1982

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The Exclusionary Rule in Probation Revocation Proceedings

Honorable Brian L. Crowe*

INTRODUCTION

The majority of federal and state courts deny application of the exclusionary rule during probation revocation proceedings, thereby allowing the government to make affirmative use of evidence which has been obtained by unlawful police conduct. Although courts have admitted evidence obtained in violation of a probationer’s fifth and sixth amendment rights, most of the reported decisions involve the prosecutor’s affirmative use of such evidence against a probationer whose fourth amendment rights were violated. Courts advance several reasons for denying a probationer the remedy of the exclusionary rule, including the court’s perception of the nature of probation and probation revocation proceedings, the announced purpose of the exclusionary rule, and the societal costs of applying the rule. Nevertheless, the court’s refusal to apply the exclusionary rule at a probation revocation hearing frustrates the rehabilitation goals of the probation system and the dual purpose of the exclusionary rule: deterrence of unlawful police conduct and preservation of judicial integrity.

This article will evaluate the application of the exclusionary rule

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1. See infra notes 43-45 and accompanying text.
2. See infra notes 6-8 and accompanying text.
3. U.S. Const. amend. V provides in pertinent part: “No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .”
4. U.S. Const. amend. VI provides:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have Assistance of Counsel for his defense.
5. See infra note 43.
in probation revocation hearings. After explaining the nature and purpose of the probation system, the discussion will turn to the history and purposes of the exclusionary rule. This article will then examine the role of the exclusionary rule in probation revocation proceedings. Finally, it will conclude that both constitutional principles and rehabilitation goals mandate application of the exclusionary rule in a probation revocation hearing.

PROBATION PROCEEDINGS

Nature and Purpose of a Probation Sentence

Probation is a sentence imposed by a court after a conviction that releases a defendant into the community. The court usually places the defendant under the supervision of a probation agency. A probation order may also contain such other reasonable restrictions and conditions as the court deems will best protect society and rehabilitate the defendant.

6. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973). For purposes of this article, it is necessary at the outset to distinguish probation from parole. Probation and parole follow two diverse patterns of administration and invoke the power of two different branches of the government. Probation, unlike parole, involves active participation by the judiciary. FISHER, PROBATION AND PAROLE REVOCATION: THE ANOMALY OF DIVERGENT PROCEDURES—INTRODUCTION FOR THE FEDERAL PROBATION SYSTEM (1973). The court imposes probation as part of the judicial process of sentencing. The court, in its sole discretion, decides whether probation should be granted in the first instance. Whitfield v. United States, 401 F.2d 480 (9th Cir. 1968), cert. denied, 393 U.S. 1026 (1969); People v. Polansky, 6 Ill. App. 3d 773, 387 N.E.2d 747 (1972); People v. Smith, 111 Ill. App. 2d 283, 250 N.E.2d 178 (1969). The court sets the length of probation and its conditions; all questions regarding modification of these terms and conditions must be addressed to the court. The court issues a warrant for the probationer's arrest for an alleged violation of probation and conducts a probation revocation hearing to determine if the probationer should remain on probation.

Parole, on the other hand, is under the jurisdiction of a parole board, an administrative body created by statute. Once the court incarcerates a defendant, jurisdiction over him is transferred to the board. Juelich v. United States Bd. of Parole, 437 F.2d 1147 (7th Cir. 1971); United States ex rel. Lashbrook v. Sullivan, 55 F. Supp. 548 (E.D. Ill. 1944). Parole is administered by the board, which decides questions concerning length, modification of parole conditions, and revocation. United States v. Wilkinson, 513 F.2d 227 (7th Cir. 1975).

7. Probation agencies range from those that depend upon the ingenuity of a single probation officer to large multidivisional probation departments, offering clinical, foster care, and periodic imprisonment programs. President’s Comm’n on Law Enforcement & Admin. of Justice, Task Force Report 28 (1967) [hereinafter cited as Task Force]. For an analysis of the results of various probation programs offered, when measured against the background of the probationer, see Scarpitti & Stephenson, A Study of Probation Effectiveness, 59 J. Crim. L., Criminology & Police Sci. 361 (1968).

Historically, courts utilized probation as a sentence in lieu of incarceration only for petty and juvenile offenses. In contrast, current philosophy in the administration of criminal justice suggests that in the absence of aggravating factors, probation, rather than incarceration, is the appropriate disposition. Congress now authorizes probation sentences, and courts in every state utilize probation as a sentencing alternative. Some state statutes make probation the presumptive sentence.

The goals of criminal sentencing should focus upon deterrence of criminal conduct and rehabilitation of the individual who stands before the court, charged with having violated one or more of society's rules. Incarceration rarely serves these goals. Imprisonment offers society only temporary safety; it offers the offender the opportunity to be schooled by those hardened in crime. Probation rests on the theory that first offenders, particularly the young, will avoid future crimes if given the proper direction. Probation, a system of social engineering, attempts to provide such proper direction by reintegrating the defendant into the community against which he has offended, so that he can learn to live a productive life. The probation system has met with much success in achieving its rehabilitation goal. Moreover, an offender can be kept

9. In 1925, juvenile probation was available in every state. The same widespread use of probation for adult offenses, however, did not occur until 1956. Task Force, supra note 7, at 27.
10. See ABA Standards Relating to the Administration of Criminal Justice (Probation) commentary at 386 (1974) [hereinafter cited as Standards].
12. Illinois creates such a statutory presumption in favor of the imposition of a probation sentence:
   Except where specifically prohibited by other provisions of this Code, the court shall impose a sentence of probation or conditional discharge upon an offender unless, having regard to the nature and circumstances of the offense, and to the history, character and condition of the offender, the court is of the opinion that:
   (1) his imprisonment or periodic imprisonment is necessary for protection of the public; or,
   (2) probation or conditional discharge would depreciate the seriousness of the offender's conduct and would be inconsistent with the ends of justice.
IIl. REV. STAT. ch. 38, ¶ 1005-6-1 (1979). Probation may not be used, however, to obviate a statutory mandatory minimum period of incarceration. For example, in Illinois, a sentence of probation may not be given for "Class X" crimes, such as rape or armed robbery, because the mandatory minimum prison sentence for such crimes is six years. See Ill. Rev. Stat. ch. 38, ¶ 1005-6-3(c)(2) (1979).
15. The extremely high success rate of the probation system demonstrates that the probation works as a correctional tool for avoiding future crimes. Older studies indicate a 60%
under probation supervision at a cost much lower than that required for institutionalization, thus further increasing the advantage of probation over a prison sentence.  

Due to these advantages, the use of probation in our country flourishes today. For every person in prison, there are more than four people under some form of probation supervision. Continued recognition of probation as a valuable correctional tool and preservation of the integrity of the probation system are vital to the administration of justice.

**Probation Revocation Hearings**

A violation of any condition of probation, such as the commission of a crime, constitutes grounds for the revocation of probation. If the court finds the defendant in violation of the terms or conditions of his probation, especially if the violation involves commission of another crime, the court most probably will terminate the probation. Upon termination, the court may impose a prison sentence for any length of time that could have been given after a plea or finding of guilty of the original crime. However,
sentences in excess of what would have been given had the defendant not originally been placed on probation have been held proper. 20

Before 1973, judges revoked many probations and incarcerated probationers without the benefit of a probation violation hearing. In other instances, the probation revocation hearing constituted summary proceedings at best, with very limited substantive and procedural protections afforded the accused. 21 Several theories have attempted to justify withholding constitutional protection from probationers. 22 Analysis of these theories reveals that they were in fact “ignoble short-cuts” used to convict those charged with violation of probation. 23


21. Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCL. 175 (1964). The author sets out tables in this article detailing state statutes that provided for no hearing at all for violations of probation and parole. Other state statutes listed demonstrate the “summary” or “informal” nature of the revocation hearings then in existence.

22. Under the “identity of interest” theory, the defendant and the state were said to have the same goal, i.e. rehabilitation, and hence judicial oversight was not required. See Morrissey v. Brewer, 408 U.S. 471, 486 n. 14 (1972). The “exhaustion of rights” theory reasoned that the defendant had exhausted all of his rights during the criminal trial and sentence hearing. See Note, The Parole System, 120 U. PA. L. REV. 282, 286-300 (1971). “The act of grace” theory asserted that since the defendant did not have a right to probation, such a sentence was an act of grace. Because no rights attached, no constitutional safeguards had to be observed when what was given as grace was revoked. See Whitfield v. United States, 401 F.2d 480 (9th Cir. 1968), cert. denied, 373 U.S. 1026 (1969); United States v. Longknife, 258 F. Supp. 303, aff’d, 381 F.2d 17 (9th Cir. 1967); People v. Smith, 111 Ill. App. 2d 283, 250 N.E.2d 178 (1969). The “contract” theory held that the defendant made an agreement with the state when he accepted probation. That agreement estopped the probationer from complaining about any later violated rights. See United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975). Finally, the “in custody” theory assumed that the probationer was in legal custody of the court and that he had no more rights than a prisoner. Cooper v. United States, 91 F.2d 195 (5th Cir. 1937); Dillingham v. United States, 76 F.2d 35 (5th Cir. 1935).

23. In ruling that the exclusionary rule must be applied by the state courts, Justice Clark stated that “the ignoble shortcut to conviction left open to a state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.” Mapp v. Ohio, 367 U.S. 643, 660 (1961).
In 1973, the Supreme Court ruled that the revocation of probation without a hearing denied due process.24 The Court reasoned that probation, like parole, is a liberty of which termination could be accomplished only if due consideration was given to the protections of the fourteenth amendment and to the "grievous loss suffered" by the defendant.25 The Court ordered that a revocation proceeding must provide for a two-tier system of constitutional safeguards. First, a preliminary hearing must establish there is probable cause to believe that a violation of probation has occurred. The second step in the proceeding requires a formal hearing to determine if an alternative to incarceration is feasible. With respect to the formal revocation hearing, the Court held that the defendant is entitled to:

1. written notice of the claimed violation of probation;
2. disclosure by the prosecution of the evidence against the probationer;
3. an opportunity to be heard in person and to present witnesses and documentary evidence;
4. the right to confront and cross-examine adverse witnesses;
5. a neutral and detached hearing body; and
6. a written statement by the fact finder as to the evidence relied on and reasons for revoking probation.26

These procedural elements constitute only the minimal constitutional baseline for a probation revocation hearing.27 Congress has since affirmed these standards, adding only the requirement that the probationer be represented by counsel in a federal probation revocation hearing.28

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24. Gagnon v. Scarpelli, 411 U.S. 778 (1973). In Gagnon, a Wisconsin court had placed the defendant on probation after his plea of guilty to the charge of armed robbery. While on probation, the Deerfield, Illinois police arrested the defendant and a companion for burglary. Defendant admitted his participation to the Illinois police officers, who forwarded the information to the Wisconsin authorities. The state of Wisconsin, without a hearing, revoked the probation and sentenced defendant to 15 years in the state reformatory. The United States Supreme Court reversed, following Morrissey v. Brewer, 408 U.S. 471 (1972), which the year before had held that due process requires certain procedural safeguards in parole revocation proceedings.
25. 408 U.S. at 482.
28. In January 1981, Congress incorporated the Morrissey/Gagnon standards into Fed. R. Crim. P. 32.1. The rule, which also provides for the right to be represented by counsel states:
Unfortunately, the Supreme Court’s adoption of due process requirements in probation revocation hearings has failed to create uniform results in federal and state courts. Instead, the decisions reflect uncertainty as to the exact rights of a probationer. Nevertheless, the judicial opinions do reveal an awareness by the courts that the revocation hearing is, in fact, in the nature of a criminal trial. For instance, although courts have applied several standards of proof during revocation proceedings, all courts have ruled that the burden of proof is on the state. Moreover, most jurisdictions

(a) Revocation or Modification of Probation.
(1) Preliminary hearing. Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given
(A) notice of the preliminary hearing and its purpose and of the alleged violation of probation;
(B) an opportunity to appear at the hearing and present evidence in his own behalf;
(C) upon request, the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and
(D) notice of his right to be represented by counsel.
The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.
(2) Revocation hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given
(A) written notice of the alleged violation of probation;
(B) disclosure of the evidence against him;
(C) an opportunity to appear and to present evidence on his own behalf;
(D) the opportunity to question witnesses against him; and
(E) notice of his right to be represented by counsel.
(b) Modification of probation.
A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court’s own motion is favorable to him.

29. In the federal courts, the standard of proof requires that the trial judge be “reasonably satisfied” that a violation has been committed. See United States v. Smith, 571 F.2d 370 (7th Cir. 1978); United States v. Strada, 503 F.2d 1081 (8th Cir. 1974); United States v. Garza, 484 F.2d 88 (5th Cir. 1973); United States v. Jurgins, 465 F. Supp. 982 (W.D. Pa. 1979); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972).

In the state courts, many jurisdictions hold that a “preponderance of the evidence” is necessary to revoke probation. See State v. Hadley, 114 Ariz. 86, 559 P.2d 206 (1977); People v. Hidalgo, 78 Cal. App. 3d 675, 144 Cal. Rptr. 515 (1978); People v. Miller, 77 Mich. App. 381, 258 N.W.2d 235 (1977); Wallace v. State, 562 P.2d 1175 (Okl. 1977); State v.
will not allow a conviction of violation of probation to rest on hearsay evidence.\textsuperscript{30} Other cases demonstrate that courts recognize common threads running through a criminal trial and a probation revocation proceeding. Although the Supreme Court did not mandate an absolute right to counsel during the probation revocation proceeding, but instead adopted an ad hoc approach providing that counsel should be appointed when the defendant denies the charges and requests counsel,\textsuperscript{41} the recent trend of case law requires representation by counsel during the hearing as a matter or right.\textsuperscript{42} Due process requirements further include written notice of

Serio, 168 N.J. Super. 394, 403 A.2d 49 (1979); State v. Bunkman, 281 N.W.2d 442 (S.D. 1979); Cross v. State, 588 S.W.2d 478 (Tex. 1979). Illinois, by case law, insists that the evidence be "clear and convincing." \textit{See} People v. Seymour, 53 Ill. App. 3d 367, 368 N.E.2d 1018 (1977). However, an Illinois statute provides that the state may prove the violation by a "preponderance of the evidence." \textit{Ill. Rev. Stat.} ch. 38, \S 1005-6-4(C) (1981). Georgia accepts "slight evidence" as the standard. \textit{See} People v. Seymour, 53 Ill. App. 3d 367, 368 N.E.2d 1018 (1977). Finally, the recent trend of case law requires representation by counsel during the hearing as a matter or right.\textsuperscript{42} Due process requirements further include written notice of


The Federal Rules also prescribe notice of the right to be represented by counsel at the hearing. \textit{Fed. R. Crim. P.} 32(a)(1)(1), (2)(E). Similarly, Illinois requires that the probationer be addressed in open court to determine if he understands the purpose of the revocation proceeding, the nature of the violation and the condition on which it is based; that he has a right of confrontation, cross-examination and representation by counsel, and if he is indigent, that he has a right to appointed counsel. \textit{Ill. Rev. Stat.} ch. 110A, \S 401(1)(a) (1981). \textit{See} People v. Barker, 62 Ill. 2d 57, 338 N.E.2d 385 (1975).
the claimed violation of probation prior to the hearing.\textsuperscript{33} Courts have also held the privilege against self-incrimination to be applicable to revocation proceedings.\textsuperscript{34} Moreover, judges refuse to admit involuntary confessions during revocation proceedings.\textsuperscript{35} Violations of \textit{Miranda},\textsuperscript{36} however, will not bar the use of an otherwise voluntary statement.\textsuperscript{37} Both federal and state courts reject the right to trial by jury as a necessary procedure in a revocation hearing.\textsuperscript{38} Federal courts also refuse to apply traditional speedy trial provisions to revocation hearings,\textsuperscript{39} but such provisions are strictly observed in a state such as Illinois, which protects the speedy trial right by statute.\textsuperscript{40} The same state, however, severely restricts the discovery devices available to an accused probationer\textsuperscript{41} despite United States Supreme Court precedent which indicates a greater scope of discovery should be allowed in probation revocation proceedings than is allowed in Illinois.\textsuperscript{42}

33. In United States v. Davila, 573 F.2d 986 (7th Cir. 1978), a defendant who was placed on probation for heroin distribution did not receive a written petition which specified the grounds on which the government sought to revoke his probation until the day of the hearing on the violation. The Seventh Circuit ruled that he was denied due process of law, even though he was informed at his initial court appearance, almost two weeks before the hearing, of the grounds on which the government sought to revoke his probation.

34. United States v. Pierce, 561 F.2d 735 (9th Cir. 1977); People v. Peterson, 74 Ill. 2d 478, 384 N.E.2d 348 (1979).


The reasons advanced for admitting a statement taken in violation of the \textit{Miranda} decision are the same as those advanced for not applying the exclusionary rule to the probation revocation proceeding in search and seizure cases. \textit{See} People v. Redmond, 85 Ill. App. 3d 599, 407 N.E.2d 132 (1980), where the court rejected a motion to suppress eyewitness identification, due to suggestive line-up procedures employed by the police. The court reasoned that evidence obtained in technical violation of constitutional rights can be introduced at the probation revocation hearing. Little attention is paid by the courts to the fact that violations of \textit{Miranda} may affect the reliability of the statements, whereas violations of fourth amendment rights do not similarly affect the reliability of the seized evidence.


40. ILL. REV. STAT. ch. 38, ¶ 1005-6-4(b) (1981).


Without question, the fourth amendment to the Constitution protects the probationer from unreasonable searches and seizures. The exclusionary rule, which prevents evidence obtained

43. U.S. Const. amend. IV provides:
   The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, 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.

The judiciary has developed a great body of constitutional law through a case-by-case adjudication of controversies over the meaning of the fourth amendment provisions. D. MEADOR, PRELUDES TO GIDEON 9 (1967). Elementary fourth amendment law, gleaned from a reading of the United States Supreme Court decisions, provides that all searches and seizures performed without a warrant are per se unconstitutional unless: (1) the fact situation makes the fourth amendment inapplicable; or (2) the fact situation fits into one of the "few specifically established and well-delineated exceptions" as defined by the United States Supreme Court. Katz v. United States, 389 U.S. 347, 357 (1967).

44. United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975). Although the fourth amendment applies to a probationer in the same manner that it applies to one not on probation, the amendment is not applicable to all searches.

For instance, the Supreme Court has held the fourth amendment inapplicable when the search or seizure was conducted not in the home or office but upon open land. See Hester v. United States, 265 U.S. 57, 58-59 (1924) wherein Justice Holmes said: "[the] special protection accorded by the fourth amendment to the people in their persons, houses, papers, and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the Common Law." Id. at 58-59. This is true even though the officer may be trespassing on the accused's land. See Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974). But see Fulbright v. United States, 392 F.2d 432 (10th Cir. 1968) and Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966) (area of a farm protected by the fourth amendment includes not only house but also the "curtilage," i.e., the immediate surrounding area of yards, barns, outbuildings, etc.). Property which one has abandoned, such as items put in a garbage can, also falls outside the protection of the fourth amendment. See Able v. United States, 362 U.S. 217 (1960). Courts have also denied fourth amendment protection to search and seizures performed by certain classes of persons. See Burdeau v. McDowell, 256 U.S. 465 (1921) (non-governmental agents); J.M.A. v. Alaska, 542 P.2d 170 (10th Cir. 1975) (relatives); People v. Heflin, 71 Ill. 2d 525, 376 N.E.2d 1367 (1978) (relatives); People v. Hamilton, 74 Ill. 2d 457, 386 N.E.2d 53 (1979) (hospital employees); Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (1974) (school authorities); People v. Toliver, 60 Ill. App. 3d. 650, 377 N.E.2d 207 (1978) detective agencies.

Moreover, one who lacks "standing" cannot claim applicability of the fourth amendment. Jones v. United States, 362 U.S. 257 (1960). United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Hill, 447 F.2d 817 (7th Cir. 1971). See Cole, The Exclusionary Rule in Probation and Parole Revocation Proceedings: Some Observations on Deterrence and the "Imperative of Judicial Integrity," 52 CHI. KENT L. REV. 21 (1975) [hereinafter cited as Cole]; Note, The Exclusionary Rule and Probation Revocation Proceedings, 11 VAL. U.L. REV. 1149 (1967) [hereinafter cited as Note, Exclusionary Rule]. For many years, the law relative to standing was that as outlined in the 1960 Supreme Court decision of Jones v. United States, 362 U.S. 257 (1960). One had standing if he had a possessory or ownership interest in the place searched or in the property seized, or if he was legitimately on the premises when the search occurred. Jones also accorded automatic standing to one charged with criminal possession. Seven years later in Alderman v. United States, 394 U.S. 165
in violation of this amendment from being admitted in court, rep-

(1967), the Court adhered to the general rule of Jones that fourth amendment rights are personal rights which may not be vicariously asserted. The Court expressed the belief that the deterrent values of the rule are served by limiting applications of the rule only to those whose rights the police have violated.

In 1978, the Supreme Court again took up the issue of standing in Rakas v. Illinois, 439 U.S. 128 (1978). Rakas defined standing not in terms of possessory interests as in Jones, but in terms of whether the search infringed upon the defendant's legitimate expectation of privacy in the things seized or the place searched. Two years after Rakas the Supreme Court ruled on the issue of standing in three other cases. In United States v. Salvucci, 448 U.S. 83 (1980), the Court rejected the automatic standing rule of Jones for those charged with a crime of possession. In Rawlings v. Kentucky, 448 U.S. 98 (1980), the Court held that the ownership of property alone did not create a legitimate expectation of privacy. In the third case, United States v. Payner, 447 U.S. 727 (1980), the Court held that even if the government's conduct consisted of a flagrant abuse of the Constitution, only one whose own fourth amendment rights had been violated would have standing.

It has been suggested that the Payner decision stands as evidence that the Court will not give standing to one other than the victim of the unlawful search because the deterrent aim of the exclusionary rule is not served. Lauer, Fourth Amendment—The Court Further Limits Standing, 71 J. CRIM. L. & CRIMINOLOGY 567 (1980). However, Payner more clearly suggests that the exclusionary rule and its purposes are not at issue in a standing case. In Payner, the government hired a woman to seduce a banker, paid to have the banker's briefcase stolen by another person, and then participated in breaking into the case and removing its contents. Evidence obtained from the locked briefcase was later used in a tax evasion trial, not against the banker but against one of the bank's customers, whose records were found in the briefcase. This "conscience shocking" conduct of the government was not condemned by the Supreme Court, because it was said that the bank customer had no standing as he was not the victim of the government's illegality. Cf. Rochin v. California, 342 U.S. 165 (1952) (even though the fourth amendment was not generally available at the time the case was decided, the Supreme Court carved out an exception due to the abusive police conduct involved in pumping the accused's stomach to obtain evidence (pills) of a crime. The Court stated that the police conduct so abused individual liberty as to "shock the conscience of civilized society.") Id. at 172.

For the Payner Court to condone such police conduct by asserting that the defendant has no standing proves that the Payner limitation cannot be based on the deterrent aim of the exclusionary rule. The standing limitation is inconsistent with both of the asserted reasons for the exclusionary rule, the imperative of judicial integrity and the deterrence of police misconduct. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 734 (1970). The Payner case can only be explained by the fact that the fourth amendment historically has not been applied to one whose fourth amendment rights have not been violated. The common law recognized that rights such as those conferred by the fourth amendment are not bestowed vicariously. Consider the language of Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603):

[T]he house of any one is not a castle or privilege but for himself and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods.


Even where the fourth amendment applies, the United States Supreme Court has carved out certain exceptions to the amendment's warrant requirement, thus allowing an officer to lawfully conduct a search or seizure without prior judicial approval. First, a search incident
resents the principal remedy available to those whose fourth amendment rights have been violated. Whether the exclusionary

to the valid arrest of an individual does not require a warrant. Assuming that the arrest itself is based on probable cause, an officer may search the arrestee and the area under his immediate control. Such a limited search protects the officer from harm and keeps the accused from destroying evidence of the crime. Chimel v. California, 395 U.S. 752 (1969).

Nor does a valid “stop and frisk,” where an officer stops a person on the street and pats him down for weapons, require a search warrant. Assuming that the arrest itself is based on probable cause, an officer may search the arrestee and the area under his immediate control. Such a limited search protects the officer from harm and keeps the accused from destroying evidence of the crime. Chimel v. California, 395 U.S. 752 (1969).

The “doctrine of fresh pursuit” has emerged as another exception of the warrant requirement, allowing an officer faced with exigent circumstances, such as an armed and fleeing suspect or a screaming victim, to enter and conduct searches which, under normal conditions, would not be allowed in the absence of a warrant. See Payton v. New York, 445 U.S. 573 (1980); Mincey v. Arizona, 437 U.S. 385 (1978); Warden v. Hayden, 387 U.S. 329 (1967).

The Supreme Court further recognizes warrantless searches when the defendant consents to a search or where someone with equal authority over, or interest in, the premises freely and voluntarily consents to a search. The standard of voluntariness turns on the totality of the circumstances existing at the time of the search. See United States v. Watson, 423 U.S. 411 (1976); United States v. Matlock, 415 U.S. 164 (1973); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

A government agent may also search an auto without a search warrant if the car is movable and the agent has probable cause to believe that the car contains evidence of a crime. See United States v. Watson, 423 U.S. 411 (1976); United States v. Matlock, 415 U.S. 164 (1973); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

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Finally, the “plain view doctrine” constitutes a broad exception to the warrant requirement. Under this exception, an officer may, if he is lawfully present on the premises, seize items which inadvertently come into his view if such items have the appearance of criminal evidence. See Coolidge v. New Hampshire, 403 U.S. 443 (1971); Fraizer v. Cupp, 394 U.S. 731 (1969); Stanley v. Georgia, 394 U.S. 557 (1969).

The Supreme Court jealously guards these well-defined exceptions to the warrant requirement. See Katz v. United States, 389 U.S. 347, 357 (1967). The burden rests on the government to prove that a search or seizure performed outside the judicial process falls within one of the carefully defined exceptions. Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).

Probation Revocation Proceedings

rule is available to a probationer in a probation revocation hearing remains, as yet, unresolved.

The exclusionary rule applies to four types of constitutional violations: searches and seizures contrary to the fourth amendment;46 confessions, admissions, or statements taken in violation of the fifth and sixth amendments;47 identification testimony resulting from suggestive police practices at a line-up or showup;48 and evidence obtained by methods that would "shock the conscience" of the court.49 The last three situations should be distinguished from search and seizure cases, because the reliability of the evidence in the last three cases may be in doubt as a result of the police practices.50

The exclusionary rule originally applied only to federal courts.51 The Supreme Court reasoned that the states could continue to admit illegally obtained evidence, because the principles of federalism would be better served if the states were not required to use the exclusionary rule, so long as a state would rely upon some other "equally effective" method which would be "consistently enforced."52 Eventually, however, the Supreme Court recognized that there were no methods as effective as the exclusionary rule and that, in fact, most of the states had done nothing to protect against violations of fourth amendment rights.53 Thus, the Court held that as a matter of due process, evidence obtained by a search and seizure in violation of the fourth amendment would be inadmissi-

51. The Supreme Court first announced the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). Although thirty years earlier in Boyd v. United States, 116 U.S. 616 (1886), the Court in dictum hinted that illegally seized evidence might be inadmissible at trial, the Weeks Court expressly ruled that a defendant could move for return of property which was wrongfully seized by federal authorities. In Gouled v. United States, 255 U.S. 298 (1921), the Supreme Court extended Weeks to preclude unconstitutionally seized evidence from introduction at a federal criminal trial.
52. Wolf v. Colorado, 338 U.S. 25, 31 (1949). Justice Frankfurter stated that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the states through the Due Process Clause." Id. at 27-28.
ble in a state court as it was in a federal court.\textsuperscript{54} The Court expressed the belief that the exclusionary rule was integrated with the constitutional right to privacy and comprised an essential ingredient of the fourth and fourteenth amendments.\textsuperscript{55}

The Supreme Court has since emphasized the necessity of the exclusionary rule, articulating the twofold policies underlying the rule: first, the deterrence of unlawful police conduct, and second, the preservation of judicial integrity.\textsuperscript{56} The deterrent aim of the exclusionary rule lies in removing the incentive to disregard constitutional mandates.\textsuperscript{57} If a law enforcement officer knows that illegally obtained evidence cannot be used to convict, then presumably the officer will have no reason to act illegally in gathering evidence. The exclusionary rule is the only effective deterrent to police misconduct in the area of the violation of citizens' constitutional rights. Without the rule, the guarantee against unreasonable searches and seizures would be a mere "form of words," "valueless and undeserving of mention."\textsuperscript{58} The "imperative of judicial integrity" is a recognition that if the courts do not forbid the use of unlawfully seized evidence, they become accomplices in disobedience of the law.\textsuperscript{59} The imperative of judicial integrity and the

\textsuperscript{54} In \textit{Mapp}, Justice Clark stated:

Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by the official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority, inadmissible in a state court.

\textit{Id.} at 654-55.

\textsuperscript{55} \textit{Id.} at 656-57. Contrary to the majority opinion, Justice Black in his concurrence stated that "the Federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." \textit{Id.} at 661 (Black, J., concurring). Justice Black's view is now in accord with the majority opinion of the present Court. \textit{See} United States v. Calandra, 414 U.S. 338 (1974). However, Justice Brennan still holds to the philosophy that the rule is an essential ingredient of the fourth amendment. \textit{See} Stone v. Powell, 428 U.S. 465, 502-35 (1976) (Brennan, J., dissenting).

\textsuperscript{56} United States v. Peltier, 422 U.S. 531 (1975).

\textsuperscript{57} "The purpose of the exclusionary rule is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." \textit{Terry} v. Ohio, 392 U.S. 1, 13 (1968).

\textsuperscript{58} \textit{Mapp} v. Ohio, 367 U.S. 643, 655 (1961).

\textsuperscript{59} \textit{Elkins} v. United States, 364 U.S. 206, 222 (1960). Justices Brandeis and Holmes had addressed this value of judicial integrity in their dissenting comments in \textit{Olmstead} v. United States, 277 U.S. 438 (1928):

In a government of laws existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the patient, the omnipresent
police deterrent aims have been considered almost equally important rationales supporting the application of the exclusionary rule.  

However, two developments have dampened enthusiasm for the exclusionary rule. Since the 1960’s, crime and the fear of crime increasingly rank among the greatest concerns of American society. During this same time, the composition of the Supreme Court has changed, resulting in a new attitude toward the administration of criminal justice. Recent decisions of the Court involving the fourth amendment and the exclusionary rule reflect society’s attitude. A majority of the Court, particularly the Chief Justice, now view the exclusionary remedy as an impediment in the criminal law context. Against such a backdrop, the Court has shifted the

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teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.  

Id. at 485 (Brandeis, J., dissenting). In this regard, Justice Holmes declared that “no distinction can be taken between the government as prosecutor and the government as judge.”  


60. In Terry v. Ohio, 392 U.S. 1 (1968), in the same paragraph, the Court recognized the deterrent theory as the “major thrust” of the rule and referred to the “imperative of judicial integrity” as its “vital function.” Id. at 12.  

61. Chief Justice Warren Burger has said: “Crime and the fear of crime have permeated the fabric of American life, damaging the poor and minorities even more than the affluent. A recent survey indicated 46% of women and 48% of negroes are significantly frightened by pervasive crime in America.” Address by Warren Burger, Annual Report to the ABA, in Houston, Texas (Feb. 1981).  

62. The late Justice Douglas noted:  

The Court does move with political trends, as the philosophy of newly appointed Justices reflects a trend and community attutudes are not without their effect. The Court is not isolated from life. Its members are very much a part of the community and knows the fears, anxieties, cravings and wishes of their neighbors. That does not mean that community attitudes are necessarily translated by mysterious osmosis into new judicial doctrine. It does mean that the state of public opinion will often make the court cautious when it should be bold.  


63. During his remarks to the American Bar Association in February 1981, Chief Justice Burger stated that “the search for ‘perfect’ justice has led us on a cause found nowhere else in the world . . . Our search for true justice must not be twisted into an endless quest for technical errors unrelated to guilt or innocence.” Address by Warren Burger, Annual Report to the ABA, in Houston, Texas (Feb. 1981).  

In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Chief Justice referred
philosophy behind the rule, emphasizing its deterrence value and relegating the judicial integrity theory to secondary status. Still, the purposes of the exclusionary rule continue to be a hotly debated issue.

The Supreme Court now evaluates application of the exclusionary rule primarily by appraising its efficiency in deterring police

to the rule as an "anomalous and ineffective mechanism with which to regulate law enforcement." *Id.* at 420 (Burger, C.J., dissenting). At that time, however, the Chief Justice did not advocate abandonment of the rule until a meaningful alternative could be developed. *Id.* (Burger, C.J., dissenting). But in 1976, in his concurring opinion in Stone v. Powell, 428 U.S. 465 (1976), even though a meaningful alternative had not yet been developed, he suggested that the rule be abolished because it "exact(s) such exorbitant costs from society purely on the basis of speculative and unsubstantiated evidence." *Id.* at 500 (Burger, C.J., concurring).

As Justice Powell explained in Stone v. Powell, 428 U.S. 465 (1976), "while courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 485. The primary justification "for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." *Id.* at 486.


> [T]he exclusionary evidence rule is morally correct and appropriate to a free society. It is a rule naturally suggested by the Constitution itself. It insures that the issues respecting defendant's rights are raised and litigated frequently without great inconvenience. It is the most effective remedy we possess to deter police lawlessness.


It is not the purpose of this paper to discuss the details of such other devices, or the pros and cons of the rule itself. For that matter, suffice it to say that none of the alternatives had had any proven success or even acceptance by Congress or the courts. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972). The reasons for the continued vitality and application of the exclusionary rule for the protection of constitutional rights is well stated by one of its more severe critics, Dallin H. Oaks, who states that constitutional rights will only be honored if the violation of such rights is punished. In addition, Oaks explained:

> The advantage of the exclusionary rule entirely apart from any direct deterrent effect is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some Fourth Amendment ideals into the value system or norms of behavior of law enforcement agencies.

This approach turns on a judicially created two-prong balancing test: first, whether the extension of the rule in a given context produces any deterrent benefit; and second, assuming that application of the rule has recognizable deterrent value, whether the potential benefits outweigh the potential injury to the function of the proceedings in which the evidence is sought to be admitted. This balancing test has created broad new exceptions to the exclusionary rule, particularly when the rule is sought to be extended beyond its traditional application to the government's

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67. In *United States v. Calandra*, 414 U.S. 338 (1974), often cited as a case exemplifying the balancing test, the defense urged that the exclusionary rule should be extended to grand jury proceedings in which the government sought to introduce illegally seized evidence. The Court, rejecting this broad application, reasoned: 

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

*Id.* at 348. In deciding whether the remedial purpose of the exclusionary rule mandated extension of the rule to grand jury proceedings, the Court articulated a balancing test which weighed the potential injury to the grand jury against the potential benefits of applying the rule. After finding that application of the exclusionary rule in grand jury proceedings would unduly interfere with the grand jury’s duties, the Court characterized the benefits to be derived from extension of the rule as uncertain at best. The Court explained:

"Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in deterrence of police misconduct at the expense of substantially impeding the role of the grand jury."

*Id.* at 351-52. Thus, the *Calandra* Court refused to extend the exclusionary rule to grand jury proceedings, because under the balancing test the resulting injuries outweighed the possible benefits.

case in chief to proceedings such as probation revocation hearings.

**The Exclusionary Rule and Probation Revocation Hearings**

*Deterrence*

Employing the balancing test, courts generally have found

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70. The exclusionary rule only applies to the government’s affirmative use of illegally seized evidence. In Walter v. United States, 347 U.S. 62 (1954), it was held that such evidence could be used against a defendant who took the witness stand in his own behalf and would commit perjury. The court declared:

It is one thing to say that the government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction and untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.


that the deterrence rationale of the exclusionary rule does not require application of the exclusionary rule in a probation revocation hearing.\textsuperscript{72} Primarily, the courts focus on whether application of the rule would have any deterrent effect on police misconduct. Deterrence is effectuated in two modes: deterring the individual officers involved in the particular unlawful search,\textsuperscript{73} and instilling fourth amendment ideals and norms of behavior into the value systems of all law enforcement agencies.\textsuperscript{74} The two most common fact situations in which the courts refuse to apply the exclusionary rule in the revocation process thwart both of these deterrent aims.

The first situation, which could be referred to as the “previously suppressed evidence” case, involves the following typical fact pattern:\textsuperscript{75} robbery probationer, walking on a public sidewalk at 3:30 p.m. in the company of “Junkie Jim,” is carrying a large bundle covered by a blanket or sheet. A Chicago police officer stops the probationer. The subsequent arrest and search, conducted without a warrant or probable cause to believe that the probationer had committed a crime, reveals stolen merchandise. At the trial for burglary, the trial court, after hearing the officer’s testimony,
grants the probationer’s motion to suppress the evidence. Frustrated in its burglary prosecution, the state thereafter files a petition to revoke probation. At the probation revocation hearing, the same officer, over the probationer’s objection, reiterates his testimony, and the state makes affirmative use of the previously suppressed physical evidence. After a sentencing hearing in aggravation and mitigation, the court revokes probation and hands down a sentence of two to four years in the state penitentiary. The judgment and sentence of the trial court are affirmed on appeal.

The second situation, known as the “alternative prosecution” case, occurs under circumstances in which the state, knowing that its police officers have made an unlawful search, will abandon a doubtful criminal prosecution. The state then uses the fruits of the unlawful search in an independent prosecution for violation of an old probation sentence, where the tainted evidence will be admitted.76 This situation results in revocation of the probation and imposition of a prison sentence based upon criminal charges on which the probationer has never been tried.77

Use of tainted evidence in the “previously suppressed evidence” and the “alternative prosecution” cases are counterproductive of proper prosecutorial conduct78 and of the efforts made in police education over the past twenty years, which have produced a high degree of professionalism in law enforcement agencies in our country.79 The inescapable conclusion is that the application of the ex-

76. See United States v. Workman, 585 F.2d 1205, 1210 (4th Cir. 1978); United States v. Hill, 447 F.2d 817, 819-20 (7th Cir. 1971) (Fairchild, J., dissenting). See also R. Dawson, SENTENCING, THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 154 (1969) (when the prosecutor lacks confidence in the convictability of a defendant, he often tries to persuade the probation officer to initiate revocation proceedings).

77. This incongruity was demonstrated during oral arguments before the United States Supreme Court in Mepa v. Rhay, 389 U.S. 128 (1967):

Mr. Justice Fortas asked if it was true that . . . [one of the petitioners] had never actually been tried in connection with the criminal charges that led to revocation of his probation, and thus to his imprisonment. This was true, replied . . . [counsel for the petitioners]. Mr. Justice Fortas then commented that this must make for efficient administration of justice. “Very efficient administration,” replied . . . [counsel].


78. As stated by Justice Murphy in Wolf v. Colorado, 338 U.S. 25 (1949), “only by exclusion can we impress upon zealous prosecutors that violation of the constitution will do him no good. Only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.” Id. at 44 (Murphy, J., dissenting).

79. Yale Kamisar reports on the findings of an amicus brief filed with the Supreme Court by the Americans for Effective Law Enforcement and the International Association of
clusionary rule to probation revocation proceedings produces a great deal of deterrent benefit.

Although it has been assumed arguendo that the use of the rule in the revocation process would have some deterrent benefits, the majority of jurisdictions, when responding to the second prong of the balancing test, find that the benefits that would be obtained from such an application of the rule are outweighed by a strong public interest in incarcerating convicted offenders who have violated the terms of their probation. Although society does have an interest in incarcerating an offender who has committed a serious violation of his probation, the same interest prevails with any major criminal in whose criminal prosecution the exclusionary rule is invoked. The argument that society has a greater interest in protecting itself against a recidivist probationer appears illogical, since courts are willing to apply the rule to an ex-convict who is not a probationer. In fact, recent studies indicate that claims that the

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Chiefs of Police. According to the brief, a survey of warrantless search and seizure cases decided by appellate courts nationwide during the 27 month period from January 1970 through March 1972 revealed that 84%, or 1,157 of 1,371 such searches studied, were found to be proper. The brief concludes:

this excellent record of successful police compliance with the rule of search and seizure is attributed to police professionalism—an attempt by most police to learn at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions.

Professor Kamisar's comment thereon is: "[b]ut what stimulated the attempt to most officers to familiarize themselves, at least in a general way, with the law of search and seizure? Perhaps, just perhaps, it was the exclusionary rule." 15 CRIM. L. BULL. 5 (1979). In Wolf v. Colorado, 338 U.S. 25 (1949), the Court noted that recruit training programs and in-service courses in fourth amendment law were provided by states that had adopted the exclusionary rule, whereas states that did not follow the rule offered little or no such education. Id. at 44-45. The effect of the rule is seen today in Chicago, where search and seizure courses are mandatory in recruit training schools. In that city, recent Supreme Court decisions on search and seizure are briefed by the Superintendent of Police, Richard Brzecek, and are forwarded to all departments in the form of a "general order." Letter from Richard Brzecek, Supt. of Police, City of Chicago, to author (March 1981).

80. See United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975).
81. Id. at 55; In re Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970); People v. Dowery, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); Note, The Exclusionary Rule, supra note 44, at 147.
82. The Supreme Court was aware of this when it announced the exclusionary rule in Weeks v. United States, 232 U.S. 383, 393 (1914), yet it was considered worth the price. Note, Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers, 51 N.Y.U. L. Rev. 800 (1976) [hereinafter cited as Note, Striking the Balance].
exclusionary rule frees criminals are greatly exaggerated.\textsuperscript{84}

Courts further argue that use of the exclusionary rule during the probation hearing will make the proceedings adversary and formal, to the detriment of the rehabilitative objective of probation.\textsuperscript{85} However, the revocation hearing represents an adjudicative proceeding wherein incarceration is the likely result of an adverse finding. The adversarial and formal nature injected into the hearing by the exclusionary rule would not create any more or less significant effect than does application of the rule in any other adjudicative hearing, most notably the criminal trial.\textsuperscript{86}

It is also alleged that correction officers would have to devote precious time to personally gather admissible proof against probationers who will not accept rehabilitation, and that the exclusion of evidence in the revocation proceeding would deprive the corrections system of important evidence for rehabilitation.\textsuperscript{87} These arguments fail to account for the fact that judicial enforcement of almost all constitutional rights occurs in an adversary setting and

\textsuperscript{84} Wayne R. LaFave, in his text on search and seizure, reports the results of a study of motions to suppress evidence in the federal courts conducted by the Comptroller General in 1979:

Moreover, there is reason to believe that the “cost” of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed. In \textit{Impact of the Exclusionary Rule on Federal Criminal Prosecutions} (Report of the Comptroller General, April 19, 1979) an empirical study of cases handled in 38 U.S. Attorneys offices from July 1-August 31, 1978, it was found that of 2,804 charged defendants only 30\% involved a search or seizure and only 11\% filed a motion to suppress on Fourth Amendment grounds. These motions were denied in the overwhelming majority of cases, so that in only 1.3\% of the 2,804 defendant cases was evidence excluded as a result of a Fourth Amendment suppression motion. Moreover, over half of the defendants whose motions were granted in total or in part, were convicted nonetheless. As for the cases during the sample period which the U.S. Attorneys declined to prosecute, in only 0.4\% of them was a search and seizure problem the primary reason.

\textit{W. LAFAVE, SEARCH \& SEIZURE} 1 n.9 (1981).


\textsuperscript{86} As described in United States v. Workman, 585 F.2d 1205 (4th Cir. 1978):

Consideration of the nature of a probation revocation hearing leads to the conclusion that the application of the exclusionary rule will result in approximately the same potential for injury and benefit as its application in other criminal adjudicative proceedings. The rule’s exclusion of some of the evidence about the new charges which form the basis of the complaint about the probationer, the delay incident to suppression hearings, and the rule’s effectiveness in deterring future unconstitutional searches are neither significantly more nor less than in other such adjudicative proceedings.

\textit{Id.} at 1210.

\textsuperscript{87} See United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975).
involves a certain amount of inconvenience and delay.\textsuperscript{88} Application of the exclusionary rule would consume little pretrial time and would impose no greater burden than other required procedural safeguards.\textsuperscript{89} In contrast, the use of a summary proceeding in which fourth amendment rights are arbitrarily rejected will instill bitterness in the probationers and thwart the primary goal of probation, reintegration into the community.\textsuperscript{90} Furthermore, the charge that the exclusionary rule will deprive the probation department of important evidence of lack of rehabilitation fails to consider that a system that depends on illegally seized evidence is very weak.\textsuperscript{91} Nothing prevents a probation department from obtaining a search warrant.\textsuperscript{92} Also, exclusion of the evidence does not eliminate its rehabilitative usefulness in the corrections system, since the probation officer may use the evidence to guide his future relationship with the probationer. In fact, admitting illegally obtained evidence contravenes the rehabilitative purpose of the probation proceedings in that such admittance rewards violation of the law.\textsuperscript{93}

Finally, courts rationalize that both society and the offender will lose the benefits from a sentence of probation, because judges will be hesitant to place defendants on probation if they know that evidence of a subsequent violation may not come to light due to application of the exclusionary rule.\textsuperscript{94} This argument has proven to have no merit.\textsuperscript{95} The Supreme Court has expressly noted that seri-
ous studies have proven that fair treatment in the revocation process will not result in fewer grants of parole. The same is true of probation.

Application of the exclusionary rule in probation revocation proceedings serves the deterrent purpose of the rule. Moreover, the benefits obtained by application of the rule more than offset any purported harm. Thus, both prongs of the balancing test mandate application of the exclusionary rule in probation proceedings.

**Police Harassment and the Winsett Caveat**

Courts that generally refuse to apply the exclusionary rule in the revocation process recognize that in certain exceptional circumstances the deterrent value of the rule sufficiently outweighs the potential harm to the probation system. Some courts limit this exception to instances where there is demonstrable police harassment of a given probationer. Other courts apply the rule if, at the time of the arrest and search, the police officers had knowledge or reason to believe that the suspect was a probationer. Courts which apply the latter exception reason that if the police officer knows that the defendant is on probation, the officer will be tempted to conduct an unlawful search. However, the burden of

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99. This exception is known as the “Winsett caveat.” See United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975).
proving harassment or knowledge of probationary status rests on the accused. These exceptions do little to protect fourth amendment rights or further the goals of the judicially created remedy. An exclusionary standard which relies upon proof of police motive, inferences of police incentives, or worse yet, claimed lack of knowledge of probationer's status at the time of the search, creates a danger of police fabrication. Such a standard only widens the credibility gap that is said to exist between the policeman's testimony and the actual arrest situation. In large metropolitan areas with modern technology and sophisticated police equipment, officers will have knowledge of a citizen’s probationary status within minutes after they decide upon a confrontation. Yet, the defendant faces a nearly impossible task in proving, at a later hearing, that the officers are not telling the truth when they testify that they had no knowledge or reason to believe that the accused was on probation.

Applying the exclusionary rule in exceptional circumstances of bad faith on the part of the police will not necessarily protect a probationer from an overly intrusive search conducted by the police between the time of the arrest and the placing of formal charges. The language articulating the bad faith exception may well be interpreted to mean that protection will be afforded the defendant only if he can prove that the policeman had knowledge


104. In March, 1981, the writer interviewed Captain William Hanhardt, Chief of Detectives of the Chicago Police Department, and James O'Grady, former undersheriff of Cook County. Captain Hanhardt claimed that there are 200 computer equipped squad cars in use by the police in Chicago. The cars are “strategically located” five to seven in a district, and twelve in the auto theft unit where a “lot of the action is.” The main police station and each district station is equipped with similar computer systems. Hanhardt explained that by recording the name and “any other relevant information such as social security number or birth date,” the computer will furnish “fairly reliable information” as to an accused criminal record, including the fact that he is on probation, within 30 seconds. According to Captain Hanhardt, the City of Chicago plans to have all of its squad cars computer equipped in the “near future.” James O'Grady explained that the source of information for areas outside the City of Chicago, i.e., suburban Cook County, is not as good as that in the city. In those areas, it can take a number of days to get a good record of conviction.
of his probation status at the time of the arrest.105 As noted earlier, in this day of modern technology police officers, who have no knowledge of the defendant's status at the moment of arrest, likely will receive information as to his criminal record before he is formally taken into custody or charged.106 Armed with information as to the defendant's criminal history, the officer could conduct a search beyond the permissible limits of exceptions to the warrant requirement without being deterred by application of the exclusionary rule.107

Restricting the officer's relevant knowledge to the time of the search will not solve the problem of police bad faith. Particularly, the modified exclusionary remedy does not serve the deterrent aim of the rule. Except in large metropolitan areas, the officer rarely will know at the time of arrest that the defendant is on probation. This lack of knowledge allows police officers to use not only evidence that was gained by "inadvertent" violations of privacy,
but also will sanction the use of evidence which may have been acquired in bad faith. The modified exclusionary rule offered by courts not only allows the “constable to blunder,” but permits him to do as he pleases and trammel the fourth amendment rights of those entrusted with probation.109

**Imperative of Judicial Integrity**

Although relegated to a lesser role, the “imperative of judicial integrity”110 remains a necessary ingredient in any decision making process relative to application of the exclusionary rule during the probation revocation process.111 Probation involves direct and active participation by the judiciary in a judgment resulting in imprisonment of an individual.112 The judiciary, indeed, plays an “igneble part”113 when it accepts unconstitutionally seized evidence against a probationer, the victim of the search, in an adjudicatory hearing that results in imprisonment.114 Admission during a probation revocation hearing of tainted evidence, seized in violation of constitutional rights, clearly makes a mockery of judicial integrity.115

Violent Crimes, citing the Fifth Circuit Court of Appeals decision in United States v. Williams, 622 F.2d 830 (5th Cir. 1980), in pertinent part provides: “In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution.” ATTORNEY GENERAL’S TASK FORCE ON VIOLENT CRIME: FINAL REPORT, RECOMMENDATION 40, 55 (Aug. 17, 1981).

109. In People v. DeFore, 242 N.Y. 12, 150 N.E. 585, 587 (1926), Justice Cardozo observed of the exclusionary rule that “the criminal is to go free because the constable has blundered.”
110. See Elkins v. United States, 364 U.S. 206 (1960). See also supra note 60.
112. See supra note 6.
113. It is “a less evil that some criminals should escape than that the government should play an ignoble part.” Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).
114. “To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend.” Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting).
115. In one legal commentary it is suggested that judicial integrity is not violated and that due process is sufficiently flexible to allow judges to mold the exclusionary rule to fit the exigencies and demands of a particular situation. See Cole, supra note 44 at 61-62. However, the Supreme Court historically has demonstrated flexibility and has held the fourth amendment inapplicable where common sense would so dictate, and the Court has developed exceptions to the warrant requirement consistent with the needs of law enforcement agencies. See supra note 44. To ask that an additional exception to the warrant requirement be found in the case of probation revocation proceedings would cause the right of privacy to be pushed below the plimsoll’s mark of due process. See Fikes v. Alabama, 352
Those who oppose application of the rule during the revocation process claim that United States Supreme Court precedent supports their position, at least analogously. However, these cases are not only not analogous, but in fact support application of the exclusionary rule. The Court has held that the exclusionary rule applies to evidence introduced against a defendant only if he is also the victim of the search. If a person satisfies this test, his status as a probationer should not preclude application of the rule. In a probation revocation hearing the state seeks to use evidence unconstitutionally obtained from the probationer to prove the violation of his probation and to imprison him. Thus, the probationer has the requisite standing to invoke the exclusionary rule, except that the nature of the hearing negates this right.

The Supreme Court has also refused to apply the exclusionary rule to evidence introduced against a defendant for impeachment purposes. According to the Court, the exclusionary rule will not preclude impeachment by the use of statements obtained in violation of Miranda if such statements are otherwise voluntary. Illegally seized evidence which would ordinarily be inadmissible can also be used to impeach a defendant when he testifies in his own behalf and would commit perjury. Although these impeachment exceptions apply to a probationer, they do not justify the use of illegally obtained evidence to prove a direct violation of probation.

The Supreme Court has further refused to extend the exclusionary rule to a habeas corpus proceeding, wherein the defendant petitioned to relitigate his fourth amendment claim which had previously been rejected in the state court. The opinion, written by Justice Powell, explained that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim,

U.S. 191, 199 (1957) (Frankfurter, J., concurring).


118. United States v. Workman, 585 F.2d 1205, 1209 (4th Cir. 1979).


the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search and seizure was introduced at his trial.\textsuperscript{124} This reasoning does not apply to the revocation process, because the probationer has been denied not just full and fair litigation of his fourth amendment claim—he has been denied any litigation of his claim.

Finally, the Court has taken the position that allowing a grand jury witness to invoke the exclusionary rule during the grand jury proceeding would unduly interfere with the effective and expeditious discharge of the grand jury's duties.\textsuperscript{125} The Court has pointed out that the victim of the search would be given an opportunity to litigate his fourth amendment claim in the subsequent criminal trial.\textsuperscript{126} In contrast, in the case of the probationer who is subjected to an alternative prosecution for violation of his probation, no subsequent trial occurs in which to present his fourth amendment claim, and his possible imprisonment will be accomplished in disregard of those rights. In the same opinion, the Court observed that standing to invoke the exclusionary rule is strongest where the government's unlawful conduct could result in imposition of a criminal sanction on the victim of the search. This appraisal of the rule bears directly on the probation revocation hearing, because the evidence is employed to revoke probation and impose a prison sentence, often as an alternative to a trial on the new charges.\textsuperscript{127}

In addition to Supreme Court precedent supporting application of the exclusionary rule in probation revocation proceedings, the American Bar Association Committee on Probation Standards recognizes that probation, unlike parole, inherently involves the judicial branch of the government and that a court should "supervise decisions made under its authority to protect the integrity of its process."\textsuperscript{128} Thus, the American Bar Association recommends that illegally obtained evidence should not be used to revoke probation.\textsuperscript{129}

\textsuperscript{124} Id. at 482.
\textsuperscript{126} Id. at 351.
\textsuperscript{127} United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1979).
\textsuperscript{128} 1980 Standards, supra note 27, § 18-7.5, commentary at 529 (1980).
\textsuperscript{129} 1980 Standards, supra note 27, § 18-7.5, provides in pertinent part:
(a) Formal arrest of probationers for the alleged violation of conditions of their probation should be preceded by the issuance of an arrest warrant based on probable cause that a violation has occurred. Arrest without a warrant should be per-
The imprisonment of a probationer based on unconstitutionally acquired evidence without a hearing as to the violation of his fourth amendment rights can only be accomplished if the government can establish an exception to the exclusionary rule.\textsuperscript{130} The burden rests on the government to show that the situation has made that course imperative.\textsuperscript{131} The government, as laudable as its motives might be in fighting crime, has failed in its burden because the price involves forsaking constitutional guarantees.\textsuperscript{132} Courts should, of course, resist attempts to extend the exclusionary rule beyond its intended purpose, as society is entitled to constitutional protection. Vigilant watch over the rights of our citizens, however, also requires that courts not become a party in the evisceration of constitutional guarantees.

**Conclusion**

Application of the exclusionary rule in probation revocation proceedings best serves the rehabilitative purpose of the probation system by treating probationers fairly, and by demonstrating that the court will not tolerate misconduct from the probationer or the police. Application of the exclusionary rule in probation revocation proceedings also serves the dual purposes of the exclusionary rule: deterrence of violations of fourth amendment rights and maintenance of judicial integrity. Denial of the rule in a probation revocation hearing is an unconstitutional act that should not be passed over in the guise of effective law enforcement. Justice Bardley's warning in *Boyd v. United States*,\textsuperscript{133} in 1886, is worth repeating:

It may be that the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their

\textsuperscript{130} United States v. Workman, 585 F.2d 1205, 1209 (4th Cir. 1979).


\textsuperscript{132} In announcing the exclusionary rule in *Weeks v. United States*, 232 U.S. 385 (1914), Justice Day said of the protection afforded by the fourth amendment:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

\textit{Id.} at 393.

\textsuperscript{133} 116 U.S. 616 (1886).
first footing in that way, namely, by silent approaches and silent deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and lends to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.\textsuperscript{134}

Thus, both constitutional principles and rehabilitation ideals require adherence to the exclusionary rule in probation revocation hearings.

\textsuperscript{134} Id. at 635.