will have only minimal deterrent effects. See *id.* at 1040, 1043-46.

331. See *id.* at 1044-45. The Court noted regulations that require that no one be detained without reasonable suspicion of illegal alienage; no one could be arrested without an admission or strong evidence of illegal alienage; training that included an examination on Fourth Amendment law for new INS officers; Department of Justice policy that excluded evidence seized through intentionally unlawful conduct; and an internal discipline procedure that punished Fourth Amendment violations. See *id.*

332. See *supra* Part IV.B (discussing two erroneous conclusions in the Court's analysis of the standard used to determine the applicability of the exclusionary rule).

riment of a particular class of persons without adequate justification.³³³ Effectively, parolees no longer have Fourth Amendment protection.³³⁴ If the kind of reasoning used in *Scott III* continues to dominate exclusionary rule jurisprudence, we will create a society where some persons are protected from governmental intrusions while others are not.³³⁵

VI. CONCLUSION

The Court's decision in *Scott III* sets a dangerous precedent. The Supreme Court again refuses to swallow the bitter pill, further whittling away Fourth Amendment protections. But the Court uses a sharper knife this time. Instead of restricting the protections of the Fourth Amendment in a particular context, the Court, in effect, has restricted the protections of the Fourth Amendment for a particular class of persons—parolees. Application of the cost-benefit balancing test rests upon the assumption that the exclusionary rule serves only a deterrent purpose. As a result, the Court's inquiry shifts away from the liberty interest that has been invaded, to a cold and sparse set of empirical facts. This inquiry makes it easier to restrict the protections of the Fourth Amendment for a class of persons. To prevent the future erosion of the Fourth Amendment, the Court should reexamine the underlying purposes of the exclusionary rule so that its inquiry is refocused upon the liberty interest that is invaded by the unconstitutional search.

PATRICK ALEXANDER

333. See *supra* notes 319-21 and accompanying text; see also *Morrissey v. Brewer*, 408 U.S. 471, 487-90 (1972) (holding that parolees possess liberty interests and due process rights).

334. See *supra* note 319 and accompanying text (discussing how the decision strips parolees of their Fourth Amendment rights).

335. See 1 LAFAVE, *supra* note 24, § 1.3(b), at 55-57 (criticizing the decision in *United States v. Leon*, 468 U.S. 897 (1984), for creating the illusion of objectivity by shifting the inquiry away from the constitutional question to questions of deterrence and cost-benefit analysis that are supported only by intuition and hunches).