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SEARCH AND SEIZURE RIGHTS OF PAROLEES AND PROBATIONERS IN THE NINTH CIRCUIT

I. INTRODUCTION

Two recent companion cases in the Ninth Circuit have shed new light on the developing doctrine of the rights of parolees and probationers.[1] Both cases involved the methods and fruits of search and seizure; both decisions analyzed the purposes of the parole and probation systems and applied these purposes in assessing the validity of specific searches involved. In this process, there are the opposing considerations of the constitutionally protected individual's right to privacy and the practical needs of the parole and probation systems. A tentative balance has been reached[2] but the weighing process is continuing. Not all judges in the Ninth Circuit are satisfied that a proper judicial balance has been achieved.[3]

II. FOURTH AMENDMENT SEARCH AND SEIZURE PROTECTIONS

"The Fourth Amendment[4] declares that the right to be secure against unreasonable searches shall not be violated . . . . General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them."[5] This protection does not however, reach all alike—the protection afforded parolees and probationers is different from that applicable to ordinary citizens.

Searches of ordinary citizens in the United States must be made on reasonable grounds based on probable cause. "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[6]

Courts prefer searches to be preceded by the obtaining of search warrants, but the great bulk of searches are made without them.[7] In such cases, reasonable grounds exist both for belief that a search will produce evidence or

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1. Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), cert. denied, 44 U.S.L.W. 3229 (U.S. Oct. 6, 1975); United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975).

2. See Note, Extending Search-and-Seizure Protection to Parolees in California, 22 Stan. L. Rev. 129 (1969) [hereinafter cited as Stanford Note].

3. In Latta, five judges joined in the majority opinion, three and two judges joined in two concurring opinions, and three judges dissented. In Consuelo-Gonzalez, four judges joined in the majority, two concurred, three concurred specially, three joined in dissent and one other judge dissented separately.

4. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

5. Marron v. United States, 275 U.S. 192, 195 (1927) (footnote added).

6. Draper v. United States, 358 U.S. 307, 313 (1959).

7. Lockhart, Kamisar, & Choper, Constitutional Law 610 (4th ed. 1975).

prevent harm to a law enforcement officer and for belief that the search would be ineffective if delayed by the obtaining of a warrant.[8] Such reasonable grounds were found where a probability of loss of evidence was due to natural bodily functions[9] and "where it [was] not practicable to secure a warrant because the vehicle [on the highway could] be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[10] This reasoning was extended to include the warrantless search of an automobile after its occupants were arrested and the car driven to the police station; where probable cause to search existed, the Court saw "no [constitutional] difference between [immobilizing] a car before presenting the probable cause issue to a magistrate and [conducting] an immediate search without a warrant. . . . [E]ither course is reasonable under the Fourth Amendment."[11]

Furthermore, the Court has found "ample justification . . . for a search of [an] arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[12] However, no such justification exists for routinely searching rooms other than that in which an arrest occurs.[13]

Probable cause for searches has never been necessary where the person searched has given his consent. When no valid consent exists and there is no circumstance requiring an immediate search, search of premises must be predicated on a warrant based on probable cause or reasonable grounds.[14] Thus, "[b]elief, however well founded, that an article sought is concealed in a

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8. The role of warrants in the reasonability of searches is explored in United States v. Rabinowitz, 339 U.S. 56 (1950): "It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. It is not disputed that there may be reasonable searches, incident to arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment." Id. at 65-66 (emphasis deleted).

9. Schmerber v. California, 384 U.S. 757 (1966) (withdrawal of blood for alcohol content test).

10. Carroll v. United States, 267 U.S. 132, 153 (1925).

11. Chambers v. Maroney, 399 U.S. 42, 52 (1970). The Court has allowed evidence to be admitted which was discovered when police were securing an impounded car. Harris v. United States, 390 U.S. 234 (1968). The Court has also upheld a warrantless search of a disabled car which the police had towed to a private garage. Cady v. Dombrowski, 413 U.S. 433 (1973).

12. Chimel v. California, 395 U.S. 752, 763 (1969). From 1950 to 1969, the rule was that a warrantless search "incident to a lawful arrest" could include the entire area in the arrestee's general, not immediate, possession or control. United States v. Rabinowitz, 339 U.S. 56 (1950).

13. Chimel v. California, 395 U.S. 752, 766 (1969).

14. Fed. R. Crim. P. 41.

dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."[15] Courts stress the necessity of "reasonable grounds" and "probable cause" being determined by "a neutral and detached magistrate."[16] This impartiality requirement is shown in two recent contrasting cases. In the first,[17] the Court concluded that the state Attorney General, who issued search warrants, was not a neutral magistrate, especially since he was also chief prosecutor in the case in question. In the second,[18] the Court found that clerks of a municipal court were sufficiently removed from prosecutor and police to be qualified as neutral magistrates to issue arrest warrants for violation of city ordinances, since they worked within the judicial branch and were subject to the supervision of a judge.[19]

The probable cause for a warrant need not be equal to evidence sufficient to prove guilt in a criminal case.[20] It may be based on hearsay, but then "what is necessary . . . is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information."[21]

The fourth amendment protections against unreasonable search and seizure, as applied to ordinary citizens, are broad in scope, with a long history of developing case law. The fourth amendment protection as applied to parolees and probationers is not nearly so broad; the developing case law in this area will now be explored.

III. The Fourth Amendment and the "Traditional View"

The court in *Latta v. Fitzharris,*[22] citing the leading case of *People v. Hernandez,*[23] noted that under the traditional view of the fourth amendment,

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15. Agnello v. United States, 269 U.S. 20, 33 (1925).

16. Johnson v. United States, 333 U.S. 10 (1948). "[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. . . ." United States v. Lefkowitz, 285 U.S. 452, 464 (1931), quoted in Johnson v. United States, 233 U.S. 10, 14 n.3 (1948).

17. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

18. Shadwick v. City of Tampa, 407 U.S. 345 (1972).

19. "The assumption of appellate courts that greater protection for the individual is afforded by the warrant procedure is unsupported by studies indicating that typically the decision to issue a warrant is really made by the prosecutor, the judicial officer routinely signing the warrant without any independent inquiry." Lockhart, Kamisar, & Choper, Constitutional Law 605, n.b (4th ed. 1975).

20. Jones v. United States, 362 U.S. 257, 269-70 (1960); Draper v. United States, 358 U.S. 307, 311-12 (1959); Brinegar v. United States, 338 U.S. 160, 173 (1949).

21. Spinelli v. United States, 393 U.S. 410, 425 (1969) (White, J., concurring).

22. 521 F.2d 246 (9th Cir.), cert. denied, 44 U.S.L.W. 3229 (U.S. Oct. 6, 1975).

23. 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (3d Dist. 1964), cert. denied, 381 U.S. 953 (1965).

"parole officers have long enjoyed broad powers to search parolees under their supervision."[24] In *Hernandez*, the court held that the requirement of reasonable or probable cause was not applicable to the search of a parolee or his automobile by his parole officer who had acted on information received from an informer and had obtained the help of narcotics agents.[25]

Hernandez was the culmination of a series of cases in California. *People v. Cahan*[26] established the rule that evidence obtained in violation of the fourth amendment is inadmissible in criminal trials.[27] Four subsequent decisions involving parolees' rights increasingly restricted the rule set down in *Cahan*. In *People v. Denne*[28] and two similar cases,[29] parole officers found narcotics while searching for parole violations. The search was a by-product of the parole officer's prior determination, upon probable cause, to apprehend the parolee. The *Denne* court assumed *arguendo* that fourth amendment rights could be argued by a parolee[30] but, on the facts of the case,[31] held that a warrantless search by a parole officer was reasonable because of the special relationship between the parolee and the parole officer.[32]

People v. Triche[33] further narrowed the fourth amendment's applicability to parolees.[34] In *Triche*, the parole officer had gone to the defendant's

This case was criticized for its "traditional view." Stanford Note, supra n.2, at 132-37. The continuing importance of this view, despite subsequent less traditional cases, is evidenced by the Ninth Circuit's reference to it, ten years later, as "the leading case." 229 Cal. App. 2d at 143, 40 Cal. Rptr. at 101-02.

24. 521 F.2d at 248.

25. 229 Cal. App. 2d at 143, 40 Cal. Rptr. at 104-05.

26. 44 Cal. 2d 434, 282 P.2d 905 (1955).

27. Defendant Cahan was found guilty of conspiring to engage in bookmaking and related offenses in violation of section 337a of the California Penal Code. Judge Traynor found that evidence obtained from microphones surreptitiously placed by police officers on premises occupied by defendant and evidence obtained by numerous forcible entries and seizures without search warrants were obtained "in flagrant violation of the United States Constitution, 4th and 14th Amendments, the California Constitution, Art. I, § 19, and state and federal statutes." Id. at 436, 282 P.2d at 906.

28. 141 Cal. App. 2d 499, 297 P.2d 451 (2d Dist. 1956).

29. People v. Contreras, 154 Cal. App. 2d 321, 315 P.2d 916 (3d Dist. 1957); People v. Robarge, 151 Cal. App. 2d 660, 312 P.2d 70 (2d Dist. 1957).

30. 141 Cal. App. 2d at 506, 297 P.2d at 455.

31. Denne was released on parole subject, in part, to his not possessing, using or selling any narcotics in violation of the law, and his avoiding former inmates of penal institutions and individuals of bad reputation. The parole officer received information that the defendant had been associating with former inmates who were dealing in narcotics. With the apartment manager's permission, the parole agent climbed through a window of the defendant's apartment and the subsequent search revealed a package of marijuana. Id. at 504-05, 297 P.2d at 454-55. The District Court of Appeals held that since the parole officer had knowledge that the defendant was associating with a felon currently engaged as a narcotics peddler, search by the parole officer of the parolee's apartment in his absence was not unreasonable. Id. at 509-10, 297 P.2d at 457-58.

32. This "special relationship" is crucial to both the Latta and Consuelo-Gonzalez cases. See notes 79-82 & 115-18 infra and accompanying text.

33. 148 Cal. App. 2d 198, 306 P.2d 616 (1st Dist. 1957).

34. It has been said that Triche makes the fourth amendment inapplicable to parolees.

premises in the course of surveillance and a warrantless search revealed narcotics. These narcotics were later admitted as evidence because the search was found to be reasonable due to the parole officer's special supervisory and visitation powers.[35]

All four post-*Cahan* cases assumed that there was a requirement of some kind of probable cause, but all four found probable cause within the parolee-parole officer relationship.[36] The *Hernandez* court, though it denied full fourth amendment rights to parolees, did not abrogate all such rights:

> We recognize but do not accept a dictum in *People v. Goss* . . . which describes the *Denne* case as denying parolees [all] constitutional immunity against unreasonable searches and seizures. There is a marked legal distinction between arbitrary search[37] by the parole authorities whom the law . . . places in control of the parolee and one by general law enforcement officers.[38]

In *Hernandez*, the court viewed the parolee as more akin to a prisoner than to an ordinary citizen: "Although a parolee is not a prison inmate in the physical sense, he is constructively a prisoner under legal custody of the State Department of Corrections and may be returned to the prison walls without notice and hearing."[39] The court here did not deny parolees all of their constitutional rights, relying on its interpretation of the *Denne* decision.[40] The court explicitly confronted both the contract[41] and the act of grace theories of

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Comment, Parole: A Critique of Its Legal Foundations and Conditions, 38 N.Y.U.L. Rev. 702, 731 (1963) [hereinafter cited as Critique].

35. 148 Cal. App. 2d at 202, 306 P.2d at 618. These powers are part of the "special relationship."

36. See discussion in Hernandez, 229 Cal. App. 2d at 145-46, 40 Cal. Rptr. at 102. In Robargo and Contreras, the special relationship had led to the parole officer's determination of probable cause for a search. Thus the special relationship itself was not necessary as an independent cause.

37. The arbitrariness of a parole officer's search apparently allowable under Hernandez was changed in Latta to a minimum requirement of reasonableness based on the parole officer's hunch. 521 F.2d at 251-52. But see Judge Choy's concurring opinion where more than a mere hunch—and clearly not mere arbitrariness—is required. Id. at 253-54 (Choy, J., concurring).

38. 229 Cal. App. 2d at 147 n.2, 40 Cal. Rptr. at 102 n.2 (footnote added).

39. Id. at 149, 40 Cal. Rptr. at 103. In this context, the court quotes the Denne opinion: "The parolee, although physically outside the walls, is still a prisoner; his apprehension, although outwardly resembling arrest, is simply a return to physical custody." Id. See 521 F.2d at 273-74 (Wright, J., dissenting).

40. See note 28 supra and accompanying text.

41. The essence of the contract theory is that the parolee agrees to give up certain rights in exchange, for his release from actual custody. See 521 F.2d at 274. (Wright, J., dissenting); Critique, supra note 34, at 703. The idea originated from the custom of having a prisoner sign a consent form before parole. The inequality of bargaining power between the parolee and the state, which would negate any such contract, is discussed in Hahn v. Burke, 430 F.2d 100, 104 (7th Cir. 1970), cert. denied, 402 U.S 933 (1971). See Comment, Judicial Review of Probation Conditions, 67 Colum. L. Rev. 181, 191-92 (1967) [hereinafter cited as Judicial Review]; Comment, The Parole System, 120 U. Pa. L. Rev. 282, 287 (1971) [hereinafter cited as The Parole System]; Note, The Impossible Dream?: Due Process Guarantees for California

parole,[42] seeing the latter as making constitutional rights dependent upon a kind of forced " 'contract' in which one side has all the bargaining power."[43] Rejecting such a view, the court said that

> the state may not attach unconstitutional conditions to the grant of state privileges. . . . The problem should be approached by considering what constitutional guaranties the individual may claim as a paroled prisoner of the state, not what contitutional liberties he surrendered as a condition of parole.[44]

The *Latta* court quoted from *Hernandez* to show the traditional view of parolees' rights.[45] However, there is also in *Hernandez* a condemnation of the

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Parolees and Probationers, 25 Hastings L.J. 602, 606 (1974) [hereinafter cited as Hastings Note].

42. According to this theory, the parolee is not physically in jail because of the "grace" or benevolence of the state. Therefore the parolee has no legally protected right to remain at liberty. In the words of Justice Cardozo: "[W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935) (dictum). A similar description is in Ughbanks v. Armstrong, 208 U.S. 481, 487-88 (1908). See People v. Chinnici, 51 Misc. 2d 570, 273 N.Y.S.2d 538, 540 (Nassau County Ct. 1966); White, The Fourth Amendment Rights of Parolees and Probationers, 31 U. Pitt. L. Rev. 167 (1969) [hereinafter cited as White]; Judicial Review, supra note 41, at 200; The Parole System, supra note 41, at 286-87; Hastings Note, supra note 41, at 604-06; 39 Mo. L. Rev. 640, 641 n.9 (1974) [hereinafter cited as Procedural Due Process]. The growth and decline of the right-privilege distinction is discussed in Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

The Hernandez and Denne courts saw the parolee through the "constructive custody" theory. The Triche court also described the parolees as in a prison without bars. Judge Hufstedler of the Ninth Circuit added further dimension to the theory: " 'A parolee does not stand discharged from prison, but merely serves the remainder of his sentence outside rather than within the prison walls. He is at all times in custodia legis and his physical apprehension by a parole officer is not arrest.' " People v. Limon, 255 Cal. App. 2d 321, 63 Cal. Rptr. 91, 93 (2d Dist. 1967), cert. denied, 393 U.S. 866 (1968), quoting People v. Quilon, 245 Cal. App. 2d 624, 627, 54 Cal. Rptr. 294, 297 (1st Dist. 1966). A main criticism of the theory is that protection against unreasonable searches is a fundamental constitutional right. White, supra, at 178-81, referring to Mapp v. Ohio, 367 U.S. 643 (1961) and Wolf v. Colorado, 338 U.S. 25 (1949). Also, parolees are not equivalent to prisoners because they do not require the same degree of control. White, supra, at 180. The custody theory was substantially destroyed in Specht v. Patterson, 386 U.S. 605 (1967). The court in Latta disagreed with the theory. See text accompanying note 58 infra. See also Hastings Note, supra note 41, at 607-08; The Parole System, supra note 41, at 286-95.

43. 229 Cal. App. 2d at 148, 40 Cal. Rptr. at 103.

44. Id.

45. "For the purpose of maintaining the restraints and social safeguards accompanying the parolee's status, the authorities may subject him, his home and his effects to such constant or occasional inspection and search as may seem advisable to them. . . . He may not assert [fourth amendment] guaranties against the correctional authorities who supervise him on parole. . . . If this constitutional fact strips him of constitutional protection against invasions of privacy by his parole officer, the answer is that he has at least as much protection as he had within prison walls. He did not possess this guaranty in prison and it was not restored to him when the gates of parole opened." 521 F.2d at 248, quoting 229 Cal. App. 2d at 150, 40 Cal. Rptr. at 104.

abrogation of parolees' rights and the germ of a less severe interpretation of those rights.[46] The *Hernandez* court also limited its holding by concluding that the requirement of reasonable or probable cause does not apply to search of a paroled prisoner when conducted by his parole supervisor—other law enforcement officials are not included in this exception.[47]

People v. Rosales[48] granted fourth amendment protection to parolees by requiring law enforcement officers to announce their purpose before entering a parolee's home to conduct a search, in accordance with section 844 of the California Penal Code.[49] The Supreme Court subsequently held that due process had to be met when parole was revoked,[50] requiring "basic fairness" in the treatment of parolees.[51] However, full fourth amendment protections are still somewhat limited when a court is confronted with a search of a parolee or a probationer by his parole or probation officer, as evidenced by two recent Ninth Circuit decisions.

IV. THE FIRST DECISION: *Latta v. Fitzharris*[52]

In April 1966, Latta was on parole from imprisonment under a California armed robbery conviction. His parole officer arrested him at the house of an acquaintance for violating the conditions of his parole.[53] When arrested, Latta was holding a pipe containing marijuana. About six hours after the arrest, Latta's parole officer and two local police officers went to Latta's home, about thirty miles away. No one was present at the house, but Latta's stepdaughter soon arrived and admitted them. They identified themselves,

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46. The Latta court, while following such implications, did not acknowlege them.

47. 229 Cal. App. 2d at 150, 40 Cal. Rptr. at 104. In addition, Hernandez is limited to parolees' rights, separating them from probationers' rights.

48. 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (1968).

49. One commentator thought Rosales introduced the possibility of variable standards for searches of parolees. Stanford Note, supra note 2, at 140. He foresaw normal probable cause for general parole searches and seizures, and "variable probable cause" for exceptional cases. In cases where parole/probation administration functions would be served by allowing invasions of privacy, a variable probable cause concept might supply the necessary constitutional justification. Id. at 137-40. The primary problem in using this approach is the determination of when circumstances are so exceptional as to allow less-than-strict interpretation of the fourth amendment's probable cause requirement. The Supreme Court and the Ninth Circuit have not followed this concept.

Others felt that Camara v. Municipal Court, 387 U.S. 523 (1967), would lead to decisions requiring reasonableness and a warrant for searches by parole officers. See generally White, supra note 42, at 193-97. The author felt that the parole officer could learn enough about his parolee without a search; if he needed more information, he could get a warrant. Id. This prognosis has also proven inaccurate.

50. Morrissey v. Brewer, 408 U.S. 471 (1972). See notes 63-65 infra and accompanying text.

51. 408 U.S. at 484.

52. 521 F.2d 246 (9th Cir.), cert. denied, 44 U.S.L.W. 3229 (U.S. Oct. 6, 1975).

53. Id. at 247. Whether or not the violations of parole which were the cause for this arrest coincided with the subsequent drug law violations is not clear from the opinion. Since no question was raised as to the validity of the arrest, the question of probable cause for the arrest did not arise. All discussion centered on the subsequent search.

told her that they were there to conduct a search and that a warrant was unnecessary. The search produced a four-and-one-half pound brick of marijuana, which became the basis of Latta's later state conviction for possession of marijuana with intent to distribute.[54]

Latta made two arguments on appeal: "first, that his parole officer's warrantless search of his home violated the Fourth Amendment . . . and second, assuming that the search was valid, that the evidence that was seized could only be used as a basis for revoking his parole."[55] The Ninth Circuit held that, once the search is decided to be lawful, the second of Latta's contentions is without merit.[56] The court however, went into great detail in analyzing the fourth amendment issue.

A. *Limitations on the Traditional View*

The *Latta* court specificially limited the traditional view as espoused in *Hernandez,* and followed prior decisions which held that parolees are entitled to fourth amendment protection in certain situations.[57] The court impliedly agreed with those who have criticized the notion that the status of parolees is legally comparable to that of prisoners in actual custody, treating this aspect of *Hernandez* as "logically inconsistent and ignoring reality."[58] In expanding the rights of parolees, the court favorably cited the Supreme Court's statement that parole officers do not "have unfettered discretion in dealing with parolees . . . ."[59] Following this view, *Latta* held that fourth amendment rights are applicable to parolees, and that "such searches [of parolees] may be

54. Latta appealed from an order of the district court denying his application for a writ of habeas corpus. Id. For a discussion of the development of the exclusionary rule and the writ of habeas corpus, see Note, The Threatened Future of State Prisoners' Fourth Amendment Rights Exercised Through Federal Habeas Corpus, 9 New England L. Rev. 433 (1974).

55. 521 F.2d at 248.

56. Id. at 252-53. The court referred to its previous ruling in United States v. Davis, 482 F.2d 893, 909 n.44 (9th Cir. 1973). However, California courts have held that an "unconstitutional seizure places the articles [of evidence] permanently beyond the pale of admissibility." People v. Coffman, 2 Cal. App. 3d 681, 689, 82 Cal. Rptr. 782, 787 (3d Dist. 1969).

57. 521 F.2d at 248.

58. Id. For criticisms of this notion, see White, supra note 42, at 178-81; The Parole System, supra note 41, at 289-96; Critique, supra note 34, at 704-08.

59. 521 F.2d at 248, referring to Morrissey v. Brewer, 408 U.S. 471, 477-84 (1972). Morrissey's parole was revoked only on the recommendation of his parole officer—there was no hearing. Writing for the Court, Chief Justice Burger disregarded theories which hinge on fine verbal distinctions but rather saw procedural protections as dependent on the extent of loss an individual might suffer. Id. at 481. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' " Id., quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). The Morrissey Court thus looked to the factual situation to determine the extent to which constitutional rights may be altered.

held illegal and the evidence obtained therefrom suppressed unless they pass muster under the Fourth Amendment test of reasonableness."[60]

B. *The Standard of Reasonableness*

It was apparent that the search in *Latta* was not justifiable on the basis of the traditional standard of probable cause, but the court emphasized that the search was not therefore invalid: "A California parolee is in a different position from that of the ordinary citizen. He is still serving his sentence. He remains under the ultimate control of the Adult Authority and the immediate control of his parole officer. His parole is subject to revocation for reasons that would not permit the arrest or incarceration of other persons."[61] The restrictions on parole are directly related to its purposes;[62] the *Latta* court analyzed the reasonableness of the search restriction with a view to these purposes.[63] Such analysis is consistent with *Morrissey v. Brewer*[64] where the Supreme Court held that the purpose of parole "is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison."[65] The *Latta* court did not consider the financial cost to society, but did discuss briefly the parole officer's duty to protect society from recidivist parolees.[66] It focused instead on rehabilitation: "To the extent that there is a 'law enforcement' emphasis, it is to deter the parolee from returning to a life of crime."[67] The *Latta* majority adopted the constructive approach of *Morrissey,* holding that the "overriding goal of the parole system is to give the parolee a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls."[68]

To satisfy these goals, the court then proceeded to balance two conflicting interests. First, it found that the parole authorities have a

> special and unique interest in invading the privacy of parolees under their supervision. In order to fulfill his dual responsibilities for helping the parolee to reintegrate into society and evaluating his progress, and for preventing possible further antisocial or criminal conduct by the parolee, it is essential that the parole officer have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other persons, and what he is doing, both at home and outside it.[69]

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60. 521 F.2d at 248-49.

61. Id. at 249.

62. Conditions must be shaped to correctional and rehabilitative needs both because such is constitutionally required and because other conditions are dysfunctional to the rehabilitative goals of parole. The Parole System, supra note 41, at 376.

63. 521 F.2d at 249-50.

64. 408 U.S. 471 (1972).

65. Id. at 477.

66. 521 F.2d at 249.

67. Id.

68. Id.

69. Id. While Latta can be considered a "modernizing" of Hernandez, the incorporation

The second interest considered is the parolee's right to protect his personal privacy.[70] The court again followed *Morrissey*:

"The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison."[71]

In the case of parolee Latta, the court felt that one of the conditions of parole necessary for the effective operation of the system was the subjection of Latta and his home to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties.[72] The court was careful, however, to say that such searches are subject to abuse which could defeat the purposes of parole.[73] The principal protection against abuse[74] is the parole officer's training. He should act as a guide and helpmate—not as a policeman.[75]

C. *The Warrant Requirement— The Parallel of Administrative Searches*

The court in *Latta* followed California precedent holding that a parole officer need not obtain a warrant before searching his parolee or his parolee's home.[76] It stated that search of a parolee has characteristics of an ordinary

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of the prevention of recidivism as a goal of parole is, apparently, more "traditional" than the Morrissey view.

70. See Note, Observations on the Administration of Parole, 79 Yale L.J. 698, 700 (1970) [hereinafter cited as Yale Note].

71. 521 F.2d at 250, quoting 408 U.S. at 482.

72. Id. The majority considered even a "hunch" as a possibly reasonable basis. On this point Justices Choy and Merrill dissented. See text accompanying note 124 infra.

73. 521 F.2d at 252. A similar warning is found in Morrissey: "Society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S. at 484.

74. A further protection, if needed, might be afforded by a change in evidentiary rules. See United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

75. This is the distinction downplayed by the Consuelo-Gonzalez dissent. 521 F.2d at 268-76 (Wright, J., dissenting).

76. 521 F.2d at 250, citing People v. Taylor, 266 Cal. App. 2d 14, 71 Cal. Rptr. 886 (2d Dist. 1968) and People v. Limon, 255 Cal. App. 2d 519, 63 Cal. Rptr. 91 (2d Dist.), cert. denied, 393 U.S. 866 (1968). In Taylor, Judge Hufstedler found that there is no legal barrier to the parole officer's unrestricted search of his parolee's residence, except under section 844 of the California Penal Code: "[t]o make an arrest . . . a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." 266 Cal. App. 2d at 17 n.3, 71 Cal. Rptr. at 887 n.3. The officer had knocked on a door which was already ajar and which further opened; the officers then entered. Section 844 thus was not violated. Id. at 17, 71 Cal. Rptr. at 888. Contrast People v. Olivas, 266 Cal. App. 2d 380, 72 Cal. Rptr. 109 (2d Dist. 1968).

search (fourth amendment rights require some reasonableness) and of an administrative search (warrant sometimes required),[77] but held that searches of parolees "must be governed by unique, separate, and distinct rules."[78] The basis of such rules is the special relationship between the parole officer and parolee.[79] Because of the closeness of such a relationship, if a warrant were required, any suspicion of a parole officer would be grounds for a magistrate to issue a warrant. The magistrate would always issue a warrant at a parole officer's request and the warrant would be reduced to a "paper tiger."[80] Yet, harassment and intimidation are still not allowed.[81] Complete searches of parolees and their homes are permitted only for good cause. Further, parole officers are not allowed to act as police surrogates.[82] Vigilance in protecting

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In Limon, Judge Hufstedler also found that search and seizure of heroin, made by a parole officer and police officers when they broke into the defendant's room to arrest him for a parole violation, was legal where evidence disclosed that the defendant saw his parole officer accompanied by a police officer when the defendant's door was opened by the defendant's companion. Since the defendant knew both the identity and the purpose of the callers, there was no violation of section 844. The court stated: "[The parole officer] was entitled to search Limon and his apartment without a search warrant, without Limon's consent and without probable cause." 255 Cal. App. 2d at 322, 63 Cal. Rptr. at 93. Hernandez had eliminated the need for probable cause because of the parole officer-parolee relationship. See text accompanying note 47 supra. In searches of the parolee by the parole officer, "[t]he decisive question . . . is not whether the parole officer had probable cause for an arrest and incidental search, but whether his paroled prisoner could invoke constitutional barriers against the search." People v. Hernandez, 229 Cal. App. 2d 143, 148, 40 Cal. Rptr. 100, 103 (3d Dist. 1964), cert. denied, 381 U.S. 953 (1965). While probable cause is not required in a parole officer's search of his parolee, the parolee still "may be able to assert constitutional guaranties and safeguards against arbitrary or oppressive official action." Id. at 149, 40 Cal. Rptr. at 104.

77. See notes 90-101 infra and accompanying text.

78. 521 F.2d at 251.

79. See note 36 supra and accompanying text.

80. 521 F.2d at 252. For a discussion of analogous "rubber stamp" warrants in administrative cases, see Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

81. This principle was asserted in The Parole System, supra note 41, at 327.

82. The court in Latta distinguished those cases "in which the parole officer was a stalking horse for the police." 521 F.2d at 247. In United States v. Hallman, 365 F.2d 289 (3d Cir. 1966), a warrant for arrest came after police acquired evidence against the defendant and elicited from the parole officer a request that they bring the defendant to his office without arresting him. The court found that "[t]he veil afforded by Provenzano's position as Hallman's parole officer cannot here serve as a shield against what was plainly the action of the arresting officers to effect an illegal search." Id. at 292.

In People v. Coffman, 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (3d Dist. 1969), a search of the defendant's house was held illegal when the defendant was in jail and the police had ample time and opportunity to secure a search warrant. "They chose the parole agent rather than a search warrant as their ticket of entry to the [defendant's] apartment." Id. at 689, 82 Cal. Rptr. at 786. The court rejected the view "that a parole officer's physical presence or his delegation of authority to the police validates the search without regard to its instigating source." Id. at 688, 82 Cal. Rptr. at 786. See Chimel v. California, 395 U.S. 752 (1969); Warden v. Hayden, 387 U.S. 294 (1967); People v. Sandoval, 65 Cal. 2d 303, 419 P.2d 187, 54 Cal. Rptr. 123 (1966), cert. denied, 386 U.S. 948 (1967); People v. Gallegos, 62 Cal. 2d 176, 397 P.2d 174, 41 Cal. Rptr. 590 (1964);

state parolees from harassing searches is made the responsibility of parole authorities and the California courts[83]—not the federal courts.

While not relying on federal administrative search cases, and referring to them as providing only "raw matter" for consideration of parolee searches, the Ninth Circuit nevertheless stressed the consistency of its parolee search decision with previous Supreme Court administrative warrantless search cases. In *Wyman v. James*[84] a warrant was not required for a home visit by a welfare worker. The *Latta* court quoted from *Wyman* to show that in certain situations (*e.g.*, checking of home environment) probable cause cannot be found, yet visitation is necessary for the welfare of the one being searched and for society in general. "In this setting the warrant argument is out of place."[85] Actual searches—and warrant requirements—were involved in two earlier Supreme Court cases. In *Camara v. Municipal Court*[86] it was held that a building owner had the right to insist that a building code inspector obtain a search warrant[87] and in *See v. City of Seattle*,[88] a warrant was required for unconsented administrative entry and inspection of private commercial premises.[89]

Yet, in 1970 the Supreme Court in *Colonnade Catering Corp. v. United States*[90] held that a warrantless non-forcible entry would be lawful to check for illegal liquor on a commercial premise.[91] Further, in *United States v. Biswell*,[92] it was held that the warrantless but non-forcible search of a locked storeroom during business hours, as part of an inspection procedure au-

People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605, cert. denied, 379 U.S. 866 (1964); People v. Thompson, 252 Cal. App. 2d 76, 60 Cal. Rptr. 203 (1st Dist. 1967), cert. denied, 392 U.S. 930 (1968). For analysis of how a Hernandez-type search can be distorted, see The Parole System, supra note 41, at 328-29.

83. For a discussion of the value of judicial responsibility in the granting of parole, see Fairbanks, Parole—A Function of the Judiciary?, 27 Okla. L. Rev. 634, 651-59 (1974); The Parole System, supra note 41, at 376.

84. 400 U.S. 309 (1971).

85. Id. at 324, cited in 521 F.2d at 251.

86. 387 U.S. 523 (1967).

87. Id. at 540. There were three persuasive factors which combined to support the reasonableness of the area code-enforcement inspection in Camara: the long history of judicial and public acceptance of such programs; the public interest that all dangerous conditions be prevented or abated; and the relatively limited invasion of privacy because building inspections are not personal in nature and are not aimed at discovery of criminal evidence. Id. at 537. The third factor contrasts with Latta's situation: there the search was personal and aimed at discovery of evidence. Yet no warrant was required for a parole officer to search. This highlights the importance which courts have afforded the parole officer-parolee relationship.

88. 387 U.S. 541 (1967).

89. Id. at 545-46.

90. 397 U.S. 72 (1970).

91. In this case, however, forcible entry was made; the Court found that Congress had not expressly provided for forcible entry in the absence of a warrant but had instead given government agents a remedy by making it a criminal offense to refuse admission to the inspectors under 26 U.S.C. § 7342 (1970). Id. at 77. See Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 Calif. L. Rev. 1011, 1018-19 (1973) [hereinafter cited as Greenberg].

92. 406 U.S. 311 (1972).

thorized by section 923(g) of the Gun Control Act of 1968,[93] was not violative of the fourth amendment. Distinguishing *See,* the Court stated that there was no occasion in that case to consider the reach of the fourth amendment with respect to various federal regulatory agencies. However, in *Biswell* there was statutory authorization for a warrantless inspection of a federally licensed gun dealer, similar to the authorization for inspection of federally licensed alcoholic beverages dealers[94] found in the *Colonnade* case. Thus, "officers . . . were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action. . . . In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all."[95] The large interests at stake and the fact that inspection is a crucial part of the regulatory scheme were important factors in *Biswell.*[96] The analogous crucial role of parole inspections was vital to the reasoning in *Latta.*[97] Both the safety of society and the rehabilitation of the parolee are vital interests in the parole officer-parolee relationship.

In *Biswell,* frequent and unexpected inspections were absolutely necessary to the accomplishment of the statute's purpose.[98] The dealer, moreover, had a copy of the relevant ordinance and was not left to wonder about the purpose of the inspection or the limits of the inspector's task.[99] In these respects, the situation in *Latta* was far more like that in *Biswell*: unexpected inspections were necessary for proper information; the parolee was aware that such inspections might occur; such inspections were required to be reasonable.[100]

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93. 18 U.S.C. §§ 921-28 (1970), as amended, (Supp. III, 1973).

94. 26 U.S.C. § 7342 (1970). See note 91 supra.

95. 406 U.S. at 314-15.

96. Id. at 315.

97. 521 F.2d at 252.

98. 406 U.S. at 316. Whether they had to be warrantless inspections is not as clear: "Biswell's response was to label inspection as 'crucial' and to give the citizen only the protection provided by the statute, which included neither warrant nor probability requirement—a result foreshadowed by Colonnade. . . . [T]he court failed to recognize that some form of warrant procedure and accompanying probability decision, perhaps different from that traditionally followed, could provide useful citizen protection without undermining the inspection program." Greenberg, supra note 91, at 1021-22.

99. 406 U.S. at 316.

100. Although border searches have separate requirements under the fourth amendment, border police searching cars for contraband might also require surprise inspections. But when the police searched a randomly selected car 25 miles from the border, the Supreme Court held that search unconstitutional. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Court stated that the border patrol used unfettered discretion in searching without a warrant, probable cause or consent. "The search thus embodied precisely the evil the Court saw in Camara when it insisted that the 'discretion of the official on the field' be circumscribed by obtaining a warrant prior to the inspection." Id. at 270. Colonnade and Biswell were inapposite in that licensed businessmen accepted the burdens and benefits of their trade and officers knew for a certainty that liquor and gun businesses were carried on. Id. In Latta, the parolee accepted the burdens and benefits of his situation and the parole officer had a reasonable basis (even more than a hunch) for his search. The Latta situation is sufficiently distinguishable from that in Almeida-Sanchez so as to account for the differences in result.

Insofar as a parallel may be drawn between administrative searches and parolee searches,[101] therefore, *Latta* is in accord with recent Supreme Court decisions.

V. THE SECOND DECISION: *United States v. Consuelo-Gonzalez*[102]

Between November 15, 1972, and December 18, 1972, agents of the Federal Bureau of Narcotics and Dangerous Drugs received information that Virginia Consuelo-Gonzalez was actively engaged in the importation and sale of heroin. Records of the United States Attorney's Office revealed to the agents that the defendant had previously been convicted of heroin smuggling under another name and was currently on probation. The agents also learned that a condition of her probation was that she submit her person and property to search at any time upon request by a law enforcement officer.[103] On December 19, 1972, federal and local law enforcement officers visited the Consuelo-Gonzalez residence for the purpose of searching the premises. The front door was ajar and the agents knocked. When Consuelo-Gonzalez appeared, an agent showed his identification, informed her that he knew of her probation and its conditions, and indicated his intention to conduct a search. A thorough search of the house produced a narcotics injection outfit and 11.7 grams of heroin. This evidence provided the basis for her conviction for possession of heroin with intent to distribute. The Ninth Circuit held that the search in this case was unreasonable and that evidence seized should have been suppressed by the trial court.[104]

This case differs from *Latta* in that Consuelo-Gonzalez was on probation, not parole. The court assumed that probationers and parolees are to be treated equally in this search context.[105] However, probation status should be distinguished from parole because the Federal Probation Act[106] gave new

101. For another view of administrative searches, see 521 F.2d at 255-57. (Hufstedler, J., dissenting).

102. 521 F.2d 259 (9th Cir. 1975).

103. Id. at 261.

104. Id. at 263.

105. Id. at 264-66. However, some distinction between probation and parole can be made. "A principal distinction is that a 'parole' operates prior to the expiration and after the commencement of the service of sentence; and 'probation' is granted prior to the imposition of sentence or prior to the commencement of the service of a sentence imposed." State v. Brantley, 353 S.W.2d 793, 795 (Mo. 1962). This is a very real distinction, reinforced by the existence of federal law governing probation and not parole. See People v. Hernandez, 229 Cal. App. 2d 143, 150, 40 Cal. Rptr. 100, 104 (3d Dist. 1964), cert. denied, 381 U.S. 953 (1965). Most authority, however, is in accord with the majority view in Consuelo-Gonzalez. "[T]he one thing all parolees and probationers have in common [is that] they have been convicted of a crime. It is for this reason that they may be singled out and their constitutional rights restricted where important public interests would be served." 521 F.2d at 275. (Wright, J., dissenting). In deciding another case (Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)), "the Court could not perceive any relevant difference between parole and probation revocations." Procedural Due Process, supra note 42, at 642; Hastings Note, supra note 41, at 603-04, 615-17.

106. 18 U.S.C. § 3651 (1970), which provides in pertinent part: "Upon entering a judgment of

dimensions to the reasonableness consideration discussed in *Latta*. The determinations of reasonableness in *Latta* and unreasonableness in *Consuelo-Gonzalez* hinge upon a difference of fact: the search in *Latta* was by Latta's parole officer; the search in *Consuelo-Gonzalez* was by federal and local law enforcement officers.

A. The Federal Probation Act—An Added Basis for Judgment

The *Consuelo-Gonzalez* majority reviewed the purpose of the 1925 Federal Probation Act by quoting from *United States v. Murray*.[107] Probation provides "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict."[108] Subsequent amendments have not affected the preeminence of rehabilitation as a purpose of the act.[109] The actual methods for producing such rehabilitation are not clearly delineated, and a "court is permitted to impose such terms and conditions as it 'deems best.' "[110] There are certain restrictions, however, imposed upon the court's discretion.[111] All conditions, when considered in context, must contribute significantly both to the rehabilitation of the convicted person and to the protection of the public.[112] Any conditions not contributing to rehabilitation and protection are not permissible.[113] Therefore, the Federal Probation Act

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conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

107. 275 U.S. 347 (1928).

108. Id. at 357, quoted in 521 F.2d at 263.

109. See 521 F.2d at 263 & n.5. Similar purposes are evident in state laws and the Model Penal Code. Id. at 263-64 & nn.7-8.

110. Id. at 264.

111. See Porth v. Templar, 453 F.2d 330, 333-34 (10th Cir. 1971) (forbidding imposition of a condition restricting freedom of speech so long as defendant did not urge others to violate the law); Fortune Society v. McGinnis, 319 F. Supp. 901, 905 (S.D.N.Y. 1970) (affirming prisoner's right to receive periodicals).

112. The Consuelo-Gonzalez court substantiated this principle: "The sentencing judge has a broad power to impose conditions designed to serve the accused and the community. The only limitation is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public." 521 F.2d at 264, quoting Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971).

113. The Consuelo-Gonzalez case involves probation regulations but comparison may be made with parole rules. For an overview of rules in different states, see Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime and Delinquency 267 (1969). There has been an increase in the number of rules in various states, perhaps because the courts have become more concerned with the rights of convicted prisoners and parolees. "It is now becoming more and more necessary to prove in court that specific regulations have been violated—and the more specific the regulation, the easier it is to prove the violation." Id. at 267. Insight into parole regulations may be gained from Milligan, California's Parole Rules, 15 Crime and Delinquency

was used by the *Consuelo-Gonzalez* majority as another approach to the "reasonableness" analysis of the majority in *Latta*.

B. *Constitutional Rights and the Law Enforcement Aspects of Probation*

The *Consuelo-Gonzalez* court noted that conditions of probation which limit an individual's fundamental rights are not automatically suspect:

> [T]he crucial determination in testing probationary conditions is not the degree of "preference" which may be accorded those rights limited by the condition, but rather whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public.[114]

The court applied the *Latta* method of resolving the conflict between the practical needs of the parole/probation system, which requires visits and searches, and the parolee's/probationer's constitutional rights. The unique relationship which exists between parolee and parole officer also exists between probationer and probation officer.[115] Thus, if the search in *Consuelo-Gonzalez* had been carried out by the probation officer, it would probably have been held proper. But the probation officer did not initiate the search, was not present at the search, and apparently did not even know of the search. The unique relationship between parole/probation officers and those under their guidance does not extend to law enforcement officers generally. Therefore the search of Consuelo-Gonzalez conducted by the police officers was illegal and the evidence obtained had to be suppressed.[116] In addition, the terms of probation allowing searches of the probationer at any time by any law enforcement officer were found to be unreasonable in relation to the purposes of the Federal Probation Act.[117]

While the *Consuelo-Gonzalez* court realized that no one rule would give

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275 (1969), where the author states that "California conditions of parole are not harsh or intended to be unduly restrictive. They are designed mainly to protect society and to serve as guidelines for the parolee as he begins his life anew." Id. at 282. Nevertheless, the parolee's "Civil Rights have been suspended by law"—including the right to marry, to engage in business, and to sign certain contracts unless they are restored with official approval. Id. at 280.

114. 521 F.2d at 265 n.14. In applying this method of determination, the court dismissed the custody and contract theories as inappropriate to the probation setting. Id. at n.15. Latta held these theories inappropriate in the parole setting. See notes 58 & 59 supra and accompanying text.

115. 521 F.2d at 265-66. The majority in Latta said that "the parolee and his home are subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties." 521 F.2d at 250. But the Consuelo-Gonzalez majority interpreted this "reasonable belief" to mean "a parole officer need not have probable cause." 521 F.2d at 265. The two views do not seem identical. Judges Choy and Merrill, concurring in Latta, objected to a "hunch" as being reasonable; they could not accept a complete absence of probable cause. 521 F.2d at 253-54. Judge Sneed tried to reconcile the views by stating that probable cause would not be necessary if the probation officer has a reasonable belief that the search is required to perform his duties properly. 521 F.2d at 266. This still seems to be a modification of the stricter view of Hernandez. See notes 37-39 supra and accompanying text.

116. 521 F.2d at 266.

117. Id. at 262-63.

unambiguous guidance to the probation officer, it suggested a condition for Consuelo-Gonzalez' probation which would reflect the court's views: "That she submit to search of her person or property conducted in a reasonable manner and at a reasonable time by a probation officer."[118] Therefore, searches conducted in the absence of probable cause must be made by probation officers, at a reasonable time, and in a reasonable manner. "Reasonableness," therefore, is to be defined by the probation officer at the time of the search, and later by the overseeing court.

VI. THE "MINORITY" OPINIONS

The discussion thus far has centered on the majority opinions of the *Latta* and *Consuelo-Gonzalez* cases. In reality, only a minority of judges fully concurred in the "majority" opinions. In *Latta,*[119] three judges agreed with the result but did not think that the parole officer-parolee relationship was so special that only parole officers should be allowed to initiate searches. They felt that it would also be proper for the parole officer to search at the suggestion of the police.[120] Two other judges concurred but noted that there was no need for the majority to speak of mere hunches as a possible basis for search.[121] Three judges dissented on the grounds that the parole officer should *not* be able to search the parolee without clear probable cause and without a warrant; they objected to the standard of reasonableness being subject to only an ex post facto determination.[122]

In *Consuelo-Gonzalez,* five separate opinions were filed.[123] The same two judges disputed that a "hunch" could justify a search, even by a probation officer.[124] The dissenters in *Latta* concurred specially in *Consuelo-Gonzalez*; consistent with their dissent in *Latta,* they felt that the search would still have been illegal even if a probation officer, rather than state and federal law enforcement officers, had made it.[125] Judge Chambers[126] suggested that policemen should be able to conduct searches, since probation officers "should play the role of being the defendant's pal and not his jailer."[127]

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118. Id. at 263.

119. Judges Duniway, Koelsch, Trask, Goodwin, and Sneed joined in the majority opinion. Judges Wright, Chambers and Wallace concurred. Judges Choy and Merrill concurred separately. Judges Hufstedler, Browning and Ely dissented.

120. 521 F.2d at 253. (Wright, Chambers & Wallace, JJ., concurring).

121. Id. (Choy & Merrill, JJ., concurring).

122. Id. at 254 (Hufstedler, Browning & Ely, JJ., dissenting).

123. Judges Sneed, Koelsch, Duniway and Trask joined in the majority opinion. Judges Choy and Merrill concurred. Judges Hufstedler, Browning, and Ely concurred specially. Judge Chambers dissented, as did Judges Wright, Goodwin, and Wallace.

124. 521 F.2d at 267. (Choy & Merrill, JJ., concurring).

125. Id. (Hufstedler, Browning & Ely, JJ., concurring specially).

126. In Latta, Judge Chambers felt the parole officer should be able to search at the suggestion of the police.

127. 521 F.2d at 276 (Chambers, J., dissenting). Judge Chambers also stated that the liberalizing of search requirements "will result in more trial judges sending more defendants to prison where they will have very little Fourth Amendment rights." Id.

The issue of the parole/probation officer's role, raised by Judge Chambers, was discussed in detail[128] by Judges Wright, Wallace[129] and Goodwin.[130] If the trial judge cannot prescribe reasonable probation conditions, he may feel that public safety will be endangered and therefore order commitment rather than probation. A probation officer needs help in order to function effectively as guardian of the public and rehabilitator of the convicted. In many states, these judges felt, probation officers do not have the close, unique relationship which is assumed in the majority opinion in both cases. Home visits rarely take place, particularly in remote areas. Thus, the judges suggest, it is more reasonable for probationers

> to be under regular observation by law enforcement officers who, in turn, would be expected to communicate violations or crisis situations to the nearest probation officers. Similarly, it would be law enforcement officers who should know when, if and how to make a search. . . . [S]earches by law enforcement officials can often serve the same purposes as those made by probation officers and generally can be carried out more efficiently, thoroughly, safely, and with less damage to the probationer-probation officer relationship.[131]

The logic of this dissent is compelling, since it is true that not all probation officers can visit their probationers in the manner ideally envisioned by the majority. However, confusing the functions of a parole/probation officer with those of a policeman will lead to confusion of what should be sharply delineated functions: to what extent can a policeman effectively serve as a parole/probation officer and vice versa?

VII. Current Status of Parolees' and Probationers' Rights

The *Latta* court did not decide the extent of a parole officer's authority to enter a home forcibly without a warrant.[132] The *Consuelo-Gonzalez* court similarly stated that it expressed "no opinion here regarding the extent to which the states constitutionally may impose conditions more intrusive on the probationer's privacy than those we here have indicated are proper under the Federal Probation Act."[133] Finally, *Consuelo-Gonzalez* did not decide "the issue of whether contraband found as a result of an improper probation search may be considered in a probation revocation proceeding."[134] These issues must await further decisions for clarification.[135]

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128. Id. at 268-76 (Wright, J., dissenting).

129. Judges Chambers and Wallace joined with Judge Wright in the Latta concurring opinion.

130. Judge Goodwin joined in the Latta majority opinion.

131. 521 F.2d at 271, 273 (Wright, J., dissenting).

132. 521 F.2d at 252 n.2. Cf. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

133. 521 F.2d at 266. The court also expressed no opinion regarding the California Supreme Court's decision in People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302, cert. denied, 405 U.S. 1016 (1972), where contraband seized in a search pursuant to a probation condition similar to that in Consuelo-Gonzalez was used to obtain a revocation of the probation. 521 F.2d at 266.

134. 521 F.2d at 267.

135. The Ninth Circuit has since held that improperly seized evidence may be admitted in

Parolees and probationers have been slowly gaining fourth amendment rights. In *People v. Rosales,*[136] the California court required that statutory announcement rules be applied to parolees. In addition, the Supreme Court in *Morrissey*[137] applied fourth amendment rights to parolees in a parole revocation situation. Now the Ninth Circuit has given dimension to the concept of "reasonableness" in the search of parolees/probationers. Searches by law enforcement officers must meet full fourth amendment standards applicable to searches of ordinary citizens. But searches by the parole/probation officer do not need to meet full probable cause standards because of the special relationship between the parole/probation officer and the parolee/probationer.[138] This relationship is vital to the fulfillment of the purposes of parole—rehabilitation and the protection of society.[139] Since the protective purpose only emerges if the rehabilitative purpose fails, the Ninth Circuit has stressed the rehabilitative function.[140] The parole/probation officer's primary role, then, is to help the parolee/probationer become a useful citizen. The trust implicit in such a relationship is not furthered by harassment or "stalking horse" policies which are clearly unreasonable. The court in *Consuelo-Gonzalez* added the further requirements of reasonable manner and reasonable time.[141] The constitutional protections generally available to parolees/probationers, the law enforcement process as it relates to probation, and the Federal Probation Act support the court's reasonableness standards.[142]

The fact that a parolee/probationer enjoys fourth amendment rights is no longer disputed. These rights are modified, however, by the relationship he has with his parole/probation officer. The key, then, to what is reasonable—in manner, time or any other aspect—is the role of the parole/probation officer, which has not been clearly delineated. The *Morrissey* court spoke of this role:

> The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise

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probation revocation hearings and subsequent sentencing. United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975).

136. 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 2 (1968). See notes 48 & 49 supra and accompanying text.

137. Morrissey v. Brewer, 408 U.S. 471 (1972). See notes 50, 64-65 & 71 supra and accompanying text.

138. The Latta majority further qualified this in stating that the court will not uphold every search by a parole officer. An unqualified holding would "practically gut the principle that parolees are entitled to some privacy. Moreover, it would not advance the goals of the parole system." 521 F.2d at 252. See notes 116-17 supra and accompanying text.

139. See note 73 supra and accompanying text.

140. 521 F.2d at 249; 521 F.2d at 263. But see the discussion of recidivism and the need for alertness in protecting society. 521 F.2d at 271-72 & n.5. (Wright, J., dissenting). The purposes of parole/probation are discussed in notes 63-74, 77-89 & 108-13 supra and accompanying text.

141. See text accompanying note 118 supra.

142. 521 F.2d at 263.

him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.[143]

The probation officer must try to save "a man who has taken one wrong step."[144] The parole officer is to be a guide, not a policeman.[145] The parole/probation officer cannot trap a parolee/probationer for the police, although he may cooperate with them.[146] A policeman cannot search the parolee/probationer but can accompany the parole/probation officer on a routine visit to the home of the parolee/probationer.[147] Although police may be present when a parole/probation officer makes a search without probable cause, they cannot make such a search on their own. This can produce a situation where the parole/probation officer acts more as an agent of the police for purposes of law enforcement than as an independent officer for the purposes of rehabilitation. Moreover, a parole/probation officer is allowed to search his "pal" whereas a police officer—whose job includes searches and seizures—is not permitted to search a parolee/probationer even though there is no trust relationship that would be violated by such a search. A proper visit by a parole/probation officer can include an unwarranted search—as long as it is based upon suspicion of wrongdoing. The blurring of parole/probation officer and police officer roles makes the parole/probation officer's search duties seem more punitive and less reconstructive. This situation cannot encourage positive behavior in the parolee/probationer nor further his relationship with his parole/probation officer. Quite the contrary, it can only lead to difficulty in defining what constitutes a reasonable search.

Reasonableness will always rest on the facts in a given situation. But before there can be agreement on what is reasonable in any parole/probation search, there must first be agreement on the role of the parole/probation officer and clarification of the nature of the special relationship between that officer and the parolee/probationer.

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143. United States v. Morrissey, 408 U.S. 471, 478 (1972). For discussion of the parole officer's role and the finding of "a striking absence of police ideology among parole officers," see Yale Note, supra note 70, at 705. The authors recommended that parole officers not have the power of penal sanctions, only the duties of a social worker. Id. at 704.

144. 521 F.2d at 263, quoting United States v. Murray, 275 U.S. 347, 358 (1928).

145. 521 F.2d at 250.

146. 521 F.2d at 267.

147. Id.