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The Exclusionary Rule in Parole Revocation Hearings: Detering Official Infringement of Parolees' Fourth Amendment Rights

Courts have generally held that parolees are entitled to the protection of the fourth amendment¹ against unreasonable searches and seizures.² Attempts to define the actual protection afforded by the reasonableness requirement, however, have led to considerable controversy.³ The courts do seem to agree on one matter—evidence seized through an illegal search by either a police officer or parole officer is inadmissible in a new criminal prosecution.⁴ On the other hand, the issue of whether courts will exclude from revocation proceedings evidence illegally seized by police officers, has received no definitive resolution.⁵ More impor-

1. The Supreme Court in *Stone v. Powell*, 428 U.S. 465 (1976), said:

The Fourth Amendment assures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, . . . and was intended to protect the "sanctity of a man's home and the privacies of life," . . . from searches under unchecked general authority.

Id. at 482 (citations omitted). See also *Boyd v. United States*, 116 U.S. 616, 624-30 (1886).

2. *E.g.*, *United States v. Bradley*, 571 F.2d 787, 789 n.2 (4th Cir. 1978) (citing *Latta v. Fitzharris*, 521 F.2d 246, 248 (9th Cir. 1975)); *Diaz v. Ward*, 437 F. Supp. 678, 682 (S.D.N.Y. 1977); *State v. Simms*, 10 Wash. App. 75, 84, 516 P.2d 1088, 1094 (1973).

3. A major point of division among courts is the issue of whether the fourth amendment requires that a parole officer obtain a search warrant before conducting a search of a parolee or his residence. Many courts have held that it does not. *E.g.*, *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975); *United States ex rel. Santos v. New York State Bd. of Parole*, 441 F.2d 1216 (2d Cir. 1971); *United States ex rel. Randazzo v. Follette*, 282 F. Supp. 10 (S.D.N.Y. 1968); *People v. Hernandez*, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965); *People v. Robarge*, 151 Cal. App. 2d 660, 312 P.2d 70 (1957); *People v. Denne*, 141 Cal. App. 2d 499, 297 P.2d 451 (1956); *People v. Randazzo*, 15 N.Y.2d 526, 202 N.E.2d 549, 254 N.Y.S.2d 99 (1964), *cert. denied*, 381 U.S. 953 (1965). Other courts have found that it does. *E.g.*, *United States v. Bradley*, 571 F.2d 787 (4th Cir. 1978); *State v. Cullison*, 173 N.W.2d 533 (Iowa 1970). See *Diaz v. Ward*, 437 F. Supp. 678, 686 (S.D.N.Y. 1977) ("the differences in judicial expression have to do not with the requirement of reasonableness, but how that concept is defined").

4. *E.g.*, *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970) (police officer); *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966) (police officer and parole officer); *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155 (W.D.N.Y. 1975) (parole officer); *United States v. Lewis*, 274 F. Supp. 184 (S.D.N.Y. 1967) (FBI agents); *State v. Cullison*, 173 N.W.2d 533 (Iowa 1970) (police officer and parole officer); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088 (1973) (police officer and parole officer). See *State v. Caron*, 334 A.2d 495, 498-99 (Me. 1975) (police officer).

5. Compare *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d

tantly, the courts have largely ignored or avoided the question whether evidence illegally seized by parole officers should be excluded from revocation proceedings.⁶

The reluctance of the Fourth Circuit to address this last named issue in *Bradley v. United States*⁷ is typical. In this case, the court held that absent a recognized exception such as exigent circumstances, the fourth amendment requires a parole officer to obtain a search warrant based on probable cause before conducting a search of a parolee or his residence.⁸ Consequently, the court held evidence seized by a parole officer in a warrantless search inadmissible in new criminal proceedings, and Bradley's conviction based on such evidence was reversed.⁹ The court indicated in a footnote, however, that while it reversed Bradley's conviction "because his fourth amendment rights were violated by the warrantless search, [it expressed] no view of the effect, if any, of [its decision] on the revocation of Bradley's parole."¹⁰

This Comment will discuss and attempt to resolve two related issues: (1) whether the exclusionary rule should be applied in a parole revocation proceeding where a police officer conducts an unreasonable search of a parolee, and (2) whether the rule should be applied where a parole officer conducts an unreasonable search.¹¹ Before addressing these issues, however, a brief discussion of the exclusionary rule in general should prove helpful.

1161 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir. 1971); *State v. Caron*, 334 A.2d 495 (Me. 1975); and *State v. Kuhn*, 7 Wash. App. 190, 499 P.2d 49 (1972) with *Michaud v. State*, 505 P.2d 1399 (Okla. Crim. App. 1973) and *Tamez v. State*, 534 S.W.2d 686 (Tex. Crim. App. 1976).

6. See *United States v. Bradley*, 571 F.2d 787, 790 n.6 (4th Cir. 1978); *State v. Cullison*, 173 N.W.2d 533, 537 (Iowa 1970); Note, *The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal*, 54 Tex. L. Rev. 1115, 1117 n.13 (1976) [hereinafter cited as *The Exclusionary Rule: A Policy Appraisal*]. But see *Brown v. Kearney*, 355 F.2d 199, 200 (5th Cir. 1966) (*per curiam*); *State v. Caron*, 334 A.2d 495, 499-500 n.6 (Me. 1975) (citing *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1166 (2d Cir. 1970) (Lumbard, C.J., Concurring)) (exclusionary rule could become applicable in revocation proceedings).

7. 571 F.2d 787 (4th Cir. 1978).

8. *Id.* at 789.

9. *Id.* at 790.

10. *Id.* at 790 n.6.

11. This Comment will not deal with the issue of what constitutes an unreasonable search of a parolee under the fourth amendment. Rather, it will deal with what the result should be once a search by either a policeman or a parole officer is found unconstitutional. That is, given an unreasonable search of a parolee or his residence, should illegally seized evidence be excluded from parole revocation proceedings?

Although this discussion is limited to parolees, most of the considerations and observations regarding parole revocation proceedings apply to probationers as well. Therefore, cases involving probationers are also relied upon. The Supreme Court in *Gagnon v. Scar-*

I. THE EXCLUSIONARY RULE

The exclusionary rule is the primary vehicle employed by courts to implement the fourth amendment prohibition of unreasonable searches and seizures by enforcement officials.¹² Application of the exclusionary rule has been justified on the basis of two different theories: (1) it deters official conduct violative of the fourth amendment,¹³ and (2) it maintains "the imperative of judicial integrity."¹⁴ The latter theory rests on the proposition that by admitting illegally obtained evidence, the courts become accomplices to the willful violation of the Constitution. Since judges are sworn to uphold the Constitution, their admissions of illegally obtained evidence undermine respect for the law.¹⁵

Recent Supreme Court decisions have limited the theory of judicial integrity as a justification for the exclusionary rule.¹⁶ These decisions establish that the primary purpose of the exclusionary rule, "if not the sole one," is to deter future illegal conduct.¹⁷ In *United States v. Calandra*,¹⁸ the Court stated:

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

"[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."

...

Instead, the rule's prime purpose is to deter future unlawful

PELLI, 411 U.S. 778 (1973), noted that: "Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation . . . is constitutionally indistinguishable from the revocation of parole." *Id.* at 782 n.3. See *State v. Simms*, 10 Wash. App. 75, 79, 516 P.2d 1088, 1091 (1973).

12. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961); *id.* at 670 (Douglas, J., concurring); OAKS, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665-66 (1970) (exclusionary rule is "sole" technique available to courts).

13. E.g., *United States v. Janis*, 428 U.S. 433, 446-48 (1976); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

14. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

15. *Id.* at 222-23 (relying on Justice Holmes' opinion in *Olmstead v. United States*, 227 U.S. 438, 485 (1928) (Holmes, J., dissenting)). *Contra*, *Stone v. Powell*, 428 U.S. 465, 491 (1976); 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, 50 (1975); OAKS, *supra* note 12, at 669.

16. See *Stone v. Powell*, 428 U.S. 465, 485 (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."); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974); COLE, *supra* note 15, at 38.

17. *United States v. Janis*, 428 U.S. 433, 446 (1976). See *Stone v. Powell*, 428 U.S. 465, 486 (1976).

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

police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."¹⁹

In a related vein, the Court found 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."²⁰ Therefore, the rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. . . . [T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."²¹ In determining when to apply the exclusionary rule, the Court has balanced the rule's potential harm—excluding relevant evidence—against its potential benefit—deterring illegal behavior.²²

The balancing engaged in by the Supreme Court, however, has focused on the probable deterrent effect²³ rather than the potential injury to society. It is only where the Court has described the possible deterrent effect as insubstantial, marginal, or speculative that the exclusion of illegally seized evidence has not been required.²⁴

The Supreme Court recently applied these principles in the case of *United States v. Janis*.²⁵ In *Janis*, the Court considered the application of the exclusionary rule in federal civil proceedings to evidence illegally seized by state law enforcement agents. The Court first reasoned that the object of any exclusionary rule sanction is deterrence of illegal police conduct. The Court then pointed out that the "concern and duty" of state police officers is criminal law enforcement.²⁶ Civil proceedings fall "outside the

19. *Id.* at 347 (citations omitted).

20. *Id.* at 348 (footnote omitted). *Contra, id.* at 360 (Brennan, J., dissenting).

21. *Id.* at 348.

22. *E.g.*, *United States v. Ceccolini*, 435 U.S. 268, 273-79 (1978); *United States v. Janis*, 428 U.S. 433, 453-54 (1976); *United States v. Calandra*, 414 U.S. 338, 349 (1974).

23. *See, e.g.*, *United States v. Janis*, 428 U.S. 433, 453-60 (1976); *United States v. Calandra*, 414 U.S. 338, 350-52 (1974); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

24. *E.g.*, *United States v. Janis*, 428 U.S. 433, 453-54, 458 (1976); *United States v. Calandra*, 414 U.S. 338, 351-52 (1974).

25. 428 U.S. 433 (1976).

26. *Id.* at 448. Consequently, the state officers were already punished by the exclusion of the evidence from state and federal criminal trials. *Id.*

offending officer's zone of primary interest."²⁷ Hence, imposition of the exclusionary rule in civil proceedings would not result in any significant deterrent effect.²⁸ Under this analysis, the Court found extension of the rule to civil proceedings unjustified.²⁹

II. EXCLUSIONARY RULE IN PAROLE REVOCATION HEARINGS

Most of the arguments relating to extension of the exclusionary rule to revocation proceedings are applicable to both police and parole officer searches. Differences arise only when considering the possible deterrent effects. The arguments applicable to both parole officer and police officer searches will be discussed in conjunction; the deterrent arguments will then be considered separately.

A. General Arguments

The major arguments against extending the exclusionary rule to parole revocation proceedings place heavy emphasis on the special role of the parole system. The two primary purposes of parole are to protect society and to promote the rehabilitation of the criminal.³⁰ Disallowing the introduction of illegally seized evidence in parole revocation proceedings may endanger society by permitting dangerous criminals to remain free.³¹ It is also feared

27. *Id.* at 458.

28. *Id.*

29. *Id.* at 459-60.

30. *E.g.*, CITIZENS INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., PRISON WITHOUT WALLS 4 (1975) [hereinafter cited as PRISON WITHOUT WALLS]; R. DAWSON, SENTENCING 317-26 (1969); C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 332 (3d ed. 1968).

31. The California Supreme Court has stated:

[T]he social consequences of imposing the exclusionary rule upon the [Adult Authority] can be disastrous. Conceivably, if the improperly obtained evidence were the sole basis for parole revocation, the authority might find itself unable to act in the case of the paroled murderer whom the police improperly discovered had cached a minor armory for future use or the paroled narcotics peddler who had collected a quantity of heroin for future sale. Although we recognize, of course, that such evidence would not be admissible in a court of law, we believe that an agency whose delicate duty is to decide when a convicted offender can be safely allowed to return to and remain in society is in a different posture than the court which decides his original guilt. To blind the authority to relevant facts in this special context is to incur a risk of danger to the public which, at least as of this date, outweighs the competing considerations of a problematical gain in deterrence.

In re Martinez, 1 Cal. 3d 641, 650, 463 P.2d 734, 740, 83 Cal. Rptr. 382, 388, cert. denied, 400 U.S. 851 (1970). A risk to society is created by releasing prisoners on parole. This risk would be greatly increased if society could not return unrehabilitated criminals to prison.

that application of the exclusionary rule to revocation proceedings "would tend to obstruct the parole system in accomplishing its remedial purposes."³²

Exclusion would place an additional burden of surveillance on parole officers in a system that is already understaffed and underfunded.³³ Chief Judge Lumbard of the Second Circuit, concurring in *United States ex rel. Sperling v. Fitzpatrick*,³⁴ observed:

To apply the exclusionary rule in the context of parole revocation hearings at the present time would merely exacerbate the problems [created by overworked and underfunded parole offices]; to import fourth amendment suppression law into this process would in fact be counterproductive. Parole officers would be forced to spend more of their time personally gathering admissible proof concerning those parolees who cannot or will not accept rehabilitation. Time devoted to such field work necessarily detracts from time available to encourage those parolees with a sincere desire to avoid the all-too-familiar cycle of recidivism. An even greater potential loss would be in the time available to counsel and supervise—particularly in the early months—those who leave confinement with the question of rehabilitation in real doubt.

. . . [A] double application of the exclusionary rule is not warranted at the present time. I draw this conclusion by balancing the interests of all parolees in securing administration of the parole system which is as nearly consonant with its dual goals as is possible at present levels of staffing and funding against the interest of individual parolees . . . in not being subjected to [unconstitutional] search[es]³⁵

Some suggest that the rehabilitative goals of the parole system require the admission of all evidence relevant to the parolee's rehabilitation. A more accurate evaluation of the parolee's progress can be made if all evidence relating to his conduct is consid-

See *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1120.

32. *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970). See *United States v. Winsett*, 518 F.2d 51, 55 (9th Cir. 1975).

33. *United States v. Winsett*, 518 F.2d 51, 55 (9th Cir. 1975); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164-65 (2d Cir. 1970) (Lumbard, C.J., concurring). *Contra*, *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1127. See generally R. DAWSON, *supra* note 30, at 326; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 70 (1967) [hereinafter cited as TASK FORCE REPORT: CORRECTIONS].

34. 426 F.2d 1161 (2d Cir. 1970).

35. *Id.* at 1165-66 (Lumbard, C.J., concurring).

ered.³⁶ Admission of evidence of parole violation, although illegally seized, allows the system to remove from society those parolees who manifest a present inability to successfully rehabilitate. This lightens caseloads and reduces supervision duties of parole officers.³⁷

Another important consideration is the effect extension of the exclusionary rule would have on the parole revocation hearing itself. The Supreme Court has made it clear that the rights of a parolee in a revocation hearing are not coextensive with those of an accused in a criminal prosecution.³⁸ In fact, there are critical differences between criminal trials and revocation hearings:

In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer . . . ; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of . . . parole.³⁹

Similarly, the Court in *Morrissey v. Brewer*⁴⁰ stated that "there is no thought to equate . . . parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."⁴¹ This opinion also pointed out that states have an "overwhelming interest in being able to return [a parole violator] to imprisonment without the burden of a new adversary criminal trial."⁴²

The problem with extending the exclusionary rule to revocation proceedings is that it could transform the informal hearing envisioned by the Supreme Court into a full adversary process.

36. See *United States v. Winsett*, 518 F.2d 51, 54-55 (9th Cir. 1975) (probation); *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1117.

37. *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1127. See *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1165 (2d Cir. 1970) (Lumbard, C.J., concurring).

38. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

39. *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973).

40. 408 U.S. 471 (1972).

41. *Id.* at 489.

42. *Id.* at 483.

Application of the exclusionary rule would require parole boards to make technical legal rulings regarding the suppression of evidence.⁴³ In turn, parole board members would have to receive legal training⁴⁴ and parolees would require legal counsel to ensure that appropriate and timely motions are raised in their behalf.⁴⁵ Making parole revocation hearings more complex would make them more time consuming. Moreover, the state would find it more difficult to return incorrigible parolees to prison.⁴⁶ This would not only substantially threaten public safety, but would also endanger the vitality of the parole system for those who are actually helped by it. If parole boards knew it would require the equivalent of a new conviction to return parolees to prison it is possible they would grant parole less frequently.⁴⁷

Two significant facts affect the arguments against extending the exclusionary rule to revocation proceedings. First, excluding relevant evidence from a parole revocation proceeding is no more dangerous to the public in general than is exclusion of evidence from a criminal trial. Admittedly, there is a greater possibility that a parolee will commit a crime than an ordinary citizen.⁴⁸ The

43. Revocation proceedings are currently informal in nature and lack "technical rules of procedure or evidence." *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973). Application of the exclusionary rule would require a suppression hearing which is a technical procedure. *Diaz v. Ward*, 437 F. Supp. 678, 685-86 (S.D.N.Y. 1977).

44. This would require certain states to revise their systems. New York, for example, currently imposes no specific qualifications for membership on a parole board. *PRISON WITHOUT WALLS*, *supra* note 30, at 9.

45. The Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), observed:

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the . . . parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.

Id. at 787-88 (footnote omitted).

46. *Id.* at 789-90.

47. See *State v. Kuhn*, 7 Wash. App. 190, 194-95, 499 P.2d 49, 52 (1972) (extending exclusionary rule to probation hearings could discourage use of probation).

48. See *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); TASK FORCE REPORT: CORRECTIONS, *supra* note 33, at 62.

real question, however, is whether there is a greater possibility that a person who remains on parole by virtue of the exclusionary rule will be more of a threat to public safety than an accused who, by successfully seeking exclusion, avoids conviction for a serious crime. Both have shown a penchant toward illegal activity, and there are no indications that an accused left free will be any less likely to renew criminal activity than a parolee who remains on parole. Indeed, since a parolee who has been discovered in a parole violation knows that he will thereafter be placed under stricter supervision by his parole officer, it is more likely the parolee will observe the law than will a criminal suspect who must be released without supervision of any kind.⁴⁹

Second, although society has an interest in the successful rehabilitation of offenders,⁵⁰ which interest would be damaged if any use of the exclusionary rule resulted in fewer successful rehabilitations, parolees stand to lose the most from extending the exclusionary rule to revocation proceedings. They will be losers as a class in two ways. Extension will result in parole officers having less time to devote to parolees as advisors. The rule's application will also discourage use of the parole system as an alternative to continued incarceration. Thus, the brunt of the argument against extending the exclusionary rule to revocation proceedings is that it would do parolees more harm than good. The tendency of the exclusionary rule to complicate and disrupt the parole system would be more detrimental to parolees than the unreasonable searches the exclusionary rule would prevent.⁵¹

In rebuttal to the above arguments it has been suggested that excluding illegally seized evidence would actually enhance, rather than impair, the rehabilitative goals of the parole system. Admitting unlawfully seized evidence, it is argued, would aggravate the parolee's bitterness toward the system, while recognizing the fourth amendment rights of parolees by excluding such evidence would help engender the respect for the law that is essential to successful rehabilitation.⁵²

The strongest arguments favoring application of the exclusionary rule focus on the right of parolees to be free from unrea-

49. See *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1128.

50. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *State v. Kuhn*, 7 Wash. App. 190, 195, 499 P.2d 49, 52 (1972).

51. See *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1166 (2d Cir. 1970) (Lumbard, C.J., concurring).

52. *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1126.

sonable searches and seizures.⁵³ Since parole revocation results in incarceration, the admissibility of illegally seized evidence in revocation hearings arguably provides an incentive to disregard parolees' important fourth amendment right against unreasonable searches.⁵⁴ To destroy this incentive for unlawful conduct, illegally seized evidence should be excluded.⁵⁵

B. Arguments Relating to Deterrent Effect

Parolees will gain as a class from the application of the exclusionary rule to revocation proceedings only if it actually deters official misconduct. Because of the differences which exist between the roles of police officers and parole officers, the deterrence arguments will be treated separately.

1. Police officer searches

A potent argument against application of the exclusionary rule in revocation proceedings to evidence illegally seized by po-

53. See *State v. Cullison*, 173 N.W.2d 533, 537-38 (Iowa 1970); *Michaud v. State*, 505 P.2d 1399, 1402-03 (Okla. Crim. App. 1973).

54. *In re Martinez*, 1 Cal. 3d 641, 652-53, 463 P.2d 734, 742, 83 Cal. Rptr. 382, 390, (Peters, J., dissenting), cert. denied, 400 U.S. 851 (1970); *Michaud v. State*, 505 P.2d 1399, 1402 (Okla. Crim. App. 1973). Cf. *Elkins v. United States*, 364 U.S. 206, 217 (1960) (only effective way to deter illegal searches is to remove incentive to disregard it by disallowing use of the fruits of illegal activity); *Verdugo v. United States*, 402 F.2d 599, 613 (9th Cir. 1968) ("the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures").

55. This argument rests on the premise that exclusion of evidence actually deters unlawful conduct. Due to the lack of adequate empirical data, it is uncertain whether this premise is justified. The Supreme Court in *Irvine v. California*, 347 U.S. 128 (1954), stated:

What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. . . . There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it.

Id. at 135-36. The Court's doubts on this issue were reiterated in *Elkins v. United States*, 364 U.S. 206, 218 (1960), and more recently in *United States v. Janis*, 428 U.S. 433 (1976), where the Court stated:

[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed. It would not be appropriate to fault those who have attempted empirical studies for their lack of convincing data. The number of variables is substantial, and many cannot be measured or subjected to effective controls. Recordkeeping before *Mapp* was spotty at best, a fact which thus severely hampers before-and-after studies.

Id. at 449-52 (footnotes omitted).

lice officers is that it would not result in any significant deterrence.⁵⁶ Even though exclusion of illegally seized evidence from criminal prosecutions may deter unlawful police conduct, exclusion from parole revocation hearings would probably not deter police invasion of fourth amendment rights. Only police searches consciously directed at parolees would be deterred by this extension of the rule,⁵⁷ and then only in cases where the officers consider revocation an adequate substitute for a new criminal prosecution.⁵⁸ Indeed, it is highly unlikely that a police officer would ever consider parole revocation as an alternative to a criminal conviction unless he were aware of the suspect's parolee status.⁵⁹ Consequently, a double application of the exclusionary rule is uncalled for. "The deterrent purpose of the exclusionary rule is adequately served by the exclusion of the unlawfully seized evidence in the criminal prosecution."⁶⁰

The above argument loses its force when a police officer who conducts an unreasonable search has prior knowledge of a suspect's parolee status.⁶¹ Independent prosecution and revocation under an old conviction are often interchangeable to the informed officer.⁶² If a police officer is aware that illegally seized evidence may be used to revoke a suspect's parole, he will have a considerable temptation to conduct an unlawful search.⁶³ This temptation

56. *E.g.*, *United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975); *Cole*, *supra* note 15, at 33-37.

57. *United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975) (footnote omitted) (probation).

58. If the crime committed is serious, a police officer may want to be able to use available evidence to obtain a new criminal conviction, rather than a parole revocation. Under such circumstances, a police officer would have a strong incentive to adhere to fourth amendment reasonableness requirements even if he were aware of the suspect's parolee status. *See Cole*, *supra* note 15, at 36-37.

59. *See United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975); *Cole*, *supra* note 15, at 33-37.

60. *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970).

61. *See United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975). *See generally* R. DAWSON, *supra* note 30, at 145, 319, 342.

Parole officers often look to police officers to furnish information on the activities of parolees. As a result, the parole agency often notifies the local police of a parolee's presence, status, and background. TASK FORCE REPORT: CORRECTIONS, *supra* note 33, at 69.

62. In *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971), a probation case, Judge Fairchild stated: "[T]he fact that an independent prosecution and revocation under an old conviction are often interchangeable . . . suggests that abrogation of the exclusionary rule for . . . revocation would seriously undermine the rule's effect as a deterrent." *Id.* at 820 (Fairchild, J., dissenting). *See Morrissey v. Brewer*, 408 U.S. 471, 479 (1972) (parole revocation "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"); R. DAWSON, *supra* note 30, at 363.

63. *See United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975); *United States v.*

is removed if illegally seized evidence is excluded from revocation proceedings as well as new criminal prosecutions. Therefore, the deterrent purposes of the rule will be furthered if illegally seized evidence is excluded from revocation proceedings where police officers are aware of a suspect's parolee status at the time of an unlawful search.⁶⁴

2. Parole officer searches

The parole officer plays a unique role within the parole system. As the official primarily responsible for supervision of the parolee in the community, the parole officer has two functions: (1) to aid parolees in their rehabilitative process and (2) to protect society.⁶⁵ In this supervisory capacity, the parole officer is simultaneously a counselor to the parolee and an enforcement officer.⁶⁶

In his enforcement role the parole officer has the duty to initiate the parole revocation process when necessary. The decision to recommend that a parolee have his parole revoked is highly discretionary, but it is not made unless it is believed that the parolee has seriously violated the conditions of his parole or has returned to criminal activity.⁶⁷ Upon making such a recommendation, the parole officer must justify his decision to the parole board.⁶⁸

Parole revocation is not an infrequent occurrence. Between thirty-five and forty-five percent of adult offenders released on parole are eventually returned to prison.⁶⁹ The majority of these

Hill, 447 F.2d 817, 821 (7th Cir. 1971) (Fairchild, J., dissenting); *The Exclusionary Rule: A Policy Appraisal*, *supra* note 6, at 1125-29.

64. See *United States v. Vandemark*, 522 F.2d 1019, 1020 (9th Cir. 1975); *United States v. Winsett*, 518 F.2d 51, 54-55 (9th Cir. 1975).

65. R. DAWSON, *supra* note 30, at 317-18. See *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

66. PRISON WITHOUT WALLS, *supra* note 30, at 75. The attitudes of parole officers toward these roles vary. Some parole officers are "law enforcement" oriented while others concentrate on the "social work" aspect of their position. R. DAWSON, *supra* note 30, at 318. Many parole officers express dissatisfaction with the present arrangement because they believe these dual functions conflict. PRISON WITHOUT WALLS, *supra* note 30, at 75-78. As a result, some suggest that the present law enforcement role of parole officers should be abolished. PRISON WITHOUT WALLS, *supra* note 30, at 181; R. ERICKSON, W. CROW, L. ZURCHER, & A. CONNETT, *PAROLED BUT NOT FREE* 101 (1973); see TASK FORCE REPORT: CORRECTIONS, *supra* note 33, at 69.

67. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 478-79, 485-86 (1972); PRISON WITHOUT WALLS, *supra* note 30, at 129-33; R. DAWSON, *supra* note 30, at 339-40, 358, 367-77. See generally C. NEWMAN, *supra* note 30, at 73-80.

68. See *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 484-90 (1972).

69. TASK FORCE REPORT: CORRECTIONS, *supra* note 33, at 62.

are returned through the revocation process.⁷⁰ Since parole officers initiate this process and must substantiate their reasons for doing so, the admissibility of illegally seized evidence in revocation proceedings provides a substantial incentive to parole officers to infringe on the fourth amendment rights of parolees.⁷¹ Perhaps the only practicable way to deter unreasonable parole officer searches, then, is to exclude the fruits of such searches.⁷² Indeed, if the exclusionary rule is ever effective in deterring unlawful official conduct, this would seem to be a prime example of where its objectives could be realized.⁷³

The deterrence argument strongly favors extension of the exclusionary rule to revocation hearings where a parole officer has unreasonably searched a parolee, and under certain circumstances, where a police officer engages in an unlawful search. This argument must be weighed against the arguments favoring rejection of the rule.

C. *Balancing the Competing Interests*

The determination of whether the exclusionary rule should be extended to parole revocation proceedings eventually results in a balancing test. Normally, the potential harm to society is balanced against the potential deterrence of unlawful police conduct. In the past, the Supreme Court has held that the cost to society outweighs the potential deterrent effect of the rule only where it has first characterized any potential deterrence as minimal, insubstantial, or speculative.⁷⁴ Under this test extension of the rule to parole revocation proceedings would be appropriate since the deterrent effect could not always be classified as negligible. The exclusionary rule's potential adverse effect on the parole system and hence on parolees, however, supplies a unique twist that cannot be overlooked.

70. *Id.*

71. The problem is aggravated since parole authorities often would rather see evidence used in a parole revocation proceeding than a criminal prosecution. Parole agencies are sensitive to media criticism that arises when a parolee is prosecuted for a new crime. Revocation may be a way of avoiding adverse publicity. R. DAWSON, *supra* note 30, at 364.

72. See *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961). But see *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970).

73. Although the actual effectiveness of the exclusionary rule is uncertain, it seems reasonable that if parole officers wanted evidence of parole violation or criminal activity for revocation purposes, but knew that any evidence obtained in violation of the fourth amendment could not be used, they would be careful to conduct their searches in compliance with the reasonableness standards of the fourth amendment.

74. See notes 23-29 and accompanying text *supra*.

Besides the cost to society,⁷⁵ two competing interests of parolees may be taken into account in the balancing process. On one side of the scales could be placed the parolees' interest in being free from unreasonable searches and seizures. On the opposite side could be placed the detrimental impact parolees would suffer should extension of the rule result in less liberality on the part of parole boards in granting parole and less individualized attention from parole officers. Under such a test the potential harm may outweigh the potential benefit to parolees,⁷⁶ despite the possible deterrent effect that could be derived from application of the rule.

There is a substantial problem with this rationale: it requires the balancing of two unknowns—the supposed harm to the parole system and the potential deterrence of unlawful enforcement conduct. Experience has shown that it is difficult if not impossible to measure the deterrent effect that results from the exclusionary rule.⁷⁷ Likewise, it is impossible to measure before the fact the damage to the parole system that would result from extension of the exclusionary rule to revocation proceedings.⁷⁸ Should experi-

75. Exclusion results in societal harm since "the public [has an] interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

76. Some courts have argued for this conclusion. See, e.g., *United States v. Winsett*, 518 F.2d 51, 54-55 (9th Cir. 1975); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 650-51 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir. 1971); *State v. Simms*, 10 Wash. App. 75, 79-80, 516 P.2d 1088, 1091 (1973).

77. See note 55 *supra*.

78. It is not entirely certain whether a displacement of parole officer time by an increased burden of surveillance would result in less effective rehabilitation. One survey has suggested that there is no correlation between successful rehabilitation and the amount of time parole officers devote to parolees. *PRISON WITHOUT WALLS*, *supra* note 30, at 170-71.

It is also highly unlikely that application of the exclusionary rule would discourage parole boards from granting parole for at least two reasons. First, parole board decisions are often arbitrarily made. E.g., *PRISON WITHOUT WALLS*, *supra* note 30, at 176-77; *TASK FORCE REPORT: CORRECTIONS*, *supra* note 33, at 63. In fact, concern that a parolee is likely to return to criminal activity often does not discourage parole boards from paroling certain convicts. E.g., *PRISON WITHOUT WALLS*, *supra* note 30, at 63-64; *R. DAWSON*, *supra* note 30, at 278. It seems doubtful that a parole board that does not hesitate to grant parole, even when the danger of recidivism is high, will be hindered by the prospects of more stringent procedural requirements in revocation proceedings. Second, and perhaps of greater consequence, economic pressures and the lack of prison facilities require that a large number of inmates be paroled each year. See Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702, 705-07 (1963). Extension of the exclusionary rule to revocation proceedings will not change this. On the other hand, application of the rule might spur desperately needed reform in the present system. See generally *PRISON WITHOUT WALLS*, *supra* note 30, at 178-82; *R. DAWSON*, *supra* note 30, at 415-24; *C.*

ence prove this damage to be intolerable, however, application of the rule could be discontinued.

It is proposed that courts use the test developed by the Supreme Court that focuses primarily on the deterrent effect of the exclusionary rule.⁷⁹ This test requires reliance on common sense and human nature rather than precise legal analysis,⁸⁰ since there has been no adequate empirical data to measure the effectiveness of the rule.⁸¹ The test is, however, manageable and workable. It merely requires evaluation of the circumstances in given situations to determine if application of the rule would result in only minimal or speculative deterrence. If it is decided that the deterrent effect would be insubstantial, the rule is rejected.⁸²

According to this test, evidence illegally seized by parole officers should be excluded from revocation proceedings, since the deterrent effect cannot be classified as insubstantial or speculative as the Court has used these terms.⁸³ In the context of police officer searches, the rule developed for probationer cases in *United States v. Winsett*⁸⁴ should be applied. In that case the Ninth Circuit Court of Appeals stated:

Therefore, in light of the minimal deterrent effect, if any, that would result from extension of the exclusionary rule and the danger such extension would pose to the probation system, we conclude that the Fourth Amendment does not require suppression of evidence in a probation revocation proceeding where, at the time of arrest and search, the police had neither knowledge nor reason to believe that the suspect was a probationer.⁸⁵

Evidence should be excluded, however, when police officers are aware of a suspect's parolee status before conducting an unreasonable search, since there is a high probability that the prospect of having illegally seized evidence excluded from both criminal

NEWMAN, *supra* note 30, at 332-41; TASK FORCE REPORT: CORRECTIONS, *supra* note 33, at 1-16.

79. This test should be followed as long as the exclusionary rule is used as a means of protecting fourth amendment rights. There is a possibility, of course, that in the future the rule will be abolished or greatly restricted in its application. See *Stone v. Powell*, 428 U.S. 465, 496, 500-01 (1976) (Burger, C.J., concurring). But see *Franks v. Delaware*, 98 S.Ct. 2674, 2684 (1978). See generally Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33 (1979).

80. See *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961).

81. See note 55 *supra*.

82. See notes 23-29 and accompanying text *supra*.

83. See notes 67-73 and accompanying text *supra*.

84. 518 F.2d 51 (9th Cir. 1975).

85. *Id.* at 55.

and revocation proceedings would deter them from such unlawful activity.⁸⁶

III. CONCLUSION

Two important considerations emerge from the arguments concerning extension of the exclusionary rule to parole revocation hearings. First, application of the rule would not only result in the normal cost to society of excluding relevant evidence, but it might also cause substantial harm to the parole system and hence to parolees. Consequently, parolees could be simultaneously benefited and injured through its application. Second, in determining whether to extend the exclusionary rule it has been the practice of the Supreme Court to apply a test that focuses on deterrent effect. As a result, application of the rule has been denied only where the potential deterrence has been characterized as minimal or insubstantial.

Rather than attempt to balance the competing interest of parolees, courts should follow the past practice of the Supreme Court in determining whether to extend the exclusionary rule to parole revocation proceedings. According to this test, evidence illegally seized should be excluded from parole revocation hearings when: (1) a parole officer conducts an unlawful search or (2) a police officer, having prior knowledge of a suspect's status as a parolee, conducts an unlawful search.

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86. See notes 61-64 and accompanying text *supra*.