The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees

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by

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Almost 2,000,000 adults\(^1\) were on probation\(^2\) or parole\(^3\) in the United States in 1984. The primary purpose of probation and parole is to rehabilitate the offender by placing him back into the community.\(^4\) The release into the community, however, is not without restriction; in virtually every case, conditions accompany the release of the probationer or parolee.\(^5\) To be valid, the conditions attached to the release must "rea-
reasonably relate” to the twin goals of probation and parole: rehabilitation of the offender and protection of the public. If the probationer or parolee fails to obey valid conditions, his probation or parole may be revoked and he may be sent to prison.

One frequently imposed condition of probation or parole requires the probationer or parolee to submit to searches at any time and at any (must remain within state and “obey each and every direction of the United States Probation Officer”); see also United States v. Rea, 678 F.2d 382, 384 n.1 (2d Cir. 1982) (list of standard conditions of probation); Sobell v. Reed, 327 F. Supp. 1294, 1296 n.2 (S.D.N.Y. 1971) (same); 18 U.S.C. § 4209 (1985) (same).

6. See United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982) (Although a judge has broad discretion to impose conditions of probation reasonably related to rehabilitating the defendant and protecting the public, he may not require defendant to pay a contribution to a group unharmed by his crime); Higdon, 627 F.2d at 898-900 (Although imposing conditions that probationer forfeit all his property, as well as work full-time for a charity for three years, is punitive rather than rehabilitative or protective, imposing only one of these conditions may be permissible.).

Courts have applied a “reasonable relation” test to validate conditions that infringe parolees’ fourth amendment rights. See Owens v. Kelley, 681 F.2d 1362, 1366 (11th Cir. 1982); United States v. Tonry, 605 F.2d 144, 150 (5th Cir. 1979); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975); Latta v. Fitzharris, 521 F.2d 246, 249-50 (9th Cir.), cert. denied, 423 U.S. 897 (1975); People v. Mason, 5 Cal. 3d 759, 764, 488 P.2d 630, 632-33, 97 Cal. Rptr. 302, 304-05 (1971). Courts give more careful scrutiny, however, to conditions that restrict first amendment rights. See, e.g., Birzon, 469 F.2d at 1243 (condition restricting freedom of association valid if “reasonably and necessarily related” to goals of probation); Sobell, 327 F. Supp. at 1303-04 (compelling need standard for condition restricting freedom of speech); see also Note, Probation Conditions and the First Amendment: When Reasonableness is Not Enough, 17 COLUM. J.L. & SOC. PROBS. 45 (1981) (authored by Bruce D. Greenburg) (history of probation with special attention to restrictions on first amendment rights); Comment, The Parole System, 120 U. PA. L. REV. 282, 313-39 (1971) (general discussion of conditions limiting first amendment rights).

This Note argues that, since the fourth amendment is a fundamental right that is implicit in the concept of ordered liberty (see infra notes 73-75 and accompanying text), a compelling need test should also apply to conditions infringing parolees’ fourth amendment rights.

7. One uniformly imposed condition of probation or parole is that the convict obey all the laws of the jurisdiction. A court may revoke probation or parole when it is “reasonably satisfied” that the convict has violated state or federal law. Neither actual conviction of the underlying crime nor proof beyond a reasonable doubt the court will require. United States v. Rice, 671 F.2d 455, 458 (11th Cir. 1982); United States v. Cates, 402 F.2d 473, 474 (4th Cir. 1968). Because the burden of proof is much lighter in a revocation hearing than in a full-fledged criminal trial, prosecutors will often seek probation revocation and subsequent incarceration rather than pursue a new criminal prosecution. Morrissey v. Brewer, 408 U.S. 471, 479 (1972); United States v. Hill, 447 F.2d 817, 819-20 (7th Cir. 1971) (Fairchild, J., dissenting); see also Seymore v. Beto, 383 F.2d 384, 384 (5th Cir. 1967) (proper to revoke probation on basis of charge subsequently dismissed by prosecution because of insufficient evidence); In re Martinez, 1 Cal. 3d 641, 653, 463 P.2d 734, 742, 83 Cal. Rptr. 382, 390 (1970) (Peters, J., dissenting) (“When the cost of prosecution in terms of time and money is considered too high, and when the parolee still has a considerable time to serve on his original sentence, the People will often forego a new criminal trial and instead will look to the parole revocation to serve the ends of a new conviction.”).
place.\textsuperscript{8} Even when such a condition is not expressly imposed, courts have allowed probation and parole searches without either probable cause or a search warrant.\textsuperscript{9} In effect, these courts strip probationers and parolees of standard fourth amendment protections.

In \textit{Griffin v. Wisconsin},\textsuperscript{10} the first United States Supreme Court ruling on the proper scope of probationers' fourth amendment rights,\textsuperscript{11} the Court relied on a state regulation that authorized probation searches on the basis of "reasonable grounds" to uphold a search of a probationer's home conducted without either probable cause or a search warrant.\textsuperscript{12} The Court, however, refused to create a general "probation search" exception to the fourth amendment's safeguards. The Court also declined to decide whether it would uphold restrictions on a probationer's privacy that are only "'reasonably related to a legitimate penological interest,'" or whether it would restrict the government's searches under a strict scrutiny standard.\textsuperscript{13}

This Note argues that courts should not restrict fundamental fourth amendment rights simply because the individual is a probationer or parolee. Fundamental rights should be limited only when necessary to effectuate compelling state interests. Furthermore, even when the government objectives are compelling, the state should use only those methods that are narrowly tailored to achieve its ends. Because the state can use means that are less restrictive of constitutional rights, the government should not have the power to conduct probation and parole searches without a warrant and probable cause.

This Note first presents an overview of fourth amendment protections for the general public. Next, the Note examines the current status of probationer's and parolee's fourth amendment rights. The Note then examines five theories that have been used to justify limitations on parolee's fourth amendment rights. After presenting and criticizing the three older theories of constructive custody, act of grace, and explicit


\textsuperscript{10} 107 S. Ct. 3164 (1987).


\textsuperscript{12} Probation officers searched Griffin's home after receiving a telephone tip from someone claiming to be a police officer. The tipster told the probation agent that Griffin may have had guns in his apartment. \textit{Griffin}, 107 S. Ct. at 3175 (Blackmun, J., dissenting). Four Justices dissented from the majority opinion upholding the search.

\textsuperscript{13} \textit{Id.} at 3168 n.2 (quoting O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404 (1987)).
waiver, the Note describes the protections that even courts using these theories concede to probationers and parolees. It then presents and criticizes the two more modern theories of "diminished expectation of privacy" and "administrative search"; the two theories that the Wisconsin Supreme Court used to uphold the search in Griffin. The United States Supreme Court declined to use the diminished expectation of privacy theory and instead relied on the administrative search theory to affirm the Wisconsin decision. In this discussion, the Note argues that parolees have legitimate expectations of privacy and that the government must demonstrate a "compelling interest" before abridging their fourth amendment rights. Although the state interest in rehabilitating convicts may be compelling, blanket denials of fundamental fourth amendment rights are not narrowly tailored to meet the state's important interests in rehabilitating the probationer and protecting the public. Means less destructive of constitutional freedoms, such as visitation and reporting requirements, are available to the government. Since blanket denials of fourth amendment rights unnecessarily impinge privacy rights, they are unconstitutional.

In addition to the constitutional arguments, the Note argues that limiting privacy rights is unwise public policy when other alternatives are open to the government. Limits on privacy may hinder, rather than promote, rehabilitation. Furthermore, since the public's best protection lies in the offender's rehabilitation, unwarranted searches harm the protective, as well as the rehabilitative goals of probation.

The Note concludes by proposing that courts apply a "compelling interest" and "narrowly tailored means" test to conditions limiting probationer's and parolee's fourth amendment rights. This Note also proposes that courts extend the exclusionary rule to revocation hearings.

I. Fourth Amendment Protection for the Public at Large

The fourth amendment protects an individual's legitimate expecta-

16. The fourth amendment reads:
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.


Many courts have treated probationers and parolees identically in discussions of their fourth amendment rights. See, e.g., United States v. Thomas, 729 F.2d 120, 125 n.1 (2d Cir. 1984); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265-66 (9th Cir. 1975); People v. Jackson, 46 N.Y.2d 171, 174, 385 N.E.2d 621, 623, 412 N.Y.S.2d 884, 886 (1978). Arguably,
tion of privacy\textsuperscript{17} against arbitrary state intrusion by requiring that all searches and seizures\textsuperscript{18} be reasonable. Both civil and criminal searches are subject to the fourth amendment’s limits.\textsuperscript{19}

Although the fourth amendment’s underlying command is that all searches be “reasonable,” traditional fourth amendment jurisprudence measures reasonableness in terms of the warrant clause.\textsuperscript{20} Police must have both probable cause and a search warrant to conduct a valid search.\textsuperscript{21} A search without a warrant is per se unreasonable and therefore unconstitutional unless it falls within one of the “‘few specifically established and well-delineated exceptions’” to the warrant requirement.\textsuperscript{22}

Parolees should be treated differently than probationers since the initial jail sentence may reflect a judge’s assessment of the gravity of the offense or the continued dangerousness of the convict. It may be true that, as a class, convicts sentenced to prison are more dangerous than the class of probationers. By deciding to grant parole, however, the state demonstrates its judgment that the parolee, as an individual, is rehabilitable. Once this judgment is reached, the classes of parolees and probationers should be treated alike. The state has the same interest in rehabilitation in both the probationer and the parolee. Differences in the amount of protection the public requires are better dealt with on an individual basis in the determination of probable cause in the “totality of the circumstances” (see infra notes 35-37, 179-80 and accompanying text) rather than by blithely classifying parolees as more dangerous than probationers. Since the arguments set forth in this Note apply equally to both probationers and parolees, this Note will use the terms “probationer” and “parolee” interchangeably.

17. Before fourth amendment protections apply, a person must have an expectation of privacy that society is “‘prepared to recognize as legitimate.’”\textsuperscript{17} New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).

18. A fourth amendment search occurs “‘when an expectation of privacy that society is prepared to recognize as reasonable is infringed.’”\textsuperscript{18} United States v. Karo, 468 U.S. 705, 712 (1984) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). A fourth amendment seizure of property occurs when there is some meaningful interference with an individual’s possessory rights in that property. Id. A fourth amendment seizure of a person occurs when a reasonable person would think that he was not free to leave. I.N.S. v. Delgado, 466 U.S. 210, 216 (1984).

19. Marshall v. Barlow’s, Inc., 436 U.S. 307, 312 (1978); Camara v. Municipal Court, 387 U.S. 523, 540 (1967). In New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court stated: Because the individual’s interest in privacy and personal security “suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,” it would be “anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior.” 469 U.S. at 335 (quoting Marshall, 436 U.S. at 312-313 and Camara, 387 U.S. at 530) (citations omitted).

20. The warrant clause provides that “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.


22. Coolidge, 403 U.S. at 455 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); see also infra notes 32-34 and accompanying text.
A warrant must be issued by a neutral, detached magistrate,\textsuperscript{23} who may grant the warrant only upon a showing of probable cause.\textsuperscript{24} Before a magistrate may find probable cause to search, the state must show facts and circumstances that would lead a prudent person to believe that seizable evidence would be found in a particular location.\textsuperscript{25} Probable cause to arrest requires facts and circumstances "sufficient to warrant a prudent person's belief that the suspect had committed or was committing an offense."\textsuperscript{26} An applicant for a search warrant must provide the magistrate with sufficient and specific facts and circumstances to allow him to evaluate independently whether probable cause exists. The magistrate is not to act as a mere "rubber stamp" by approving the conclusory allegations of the applicant.\textsuperscript{27} To avoid the evils of a "general warrant" or "writ of assistance,"\textsuperscript{28} the warrant must particularly describe the items sought and the locations in which the search is authorized.

The search warrant requirement serves as objective evidence that the officer is legally authorized to conduct the search and prevents hindsight from coloring the evaluation of the reasonableness of the search.\textsuperscript{29} Most importantly, the warrant requirement limits the discretion exercised by the searching officer by substituting the judgment of a neutral and detached magistrate for that of the searching officer.\textsuperscript{30}


The probable cause standard is the necessary and proper accommodation between individuals' rights and the state's duty to control crime. Gerstein v. Pugh, 420 U.S. 103, 112 (1975). Since in the absence of probable cause, a prudent person would not think that seizable evidence would be found, a full search conducted on less than probable cause would be unreasonable.

\textsuperscript{25} Carroll v. United States, 267 U.S. 132, 162 (1925).

\textsuperscript{26} Gerstein, 420 U.S. at 111 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)).


\textsuperscript{28} Frequently used in colonial America, these instruments conferred unlimited powers on officials to search for customs and tax violations. Popular resentment to these unlimited intrusions into the colonists' privacy was one cause of the American Revolution. United States v. Chadwick, 433 U.S. 1, 7-8 (1977); United States v. United States Dist. Court (Plamondon), 407 U.S. 297, 326-29 (1972) (Douglas, J., concurring); Stanford v. Texas, 379 U.S. 476, 481-85 (1965).

\textsuperscript{29} Chadwick, 433 U.S. at 9; United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976). Whether probable cause exists is a question a magistrate must determine before issuing a warrant authorizing a search. This requirement reduces the temptation to use the fruits of a search to justify the intrusion. A search conducted in violation of the Constitution cannot be made lawful by the evidence that it uncovers. Byars v. United States, 273 U.S. 28, 29 (1927).

\textsuperscript{30} Aguilar, 378 U.S. at 110-11; United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants
A court may excuse the warrant requirement when some exceptional governmental need to search exists. This need, however, cannot be merely the necessity for law enforcement. In general, the warrant requirement is excused only where the government has shown some exigency that would make obtaining a warrant impossible. For example, an exigency exists when the time required to obtain a warrant may endanger a police officer or lead to the destruction of evidence.

Even if a search falls into one of the carefully delineated exceptions to the search warrant requirement, probable cause must still be present to validate the search. Probable cause is a flexible standard that a court 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.

The point of the fourth amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

The government has the burden of proving the necessity for an exemption from the warrant requirement. It will not meet this burden merely by showing that obtaining a warrant will make enforcement somewhat more difficult. The government must show that imposition of the warrant requirement will substantially frustrate the search. See id. at 532-33. Cf. Mincey v. Arizona, 437 U.S. 385, 395 (1978) (no general murder scene exception).

For specific exceptions to the warrant requirement, see, for example, Coolidge v. New Hampshire, 403 U.S. 443, 465-68 (1971) (plain view); Chimel v. California, 395 U.S. 752, 762-63 (1969) (search of limited area valid incident to arrest); and Terry v. Ohio, 392 U.S. 1, 27 (1968) (protective frisk for weapons valid on articulable suspicion).

Consent excuses both the warrant and probable cause requirements. The state has the burden of proving effective consent. For the consent to be "effective," the individual must
will evaluate in the totality of the circumstances.\textsuperscript{36} Police may use personal observations, hearsay reports, and previous contacts to establish probable cause.\textsuperscript{37}

A. Fourth Amendment Safeguards for “Less Intrusive” Searches

In certain circumstances, the Supreme Court has applied a “sliding scale”\textsuperscript{38} approach to probable cause. This approach examines the intrusiveness of the search as well as the justification for the search to determine whether it is constitutional. Less intrusive searches require less justification.

The Supreme Court has adopted this approach to justify protective frisks for weapons by police officers\textsuperscript{39} as well as brief investigative seizures.\textsuperscript{40} In these cases, the Court has allowed minimal intrusions into personal privacy on the basis of “reasonable suspicion.”\textsuperscript{41} Under the reasonable suspicion standard, the officer must be able to articulate facts that reasonably led him to believe that criminal activity was afoot.\textsuperscript{42}


Probable cause is not a substitute for a search warrant. As a general rule, both probable cause and a search warrant are required. Excusing one requirement does not necessarily justify excusing the other. \textit{See} Jones v. United States, 357 U.S. 493, 499 (1958) (“were officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home the provisions of the Fourth Amendment . . . [would be] empty phrases, and the protection it affords largely nullified.”); \textit{see also} Griffin v. Wisconsin, 107 S. Ct. 3164, 3174 (1987) (Blackmun, J., dissenting) (“\textit{reduced} need for review does not justify a complete removal of the warrant requirement.”).


\textsuperscript{38} This phrase is taken from R. \textsc{Allen} \& R. \textsc{Kuhns}, \textsc{Constitutional Criminal Procedure} 602 (1985).

\textsuperscript{39} Terry v. Ohio, 392 U.S. 1, 30 (1968).

\textsuperscript{40} United States v. Brignoni-Ponce, 422 U.S. 873, 881-82, 884 (1975) (reasonable suspicion required for investigative stop by roving patrol near border); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (articulable suspicion needed to stop car to check registration and license). \textit{Cf.} United States v. Ortiz, 422 U.S. 891, 896-97 (1975) (either probable cause or consent required to conduct full search of automobile near border); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (objective facts required to justify brief investigative stop of automobile by roving patrol but not for stop at functional equivalent of a border).

\textsuperscript{41} \textit{See} New Jersey v. T.L.O., 469 U.S. 325, 360 (1985) (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{42} Terry, 392 U.S. at 30. In most circumstances in which the sliding scale approach applies, it would be impractical to obtain a search warrant. The delay necessary to obtain a search warrant would usually frustrate the objectives of the search. But if it is practical to obtain a warrant, the fact that the full measure of probable cause is not required does not mean the judgment of a neutral magistrate should also be excused. \textit{See} Camara v. Municipal Court, 387 U.S. 523, 528-39 (1967) (warrant required even though traditional probable cause standard is inapplicable). Excusing the warrant requirement just because a lower standard is substituted for the traditional standard of probable cause would leave even more discretion in the
The sliding scale approach, however, only applies to searches that are substantially less intrusive than a "full-blown" search. For more significant intrusions into privacy, enforcement officers must satisfy the measure of reasonableness provided by the Framers of the Constitution: probable cause and a search warrant.\textsuperscript{43}

B. Administrative Searches

The Court also has engaged in a balancing process when the government articulates important interests other than that in law enforcement, such as health and safety code enforcement. Unlike the sliding scale approach that balances the extent of the intrusion against the facts justifying the intrusion, the "administrative search theory" balances the societal interest in conducting the search against the individual’s interest in maintaining his privacy.\textsuperscript{44} When the government conducts a search to find violations of regulatory codes,\textsuperscript{45} the Supreme Court sometimes has been willing to defer to legislative judgments of reasonableness,\textsuperscript{46} rather than independently scrutinizing the search to see whether it meets the

\textsuperscript{43} The Court allowed a full blown search on less than probable cause in New Jersey v. T.L.O., 469 U.S. 325 (1985). In \textit{T.L.O.}, the Court held that although students had a reasonable expectation of privacy while in school, school officials could search a student’s purse on reasonable suspicion rather than on probable cause. The Court apparently felt that teachers were too unfamiliar with the criminal process to evaluate accurately whether probable cause existed. This reasoning fails because probable cause depends on whether a reasonable person, not a hypertechnical magistrate, thinks seizable evidence would be found. Illinois v. Gates, 462 U.S. 213 (1983); see also \textit{T.L.O.}, 469 U.S. at 364 (Brennan, J., concurring in part and dissenting in part). In excusing the warrant requirement, the \textit{T.L.O.} Court emphasized the need to need to maintain school discipline through immediate action. \textit{Id.} at 340. Cf. Hudson v. Palmer, 468 U.S. 517, 527-28 (1984) (prison searches without probable cause or warrant allowed because of the need to maintain security and discipline).

\textsuperscript{44} Administrative searches may be less intrusive than criminal searches. The Court has weighed this factor when evaluating administrative searches of commercial premises. \textit{See, e.g.}, New York v. Burger, 107 S. Ct. 2636, 2642-43 (1987); Donovan v. Dewey, 452 U.S. 594, 598-99 (1981).

\textsuperscript{45} The fact that a regulatory inspection may uncover evidence of a crime does not make the search or the regulation unconstitutional or the evidence inadmissible. \textit{Burger}, 107 S. Ct. at 2651.

\textsuperscript{46} \textit{Griffin}, 107 S. Ct. at 3167-68; Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).
standard fourth amendment requirements of a warrant and particular-
ized\textsuperscript{47} probable cause.

The Court's administrative search cases fall into three general cate-
gories. In the first category, the Court has adopted a less stringent stan-
dard of probable cause because enforcement of the traditional probable cause standard would lead to an inadequate level of enforcement.\textsuperscript{48} For example, in \textit{Camara v. Municipal Court},\textsuperscript{49} the Court refused to apply the traditional probable cause standard because inspectors could not gather evidence of housing code violations unless they entered the dwelling. If the Court had enforced the traditional probable cause standard, the inspec-
tors would be placed in an impossible quandary: they could not demonstrate probable cause without entering the building, but they could not enter the building without first showing probable cause. Faced with this dilemma, the Court held that the government need not show particu-
larized probable cause for this type of inspection, but only that a reason-
able legislative scheme existed and that the particular inspection fell within the legislative scheme. The government could demonstrate the necessity for inspection by showing either the general need for inspection of buildings in the surrounding area or that the building itself had not been inspected for some time, rather than by presenting evidence of the actual condition of the particular building.\textsuperscript{50}

In this first category, then, the Court has required a search warrant, but has allowed the warrant to issue on a showing much less demanding than that required for a traditional criminal search warrant.\textsuperscript{51} In these cases, the Court emphasized that administrative searches intrude upon fourth amendment interests.\textsuperscript{52} To minimize the intrusion, the searching party must obtain a warrant, unless such a requirement would frustrate the governmental purpose behind the search.\textsuperscript{53} These cases recognize that the fourth amendment's protections apply where Congress or an-

\begin{itemize}
\item \textsuperscript{47} Probable cause must exist for each person searched. Mere association with, or prox-
imity to, a person being validly searched does not mean that the associate may also be searched. \textit{Ybarra v. Illinois}, 444 U.S. 85, 90-94 (1979).
\item \textsuperscript{49} 387 U.S. at 523.
\item \textsuperscript{50} \textit{Id.} at 538.
\item \textsuperscript{51} The balancing process of this category is most analogous to the proper method for analyzing the standard to be applied in probation and parole searches. But although the bal-
ancing process is similar, the outcome is different in the probation and parole search context. \textit{See infra} notes 154-61 and accompanying text.
\item \textsuperscript{52} \textit{See Camara}, 387 U.S. at 530. Nevertheless, the \textit{Camara} court found the search to be constitutional, because the inspections were neither personal in nature nor aimed at the discov-
ey of evidence of a crime, and thus involved a relatively limited invasion of privacy. \textit{Id.} at 537.
\item \textsuperscript{53} \textit{Id.} at 533.
\end{itemize}
other legislative body authorizes a search but fails to provide suitable safeguards for fourth amendment interests.

In the second category of administrative search cases, the Court has not required either probable cause or a warrant for inspections of pervasively regulated businesses. In this category, an individual's protections from "slight" invasions into legitimate fourth amendment interests are "outweighed" by important governmental interests that can only be achieved by limiting fourth amendment rights. Detailed regulations serve to delineate the inspector's authority and the licensee's obligations. Therefore, the individual "is not left to wonder about the purposes of the inspector or the limits of his task." For example, in United States v. Biswell, the Court approved a warrantless inspection of a licensed firearms dealer. The Court stressed three factors: the limited nature of the privacy interest involved, the strong governmental interest in regulating firearms, and the need for frequent and unannounced inspections for effective enforcement.


55. The injury to privacy interests is minimal since all the businesses in this category are already pervasively regulated. Because of this pervasive regulation, the businesses are on notice that they may be inspected without a warrant or probable cause. This notice is particularly effective in minimizing damage to privacy interests when the government actually conducts inspections regularly. Donovan, 452 U.S. at 599, 604 (1981).

56. These regulations delineate the scope and object of any search conducted necessary to enforce the regulatory scheme. Both the searching official and the business owner are on notice of the permissible scope of the search. Biswell, 406 U.S. at 315.

57. Id.

58. Id. at 311.

59. The Biswell Court stated:

   It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U.S.C. § 921(a)(19). The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

   Id. at 316.

   The privacy interest in Biswell was minimal because of pervasive, rather than long-standing regulation. Cf. Colonnade, 397 U.S. at 75 (long history of regulation minimizes privacy interest).

60. Biswell, 406 U.S. at 315 ("close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders").

61. Id. at 316 ("[U]nannounced, even frequent inspections are essential. . . . [T]he prerequisite of a warrant could easily frustrate inspection.").

In New York v. Burger, the Court stressed that a warrantless inspection, . . . even in the context of a pervasively regulated business,
In the third category of administrative search cases, the Court has created an exception to the warrant requirement when administrative safeguards adequately protect privacy interests. In these cases, neutral criteria for selecting the person or object to be searched remove the risk of arbitrary actions by the searching officer. This category includes only those searches that cause minimal intrusion into fourth amendment interests. For example, *United States v. Martinez-Fuerte* authorized only very limited investigative detentions at fixed roadblocks. Searches, even at fixed roadblocks, require a warrant and the full measure of probable cause.

In all three categories of administrative search cases, the Court has emphasized the need to limit the field officer's discretion. Either a warrant, neutral criteria, or regulatory limits on the scope of the search must limit the officer's power and discretion.

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will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest . . . Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . . Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."


The administrative warrant requirement is also excused by "exigency." *See, e.g., Michigan v. Clifford, 464 U.S. 287, 293 (1984) (need to find cause of fire excused warrant requirement for short-time after fire was extinguished); Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (same).*

63. The Court stated: The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. . . . Such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops [which may only be made on reasonable suspicion].

*Martinez-Fuerte, 428 U.S. at 559.* *Opperman* authorizes routine inventory searches of impounded automobiles. 428 U.S. at 364.

64. *United States v. Ortiz, 422 U.S. 891, 896-97 (1975).* When an automobile is the object of the search, the automobile exception excuses the warrant requirement. *Carroll v. United States, 267 U.S. 132, 153 (1925).* The officer, however, must still have probable cause to conduct the search. *Id.* at 154.

A search conducted at a national border need not be based on probable cause because of the compelling governmental interest in securing the nation's borders. *Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).*

65. *See Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967).* The *Camara* Court explained: "The practical effect of [warrantless administrative searches] is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.*

66. *See, e.g., Opperman, 428 U.S. at 384 (Powell, J., concurring) ("[N]o significant discre-
C. The Exclusionary Rule

Under the exclusionary rule, the trial court generally will exclude evidence from the subsequent criminal trial gathered in violation of a defendant’s fourth amendment rights. The exclusionary rule is a judicially created remedy designed to safeguard fourth amendment rights of the general public. The purpose behind the rule is to deter future constitutional violations by the government, rather than to protect the personal constitutional rights of the aggrieved party.

Because exclusion often results in the loss of highly probative evidence, the Court has limited the remedy to those situations in which it will have the maximum deterrent effect on enforcement officers. To determine which situations merit application of the exclusionary rule, the Court has established a balancing test that weighs the benefit gained (the potential deterrent value of exclusion) against the cost incurred (the loss of probative evidence and the costs of litigating the legality of the search). Applying this balancing test, the Court has ruled that the exclusionary rule is inapplicable in grand jury proceedings, civil cases, and deportation hearings. In all of these contexts, the Court found the cost of exclusion too high and the benefit of the deterrent effect too slight to merit application of the exclusionary remedy.

II. Fourth Amendment Protections as Fundamental Rights

As the preceding sections illustrate, the Framers of the Constitution and the courts have gone to great lengths to assure adequate protection of fourth amendment rights. Even where important state interests require some compromise of standard fourth amendment protections, courts have substituted other protections to minimize injury to fourth amendment
tion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope.

67. In United States v. Calandra, the Court articulated this rationale: “The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” 414 U.S. at 347 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

Although the early formulations of the exclusionary rule also pointed out the need to preserve “judicial integrity,” the Court’s recent majority opinions have tended to either ignore or minimize this justification. Compare the majority and dissenting opinions in Calandra, 414 U.S. at 351-54, 356-60.

68. Id. at 348.

69. One factor the Court has weighed in measuring the benefit gained through exclusion is whether the proceeding in which exclusion is sought is outside the “offending officer’s zone of primary interest.” If it is outside his zone of interest or responsibility, exclusion will not affect him enough to deter him from the same type of conduct in the future. United States v. Janis, 428 U.S. 433, 458 (1976).

70. Calandra, 414 U.S. at 349-52.


amendment interests. This type of strict scrutiny and obedience to fourth amendment commandments secures and protects the right of all "the people," whether they are guilty or innocent, to be free from unreasonable searches.73

In perhaps its most poignant language, the Court pointed out the importance of fourth amendment freedoms:

It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials: "These [fourth amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."74

The Court has repeatedly stressed that the guaranties of the fourth amendment are the very essence of constitutional liberty . . . [and are] as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen. . . . [The fourth amendment] should receive a liberal construction, so as to prevent stealthy encroachment . . . or gradual depreciation of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers.75

Courts protect these fundamental rights by adhering strictly to the fourth amendment's warrant and probable cause requirements. Unless the search falls within one of the specifically delineated and jealously guarded exceptions to the fourth amendment's requirements, the searching officer must procure a warrant supported by probable cause.

III. Current Status of Probationers' and Parolees' Fourth Amendment Rights

Despite the Supreme Court's strong language concerning the "fun-
damental” nature of these rights, most courts have failed to carefully scrutinize conditions of release that limit probationers’ and parolees’ fourth amendment rights. Traditionally, courts have afforded probationers and parolees little or no fourth amendment protection. Some courts have held that parolees and probationers may be searched at any time by any probation officer.76 Others have validated searches that are based on “reasonable grounds”77 or that are “reasonably related to a probation agent’s duties.”78 In two different cases, the Ninth Circuit has even intimated that a search may be based upon a mere “hunch.”79 All of these standards fall well below the probable cause standard required to search other individuals of the general public. In addition to denying probationers protections of the probable cause standard, most courts also eliminate the safeguards of the warrant clause by not requiring probation agents to obtain a warrant before conducting a search.80

A. Theories Used to Justify Limiting Probationers’ and Parolees’ Fourth Amendment Rights

Courts have used several theories to strip fourth amendment protections from probationers and parolees. Although the older theories of “constructive custody,” “act of grace,” and “explicit waiver”81 have been soundly criticized by commentators,82 courts continue to apply these theories, either alone or in conjunction with more modern rationales.83 Courts that have discarded the three older theories generally rely on two

78. Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir.), cert. denied, 423 U.S. 897 (1975); United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975).
79. Latta, 521 F.2d at 250; Consuelo-Gonzalez, 521 F.2d at 266.
81. See infra notes 84-104 and accompanying text.
83. See infra notes 114-60 and accompanying text. For an example of a court using a combination of theories to justify its result, see People v. Mason, 5 Cal. 3d 759, 764-66, 488 P.2d 630, 632-34, 97 Cal. Rptr. 302, 305 (1971) (using consent, reduced expectation of privacy, and act of grace).
more modern approaches, "diminished expectation of privacy" and "administrative search," to limit probationer's and parolee's fourth amendment rights. Like their older counterparts, the modern theories fail to recognize the fundamental nature of fourth amendment rights and, therefore, do not adequately explain why these rights should be stripped from probationers and parolees.

(1) Older Theories

Older theories used to justify limitations on probationer's fourth amendment rights include "constructive custody," "act of grace," and "explicit waiver."

a. Constructive Custody

The constructive custody theory is premised on the idea that, although a probationer or parolee is not physically confined, she technically remains under the ultimate control of the correctional system and is therefore in "custody."\footnote{Statutes often refer to the sentence of probation as remanding the convict to the custody of the Attorney General for the term of probation. \textit{See Cal. Penal Code} § 3056 (West 1982); Comment, \textit{supra} note 6, at 287-88. This phrasing may explain the durability of the constructive custody theory.}

While in technical custody, the argument runs, probationers and parolees are entitled to no more rights than people actually behind prison walls. Since a prisoner has no legitimate expectation of privacy in his prison cell,\footnote{Hudson v. Palmer, 468 U.S. 517, 530 (1984).} a probationer or parolee has no expectation of privacy in her home.

In \textit{People v. Hernandez},\footnote{229 Cal. App. 2d 143, 149-50, 40 Cal. Rptr. 100, 103-04 (1964), cert. denied, 381 U.S. 953 (1965).} for example, a California court used the constructive custody theory to uphold a parole officer's warrantless search of a parolee's car even though the officer had no probable cause to search. At the time of the \textit{Hernandez} decision, parolees could be arrested and returned to prison without probable cause, notice, or a hearing.\footnote{\textit{Id.} at 148, 40 Cal. Rptr. at 103 ("The parolee, although physically outside the walls, is still a prisoner; his apprehension, although outwardly resembling arrest, is simply a return to physical custody.").} The court reasoned that the extensive power to seize a parolee carried with it the less intrusive power to search:

\begin{quote}
[T]he authorities may subject [the parolee], his home and his effects to such . . . inspection and search as may seem advisable to them. Neither the fourth amendment nor the parallel guaranty in [the state] Constitution block[s] that scrutiny. He may not assert these guaranties against the correctional authorities who supervise him on parole.

. . . If this constitutional fact strips him of constitutional protection against invasions of privacy by his parole officer, the answer is that he
\end{quote}
has at least as much protection as he had within the prison walls.\textsuperscript{88}

The error in this argument is its assumption that the state deprives the prisoner of his privacy rights merely as an incident of "custody." In fact, the deprivation of privacy inside a prison derives from the state's compelling interest in maintaining prison security and discipline.\textsuperscript{89} Thus, the analogy between prisoners on the one hand, and parolees and probationers on the other, falls apart. The legal fiction of constructive custody fails to recognize differences between the expectations and physical surroundings of prisoners and parolees as well as the different state interests involved.\textsuperscript{90}

Prisoners are subject to searches for weapons, drugs, and illicit communications because of the need to maintain security and discipline in the highly regulated prison environment. Searches are necessary both to protect guards and prisoners from violence and to control potential riots and escape attempts. These compelling needs have led courts to hold that there is no legitimate expectation of privacy in a prison cell.\textsuperscript{91} This holding, however, does not mean that prisoners do not expect some measure of privacy in their personal effects. Rather, any subjective expectation of privacy that a prisoner may have in his personal effects is constitutionally unprotected because society is unwilling to recognize the prisoner's privacy interest in the face of the compelling state interest in maintaining prison security.\textsuperscript{92}

Probation and parole searches, however, do not involve the same

\textsuperscript{88}. Id. at 149-50, 40 Cal. Rptr. at 104.

\textsuperscript{89}. See Hudson v. Palmer, 468 U.S. 517, 527-28 (1984). In Hudson, the Supreme Court held that the fourth amendment does not apply in a prison cell because society demands that a prisoner's expectation of privacy must give way to the overriding state interest in maintaining secure prisons. Id. at 528. Therefore, any expectation of privacy held by a prisoner is "illegitimate" and without constitutional protection. Although not upholding an expectation of privacy, the Hudson analysis demonstrates that the government cannot strip away fundamental constitutional privacy rights without having an objective and compelling reason for its actions. Merely informing an individual that he may be searched at any time will not make his expectation of privacy "illegitimate."

The Supreme Court has recently held that prison regulations need only reasonably relate to a "legitimate penological interest," emphasizing that prison security is a compelling interest best served by deference to prison administrators' experience and discretion. O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2404 (1987); Turner v. Safley, 107 S. Ct. 2254, 2261 (1987).

The Court relied on a similar reasonableness test to uphold a probation search based on a telephone tip. Griffin v. Wisconsin, 107 S. Ct. 3164, 3167 (1987). Yet in the probation setting, the compelling interests of maintaining institutional security and preserving internal order and discipline inside prison walls are absent. Nevertheless, the Court used this lax reasonable relation test to limit a probationer's constitutional rights. See id. at 3172 n.2 (Blackmun, J., dissenting) (arguing that reasonable relation test need not be used to evaluate probation conditions since probationers are not in confinement).

\textsuperscript{90}. See In re Martinez, 1 Cal. 3d 641, 646, 463 P.2d 734, 737, 83 Cal. Rptr. 382, 385-86; White, supra note 82 at 180; Note, supra note 82, at 133.

\textsuperscript{91}. Hudson, 468 U.S. at 525-28.

\textsuperscript{92}. Id. at 526; see also supra note 89 and accompanying text.
Rather than living in a highly regulated prison environment, parolees live in free society and, for the most part, may conduct themselves as do members of the public at large. Like members of the general public, they do not expect to be searched whenever they return to their home. The state has no compelling interest in regulating the parolee's home environment to prevent escapes and riots. Although the state does possess an interest in preventing an unauthorized departure from the jurisdiction, this type of an escape does not entail the physical danger present in a prison break-out. Furthermore, the need to prevent and detect other crimes is the same law enforcement interest as that of preventing any crime committed by members of the general public.

Probation and parole agents, therefore, should rely on the same tools available to combat crime by other members of the public. The need to supervise probationers and parolees does not justify stripping them of fourth amendment protections. When courts allow police to conduct searches in the name of more efficient law enforcement or simply for the sake of deterrence, American society returns to the evils of general warrants and writs of assistance. The courts should not so lightly abandon fundamental constitutional protections.

b. Act of Grace and Implied Consent

The act of grace or implied consent rationale assumes that, since the state need not grant either parole or probation, the state may attach whatever conditions it desires to the privilege. Courts also use this rationale to deny probationers and parolees standing to complain about the conditions attached to the act of grace. Courts that use this approach reason that the probationer implicitly has consented to the condition by accepting probation rather than choosing prison.

The error in this argument lies in the assumption that the absolute power to grant or withhold parole necessarily includes the power to grant parole with conditions that infringe upon constitutional rights. Constitutional rights do not depend on whether a government benefit is

93. See Note, supra note 82, at 133.
94. That parolees have a high rate of recidivism should not freely license enforcement agents to use unconstitutional methods for combating crime. Allowing searches of a parolee or probationer that would be unconstitutional if carried out on a member of the general public would be a dangerous precedent. Such a precedent easily could extend to groups other than probationers and parolees, such as convicts who have already served their sentences and residents of high crime areas.
95. See supra note 28.
characterized as a "right" or a "privilege." Since the state may not attach unconstitutional conditions to the grant of state privileges, there must be an independent justification for the deprivation of constitutional rights.

In addition, the act of grace theory erroneously assumes that the parole and probation systems exist merely for the benefit of the convict. Rather, conditional release is an important penological tool that serves the state's interests in rehabilitating criminals and, by so doing, in protecting society. Conditional releases are also more cost-effective than prolonged incarceration. By releasing prisoners, or by letting convicts avoid prison altogether, the state also eases the acute prison overcrowding problem.

c. Explicit Waiver

The explicit waiver theory arises from the concept that an individual may waive his constitutional rights. States that follow this rationale condition parole or probation on the convict's explicit waiver of his fourth amendment rights. Under this theory, when the convict agrees to a search condition, he enters into the equivalent of a parole or probation "contract" and effectively gives up his fourth amendment rights.


99. *See Comment, supra note 6, at 294 ("[Parole] is the implementation of a correctional policy and is no more a matter of grace than the decision to rehabilitate a slum or locate a highway."); see also People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), cert. denied, 381 U.S. 953 (1965). In Hernandez, the court stated:*

At this point we confront authorities theorizing that parole is an act of grace, acceptance of which entails the voluntary surrender or curtailment of constitutional rights. The rationale is not particularly appealing. ... A better doctrine is that the state may not attach unconstitutional conditions to the grant of state privileges. The problem should be approached by considering what guaranties the individual may claim as a paroled prisoner of the state, not what constitutional liberties he surrendered as a condition of parole.

*Id.* at 148, 40 Cal. Rptr. at 103 (citations omitted).

Even though Hernandez properly rejected the act of grace theory, the court asked the wrong question to arrive at the result. Rather than asking what guaranties the parolee may claim, the court should have asked what constitutional guaranties the state may deny. This question would properly emphasize the fundamental nature of fourth amendment rights and focus the court's attention on the "compelling interest" and "narrowly tailored means" analysis. *See infra* notes 173-80 and accompanying text.

100. *See Schneckloth v. Bustamonte, 412 U.S. 218, 235-48 (1973) (unlike waiver of right to counsel, effective consent to search does not require knowing and intelligent abandonment of understood rights).*

101. *See People v. Mason, 5 Cal. 3d 763, 766, 488 P.2d 630, 634, 97 Cal. Rptr. 302, 306 (1971). In California, prisoners cannot refuse parole. Therefore, the explicit waiver theory does not apply to a parole condition that would allow searches without a warrant or probable...*
The flaw in the explicit waiver theory is that a waiver is effective only if made voluntarily in the “totality of the circumstances.” Courts that use an explicit waiver rationale fail to analyze whether the waiver is truly voluntary. To say that the convict has a right to refuse a conditional release and that he, therefore, has a choice that makes his waiver voluntary begs the question. The convict is faced with prison on the one hand and relative freedom on the other. The threat of incarceration casts serious doubts on the “voluntariness” of the waiver.

(2) Limits On The Older Theories

Using these theories, most courts either strip or dilute probationers’ fourth amendment rights by excusing the warrant and probable cause requirements. Even these courts, however, recognize some limits on the government’s power to search.

In more recent cases, courts that use these older theories have held that, at least, probationers are entitled to the fourth amendment’s protection against unreasonable searches. Probationers therefore can argue that a particular search was arbitrary or oppressive. Some courts have limited any particularly lenient rules for probation searches to those conducted by probation officers. Police officers may not search probationers without complying with the usual probable cause and warrant requirements, since they do not share the rehabilitative interests of the probation agent.

cause. Instead, the California Supreme Court has balanced the parolee’s privacy interests against society’s interest in public safety. This balancing approach is applied to parolees, but not to probationers who explicitly waive their privacy rights. This has led to the anomalous result that, in California, a parolee may be searched only on “reasonable suspicion” while a probationer who may never even have been to jail may be searched without a warrant or probable cause at any time. People v. Bravo, 43 Cal. 3d 600, 608, 738 P.2d 336, 340-41, 238 Cal. Rptr. 282, 286-87 (1987). Cf. supra note 16 (arguing that probationers and parolees should be treated alike).

102. Schneckloth, 412 U.S. at 235-49. A waiver of other constitutional rights requires a stricter standard. A valid waiver of the sixth amendment right to counsel, for example, must be knowing and intelligent, as well as voluntary. Id.

103. The courts tend to interpret a purported waiver narrowly, rather than analyzing whether the waiver is truly voluntary. See, e.g., Mason, 5 Cal. 3d at 765-766, 488 P.2d at 633-34, 97 Cal. Rptr. at 305-06 (assumes waiver in probation context is voluntary by relying on Zap v. United States, 328 U.S. 634 (1946), a case approving advance waiver in business context).


107. United States v. Jarrad, 754 F.2d 1451, 1454 (9th Cir. 1985); Latta v. Fitzharris, 521 F.2d 246, 250-51 (9th Cir.), cert. denied, 423 U.S. 897 (1975) (stressing special nature of parole agent-parolee relationship). Some courts have held that since a police officer does not share the rehabilitative interests of the probation system, a condition allowing searches by any law
Probationers also have the protection of the usual knock-and-announce rule that requires the searching officer to announce his authority and purpose before resorting to a forcible entry. This rule protects both the suspect and the officer by decreasing the surprise inherent in a forcible entry and the resulting possibility of a violent response.

In practice, however, these limitations on the government’s search powers provide scant protection to a probationer’s or a parolee’s privacy interests. As one court stated:

Any search by a parole officer [made] in good faith to determine whether a paroled prisoner is complying with the conditions of his release would . . . be reasonable. Such a search could become “unreasonable” only if made too often or if made at an unreasonable hour or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the parole officer.

This standard provides insufficient protection for probationers’ rights. Under this rationale, a court easily could justify the search through hindsight if the search had uncovered incriminating evidence. The simple good faith of a probation agent who has law enforcement as well as rehabilitative responsibilities is a poor substitute for the neutral judgment of a magistrate.

enforcement officer other than probation agents does not reasonably relate to the goals of conditional release. See, e.g., Consuelo-Gonzalez, 521 F.2d at 265. Searches by police officers, however, do reasonably relate to the societal protection goals of the probation system. See id. at 270-71 (Wright, J., dissenting) (allowing police officers to conduct probation searches would serve two goals: frequent searches that would better protect the public, and minimization of harm to the probationer-probation agent relationship). In California, a probationer may effectively consent in advance to a search by any law enforcement officer, including police officers. Bravo, 43 Cal. 3d at 604, 738 P.2d at 336, 238 Cal. Rptr. at 282.

108. The knock-and-announce requirements are excused if the searching officer has a good-faith reasonable belief that complying with the rule would place the officer in jeopardy or would substantially increase the probability that the suspect would either flee or destroy evidence. See Ker v. California, 374 U.S. 23, 37 (1963); Miller v. United States, 357 U.S. 301, 309 (1958).

109. See White, supra note 82, at 173-76.


111. Latta, 521 F.2d at 257 (9th Cir. 1975) (Hufstedler, J., dissenting) (“Post search reviews of reasonableness neither deter unreasonable searches nor remedy those that have occurred. In all but the most egregious cases, the searching officer will be able retrospectively to point to specific facts that justified the search.” (citations omitted)).

In People v. Bravo, police officers received an anonymous tip from a person claiming to be Bravo’s neighbor. The informant told the police that the volume of foot and vehicle traffic around Bravo’s home caused him to suspect that Bravo was a narcotics dealer. Police officers conducted a surveillance of Bravo’s home but “observed nothing to substantiate the caller’s suspicions . . . .” Nonetheless, after learning that Bravo was a probationer subject to warrantless searches, the police searched Bravo’s home. The California Supreme Court upheld the search under the explicit waiver theory. 43 Cal. 3d at 602-06, 738 P.2d at 336-39, 238 Cal. Rptr. at 283-85.

112. See supra notes 23-30 and accompanying text.
Similarly, limiting the more lenient rules for searches of probationers to those conducted by the probation agent also provides little protection. Policemen can simply inform probation officers of their suspicions about a parolee. The parole agent can then either authorize the police to conduct a search or conduct it himself. "The only restriction placed on the policeman is that before he can act, he must obtain the approval of an official who will generally readily cooperate with him."  

(3) Modern Theories

Courts abandoning the three older theories have adopted the "diminished expectation of privacy" and the "administrative search" theories to justify limits on probationer's fourth amendment rights. The courts that use these theories, however, also fail to properly recognize the fundamental nature of fourth amendment rights.

a. Diminished Expectation of Privacy

The premise of this theory is that only legitimate expectations of privacy are protected by the fourth amendment. Courts following this theory reason that probationers have a lesser expectation of privacy than the rest of society because of the conditions placed on their release. These courts afford less protection to this diminished expectation, generally requiring only "reasonable suspicion" rather than probable cause. Trusting probation officers to exercise their discretion properly, many courts following this theory also do not require a search warrant.

113. White, supra note 82, at 175. In Griffin v. Wisconsin, 107 S. Ct. 3164, 3175 (1987), a probation officer received a call from someone claiming to be a police officer and reporting that Griffin may have had guns in his apartment. Although the probation officer could not even identify the caller, he went ahead and searched Griffin's home. The United States Supreme Court upheld the search.

114. See supra notes 84-104 and accompanying text.

115. See, e.g., United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (rejecting custody and waiver theories in favor of "reasonable relation" test).

116. See supra notes 16-18, 89 and accompanying text.

117. See supra notes 38-43 and accompanying text.

118. See Griffin v. Wisconsin, 131 Wis. 2d 41, 388 N.W.2d 535 (1986), aff'd, 107 S. Ct. 3164 (1987). In Griffin, the Wisconsin Supreme Court stated:

"The expectations of privacy of a person on probation cannot be the same as the expectations of privacy of persons not on probation. It is only the reasonable expectations of privacy which the fourth amendment protects. Conditions of probation must at times limit the constitutional freedoms of the probationer. Necessary infringements on these freedoms are permissible as long as they are not overly broad and are reasonably related to the person's rehabilitation. By the very nature of probation, limitations on the liberty and privacy of probationers are imposed. These limitations are the bases for an exception to the warrant requirement of the fourth amendment."

Id. at 55, 388 N.W.2d at 539-40 (quoting State v. Tarrell, 74 Wis. 2d 647, 653-54, 247 N.W.2d 696, 701 (1976) (emphasis omitted).

The diminished expectation of privacy presumed by the court, however, does not lead
The problem with this theory is it asks the wrong question. Instead of asking "What do probationers expect?" these courts should ask, "What justification is there for diminishing the normal fourth amendment protections?" The latter question properly emphasizes the fundamental nature of fourth amendment rights. As Justice Peters of the California Supreme Court, with Justice Tobriner joining, pointed out:

"A diminution of fourth amendment protection . . . can be justified only to the extent actually necessitated by the legitimate demands of the parole process . . . ." A probationer may be entitled to [only] a diminished expectation of privacy because of the necessities of the correctional system, but his expectation may be diminished only to the extent necessary for his reformation and rehabilitation.

Furthermore, the diminished expectation of privacy rationale as applied to probation and parole searches does not coincide with Supreme Court cases applying the theory in other contexts. In other instances, the Court has still required the full measure of probable cause before approving a search. For example, the Court has consistently held that there is only a diminished expectation of privacy inside an automobile. But a search of an automobile, unless it falls within the inventory exception, is permissible only when either consent or the full measure of probable cause exists.

Logically then, the diminished expectation of privacy rationale should not lead to diminished protections for probationers unless absolutely required by the legitimate demands of the probation system. The probable cause and warrant requirements should apply to probation searches, subject to the well-established and specifically delineated exceptions already carved out for searches of the general public. One such exception is that of the "administrative search."

b. Administrative Search

The administrative search theory, as introduced in section I, is the necessarily to the conclusion that either the warrant or probable cause requirements are excused. See infra notes 121-24 and accompanying text.

119. See supra notes 73-75 and accompanying text.
122. Id. at 364.
124. Although the Wisconsin Supreme Court grounded its decision in Griffin in part on the diminished expectation of privacy theory, the United States Supreme Court declined to adopt the theory as applied in the probation context by the Wisconsin court. Griffin v. Wisconsin, 107 S. Ct. 3164, 3167 (1987).
other modern justification for limiting parolees' and probationers' fourth amendment rights.\textsuperscript{125} Under this approach, courts attempt to balance the government's interest in rehabilitating convicts and protecting the public at large against the probationer's interest in retaining his privacy. This balancing test often results in courts approving searches of probationers and parolees that clearly would be illegal if carried out on members of the general public.\textsuperscript{126} The United States Supreme Court used this theory to uphold the search in \textit{Griffin}.\textsuperscript{127}

\textbf{(4) The Applicability of the Administrative Search Theory to Parolees' and Probationers' Rights}

This section of the Note will first show why the general balancing approach of the administrative search theory is indeed applicable in the probation and parole search context. Then, the Note will demonstrate why neither the pervasively regulated business (\textit{Biswell-Colonnade})\textsuperscript{128} nor the neutral criteria (\textit{Martinez-Fuerte-Opperman})\textsuperscript{129} categories of administrative search cases are appropriate classifications for probation and parole searches. Left with the \textit{Camara-See} type of cases that illustrates the general balancing approach of the administrative search theory, the Note will argue that, although this general approach should apply to parole and probation searches, different factors are involved in probation searches than in the Supreme Court's \textit{Camara-See} type of cases. These differences require that the administrative search theory's balance be struck in favor of the probationer. Thus, both the normal measure of probable cause and a search warrant should be required.

\textbf{a. The Balancing Approach}

The administrative search theory's balancing approach as applied in \textit{Camara v. Municipal Court}\textsuperscript{130} and its progeny is applicable to the problem posed by probation searches. As in the Supreme Court's administrative search cases, probation searches further important governmental interests other than the usual interest in law enforcement. For example, in \textit{Camara}, the primary state interest was assuring housing safety. Similarly, in probation searches, the state interest in the probationer's rehabilitation and the general public's protection are paramount. In both contexts, objectives other than the interest in normal law enforcement trigger the administrative search theory's balancing process.\textsuperscript{131}

\begin{itemize}
\item \textsuperscript{125} \textit{See supra} notes 44-66 and accompanying text.
\item \textsuperscript{126} \textit{Griffin}, 107 S. Ct. at 3168.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{See supra} notes 54-61 and accompanying text.
\item \textsuperscript{129} \textit{See supra} notes 62-64 and accompanying text.
\item \textsuperscript{130} 387 U.S. 523 (1967).
\item \textsuperscript{131} \textit{Griffin}, 107 S. Ct. at 3168.
\end{itemize}
In *Griffin*, the United States Supreme Court used the administrative search theory to uphold a probation search based on a telephone tip that Griffin may have had guns in his apartment. The Court reasoned that the state's interest in protection and rehabilitation were special interests beyond the need for normal law enforcement. These interests, along with the resulting need to supervise the probationer, triggered the balancing approach of the administrative search theory. The Court then relied on a Wisconsin regulation authorizing probation searches on "reasonable grounds" to excuse both the probable cause and warrant requirements, ruling that the search was authorized by a "regulation that itself satisfies the Fourth Amendment's reasonableness requirement ...."132

As Justice Blackmun's dissent pointed out, however, these special interests should be a threshold requirement to trigger the balancing process and an examination of the practicality of the warrant and probable cause requirements. Justice Blackmun stated: "[t]he presence of special . . . needs justifies resort to the balancing test, but it does not preordain the necessity of recognizing exceptions to the warrant and probable cause requirements."133 The government's interest in probation searches does not justify abandoning of the specific constitutional safeguards of the warrant clause in favor of the more general "reasonableness" test. Before abandoning the warrant clause requirements, the Court must ascertain whether the warrant and probable cause requirements would frustrate the purpose of the search and whether the administrative safeguards truly protect fourth amendment interests.

The Court erred in its analysis by failing to categorize the search within the three general categories of administrative searches. Instead of first properly classifying the search, the Court simply relied on a regulation allowing searches on "reasonable grounds."134 If the Court had first categorized the search, the majority would have realized that it was improperly relying on cases such as *New York v. Burger,*135 *Donovan v. Dewey,*136 and *United States v. Biswell*137 that define the "pervasively regulated industry" subcategory138 of administrative searches. The Court would also have had to rule out the "neutral criteria" category139 as defined in *United States v. Martinez-Fuerte*140 and *South Dakota v. Opperman.*141 Left with the general balancing approach of the Camara-See

132. *Id.* at 3167.
133. *Id.* at 3172 (Blackmun, J., dissenting).
134. *Id.* at 3171 n.8.
138. See supra notes 54-61 and accompanying text.
139. See supra notes 62-64 and accompanying text.
line of cases, the Court would have focused on the “necessity” requirement contained in those cases. That requirement dispenses with the probable cause and warrant requirement only when necessary to attain an adequate level of enforcement.

b. The Three Categories of Administrative Search Cases

This section of the Note will demonstrate that of the three categories of administrative searches, probation searches are most akin to the *Camara*-See category. But as argued below, principled application of the general *Camara* rule requires that both the normal measure of probable cause and the warrant requirement be enforced.

The *Biswell-Colonnade* category of administrative searches is an improper classification for probation and parole searches because probationers are not regulated in the same pervasive fashion as the typical gun and liquor businesses found in this group. Probation searches are infrequent in comparison to the regular routine of inspections in the gun and liquor industry. Furthermore, searches of either the probationer’s person or his home intrude on the probationer’s significant privacy interests. Most importantly, unlike the detailed regulations that serve to define and limit the scope and object of the *Biswell*-type inspection, there are no limits to the scope or object of a probation search. The proba-

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142. See supra notes 48-53 and accompanying text.

143. See supra note 61. Although the Court stated that a warrant requirement would frustrate the purpose of the search, the Court failed to analyze the available alternatives before abandoning those constitutional safeguards. See *Griffin*, 107 S. Ct. at 3169. For available alternatives, see infra notes 177-80 and accompanying text.

144. See supra notes 44-66 and accompanying text.

145. See infra notes 153-60 and accompanying text.

146. See United States v. Consuelo-Gonzalez, 521 F.2d 259, 268 (9th Cir. 1975) (Hufstedler, J., dissenting) (“To the extent that there is a check on unreasonable searches, it is more attributable to case overload than to a regard for fourth amendment values; parole officers simply do not have the time to search many of their parolee’s homes.”).

147. Justice Blackmun’s dissent in *Griffin* pointed out that the administrative search cases relied on by the majority all dealt with “closely regulated” businesses that have a reduced expectation of privacy. *Griffin* v. Wisconsin, 107 S. Ct. 3164, 3173 (1987) (Blackmun, J., dissenting). The search in *Griffin* took place in the probationer’s own home. The Court has emphasized that the home is at the very core of the fourth amendment’s protection and that “physical entry of the home is the chief evil against which the... fourth amendment is directed.” *United States v. United States Dist. Court (Plamondon)*, 407 U.S. 297, 313 (1972). Therefore, “[t]he reasoning that may justify an administrative inspection... of a business enterprise without a warrant simply does not extend to the invasion of the special privacy... of the home.” *Griffin*, 107 S. Ct. at 3173-74 (Blackmun, J., dissenting).

148. Although Wisconsin had a regulation containing the factors that “should” guide a probation officer’s decision to search, the searching officer in *Griffin* did not even come close to complying with the regulation. The majority deemed this failure “irrelevant.” *Id.* at 3171 n.8. Justice Blackmun criticized the majority for ignoring the regulation that gave content to the “reasonable grounds” standard and defined the steps necessary to ensure that “reasonable grounds” are present, writing that “[t]his conclusion that the existence of a facial requirement
tion agent may enter the probationer's home and conduct a wide-ranging search for evidence of any crime, since a standard condition of probation is that the probationer not violate any laws.149

The Martinez-Fuerte-Opperman category of administrative searches150 is also an inappropriate analogy for probation cases. Unlike the searches characteristic of this group, in the probation context, no regulations effectively limit the searching officer's discretion or otherwise substantially protect the probationer's fourth amendment interests.151 Without such limits, probation searches are as intrusive as searches of members of the public. The field officer, rather than a high-level supervisor or other disinterested party, is the one that decides whether to search. The Supreme Court has repeatedly assailed this kind of unfettered discretion.152

In the remaining category of cases, the Camara-See group, the Court has substituted a watered-down measure of probable cause in place of the traditional measure required for criminal searches. This set of cases illustrates the general balancing approach of the administrative search theory. As noted previously, the balancing approach is applicable to the problem posed by probation searches.153 For a number of reasons, however, even the Camara line of cases does not support substituting a

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149. See supra note 7. Such warrantless searches are also not "necessary" to further the regulatory scheme since the state has alternative less intrusive means to further probation's protective and rehabilitative goals. See infra notes 153-60 and accompanying text. The "necessity" requirement was recently reaffirmed in New York v. Burger, 107 S. Ct. 2636, 2644 (1987). See supra note 61. The majority did not mention this requirement in Griffin. Justice Blackmun's dissent noted that the "privacy interests of probationers should be ... invaded no more than is necessary to satisfy probation's dual goals of protecting the public safety and encouraging the rehabilitation of the probationer." Griffin, 107 S. Ct. at 3174 (Blackmun, J., dissenting).

150. See supra notes 62-64 and accompanying text.

151. Compare United States v.Consuelo-Gonzalez, 521 F.2d 259, 268 (9th Cir. 1975) (Hufstedler, J., dissenting) ("[S]tatutes and regulations applicable to the searching [probation or parole] officer's conduct are non-existent.") with Camara v. Municipal Court, 387 U.S. 523, 533 (1967) (broad statutory safeguards that do not set effective limits on the discretion exercised by the field officer or that fail to substantially limit the scope and object of the search are not an adequate substitute for individualized review). In Griffin, the majority deemed the probation officer's failure to apply Wisconsin's regulatory standards that should have guided his decision to search "irrelevant." Griffin, 107 S. Ct. at 3171 n.8. The dissent quoted the regulation setting forth the factors that the probation agent should have considered. Id. at 3176 n.3. (Blackmun, J., dissenting). Justice Blackmun, as well as Judge Bablitch of the Wisconsin Supreme Court, argued that the search did not even meet the administrative guidelines, much less the constitutional safeguards. Id. at 3175-76 (Blackmun, J., dissenting); Griffin v. Wisconsin, 131 Wis. 2d 41, 388 N.W.2d 535, 545-46 (1986) (Bablitch, J., dissenting), aff'd, 107 S. Ct. 3164 (1987).

152. See supra note 30 and accompanying text.

153. See supra note 130-43 and accompanying text.
watered-down standard of probable cause in most probation search cases. Although the state interest in rehabilitating the probationer must be weighed against the privacy interests of the probationer, the factors involved in probation searches are different than those involved in the Camara-See cases that approve searches without particularized probable cause. These differences, when weighed on a scale that gives the proper weight to the fundamental nature of fourth amendment rights, tip the administrative search theory's balance in favor of the probationer. Both the normal measure of probable cause and a warrant should be required in most cases.

The normal measure of probable cause should be required because, unlike the Camara-See cases, police officers and probation agents can detect many parole violations through normal law enforcement techniques. Unlike faulty wiring or other structural defects that are not visible from outside of a building, parole violations are more like ordinary crimes. Traditional law enforcement tools should be sufficient to achieve an acceptable level of enforcement. For example, commission of a crime is always a probation violation. Securing evidence that a probationer has committed a crime, such as selling heroin, should be no more difficult than detecting the same crime committed by a nonprobationer. Additionally, other common violations such as drug and alcohol abuse, failure to make restitution, or failure to report to the probation office also can be detected without stripping the probationer of his fourth amendment rights. Although unlimited search powers would certainly increase the number of violations that are actually detected, fundamental fourth amendment rights need not and should not be abridged in the name of more efficient law enforcement.

Furthermore, unlike the contexts in which the Supreme Court has excused the warrant and probable cause requirements under the adminis-

154. See Latta v. Fitzharris, 521 F.2d 246, 255-56 (9th Cir.) (Hufstedler, J., dissenting), cert. denied, 423 U.S. 897 (1975). Justice Blackmun's dissent in Griffin would allow probation searches based on "reasonable suspicion" rather than on probable cause. Griffin v. Wisconsin, 107 S. Ct. 3164, 3172-73 (1987) (Blackmun, J., dissenting). Although his opinion applies the "alternative means" approach to invalidate warrantless searches, id. at 3174, it does not explain why a reduction of the probable cause standard is necessary in light of the available alternatives such as normal police investigation paired with the probation officer's broad visitation powers.

155. In a particular case, effective supervision may require limits on that probationer's privacy rights. In such cases, the releasing court or parole board should impose a condition before the probationer is released and specifically advise the probationer why such a condition is necessary in his particular case. Such conditions would be subject to review under the "narrowly tailored means" prong of the compelling interest test. See infra notes 173-80 and accompanying text.

156. See supra note 7.

trative search theory,¹⁵⁸ probation searches are highly intrusive¹⁵⁹ and are often aimed at discovering evidence of crime. Additionally, the government can effectively serve its interests through less intrusive methods such as visitation¹⁶⁰ and reporting requirements. The state, therefore, does not need to conduct warrantless probation searches without probable cause to further the goals of the probation system. Because these alternative methods effectively serve the governmental interests and because warrantless searches cause substantial harm to the probationer’s legitimate privacy interests, the balance of the administrative search theory should be struck in favor of the probationer.

B. The Warrant Requirement

Even courts that use the modern diminished expectation of privacy and administrative search theories to define probationer’s fourth amendment rights generally do not require the searching officer to obtain a warrant before the search.¹⁶¹ This exemption from the warrant requirement, in combination with the low standards presently required by courts to validate probation searches, places the probationer’s privacy in the hands of his probation agent. As a result, the agent has unfettered discretion; no neutral and detached magistrate stands between the agent and the probationer.¹⁶²

Unlike the institutional settings of the searches in Hudson v. Palmer¹⁶³ and New Jersey v. T.L.O.,¹⁶⁴ in which the government had an overriding interest in maintaining security and being prepared for immediate action,¹⁶⁵ no overriding interest justifies a blanket exemption from the warrant requirement for searches conducted in probationers’ and parolees’ homes. Because the probationer is not in confinement, the essential goals of maintaining institutional security and discipline”¹⁶⁶ that are present in both the prison and school contexts¹⁶⁷ are absent in the probation and parole contexts.

¹⁵⁸. See supra notes 44-66 and accompanying text.
¹⁵⁹. See supra note 148 and accompanying text.
¹⁶². See supra note 30 and accompanying text.
¹⁶³. See supra notes 44-66 and accompanying text.
¹⁶⁴. See T.L.O., 469 U.S. 325 (1985) (at school, teacher may search student without a warrant and with only reasonable suspicion).
¹⁶⁵. See supra notes 44, 89 and accompanying text.
Furthermore, a warrant requirement would not frustrate any other legitimate governmental purpose behind the search. To meet any exigency, probation agents would have the benefit of the traditional exceptions to the warrant requirement. In addition, a magistrate may consider the fact that a suspect is on probation or parole when deciding whether probable cause to search exists in the "totality of the circumstances." The traditional exigency exceptions and consideration of parole status in the probable cause determination should effectively serve the state interest in protecting members of the general public without sacrificing the probationer's fundamental constitutional rights.

Warrantless searches also harm the state's interests in rehabilitating parolees and probationers. Although explicitly requiring the probationer to submit to warrantless searches by his probation agent as a condition of probation may theoretically serve to put him "on notice" that he may be searched at any time, in reality the probationer will feel either harassed by frequent searches or surprised by a rare and infrequent search. This unnecessary intrusion into his privacy can only serve as a roadblock on the path to rehabilitation.

The probationer who has been excused from jail in the hopes that he will become a law-abiding citizen is thus subject to what he may well perceive as lawless and random searches by the very person who is entrusted with the responsibility of overseeing and guiding his hoped-for rehabilitation. Such seeming lawlessness can hardly inspire the probationer's confidence and trust in either his probation agent or in the rule.

168. Cf. Camara v. Municipal Court, 387 U.S. 523, 539 (1967) ("[N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." (citations omitted)). In his dissent in Griffin, Justice Blackmun stated:

If in a particular case there is a compelling need to search the home of a probationer without delay, then it is possible for a search to be conducted immediately under the established exception for exigent circumstances. There is no need to create a separate warrant exception for probationers. The existing exception provides a probation agent with all the flexibility the agent needs.

Griffin, 107 S. Ct. at 3174 (Blackmun, J., dissenting).

No exigency existed under the facts in Griffin. The probation officer waited two to three hours from the time he received the tip until the time he searched Griffin's home. Id. These two to three hours should have been sufficient time to submit an affidavit and application for a search warrant to a magistrate.


170. Cf. New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part). In T.L.O., Justice Brennan referred to the need for teachers to obey fourth amendment commandments: "It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections." Id.

Probation agents, like schoolteachers, are responsible for teaching their charges the value of obeying the law and living responsibly in society.

171. Justice Blackmun made a similar observation in Griffin v. Wisconsin:
of law. Teaching a probationer that the law will not respect his right to privacy will also teach him not to respect the law.\textsuperscript{172}

\textbf{IV. Proposal}

Since the fourth amendment is a fundamental constitutional right implicit in the concept of ordered liberty,\textsuperscript{173} its protections should be abridged only when the state can demonstrate a compelling interest in doing so.\textsuperscript{174} Moreover, the means used to achieve the state's compelling interest should be narrowly tailored so as to inflict the least damage to constitutional freedoms. If alternatives less restrictive of constitutional rights exist, those means must be used. Unless the state can show a compelling need to do so, the Constitution prohibits the government from simply declaring that a certain class of persons no longer possesses fourth amendment rights.\textsuperscript{175}

Although the state's interests in rehabilitating offenders and in protecting society are certainly important, limitations on fourth amendment rights are unnecessary and therefore not narrowly tailored to achieve the state interest.\textsuperscript{176} Instead of imposing a blanket denial of fourth amendment rights, the state should use the other less intrusive means at its disposal to effectuate its interests.

For example, probation agents have broad visitation powers over their charges.\textsuperscript{177} During such a visit, probation agents may use the
“plain view” exception to seize evidence. Observations made during a visit, combined with the parolee's status and prior record may well show probable cause to search, in the “totality of the circumstances.” Additionally, exigent circumstances may permit a full-scale search as a result of observations made during the course of a visit.

To protect the fourth amendment rights of probationers and parolees as a class, the exclusionary rule should apply at revocation hearings. In addition to providing a remedy for searches that violate the warrant and probable cause requirements, extending the rule to revocation hearings would also deter police officers from using a probation agent as a "stalking horse" since both the officer and the agent would have to obey the same constitutional mandate. Both would have to comply with the warrant and probable cause requirements. The same exceptions to the warrant requirement would be available to both the police officer and the probation agent. Furthermore, extending the exclusionary rule eliminates the incentive for police to gamble that the person they are searching is a probationer or parolee. Generally limiting the rule's exceptions will increase its deterrent effect in situations other than the parole search by reducing the possibility that a search will fall fortuitously within one of the rule's exceptions.

Monitor rehabilitation. Conditions requiring visitations should therefore pass the "compelling interest" and "narrowly tailored means" test.

If the Supreme Court does allow specially lenient rules for probation searches (such as allowing searches on "reasonable suspicion" without a warrant) because of the state's rehabilitative interest, the agent should, at the least, be required to make an independent judgment of whether a search is warranted. Rather than ruling that failure to comply with administrative regulations designed to guide the officer's decision to search is "irrelevant," the Court should evaluate compliance with regulations in the same manner that it evaluates compliance with the "neutral and detached magistrate" requirement in other fourth amendment cases. The agent would take the place of the magistrate and he must be provided with facts rather than mere conclusory allegations. The evidence in Griffin which showed that someone identifying himself as a police officer informed the probation office that Griffin "may have had guns in his apartment" would not meet this requirement. Reliance on such a tip without independent corroboration would leave probationers vulnerable to a search whenever someone with a grudge against him decided to call the police or the probation office.

179. See supra note 24 and accompanying text.
180. For instance, the agent may believe that both probable cause to search as well as a substantial danger that the probationer will flee or destroy evidence exists. See Latta v. Fitzharris, 521 F.2d 246, 258 (9th Cir.) (Hufstedler, J., dissenting), cert. denied. 423 U.S. 897 (1975).
181. See supra notes 67-72 and accompanying text.
182. See United States v. Hill, 447 F.2d 817, 821 (7th Cir. 1971) (Fairchild, J., dissenting). Judge Fairchild stated:

The broader the cumulative exceptions, the greater the probability that the fruits of an unlawful search will turn out to be useful, and the weaker the deterrence from unlawful searching engendered by the rule. The very breadth of exceptions to the exclusionary rule render it less effective than it otherwise would be, and counsels against recognition of further exceptions as long as we rely on it at all.
Rather than changing the current rule, that there is no general right to counsel at revocation hearings, courts should treat fourth amendment claims as another "special circumstance" that would entitle the probationer to a due process right to appointed counsel. Judges should screen claims and appoint counsel when there is a substantial likelihood that the probationer's rights have been violated.

**Conclusion**

This Note has argued that probationers and parolees should have the same constitutional protections as the general public. The state must demonstrate a compelling need before abridging constitutional freedoms. If the state can demonstrate a compelling interest, it must minimize damage to constitutional rights by using only the most narrowly tailored method of achieving those ends.

Although the state's interest in protecting the rest of society by rehabilitating probationers and parolees is compelling, limitations of fourth amendment rights are unnecessary to achieve that end. Visitation and reporting requirements, along with normal law enforcement methods, are sufficient to achieve the state interests. Therefore, warrantless searches and searches on less than probable cause are unconstitutional.

Furthermore, such searches may injure, rather than promote, the state's interests. Searches conducted on the theory that arbitrary

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183. See Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973). Special circumstances entitling the probationer to a due process right to counsel exist whenever the probationer or parolee makes such a request [for counsel], based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

184. People v. Mason, 5 Cal. 3d 759, 770, 488 P.2d 630, 637, 97 Cal. Rptr. 302, 309 (1971) (Peters, J., dissenting, Tobriner, J., joining) ("Such searches measure the effectiveness of rehabilitation in the same manner that one fells a tree to measure its age.").
searches will deter criminal conduct will only drive a wedge between the probation agent and the probationer. The probationer should not be treated like a prisoner. Probation agents should teach by example, not by fear. "It is high time that we recognized that a person must have the freedom to be responsible if he is to become responsibly free."185