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# ADMISSIBILITY OF EVIDENCE IN PROBATION/PAROLE REVOCATION PROCEEDINGS AND IN CRIMINAL PROSECUTIONS: APPLYING A SINGLE STANDARD

## INTRODUCTION

Federal and state courts have uniformly acknowledged that probationers and parolees<sup>1</sup> are entitled to some fourth amendment protection against unreasonable searches.<sup>2</sup> Because of differing views<sup>3</sup> on

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1. A probationer is an offender who is "sentenced to remain in the community, under supervision, in lieu of being incarcerated." A. Smith & L. Berlin, Introduction to Probation and Parole 3 (2d ed. 1979). A parolee is released from incarceration before completion of his sentence and placed under supervision in the community. See *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). "In the U.S. Federal government, probation and parole are handled by the same agency, and officers handle probation and parole cases simultaneously." A. Smith & L. Berlin, *supra*, at 3 n.1. Although there are minor administrative differences between probation and parole, the fourth amendment rights of probationers and parolees are indistinguishable. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); see *Van Dyke, Parole Revocation Hearings in California: The Right to Counsel*, 59 Calif. L. Rev. 1215, 1241 (1971) ("technical differences [between probation and parole] should not receive constitutional importance").

2. E.g., *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978); *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc); *Latta v. Fitzharris*, 521 F.2d 246, 248 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975); *Diaz v. Ward*, 437 F. Supp. 678, 682 (S.D.N.Y. 1977); *Grubbs v. State*, 373 So. 2d 905, 907 (Fla. 1979); *Dulin v. State*, 169 Ind. App. 211, 216, 346 N.E.2d 746, 749 (1976); *People v. Jackson*, 46 N.Y.2d 171, 174, 385 N.E.2d 621, 623, 412 N.Y.S.2d 884, 886 (1978); *State v. Deener*, 64 Ohio St. 2d 335, 337, 414 N.E.2d 1055, 1057 (1980) (per curiam), *cert. denied*, 450 U.S. 1044 (1981). The fourth amendment states: "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. At least one state court has adopted the view that fourth amendment standards are the same for probationers and parolees as for other citizens. *State v. Cullison*, 173 N.W.2d 533, 537 (Iowa), *cert. denied*, 398 U.S. 938 (1970). "[W]e believe it fairer and far more realistic that an Iowa State parolee's Fourth Amendment rights, privileges and immunities, be accorded the same recognition as any other person. In fact there is to us no apparent constitutionally adequate or permissible basis upon which to hold otherwise." *Id.*

3. Compare, e.g., *Latta v. Fitzharris*, 521 F.2d 246, 250-51 (9th Cir.) (en banc) (relationship between parole officer and his parolee is *sui generis* as to warrant requirement), *cert. denied*, 423 U.S. 897 (1975), and *United States v. Rea*, 524 F. Supp. 427, 430 (E.D.N.Y. 1981) (same regarding probationer), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981), with *United States v. Bradley*, 571 F.2d 787, 789-90 (4th Cir. 1978) (special relationship serves as grounds for diminished standard of probable cause required to obtain warrant for parolee), and *People v. Jackson*, 46 N.Y.2d 171, 175-77, 385 N.E.2d 621, 623-25, 412 N.Y.S.2d 884, 887-88 (1978) (same regarding probationer).

the authority needed by probation/parole officers to effectively supervise their charges, however, courts often disagree as to what constitutes an unreasonable search.<sup>4</sup>

Many courts consider warrantless searches by probation/parole officers reasonable if they are based on reasonable cause to believe that a violation has occurred or is about to occur.<sup>5</sup> One court has even suggested that a probation or parole officer's hunch is sufficient basis for a warrantless search of his charge.<sup>6</sup> In contrast, some courts, although granting search warrants to probation/parole officers under a relaxed standard, maintain that such officers must still obtain a warrant prior to searching their charges.<sup>7</sup>

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4. The fourth amendment does not require that to be reasonable a search must be conducted with a warrant. In *United States v. Rabinowitz*, 339 U.S. 56 (1950), *overruled*, *Chimel v. California*, 395 U.S. 752, 768 (1969), the Court, in dictum, explored the reasonableness of searches in relation to the warrant clause. "[W]e cannot agree that [requiring a search warrant] should be crystallized into a *sine qua non* to the reasonableness of a search." *Id.* at 65. Taking all the circumstances into consideration, a search may be reasonable even if conducted without a warrant. *Id.* at 65-66. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* at 66. Compare *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc) (warrantless search by probation officer is not a violation of the fourth amendment), and *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (en banc) (warrantless search of charge by parole officer did not violate the fourth amendment even though the officer has no probable cause to believe that a parole violation exists), *cert. denied*, 423 U.S. 897 (1975), with *United States v. Workman*, 585 F.2d 1205, 1207 (4th Cir. 1978) (in the absence of an established exception to the warrant requirement, a search by a probation officer of his charge requires a warrant), and *United States v. Bradley*, 571 F.2d 787, 789-90 (4th Cir. 1978) (warrant required for search by parole officer). For a good general discussion of the constitutional rights of parolees, see Note, *Rights of the Convicted Felon on Parole*, 13 U. Rich. L. Rev. 367 (1979); Note, *Search and Seizure—Applying the Warrant Requirement to Parolee Searches*, 14 Wake Forest L. Rev. 1207 (1978).

5. *Diaz v. Ward*, 437 F. Supp. 678, 686-87 (S.D.N.Y. 1977); *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1158 (W.D.N.Y. 1975); *People v. Anderson*, 189 Colo. 34, 37, 536 P.2d 302, 305 (1975) (en banc); *State v. Williams*, 486 S.W.2d 468, 472-73 (Mo. 1972); *Seim v. State*, 95 Nev. 89, 94, 590 P.2d 1152, 1155 (1979); *People v. Huntley*, 43 N.Y.2d 175, 181, 371 N.E.2d 794, 797, 401 N.Y.S.2d 31, 34 (1977); *State v. Simms*, 10 Wash. App. 75, 85-88, 516 P.2d 1088, 1094-96 (1973). In *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980), the court upheld a warrantless search by a probation officer of his charge based on probable cause. *Id.* at 368-69. The court refused to decide, however, whether a showing of less than probable cause would have been sufficient to uphold the warrantless search. *Id.* at 369 n.5. In *Commonwealth v. Brown*, 240 Pa. Super. 190, 361 A.2d 846 (1976), although the court stated that a parole officer performing his normal duties is not required to obtain a warrant, *id.* at 197, 361 A.2d at 850, it failed to state whether probable cause was required.

6. *Accord Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (en banc) (parole), *cert. denied*, 423 U.S. 897 (1975); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir. 1975) (en banc) (probation).

7. *United States v. Workman*, 585 F.2d 1205, 1207-08 (4th Cir. 1978) (probation); *United States v. Bradley*, 571 F.2d 787, 789-90 (4th Cir. 1978) (parole); *People*

The fourth amendment guarantee against unreasonable searches<sup>8</sup> is implemented by the exclusionary rule, which deters such searches by excluding from criminal proceedings evidence illegally obtained.<sup>9</sup> Some courts extend the application of the exclusionary rule to probation/parole revocation hearings,<sup>10</sup> thus creating a single standard of admissibility under which evidence obtained in violation of the fourth amendment is excluded from both criminal trials and revocation proceedings. Application of the exclusionary rule has been often denied, however, in revocation proceedings.<sup>11</sup> Courts denying application

v. Jackson, 46 N.Y.2d 171, 174-77, 385 N.E.2d 621, 623-25, 412 N.Y.S.2d 884, 886-88 (1978). In *State v. Fogarty*, 610 P.2d 140 (Mont. 1980), the Montana Supreme Court stated that a warrant based on probable cause is required before a probation officer may conduct a search of his charge's home because such a search infringes on the privacy of the probationer's family and friends. *Id.* at 152. A warrantless search of the probationer's person or automobile, however, if based on reasonable grounds, is constitutional. *Id.* at 153.

8. U.S. Const. amend. IV; *see supra* note 2.

9. *Mapp v. Ohio*, 367 U.S. 643, 654-56 (1961); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 665 (1970).

10. *United States v. Workman*, 585 F.2d 1205, 1210 (4th Cir. 1978); *Amiss v. State*, 135 Ga. App. 784, 786-87, 219 S.E.2d 28, 30-31 (1975); *State ex rel. Piccarillo v. Board of Parole*, 48 N.Y.2d 76, 81, 397 N.E.2d 354, 356-57, 421 N.Y.S.2d 842, 845 (1979); *Michaud v. State*, 505 P.2d 1399, 1402-03 (Okla. Crim. App. 1973); *State v. Stephens*, 614 P.2d 1180, 1184 (Or. Ct. App. 1980); *see State v. Fogarty*, 610 P.2d 140, 152 (Mont. 1980); *People v. Jackson*, 46 N.Y.2d 171, 177, 385 N.E.2d 621, 625, 412 N.Y.S.2d 884, 888 (1978); *Wilson v. State*, 621 S.W.2d 799, 805 (Tex. Crim. App. 1981); *Rushing v. State*, 500 S.W.2d 667, 673 (Tex. Crim. App. 1973).

11. *Schneider v. Housewright*, No. 81-2055, slip op. at 3 & n.4 (8th Cir. Dec. 28, 1981); *United States v. Wiygul*, 578 F.2d 577, 578 (5th Cir. 1978) (per curiam); *United States v. Frederickson*, 581 F.2d 711, 713-14 (8th Cir. 1978) (per curiam); *United States v. Farmer*, 512 F.2d 160, 162-63 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States v. Brown*, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam) (alternate holding); *United States v. Johnson*, 455 F.2d 932, 933 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States v. Hill*, 447 F.2d 817, 818-19 (7th Cir. 1971) (alternate holding); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970); *United States v. Rea*, 524 F. Supp. 427, 431 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *United States v. Delago*, 397 F. Supp. 708, 712 (S.D.N.Y. 1974); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 650-52 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *State v. Sears*, 553 P.2d 907, 909-10 (Alaska 1976); *State v. Alfaro*, 127 Ariz. 578, 579-80, 623 P.2d 8, 9-10 (1980) (en banc); *People v. Atencio*, 186 Colo. 76, 78-80, 525 P.2d 461, 462-63 (1974) (en banc); *People v. Dowery*, 20 Ill. App. 3d 738, 741-44, 312 N.E.2d 682, 684-87 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Davis*, 375 So. 2d 69, 73-75 (La. 1979); *State v. Spratt*, 386 A.2d 1094, 1094-96 (R.I. 1978); *State v. Kuhn*, 7 Wash. App. 190, 192-94, 499 P.2d 49, 51-52, *aff'd en banc*, 81 Wash. 2d 648, 503 P.2d 1061 (1972); *see Note, The Exclusionary Rule in Parole Revocation Hearings: Detering Official Infringement of Parolees' Fourth Amendment Rights*, 1979 B.Y.U. L. Rev. 161; *Note, The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal*, 54 Tex. L. Rev. 1115 (1976).

either question the deterrent effect of such exclusion<sup>12</sup> or view revocation hearings as non-adversarial proceedings to which the exclusionary rule does not apply.<sup>13</sup>

This Note contends that the latter approach, wherein the fruits of an illegal search are admitted into revocation proceedings but excluded from criminal trials, creates a danger that probation/parole officers will conduct illegal searches, content in the knowledge that evidence obtained can be used for the limited purpose of revocation. Under these circumstances, the deterrent effect of excluding the evidence from the criminal trial is questionable. Moreover, the potential impact of the probation/parole officer's investigatory role is diminished and the protection of society is compromised by diminution of the possibility of a new prison term, in addition to whatever prison term the revocation proceeding might yield, for a criminal offender.

This Note examines the conflicting views toward application of the fourth amendment to searches by probation and parole officers, and toward the admissibility in revocation proceedings of evidence obtained in such searches. It argues that a search warrant requirement, coupled with a lesser standard of probable cause, satisfies the purposes of probation/parole while affording probationers and parolees some fourth amendment protection. More significantly, because of the danger posed by separate standards of admissibility for criminal trials and revocation proceedings, this Note urges those courts that adhere to the dual standard to adopt a single standard of admissibility.

## I. PROBATION AND PAROLE

Both probation and parole are means by which, as an alternative to incarceration, a criminal offender is placed under supervision in the community.<sup>14</sup> Probation is the suspension of the imposition of sen-

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12. *United States v. Hill*, 447 F.2d 817, 818 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970); *State v. Robledo*, 116 Ariz. 346, 348, 569 P.2d 288, 290 (1977); *Dulin v. State*, 169 Ind. App. 211, 219-21, 346 N.E.2d 746, 752 (1976); *State v. Davis*, 375 So. 2d 69, 74 (La. 1979). Other courts specifically question the deterrent effect when the search is conducted by a policeman unaware of the search victim's probation or parole status. *See United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975); *State v. Sears*, 553 P.2d 907, 912 (Alaska 1976); *People v. Dowery*, 20 Ill. App. 3d 738, 741, 312 N.E.2d 682, 685 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Spratt*, 386 A.2d 1094, 1095 n.2 (R.I. 1978).

13. *United States v. Johnson*, 455 F.2d 932, 933 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970); *United States v. Rea*, 524 F. Supp. 427, 431 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 652 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971).

14. A. Smith & L. Berlin, *supra* note 1, at 143; *see Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

tence, or the suspension of the execution of a sentence already imposed.<sup>15</sup> Parole is the conditional release of a convicted criminal after he has served a portion of his sentence.<sup>16</sup> Probation or parole status is generally granted with express conditions directed toward rehabilitating the probationer or parolee and enabling the probation or parole officers to control their charges.<sup>17</sup> Breach of a condition constitutes a "technical violation"<sup>18</sup> and presents grounds for initiating action to revoke probation/parole.<sup>19</sup> The decision to initiate revocation proceedings, however, is within the discretion of the probation and parole agencies.<sup>20</sup> In the exercise of this discretion, technical violations

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15. 18 U.S.C. § 3651 (1976); see *Roberts v. United States*, 320 U.S. 264, 269-70 (1943); A. Smith & L. Berlin, *supra* note 1, at 104.

16. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); A. Smith & L. Berlin, *supra* note 1, at 107; see 18 U.S.C. § 4205(a) (1976).

17. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972); H. Abadinsky, *Probation and Parole: Theory and Practice* 185 (1977); H. Burns, *Corrections Organization and Administration* 251, 300 (1975); see R. Dawson, *Sentencing* 306-07 (1969); A. Smith & L. Berlin, *supra* note 1, at 144. A statutory provision entitled "Conditions of parole," 18 U.S.C. § 4209(a) (1976), mandates that in every parole release a condition be imposed "that the parolee not commit another Federal, State, or local crime." *Id.* In addition to the mandatory condition, the Parole Commission may impose any other reasonable condition to protect the public welfare. *Id.* A judge granting probation is given great discretion in imposing conditions. *Id.* § 3651. The conditions of parole and probation are very similar. H. Abadinsky, *supra*, at 184. Some commonly imposed probation and parole conditions are that the releasee make restitution to the aggrieved party of his crime, that he not associate with known criminals and that he obtain and maintain employment. See H. Abadinsky, *supra*, at 121-22; A. Campbell, *Law of Sentencing* 83-86 (1978); R. Dawson, *supra*, at 308-09; A. Smith & L. Berlin, *supra* note 1, at 143-44. One condition, the validity of which has been the subject of controversy, is the requirement that the probationer/parolee submit to warrantless searches at any time of the day or night by any law enforcement officer. Generally, the courts hold that this condition is too broad and must be narrowed to be valid. In *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) (en banc), this type of condition was held invalid as an improper infringement of the probationer's fourth amendment rights. *Id.* at 265-66; accord *People v. Peterson*, 62 Mich. App. 258, 265-66, 233 N.W.2d 250, 254-55 (1975); *Tamez v. State*, 534 S.W.2d 686, 691-92 (Tex. Crim. App. 1976). In *Peterson* and *Tamez*, the courts viewed acceptance of the condition as being coerced because the alternative to acceptance was incarceration. In *Consuelo-Gonzalez*, the court concluded that if the condition were narrowed to require the probationer to submit her person and property to search by her probation officer in a reasonable manner and at reasonable times, the condition would have been valid. 521 F.2d at 265 & n.14. This Note is not concerned with searches made pursuant to a constitutionally valid search condition.

18. H. Abadinsky, *supra* note 17, at 126; A. Smith & L. Berlin, *supra* note 1, at 146.

19. See H. Abadinsky, *supra* note 17, at 126; A. Campbell, *supra* note 17, at 82; R. Dawson, *supra* note 17, at 307; A. Smith & L. Berlin, *supra* note 1, at 143.

20. H. Abadinsky, *supra* note 17, at 126, 189; see 18 U.S.C. § 3653 (1976) (probation); *Id.* § 4203(b)(3) (parole); C. Newman, *Sourcebook on Probation, Parole and Pardons* 76 (3d ed. 1972); A. Smith & L. Berlin, *supra* note 1, at 146-47.

are often ignored, and revocation proceedings are usually not initiated unless it is believed that the probationer or parolee has committed a new crime.<sup>21</sup> Additionally, in order to effectuate both rehabilitation and public protection, the probation/parole officer is afforded great latitude in visiting the home or place of employment of his charge.<sup>22</sup> If the circumstances indicate that such action is necessary, officers also have the authority to investigate and arrest their charges.<sup>23</sup>

Supervision by the probation/parole officer, therefore, serves a dual function: protecting society by insuring that the probationer/parolee abides by the law, and effectuating the rehabilitation of the charge.<sup>24</sup> Which of these two roles predominates depends largely on the attitude of the individual probation/parole officer<sup>25</sup> and may affect the likelihood of an officer conducting an illegal search.

## II. PROBATION/PAROLE AND THE FOURTH AMENDMENT

Warrantless searches of an ordinary citizen are unreasonable per se under the fourth amendment<sup>26</sup> unless they fall within one of a few narrowly defined exceptions:<sup>27</sup> searches to which the subject voluntarily consents;<sup>28</sup> routine administrative searches;<sup>29</sup> or searches under

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21. H. Abadinsky, *supra* note 17, at 126; *see* R. Dawson, *supra* note 17, at 145, 315, 358; C. Newman, *supra* note 20, at 132-33; A. Smith & L. Berlin, *supra* note 1, at 146-48.

22. *See, e.g.*, *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978) (authority of a probation/parole officer to visit the home or place of employment of his charge may be specifically enumerated as a condition to release); *State v. Malone*, 403 So. 2d 1234, 1239 (La. 1981) (same); *Commonwealth v. Brown*, 240 Pa. Super. 190, 193, 361 A.2d 846, 847-48 (1976) (same). Some courts view probation/parole officers' rights to make home visits as inherent to their supervisory role. *E.g.*, *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978); *Grubbs v. State*, 373 So. 2d 905, 908 (Fla. 1979).

23. H. Abadinsky, *supra* note 17, at 284; A. Smith & L. Berlin, *supra* note 1, at 146-47.

24. A. Smith & L. Berlin, *supra* note 1, at 145-46; *see* H. Abadinsky, *supra* note 17, at 282-85; C. Newman, *supra* note 20, at 205-08.

25. R. Dawson, *supra* note 17, at 318; A. Smith & L. Berlin, *supra* note 1, at 202-05; *see* H. Abadinsky, *supra* note 17, at 283-86.

26. U.S. Const. amend. IV, *construed in* *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Katz v. United States*, 389 U.S. 347, 357 (1967).

27. *United States v. United States District Court*, 407 U.S. 297, 318 (1972). The exceptions to the warrant requirement "are few in number and carefully delineated." *Id.* "The exceptions . . . have been jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958).

28. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973). In order for the consent to be valid, it must be voluntary. *Id.* at 228-29; *see* *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Davis v. United States*, 328 U.S. 582, 593-94 (1946). The consent may be given by someone authorized to act for the search victim. *Compare* *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (joint user of an article clearly has authority to

exigent circumstances that would render obtaining a warrant impractical.<sup>30</sup> Absent one of these exceptions, a reasonable search is one conducted under a search warrant issued by a "neutral and detached magistrate" and based on a showing of probable cause.<sup>31</sup>

Probationers and parolees, however, historically were virtually denied fourth amendment guarantees<sup>32</sup> under the "grace,"<sup>33</sup> "contract

consent to its search), *with Stoner v. California*, 376 U.S. 483, 489-90 (1964) (consent given by a hotel clerk to the police to search the room of a guest held invalid because the guest had not authorized the clerk to permit the search).

29. *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). These are searches in which the person or premises to be searched is subject to extensive government regulation, there is statutory authority for the search, there is a lesser expectation of privacy, and in which there is a need for unannounced, frequent searches by government officials. *Id.* Within this category are international border searches, *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973), and regulatory inspections of business premises based on statutory authority. *United States v. Biswell*, 406 U.S. 311, 315-17 (1972) (premises inspection of firearm dealer); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73-76 (1970) (searches made in conjunction with the enforcement of the federal liquor laws).

30. *E.g.*, *Chambers v. Maroney*, 399 U.S. 42, 46-51 (1970) (warrantless search of a car, which could not be justified as a search incident to an arrest, justifiable because of mobility of an automobile, provided there is reasonable cause); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (justification exists for a warrantless search of an arrestee's person and the area within his immediate control conducted incident to an arrest); *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (stop and frisk for weapons if the circumstances present sufficient facts to warrant the belief that the suspect is armed and dangerous); *Warden of Maryland Pen. v. Hayden*, 387 U.S. 294, 298 (1967) (hot pursuit); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (withdrawal of blood for alcohol level considered an appropriate search incident to arrest because normal body functions would eliminate evidence before a warrant could be obtained).

31. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971); *Katz v. United States*, 389 U.S. 347, 356-57 (1967); *Johnson v. United States*, 333 U.S. 10, 13-15 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); *Agnello v. United States*, 269 U.S. 20, 32 (1925). In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court concluded that a warrant issued by the state Attorney General, who was also the chief prosecutor in the case, was invalid because the issuer "was not the neutral and detached magistrate required by the Constitution." *Id.* at 453. "[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 (1932).

32. *See generally White, The Fourth Amendment Rights of Parolees and Probationers*, 31 U. Pitt. L. Rev. 167 (1969).

33. *Escoe v. Zerbst*, 295 U.S. 490 (1935). The Court stated that the privilege of probation does not have its basis in the Constitution. "Probation . . . comes as an act of grace to one convicted of a crime . . ." *Id.* at 492; *accord United States ex rel. Randazzo v. Follette*, 282 F. Supp. 10, 12-13 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971). "[A parolee's] release on parole [is]



consent"<sup>34</sup> and "constructive custody"<sup>35</sup> theories. Proponents of the grace theory viewed probation and parole as conditional privileges emanating from an act of mercy by a judge or parole board.<sup>36</sup> The contract consent theory is based on a contractual exchange of fourth amendment rights for conditional freedom.<sup>37</sup> The premise of the custody theory is that the probationer or parolee is in legal custody and thus a quasi-prisoner.<sup>38</sup> These theories have now been largely rejected by courts more sensitive to the rights and needs of probationers and parolees.<sup>39</sup>

Nevertheless, most courts today still hold that the right of probationers or parolees to be free from unreasonable searches and seizures by their supervising officers is subject to lower fourth amendment standards.<sup>40</sup> The justification for this reduced fourth amendment

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an act of grace and favor to him by the Parole Board." *Id.* at 12; see Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. Rev. 702, 704-08 (1963) [hereinafter cited as *Parole: A Critique*].

34. See *Parole: A Critique*, *supra* note 33, at 708-11; see, e.g., *People v. Mason*, 5 Cal. 3d 759, 766, 488 P.2d 630, 634, 97 Cal. Rptr. 302, 306 (1971) (en banc), *cert. denied*, 405 U.S. 1016 (1972).

35. See *Parole: A Critique*, *supra* note 33, at 711-20 (a parolee is still in custody and, therefore, his rights should be "no different than one who remains in confinement"); see, e.g., *People v. Hernandez*, 229 Cal. App. 2d 143, 149-50, 40 Cal. Rptr. 100, 104 (1964), *cert. denied*, 381 U.S. 953 (1965).

36. *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935); *United States ex rel. Randazzo v. Follette*, 282 F. Supp. 10, 12-13 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971); H. Abadinsky, *supra* note 17, at 130, 201; see *Parole: A Critique*, *supra* note 33, at 704-08.

37. *People v. Mason*, 5 Cal. 3d 759, 766, 488 P.2d 630, 634, 97 Cal. Rptr. 302, 306 (1971) (en banc), *cert. denied*, 405 U.S. 1016 (1972); see H. Abadinsky, *supra* note 17, at 130, 201-02; *Parole: A Critique*, *supra* note 33, at 708-11.

38. *People v. Hernandez*, 229 Cal. App. 2d 143, 149-50, 40 Cal. Rptr. 100, 104 (1964), *cert. denied*, 381 U.S. 953 (1965); H. Abadinsky, *supra* note 17, at 131, 202; see *Parole: A Critique*, *supra* note 33, at 711-20.

39. See *Morrissey v. Brewer*, 408 U.S. 471, 481-84 (1972). The Court specifically rejected the custody theory for diminishing a parolee's constitutional right to due process. *Id.* at 483; *accord* *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978); *Latta v. Fitzharris*, 521 F.2d 246, 248-49 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). *Morrissey v. Brewer* has been construed as rejecting both the contract consent and custody theories. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 n.15 (9th Cir. 1975) (en banc). For a discussion of the weaknesses of the grace, contract consent and custody theories, see *Parole: A Critique*, *supra* note 33, at 704-20. For an excellent analysis of all three theories and the problems attendant to them, see Comment, *The Parole System*, 120 U. Pa. L. Rev. 282, 286-300 (1971).

40. *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-66 (9th Cir. 1975) (en banc); *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975); *United States v. Rea*, 524 F. Supp. 427, 430 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *People v. Anderson*, 189 Colo. 34, 36-38, 536 P.2d 302, 304-05 (1975) (en banc); *Grubbs v. State*, 373 So. 2d 905, 907 (Fla. 1979); *State v. Malone*, 403 So. 2d 1234, 1239 (La. 1981); *State v. Earnest*, 293 N.W.2d 365, 368

protection is that broad search powers are required by probation/parole officers to supervise their charges effectively and to accomplish the rehabilitative and public protection goals of probation/parole.<sup>41</sup>

### A. *Eliminating the Warrant Requirement*

Many courts do not require a probation or parole officer to obtain a warrant prior to conducting a search of his charge.<sup>42</sup> The Ninth Circuit, in *Latta v. Fitzharris*,<sup>43</sup> reviewed the search of a parolee's

(Minn. 1980); *People v. Jackson*, 46 N.Y.2d 171, 174, 385 N.E.2d 621, 623, 412 N.Y.S.2d 884, 886 (1978); *People v. Huntley*, 43 N.Y.2d 175, 181, 371 N.E.2d 794, 797, 401 N.Y.S.2d 31, 34 (1977); *State v. Stephens*, 614 P.2d 1180, 1183-84 (Or. Ct. App. 1980) (en banc); *Commonwealth v. Brown*, 240 Pa. Super. 190, 195, 361 A.2d 846, 848-49 (1976). *Contra State v. Cullison*, 173 N.W.2d 533, 537 (Iowa), *cert. denied*, 398 U.S. 938 (1970).

41. *United States v. Bradley*, 571 F.2d 787, 790 (4th Cir. 1978); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-66 (9th Cir. 1975) (en banc). "Probation authorities . . . have a special and unique interest in invading the privacy of probationers." *Id.* at 266; *accord Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.) (en banc) (dual purpose of public protection and rehabilitation), *cert. denied*, 423 U.S. 897 (1975); *United States v. Rea*, 524 F. Supp. 427, 430 (E.D.N.Y. 1981) (same), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *People v. Anderson*, 189 Colo. 34, 37, 536 P.2d 302, 304-05 (1975) (en banc) (focused on the public protection aspect); *Grubbs v. State*, 373 So. 2d 905, 909 (Fla. 1979) (dual purpose); *State v. Malone*, 403 So. 2d 1234, 1239 (La. 1981) (same); *State v. Earnest*, 293 N.W.2d 365, 368 (Minn. 1980) (same); *People v. Jackson*, 46 N.Y.2d 171, 174-75, 385 N.E.2d 621, 623-24, 412 N.Y.S.2d 884, 886-87 (1978) (same); *People v. Huntley*, 43 N.Y.2d 175, 181-82, 371 N.E.2d 794, 797, 401 N.Y.S.2d 31, 34 (1977) (same); *State v. Stephens*, 614 P.2d 1180, 1183-84 (Or. Ct. App. 1980) (en banc) (same); *Commonwealth v. Brown*, 240 Pa. Super. 190, 195-98, 361 A.2d 846, 849-50 (1976) (same).

42. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266 (9th Cir. 1975) (en banc); *Latta v. Fitzharris*, 521 F.2d 246, 250-52 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975); *United States ex rel. Santos v. Board of Parole*, 441 F.2d 1216, 1218-19 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1158-59 (W.D.N.Y. 1975); *People v. Anderson*, 189 Colo. 34, 38, 536 P.2d 302, 305 (1975) (en banc); *State v. Williams*, 486 S.W.2d 468, 472-73 (Mo. 1972); *Seim v. State*, 95 Nev. 89, 93-94, 590 P.2d 1152, 1154-55 (1979); *People v. Huntley*, 43 N.Y.2d 175, 179, 371 N.E.2d 794, 797, 401 N.Y.S.2d 31, 33 (1977); *Commonwealth v. Brown*, 240 Pa. Super. 190, 197, 361 A.2d 846, 849-50 (1976); *State v. Simms*, 10 Wash. App. 75, 84-85, 516 P.2d 1088, 1094 (1973).

43. 521 F.2d 246 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). *Latta*, on parole from imprisonment pursuant to a California armed robbery conviction, was arrested at the home of an acquaintance by his parole officer for violating a condition of his parole. No question was raised as to the validity of the arrest. When arrested, *Latta* was holding a pipe containing marijuana. About six hours after the arrest, *Latta's* parole officer, accompanied by two local police officers, went to *Latta's* home located thirty miles from the place of arrest. Soon after their arrival they were admitted by *Latta's* stepdaughter. They identified themselves and informed her of their intention to conduct a search of the premises. Their search yielded a 4½ pound brick of marijuana. *Id.* at 247.

residence by his parole officer acting without either a warrant or probable cause.<sup>44</sup> The court held that a parole officer need not obtain a warrant before searching his parolee or his parolee's home provided the search is reasonable.<sup>45</sup> On the day it decided *Latta*, the circuit court, in *United States v. Consuelo-Gonzalez*,<sup>46</sup> equated the probation officer/probationer relationship to the parole officer/parolee relationship<sup>47</sup> and stated that a probation officer, like a parole officer, may conduct a warrantless search provided it is reasonable in time and manner.<sup>48</sup>

The Ninth Circuit suggested that a probation/parole officer's decision to search may be reasonable even if it is merely based on a hunch.<sup>49</sup> Other courts that have eliminated the warrant requirement for probation/parole officer searches allow the search to be based on a showing of less than probable cause, but require a more concrete basis than a hunch.<sup>50</sup> All of these courts, however, have had to circumvent

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44. *Id.* at 248-50.

45. *Id.* at 250.

46. 521 F.2d 259 (9th Cir. 1975) (en banc). In *Consuelo-Gonzalez*, the petitioner was a federal probationer who had signed an open-ended consent to be searched as a condition of her probation. *Id.* at 261. The court invalidated the condition as being too broad and an unconstitutional infringement of the probationer's rights. *Id.* at 265. The probationer was the victim of an illegal search of her home conducted by narcotics agents. *Id.* at 263. The court suppressed the evidence obtained from the search in a new criminal prosecution largely because the search was conducted by government agents rather than by her probation officer. *Id.* at 266.

47. *Id.* at 265-66.

48. *Id.* at 266.

49. *Id.* (probation officer); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir.) (en banc) (parole officer), *cert. denied*, 423 U.S. 897 (1975). The plurality in *Latta* articulated its standard of reasonableness: "[A parole officer's] decision [to search] 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." *Id.* Even if the basis for the search is reasonable, if the manner of the search is unreasonable the Ninth Circuit will invalidate the search as violative of the fourth amendment. *Id.* at 252. Moreover, if the search is nothing more than a subterfuge for a criminal investigation the search is constitutionally invalid. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 267 (9th Cir. 1975) (en banc).

50. *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1158 (W.D.N.Y. 1975) (reasonable suspicion); *People v. Anderson*, 189 Colo. 34, 37-38, 536 P.2d 302, 304-05 (1975) (en banc) (rejecting the holding that neither probable nor reasonable cause is needed, and stating that reasonable grounds are necessary); *State v. Williams*, 486 S.W.2d 468, 472-73 (Mo. 1972) (search may be conducted on less than probable cause); *Seim v. State*, 95 Nev. 89, 94, 590 P.2d 1152, 1155 (1979) (reasonable grounds); *People v. Huntley*, 43 N.Y.2d 175, 181, 371 N.E.2d 794, 797, 401 N.Y.S.2d 31, 34 (1977) (decision must be rational and reasonable); *State v. Simms*, 10 Wash. App. 75, 87, 516 P.2d 1088, 1095-96 (1973) (based on well-founded suspicion). In *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980), the court upheld a warrantless search by a probation officer which was based on probable cause. The

the Supreme Court's position that warrantless searches are unreasonable per se.<sup>51</sup> The Ninth Circuit did so by analogizing probation/parole officer searches to the administrative searches sanctioned by the Supreme Court in *United States v. Biswell*<sup>52</sup> and *Colonnade Catering Corp. v. United States*.<sup>53</sup> Justification was found in the extensive regulation to which parolees are subject,<sup>54</sup> long-standing California case law authorizing such searches,<sup>55</sup> the parolee's reduced expectation of privacy,<sup>56</sup> and the need for probation/parole officers to have broad search powers to perform their dual role effectively.<sup>57</sup> Other courts that permit warrantless searches have either relied on *Latta*<sup>58</sup> or applied similar reasoning.<sup>59</sup>

The Ninth Circuit's analogy between probation/parole searches and administrative searches is faulty. A necessary condition for the administrative search exception is the presence of express statutory authority.<sup>60</sup> The Ninth Circuit relied on California case law in lieu of express statutory authority.<sup>61</sup> This substitution in no way reflects the

court, however, refused to decide whether a showing of less than probable cause would have been sufficient to uphold the validity of the search. *Id.* at 369 n.5. In *Diaz v. Ward*, 437 F. Supp. 678 (S.D.N.Y. 1977), the court, in dictum, stated "that a parole officer's 'hunch' does not satisfy Fourth Amendment requirements." *Id.* at 686 (footnote omitted).

51. See *supra* notes 26-30 and accompanying text.

52. 406 U.S. 311 (1972) (warrantless search of premises of firearms dealers authorized by federal statute), *cited in* *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975).

53. 397 U.S. 72 (1970) (warrantless entry and investigation of retail liquor dealers authorized by statute), *cited in* *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975).

54. *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975).

55. *Id.*

56. *Id.*

57. *Id.*

58. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc); *United States v. Rea*, 524 F. Supp. 427, 430 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1159 (W.D.N.Y. 1975).

59. *United States ex rel. Santos v. Board of Parole*, 441 F.2d 1216, 1218 (2d Cir. 1971); *People v. Anderson*, 189 Colo. 34, 37-38, 536 P.2d 302, 305 (1975) (en banc); *State v. Williams*, 486 S.W.2d 468, 472 (Mo. 1972); *Seim v. State*, 95 Nev. 89, 93-94, 590 P.2d 1152, 1154-55 (1979); *People v. Huntley*, 43 N.Y.2d 175, 181-82, 371 N.E.2d 794, 797, 401 N.Y.S.2d 31, 34 (1977); *Commonwealth v. Brown*, 240 Pa. Super. 190, 197-98, 361 A.2d 846, 849-50 (1976); *State v. Simms*, 10 Wash. App. 75, 85-86, 516 P.2d 1088, 1094-95 (1973).

60. *United States v. Biswell*, 406 U.S. 311, 317 (1972). Inspection searches "may proceed without a warrant where specifically authorized by statute." *Id.*; *accord Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970).

61. *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975). Acknowledging that the administrative searches in *Biswell* and *Colonnade* were conducted pursuant to express statutory authority, the *Latta* court

concern or policy espoused by the Court in *Biswell* and *Colonnade*. Creation of the exception by the Supreme Court reflected the Court's deference to congressional authority and its recognition that the need of Congress to regulate may justify occasional fourth amendment infringement.<sup>62</sup> The subsequent Supreme Court decision in *Marshall v. Barlow's, Inc.*<sup>63</sup> further weakens the *Latta* court's reliance on *Biswell* and *Colonnade*. The Court, in *Marshall*, stated that the holdings in *Biswell* and *Colonnade* represent "responses to relatively unique circumstances"<sup>64</sup> and, emphasizing the importance of preserving fourth amendment rights, rejected a broad reading of the administrative search exception.<sup>65</sup> After *Marshall*, there is little doubt that searches conducted for administrative purposes are within the fourth amendment and, absent exigent or unique circumstances, require a warrant.<sup>66</sup>

### B. *Retaining the Warrant Requirement Under a Lesser Standard of Probable Cause*

Contrary to the Ninth Circuit, some courts have refused to eliminate the need for a warrant when a probation or parole officer conducts a search of his charge.<sup>67</sup> This position was adopted by the Fourth Circuit in *United States v. Bradley*,<sup>68</sup> which held that "unless

reasoned that even though "no such express statute [exists] here . . . there is long standing judicial authority in California." *Id.*

62. *United States v. Biswell*, 406 U.S. 311, 314-17 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970).

63. 436 U.S. 307 (1978).

64. *Id.* at 313. The Court stressed that the fourth amendment applies to administrative searches. "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Id.* at 312-13.

65. *Id.* at 311-13.

66. *See Michigan v. Tyler*, 436 U.S. 499, 504-06 (1978). The Court noted that although the warrant requirement is unaffected, a lesser showing of probable cause may suffice in certain cases. *Id.* at 506.

67. *United States v. Workman*, 585 F.2d 1205, 1207-08 (4th Cir. 1978); *United States v. Bradley*, 571 F.2d 787, 789-90 (4th Cir. 1978); *State v. Fogarty*, 610 P.2d 140, 151-52 (Mont. 1980); *People v. Jackson*, 46 N.Y.2d 171, 174-77, 385 N.E.2d 621, 623-25, 412 N.Y.S.2d 884, 886-88 (1978).

68. 571 F.2d 787 (4th Cir. 1978). *Bradley* was convicted in 1972 and sentenced to a term of imprisonment. In 1976 he was released on parole. "The conditions of his parole included, *inter alia*, that he obey all federal, state and municipal laws, that he refrain from possessing any firearm without permission, and that he 'permit [his] Parole Officer to visit [his] home or place of employment.'" *Id.* at 788. The court specifically noted that "[n]ot included in the conditions of parole was consent to searches conducted during such visits." *Id.* *Bradley's* parole officer received a series of calls from *Bradley's* landlady stating that *Bradley* was in possession of a loaded firearm. Approximately six hours later *Murphy* went to *Bradley's* home to investigate

an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer."<sup>69</sup> In *United States v. Workman*,<sup>70</sup> the circuit court extended the warrant requirement to probation officers.<sup>71</sup>

In refusing to eliminate the warrant requirement in the probation/parole setting, the Fourth Circuit asserted that its position was consistent with the Supreme Court's view that exceptions to the warrant requirement " 'are few in number and carefully delineated.' "<sup>72</sup> The *Workman* and *Bradley* courts rejected the analogy to administrative searches espoused by the Ninth Circuit.<sup>73</sup> This rejection was based on the absence of a statute enabling probation and parole officers to make warrantless searches.<sup>74</sup> Rather, the Supreme Court decision in *Camara v. Municipal Court*,<sup>75</sup> "requiring as it does prior judicial

the alleged violations. She conducted a warrantless search without Bradley's consent and uncovered a loaded firearm wrapped in a shirt inside a suitcase. The parole officer delivered the weapon to federal investigators who determined that it had been transported in interstate commerce before coming into Bradley's possession. *Id.* In addition to having his parole revoked, Bradley was tried and convicted for violating the federal firearms laws. On appeal, Bradley contended that the warrantless search was in violation of his fourth amendment rights, and that the evidence thus seized should be excluded from the subsequent criminal prosecution. Even though the search was based on probable cause, *id.* at 788 n.1, the court held the fruits of the warrantless search inadmissible in the subsequent criminal prosecution. *Id.* at 790.

69. *Id.* at 789 (footnote omitted).

70. 585 F.2d 1205 (4th Cir. 1978). *Workman*, while on five years probation for a conviction of possession of a distillery and bootleg whiskey, *id.* at 1206, was charged with violating the conditions of his probation. Two of the conditions were that he "not possess, manufacture, sell, or buy any illegal whiskey and that he not violate any law of the United States or North Carolina." *Id.* During his probationary period, his probation officer, accompanied by an alcoholic beverage control agent, conducted a warrantless search of *Workman*'s property. This search uncovered an illegal still. Based on this evidence, the probation officer filed a complaint against *Workman*. *Id.* at 1206-07.

71. *Id.* at 1207. "Relying primarily" on *Bradley*, the *Workman* court concluded that a probation officer could not conduct a warrantless search of his probationer's premises merely because he has probable cause. *Id.*

72. *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 318 (1972)); see *supra* notes 26-31 and accompanying text.

73. *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978). The court stated that *Biswell* and *Colonnade* "represent narrow exceptions to the general rule . . . that warrants are required prior to conducting administrative searches." *Id.* (emphasis in original).

74. *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978). "[The] absence of legislative authority distinguishes probation officers from inspectors who are empowered by statute to conduct searches of certain regulated businesses without warrants." *Id.*

75. 387 U.S. 523 (1967).

approval to unconsented [administrative] searches even in the face of reduced privacy interest, is the more persuasive authority."<sup>76</sup>

Acknowledging the special relationship that comprises probation/parole and which serves as a justification for eliminating the warrant requirement in the Ninth Circuit,<sup>77</sup> the court determined that the dual goals of probation and parole would be adequately served by relaxing the showing of probable cause necessary for a probation/parole officer to obtain a warrant.<sup>78</sup> The court, however, did not articulate its standard of diminished probable cause. One suggested standard would involve consideration of the strength of the showing of cause,<sup>79</sup>

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76. *United States v. Bradley*, 571 F.2d 787, 789-90 (4th Cir. 1978).

77. 585 F.2d at 1207; *accord* *United States v. Bradley*, 571 F.2d 787, 790 (4th Cir. 1978).

78. *United States v. Workman*, 585 F.2d 1205, 1207 (4th Cir. 1978); *United States v. Bradley*, 571 F.2d 787, 790 (4th Cir. 1978). The concept of variable probable cause in administrative searches has been utilized by the Supreme Court. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court stated that a search warrant issued in a criminal investigation must be based on a showing of probable cause that the goods will be uncovered in the place sought to be searched. *Id.* at 535. On the other hand, if the search is for the purpose of insuring compliance with health and safety codes, probable cause to issue a warrant "may be based upon the passage of time, the nature of the building [to be searched] . . . or the condition of the entire area, but [probable cause] will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Id.* at 538; *accord* *Michigan v. Tyler*, 436 U.S. 499, 505-09 (1978) (search warrant to determine origin of fire may be issued on less of a showing of probable cause than in criminal searches); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (probable cause in a criminal sense is not required for federal safety inspections). In New York, the authority of a probation officer to search his charge is governed by statute. Section 410.50(3) of the New York Criminal Procedure Law allows a court to issue a search warrant to a probation officer on a showing that there is reasonable cause to believe that there has been a probation violation. N.Y. Crim. Proc. Law § 410.50(3) (McKinney 1971). Section 410.50(4) provides for a limited search of a probationer's person when the probation officer makes an arrest. *Id.* § 410.50(4). Based on this statute and the fourth amendment prohibition against unreasonable searches and seizures, the New York Court of Appeals, in *People v. Jackson*, 46 N.Y.2d 171, 385 N.E.2d 621, 412 N.Y.S.2d 884 (1978), held that a probation officer must obtain a search warrant based on reasonable cause prior to conducting a search of his charge. *Id.* at 175-77, 385 N.E.2d at 623-25, 412 N.Y.S.2d at 887-88. In *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975), the Ninth Circuit addressed the possibility of requiring a diminished standard of probable cause as an alternative to eliminating the warrant requirement altogether. *Id.* at 251. The court reasoned that having a magistrate issue a warrant on the basis of a parole officer's hunch, however, would reduce the warrant to a "paper tiger." *Id.* at 251-52. Judge Hufstедler, in her dissenting opinion in *Latta*, strenuously opposed the plurality's decision to eliminate the warrant requirement. *Id.* at 254 (Hufstедler, J., dissenting). She argued that the "concept of probable cause is not rigid. It is flexible enough to be adapted to parole searches to give the parolee meaningful protection and to preserve the functions of parole." *Id.*

79. *Latta v. Fitzharris*, 521 F.2d 246, 257 (9th Cir.) (en banc) (Hufstедler, J., dissenting), *cert. denied*, 423 U.S. 897 (1975).

the nature of the suspected probation/parole violations,<sup>80</sup> the possible invasion of privacy of persons other than the probationer/parolee<sup>81</sup> and the possibility of alternative means of probation/parole supervision.<sup>82</sup> Any such standard, although necessarily subjective, permits a neutral and detached magistrate to strike a pragmatic balance between the rigors of traditional probable cause<sup>83</sup> and the potential excesses of a warrantless search.

Any restriction placed on probation or parole officers by a warrant requirement will not be overly detrimental to either the public protection or rehabilitation goal of probation/parole.<sup>84</sup> These goals are well served by the officer's broad authority to visit his charge.<sup>85</sup> While visiting, the officer may conduct a warrantless search if circumstances so require.<sup>86</sup>

### III. THE EXCLUSIONARY RULE IN PROBATION/PAROLE REVOCATION PROCEEDINGS

The exclusionary rule—the primary mechanism employed by the courts to enforce the fourth amendment prohibition against unreasonable search and seizure<sup>87</sup>—was first applied by the Supreme Court to

80. *Id.*

81. *Id.* In *State v. Fogarty*, 610 P.2d 140 (Mont. 1980), the Montana Supreme Court, concerned with the possible violation of privacy of a probationer's family and friends, applied the traditional standard of probable cause to a probation officer seeking to obtain a search warrant for a probationer's home. *Id.* at 152. The holding, however, is specifically limited to searches of a probationer's residence, *id.* at 153, and does not include a search by a probation officer of a probationer's person or his automobile, which are subject to warrantless searches. *Id.*

82. *Latta v. Fitzharris*, 521 F.2d 246, 257 (9th Cir.) (en banc) (Hufstедler, J., dissenting), *cert. denied*, 423 U.S. 897 (1975).

83. *See United States v. Bradley*, 571 F.2d 787, 790 (4th Cir. 1978).

84. *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978).

85. *See Wyman v. James*, 400 U.S. 309, 317-18 (1971). A visit is not a search, *id.*, and therefore does not present the constitutional issues attendant to searches. The federal probation law, 18 U.S.C. § 3655 (1976), provides that a probation officer "shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition." *Id.* This statute inherently gives probation officers the right to make home visits. *United States v. Workman*, 585 F.2d 1205, 1208 (4th Cir. 1978); *cf. R. Dawson, supra* note 17, at 131, 326 (home visits under Michigan parole laws).

86. *See Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971). Any evidence of violation in plain view may be seized by the probation or parole officer. *Id.* For his own safety, the probation or parole officer can frisk his charge without consent. *See Terry v. Ohio*, 392 U.S. 1, 23-27 (1968). He may also conduct a search pursuant to consent. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Moreover, "any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant." 18 U.S.C. § 3653 (1976). Therefore, if during a visit a probation officer has cause to arrest his client, he may make a search incident to the arrest. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969).

87. *Mapp v. Ohio*, 367 U.S. 643, 654-56 (1961).



federal peace officers in *Weeks v. United States*.<sup>88</sup> In *Mapp v. Ohio*,<sup>89</sup> the rule was applied to state officers and made binding on the states.<sup>90</sup>

The primary purpose of the application of the exclusionary rule is to deter law enforcement officers from engaging in searches violative of the fourth amendment.<sup>91</sup> In *United States v. Calandra*,<sup>92</sup> the Supreme Court stated that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. . . . [It] has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."<sup>93</sup> In determining whether the rule should be applied, the Court requires a weighing of the potential harm of excluding relevant evidence against the potential benefit of deterring illegal searches.<sup>94</sup>

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88. 232 U.S. 383 (1914). In establishing the rule, the *Weeks* Court based the need for an exclusionary rule in the federal courts upon the prohibition of unreasonable searches and seizures in the fourth amendment. The Court stated that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393. In *Weeks*, however, the exclusionary rule was expressly limited to federal cases in which federal officers had obtained the evidence illegally. *Id.* at 398. Therefore, the states were left free to decide whether or not to follow the federal exclusionary rule. In *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court held that a conviction by a state for a state offense does not deny the due process of law required by the fourteenth amendment solely because evidence that was admitted was obtained by an unreasonable search and seizure. *Id.* at 33.

89. 367 U.S. 643 (1961).

90. *Id.* at 655-60. The Supreme Court held that the due process clause of the fourteenth amendment fully incorporated the fourth amendment, and therefore, the exclusionary rule requires the exclusion of all evidence obtained by searches violative of the fourth amendment from all state, as well as federal, criminal proceedings. *Id.*

91. *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see Elkins v. United States*, 364 U.S. 206, 216-17 (1960). Another justification for the application of the exclusionary rule has been that it maintains judicial integrity, *id.* at 222-23, in that courts admitting illegally obtained evidence would "be accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.* at 223. Recent Supreme Court decisions, however, have rejected the "imperative of judicial integrity." *Stone v. Powell*, 428 U.S. 465, 485 (1976). "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* (footnote omitted).

92. 414 U.S. 338 (1974) (refusing to extend application of the exclusionary rule to grand jury proceedings).

93. *Id.* at 348 (footnote omitted).

94. *See, e.g., United States v. Janis*, 428 U.S. 433, 458-60 (1976) (refusing to extend the exclusionary rule to civil proceedings because such extension would not provide any significant deterrent effect); *United States v. Calandra*, 414 U.S. 338, 351 (1974) (deterrent effect to be derived from application of the exclusionary rule to

Regardless of the standard employed, once a court decides that a probationer or parolee has been the victim of an unreasonable search by his supervising officer, it must then determine the admissibility of the evidence obtained. Although the exclusionary rule will prohibit admission of the evidence in a subsequent criminal trial,<sup>95</sup> the applicability of the exclusionary rule to revocation proceedings is unsettled.<sup>96</sup>

### A. Applying the Rule

Some courts refuse to admit evidence illegally obtained by probation/parole officers into revocation proceedings.<sup>97</sup> In *United States v. Workman*,<sup>98</sup> the Fourth Circuit extended the exclusionary rule to revocation hearings,<sup>99</sup> utilizing the balancing test prescribed in *United States v. Calandra*.<sup>100</sup> The test, as applied by the Fourth Circuit, weighed the potential deterrent benefit of extending the rule against

grand jury proceedings would be "uncertain at best"). In *Alderman v. United States*, 394 U.S. 165 (1969), the Court, determining whether evidence illegally obtained from a person other than the defendant should be excluded from a criminal trial, refused to extend the exclusionary rule. The Court reasoned that the additional benefits of extending the rule to defendants whose rights were not violated by the search would not justify "further encroachment upon the public interest." *Id.* at 175.

95. See *supra* note 9 and accompanying text.

96. Compare *United States v. Workman*, 585 F.2d 1205, 1210 (4th Cir. 1978) (rule applied), and *State v. Stephens*, 614 P.2d 1180, 1181 (Or. Ct. App. 1980) (en banc) (same), with *United States v. Rea*, 524 F. Supp. 427, 431 (E.D.N.Y. 1981) (rule not applied), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981), and *State v. Robledo*, 116 Ariz. 346, 347-48, 569 P.2d 288, 289-90 (1977) (same). For a general discussion of the constitutional questions involved in this application of the exclusionary rule, see *The Exclusionary Rule in Parole Revocation Hearings: Detering Official Infringement of Parolees' Fourth Amendment Rights*, *supra* note 11; *The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal*, *supra* note 11.

97. *United States v. Workman*, 585 F.2d 1205, 1210 (4th Cir. 1978); *State v. Stephens*, 614 P.2d 1180, 1181 (Or. Ct. App. 1980) (en banc); see *State v. Fogarty*, 610 P.2d 140, 154 (Mont. 1980) (lower court's decision to revoke probation based on evidence obtained by illegal search by probation officer vacated); *People v. Jackson*, 46 N.Y.2d 171, 177, 385 N.E.2d 621, 624-25, 412 N.Y.S.2d 884, 888 (1978) (evidence obtained by unreasonable search could not be used as a basis for probation revocation). In *Rushing v. State*, 500 S.W.2d 667 (Tex. Crim. App. 1973), two policemen, aware of the defendant's probationary status, conducted a warrantless search. *Id.* at 670-71. The court held the search illegal and ordered the evidence excluded from defendant's revocation hearing. *Id.* at 673.

98. 585 F.2d 1205 (4th Cir. 1978).

99. *Id.* at 1210-11.

100. *Id.* at 1209 (citing *United States v. Calandra*, 414 U.S. 338 (1974)). The Court in *Calandra* balanced the potential injury to the role and functions of a grand jury against the potential benefits of applying the exclusionary rule. 414 U.S. at 349-52. In deciding against extending the rule to grand jury proceedings, the Court concluded that the deterrent effect would be minimal because the grand jury proceeding was not finally adjudicative of the issue of guilt or innocence. *Id.*

the potential injury to the process of revocation.<sup>101</sup> The court concluded that because a revocation proceeding may result in the loss of liberty,<sup>102</sup> "the application of the exclusionary rule will result in approximately the same potential for injury and benefit"<sup>103</sup> as would its application in a criminal trial.<sup>104</sup>

This application of the exclusionary rule creates a single standard of admissibility of evidence in revocation proceedings and new criminal trials.<sup>105</sup> Those probation/parole officers who emphasize their law

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101. 585 F.2d at 1209. Other courts that have used a *Calandra*-type balancing test have concluded that the harm to the probation/parole system caused by excluding relevant evidence outweighs any benefit that might be realized by extension of the exclusionary rule to revocation proceedings. *State v. Sears*, 553 P.2d 907, 913-14 (Alaska 1976); *State v. Alfaro*, 127 Ariz. 578, 580, 623 P.2d 8, 10 (1980) (*en banc*); *State v. Davis*, 375 So. 2d 69, 73-74 (La. 1979); *State v. Spratt*, 386 A.2d 1094, 1095-96 (R.I. 1978); *State v. Kuhn*, 7 Wash. App. 190, 195, 499 P.2d 49, 52, *aff'd en banc*, 81 Wash. 2d 648, 503 P.2d 1061 (1972).

102. 585 F.2d at 1209. A revocation proceeding is adjudicative. The hearing will determine if the probationer/parolee is guilty of a violation and, ultimately, whether he retains his liberty interest. *Id.* Upon a determination of parole violation, parole may be revoked. 18 U.S.C. § 4214(d)(5) (1976). Upon revocation of probation, "the court may . . . require [the probationer] to serve the sentence imposed . . . and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed." *Id.* § 3653. In *People ex rel. Piccarillo v. Board of Parole*, 48 N.Y.2d 76, 397 N.E.2d 354, 421 N.Y.S.2d 842 (1979), the court refused to admit evidence illegally obtained by a police officer into a parole revocation hearing. *Id.* at 81, 397 N.E.2d at 357, 421 N.Y.S.2d at 845. The court viewed revocation hearings as a type of administrative proceeding and stated that the applicability of the exclusionary rule to administrative hearings is indisputable. *Id.* Additionally, the court stressed the potential deprivation of liberty attendant to revocation proceedings. *Id.* at 80-81, 397 N.E.2d at 356, 421 N.Y.S.2d at 845.

103. 585 F.2d at 1210; *cf.* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (forfeiture proceeding). In *Plymouth Sedan*, two Pennsylvania liquor control officers, without a warrant, stopped and searched an automobile finding thirty-one cases of liquor not bearing Pennsylvania tax seals. *Id.* at 694. Pursuant to a state statute, the automobile, as a vehicle used in the illegal transportation of liquor, was the subject of a forfeiture proceeding initiated by the Commonwealth. *Id.* The court held that because the evidence, the liquor, was obtained by a search conducted in violation of the fourth amendment, it could not be relied upon to sustain a forfeiture of the automobile. *Id.* at 696-98. The Court reasoned that a forfeiture proceeding of this type is quasi-criminal in character because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700. The Court further noted that, in this case, allowing the state to retain the automobile would result in a greater monetary fine than the maximum fine imposed by statute in a criminal proceeding. *Id.* at 700-01.

104. 585 F.2d at 1210.

105. It is still possible for a dual standard of admissibility to exist, however, even when the exclusionary rule is applied to revocation proceedings. In *Grubbs v. State*, 373 So. 2d 905 (Fla. 1979), the Supreme Court of Florida construed the Florida constitution as requiring the application of the exclusionary rule in revocation proceedings as well as in new criminal prosecutions. *Id.* at 909. Nonetheless, the court created a dual standard of admissibility by holding that a warrantless search by a

enforcement function<sup>106</sup> are thereby deterred from using their position to conduct illegal searches for the limited purpose of obtaining evidence admissible only in revocation proceedings.<sup>107</sup> Moreover, producing evidence admissible at a criminal trial through satisfaction of the single standard maximizes the public protection aspect of probation/parole supervision<sup>108</sup> by increasing the likelihood of imposition of a new sentence for the crime constituting the probation/parole violation.

The issue of admissibility of evidence obtained against probationers and parolees has also arisen in the context of unreasonable searches conducted by police officers who were unaware of the victim's probation or parole status.<sup>109</sup> Without knowledge of this status, the police officers could not possibly have planned an unreasonable search for the limited purpose of revocation. Extending the exclusionary rule under these circumstances, therefore, has a questionable deterrent effect.<sup>110</sup> Thus, some courts have correctly refused to apply the exclu-

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probation officer "is valid to the extent that the evidence discovered is used only in probation violation proceedings." *Id.* at 907. Thus, the dual standard of admissibility is created not by an express inconsistent application of the exclusionary rule, but by the inconsistent application of the warrant requirement to create a dual standard of reasonableness of a search. *Id.*; accord *Commonwealth v. Brown*, 240 Pa. Super. 190, 197, 361 A.2d 846, 850 (1976) (no warrant is required if parole officer is collecting evidence to revoke charge's parole). Its effect, however, is the same as that achieved by differing applications of the exclusionary rule and is therefore subject to the same criticisms.

106. See *supra* notes 24-25 and accompanying text.

107. *United States v. Workman*, 585 F.2d 1205, 1210-11 (4th Cir. 1978).

108. See *supra* notes 14-25 and accompanying text. If, in addition to revocation, a probationer/parolee is convicted of a new criminal offense, consecutive sentences may be imposed to punish both the original conviction and the subsequent offense. *United States v. Lustig*, 555 F.2d 751, 753 (9th Cir. 1977) (per curiam, cert. denied, 434 U.S. 1045 (1978)). Imposing a consecutive sentence will considerably postpone a parolee's eligibility for reparole. R. Dawson, *supra* note 17, at 365. Another advantage of securing a conviction in addition to revocation is that the conviction will be reflected on the probationer/parolee's record and possibly have adverse effects upon him in later contacts with criminal justice agencies. Even if the sentence for the new criminal conviction is imposed concurrently, the new minimum sentence may be longer than the time left on his original sentence. *Id.*

109. *United States v. Vandemark*, 522 F.2d 1019, 1020 (9th Cir. 1975); *United States v. Winsett*, 518 F.2d 51, 52 (9th Cir. 1975); *State v. Sears*, 553 P.2d 907, 908 (Alaska 1976); *Amiss v. State*, 135 Ga. App. 784, 784-85, 219 S.E.2d 28, 29 (1975); *People v. Dowery*, 20 Ill. App. 3d 738, 741, 312 N.E.2d 682, 685 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Davis*, 375 So. 2d 69, 70 (La. 1979); *People ex rel. Piccarillo v. Board of Parole*, 48 N.Y.2d 76, 81, 397 N.E.2d 354, 357, 421 N.Y.S.2d 842, 845 (1979); *Michaud v. State*, 505 P.2d 1399, 1401 (Okla. Crim. App. 1973); *State v. Spratt*, 386 A.2d 1094, 1094 (R.I. 1978). For purposes of this discussion, police officers include all peace officers such as Border Patrol Agents, agents of the Federal Bureau of Investigation, and other similar law enforcement agents.

110. *United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975); *State v. Sears*, 553 P.2d 907, 912 (Alaska 1976); *People v. Dowery*, 20 Ill. App. 3d 738, 741, 312 N.E.2d

sionary rule in these instances.<sup>111</sup> Many of these courts, however, have stated that if an illegal search were conducted by a probation/parole officer, or a policeman aware of the search victim's probation/parole status, the result might be different.<sup>112</sup>

Nonetheless, other courts, when confronted with unreasonable searches conducted by police officers unaware of their subjects' probation/parole status, have extended the exclusionary rule to revocation proceedings.<sup>113</sup> The rationale has been that such searches present no less an invasion of an individual's constitutional rights.<sup>114</sup> Such reasoning, however, ignores that the exclusionary rule is not a personal constitutional right,<sup>115</sup> but rather a judicial deterrent to constitutional violations.<sup>116</sup> Where, as here, the deterrent effect is questionable at best, application of the rule is unwarranted.<sup>117</sup>

### B. Refusing to Apply the Rule

Several courts, relying on various rationales, have held that the exclusionary rule does not apply to revocation proceedings.<sup>118</sup> Some

682, 685 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Davis*, 375 So. 2d 69, 74 (La. 1979); *State v. Spratt*, 386 A.2d 1094, 1095 n.2 (R.I. 1978).

111. *United States v. Winsett*, 518 F.2d 51, 55 (9th Cir. 1975); *State v. Sears*, 553 P.2d 907, 913 (Alaska 1976); *People v. Dowery*, 20 Ill. App. 3d 738, 744-45, 312 N.E.2d 682, 687 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Davis*, 375 So. 2d 69, 75 (La. 1979); *State v. Spratt*, 386 A.2d 1094, 1096 (R.I. 1978).

112. *United States v. Winsett*, 518 F.2d 51, 54 n.5 (9th Cir. 1975); *State v. Sears*, 553 P.2d 907, 914 (Alaska 1976); *State v. Davis*, 375 So. 2d 69, 74 (La. 1979); *State v. Spratt*, 386 A.2d 1094, 1095 n.2 (R.I. 1978).

113. *Amiss v. State*, 135 Ga. App. 784, 786-87, 219 S.E.2d 28, 30 (1975); *Michaud v. State*, 505 P.2d 1399, 1402-03 (Okla. Crim. App. 1973); *Wilson v. State*, 621 S.W.2d 799, 803-05 (Tex. Crim. App. 1981); *see People ex rel. Piccarillo v. Board of Parole*, 48 N.Y.2d 76, 81-83, 397 N.E.2d 351, 357-58, 421 N.Y.S.2d 842, 846 (1979). The same result was obtained in *Ray v. State*, 387 So. 2d 995, 997 (Fla. App. 1980), based on an express exclusionary rule in the Florida State Constitution.

114. *Amiss v. State*, 135 Ga. App. 784, 786, 219 S.E.2d 28, 30 (1975); *People ex rel. Piccarillo v. Board of Parole*, 48 N.Y.2d 76, 82-83, 397 N.E.2d 354, 357, 421 N.Y.S.2d 842, 846 (1979); *Michaud v. State*, 505 P.2d 1399, 1402-03 (Okla. Crim. App. 1973).

115. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

116. *Id.*; *see supra* notes 91-94 and accompanying text.

117. Unlike police officers who are unaware of the search victim's status, probation and parole officers would logically be deterred from conducting unreasonable searches by extension of the exclusionary rule to revocation hearings. Therefore, it can be inferred that courts applying the rule to searches by police unaware of the probationer/parolee's status would similarly invoke the exclusionary rule to unreasonable searches conducted by probation and parole officers, because by doing so they would simultaneously vindicate the privacy rights of the individual and achieve the primary goal of the exclusionary rule—deterrence.

118. *Schneider v. Housewright*, No. 81-2055, slip op. at 3 n.4 (8th Cir. Dec. 28, 1981); *United States v. Wiygul*, 578 F.2d 577, 578-79 (5th Cir. 1978) (*per curiam*); *United States v. Frederickson*, 581 F.2d 711, 713-14 (8th Cir. 1978) (*per curiam*);

courts reason that exclusion of evidence in criminal prosecutions is sufficient to deter illegal law enforcement behavior.<sup>119</sup> It has also been suggested that revocation hearings are non-adversarial proceedings to which the exclusionary rule does not apply.<sup>120</sup> Another enunciated rationale is that exclusion of evidence from revocation hearings would be detrimental to the efficient operation of the probation/parole system.<sup>121</sup> Evidence obtained from an illegal search, therefore, would be admissible in probation/parole revocation proceedings, although inadmissible in a new criminal prosecution.<sup>122</sup> In *United States ex rel. Sperling v. Fitzpatrick*,<sup>123</sup> evidence from an illegal search conducted by two policemen was used to revoke Sperling's parole<sup>124</sup> after an indictment based on this evidence had been dismissed because

*United States v. Farmer*, 512 F.2d 160, 162-63 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States v. Brown*, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam) (alternate holding); *United States v. Johnson*, 455 F.2d 932, 933 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States v. Hill*, 447 F.2d 817, 818-19 (7th Cir. 1971) (alternate holding); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970); *United States v. Rea*, 524 F. Supp. 427, 431 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *United States v. Delago*, 397 F. Supp. 708, 712 (S.D.N.Y. 1974); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 650-52 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *State v. Sears*, 553 P.2d 907, 910 (Alaska 1976); *State v. Alfaro*, 127 Ariz. 578, 579-80, 623 P.2d 8, 9-10 (1980) (en banc); *People v. Atencio*, 186 Colo. 76, 79-80, 525 P.2d 461, 463 (1974) (en banc); *People v. Dowery*, 20 Ill. App. 3d 738, 741-44, 312 N.E.2d 682, 685-87 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Davis*, 375 So. 2d 69, 73-75 (La. 1979); *State v. Spratt*, 386 A.2d 1094, 1095-96 (R.I. 1978); *State v. Kuhn*, 7 Wash. App. 190, 193-95, 499 P.2d 49, 51-52, *aff'd en banc*, 81 Wash. 2d 648, 503 P.2d 1061 (1972).

119. *E.g.*, *United States v. Hill*, 447 F.2d 817, 818-19 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970).

120. *United States v. Johnson*, 455 F.2d 932, 933 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970); *United States v. Rea*, 524 F. Supp. 427, 431 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 652 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971). *But cf.* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (exclusionary rule applied to criminal forfeiture proceeding).

121. *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970).

122. *See United States v. Lacey*, 648 F.2d 441, 443 n.3 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3772 (U.S. Jan. 26, 1982) (No. 81-1501); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 650-52 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *People v. Dowery*, 20 Ill. App. 3d 738, 739, 744, 312 N.E.2d 682, 683, 687 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *State v. Davis*, 375 So. 2d 69, 75 (La. 1979); *State v. Caron*, 334 A.2d 495, 498 (Me. 1975).

123. 426 F.2d 1161 (2d Cir. 1970).

124. *Id.* at 1162-63.

of the illegal search.<sup>125</sup> Holding that the exclusionary rule is not applicable to parole revocation proceedings, the Second Circuit stated that "[t]here is no need for double application of the exclusionary rule, using it first as it was used here in preventing criminal prosecution of the parolee and a second time at a parole revocation hearing."<sup>126</sup>

In *United States v. Rea*,<sup>127</sup> this dual standard was extended to a search conducted by four probation officers of a probationer's residence. Citing *Sperling*,<sup>128</sup> the court determined that because "the exclusionary rule is not applicable in a proceeding to revoke parole or probation," it did not have to decide whether the search was constitutionally reasonable.<sup>129</sup> In support of its position, the court stated that "if Rea is correct in his contention that a warrant was required, he will be protected in any criminal prosecution that may be brought against him based on the items found in his apartment."<sup>130</sup> Because the evidence was admitted in the revocation hearing, however, the probation officers succeeded in incarcerating Rea<sup>131</sup> and were thereby encouraged to conduct future such illegal searches.

The deterrent effect of excluding evidence from criminal trials under these circumstances, therefore, is illusory. Moreover, whatever the benefit of removing a criminal from society by revoking probation or parole, society is not afforded the full protection of its laws because of the increased likelihood that probation/parole officers will conduct substandard searches and the consequent loss of the use of evidence in a criminal prosecution. This loss seriously impairs the ability of society to commit a criminal offender to a term of imprisonment in addition to whatever term the revocation might yield.<sup>132</sup>

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125. *Id.* at 1162 n.2.

126. *Id.* at 1164. In *United States v. Delago*, 397 F. Supp. 708 (S.D.N.Y. 1974), the defendant sought to exclude from his probation revocation hearing certain admissions he had made to his probation officer. His contention was that the exclusionary rule prohibits the use of evidence obtained in violation of the *Miranda* rule. The court, relying on *Sperling*, *id.* at 712, refused to extend the exclusionary rule to the probation revocation. *Id.*

127. 524 F. Supp. 427 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981).

128. *Id.* at 431 (citing *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970)).

129. *Id.*

130. *Id.*

131. *Id.* at 432.

132. *United States ex rel. Coleman v. Smith*, 395 F. Supp. 1155, 1160 (W.D.N.Y. 1975) ("In the absence of regulations, however, the day may come when the fruits of searches of parolees will be admissible in parole revocation proceedings only."). In *Coleman*, a parole officer's search was held illegal under the fourth amendment because the parole officer possessed no "reasonable suspicion" of the petitioner's unlawful activity. *Id.* at 1158. Therefore, the court held the search illegal and the fruits inadmissible in a subsequent criminal prosecution. *Id.* Even though a search is

The danger that probation and parole officers will conduct illegal searches for the limited purpose of revocation<sup>133</sup> is exacerbated by the fact that probation and parole officers may undertake searches at the urging of the police.<sup>134</sup> To police, an independent prosecution and a probation or parole revocation are often equivalent:<sup>135</sup> Both serve to remove a criminal offender from the community. Indeed, the procedural ease of revocation may make it preferable to police.<sup>136</sup> The advantages of revocation for police, and the substantial advantages accruing to probation and parole officers who develop an informal working relationship with law enforcement agencies,<sup>137</sup> create a dan-

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considered unreasonable, as was the search in *Coleman*, and its fruits inadmissible in a subsequent criminal prosecution, the law is clear in the Second Circuit that the evidence may be used as grounds for revocation. See *United States v. Rea*, 524 F. Supp. 427 (E.D.N.Y. 1981), *appeal docketed*, No. 81-1463 (2d Cir. Oct. 30, 1981).

133. See *R. Dawson*, *supra* note 17, at 364. The danger is enhanced because parole authorities would rather see evidence used in a revocation proceeding than in a criminal prosecution. "If the parolee is prosecuted, convicted, and sentenced, he is continually exposed to newspaper publicity which . . . may result in the formation of public opinion adverse to the parole system. Parole agencies are particularly sensitive to newspaper criticism and may view revocation as a satisfactory means of avoiding it . . ." *Id.* (footnote omitted).

134. See, e.g., *United States v. Gordon*, 540 F.2d 452, 453 (9th Cir. 1976); *United States ex rel. Santos v. New York State Board of Parole*, 441 F.2d 1216, 1217 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972). Frequently, law enforcement officers will inform the probation or parole officer that his charge is involved in illegal conduct, and will then accompany the probation/parole officer conducting a warrantless search. See *id.* In *Gordon*, narcotics agents informed the probation officer that his client might be dealing in controlled substances. 540 F.2d at 453. The probation officer requested that the narcotics agents assist in performing a search of the probationer's home. The actual search was conducted by the narcotics agents. *Id.* In *Santos*, a police detective informed the parole officer that he had received information that the parolee was dealing in stolen goods. The detective and the parole officer went to the parolee's house and, not finding the parolee home, conducted a warrantless search seizing evidence of criminal activity. 441 F.2d at 1217. The police serve as a principal source of information for probation officers. *R. Dawson*, *supra* note 17, at 145. In *People v. Jackson*, 46 N.Y.2d 171, 385 N.E.2d 621, 412 N.Y.S.2d 884 (1978), a police officer informed Jackson's probation officer that Jackson was dealing in drugs. The police officer then accompanied two probation officers in making a search. *Id.* at 173, 385 N.E.2d at 622, 412 N.Y.S.2d at 885-86. The likelihood of police surveillance of a parolee is increased because parole agencies often notify the police of a parolee's status. *R. Dawson*, *supra* note 17, at 319.

135. *United States v. Hill*, 447 F.2d 817, 820 & n.4 (7th Cir. 1971) (Fairchild, J., dissenting).

136. *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972) ("[Revocation] is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State." (footnote omitted)); see *R. Dawson*, *supra* note 17, at 363-64.

137. *R. Dawson*, *supra* note 17, at 365 n.72. "The parole agency's cooperation in revoking upon request [of police and prosecutors] may have considerable value in promoting cooperation from the enforcement agencies in areas in which the parole agency needs it." *Id.*



gerous possibility that the probation or parole officer will comply with a request from a law enforcement officer to conduct a substandard search for revocation purposes.<sup>138</sup> This unacceptable practice can be avoided by adoption of a single standard of admissibility.

A similar problem may arise when an illegal search is conducted by a police officer. A number of courts that have explicitly held that the exclusionary rule is inapplicable to revocation proceedings have reached this conclusion only in the context of such searches.<sup>139</sup> A

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138. In addition to the advantage to parole agencies of the lesser publicity attendant to revocation, seeking revocation instead of prosecuting for a new offense puts the parole agency in a posture of cooperation with enforcement agencies. R. Dawson, *supra* note 17, at 364. "In many cases, the benefits of the revocation alternative are greater for the enforcement agencies than for the parole system. Nevertheless, the parole agency invariably complies with requests from these agencies to revoke the parole of a clearly convictable parolee. While the direct benefits of revocation in such cases may be minimal to the parole agency, its action aids efforts to secure the cooperation of police and prosecutor in their contacts with parolees." *Id.* at 364-65 (footnotes omitted).

139. See *United States v. Wiygul*, 578 F.2d 577 (5th Cir. 1978) (per curiam); *United States v. Fredrickson*, 581 F.2d 711 (8th Cir. 1978) (per curiam); *United States v. Farmer*, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973) (per curiam); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *State v. Sears*, 553 P.2d 907 (Alaska 1976); *State v. Alfaro*, 127 Ariz. 578, 623 P.2d 8 (1980) (en banc); *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974) (en banc); *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *Dulin v. State*, 169 Ind. App. 211, 346 N.E.2d 746 (1976); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Kuhn*, 7 Wash. App. 190, 499 P.2d 49, *aff'd en banc*, 81 Wash. 2d 648, 503 P.2d 1061 (1972). Although these cases were decided in the context of illegal police searches of probationers and parolees, in the absence of any holdings to the contrary and in light of the policy stressed in many of these decisions, it can be inferred that these courts would similarly deny application of the exclusionary rule in the context of unreasonable probation/parole officer searches. When the decision not to extend the exclusionary rule is based on a finding that revocation proceedings are not criminal trials, illegally seized evidence is likely to be admitted regardless of who conducts the search. See *United States v. Farmer*, 512 F.2d 160, 162 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 650, 652 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *State v. Alfaro*, 127 Ariz. 578, 579, 623 P.2d 8, 9 (1980) (en banc); *People v. Atencio*, 186 Colo. 76, 79, 525 P.2d 461, 462 (1974) (en banc); *Dulin v. State*, 169 Ind. App. 211, 217-21; 346 N.E.2d 746, 750-51 (1976); *State v. Caron*, 334 A.2d 495, 499 (Me. 1975); *State v. Kuhn*, 7 Wash. App. 190, 193, 499 P.2d 49, 51, *aff'd en banc*, 81 Wash. 2d 648, 503 P.2d 1061 (1972). Similarly, many of these courts indicate that the purposes of probation/parole can only be served by admitting any reliable evidence into revocation proceedings, even if it is unconstitutionally obtained. See *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 651 (E.D.

search by a police officer who has knowledge of a probationer's or parolee's status, however, is analogous to a search by a probation or parolee officer. Courts refusing to extend the exclusionary rule to probation revocation proceedings under these circumstances,<sup>140</sup> therefore, create the danger that a police officer with such knowledge will conduct a substandard search<sup>141</sup> and that incriminating evidence will not be put to its maximum use for the protection of society.<sup>142</sup>

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La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *State v. Alfaro*, 127 Ariz. 578, 580, 623 P.2d 8, 10 (1980) (en banc); *People v. Atencio*, 186 Colo. 76, 79-80, 525 P.2d 461, 463 (1974) (en banc); *People v. Dowery*, 20 Ill. App. 3d 738, 741-42, 312 N.E.2d 682, 685 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); *Dulin v. State*, 169 Ind. App. 211, 221, 346 N.E.2d 746, 753 (1976); *State v. Caron*, 334 A.2d 495, 499 (Me. 1975); *State v. Kuhn*, 7 Wash. App. 190, 195, 499 P.2d 49, 52, *aff'd en banc*, 81 Wash. 2d 648, 503 P.2d 1061 (1972).

140. *E.g.*, *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970), *aff'd per curiam*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *State v. Alfaro*, 127 Ariz. 578, 623 P.2d 8 (1980) (en banc). In *Lombardino*, a probationer was stopped on the street and frisked by the policeman who had arrested him for the offense for which he was then serving probation. 318 F. Supp. at 650. In conducting the search, the officer had neither reasonable grounds for suspicion that *Lombardino* was armed, nor probable cause for arrest. *Id.* The search was unconstitutional, and the marijuana discovered was suppressed in a subsequent criminal trial, but admitted in *Lombardino's* revocation hearing. The court held that "*Lombardino* was afforded protection from the unlawful search . . . when the marijuana was suppressed and the possession charge dropped." *Id.* at 650 (emphasis omitted). A similar position was taken by the Arizona Supreme Court in *State v. Alfaro*. Three years prior to *Alfaro*, the Arizona Court of Appeals, in *State v. Shirley*, 117 Ariz. 105, 570 P.2d 1278 (Ct. App. 1977), *overruled*, *State v. Alfaro*, 127 Ariz. 578, 623 P.2d 8 (1980) (en banc), held that the exclusionary rule was properly invoked to suppress evidence in a probation revocation hearing in which the evidence had been obtained from an illegal search conducted by a police officer who was aware of the defendant's probation status. *Id.* at 107, 570 P.2d at 1280. In *Alfaro*, a probationer was the subject of a search conducted by police officers who were aware of his probation status. 127 Ariz. at 579, 623 P.2d at 9. Relying on *Shirley*, the defendant argued that the search was illegal and that the evidence obtained should be excluded from his revocation hearing. The state supreme court, expressly disapproving *Shirley*, held that the exclusionary rule is not applicable to revocation proceedings regardless of the prior knowledge possessed by the police. *Id.* at 580, 623 P.2d at 10.

141. *United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975). "[W]hen the police at the moment of search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding. The police have nothing to risk: If the motion to suppress in the criminal proceedings were denied, defendant would stand convicted of a new crime; and if the motion were granted, the defendant would still find himself behind bars due to revocation of probation." *Id.* at 54 n.5. See generally R. Dawson, *supra* note 17, at 145, 319, 342-43 (inclination of police to investigate parolees and probationers). The substantial time and effort saved by avoiding a new trial and seeking revocation may make revocation the preferred alternative. See *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972); R. Dawson, *supra* note 17, at 363.

142. See *supra* notes 108, 132 and accompanying text.

The potential injury to the public from the loss of evidence is easily illustrated.<sup>143</sup> For example, a felony narcotics offender with two years left on parole who commits a subsequent narcotics offense can be incarcerated under federal law, as a multiple felon, for up to thirty years.<sup>144</sup> Admission in a revocation proceeding of evidence obtained in an illegal search by a parole officer concerned only with revocation could result in a maximum return to jail for two years, the term left on his parole.<sup>145</sup> The evidence, however, would be inadmissible at trial.<sup>146</sup> Requiring the officer to satisfy a single standard of admissibility would result in the greater likelihood of a maximum incarceration of thirty-two years—the two years left on parole and the maximum, thirty-year new sentence.<sup>147</sup> The undeterred probation/parole officer, therefore, presents a double danger: invasion of the privacy of the probationer/parolee and diminution of society's ability to deal effectively with the multiple criminal offender.

### CONCLUSION

The warrant requirement coupled with a lesser standard of probable cause strikes a favorable balance between a probationer's or parolee's legitimate expectation of privacy and the rehabilitative and crime prevention goals of probation/parole. The probation/parole officer's broad authority to make reasonable home visits and a flexible stan-

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143. To comprehend the inadequacy of probation/parole revocation when contrasted against the possibility of successfully lodging new criminal charges in addition to revocation, the consequences of revocation must be understood. If parole is revoked, the parolee can be incarcerated only for the number of years remaining on his original sentence as of the day parole began. See 18 U.S.C. § 4214(d)(5) (1976); H. Abadinsky, *supra* note 17, at 190; H. Burns, *supra* note 17, at 307; C. Newman, *supra* note 20, at 73. If, upon granting probation, the court imposes a sentence and suspends the execution, the court will be barred from imposing a greater sentence upon revocation than was initially imposed. 18 U.S.C. § 3653 (1976); *Roberts v. United States*, 320 U.S. 264, 272-73 (1943); see *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971).

144. Under 21 U.S.C. § 841(a)(1) (1976), it is unlawful for an unauthorized person "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.* Any person performing any of these proscribed acts with a schedule I or II narcotic drug, such as heroin, cocaine, marijuana, and many widely used amphetamines, may be sentenced to a term of imprisonment of up to 15 years. *Id.* § 841(b)(1)(A). A second conviction under § 841(b)(1), or under any other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, may lead to a term of imprisonment of up to 30 years. *Id.* Under § 846, attempts and conspiracies to commit the acts proscribed by § 841 are punishable by the same penalties prescribed for commission of the act itself. *Id.* § 846.

145. See *supra* note 143.

146. See *supra* note 9 and accompanying text.

147. See *supra* note 108.

dard of diminished probable cause give the officers the considerable latitude necessary to exercise their supervisory responsibilities.

More importantly, the loss of evidence that results from a dual standard of admissibility deprives society of needed protection. Therefore, once a court determines that an illegal search has occurred, it should extend the exclusionary rule to revocation proceedings. Such application of the exclusionary rule would deter probation/parole officers from conducting substandard searches. The goals of deterring illegal searches and of protecting society from criminal activity, often in conflict, are both optimally promoted by a single standard of admissibility.\*

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\* After this Note went to press, the Second Circuit applied the exclusionary rule in a probation revocation proceeding to evidence obtained in a warrantless search by the defendant's probation officer. *United States v. Rea*, No. 81-1463 (2d Cir. May 3, 1982), *vacating and remanding* 524 F. Supp. 427 (S.D.N.Y. 1981).