

NOTES

FOURTH AMENDMENT LIMITATIONS ON PROBATION AND PAROLE SUPERVISION

The assertion of fourth amendment rights by a probationer¹ or parolee² suspected of renewed criminal activity creates a potential confrontation between a fundamental constitutional guarantee³ and society's legitimate interest in correctional programs which rehabilitate released offenders and prevent them from lapsing back into crime.⁴ Because courts refuse to apply the exclusionary rule⁵ to probation and

1. Probation is a judicial act whereby a convicted criminal offender is released into the community under the supervision of a probation officer, in lieu of incarceration. Administratively, this release may be accomplished either by suspending the prison sentence or by withholding the imposition of a sentence altogether. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 27-34 (1967). Probation has been described as a "reforming discipline" through which offenders who are deemed to be good social risks are restored to society. *Roberts v. United States*, 320 U.S. 264, 272 (1943); *Koreinatsu v. United States*, 319 U.S. 432, 435 (1943).

2. A parolee is a convict who, after serving a portion of his judicially imposed sentence in a penal institution, is released under the supervision of a parole officer for the remainder of the sentence. Parole is an administrative act within the exclusive discretion of correctional authorities. See *Morrissey v. Brewer*, 408 U.S. 471, 477-78 (1972); TASK FORCE REPORT, *supra* note 1, at 60-71; Wolin, *After Release—The Parolee in Society*, 48 ST. JOHN'S L. REV. 1 (1973).

There does not appear to be any significant difference between the constitutional status of probationers and parolees. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-66 (9th Cir. 1975) (Ninth Circuit concluding that the reasons justifying warrantless searches by parole officers of their parolees are equally applicable in probation setting). This similarity was suggested in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), where the Supreme Court, in applying the due process clause to probation revocation proceedings, stated that "revocation of probation . . . is constitutionally indistinguishable from the revocation of parole." *Id.* at 782 n.3. In light of this similarity, the term "released offender" will be used throughout the remainder of this Note to refer to both probationers and parolees.

3. 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.

This right has been characterized as "basic to a free society," *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), and is applicable to the states under the due process clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

4. See *Porth v. Templar*, 453 F.2d 330, 333 (10th Cir. 1971); D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 159 (2d ed. 1969).

5. The exclusionary rule renders inadmissible evidence seized in violation of a de-

parole revocation proceedings,⁶ this conflict has been avoided in most cases.⁷ Where a released offender is actually prosecuted for a crime committed while he is still on probation or parole, however, he may have a fourth amendment claim. Courts have generally agreed that he is entitled to some degree of protection against unreasonable searches,⁸ but an appropriate standard of reasonableness has not yet emerged. The task of formulating a standard is particularly difficult with respect to searches conducted by correctional officers. Unlike police, these officers have a special interest in rehabilitating their clients which is coextensive with their duty to protect society from further criminal conduct. Yet while some dilution of normal fourth amendment standards may be necessary in order to accommodate the informational needs of correctional officers, the risk of abuse increases as their activities become prosecutorial in nature.

This Note will develop guidelines for formulating a standard to govern searches by correctional officers. A review of the constitutional status of released offenders will be followed by an examination of the role of correctional officers, including the relationship between them and their clients. Notable judicial attempts to deal with the fourth amendment problem in this area will then be canvassed. Finally, after an assessment of the value of the search as a supervisory technique, this Note will recommend various means by which legitimate correctional objectives can be achieved with a minimal degree of intrusion into the privacy of released offenders.

CONSTITUTIONAL CONSTRAINTS ON THE CONDITIONS OF RELEASE

The Supreme Court's decision in *Morrissey v. Brewer*⁹ to extend procedural protections to parolees facing revocation represented a new

fendant's fourth amendment rights. See *Mapp v. Ohio*, 376 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

6. See, e.g., *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975) (probation); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970) (parole). See also *United States v. Vandemark*, 522 F.2d 1019, 1020-21 (9th Cir. 1975) (supporting cases compiled in opinion).

7. It has been estimated that parole revocation, rather than conviction for a new offense, is the device used for two-thirds of the parolees who are reincarcerated. TASK FORCE REPORT, *supra* note 1, at 62.

8. See, e.g., *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.), *cert. denied*, 96 S. Ct. 200 (1975); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *DiMarco v. Greene*, 385 F.2d 556 (6th Cir. 1967); *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966); *Brown v. Kearney*, 355 F.2d 199 (5th Cir. 1966); *Martin v. United States*, 183 F.2d 436 (4th Cir.), *cert. denied*, 340 U.S. 904 (1950).

9. 408 U.S. 471 (1972).

judicial conception of the constitutional status of released offenders.¹⁰ Previously, courts had struggled with various theories of parole and probation which served, in essence, to justify the complete denial of an offender's rights.¹¹ The prevalent rationale was the "custody" theory, under which the offender was said to be entitled to no more liberty than he would have enjoyed had he been incarcerated.¹² *Morrissey* seemed to reject this theory by emphasizing that the parolee's status more closely resembles that of an ordinary citizen than a prisoner.¹³ Since parole revocation changes only the type of penalty imposed on a convicted criminal, the Court did not afford parolees "the full panoply of rights" available under the fourteenth amendment to a free man who is a defendant in a criminal prosecution.¹⁴ However, the Court

10. See generally Tobriner & Cohen, *How Much Process Is "Due"? Parolees and Prisoners*, 25 HASTINGS L.J. 801 (1974); Wolin, *supra* note 2, at 34-37; *The Supreme Court*, 1971 Term, 86 HARV. L. REV. 1, 95-104 (1972).

11. The theories of parole and probation are discussed in Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702, 704-20 (1963); Comment, *The Parole System*, 120 U. PA. L. REV. 282, 286-89 (1971); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 188-93 (1967). See also *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 273-75 (9th Cir. 1975) (Wright, J., dissenting).

Other than the "custody" theory, see note 12 *infra* and accompanying text, two other rationales have frequently been invoked to justify release conditions. The "act of grace" theory considered probationer or parolee status a privilege which could be granted under whatever terms the state dictated. See, e.g., *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935); *United States v. Fultz*, 482 F.2d 1, 4 (8th Cir. 1973). Under the "consent" or "waiver" theory, the offender was said to have agreed to the conditions of his release by the very act of accepting it. See, e.g., *People v. Kern*, 264 Cal. App. 2d 962, 71 Cal. Rptr. 105 (1968); *State v. White*, 264 N.C. 600, 142 S.E.2d 153 (1965). As a practical matter, of course, neither the probationer nor the parolee enjoys any real bargaining power. See Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, *supra*, at 704-11. In addition, neither the "act of grace" theory nor the "consent" theory can be used to justify a condition which infringes upon a fundamental right since a state may not condition the granting of a benefit upon the relinquishment of a constitutional guarantee. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

12. See, e.g., *Rose v. Haskins*, 388 F.2d 91, 95 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); *People v. Hernandez*, 229 Cal. App. 2d 143, 148-50, 40 Cal. Rptr. 100, 103-04 (1964). See generally White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 177-81 (1969); Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, *supra* note 11, at 711-20; Comment, *The Parole System*, *supra* note 11, at 287-88.

13. 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. 408 U.S. at 482.

14. *Id.* at 480.

did term parole a form of "conditional liberty,"¹⁵ and considered its curtailment a sufficiently "grievous loss"¹⁶ to entitle a parolee to certain procedural safeguards before he can be taken back into custody,¹⁷ and before his parole can actually be revoked.¹⁸ The protections afforded parolees in *Morrissey* were subsequently extended to probationers facing revocation in *Gagnon v. Scarpelli*.¹⁹

If *Morrissey* recognized that a released offender has a constitutionally protected interest in his status, it left unanswered the question of what limitations the Constitution places upon the terms of his release. Traditionally, the fixing of release conditions has been left to the discretion of correctional authorities and trial courts.²⁰ This discretion has come under increasingly strict review,²¹ however, especially where release conditions impinge upon the first and fourth amend-

15. *Id.*

16. *Id.* at 482.

17. A preliminary hearing to determine whether probable cause exists for the revocation of parole should be conducted by some person other than the officer directly involved in the case. The parolee is entitled to notice of the hearing, its purpose, and the alleged parole violations. He can present evidence in his own behalf and question persons who have supplied adverse information, unless such a confrontation would endanger the informant. Upon a showing of probable cause, the parolee is returned to a correctional institution pending final revocation. *Id.* at 485-87.

18. The minimum procedural requirements of a final revocation hearing include:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id.* at 489.

Morrissey did not decide whether the right to counsel attached to this proceeding. *Id.*

19. 411 U.S. 778 (1973).

20. See Comment, *The Parole System*, *supra* note 11, at 285.

21. Traditionally, challenges to the terms of release have been made on the basis of reasonableness, rather than on constitutional grounds. For example, in *Springer v. United States*, 148 F.2d 411, 415 (9th Cir. 1945), the court avoided the eighth amendment proscription against cruel and unusual punishment by deciding that probation is not punishment. The court then struck down a probation condition requiring a draft evader to donate a pint of blood to the Red Cross on the grounds that this requirement bore no reasonable relation to the crime committed. Restrictions on the range of employment opportunities available to a probationer have been held to be reasonable rehabilitative conditions where the convict's crime was facilitated by his former position. See, e.g., *Whaley v. United States*, 324 F.2d 356 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964); *Berra v. United States*, 221 F.2d 590 (8th Cir. 1955), *aff'd in part*, 351 U.S. 131 (1956). For an analysis of the constitutionality of normal parole conditions, see Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, *supra* note 11. See also Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 CRIME & DELINQUENCY 267 (1969).

ment rights²² of a released offender. In *Porth v. Templar*,²³ the Tenth Circuit declared that release conditions must bear "a reasonable relationship to the treatment of the [offender] and the protection of the public,"²⁴ and then struck down a condition restricting a probationer's freedom to publicly criticize the law which he had violated.²⁵ The court found that the condition did not necessarily promote rehabilitation,²⁶ and that it prohibited activity which was not per se harmful to the public order.²⁷ The case stands for the proposition that, absent a showing of a reasonable relationship between a release condition and the purposes of release, the abridgement of a fundamental right will not be tolerated.²⁸

22. Despite the notion that first amendment freedoms are "preferred," see Kovacs v. Cooper, 336 U.S. 77, 90-94 (1949) (Frankfurter, J., concurring); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1184, 1191-93 (1959), conditions infringing fourth amendment rights should not be subject to a reduced level of scrutiny, since these rights are also considered fundamental. See note 3 *supra*. The Ninth Circuit recently observed that

the 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. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (1975).

23. 453 F.2d 330 (10th Cir. 1971).

24. *Id.* at 333. Both the American Bar Association, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 3.2(b) (1970), and the American Law Institute, ALI MODEL PENAL CODE § 301.1(2)(f) (Proposed Official Draft, 1962), have embraced a similar standard. Probation and parole conditions must be "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." *Id.*

25. The condition under review prohibited the defendant, who had been convicted of failure to file income tax returns, from publicly questioning the constitutionality of the federal income tax laws or the Federal Reserve System. 453 F.2d at 331.

26. Indeed, it has been suggested that rehabilitation is enhanced by encouraging probationers to exercise their rights of expression. Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 480 (1974).

27. In determining that the condition would have been valid had it prohibited only speeches "designed to urge or encourage others to violate the laws," 453 F.2d at 334, the Tenth Circuit was apparently following the Supreme Court's directive that only speech which is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" can be censored. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); see *Gooding v. Wilson*, 405 U.S. 518 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

28. *Porth* was preceded by two district court cases in which correctional authorities were unable to show a relationship between prior restraints imposed upon a parolee's speech and the purposes of parole. In *Hyland v. Proconier*, 311 F. Supp. 749 (N.D. Cal. 1970), which the *Porth* court approved, a parole officer prohibited his parolee from addressing a student rally protesting prison conditions. The court held that the use of a parole condition to impose subject matter restrictions on a parolee's public speech had no reasonable relationship to rehabilitation. In *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971), which the *Porth* court, without explanation, declined to endorse, 453

Courts have most readily conceded the existence of a sufficient relationship where a condition of release restricts an offender's freedom of association.²⁹ Indeed, the rehabilitative and social value of limiting a released offender's contacts with known criminals is self-evident. In *Arciniega v. Freeman*,³⁰ however, the Supreme Court indicated that even associational restrictions are valid only to the extent that they promote rehabilitation. While upholding in principle a prohibition against associating with other convicts, the Court held that on-the-job contacts with fellow employees who had criminal records could not violate a valid condition of release since the parolee's continued employment was essential to his readjustment to society.³¹ Thus the implication here, as in *Porth*, was that release conditions which abridge fundamental first amendment freedoms can be sustained only if they serve a legitimate and demonstrated correctional objective.

CORRECTIONAL OFFICERS AND CRIMINAL INVESTIGATIONS

The Role of the Correctional Officer

In order to determine whether a release condition diluting fourth amendment protections serves a legitimate correctional purpose, it is necessary to examine the responsibilities of the correctional officer, including his relationship with his client and with law enforcement officials. The correctional officer has been described as a "social

F.2d at 333 n.4, a parolee, who had been convicted along with Julius and Ethel Rosenberg of transmitting national defense information to the Soviet Union, was refused permission by his parole officer to attend an anti-Vietnam war rally and a Communist Party gathering, even though he had previously been permitted to travel greater distances to speak on other matters. The court held that the parolee's first amendment freedoms could be denied only "upon a showing that such prevention . . . is necessary to safeguard against specific, concretely described and highly likely dangers of misconduct by [the parolee] himself." 327 F. Supp. at 1306. Restrictions on a parolee's travel have also been upheld on the basis of their supposed rehabilitative value. See *Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974) (where parole authorities were able to demonstrate that permitting the parolee to travel to North Vietnam would place him beyond the practical range of supervision).

29. See, e.g., *United States v. Malone*, 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975) (upholding a condition requiring the probationer, convicted of unlawfully exporting arms to the Irish Republican Army, to refrain from all contact with other Irish sympathizers); *United States v. Kohlberg*, 472 F.2d 1189 (9th Cir. 1973) (upholding a prohibition against associating with known homosexuals); *Birzon v. King*, 469 F.2d 1241 (2d Cir. 1972) (upholding a condition forbidding contact with other persons with a criminal record). Every state, except Virginia and Wisconsin, statutorily authorizes the restriction of a parolee's association with "undesirables." *Arluke, supra* note 21, at 272-73.

30. 404 U.S. 4 (1971).

31. *Id.* at 4-5.

therapist in an authoritative setting."³² While adequately describing the ideal, this description also indicates the primary source of difficulty in determining the extent to which an officer may impinge upon his client's constitutional rights. The authority granted to a correctional officer is intended to be a useful tool in the performance of what is essentially social work.³³ Routine inspections and home visits are designed to enable the officer to gather the information he needs about his client's habits and living environment so that he can develop a viable program of rehabilitation. In addition, such visits give the officer an opportunity to win his client's trust—to show the client that he is not just another "cop."³⁴ Yet an officer has a responsibility to the public as well, and in the public's interest he should also use his authority to prevent his client from engaging in further criminal activity.³⁵ This responsibility to be both a helper and an enforcer creates, in many instances, an irreconcilable conflict for the correctional officer. After having established a constructive atmosphere of mutual trust, the officer is often reluctant to destroy a rehabilitative relationship by exercising his enforcement powers.³⁶

The predominant theoretical view appears to be that, when a conflict arises because of a correctional officer's dual functions, he should eschew the role of an enforcement officer in the interests of the re-

32. Newman, *Concepts of Treatment in Probation and Parole Supervision*, 25 *FED. PROBATION* 11, 16 (Mar. 1961). In *Morrissey v. Brewer*, 408 U.S. 471 (1972), Chief Justice Burger explained the parole officer's role as follows:

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 him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development. *Id.* at 478.

33. D. DRESSLER, *supra* note 4, at 170-72; Weiss, *The Social Worker's Technique and Probation*, in *PROBATION AND CRIMINAL JUSTICE* 165 (S. Glueck ed. 1933); Note, *Observations on the Administration of Parole*, 79 *YALE L.J.* 698, 707 (1970).

34. R. DAWSON, *SENTENCING* 131-32 & n.101 (1969).

35. The three major objectives of correctional supervision are:

- (1) control—to make the released offender conform his behavior to the requirements of the law and the conditions of release during the period of his supervision.
- (2) treatment—to achieve through counselling or referral to other resources a permanent change in the offender's antisocial behavior.
- (3) service—assisting the offender and his family with such problems as obtaining and keeping employment. *Id.* at 122-23.

36. See Note, *Observations on the Administration of Parole*, *supra* note 33, at 708. See generally Newman, *supra* note 32, at 12-13.

habilitative relationship.³⁷ Where a released offender's behavior arouses suspicion of criminal activity, the correctional officer should defer to police expertise.³⁸ Such a resolution, however, has not always been feasible. Heavy caseloads and inadequate training often result in an inability on the part of the officer to establish the personal contacts necessary to the development of a constructive rehabilitative relationship.³⁹ Too often his client therefore receives attention only after a problem has arisen,⁴⁰ and primary emphasis is placed upon the officer's enforcement function.⁴¹ When such a failure in the rehabilitative effort occurs, intrusions into the offender's privacy by a correctional officer seem to become prosecutorial in nature. The broad authority of the officer, which had been justified by his rehabilitative intent, can become simply a means of circumventing normal constitutional procedures in a criminal investigation. This danger is particularly serious where police look to the correctional officer for investigational support, since the revocation of parole or probation provides a more efficient means for removing a suspect from the streets than the institution of a new criminal prosecution.⁴² Thus, as the correctional officer moves from the performance of rehabilitative functions to the performance of such enforcement functions, the exercise of his authority to intrude upon the privacy of his client becomes less justified. The courts, however, have so far failed to recognize this distinction in the fourth amendment area.

Judicial Applications of the Fourth Amendment in a Correctional Setting

The development of a standard of reasonableness for correctional

37. TASK FORCE REPORT, *supra* note 1, at 69; see *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 270 (9th Cir. 1975) (Wright, J., dissenting).

38. As one correction officer has commented:

[S]urveillance, as opposed to treatment supervision, is essentially a police responsibility. It involves techniques for which the therapy-oriented and trained practitioner in corrections is unprepared to handle with maximum effectiveness. This does not obviate the need for surveillance, but rather, places its implementation in the hands of the police, whose responsibility it is in the first place. Newman, *supra* note 32, at 14.

39. R. DAWSON, *supra* note 34, at 126-28, 332-33; see TASK FORCE REPORT, *supra* note 1, at 29-30, 70, 93-102.

40. Newman, *supra* note 32, at 14.

41. R. DAWSON, *supra* note 34, at 121-23; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 165 (1967).

42. See *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972); Comment, *Search and Seizure Rights of Parolees and Probationers in the Ninth Circuit*, 44 *FORDHAM L. REV.* 617, 634-36 (1975); Note, *Observations on the Administration of Parole*, *supra* note 33, at 706.

searches has been no more methodical than the course of fourth amendment law in general.⁴³ Nevertheless, an effort to limit the dilution of the released offender's rights against unreasonable searches and seizures is discernible.⁴⁴ Released offenders have generally been afforded full fourth amendment protection with respect to searches performed by law enforcement officials.⁴⁵ In addition, warrantless searches conducted by correctional officers at the behest of the police have been declared unlawful.⁴⁶ When reviewing searches undertaken by correctional officers on their own initiative, however, several courts have modified traditional fourth amendment protections in order to accommodate the correctional officer's informational needs. These courts have developed a "reasonable belief" standard under which the correctional officer is permitted to make a showing of less than probable cause in order to justify intruding into the privacy of his client. The purpose of

43. See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

44. The earliest recognition that the status of the probationer and parolee did not justify a complete denial of fourth amendment protection occurred in *Martin v. United States*, 183 F.2d 436 (4th Cir.), cert. denied, 340 U.S. 904 (1950). Upholding a warrantless search by a probation officer of his client's garage, the court nevertheless acknowledged that such searches must be evaluated in terms of the fourth amendment's standard of reasonableness. The fact that the victim of the search had been convicted of a crime and was serving his sentence, however, was deemed a circumstance relevant to a determination of reasonableness. *Id.* at 439.

The notion that released offenders are protected by the fifth amendment was recently recognized by the Supreme Court of Ohio, which held that statements made by a parolee to his parole officer were inadmissible in a criminal trial where the officer failed to warn the parolee of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to questioning him. *State v. Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), cert. granted, 420 U.S. 1003 (1975).

45. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir. 1975) (invalidating search conducted by police under the Federal Probation Act); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970) (acknowledging illegality of warrantless search of parolee by police officer, but upholding use of seized evidence in parole revocation hearing); *DiMarco v. Greene*, 385 F.2d 556 (6th Cir. 1967) (applying normal fourth amendment standards to police search incident to arrest for parole violation); *United States v. Lewis*, 274 F. Supp. 184 (S.D.N.Y. 1967) (applying the "voluntariness" standard to an allegation that parolee consented to search by FBI agents).

46. *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966). After being informed by police officers that his parolee was suspected of bank robbery, a parole officer asked the police to cooperate in bringing the parolee to the parole office. The parole officer then searched his client and found marked money which was used to secure a conviction. The court invalidated the search and suppressed the evidence, holding that the parole officer's participation did not by itself justify a lesser degree of fourth amendment protection for the parolee. Since the warrantless arrest and search were at the instance of the police, the parole officer was considered to be acting as a mere "tool" by which the police could not overcome the absence of probable cause necessary to secure a warrant. *Id.* at 292.

this relaxed standard is to enable the correctional officer to perform his dual functions, while at the same time providing a check on the exercise of his search powers.⁴⁷

In New York, a parole officer can obtain from correctional authorities an administrative warrant to arrest his parolee upon a showing that he has "reasonable cause to believe that [the parolee] has lapsed, or is probably about to lapse, into criminal ways or company, or has violated the conditions of his parole"⁴⁸ Although this warrant does not expressly authorize the officer to conduct a search incident to retaking the parolee, such searches have been upheld. In *United States ex rel. Randazzo v. Follette*,⁴⁹ a parole officer received "reliable information" that his parolee was associating with a convicted felon and might be involved in narcotics traffic. This information was presented to a regional parole director who issued a parole violation warrant, but the warrant was executed by a police officer and a second parole officer who was not the parolee's supervisor. They conducted a search of the room in which the parolee was arrested and seized a quantity of heroin which was subsequently used to convict the parolee of possession. The court upheld the search, reasoning that since the arrest was specifically authorized by statute, the search was justified as a search incident to a lawful arrest under the doctrine of *Harris v. United States*.⁵⁰ Both the arrest and search were therefore deemed valid, even though both were undertaken with less than probable cause.

A similar result was reached in *United States ex rel. Santos v. New York State Board of Parole*.⁵¹ A parole violation warrant was obtained on the basis of information received from a police detective to the effect that the parolee was dealing in stolen goods. The parole officer and the detective went to the parolee's apartment in order to execute the warrant, but finding no one there, they nonetheless conducted a full search. Items of stolen property were seized and later used in evidence against the parolee. The court held that the search was a reasonable exercise of the parole officer's investigatory authority, since he was charged with enforcing a condition of parole which stipulated that the parolee refrain from criminal activity.⁵²

47. See *Latta v. Fitzharris*, 521 F.2d 246, 251-52 (9th Cir.), cert. denied, 96 S. Ct. 200 (1975).

48. N.Y. CORREC. LAW § 216 (McKinney 1968).

49. 418 F.2d 1319 (2d Cir. 1969), cert. denied, 402 U.S. 984 (1971).

50. *Id.* at 1323. *Harris* is reported at 331 U.S. 145 (1947). The *Randazzo* court noted that it would have reached a different result had the search been conducted after the Supreme Court's decision in *Chimel v. California*, 395 U.S. 752 (1969), which limited the scope of searches incident to arrests. 418 F.2d at 1323.

51. 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972).

52. *Id.* at 1218-19. It is readily apparent that, under this rationale, any search by

These two federal cases illustrate the problems involved in evaluating searches of parolees and probationers under a relaxed fourth amendment standard. In each case, the correctional officer was required by statute to show that he had "reasonable cause to believe" that an investigation into his client's activities was necessary.⁵³ It should be apparent, however, that the searches in these two cases were prosecutorial in nature, undertaken in performance of the parole officer's enforcement function. Each search was conducted in cooperation with law enforcement officials and led to a new conviction.⁵⁴ In neither case did the parole officer assert that the search would have any rehabilitative value. Thus, despite statutory language which seems to limit a parole officer's search power by requiring that the search be related to his special supervisory duties, the searches amounted to mere criminal investigations which would have been unlawful if conducted outside of a parole setting.⁵⁵

Similar difficulties have been encountered by state courts which have considered the role of searches in a corrections program. While the most common approach has been to require some showing on the part of the correctional officer that the search was within the scope of his duties,⁵⁶ the judicial response has ranged from providing released offenders with absolute fourth amendment protection against all searches⁵⁷ to upholding conditions which grant the correctional officer unlimited power to search.⁵⁸ The California courts have adopted this latter approach.

a correctional officer, regardless of its prosecutorial nature, could be evaluated under the relaxed standard. See notes 63-65 *infra* and accompanying text.

53. See note 48 *supra* and accompanying text.

54. The opinion in *Santos* did not mention the *Hallman* decision. The court did emphasize, however, that despite the fact that the search was instigated by a law enforcement officer, the parole officer played a substantial role in the search. 441 F.2d at 1219. In *Hallman* the court objected to police using the correctional officer there as a "tool." See note 46 *supra*.

55. Normal fourth amendment procedures would require the existence of probable cause for the arrest of a criminal suspect and for the search of his personal property. *Draper v. United States*, 358 U.S. 307 (1959); *Johnson v. United States*, 333 U.S. 10 (1948).

56. See, e.g., *People v. Anderson*, — Colo. —, 536 P.2d 302, 305 (1975) ("reasonable grounds to believe that a parole violation has occurred"); *State v. Williams*, 486 S.W.2d 468, 473 (Mo. 1972) (sufficient information to "arouse suspicion" that a parole violation had occurred); *Hinnage v. State*, 88 Nev. 296, 298, 496 P.2d 763, 765-66 (1972) ("reasonable cause"); *State v. Simms*, 10 Wash. App. 75, 88, 516 P.2d 1088, 1096 (1973) ("well founded suspicion").

57. *State v. Cullison*, — Iowa —, 173 N.W.2d 533, *cert. denied*, 398 U.S. 938 (1970).

58. *State v. Mitchell*, 22 N.C. App. 663, 207 S.E.2d 263 (1974); *State v. Schlosser*, 202 N.W.2d 136 (N.D. 1972).

In *People v. Hernandez*⁵⁹ a California court held that narcotics seized by a parole officer during a warrantless search of the parolee's automobile, conducted pursuant to a tip from an anonymous informant, were admissible in a criminal prosecution for possession. The court ruled that a parolee could not invoke the fourth amendment against his officer,⁶⁰ but was careful to point out that normal fourth amendment standards would apply to criminal investigations conducted by police officers.⁶¹ This distinction became blurred in subsequent California cases, primarily "because the operative facts in situations involving cooperation between police and parole authorities are numerous and capable of being accorded whatever weight a given court desires"⁶² Thus, for example, in *People v. Thompson*⁶³ a warrantless search of a parolee's hotel room was found to be a reasonable supervisory technique despite the fact that the search would not have been undertaken but for information supplied by the police, and even though the parole officer accompanying the police was not the parolee's personal officer. A similar result was reached in *People v. Limon*,⁶⁴ where narcotics officers conducted a preliminary investigation on the basis of an informant's tip, prior to enlisting the aid of a parole officer. On the other hand, in *People v. Coffman*,⁶⁵ the court invalidated a warrantless search initiated by police officers who invited a parole officer to accompany them, finding that the law enforcement officials were using the parole officer solely as a means of avoiding the probable cause requirement.

These cases illustrate the difficulty of protecting a released offender from police abuses without discouraging cooperation between correctional authorities and law enforcement officials. The principal source of these problems seems to be the assumption that since violations of the law are always violations of the conditions of release, it is within the scope of the correctional officer's authority to investigate these violations. When correctional officers perform such essentially prosecutorial tasks, they function like police. Any effort to distinguish their

59. 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965).

60. *Id.* at 150-51, 40 Cal. Rptr. at 104.

61. *Id.* at 147 n.2, 40 Cal. Rptr. at 102 n.2.

62. Comment, *The Parole System*, *supra* note 11, at 329. See also Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129, 129-34 (1969); 14 SANTA CLARA LAW. 153 (1973).

63. 252 Cal. App. 2d 76, 60 Cal. Rptr. 203 (1967), *cert. denied*, 392 U.S. 930 (1968).

64. 255 Cal. App. 2d 519, 63 Cal. Rptr. 91 (1967), *cert. denied*, 393 U.S. 866 (1968).

65. 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969).

enforcement activities from the normal duties of the police can only lead to the inconsistencies evident in the decisions of the California courts.

The California Supreme Court apparently resolved these inconsistencies against the released offender by deciding in *People v. Mason*⁶⁶ that a condition of release requiring that the offender "submit . . . to [a] search . . . at any time . . . with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer" may be reasonable.⁶⁷ The court did stress that such a "submission to search" condition must be reasonably related to the crime for which the offender was originally convicted.⁶⁸ In *Mason*, the condition was imposed upon a probationer convicted of possession of marijuana, and the use of the condition in California has been substantially limited to narcotics offenders.⁶⁹ Nevertheless, despite the obvious deterrent effect that such a broad condition has upon the offender's proclivity for crime, the absence of a requirement that searches conducted pursuant to the condition be related to the rehabilitation of the offender renders the condition a complete denial of fourth amendment protections.⁷⁰ This result seems inconsistent with the general rule that any governmental action which abridges fundamental rights be undertaken in accordance with narrowly drawn regulations.⁷¹ On the

66. 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972).

67. *Id.* at 762, 488 P.2d at 631, 97 Cal. Rptr. at 303.

68. *Id.* at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304. In *People v. Kay*, 36 Cal. App. 3d 759, 111 Cal. Rptr. 894 (1973), a "submission to search" condition was struck down as not reasonably related to a conviction for felony assault and battery, where the offender had used items not ordinarily concealed (sticks, broom handles, steel bars, and table legs). *Id.* at 762, 111 Cal. Rptr. at 895.

69. *See, e.g.*, *Marts v. Superior Court*, 49 Cal. App. 3d 517, 122 Cal. Rptr. 687 (1975); *People v. Thomas*, 45 Cal. App. 3d 749, 119 Cal. Rptr. 739 (1975); *People v. Garcia*, 44 Cal. App. 3d 1029, 119 Cal. Rptr. 128 (1975); *People v. Byrd*, 38 Cal. App. 3d 941, 113 Cal. Rptr. 777 (1974); *People v. Calais*, 37 Cal. App. 3d 898, 112 Cal. Rptr. 685 (1974); *Russi v. Superior Court*, 33 Cal. App. 3d 160, 108 Cal. Rptr. 716 (1973).

70. One court has attempted to limit *Mason* by holding that police searches of probationers who are "subject to search" are reasonable only "[w]hen a known probationer . . . is discovered conducting himself in a manner that suggests a resumption of the misconduct that brought about the condition of probation. . . ." *People v. Bremmer*, 30 Cal. App. 3d 1058, 1065, 106 Cal. Rptr. 797, 802 (1973).

71. In a wide variety of contexts, the Supreme Court has stated that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). This standard has been applied primarily where first amendment freedoms are involved. *See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Cox v. Louisiana*, 379 U.S. 559, 562-64 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940). However, the Court has also en-

other hand, it does represent a realistic appraisal of the futile efforts of California courts to distinguish between correctional officers exercising their enforcement powers and the police.

The Ninth Circuit's Search for a Standard

A pair of recent cases from the Ninth Circuit, *Latta v. Fitzharris*⁷² and *United States v. Consuelo-Gonzalez*,⁷³ presented the question of how to evaluate searches of released offenders undertaken by correctional officers. Sitting en banc, the court was unable to agree on an appropriate standard;⁷⁴ however, the various opinions written in the two cases represent the most thorough analysis of the problem to date.

In *Latta* the court held that although the fourth amendment has some application to searches conducted in a parole setting, the realities of the parole system require that parole officers be permitted to proceed with less than probable cause. The officer in the case discovered his parolee smoking marijuana at the home of an acquaintance and promptly took him into custody.⁷⁵ Six hours later the parole officer and two policemen conducted a full search of the parolee's home, which was more than thirty miles from where the arrest was made. There they found a large quantity of marijuana, and this contraband was subsequently used to convict the parolee of possession with intent to distribute.

In upholding the search, the plurality first observed that police personnel neither initiated nor supervised the search in question.⁷⁶ Then, pointing to the "special and unique interest" which parole officers have in "invading the privacy" of their clients,⁷⁷ the court declared that parole officers need more information about their parolees than is available through less intrusive techniques in order to promote rehabilitation.⁷⁸ These considerations rendered both the probable cause standard and the warrant requirement inappropriate in the court's view. Instead, the Ninth Circuit enunciated the following standard:

forced this restriction where a person's right to privacy is impinged. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

72. 521 F.2d 246 (9th Cir.), cert. denied, 96 S. Ct. 200 (1975).

73. 521 F.2d 259 (9th Cir. 1975).

74. Both cases were decided by five-judge pluralities. In *Latta*, there were two concurrences and one dissent. There were two of each in *Consuelo-Gonzalez*.

75. The legality of the arrest was not at issue. 521 F.2d at 247.

76. *Id.* Searches initiated by police have been struck down by other courts. See note 46 *supra* and text accompanying note 65 *supra*.

77. *Id.* at 249.

78. *Id.* at 249-50.

[T]he 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. The parole officer ought to know more about the parolee than anyone else but his family. He is therefore in a better position than anyone else to decide whether a search is necessary. His decision may be based upon specific facts, though they be less than sufficient to sustain a finding of probable cause. It may even be based on a "hunch," arising from what he has learned or observed about the behavior and attitude of the parolee.⁷⁹

Unfortunately, the court did not reveal the basis for the parole officer's decision to conduct a search in *Latta*.

In *Consuelo-Gonzalez* the Ninth Circuit clarified the *Latta* standard by holding that a condition of probation requiring the probationer to submit to searches by any law enforcement officer⁸⁰ was outside the scope of a trial court's discretion under the Federal Probation Act.⁸¹ The case involved a search by FBI agents who had received information that the probationer, previously convicted of smuggling heroin, was again engaging in narcotics traffic. The agents checked the suspect's record, learned of the "submission to search" condition of her probation, and, on the basis of this condition, conducted a thorough search of her home which uncovered heroin and various narcotics paraphernalia. The Ninth Circuit, however, declared the search illegal under the Federal Probation Act. Noting that searches may constitute an effective supervisory technique in cases involving probationers convicted of narcotics offenses,⁸² the plurality suggested that searches "conducted in a reasonable manner and at a reasonable time by a probation officer" would be permissible under the Act.⁸³ Where such searches are conducted by law enforcement officers, however, the court feared that probation could become a "subterfuge for criminal investigations," and concluded that normal fourth amendment standards must be enforced.⁸⁴ The court emphasized that a more relaxed standard would have been applicable had the search in *Consuelo-Gonzalez* been conducted under the "immediate and personal supervision" of a probation officer.⁸⁵

79. *Id.* at 250.

80. See text accompanying note 67 *supra*.

81. 18 U.S.C. § 3651 (1970).

82. 521 F.2d at 265.

83. *Id.* at 263.

84. *Id.* at 267, quoting *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.), *cert. denied*, 96 S. Ct. 200 (1975).

85. 521 F.2d at 266. A federal district court in South Dakota recently found the *Latta* standards applicable to searches by probation officers as well as parole officers. *Connelly v. Parkinson*, 18 CRIM. L. REP. 2331 (D.S.D. Dec. 17, 1975).

Most courts have permitted correctional officers to undertake a search of their clients upon a showing of something less than probable cause.⁸⁶ *Latta* and *Consuelo-Gonzalez* are the first federal cases to develop a specific standard, however, and the result reached by the Ninth Circuit therefore deserves a close examination. A federal district court in New York recently sought to apply the *Latta* standard in *United States ex rel. Coleman v. Smith*.⁸⁷ In that case a parole officer made a routine visit to his client's room, but the parolee was not at home. Despite his "utter lack of any articulated or unarticulated suspicions,"⁸⁸ the officer searched the room and found heroin hidden in a suitcase under the bed which was subsequently used to convict the parolee of possession. Overturning the conviction, the court ruled that the "on the spot" search was unlawful since the officer was unable to point to anything "in the way of subjective information to justify the search"⁸⁹

Prior to his visit, the parole officer in *Coleman* did not suspect any parole violations, nor did he observe anything while in the room which could reasonably have aroused his suspicion.⁹⁰ The court therefore determined that, even under the test devised in *Latta*, the search in question was unreasonable.⁹¹ It would seem, however, that under the terms of *Latta* the decision could easily have gone the other way. The Ninth Circuit did not require reasons from the parole officer in *Latta* in order to uphold the search, only a "hunch,"⁹² and the fact that the court in *Coleman* did require a stronger showing⁹³ may actually belie misgivings about the degree of protection available under a strict reading of *Latta*.⁹⁴ Indeed, it is difficult to envision many situations in which a correctional officer, having conducted a search and having found incriminating evidence, would be unable to convince a reviewing court that he had a "hunch" that the evidence would be found.

86. See notes 47 & 56 *supra* and accompanying text.

87. 395 F. Supp. 1155 (W.D.N.Y. 1975).

88. *Id.* at 1158.

89. *Id.* at 1159.

90. *Id.*

91. *Id.*

92. 521 F.2d at 250.

93. 395 F. Supp. at 1159.

94. The trial judge noted that he "harbor[ed] reservations" about the plurality opinions in *Latta* and *Consuelo-Gonzalez*. *Id.* Judge Choy, who participated in the Ninth Circuit decisions, also foresaw problems with requiring only a "hunch." *Latta v. Fitzharris*, 521 F.2d 246, 253-54 (9th Cir.) (concurring opinion), *cert. denied*, 96 S. Ct. 200 (1975); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 267 (9th Cir. 1975) (concurring opinion).

Beyond the question of how much protection the requirement of a mere "hunch" affords, this low threshold established by the *Latta* court for satisfying the "reasonable belief" standard also distorts the meaning of a phrase which has been given constitutional significance by the Supreme Court in a line of cases dealing with on-the-street encounters between law enforcement officers and ordinary citizens. There are significant parallels between the role of a correctional officer and that of a "cop on the beat." Each officer represents a supervisory presence, primarily concerned with gathering information in order to deter criminal activity.⁹⁵ Thus, it is essential that each officer develop a special rapport with the "community" he serves. He is more likely to accomplish his objectives if he is able to elicit the cooperation of the people under his supervision.

The leading case in the street encounter area is *Terry v. Ohio*,⁹⁶ where the Supreme Court upheld the admission of evidence seized during a "stop and frisk," a brief custodial detention accompanied by a "pat-down" search for weapons.⁹⁷ The Court decided that such a limited search would be reasonable under the fourth amendment whenever "the facts available to the officer at the moment of the . . . search 'warrant a man of reasonable caution in the belief' that the action taken [is] appropriate"⁹⁸ The Court reasoned that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."⁹⁹ Lower courts were therefore instructed to give "due weight . . . not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."¹⁰⁰ The *Terry* test thus resembles the tort stan-

95. Compare L. SCHWARTZ & S. GOLDSTEIN, POLICE GUIDANCE MANUALS No. 4, at 1-7 (1968) and THE NATIONAL CENTER ON POLICE AND COMMUNITY RELATIONS, A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS 327-36 (1967) with notes 33-35 *supra* and accompanying text.

96. 392 U.S. 1 (1968).

97. *Id.* at 30. A police officer observed three men who appeared to be "casing" a store for a robbery. He approached them for questioning, frisked them, and found weapons on the persons of two. *Id.* at 6-7.

98. *Id.* at 21-22.

99. *Id.* at 22 (emphasis added). The Court cited as examples *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960); and *Henry v. United States*, 361 U.S. 98 (1959).

100. 392 U.S. at 27. The Court further developed the concept of "reasonable belief" in the companion case of *Sibron v. New York*, 392 U.S. 40 (1968). The Court stated there that in order to justify a warrantless on-the-street search a police officer must be able to "point to particular facts from which he reasonably inferred that the individual

dard for assessing the conduct of a person with superior knowledge or skill. An expert's behavior must not only be reasonable, it must also be consistent with his expertise.¹⁰¹

Adopting the *Terry* Court's sense of "reasonable belief" in the area of correctional searches would provide a more effective means of controlling parole and probation officers than the mere "hunch" requirement of *Latta*. As a practical matter, requiring just a "hunch"—a mere subjective suspicion—forces a reviewing judge to defer to correctional authorities in every case. The more objective *Terry* requirements, while acknowledging an officer's expertise, permit the judge to assess the search in light of his own notions of reasonableness. It is suggested that the net result is a workable system of meaningful review which nevertheless leaves a significant amount of discretion with the correctional officer.¹⁰²

The Use of Searches as a Correctional Technique

The foregoing development of a fourth amendment standard for reviewing searches by parole and probation officers has postponed consideration of one fundamental question: what is it about the relationship between a correctional officer and his client that justifies the curtailment of a constitutional right? It appears well-settled that released offenders are entitled to full fourth amendment protection with respect to searches by both law enforcement officials¹⁰³ and correctional authorities acting at the behest of law enforcement officials.¹⁰⁴ It would

was armed and dangerous." *Id.* at 64. See generally La Fave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 40 (1968).

The American Law Institute's *Model Code of Pre-Arrest Procedure* adopted the *Terry* standard for street encounters and provided a further explanation of the type of showing required to support a "reasonable suspicion." The *Model Code* provides that a law enforcement officer may stop a person where he "reasonably suspects that [the person] has just committed, is committing, or is about to commit a misdemeanor or felony, involving danger of forcible injury" MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1)(a)(i) (Proposed Official Draft, Apr. 15, 1975). The police officer can frisk a person he has stopped where he "reasonably believes that his safety or the safety of others then present so requires" *Id.* § 110.2(4). The drafters emphasized that there is no substantive difference between the standard of "reasonable suspicion" in section 110.2(1)(a)(i) and the standard in *Terry*. A police officer who conducts a "stop and frisk" "must be prepared to justify his action in terms of objective facts in the light of which his action must appear reasonable. Thus, intuition, hunch, or mere subjective suspicion will not suffice." *Id.* Commentary to § 110.2, at 282-83.

101. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161 (4th ed. 1971).

102. This approach was taken by a Washington appellate court in *State v. Simms*, 10 Wash. App. 75, 87-88, 516 P.2d 1088, 1095-96 (1973).

103. See note 8 *supra* and accompanying text.

104. See notes 46 & 65 *supra* and accompanying text.

therefore appear that, when the purpose of a search is to gather evidence of suspected criminal activity, the released offender is entitled to the same constitutional safeguards that protect ordinary citizens. Only where the correctional officer is performing functions unique to his office would a lesser degree of concern for the privacy of his client seem justified.

The difficulty with this analysis is that the correctional officer has historically performed two separate functions, rehabilitation and enforcement.¹⁰⁵ Furthermore, when investigating for a suspected violation of release conditions pursuant to his enforcement function, the officer's actions are often indistinguishable from those of any law enforcement official. The California courts encountered just this problem in the line of cases beginning with *Hernandez*, where they sought unsuccessfully to extend extraordinary search powers to correctional officers without regard to when those powers should be used.¹⁰⁶ Whatever the validity of the assumption underlying this result—namely, that criminal activity is always a violation of release conditions and therefore a legitimate matter of concern for the officer¹⁰⁷—it should be clear that enforcement is a function which correctional officers share with law enforcement officials. What makes the job of the correctional officer unique is his responsibility for the rehabilitation of his client, and it would therefore seem that he should enjoy extraordinary search powers only when he is performing this function.

If it is possible to determine when a correctional officer is performing rehabilitative functions and when he is acting like a law enforcement official, what rehabilitative purposes are served by correctional searches? Can these objectives be achieved by less intrusive means? The most frequently mentioned purposes of correctional searches are supervision, deterrence, and public acceptance. Periodic home inspections can provide the officer with a feel for his client's environment and an opportunity to observe his rehabilitative progress first-hand.¹⁰⁸ It is also apparent that released offenders will be less likely to commit unlawful acts within their homes if they realize that their supervisor may make an unannounced visit at any time.¹⁰⁹ Finally, as the *Hernandez* court

105. See notes 33-35 *supra* and accompanying text.

106. See notes 59-65 *supra* and accompanying text.

107. See text accompanying notes 63-65 *supra*.

108. See *Latta v. Fitzharris*, 521 F.2d 246, 249-50 (9th Cir.), *cert. denied*, 96 S. Ct. 200 (1975); *R. Dawson, supra* note 34, at 129-32; *Newman, supra* note 32, at 16.

109. See, e.g., *People v. Mason*, 5 Cal. 3d 759, 763, 488 P.2d 630, 632, 97 Cal. Rptr. 302, 304 (1971), *cert. denied*, 405 U.S. 1016 (1972); *People v. Kern*, 264 Cal. App. 962, 965, 71 Cal. Rptr. 105, 107 (1968).

observed, "intense scrutiny by correctional authorities is a vital ingredient of a publicly acceptable parole system."¹¹⁰ Too high a rate of recidivism among released offenders will result either in legislation limiting the availability of parole and probation as alternatives to imprisonment, or in a judicial reluctance to grant these more lenient forms of punishment.¹¹¹

Although correctional searches may often serve the functions listed above, doubt remains as to their *rehabilitative* utility. For example, Judge Wright, dissenting in *Consuelo-Gonzalez*, feared that searches aimed at deterring criminal activity might destroy the atmosphere of trust and confidence built up between a supervisor and his client, and that they are therefore more appropriately conducted by police officers.¹¹² One commentator has also argued that frequent searches adversely affect a released offender's ability to renew ties with his family and friends.¹¹³ Not only may searches actually deter rehabilitation, however; a real danger also exists that searches ostensibly undertaken for rehabilitative purposes may in fact be prosecutorial in nature. A "routine" home inspection, whether designed to gather information, to catch the offender off-guard, or to placate public fears, comes perilously close to an ordinary criminal investigation when undertaken by virtue of a suspicion that the offender is engaged in unlawful activity. Yet searches justified under either the second or third objective listed above clearly, perhaps necessarily, run this risk. To prevent such an abuse, to avoid converting the correctional program into a "subterfuge for criminal investigations,"¹¹⁴ limitations on the correctional officer's power to search are needed.

Significant protection can be afforded released offenders simply by focusing post-search judicial review on the correctional officer's motive in undertaking the search. When a correctional officer, perhaps as the result of a tip from police officers or an informant, enters his client's home in order to investigate suspected criminal activity, his motive is essentially prosecutorial, and he is entitled to no greater authority than a law enforcement official. When the home visit is made

110. 229 Cal. App. 2d 143, 149-50, 40 Cal. Rptr. 100, 104 (1964).

111. *Cf.* United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975); *id.* at 271-72 (Wright, J., dissenting).

112. *Id.* at 270-71 (dissenting opinion). *Cf.* People v. Mason, 5 Cal. 3d 759, 769-70, 488 P.2d 630, 636, 97 Cal. Rptr. 302, 308 (1971) (Peters, J., dissenting), *cert. denied*, 405 U.S. 1016 (1972).

113. See Note, *Extending Search-and-Seizure Protection to Parolees in California*, *supra* note 62, at 135.

114. Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir.), *cert. denied*, 96 S. Ct. 200 (1975).

in the course of supervising rehabilitation, however, he should be afforded some latitude. The question is whether the officer comes solely with the expectation of uncovering criminal activity.¹¹⁵ While motivation can be difficult to prove, several courts have successfully used this factor as a basis for limiting the investigatory activities of administrative agencies to their authorized objectives.¹¹⁶

A second safeguard suggested by developments in the area of administrative searches¹¹⁷ is the formulation of detailed regulations specifying the situations in which a correctional officer may be given broad powers to search, and limiting the scope of such intrusions.¹¹⁸ Correctional efficiency is promoted by adapting the intensity of supervision to the crime involved and the behavioral history of the released

115. In distinguishing between health inspections and criminal searches, one commentator has observed:

[T]he police officer who undertakes a search has reasonable grounds to expect to find evidence of wrongdoing, and would be disappointed if the search were fruitless; the health inspector who conducts an inspection, on the other hand, has no reason to anticipate that he will find particular violations; he looks for compliance with the health laws and regulations, and the absence of instances of noncompliance ought to be a source of satisfaction, rather than of disappointment, to him. F. GRAD, PUBLIC HEALTH LAW MANUAL 76 (1965).

116. See, e.g., *United States v. Kessler*, 364 F. Supp. 66 (S.D. Ohio 1973); *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953).

117. Warrants are not always required in the administrative field. In *United States v. Biswell*, 406 U.S. 311 (1972), the Supreme Court upheld a warrantless inspection of a gun shop which resulted in the seizure of illegal weapons pursuant to the Gun Control Act of 1968. Among the factors justifying such inspections, the Court emphasized two which have special relevance to correctional searches: (1) the inspections were authorized as a crucial part of a pervasive regulatory scheme, *id.* at 315, and (2) firearms dealers were annually furnished with a copy of the regulations to which they were subject, and thus were "not left to wonder about the purposes of the inspector or the limits of his task." *Id.* at 316. *Biswell* was preceded by *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), which declared unlawful a warrantless inspection of a retail liquor dealer's premises which was accomplished by forcible entry. The Court acknowledged the power of Congress to authorize warrantless inspections in "closely regulated industries," but held that, absent an express regulation, forcible entry was unreasonable under the fourth amendment. *Id.* at 76-77.

118. Judge Kaufman of the Second Circuit suggested such an approach in *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

Parole is far more apt to be successful when limitations on the parolee's freedom are delineated with some degree of certainty

. . . I would prefer to have the Parole Board . . . spell out in precise terms—before release—its determination that searches . . . were reasonable in terms of both the overall goals of parole and the dangers of harassment or worse." *Id.* at 1168 (concurring opinion).

See also *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1160 (W.D.N.Y. 1975). The *Latta* plurality itself drew an analogy to parole searches from the Supreme Court's administrative search exception to the warrant requirement. 521 F.2d at 250-51; see Comment, *Search and Seizure Rights of Parolees and Probationers in the Ninth Circuit*, *supra* note 42, at 626-30.

offender.¹¹⁹ Regulations might therefore specify the crimes for which a "submission to search" condition could be imposed, and enumerate those character traits which indicate whether a particular offender will require careful surveillance. For example, persons who have been convicted of crimes which do not involve contraband substances, stolen property, or dangerous weapons should seldom, if ever, be subject to searches as a condition of probation or parole.¹²⁰ Search conditions might also be limited to such cases as narcotics offenses, where close supervision has proven to be an especially effective means of monitoring rehabilitative progress.¹²¹

Regulating the permissible scope of correctional searches is more difficult. Under the fourth amendment the scope of a criminal search is controlled by the requirement that a warrant describe in particular the place to be searched and the things to be seized,¹²² but a correctional officer performing a purely rehabilitative search has no idea of where to look or what he will find until he arrives on the scene. Clearly, there would be a substantial risk of abuse if the officer were permitted to rummage throughout an entire home. On the other hand, no reasonable parameters suggest themselves. For this reason, legislatures might consider removing all search powers from correctional officers. Whatever the rehabilitative value of a search, its legitimate objectives might be equally attainable through the use of less intrusive means, such as the "home visit."

The "Home Visit" As An Investigatory Alternative

The "home visit" differs from a full search in that the correctional

119. See TASK FORCE REPORT, *supra* note 1, at 29; Comment, *The Parole System*, *supra* note 11, at 309. But see Arluke, *supra* note 21, where the author notes that in New York, Colorado, and North Carolina all grants of parole are conditional upon the parolee's submission to searches conducted by his parole officer. *Id.* at 274.

120. A bill recently introduced into the General Assembly of North Carolina restricts the use of "submission to search" conditions to those cases in which such searches are "reasonably related to [the offender's] . . . supervision." S.B. 663, art. 82, § 15A-1343 (b)(15); *id.* art. 85, § 15A-1374(b)(11) (Apr. 25, 1975). The drafters of the bill noted that such a condition should only be imposed where the offender has been convicted of a crime involving contraband, stolen property, or weapons. *Id.* Draft Commentary.

121. See Diskind & Klonsky, *A Second Look at the New York State Parole Drug Experiment*, 28 FED. PROBATION 34 (Dec. 1964); Root, *What the Probation Officer Can Do for Special Types of Offenders*, 13 FED. PROBATION 19-20 (Dec. 1949); Vaillant & Rasor, *The Role of Compulsory Supervision in the Treatment of Addiction*, 30 FED. PROBATION 53 (June 1966). Judge Wright, dissenting in *Consuelo-Gonzalez*, pointed out that both federal district and state judges in California have been imposing "submission to search" conditions for several years in drug-related cases. 521 F.2d at 270 (dissenting opinion).

122. U.S. CONST. amend. IV.

officer simply converses with the client at his home and limits his observations to the immediate surroundings.¹²³ Despite its limited scope, the visit can be an effective rehabilitative tool for achieving the stated objectives of an ordinary search.¹²⁴ The correctional officer can develop a "feel" for his client's home environment; if unannounced, home visits can have a deterrent effect upon criminal behavior; and regular visits provide the continuous supervision necessary to minimize recidivism and thus win the public's confidence in release programs.

In *Wyman v. James*,¹²⁵ the Supreme Court considered the constitutional significance of home visits in the context of welfare supervision. The Court held that such visits were outside the purview of the fourth amendment when employed to ensure compliance with lawful regulations.¹²⁶ The Court suggested in dicta, however, that even if home visits were evaluated as "searches" under the fourth amendment, they should be upheld as reasonable for essentially three reasons: (1) public interest in a properly administered welfare program;¹²⁷ (2) the value of home visits as a means of gathering essential information unattainable through alternative techniques;¹²⁸ and (3) the fact that home visits are made by trained caseworkers "whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility."¹²⁹

The home visit could be sustained as a reasonable supervisory device in the corrections field by drawing on the analysis suggested in *Wyman*. Certainly, the public has a legitimate interest in seeing that correctional systems function properly,¹³⁰ and it is equally clear that familiarity with a client's home environment is of significant value to a correctional officer.¹³¹ Thus, where an officer makes a visit for purely rehabilitative purposes, the analogy to *Wyman* would be complete.

The analogy requires that correctional officers relinquish their law enforcement powers. The *Wyman* Court emphasized that welfare workers have no criminal investigatory responsibilities,¹³² and that

123. See R. Dawson, *supra* note 34, at 129-32, 326-30; White, *supra* note 12, at 187-89. See generally Comment, *The Parole System*, *supra* note 11, at 337.

124. See notes 108-11 *supra* and accompanying text.

125. 400 U.S. 309 (1971).

126. *Id.* at 318.

127. *Id.* at 318-19.

128. *Id.* at 320.

129. *Id.* at 322-23.

130. See notes 110-11 *supra* and accompanying text.

131. See note 108 *supra* and accompanying text.

132. 400 U.S. at 323.

the consequences of discovering suspicious activity should therefore be "no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct."¹³³ The implication for a correctional officer who seeks to justify home visits under *Wyman* is that he would have no authority to seize evidence for use in a criminal prosecution. Rather, he would have the option of either giving his client a warning and a second chance, seizing the evidence for use in a revocation proceeding,¹³⁴ or relating his observations to the police, which they may then exploit for the purpose of establishing probable cause and securing a warrant. The officer would not be required to abandon his rehabilitative efforts in order to undertake his own criminal investigation. This responsibility would be left with the official body to which it is charged, the police.

CONCLUSION

This Note has emphasized the distinction between correctional supervision which seeks to restore a released offender to society through rehabilitation, and supervision which seeks merely to investigate and prosecute criminal activity. Although correctional officers have historically performed both types of supervision, it is the rehabilitative function which makes their relationships with their clients unique, and which justifies the extraordinary search powers that they enjoy. Prosecutorial searches of released offenders should be subject to the same fourth amendment limitations as those of ordinary citizens, and safeguards are necessary to insure that an officer's special powers are not abused. Perhaps the most effective means of guarding against the temptation to circumvent offenders' rights, however, is to withdraw search powers from correctional officers altogether, and to limit supervision to the "home visit" technique. Less intrusive than the full search, and less open to abuse, the home visit should be considered as an alternative, rather than a mere supplement, to the correctional search.

133. *Id.*

134. Released offenders enjoy no fourth amendment rights with respect to revocation proceedings. See note 6 *supra* and accompanying text.