

**DETERRENCE IS DOWN AND SOCIAL COSTS ARE UP: A
PAROLEE REVISITS *PENNSYLVANIA BOARD OF
PROBATION & PAROLE v. SCOTT***

James M. Binnall^{*†}

A self-ordained professor's tongue too serious to fool
Spouted out that liberty is just equality in school
"Equality," I spoke the word as if a wedding vow.
Ah, but I was so much older then,
I'm younger than that now.

Bob Dylan, *My Back Pages*¹

INTRODUCTION

When I got out of prison, I knew that I would be forced to live a supervised life. I knew that I would be monitored and that someone would systematically ensure I was not breaching the conditions of my parole. Yet, when I began to walk off my sentence, I learned that parole is actually much more akin to prison than I once thought. I found out the hard way that if they know I am on parole, law enforcement can search me without suspicion of wrongdoing. I also discovered that even if they only suspect I am a parolee, any evidence acquired that indicates I violated the terms of my release will be admitted at my parole revocation hearing. They can discard my rights and return me to prison. So why is it that when I break the rules, I pay for my indiscretions, but when they do, nothing happens?

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As a parolee, I lived among the convicted and now walk among the supervised. I understand that selectively applying a judicially recognized doctrine like the exclusionary rule often furthers the mistreatment of a population of which I am now a member. As transparent as the glass that used to separate me from my loved ones during prison visits, the logic of allowing illegally seized evidence into parole revocation hearings calls into

* LL.M. Candidate, Georgetown University Law Center; J.D. 2007, Thomas Jefferson School of Law; M.S. 2000, Wagner College; B.A. 1998, Gettysburg College. In 2000, I was charged and convicted for a fatal Driving Under the Influence accident. The accident claimed the life of my passenger, a long-time friend. I spent four years, one month, and six days in a Pennsylvania maximum security prison for my crime.

† I would also like to thank Danwill Schwender for his tireless support of this project. Without his editorial input and research expertise, this Essay would not have been possible.

1. BOB DYLAN, *My Back Pages*, on ANOTHER SIDE OF BOB DYLAN (Columbia Records 1964).

question the Supreme Court's loyalty to the noble beginnings of the parole system.²

Theory does not deter police from violating my rights, and hypotheses do not preserve my liberties. Practically, my supervised life is a prison without bars, and the rules that govern the parole system in the United States no longer speak to the concept of reintegration. For parole to aid adjustment, police must face some consequence when they disregard the Constitution, and society must accept that some offenders will go free, as at trial, so that others do not fall victim to unchecked intrusions by law enforcement.

I. *PENNSYLVANIA BOARD OF PROBATION & PAROLE V. SCOTT*

In 1993, the Pennsylvania Board of Probation and Parole released Keith M. Scott from state prison.³ As a parolee, the State prohibited him from "owning or possessing any firearms or other weapons."⁴ Five months later, authorities arrested Scott based on evidence that he had violated certain conditions of his parole.⁵ Immediately after his arrest, officers searched Scott's home.⁶ There they found "five firearms, a compound bow, and three arrows."⁷ Though the search violated Scott's Fourth Amendment protections,⁸ the parole board considered the improperly obtained evidence and returned Scott to prison for a violation of supervised release.⁹ The Supreme Court granted certiorari to decide whether the federal exclusionary rule is applicable in parole revocation proceedings.¹⁰

In *Pennsylvania Board of Probation & Parole v. Scott*, Justice Clarence Thomas, writing for the Court, held that the exclusionary rule does not extend to parole revocation hearings.¹¹

Balancing the potential deterrent effect of the exclusionary rule on law enforcement violations of the Fourth Amendment against the social costs of preventing illegally seized evidence to be used at parole revocation

2. See NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* § 1.06 (1983) (noting that rehabilitation and reintegration were the initial goals in establishing the parole system).

3. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 360 (1998).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See *id.* ("The officers neither requested nor obtained consent to perform the search . . .").

9. *Id.* at 360-61.

10. *Id.* at 362 (citing Pa. Bd. of Prob. & Parole v. Scott, 522 U.S. 992 (1997)).

11. *Id.* at 369.

hearings,¹² the Court provided four justifications for its holding: (1) applying the exclusionary rule to a parole revocation hearing provides no meaningful deterrence, as exclusion in criminal trials sufficiently dissuades law enforcement from circumventing the Constitution;¹³ (2) because police often search “with an eye toward the introduction of the evidence at a criminal trial,”¹⁴ applying the exclusionary rule at parole revocation hearings is a misguided remedy;¹⁵ (3) the flexible nature of the parole revocation proceeding is compromised when the exclusionary rule is applied;¹⁶ and (4) freeing parolees who are seemingly guilty of violating their supervision conditions puts society at risk.¹⁷

These theories are now outdated and obsolete. Subsequent decisions by the Court and current empirical data question the rationales put forth by Justice Thomas to support the conclusion that the exclusionary rule has no place in a parole revocation proceeding.¹⁸ Today, law enforcement officers can search me *because* I am on parole, and the exclusion of illegally seized evidence at a criminal trial does not dissuade a police officer from arbitrarily disregarding the Fourth Amendment. In addition, using improperly seized evidence to take a parolee’s freedom aggregately raises social costs and affords law enforcement the ability to act as jury and judge without fear of reprisal.

This Essay examines the hypotheses employed in *Pennsylvania Board of Probation & Parole v. Scott* from the practical perspective of a parolee. Ignoring hypothetical deterrence and miscalculated social costs, while analyzing pertinent studies Justice Thomas failed to cite and exploring the actualities of supervised release, the rest of this Essay explains how the justifications of *Scott* do not apply to the parole system of today and how application of the exclusionary rule in parole revocation hearings where

12. *Id.* at 364–69. In *Scott*, the Court applied the exclusionary-rule balancing test announced in *United States v. Calandra*, 414 U.S. 338, 348 (1974). Patrick Alexander, Note, *Pennsylvania Board of Probation & Parole v. Scott: Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup*, 31 LOY. U. CHI. L.J. 69, 102 (1999). Many commentators find that the balancing test from *Calandra* is arbitrary. *E.g., id.* (citing WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE § 1.3(b), at 57 (3d ed. 1996)).

13. *Scott*, 524 U.S. at 367.

14. *Id.*

15. *Id.* at 367–69.

16. *Id.* at 364.

17. *Id.* at 365.

18. *See Samson v. California*, 126 S. Ct. 2193, 2202 & n.5 (2006) (holding that the “suspicionless search” of a parolee does not violate the Fourth Amendment, but suggesting that such a search, without knowledge of the parolee’s status as a parolee, would be unconstitutional); DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 25 (2005) (discussing the futility of attempting to measure levels of deterrence and several contradictory studies).

violations of the Fourth Amendment occur is one step toward fixing a system of supervision that is now in disrepair.¹⁹

II. THE CONTOURS OF THE EXCLUSIONARY RULE

Emphasized by Justice Scalia in *Hudson v. Michigan*,²⁰ the exclusionary rule is comprised of three essential principles. First, although a constitutional violation is required prior to the application of the exclusionary rule, its mere existence does not warrant exclusion: “[E]xclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence.”²¹ Second, the constitutional violation, even if it is the but-for cause of the illegally obtained evidence, cannot “be too attenuated to justify exclusion.”²² “Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”²³ Third, the exclusionary rule is “applicable only . . . ‘where its deterrence benefits outweigh its substantial social costs.’”²⁴

Adhering to the principles enunciated by Justice Scalia, exclusion in the parole revocation context would only be justified when there is action that is the but-for cause of a violation of a parolee’s constitutional protections and that violation serves to undermine the purpose of the parolee’s constitutional protection at issue. Additionally, excluding evidence obtained in violation of the Constitution at a parole revocation hearing must produce a deterrent benefit that outweighs the social costs of suppression.

A. Are Parolees Afforded Protection Under the Fourth Amendment?

Although recent Supreme Court decisions seem to suggest the opposite,²⁵ the Constitution does insulate parolees from unreasonable search

19. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment 2* (working paper prepared for the “From Prison to Home Conference” (Jan. 30–31, (2002)), available at <http://aspe.hhs.gov/HSP/prison2home02/haney.pdf> (Over the past 25 years, penologists have repeatedly described U.S. prisons as ‘in crisis’ and have characterized each new level of overcrowding as ‘unprecedented.’”).

20. *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

21. *Id.* at 2164.

22. *Id.* (citing *United States v. Ceccolini*, 435 U.S. 268, 274 (1978)).

23. *Id.* (citation omitted) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

24. *Id.* at 2163 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

25. See *Samson v. California*, 126 S. Ct. 2193, 2196 (2006) (holding a suspicionless search of a

and seizure in certain instances. In an age where suspicionless searches are justified, the Court has kept intact certain prerequisites to exercising the “unfettered discretion” now afforded law enforcement.²⁶

In *Samson v. California*, the Supreme Court, while authorizing the suspicionless search of a parolee, seemed to maintain that knowledge of a parole search condition must precede such an encounter.²⁷ This veil of protection prevents law enforcement from searching or detaining those that they “suspect” are on parole. By creating this requisite search condition, the Court recognized that law enforcement *can* violate a parolee’s Fourth Amendment protections. In such an instance, a constitutional violation has occurred.

Additionally, the Court recently created a second instance in which law enforcement can encroach on a parolee’s protection from unreasonable search and seizure. In *Brendlin v. California*, the Court held that a passenger in a car has standing to challenge an unconstitutional traffic stop.²⁸ In that case, the passenger asserting his rights was a parolee,²⁹ and the Court deemed improper the evidence seized as a result of that unconstitutional traffic stop.³⁰ Hence, the Court created another example through which a parolee’s constitutional protections possibly necessitate exclusion, at least in subsequent criminal proceedings—but what about a parole revocation hearing?

B. Why Does the Court Afford Parolees Protection Under the Constitution?

In *Samson*, the majority strongly opposed the dissent’s view that a suspicionless parole search would essentially equate parole to prison: “Contrary to the dissent’s contention, nothing in our recognition that parolees are more akin to prisoners than probationers is inconsistent with our precedents. Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights.”³¹ This passage suggests that parolees are afforded some protection, or at least more protection than those who are incarcerated based solely on their existence in society at large.³² However,

parolee constitutional).

26. *Id.* at 2207 (Stevens, J., dissenting).

27. *Id.* at 2202 & n.5 (citing *People v. Sanders*, 73 P.3d 496, 505–06 (Cal. 2003)).

28. *Brendlin v. California*, 127 S. Ct. 2400, 2403 (2007).

29. *Id.* at 2404.

30. *Id.* at 2410 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973)).

31. *Id.* at 2198 n.2.

32. *See Hudson v. Palmer*, 468 U.S. 517, 525–27 (1984) (holding that inmates are not protected

the Court goes on to conclude that a parolee's status makes "reasonable" removing certain liberties and creating suspicionless search criteria to "protect the public from criminal acts by reoffenders."³³

A second, more optimistic view as to why the Court has kept intact minimal Fourth Amendment protections for parolees is rooted in the professed reintegration goals of parole. By adamantly refusing to characterize the liberties enjoyed by parolees as analogous to those afforded the incarcerated, and emphasizing a procedural safeguard whereby "an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee,"³⁴ the Court has established a system that it believes will help aid in reintegration and curtail recidivism. This system, inadvertently or deliberately, keeps intact certain protections. Giving the Court the benefit of the doubt, one could argue that the *Samson* decision took into account reintegration and took steps to promote readjustment by maintaining a semblance of protection for parolees.

After establishing a clear violation of a parolee's constitutionally afforded protections, a court is then charged with the task of determining whether that violation is the but-for cause of the potential revocation and whether that violation undermines the purpose of establishing protection for parolees at the outset.³⁵ Taking either view, a violation of the Fourth Amendment that establishes evidence of a parole violation cannot be deemed too attenuated to preclude the use of the exclusionary rule at the revocation hearing.³⁶ If it allows such evidence to determine a parole violation, a court treats parolees like prisoners and, in doing so, undermines the reintegration goals of the *Samson* decision that left intact minimal protections.³⁷ Therefore, application of the exclusionary rule is proper in the parole context so long as its "deterrence benefits outweigh its 'substantial social costs.'"³⁸

under the Fourth Amendment due to an overwhelming need for institutional regulation).

33. *Samson*, 126 S. Ct. at 2201.

34. *Id.* at 2202 n.5 (citing *People v. Sanders*, 73 P.3d 496, 505–06 (Cal. 2003)).

35. *See Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006) (noting that "but-for causality is only a necessary, not sufficient, condition for suppression").

36. *See id.* ("Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.").

37. *See Samson*, 126 S. Ct. at 2202 (recognizing "California's prohibition on 'arbitrary, capricious or harassing' searches" (quoting *People v. Reyes*, 968 P.2d 445, 450 (1998))).

38. *Hudson*, 126 S. Ct. at 2163 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

III. DETERRING LAW ENFORCEMENT FROM IGNORING THE FOURTH
AMENDMENT

To prevent law enforcement from violating my Fourth Amendment privileges, their fear of subsequent ramifications must outweigh their desire to lock up criminals. In *Scott*, the Supreme Court essentially held that law enforcement pays no price for intruding on the constitutional protections afforded to parolees.³⁹ The inability to re-incarcerate a parolee with evidence obtained in a search that violates the Fourth Amendment could provide the necessary disincentive.⁴⁰ Will following the exclusionary rule at parole revocation hearings prevent constitutional violations?

Essential to the utilitarian concept of deterrence is a cost-benefit analysis centered on the intrinsic human desire to minimize pain and maximize pleasure.⁴¹ This theory can only be effective when the deviant pleasure source of the target population can be located, and the pain of capturing that pleasure is made more severe than that of never experiencing the pleasure at all.⁴² Thus, to effectively deter police officers from illegally searching me, they must fear the exclusion of evidence at my revocation hearing more so than they fear the consequences of being unable to search me.

The nature of law enforcement defines the occupational pleasure source of officers. By blurring the line between the theoretical quest for justice and the practical job of crime prevention, police frequently reduce their occupational duties to the crude goal of locking up criminals by engaging “in the often competitive enterprise of ferreting out crime.”⁴³ Parolees are convicted felons. They are criminals that are far “more likely

39. See discussion *supra* Part I.

40. Support for application of the exclusionary rule in criminal proceedings centers on its effectiveness. See *United States v. Havens*, 446 U.S. 620, 624–26 (1980) (weighing the deterrent effects of the exclusionary rule against the truth-finding purpose of the courts); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611, 667 (1983) (concluding that the exclusionary rule causes only slight impairment in police officers’ ability to uphold arrest). Exclusion will be as effective in a parole revocation hearing as it has been shown to be in criminal trials. *Scott*, 524 U.S. at 370 (Souter, J., dissenting).

41. See JOHN STUART MILL, *UTILITARIANISM* 17 (15th ed. 1907) (describing the goal of the utilitarian “Greatest Happiness Principle” as “an existence exempt as far as possible from pain, and as rich as possible in enjoyments”); DAVID T. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 9 (1976) (discussing utilitarianism in the context of crime deterrence).

42. See STANLEY, *supra* note 41, at 9 (“[I]f would-be criminals knew ahead of time that a definite punishment would swiftly and surely follow from the commission of a crime, many of them would be deterred from breaking the law in the first place . . .”).

43. *Scott*, 524 U.S. at 368 (quoting *United States v. Leon*, 468 U.S. 897, 914 (1984)).

to commit future criminal offenses” than non-parolees.⁴⁴ For instance, “[s]ome experts justify increasing parole revocations for technical reasons by claiming that sending more parolees back to prison is good crime policy. Taking parolees off the streets, even for technical reasons, the argument goes, might reduce crime.”⁴⁵ Therefore, removing a parolee from the street with evidence obtained in violation of the Fourth Amendment, in the eyes of police, is a way to achieve a result that successful law enforcement demands. So, given law enforcement’s desires, why not use the exclusionary rule at revocation hearings as a tool to enhance the pain of violating a parolee’s constitutional protections?

A. Impossible to Effectively Measure: The Superfluity of Deterrence

In *Scott*, Justice Thomas first concludes that applying the exclusionary rule in criminal trials provides the requisite level of deterrence needed to prevent law enforcement officers from violating a defendant’s constitutional rights⁴⁶ and that any incidental amount of deterrence gained by applying the exclusionary rule in parole revocation hearings is unnecessary.⁴⁷ However, any discussion of the inconsequential effect of applying the federal exclusionary rule at parole revocation hearings rests on the apparent ability to measure deterrence accurately.⁴⁸ Justice Thomas does not cite empirical studies or statistical data in calculating the deterrent effect of the exclusionary rule in general. Instead, he relies on precedent which assumes that exclusion “discourage[s] illegal behavior” on the part of officers generally and that there exists “no feasible alternative for controlling such behavior.”⁴⁹ By doing so, he insulates rogue state agents by relying on outmoded assumptions.

Recent studies examining deterrence have revealed results that are far less conclusive than the sweeping assertions made by Justice Thomas.⁵⁰

44. *Samson v. California*, 126 S. Ct. 2193, 2200 (1996) (quoting *Scott*, 524 U.S. at 365).

45. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 50 (2005).

46. *Scott*, 524 U.S. at 363 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

47. *See id.* (citing *United States v. Janis*, 428 U.S. 433, 448, 454 (1976)) (demonstrating the Court’s reluctance to extend the exclusionary rule beyond criminal trials).

48. *See id.* at 367–68 (discussing the deterrent effects of applying the exclusionary rule to parole revocation hearings as if they could be determined with precision).

49. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 672 (1970) (citing *Weeks v. United States*, 232 U.S. 383, 393 (1914)); *see also Scott*, 524 U.S. at 367 (“The likelihood that illegally obtained evidence will be excluded from trial [as opposed to parole hearings] provides deterrence against Fourth Amendment violations” (citing *United States v. Janis*, 428 U.S. 433, 448 (1976))).

50. *See GOLASH, supra* note 18, at 24 (“[T]he threat of negative consequences is often a factor

Scholars have investigated the effect of incarceration on criminal decision-making processes as a potential deterrent to crime.⁵¹ What they have found is hardly decisive: “[T]hough we have no proof of the positive deterrence of the penalty, we also have no proof of zero, or negative effectiveness.”⁵² Much like evaluating exclusion of illegally seized evidence as an independent deterrent, studies on incarceration and its viability in deterring crime are inconclusive.⁵³ Isolating and evaluating incarceration as a factor in the criminal decision-making process is impossible—“[s]ometimes the negative consequences are overwhelmed by other considerations: positive reasons for doing the action or other reasons to refrain.”⁵⁴

Attempting to measure the impact of incarceration on crime, researchers have identified factors other than imprisonment that often avert criminal behavior. They discovered “reasons of conscience and effects on reputation” are in some cases essential to the choices potential criminals may make.⁵⁵ They have also found that certain individuals “expect criminal behavior to enhance their reputations, or . . . are not deterred by pangs of conscience.”⁵⁶ Moreover, parsing out what parts of a criminal prosecution may actually deter criminal behavior is difficult. “Studies that have documented deterrent effects have often lumped together the effects of detection, apprehension, arrest, conviction, punishment, and collateral effects (such as effects on employability).”⁵⁷ Further complicating this quantitative analysis, the “[a]ctual measurement of deterrent effects is inherently difficult because it requires the measurement of events that did not occur.”⁵⁸

What the Court could have concluded with certainty in *Scott* is that deterrence does have *some* effect on the choice to perform a prohibited behavior, but Justice Thomas cannot, with any certainty, make predictions about the level of effectiveness of that deterrence. Though at least one empirical study has conclusively shown a marked deterrent effect based solely on sanctions imposed,⁵⁹ others have concluded that “measures aimed

in our behavior, but it often fails to be a decisive factor.”).

51. See *id.* at 26 (discussing studies on the effects of incarceration).

52. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE* 16 (1973) (quoting Ernest Van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 141, 147 (1969)).

53. See GOLASH, *supra* note 18, at 24–26 (discussing the problems associated with assuming that punishment has a deterrent effect).

54. *Id.* at 24.

55. *Id.* at 25.

56. *Id.*

57. *Id.* at 26.

58. *Id.* at 25.

59. See *id.* (noting that “mandatory penalties for gun offenses have been shown to decrease gun

at deterring crime have had the opposite effect.”⁶⁰ Therefore, in light of data that are scattered and contradictory, Justice Thomas cannot perform “a proper utilitarian analysis” without additional information that, to date, has proved immeasurable.⁶¹ Therefore, any value he places on the effect of deterrence is speculation and conjecture.

Over forty years ago, Justice Stewart recognized that tabulating the effect of the exclusionary rule on police misconduct is a futile task: “[E]mpirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained.”⁶² Analogizing renegade law enforcement officers to potential criminals is an apt exercise when examining the effects of deterrence. In both instances, the conduct involves a prohibited behavior and a multitude of potential factors that affect the decision-making process. Certain law enforcement personnel might consciously circumvent the Fourth Amendment because current deterrent measures are not effective, while others might ignore even the most radical of deterrents. These conclusions are, however, speculative.

Analogous to the studies compiled on incarceration as a deterrent to crime, instances of police misconduct that are avoided because of exclusion in a criminal proceeding cannot be calculated. Hence, Justice Thomas cannot conclude with certainty that the exclusionary rule generally deters police misconduct, and he certainly cannot accurately postulate that exclusion in a criminal trial prevents Fourth Amendment violations in the context of parolee searches.

homicides” (citing David McDowall, Colin Loftin & Brian Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes*, 83 J. CRIM. L. & CRIMINOLOGY 378, 378–94 (1992)).

60. *Id.* (citing Mark W. Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, in *WHAT WORKS: REDUCING REOFFENDING* 63, 74 (James McGuire ed., 1995)); *see also* Lipsey, *supra*, at 74 (noting that boot camps and other “shock incarceration” programs increased recidivism among juveniles).

61. *See* GOLASH, *supra* note 18, at 26.

For a proper utilitarian analysis of deterrence, we would have to know not simply whether punishment ever has any deterrent effects—no doubt it does—but also, at the very least, whether the crimes prevented by the threat of some specific punishment would have caused more or less pain than that caused by the imposition of that punishment on those who were not deterred.

Id.

62. *Elkins v. United States*, 364 U.S. 206, 218 (1960).

B. Searching with an Eye Toward Revocation

Justice Thomas supports his assumption that exclusion of illegally obtained evidence in criminal trials will alone serve to curb all police misconduct by noting that law enforcement generally searches “with an eye toward [criminal prosecution].”⁶³ Accordingly, when the permissible standard for a parole search required both knowledge of a valid search condition *and* a reasonable suspicion of wrongdoing, the goal of the search was clearly crime prevention. However, in *Samson v. California*, when the Court eliminated reasonable suspicion as a parole search prerequisite and required only knowledge of a valid parole condition on the part of the searching agent,⁶⁴ the goal of the parole search became less clear. No longer is the purpose of the parole search centered on “reasonable suspicion”⁶⁵ of wrongdoing. No longer is the purpose of the parole search centered on “individualized suspicion [of] . . . criminal conduct.”⁶⁶ Instead, by targeting individuals based solely on their supervised status, parole revocation is the primary purpose for the privacy invasion by law enforcement, rather than a new criminal conviction. The Court now authorizes police to search a parolee simply because he is on parole, without considering criminal wrongdoing. This difference undermines the Court’s rationale in *Scott* in that police now search with an *eye toward revocation* rather than with an *eye toward criminal prosecution*.

If law enforcement officers do not *know* that I am on parole and they search me without suspicion, they have violated my Fourth Amendment protections.⁶⁷ If law enforcement officers search me because they merely *believe* that I am on parole, they necessarily conduct an unconstitutional parole search. By removing the “reasonable suspicion” search criteria, the Court in *Samson* created an entirely separate justification for the suspicionless search of a parolee.⁶⁸ Justice Thomas’s reasoning in *Scott* falters post-*Samson* because the primary motivation for parole searches is no longer criminal prosecution. The *Scott* Court rationalized their refusal to

63. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 367 (1998).

64. *Samson v. California*, 126 S. Ct. 2193, 2202 & n.5 (2006) (citing *People v. Sanders*, 73 P.3d 496, 505–06 (Cal. 2003)).

65. *See United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that only “reasonable suspicion” is necessary to justify search of a probationer’s house).

66. *See id.* (“The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual’s privacy interest reasonable.” (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981))).

67. *See Samson*, 126 S. Ct. at 2202 n.5 (“Under California precedent, . . . an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee.” (citing *Sanders*, 73 P.3d at 505–06)).

68. *See id.* at 2199 (concluding that parolees have no legitimate expectation of privacy).

extend the exclusionary rule to parole revocation hearings partly on the basis that deterrence of police misconduct already exists in criminal trials.⁶⁹ Applying the exclusionary rule is now appropriate given that the parole landscape has changed drastically.

Additionally, in light of the inconclusive studies on deterrence, by surmising that application of the exclusionary rule in a parole revocation proceeding is unneeded, the Court assessed the value of the immeasurable.⁷⁰ Since the Court accepts the general idea that there is a causal link between the exclusionary rule and deterring Fourth Amendment violations by police, applying the rule at revocation hearings will prevent police from infringing on the scant Fourth Amendment protections afforded parolees. However, any attempt to place a value on deterrence generally as support for the proposition that exclusion is an unnecessary concept in revocation hearings calls into question the reasoning behind creating an entirely separate search criterion for parolees. Why eliminate reasonable suspicion, but still assume that law enforcement will search parolees with an eye toward criminal proceedings?

IV. EXCLUSION IN REVOCATION HEARINGS NO LONGER INCREASES PROCEDURAL COSTS

In *Scott*, Justice Thomas argues that “[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded.”⁷¹ He correctly concludes that applying the exclusionary rule to parole revocation hearings would increase the complexity of notably flexible hearings and in turn increase the cost of parole.⁷² Yet when confronted with the issue of exclusion in parole revocation hearings, the Court required searching agents to articulate a “reasonable suspicion” of wrongdoing on the part of the parolee.⁷³ *Samson* eliminated the reasonable-suspicion search requirement, leaving only the necessity for knowledge of

69. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 367–68 (1998).

70. *See supra* Part III.A.

71. *Scott*, 524 U.S. at 366 (citing *United States v. Calandra*, 414 U.S. 338, 349 (1974)); *see also* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048 (1984) (noting that “[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of” the deportation system); *Calandra*, 414 U.S. at 349 (noting that application of the exclusionary rule “would delay and disrupt grand jury proceedings” because “[s]uppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury’s primary objective”).

72. *Scott*, 524 U.S. at 364–65.

73. *See United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that the Fourth Amendment “requires no more than reasonable suspicion to conduct a search of [a] probationer’s house”).

parole status,⁷⁴ which is a much more easily verifiable standard, as demonstrating knowledge is as easy as picking up the phone.

In the age of mass communication and linked data sources, verifying information in relatively short order is commonplace. “[I]n recent years police computers have been linked to databases that include parole information, letting officers quickly tell, for instance, whether someone ticketed for littering on the subway is also on parole.”⁷⁵ The reasonableness of a suspicionless parole search now turns on the officer’s knowledge only,⁷⁶ and a bright-line, objective standard of knowledge would require minimal evidentiary sifting in today’s technological society.⁷⁷ Instead of assessing what would “warrant a man of reasonable caution in the belief”⁷⁸ that one is on parole, the Court could conduct a cursory examination of verifiable data accessible to searching agents almost instantaneously prior to conducting a search. Such an approach addresses Justice Thomas’s concerns in *Scott* and eliminates the need for “a piecemeal approach to the exclusionary rule [that] would add an additional layer of collateral litigation regarding the officer’s knowledge of the parolee’s status.”⁷⁹

V. SOCIETY PAYS LESS WHEN THE COURT PRESERVES THE FOURTH AMENDMENT

Apart from the procedural costs outlined above, in *Scott*, Justice Thomas expresses concern that excluding evidence in a parole revocation hearing would injure society by creating an unnecessary risk of crime for citizens.⁸⁰ The root of his concern takes hold of the basic premise that “[t]he State . . . has an ‘overwhelming interest’ in ensuring that a parolee complies with [supervised-release] requirements and is returned to prison if he fails to do so.”⁸¹ However, in *Scott*, Justice Thomas discusses the state’s supervisory interests as they relate to parole violations in general, without extricating technical violations from the commission of new crimes.⁸²

74. See *supra* text accompanying note 64.

75. Kit R. Roane, *Use of Police in Parole Raids Stirs Praise, but Also Concern*, N.Y. TIMES, Aug. 12, 1999, at A1.

76. See *supra* text accompanying note 64.

77. See Roane, *supra* note 75 (discussing the ease with which a police officer can determine whether an individual is on parole).

78. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)).

79. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 368 (1998).

80. See *id.* at 365 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987)) (noting that parolees are more likely to commit future crimes than other citizens).

81. *Id.* at 365 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972)).

82. *Id.* at 365–67.

Additionally, he fails to distinguish the social costs of exclusion in criminal trials from the potential costs of exclusion at revocation hearings and notably neglects to confront the reintegration problems created by allowing the use of illegally seized evidence in revocation hearings.

A. *Technical Parole Violations Do Not Put Society at Risk*

Justice Thomas goes so far as to say, “The costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future criminal offenses than are average citizens.”⁸³ Keeping in mind these substantive social costs, the Court claims that the exclusionary rule would prevent admission “of reliable, probative evidence” and “allow[] many who would otherwise be incarcerated to escape the consequences of their actions.”⁸⁴ Necessarily, parolees who avoid revocation for violations of the law harm society by committing new offenses. But how many parolees are actually returned to prison for committing a *new offense*?

Yearly, the number of new crimes committed by parolees pales in comparison to the number of new crimes committed by “average citizens.” As Justice Thomas notes in *Samson*, “68 percent of adult parolees are returned to prison, 55 percent for a parole violation, [and] 13 percent for the commission of a new felony offense.”⁸⁵ Most parole revocations are a result of technical and victimless crimes.⁸⁶ In 2001, the California Department of Justice reported 472,677 felony arrests.⁸⁷ Doing the math, parolees accounted for approximately 16,900 (13% of 130,000 parolees) new felonies.⁸⁸ This is only about 3.5% (16,900 divided by 472,677) of the

83. *Id.* at 365 (citing *Griffin*, 483 U.S. at 880).

84. *Id.* at 364 (citing *Stone v. Powell*, 428 U.S. 465, 490 (1976)). Furthermore, the government cannot protect the public from new crimes committed by anybody when the evidence needed for conviction is obtained illegally because the court will preclude it from a criminal proceeding. See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (holding that a criminal may go free because the evidence against him was illegally seized); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (holding that illegally seized evidence cannot be used in a prosecution), *overruled on other grounds by Mapp*, 367 U.S. 643.

85. *Samson v. California*, 126 S. Ct. 2193, 2200 (2006) (citing BILL LOCKYER, CAL. ATT’Y GEN., *CRIME IN CALIFORNIA* 37 (2001)).

86. See, e.g., LOCKYER, *supra* note 85, at 37 (noting that fifty-five percent of California state prison inmates will return to prison for technical parole violations). “Technical violations pertain to behavior that is not criminal, such as the failure to refrain from alcohol use or to remain employed.” JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 87 (2003).

87. CAL. DEP’T OF JUSTICE, *Arrests: Part I*, in *CRIME & DELINQUENCY IN CALIFORNIA* 1, 29 (2001), available at <http://ag.ca.gov/cjsc/publications/candd/cd01/ar1.pdf>.

88. See *Samson*, 126 S. Ct. at 2200 (“As of November 30, 2005, California had over 130,000 released parolees.”).

new felonies reported. Thus, “average citizens” committed about 96.5% of all new felonies. Yet the Court fails to explain how releasing a parolee found to have committed a technical violation based on illegally seized evidence hurts society.

As a parolee, I am subject to the restrictions of my supervision agreement.⁸⁹ One of those conditions is that I refrain from possessing or consuming alcohol.⁹⁰ For all Americans over the age of twenty-one, purchasing, possessing, and consuming alcohol are legal activities. For me, engaging in any one of those seemingly normal acts could lead to state prison. So how then does my consuming or possessing alcohol, a technical violation, harm society? Should illegally obtained evidence that I drank or bought a case of beer be admitted at my parole revocation hearing and be used to send me back to a cell? Surely, drinking, as proven by its legal accessibility, is not a behavior that alone harms society. Hence, the societal injuries caused by technical parole violations are *de minimis* and do not warrant inclusion in a quantification of social costs.

B. Exclusion at Parole Revocation Hearings Versus Exclusion in Criminal Trials

Lacking in *Scott* is any analysis of the price society pays for excluding illegally seized evidence in criminal trials, though present is a detailed description of the potential social costs of extending the exclusionary rule to revocation proceedings.⁹¹ Undoubtedly, the harm inflicted on society by excluding evidence from parole revocation hearings is far more innocuous than the harm incurred in criminal trials “where suppression of illegally obtained evidence in the prosecution’s case in chief certainly takes some toll on the State’s interest in convicting criminals in the first place.”⁹² Overall, the cost of exclusion in both criminal trials and in parole revocation hearings is at its highest level when new offenses are at issue. But there is no reason to believe that the social cost of releasing the guilty because of a constitutional violation in a criminal trial should weigh less heavily than those costs associated with excluding illegally obtained evidence in a parole revocation hearing.

Because parole revocation primarily results from technical violations

89. See PA. BD. OF PROB. & PAROLE, HANDBOOK 13 (2003), available at http://sites.state.pa.us/PA_Exec/PBPP/Handbook/parole_handbook.pdf (describing conditions of parole).

90. See *id.* at 14 (requiring parolees to “comply with all special conditions imposed by the Board and by parole supervision staff”).

91. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363–67 (1998).

92. *Id.* at 378 n.2 (Souter, J., dissenting).

that do not carry independent criminal penalties,⁹³ the social costs of applying the exclusionary rule to revocation hearings are far less than those associated with allowing new crimes to go unpunished at trial. Since the Court has customarily required exclusion in criminal proceedings, extension of the exclusionary rule to parole revocation hearings, where harm to society is far less drastic, seems a logical and beneficial application.

C. Failed Reintegration Costs Society the Most

The parole system is dysfunctional and “increasingly viewed as ineffective at reducing recidivism, incredibly expensive, and destructive of the lives of both victims and offenders.”⁹⁴ Applying the exclusionary rule to parole revocation hearings would serve to curb parole’s impracticability by furthering the reintegration goals of parole. By deterring improper police procedure that violates the Fourth Amendment, the exclusionary rule will facilitate readjustment by forcing law enforcement to observe a parolee’s minimal liberties. This dedication to constitutional protections will help those like me feel whole and will make reintegration easier. A noted scholar in the area of prisoner reentry, Joan Petersilia, concludes that “[c]urrent practices in most states fail to reflect this evidence about what works, and instead reflect political posturing designed to appear tough on crime. In the end, we all lose.”⁹⁵

Though Justice Thomas hypothesizes about the potential costs to society when the seemingly guilty are set free because officers failed to follow proper procedure,⁹⁶ he does not consider the ramifications of a state locking away those whose rights have been consciously disregarded. When the State released me and asked me to reenter society, I believed that it would respect certain fundamental aspects of my citizenship. I believed that I would be free from harassment and targeted hatred. But, since *Samson*, the Court has allowed for sweeping state authority in the area of supervision⁹⁷ and made the prospect of reintegration more difficult. I now fear the embarrassment of a parole search at my job, at dinner with a colleague, or at my place of worship. None of these locations is “off-limits,” and frequently the searches—conducted in such places based on a parolee’s status alone—are not predicated on verifiable information.

93. See *supra* Part V.A.

94. PETERSILIA, *supra* note 86, at 12.

95. *Id.* at vi.

96. *Scott*, 524 U.S. at 364–65.

97. See *Samson v. California*, 126 S. Ct. 2193, 2199–2201 (2006) (discussing the extent of a state’s power to limit a parolee’s freedom).

This aspect of supervision is troubling to those of us who struggle to readjust. Many of us carry the behaviors learned on the inside to the street. We continue to perpetuate the “institutionalization” that comes with imprisonment because we are treated as if we are still incarcerated.⁹⁸ In prison, I had no Fourth Amendment protections from unwarranted intrusions into my privacy.⁹⁹ By making supervision analogous to prison, as the dissent in *Samson* points out, the Court has created inmates on parole.¹⁰⁰ Simply put, the Court considers us deviants and removes our rights, and, therefore, many of us act as though we are still behind that wall, fighting to survive with no constitutional protections.

Some courts have addressed this phenomenon, noting that “the rehabilitative goals of probation are not apt to be furthered by either the threat or the practice of unauthorized warrantless searches.”¹⁰¹ Therefore, allowing police to search on a hunch and then admitting the evidence they obtained without knowledge of a valid search condition creates parolees that cannot adjust and who analogize their lives on the street to those they led in prison. The benefit of applying the exclusionary rule to parole revocation hearings lies in breaking of the cycle of recidivism that plagues criminal justice.¹⁰² Parolees who can adjust, reintegrate, and lead positive lives do not reenter the system. When we reintegrate, society is not forced to pay for our food, our lodging, or our schooling. Successful integrators ultimately cost less than those who walk the streets in fear of being targeted for harassment.¹⁰³ Facilitating reintegration by applying the exclusionary rule to parole revocation hearings will ultimately benefit society to a greater degree than failing to punish the constitutional violations committed by law enforcement and facilitating the institutionalization of hundreds of thousands of parolees nationwide.¹⁰⁴

98. “The term ‘institutionalization’ is used to describe the process by which inmates are shaped and transformed by the institutional environments in which they live.” HANEY, *supra* note 19, at 5.

99. See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that the prohibition against unreasonable searches does not apply to inmates).

100. See *Samson*, 126 S. Ct. at 2205 (Stevens, J., dissenting) (“[I]t is simply not true that a parolee’s status, vis-à-vis either the State or the Constitution, is tantamount to that of a prisoner.”).

101. *United States v. Rea*, 678 F.2d 382, 390 (2d Cir. 1982).

102. See TRAVIS, *supra* note 45, at 51 (“[T]he deprivation of liberty for months due to a ‘technical’ reason, such as a failed drug test or missed curfew, could result in increased cynicism toward the rule of law, an outcome that should be included in calculating costs and benefits.”).

103. See Press Release, U. S. Courts Newsroom, Incarceration and Supervision Costs for Fiscal Year 2006 (May 3, 2007), <http://www.uscourts.gov/newsroom/incarcerationcosts.html> (“In fiscal year 2006, it cost up to \$24,443.08 to keep a federal inmate incarcerated for 12 months, and \$3,535.18 for a federal offender to be released under the supervision of a probation officer for the same period.”).

104. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Probation and Parole Statistics, <http://www.ojp.usdoj.gov/bjs/pandp.htm> (last visited Nov. 3, 2007) (stating that as of December 31, 2005, 784,400 adult men and women were supervised as parolees).

CONCLUSION

The State initially created parole to help reintegrate those, like me, whom they release prior to the expiration of their sentence. Along those lines, the prospect of allowing inmates to reenter society requires that close supervision be an integral part of parole. The unpopular political decision to release offenders early comes with the practical burden of protecting citizens.

The current nature of parole and prison exacerbates this burden. Parole is now a necessary tool that the criminal justice system uses to hold together an overcrowded and ineffective penal system. Knowing that parole is indispensable, the Court has lost sight of the readjustment benefits of parole and instead focused on protecting society in the name of skewed statistics and inflated recidivism rates. It has granted a *carte blanche* police power and must check this authority if the long-term goal of rehabilitation is to be met.

By applying the exclusionary rule to parole revocation hearings in cases of egregious Fourth Amendment violations, the Court can curb the detrimental effects suspicionless searches have on the reintegration prospects of parolees. Exclusion of illegally obtained evidence at parole revocation hearings will serve as a deterrent for members of law enforcement who will assuredly use suspicionless searches to target those of us on parole for bigoted and biased objectives. Additionally, a verifiable evidentiary standard determining the existence of knowledge does not extend parole proceedings and does not alter the flexible nature of a revocation hearing.

To exclude illegally obtained evidence from parole revocation hearings is to force law enforcement to observe the Constitution in all instances or pay the price of exclusion. I would like to walk the street knowing that law enforcement is compelled to abide by the document that has given democracy life and that protects everyone, not just those who exist without ever faltering. To avoid the practical injustices I recognized once released, the Court must reanalyze the application of the exclusionary rule to parole revocation hearings. Authorizing suspicionless searches without an exclusionary safeguard transforms parole into a system of supervision void of consequence for those who further unfounded Orwellian tactics.