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CRIMINAL LAW

RECENT TRENDS IN THE CRIMINAL LAW

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A PRISONER'S RIGHT OF ACCESS TO THE COURTS

The United States District Court for the Middle District of Georgia recently took the opportunity to extend the Supreme Court's decision in *Bounds v. Smith*,[1] and held, in *Gibson v. Jackson*,[2] that an indigent prisoner sentenced to die is entitled to a state financed attorney to assist in his state habeas corpus petition. In *Bounds* the Supreme Court ruled that individual states are under an affirmative duty to protect a prisoner's fundamental constitutional right of access to the courts. Specifically, the Court held that the states must provide this meaningful access by maintaining adequate law libraries or by providing adequate assistance from persons trained in the law.[3] In *Gibson* the district court engaged in a particularized factual analysis and determined that the proposed law library system in Georgia would not be sufficient to assure petitioner Gibson meaningful access to the courts. To insure his meaningful access, the court ordered that the state habeas court appoint, at its own expense, an attorney for Gibson, and that the state pay for investigative witnesses and litigation expenses which would be reasonably necessary for the case to be fully and fairly aired in the state court.

In *Bounds v. Smith*,[4] several prison inmates in North Carolina brought suit under 42 U.S.C. § 1983,[5] alleging that their fourteenth amendment rights had been violated. The inmates claimed that their right of access to the courts, a constitutional right which had been upheld earlier by the Court in *Younger v. Gilmore*,[6] had been denied by the state of North Carolina because the state had not provided adequate research facilities with which to prepare court petition papers.

The Court considered at length whether a constitutionally based right of access to the courts existed. Not only did it affirm that such a right exists, but the Court went further to assert that the states have an affirmative duty to insure that such access is reasonable and adequate. The Court emphasized that " 'meaningful access' to the courts is the touchstone"[7] to assuring that indigent defendants have an adequate opportunity to present their claims fairly. Furthermore, the Court directed North Carolina to shoulder the expense of providing such access for their prisoners. The cost to the state was of minor importance to the Court. As the Court noted:

> [T]he cost of protecting a constitutional right cannot justify its total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims. The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.[8]

The Court considered the merits of various alternatives which conceivably could be utilized by North Carolina to satisfy the requirements of reasonable access,[9] found that *Ross v. Moffitt*[10] sup-

[1] 430 U.S. 817 (1977).
[2] No. 77-59-Mac (M.D. Ga., Dec. 16, 1977).
[3] 430 U.S. at 828.
[4] 430 U.S. 817 (1977).
[5] 42 U.S.C. § 1983 states:
Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[6] 404 U.S. 15 (1971). The Court, *per curiam*, affirmed the decision of the District Court for the Northern District of California on the authority of Johnson v. Avery, 393 U.S. 483 (1969). The district court suggested numerous alternatives available to the state, including providing a public defender assistance program, an adequate law library, or a joint law student-law professor program. Gilmore v. Lynch, 319 F. Supp. 105, 110-11 (N.D. Cal. 1970).
[7] 430 U.S. at 823.
[8] *Id.* at 825.
[9] *Id.* at 826-27, 830-32.
[10] 417 U.S. 600 (1974). The *Ross* Court held that a

ported its conclusions,[11] and held that North Carolina must "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[12] "Meaningful access" was the Court's touchstone.[13]

On May 12, 1975, Samuel Gibson III was tried for the rape and murder of Joan D. Bryan, was convicted by a jury, and was sentenced to die pursuant to the Georgia death penalty statute.[14] That decision was eventually upheld in an appeal of right to the Supreme Court of Georgia in *Gibson v. State*.[15] Gibson then petitioned the Butts County Superior Court for a writ of habeas corpus pursuant to Georgia Code Ann. § 50-127, and requested the appointment of counsel at the state's expense. The state refused. As a result, Gibson petitioned the United States District Court, prior to being heard in the state court, urging the district court to find, pursuant to 42 U.S.C. § 1983,[16] that the state of Georgia was denying him his constitutional right of access to the courts by refusing to finance a lawyer's services for his state habeas proceeding.

The *Gibson* court relied extensively on the *Bounds* decision and engaged in its own particularized inquiry to determine what would be needed to provide Gibson with a reasonably adequate opportunity to fairly present his claims in court. The court necessarily tailored its analysis and decision to the arguments which Gibson was attempting to present to the state habeas court because only by inspecting the complexity of his state claims could the court determine whether Gibson would be capable of handling the claims without an attorney. Volunteer counsel in the United States District Court proceeding identified for the court five issues which conceivably could be brought up in the state proceeding.[17] The complex factual and legal issues, combined with the technical nature of Georgia's habeas corpus statute, which is even "difficult for judges and lawyers to apply,"[18] and the fact that a capital offense was involved, amounted to circumstances which required the additional affirmative step of furnishing an attorney for indigent Gibson in his state habeas proceeding. As the court noted:

> Petitioner's case and its issues as presently known and already described, is far from routine. It is complex from both a legal and factual standpoint. If the hearing on the merits that the habeas statute provides for is to be truly adverserial in nature, both sides of each legal and factual issue must be presented to the trial judge. . . . This is not to say that every prisoner who petitions for a writ of habeas corpus is entitled to counsel and such expenses of litigation. It is to say that this petitioner whose need for counsel and such expenses has been demonstrated, and others similarly situated are constitutionally entitled to counsel and such expenses. Without them petitioner's access to the courts of this state for a habeas hearing is and will be meaningless instead of meaningful as the Constitution requires.[19]

The district court specifically found that the holding in *Bounds* established only a minimum standard

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prisoner's right to an opportunity to present his claims fairly did not require appointment of counsel to file petitions for discretionary review in state courts or in the Supreme Court. The *Bounds* Court distinguished the *Ross* decision on the grounds that "we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights." 430 U.S. at 827.

[11] 430 U.S. at 827.

[12] *Id.* at 828.

[13] *Id.* at 823.

[14] GA. CODE ANN. § 27-2534.1 (1975).

[15] 236 Ga. 874, 226 S.E.2d 63 (1976).

[16] For full text, see note 5 *supra*.

[17] Petitioner's initial claim is of ineffective assistance by appointed trial counsel.

Second is petitioner's claim that the grand and petit jury master lists from which his grand and petit juries were selected were unconstitutionally composed.

Third is petitioner's assertion that his death sentence violates the constitutional standards set forth in Furman v. Georgia, 408 U.S. 238 (1972). In Gregg v. Georgia, 428 U.S. 153 (1976), where the Court upheld the use of the death penalty so long as certain procedural safeguards are utilized, the Court found that there must be statutory aggravating circumstances to justify the imposition of the death penalty. Mr. Gibson contends that since the alleged sexual acts on the victim took place after her death, there was no rape. Therefore, because there was not the aggravating circumstance of rape which accompanied the murder, the death sentence was improperly applied.

Fourth is counsel's assertion that since the trial lasted until several hours after midnight, petitioner Gibson's Fifth Amendment right of due process was violated.

Fifth is counsel's assertion that Owens v. State, 120 Ga. 296, 48 S.E. 21, and Futch v. State, 90 Ga. 472, 16 S.E. 102, require that petitioner's entire admission of guilt be believed with respect to every particular fact because the crimes petitioner was convicted of cannot be proven without such admissions.

Gibson v. Jackson, No. 77-59-Mac, slip op. at 8-12 (M.D. Ga. Dec. 16, 1977).

[18] Gibson v. Jackson, No. 77-59-Mac, slip op. at 2 (M.D. Ga. Dec. 16, 1977). The fact that major amendments to the state habeas provision were to be effective April 24, 1975 (two weeks following the act in question, three weeks prior to trial) was possibly an overriding concern for the district court.

[19] *Id.* at 16, 17.

for the various states. Furthermore, the court pointed out that the *Bounds* Court noted that "any plan . . . must be evaluated as a whole to ascertain its compliance with constitutional standards."[20] As such, it found that Gibson's case of "dire consequences" required additional affirmative action to protect his constitutional right of access.

While the *Gibson* opinion is in line with the spirit of *Bounds v. Smith*, it appears that the weakest link in that opinion lies in the very area of access rights to the courts. This right is basically one of access to *federal* courts.[21] Under the *Bounds* decision, Georgia is under an affirmative duty to assist Gibson's access to the federal courts, at least by providing adequate libraries or other legal assistance. However, because the federal habeas statute requires a prisoner to exhaust his state habeas remedies prior to petitioning the federal courts,[22] and Gibson is still involved in his state habeas proceeding, Georgia is arguably not yet under an affirmative duty, as per *Bounds*, to assist Gibson in his state petition. Certainly it can be stated that Georgia is not actively inhibiting Gibson's access to the federal courts. Indeed, Gibson theoretically need only routinely approach the courts in Georgia to gain a right to petition the federal district court. The district court, however, apparently felt it important that Gibson was doing just that, stating that he was "[o]bviously aiming to eventually try to petition [the district court]"[23] by exhausting his state remedies. Furthermore, the court emphasized at length that under the federal habeas statute, all state factual determinations are statutorily presumed to be correct.[24] It is this presumption which the district court felt would so adversely affect Gibson's federal case.

Whether the federal statutory presumption of correct factual determinations at the state level is so difficult to overcome that an affirmative act on the part of each state is required to guarantee effective legal counsel, is an inquiry which warrants closer inspection. Certainly if the federal government is going to require states to provide attorneys simply to assure the validity of a prior congressional presumption, one can question whether there should be such a factual presumption in the first place. More importantly, the federal statutory exceptions to the federal presumption encompass the very situation which the district court fears. That is, the exceptions specifically cover situations where there is a lack of a fair hearing at the state level:

> [A] hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . . .
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> . . .
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; . . . .[25]

The district court in *Gibson* summarily dealt with these exceptions and labelled them as "technical."[26] As such, the district court assumed that Gibson would not be able to make effective use of the statutory exceptions when he ultimately reached the district court in his habeas proceeding.

The *Gibson* court has thus succeeded in extending the *Bounds* decision in two important respects. First, it has increased that which the state must affirmatively provide for some prisoners to insure their meaningful access to the courts. That is, Georgia must provide lawyers in complex cases, as well as law libraries for all prisoners. Second, it has effectively extended the meaningful access doctrine and its requirement of affirmative action to include state courts as well as federal courts. That is, Georgia must now take affirmative steps not only

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[20] 430 U.S. at 832.

[21] The access right to federal courts can be traced back to Ex parte Hull, 312 U.S. 546 (1940). Justice Murphy, writing for the Court, voided a state prison rule which required the prisoner Hull to submit his federal habeas corpus petition to a screening committee for approval.

[22] 28 U.S.C. § 2254 (b) states:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

[23] Gibson v. Jackson, No. 77-59-Mac, slip op. at 7 (M.D. Ga. Dec. 16, 1977).

[24] 28 U.S.C. § 2254 (d) states:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . .

[25] 28 U.S.C. § 2254 (d).

[26] Gibson v. Jackson, No. 77-59-Mac, slip op. at 5 (M.D. Ga. Dec. 16, 1977).

with respect to federal courts, but also with respect to some state court matters. Certainly, these are logical progressions from the language of the *Bounds* decision.

In choosing to rely on *Bounds,* the district court picked the one recent Supreme Court case that stands out as having extended rather than restricted the rights of prisoners.[27] The natural alternative, and certainly the more obvious one, would have been to accomodate Gibson through *Griffin v. Illinois* and its underlying equal protection analysis.[28] Together with the concern for procedural safeguards in capital cases, as expressed in *Gregg v. Georgia,*[29] the district court could have fashioned an alternative foundation for its decision to provide Gibson, an indigent, with an attorney at state expense.

As for the *Ross* decision,[30] which limited the scope of an indigent's right to an attorney, it will be remembered that the Court there only dealt with discretionary appeals. The argument could have been made that a collateral attack of a conviction, through the habeas process, is more closely related to an appeal by right than to a discretionary appeal. This is so, particularly because Georgia is under no obligation to establish the habeas machinery with which to collaterally attack state convictions, but has chosen to do so voluntarily. Furthermore, one of the underlying premises of Justice Rehnquist's opinion in *Ross* was that in discretionary appeals, an indigent already has at his disposal the briefs used in his appeals of right.[31] In a habeas proceeding, unlike a discretionary appeal, a petitioner is raising matters he was unable to litigate in a prior proceeding. He necessarily does not have any "prior materials" at his disposal. As the *Bounds* Court stated, "Rather than presenting claims that have been passed on by two courts, [habeas proceedings] frequently raise heretofore unlitigated issues. As this Court has 'constantly emphasized,' habeas corpus and civil rights actions are of 'fundamental importance ... in our constitutional scheme' because they directly protect our most valued rights."[32]

The conclusion could then be reached, in spite of the *Ross* decision, that indigent prisoners are entitled to attorneys at the state's expense in their habeas proceedings. The *Gibson* court, while alluding to aspects of this analysis, avoided the direct application of *Griffin v. Illinois* and its progeny.[33] This may prove to be wise judicial politics, particularly since the *Ross* decision has limited the equal protection analysis of *Griffin.* Certainly the Supreme Court has adopted a decidedly reserved approach to prisoner's rights. By relying on *Bounds v. Smith*, the district court has seized upon a case so recent that its rationale is more likely to be upheld than the approach of the older *Griffin* line of cases.[34]

The *Gibson* court's extension of the spirit of *Bounds* recognized the limits of simply providing legal libraries for inmates. Gibson's situation is a "complex case of dire consequences,"[35] one in which his life is on the line. As the court asserted:

> [An] indigent petitioner if unrepresented by counsel and without means to find and present evidence, will be unable to present his side of his habeas corpus case to the Butts County Superior Court. All that will be heard by that court is what the State with its superior legal and monetary resources presents or the presiding judge develops from the trial transcript, the petitioner and the state's witnesses and lawyers.[36]

Furthermore, Gibson was first sentenced under the very statute which was recently upheld in *Gregg v. Georgia,*[37] a case which emphasized the need for procedural safeguards in any capital punishment scheme. Given the fact that Georgia has undertaken to provide a habeas process to which petitioners may resort, it only seems reasonable that such proceedings include competent legal advice.

[27] *See generally* Note, 68 J. CRIM. L. & C. 591 (1977).

[28] 351 U.S. 12 (1956). In *Griffin,* the Court held that indigent petitioners convicted of a felony are entitled to a free transcript for purposes of appellate review. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19.

[29] 428 U.S. 153 (1976).

The basic procedural requirements under *Gregg* are:
(1) That there be sentencing guides, usually expressed in terms of aggravating circumstances, to aid the sentencing authority in making the decision whether to impose the death penalty; and
(2) That there be a separate procedure at which the defendant has an opportunity to bring any mitigating circumstances to the attention of the sentencing authority. *See generally* Note, 67 J. CRIM. L. & C. 437 (1976).

[30] See note 10 *supra.*

[31] 417 U.S. at 615-16.

[32] 430 U.S. at 827.

[33] *See* note 34 *infra.*

[34] Griffin v. Illinois, 351 U.S. 12 (1956) (indigent right to a free transcript on appeal in a felony case); Douglas v. California, 372 U.S. 353 (1963) (indigent right to free counsel on appeal as of right in a felony case); Mayer v. Chicago, 404 U.S. 189 (1971) (indigent right to a free transcript on appeal in a non-felony case).

[35] Gibson v. Jackson, No. 77-59-Mac, slip op. at 16 (M.D. Ga. Dec. 16, 1977).

[36] *Id.* at 12.

[37] GA. CODE ANN. § 27-2534.1 (1975).

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JUDICIAL SUPERVISION OVER COVERT ENTRIES

The installation of an electronic eavesdropping device (or "bug") often requires covert entry into the targeted premises.[1] Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[2] which governs the issuance of electronic surveillance orders, does not expressly regulate covert entry, and it has been held that Title III does not impliedly prohibit covert entry.[3] But covert entry, nevertheless, is subject to the fourth amendment, and a warrant must be obtained before a covert entry may occur.[4] Recently, in *United States* v. *Ford*,[5] *Application of United States*,[6] and *United States* v. *Scafidi*,[7] three federal courts of appeals have attempted to define the minimum requirements that must be met in the Title III intercept order, the warrant governing entries to install bugs, and a disagreement has developed among the circuits. The disagreement concerns whether the judicial officer must expressly authorize the covert entry in the intercept order, and if so, just how much judicial supervision of the covert entry operation should be required.

In *United States v. Ford*, the Washington Metropolitan Police suspected that a local store was a center of narcotics activity. After normal investigative methods failed to disclose the persons involved, the police decided to install eavesdropping devices. An affidavit complying with Title III was prepared, and a surveillance order was obtained.[8] The interception order contained a provision expressly authorizing covert entry. The entry provision, however, did not specify how many entries could be made, nor did it specify the time or manner of entry permitted.[9] In effect then, no limitations were placed on the police.

The District of Columbia Court of Appeals, in an opinion written by Judge Skelly Wright, held that the fourth amendment requires that a provi-

[1] Entry is not always necessary in order to plant eavesdropping devices. For instance, devices may be attached to the wall of an adjoining room, as in Goldman v. United States, 316 U.S. 129 (1942), or on the side of a phone booth, as in Katz v. United States, 389 U.S. 347 (1967). Covert entry is not a common phenomenon. Of 1,220 court ordered surveillances between 1968 and 1973, only 26 involved eavesdropping devices, and of these 26, presumably many did not involve covert entry. NATIONAL WIRETAP COMMISSION REPORT. *Electronic Surveillance* 15, 43 (1976).

[2] 18 U.S.C. §§ 2510-20 (1970) [hereinafter cited as Title III]. Congress is currently considering a proposed recodification of Chapter 18. None of the proposed changes affect the right of the police to make covert entries. *See* H.R. 6869, 95th Cong., 1st Sess. §§ 3101-08 (1977), for the proposed recodification of the sections of Title III pertaining to the issuance of electronic surveillance orders.

[3] United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977), held that neither the fourth amendment nor Title III prohibits covert entry to plant eavesdropping devices.

[4] The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

In Silverman v. United States, 365 U.S. 505 (1961), the Court held that the police could not enter premises to plant eavesdropping devices. The federal agents in *Silverman* did not physically enter the premises, but drilled a hole in an outside wall to implant a microphone into the heating system. The search was held to be unconstitutional because the police had entered a constitutionally protected area. The Court stated that it had "never held that a federal officer may without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's criminal trial what was seen or heard." *Id.* at 511-12.

[5] 553 F.2d 146 (D.C. Cir. 1977).

[6] 563 F.2d 637(4th Cir. 1977).

[7] 564 F.2d 633 (2d. Cir. 1977).

[8] The intercept order was not issued pursuant to Title III, but to a District of Columbia statute, 23 D.C. Code §§ 541-56 (1973). The court stated that the D.C. statute varies only in minor respects from the federal statute. 553 F.2d at 148, n.4. None of these variations had any affect on the court's decision. 18 U.S.C. § 2518 states the procedure to be followed in applying for an electronic intercept order. The applicant must show that other investigative methods are inadequate, 18 U.S.C. § 2518(1)(c), and the order must state that interception may last only so long as necessary to achieve the objective of the order, 18 U.S.C. § 2518(5). The order in *Ford* met both of these requirements.

[9] The intercept order read:

> Members of the Metropolitan Police Department are hereby authorized to *enter and re-enter* the Meljerveen Shoe Circus ... for the purpose of installing, maintaining, and removing the electronic eavesdropping devices. *Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse or strategem.*

553 F.2d at 149-50 (emphasis in opinion).

sion expressly authorizing covert entry must be included in the intercept order.[10] The court principally relied on *Silverman v. United States*[11] and *Katz v. United States*[12] in reaching this conclusion. The Court in *Silverman* had held that a warrant must be obtained before the police could make a covert entry to plant eavesdropping devices.[13] In *Katz*, the Court applied the amendment's protection against the seizure of private conversations in deciding that a warrant must be obtained before a private conversation can be seized, whether or not a physical trespass was necessary to affect the seizure.[14]

On the basis of those decisions, the *Ford* court reasoned that two constitutionally protected privacy interests are implicated when the police covertly enter premises to plant eavesdropping devices: the right against governmental seizure of conversations and the right against governmental intrusion into a home or business. The court maintained that an interception order not containing a provision expressly authorizing covert entry is violative of the fourth amendment, because by requiring in *Katz* that a warrant be obtained to seize conversations, the Supreme Court did not intend to reduce the protection against trespassory intrusion established in *Silverman*.[15] The *Silverman* requirement that a warrant expressly authorize a covert entry had to be followed. The court thus concluded that both the seizure of conversations and the entry itself must be separately tested against the fourth amendment standards of reasonableness.[16] In addition, express judicial authorization must be obtained both for the entry, pursuant to *Silverman*, and for the seizure of conversations, pursuant to *Katz*.

Although an entry provision was included in the *Ford* intercept order, the court held that it was impermissibly broad. The court stated that "the main purpose of the fourth amendment's warrant requirement is to protect the citizen's right to privacy, and that this right of privacy could be best protected if a neutral officer tailored the order to permit seizure of conversations by the least intrusive means possible."[17] The court then noted that the affidavit in this case, while justifying authorization of a covert entry, did not justify the issuance of an entry order giving the police "freedom to make multiple entries at any time of day or night, by any means they believed necessary."[18] According to the court, the judicial officer should only authorize "those entries and those means of entry necessary to satisfy the demonstrated and cognizable needs of the applicant."[19] The court, however, did not explain what specific provisions would have satisfied the fourth amendment in this case.[20]

[10] The court of appeals affirmed the district court, which had suppressed the evidence in a pre-trial ruling. The district court reasoned that the absence of statutory restrictions, combined with the continuous and indiscriminate nature of the seizure, placed an extraordinarily heavy burden on the judicial officer to tailor his order narrowly and therefore minimize the intrusion. 414 F. Supp. 879 (D.D.C. 1976). Appellate jurisdiction was based on 23 D.C. Code § 552 (1973), a provision similar to 18 U.S.C. § 2518(10)(b), which authorizes appeals from orders suppressing intercepted communications.

[11] 365 U.S. 505 (1961).

[12] 389 U.S. 347 (1967).

[13] See note 4 *supra*. In *Silverman*, the police drilled a hole in an outside wall and inserted a microphone until it touched a heating duct, thus converting the building's entire heating system into a conductor of sound. A warrant was required because by penetrating the outer wall of the building, the agents had intruded upon a constitutionally protected area. Prior to *Katz*, if penetration had not occurred, there would have been no fourth amendment violation. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942), where the placing of a bug upon the wall of an adjoining room did not violate the fourth amendment.

[14] In *Katz*, the FBI attached a bug to the outer wall of a phone booth. The device was turned on whenever Katz was inside. No warrant was obtained. The Court held that a warrant was required and stated that the fourth amendment protects "people and not simply areas," and therefore, a trespassory intrusion is not required in all cases to trigger the amendment's protection. 389 U.S. at 353. Justice Harlan, in his concurring opinion, characterized the decision as granting fourth amendment protection of those interests over which an individual has a reasonable expectation of privacy. *Id.* at 360-62 (Harlan, J., concurring). Recent decisions of the Supreme Court have purportedly applied this principle. *See, e.g.*, United States v. Miller, 425 U.S. 435, 440-43 (1976) (defendant has no legitimate expectation of privacy as to his bank records). Implicit in *Katz*, the *Ford* court stated, is the rationale that "any intrusion must be limited to that minimally necessary to effectively carry out the order's purpose." 553 F.2d at 158. Although the limits of *Katz* are unclear, it is certain that the decision prohibits warrantless electronic interception of conversations emanating from within a private premises. For a discussion of the importance of *Katz*, *see* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[15] The court stated that *Katz* "was intended to expand the scope of the amendment's protection and not to diminish existing safeguards against unwarranted invasions of physical privacy." 553 F.2d at 157.

[16] *Id.* at 161-62.

[17] The court reasoned that this was the implication of *Katz*. 553 F.2d at 158.

[18] 553 F.2d at 169-70.

[19] *Id.* at 170.

[20] An additional issue addressed by the court was

In *Application of United States*,[21] the FBI determined, while investigating an alleged bookmaking operation, that eavesdropping was needed to further the investigation. A detailed affidavit proposing restrictions on the method and timing of the covert entry was prepared. Reversing a district court decision denying the requested order, the Fourth Circuit held that an express entry provision must be included in the intercept order, but as in *Ford*, did not specify what particular terms should be included in the entry provision.[22] The court adopted a different rationale than the *Ford* court in reaching this conclusion. Rather than stating that the trespassory and non-trespassory intrusion must be separately tested against the fourth amendment warrant requirement, the court reasoned that since covert entry to plant eavesdropping devices involves a greater constitutional intrusion than a normal wiretap order, the government must present greater justification. In addition, the court claimed that a covert entry provision is necessary to limit the entry to that justified by the government's affidavit.[23] The court believed that covert entry involves a greater constitutional intrusion than a normal wiretap, since by means of a covert entry officers are able to see and possibly seize items not seen in a non-trespassory intrusion.[24]

According to the court, to limit the scope of the entry to the justification presented, the fourth amendment demands that the judge be informed of the planned entry, that covert entry be the only feasible means to continue the government's investigation, and that the judge specifically limit the entry in a manner not violative of the fourth amendment's standard of reasonableness.[25] The court did not state what minimal restrictions are necessary before an entry provision would be upheld, but it did say that the restrictions proposed by the government in the instant case would be approved.[26] Unfortunately, the specifics of the government's proposed restrictions were not available, since the district court's records were under seal to protect the secrecy of the government's investigation.[27]

In *United States v. Scafidi*,[28] the defendants were convicted of running an illegal gambling business. Bugs were installed at the Hiway Lounge pursuant to three intercept orders, and several entries were made to plant the bugs, to reposition them and to replace the batteries.[29] The intercept order in question did not expressly authorize covert entry, but the Second Circuit held that an electronic surveillance order need not contain express authorization to break into the premises. Still, the court did not imply that covert entry is an exception to the warrant requirement. Rather, the court stated that the authority to break into the premises in the instant case was implied from the order specifically authorizing the interception of oral communications only. The court noted that "[t]here is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment."[30] Unlike the courts in *Ford* and *Application of United States*, however, the court in *Scafidi* stated that it was not necessary for the authorizing judge to limit the scope of the covert

whether Title III mandated suppression of the seized conversations. 18 U.S.C. § 2518(10)(a) requires suppression of communications that are unlawfully seized. *Ford* states that communications seized in violation of the fourth amendment are unlawfully seized within the meaning of the statute, and Title III would thus require their suppression. Title III thus regulates covert entry, but only if there is a concomitant constitutional violation. 553 F.2d at 170-74.

[21] 563 F.2d 637 (4th Cir. 1977).

[22] Appellate jurisdiction was based on 18 U.S.C. § 1291 (1970). The court found that the denial of an application for an intercept order was a final decision within the meaning of that statute. Section 1291 authorizes appeals from "final decisions" of federal district courts.

The district court had denied the requested order, holding that Title III required that the government demonstrate a compelling interest before covert entry could be authorized. The court of appeals, finding nothing in the legislative history to indicate that Congress intended that any higher standard be placed on the government than the fourth amendment standard of reasonableness, rejected the district court's holding. The appellate court found that a major purpose of Title III was to give federal investigators a valuable tool to combat organized crime, and requiring that a higher burden be met than the fourth amendment standard of reasonableness before a covert entry can be authorized, would frustrate this intent. 563 F.2d at 642-43.

[23] *Id.* at 643-44.

[24] *Id.* at 643, n.6.

[25] *Id.* at 644.

[26] *Id.* at 645.

[27] Since the appeal arose from the denial of an application for an intercept order, to preserve the secrecy of the government's investigation, the district court record was sealed, and thus little can be said about the factual background of the case, or the particulars of the government's proposed restrictions on covert entry.

[28] 564 F.2d 633 (2d Cir. 1977).

[29] Entry was gained by means of a passkey. United States v. Altese, No. 75-CR-341, *slip op.* at 4, 46, 51-52 (E.D.N.Y., filed Oct. 14, 1976) (unreported opinion), *aff'd sub nom*, United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977).

[30] 564 F.2d at 640 (quoting *Altese, supra* note 29, *slip op.* at 52).

entry operation. The court reasoned that decisions as to the time and method of entry, and to the number of entries to be made, require expertise outside the judiciary's competence, often could be made only at the last moment, and almost certainly would require on-the-spot investigation by the judge.[31] Although the court held that the judicial officer need not approve the number and method of the entries, the court seemed to imply that the fourth amendment standard of reasonableness does restrict the actions of the police. Although the police entered the premises several times to plant, repair, and replace the bugs, the intrusion into the targeted premises in this case was "no greater than that necessary to plant the bugs and assure their continued functioning."[32]

Scafidi, Ford, and *Application of United States* are consistent in their requirement that the actions of the police, in making a covert entry, will be subject to the fourth amendment's standard of reasonableness. The cases are in conflict, however, with regard to the degree of judicial supervision mandated by the fourth amendment warrant requirement, and to the question of whether this judicial supervision must be express or implied.[33] *Scafidi* says that judicial authorization may be implied from an order on its face limited to the seizure of conversations, and vigorously states that the judicial officer is not competent to exercise any supervision other than the initial authorization. *Application of United States* and *Ford,* on the other hand, require that a covert entry be expressly authorized, and that the judge tailor the covert entry provision so that the constitutional intrusion is no greater than that minimally necessary to affect the seizure of the offending conversations. Unfortunately, both *Ford* and *Application of United States* fail to consider the practical problems which result from this minimal intrusion test.

It has been argued that if *Ford* and *Application of United States* are interpreted too strictly, the police may be frustrated in their ability to carry out effectively a covert entry operation.[34] To accomplish a surreptitious entry, it is necessary for the police to make extensive surveys of the targeted premises. However, an internal survey of the premises is usually not possible, and therefore, it may be impossible for the police to obtain complete information.[35] Moreover, a variety of circumstances may force last minute changes. For instance, weather may cause changes in crowd patterns, or a suspect's established patterns may change, or sudden interruptions may force a retreat before installation can be completed.[36] Furthermore, once the bugs are installed, it may be necessary to re-enter the target to replace defective equipment, replace batteries and reposition the devices.[37] For these reasons the police may be hindered in their attempts to obtain an intercept order since the judge may not have sufficient information with which to make intelligent decisions, and any restrictions he may impose in the order may quickly become outdated.[38] In addition, because of delays in obtaining authority for re-entries, incriminating conversations may be lost.

A better solution, which would alleviate the practical difficulties faced by the police, might be to accept *Scafidi* and leave the decision as to the number, method, time, and scope of the resulting intrusion to the discretion of the police. However, an express entry provision would also be required, as in *Ford* and *Application of United States.* The express provision safeguards the defendant's rights by making sure that no covert operation commences unless the judge has explicitly found the

[31] *Id.* at 640.

[32] *Id.*

[33] A number of district courts, in addition to the district courts in *Ford, Scafidi,* and *Application of United States,* have considered the question of whether express authorization is necessary for a covert entry. *See* United States v. Volpe, 430 F. Supp. 931 (D. Conn. 1977) (entry provision not required); United States v. Finazzo, 429 F. Supp. 803 (E.D. Mich. 1977) (entry provision required); United States v. Dalia, 426 F. Supp. 862 (D.N.J. 1977) (entry provision not required); United States v. London, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds sub nom,* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977) (entry provision not required).

[34] *See* McNamara, *The Problem of Surreptitious Entry To Effectuate Electronic Eavesdrop: How Do You Proceed After the Court Says "Yes,"* 15 AM. CRIM. L. REV. 1 (1977). McNamara argued the government's cause in *Ford.* For a discussion of the practical difficulties of covert entry, and a proposed procedure that would balance the needs of the police against the rights of defendants, see nn.34-39 and accompanying text.

[35] McNamara, *supra* note 34, at 3 & nn.7 & 8.

[36] *Id.* at 4 & n.9.

[37] *Id.* at 4 & n.11.

[38] The practical realities and tactical considerations of any covert entry are not only beyond the expertise of a judicial officer, but also would require him, if the critical flexibility is to be guaranteed, to stay with the entry team from the time the eavesdrop order is signed until it is executed, directly supervising each step, resolving every problem that may arise, and making tactical judgments as to the final entry method in an area in which his expertise and experience are plainly deficient. *Id.* at 15, n.67.

commencement of a covert entry operation justified. The additional protection of the defendant's rights, by adoption of a requirement that an express entry provision be included in the intercept order, would more than offset the slight additional burden placed on the government. Under this solution, the actions of the police in conducting the operation would still be subject to fourth amendment standards of reasonableness during post-seizure review, and the fourth amendment warrant requirement would not be extended to a point where covert entry, a most effective law enforcement tool, would no longer be feasible.[39]

It may be that the courts adopting the rationale of *Ford* and *Application of United States*, however, will require a greater degree of judicial supervision over covert entry than suggested by the above solution. However, that degree of supervision need not be as great as contemplated by the dictum in the two decisions that the time and method of entry would have to be regulated.[40] Based on the test that the intrusion shall be limited to that minimally necessary, it is probable that the courts will leave the method and timing of entry, decisions which do *not* affect the total intrusion, to the discretion of the police. Regarding the number of entries that may be made during the life of the intercept order and the total canvassing of the premises needed to plant the bugs, decisions that *do* affect the total intrusion, it is likely that the courts will require judicial approval. However, the courts should establish exceptions to these requirements where substantial delays in obtaining judicial authorization or the impossibility of obtaining complete information, would frustrate the government's investigation.

[39] McNamara suggests that an entry provision be included to make it clear that the judge has authorized covert entry, and that each entry be approved by the judicial officer. The recommended entry provision would leave the method of entry to the discretion of the police, and would provide that subsequent entries could be made without prior approval if delay would prejudice the success of the entry, as long as the judge was notified within 48 hours. *Id.* at 27–28.

[40] *Ford* suggests that the time and method of entry may need to be regulated. 553 F.2d at 170. *Application of United States* does so only obliquely by stating that the restrictions in the government's proposed order would be upheld. 563 F.2d at 645.

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CONSTITUTIONAL RIGHTS DURING THE SENTENCING PROCEEDING

In *United States v. Fatico*,[1] the United States District Court for the Eastern District of New York was presented with an opportunity to extend the trend of recent cases toward guaranteeing a defendant's constitutional protections during sentencing. In that case, the court confronted the due process and right of confrontation issues of whether evidence used in determining the defendants' sentence was reliable, and whether the defendants were afforded an adequate opportunity to rebut the evidence.

The defendants in *Fatico* pleaded guilty to a charge of conspiring to hijack trucks.[2] During the sentencing proceeding, the defendants objected to a presentence report linking them to organized crime. The information concerning the defendants' affiliation with organized crime was allegedly obtained by an FBI agent "based upon information furnished to him by a confidential informant who allegedly is a member of the Gambino Family and who has previously supplied reliable information."[3] The defendants sought to cross-examine the FBI agent, but the prosecution objected on the ground that any cross-examination would jeopardize the confidentiality of the agent's source and jeopardize the informant's life. To ensure that the defendants had an opportunity to refute the evidence and be sentenced upon reliable information, the court held that the Government must disclose the name of the informer. Judge Weinstein, writing the opinion for the court, used a balancing approach, weighing society's interests against the individual defendant's rights, to protect the defendants from possible injustice in sentencing.

This concern of the *Fatico* court, for safeguarding a defendant's rights during the sentencing aspect of a criminal proceeding, represents the latest protective movement in an area that historically has afforded little protection to the convicted defendant. The judiciary's reluctance to find constitutional violations of a defendant's rights during the sentencing proceeding can be traced to *Williams v. New York*.[4] In *Williams*, the Supreme Court of the United States considered whether a defendant was denied due process of law where the judge imposed the death sentence based upon evidence in the presentence report which was inadmissible at trial.[5] In upholding the sentence, Justice Black, writing the opinion for the Court, stated that:

> [W]e do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.[6]

In reaching its determination, the *Williams* Court relied upon the notion that punishment for crimes is to be determined on an individual basis, and hence all information is relevant to the issue, notwithstanding the rules of evidence and strict due process considerations.[7]

The *Williams* Court's failure to find a due process violation represented a marked departure from the earlier Supreme Court decision of *Townsend v. Burke*.[8] In *Townsend*, the Court found a due process violation where the defendant, who was disadvantaged by lack of counsel, was sentenced on the basis of *untrue* assumptions concerning his prior criminal record.[9] In an attempt to reconcile the two opin-

[1] 441 F. Supp. 1285 (E.D.N.Y. 1977).

[2] The defendants were initially charged with three indictments stemming from three hijackings occurring in February and March of 1971. The initial indictment, charging the defendants with conspiracy to receive and with receiving goods stolen from interstate commerce was aborted, however, when the jury failed to reach a verdict. The defendants then pleaded guilty to the conspiracy charge in the second indictment in satisfaction of all charges against them. *Id.* at 1288.

[3] *Id.*

[4] 337 U.S. 241 (1949).

[5] *Id.* at 244.

[6] *Id.* at 251. For a legislative enactment which seemed to incorporate the philosophy of the *Williams* holding, see the Organized Crime Act of 1970, 18 U.S.C. § 3577 (1970), which states that "[n]o limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

[7] 337 U.S. at 247, 251. *See also* FED. R. EVID. 1101 (d)(3) which states that the federal rules are inapplicable at the sentencing stage of a criminal prosecution.

[8] 334 U.S. 736 (1948).

[9] In *Townsend*, the trial court, during sentencing, relied upon prior charges against the defendant, even though the defendant had been found not guilty. *Id.* at 739-41.

ions, the Court in *Williams*, in a footnote, stated that "[w]hat we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause."[10]

The two cases, nonetheless, can be distinguished on the basis of a reliability concept, the same concept upon which the court in *Fatico* focuses. In *Townsend*, the Court based its decision upon the fact that the defendant was sentenced as a result of false and totally unreliable information. In *Williams*, on the other hand, the key factor appears to be that the defendant did not attempt to refute any of the additional information upon which the judge relied, the inference being that the information was thus reliable and true.[11]

Extending this analysis one step further, it appears that the Court in *Williams* imposed a duty upon the defendant to challenge any inaccuracies in the presentence report upon which the judge relies. Absent such a challenge, the Court will apparently assume that the information is reliable and refuse to apply due process considerations.

The *Williams* opinion, however, gives no indication as to whether the burden imposed upon the defendant is merely to attempt to refute the evidence, or whether the defendant must show that the evidence is untrue. The Ninth Circuit, in *United States v. Weston*,[12] confronted this issue, and refused to place the burden upon the defendant to prove that the information from an anonymous informant was inaccurate. Instead the court held that the defendant's mere contest of the evidence was sufficient. In *Weston*, the defendant objected to the use of allegedly inaccurate information in determining the sentence to be imposed. There, the defendant was convicted of receiving, concealing and facilitating the transportation of heroin, for which the trial judge recommended the minimum sentence of five years. However, before the sentence was imposed, a presentence report which relied upon an anonymous informer, detailed the defendant's alleged involvement in other crimes. Based upon this report, the judge gave the defendant an additional sentence of fifteen years.

In distinguishing the Ninth Circuit's approach in *Weston* from *Williams*, the key factor again appears to have been the reliability of the information used in the sentencing proceeding. In *Weston*, the court took notice of the defendant's vigorous denial of the information contained in the presentence report, a denial casting doubt upon the reliability of the information used. Nevertheless, unlike in *Townsend*, the court did not rule that the information was inaccurate, but appeared to be saying that the mere challenge of the information used was enough to cast doubt upon its reliability and hence preclude its use against the defendant. The court, however, in an attempt to follow *Townsend*'s line of reasoning, stated that "[w]e extend it [*Townsend*] but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."[13]

The implications stemming from the *Weston* case are enormous. As the dissent in *Weston* pointed out: "[T]he majority disclaims a repudiation of the rule of these cases [*Williams* and *Townsend*], but in substance opens up Pandora's box on procedures in the trial court in the use of a presentence report."[14] The notion that contested information must be excluded from the sentencing report was a far cry from the Supreme Court decisions concerning the defendant's safeguards during sentencing, and has not gained universal acceptance in other jurisdictions.[15]

A similar situation arose in United States v. Tucker, 404 U.S. 443 (1972), where an accused was given a maximum sentence because of the judge's reliance upon three prior felony convictions. The Supreme Court affirmed the decision of the Ninth Circuit in remanding the case for resentencing due to the determination that the three prior convictions were illegal in light of Gideon v. Wainwright, 372 U.S. 335 (1963), and the defendant's right to counsel.

[10] 337 U.S. 241, 252 n.18 (1949).

[11] *See* United States v. Bass, 535 F.2d 110, 121 (D.C. Cir. 1976), where the court held that "the absence of a denial itself provides an important indicia of reliability." In *Bass*, the court refused to vacate the lower court's sentence imposed upon the appellant, where the appellant did not even attempt to dispute the truthfulness of various allegations made by the prosecution during the sentencing proceeding.

[12] 448 F.2d 626 (9th Cir.), *cert. denied*, 404 U.S. 1061 (1971).

[13] *Id.* at 634.

[14] *Id.*

[15] In United States v. Metz, 470 F.2d 1140 (3d Cir. 1972), *cert. denied sub nom*, Davenport v. United States, 411 U.S. 919 (1973), the court distinguished *Weston* on the basis of the reliability of the evidence used, and held that the sentencing judge can consider pending indictments for other crimes in determining the defendant's sentence for his current criminal activity. The *Metz* court used a reliability of the evidence test in holding that the indictments were a reliable source of information even though the defendant contended that his "presumption of innocence is affronted by the consideration of unproved criminal activity." *Id.* at 1142.

The reliability concept was extended one step further in the recent United States Supreme Court decision, *Gardner v. Florida*.[16] In *Gardner*, the Court held that the petitioner was denied due process of law when the death sentence was imposed, since the petitioner had no opportunity to deny or explain the confidential portion of the presentence report and thereby no chance to sway the trial judge to accept the jury's determination that a life sentence should be imposed.[17] In this case, the confidential information in the presentence investigation report was neither disclosed to nor requested by defense counsel.

The Court in *Gardner* expanded its focus upon the reliability concept to include a consideration as to whether the opportunity existed for the defendant to refute the information, as well as whether the defendant challenged the presentence report. In *Gardner*, since the information used in imposing the harsher sentence was not disclosed to the defendant, no inference of the information's reliability could be drawn from the defendant's inability to refute the information, and thus the Court was unwilling to uphold the petitioner's death sentence.[18]

The *Gardner* Court, however, failed to highlight adequately the relative importance of a defense counsel's failure to *refute* the presentence report, as in *Williams*, as opposed to the defendant's failure to *request* the full presentence report. Logically, if the key determinant in a due process issue is the reliability of the information used in the sentencing proceeding, as the Court implies, then the fact that the defense does not even seek to examine the entire report becomes as crucial as whether the defendant refutes the information in the presentence report. From a reliability standpoint, the failure to refute the information in the presentence report is a stronger indication of reliability than the failure to request the disclosure of the report. Yet, if one views *Williams* as saying that a defendant's waiver of his right to refute the contents of the report is indicative of reliability, then waiver of the right to request disclosure of the report can also be read as imposing a presumption of reliability on the information, thus cutting off due process considerations.

In *United States v. Fatico*,[19] the court also concentrated upon the reliability concept and expanded the focus for determining reliability even further than *Gardner*. The *Fatico* court looked to the totality of circumstances rather than just to the defendant's actions or inactions to decide whether certain information should be considered during sentencing. This expansion is reflected in the court's overall concern for ensuring justice. As the court noted, "[w]hat is required is a sound judicial sense for what is essential to protect a defendant against injustice in sentencing."[20] The court recognized that safeguards concerning the admission of evidence were either too restrictive, or not protective enough, of the defendant, and thus believed that a flexible, discretionary approach should be utilized.

The approach utilized in *Fatico* appears to be a balancing test, as the court weighed society's interest in protecting itself from the criminally convicted against the individual defendant's interest in preserving his constitutional rights. This approach represents a departure from earlier cases where less consideration was given to the individual defendant's rights.

While applying this balancing approach to safeguard the defendant's due process rights during

In United States v. Needles, 472 F.2d 652 (2d Cir. 1973), the defendant contested an allegation in the presentence report that he was involved in the widespread manufacture and sale of firearms.

> It does not follow ... that an evidentiary hearing must be held whenever a defendant asserts the falsity of some statement in his pre-sentence report.... [T]here is no definitive set of criteria and no required weight to be allocated to each consideration; many of the matters received cannot readily be measured, quantified, proved or disproved; and some come from confidential sources. Hence it has not been required that each statement in a pre-sentence report be established or refuted on presentation of evidence.

Id. at 657-58. The court, however, even though the defendant contested the information in the report, affirmed his sentence since the report was fully corroborated. Based upon this corroboration, the court distinguished *Needles* from *Weston* and stated that "even if *Weston* were controlling authority in this circuit, we do not think it would require a remand here for resentencing." *Id.* at 659.

[16] 430 U.S. 349 (1977).

[17] *Id.* at 362.

[18] The *Gardner* Court also justified its decision in terms of a restructuring of capital sentencing procedures. Like *Williams, Gardner* involved the imposition of the death sentence on a defendant notwithstanding the jury's recommendation of life imprisonment. The Court, in a further attempt to distinguish the two cases, traced the recognition since *Williams* of the constitutional difference between the death penalty and lesser punishments. *Id.* at 1204-05. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court's analysis and focus on the death penalty, however, has been read as limiting its holding to only capital cases. United States v. Fatico, 441 F. Supp. at 1291.

[19] *Id.* at 1293-94.

[20] *Id.* at 1295.

sentencing, the *Fatico* court was confronted with the issue of the defendant's right to confrontation under the sixth amendment.[21] The Supreme Court had held in *Morrissey v. Brewer*[22] that minimum requirements of due process include the right to confront and cross examine adverse witnesses.[23] In *Morrissey*, the Court was confronted with a due process claim based upon an individual's alleged right to be heard before his parole is revoked. In deciding whether any procedural protections were due, the Court looked to the "extent to which an individual will be 'condemned to suffer grevious loss,'"[24] and held that due process considerations are flexible, depending upon the particular situation.[25]

In finding support for its conclusion that the defendant's sixth amendment right to confrontation applies to the post-conviction sentencing proceeding, the court in *Fatico* referred to the *Morrissey* parole revocation situation. Both situations involved the possible loss of liberty to the defendant after the initial determination of guilt and innocence, but since both situations were not part of the actual criminal prosecution, the full spectra of rights due a defendant may not apply.[26] Therefore, as in *Morrissey*, since the witness in *Fatico* possessed crucial information concerning the defendants' future liberty, the *Fatico* court, as part of its overall concern for justice, held that the right to cross examination existed in the sentencing proceeding.[27] The court reasoned:

> [T]he government cannot affirmatively prevent the defendant from examining under oath a declarant when a declarant's knowledge is offered by the government (1) at a critical stage of the criminal process,[28] (2) as to crucial information that (3) directly affects a substantial liberty interest of the defendant. To deny defendant access to an informant whose declarations are introduced as evidence is to affirmatively prevent the defendant from examining him. This requirement does not unduly burden the sentencing or other critical criminal process, but it does afford the defendant his constitutional mandated protection of confrontation.[29]

The defendants' confrontation rights were further complicated by the claim of an informer privilege. The right to confrontation of adverse witnesses had been subjected to the claim of informer privilege in *Roviaro v. United States*.[30] In that case, the Supreme Court gave effect to the informer privilege, the purpose of which is to encourage communication of alleged crimes by the public to the police force.[31] In *Roviaro*, the petitioner was indicted for selling and transporting heroin based upon the testimony of an anonymous informer. In refusing to invoke the informer privilege, the Court applied a flexible balancing approach and held:

> [T]he applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.[32]

The Court continued by saying that no fixed rule with respect to the informer privilege is applicable and that a balancing test weighing the confidentiality of the source of information against the defendant's individual rights must be applied, depending on the circumstances of each individual case.[33]

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[21] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . " U.S. CONST. amend. VI.

[22] 408 U.S. 471 (1972).

[23] *Id.* at 489.

[24] *Id.* at 481.

[25] *Id.*

[26] *Id.* at 480.

[27] 441 F. Supp. at 1297.

[28] In Mempa v. Rhay, 389 U.S. 129, 134 (1967), the Supreme Court stated that "*Townsend v. Burke* . . . illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing." In *Mempa*, the Court was presented with the issue of the right to counsel in a sentencing proceeding which had been deferred subject to probation.

The critical nature of the sentencing process becomes apparent when one considers that "the vast majority of defendants plead guilty: for them the only significant formal procedures of criminal administration are those culminating in the sentence, and it is often the sentence and not the conviction on which plea bargaining and other elements of a typical criminal defense focus." 81 HARV. L. REV. 821 (1968).

[29] 441 F. Supp. at 1297.

[30] 353 U.S. 53 (1957).

[31] *Id.* at 60-61.

[32] *Id.*

[33] *Id.* In an apparent furtherance of the *Roviaro* test, the American Bar Association's approved draft of sentencing alternatives and procedures, which the *Fatico* court cites, states that:

> [I]n extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information

In applying the *Roviaro* test to the facts in *Fatico*, the district court concluded that since the informer's information directly affected a substantial liberty interest of the defendant, the prosecutor must disclose the informer's identity or be precluded from presenting the information to the court. The *Fatico* court's reliance upon the flexible balancing test of *Roviaro* is consistent with the Supreme Court's generally flexible approach to the entire presentence proceeding.

In sum, the *Fatico* court capitalized upon the opportunity to extend the trend of recent cases toward guaranteeing a defendant's constitutional protection during sentencing. The court focused upon the totality of circumstances in determining whether evidence was reliable and could thus be used by a judge in determining a defendant's sentence. Similarly, the court's attitude toward ensuring that the defendant's constitutional rights were protected was reflected in its flexible application of the rules regarding the informer privilege.

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which has [*sic*] been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reason for its actions and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review."

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Sentencing Alternatives and Procedures, § 4.4, at 214 (Approved Draft 1968).

The requirement for stating for the record why the information was not disclosed, according to the comments to the draft, is to prevent abuse, by making the nondisclosure of presentencing information a burdensome task, notwithstanding the risk that certain information that should be protected, would not be. *Id.* at 225. *But see* United States v. Holder, 412 F.2d 212 (2d Cir. 1969), which held that there is no abuse of discretion where the trial judge, based upon no apparent reason, refuses to disclose the presentence report. *See also* New Jersey v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969); Annot. 40 A.L.R.3d 681 (1971).

The argument that an assurance of confidentiality is essential to enable investigators to obtain information relevant to the defendants and that the possible disclosure of such information would have an adverse effect on the informational gathering process has been espoused by some in favor of non-disclosure of presentencing reports. *See* Gardner v. Florida, 430 U.S. 349, 358-59 (1977). This fear, however, that sources of information will dry up upon disclosure of the presentence report has been criticized by different studies as having no factual basis. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Sentencing Alternatives and Procedures, 219-20. (Approved Draft, 1968); New Jersey v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

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THE CONSTITUTIONAL PROTECTION OF THE SWASTIKA

The Illinois Supreme Court has "reluctantly"[1] held that the first amendment protects the rights of neo-Nazis to display the swastika during a protest march in a predominantly Jewish suburb of Chicago. In *Village of Skokie v. National Socialist Party of America*,[2] the court held that the village had not met its "heavy burden" of justifying a prior restraint on speech—a drastic and presumptively unconstitutional prohibition of expression.[3] The court overturned the injunction which prohibited the Nazis from "[i]ntentionally displaying the swastika on or off their persons, in the course of a demonstration, march or parade" in the village.[4] However, the court left open the possibility of subsequent criminal punishment for incitement to riot, or for any other unlawful conduct on the part of the demonstrators or the audience.[5]

The per curiam opinion stated that the swastika is symbolic political speech[6]—not "fighting words," a narrow form of insulting expression which tends to provoke immediate, retaliatory breach of the peace.[7] Traditionally, the first amendment has not shielded fighting words from post factum criminal punishment. The Illinois Supreme Court indicated that even if the swastika could have been characterized as "fighting words," a prior restraint on speech would not have been justified.

Nor would evidence of possible violence on the part of a hostile crowd have overcome the strong presumption against a prior restraint. The justices noted that "courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy."[8] The court considered the hostile audience argument particularly unpersuasive because the Nazi group had given advance notice of their planned demonstration. "A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen," the court reasoned.[9]

The asserted purpose of the Nazi demonstration planned for May 1, 1977, was to protest a $350,000 bond requirement for use of Skokie parks.[10] The

[1] Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 619, 373 N.E.2d 21, 26 (1978).

[2] 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

[3] *Id.* at 612, 373 N.E.2d at 23. The strong presumption against prior restraint of first amendment rights has been considered black letter law at least since Near v. Minnesota, 283 U.S. 697 (1931), invalidating an injunction against publication of materials considered libelous and anti-Semitic. Other examples of the United States Supreme Court's refusal to approve of prior restraints include Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (prior restraint on distribution of leaflets considered unjustified by privacy interests asserted by a real estate broker described in the leaflets as a block buster and panic peddler), and New York Times v. United States, 403 U.S. 713 (1971) (even classified government documents such as the Pentagon Papers may not be previously restrained).

[4] 51 Ill. App. 3d 279, 295, 366 N.E.2d 347, 359 (1977). A broader injunction had been issued by the trial court, prohibiting defendant Nazis from:

> [m]arching, walking or parading or otherwise displaying . . . the swastika on or off their person; Distributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion [within the village of Skokie].

Id. at 284–85, 366 N.E.2d at 351. Defendants' subsequent motion for a stay of the injunction was denied by the trial court and the Illinois Supreme Court. The United States Supreme Court granted certiorari June 14, 1977, reversed the denial of a stay and remanded for immediate appellate review or a stay. National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977). Six days later, the Illinois Supreme Court ordered the appellate court to commence review immediately or to grant a stay of the injunction. On July 12, 1977, the appellate court reversed those portions of the injunction which prohibited the uniformed march and distribution of Nazi literature in Skokie; however, that court retained the portion of the injunction which prohibited intentional display of the swastika in Skokie. 51 Ill. App. 3d at 295, 366 N.E.2d at 359.

[5] "[I]f the speaker incites others to immediate unlawful action he may be punished—in a proper case, stopped when disorder actually impends; but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker." 69 Ill. 2d at 617, 373 N.E.2d at 25 (quoting Rockwell v. Morris, 12 App. Div. 2d 272, 281–82, 211 N.Y.S.2d 25, 35–36, *aff'd mem.*, 10 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 268, *cert. denied*, 368 U.S. 913 (1961)).

[6] 69 Ill. 2d at 618, 373 N.E.2d at 25.

[7] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[8] 69 Ill. 2d at 616-17, 373 N.E.2d at 251.

[9] *Id.* at 618, 373 N.E.2d at 26.

[10] *Id.* at 610, 373 N.E.2d at 22.

The ordinance was held unconstitutional by the United States District Court for the Northern District of Illinois approximately one month after the Illinois Supreme Court decision invalidated the injunction against

proposed march was to consist of thirty to fifty demonstrators walking single file along the sidewalk, wearing stormtrooper uniforms and swastikas and carrying signs with slogans such as "Free Speech For The White Man."[11]

The village had argued that special circumstances justified an injunction prohibiting display of the swastika in Skokie. In its brief to the Illinois Supreme Court, the village cited the "historical reality of genocide within recent memory" and the high concentration in Skokie of Jews and Jewish Holocaust survivors.[12] Of approximately 70,000 Skokie residents, 40,500 were Jewish or of Jewish ancestry, and approximately 5,000–7,000 had survived Hitler's concentration camps.[13] Opinion evidence showed that a demonstration would result in violence.[14] The mayor of Skokie testified that there was a "terrible feeling of unrest" over the planned demonstration.[15] One Holocaust survivor testified that to him, the swastika symbolized the murdering of his family at the hands of the Nazis. The survivor added that he did not know if he could control himself if he were to see the swastika displayed in the village where he lives.[16] In this context, the village cited the much-quoted dictum of Mr. Justice Holmes in *Schenck v. United States*:

> We admit that in many places and in ordinary times the Defendants ... would have been within their constitutional rights. *But the character of every act depends upon the circumstances in which it is done*.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing panic. *It does not even protect a man from an injunction against uttering words that may have all the effect of force* .... The question in every case is whether the words used are used in such circumstances as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent. It is a question of proximity *and degree*.[17]

The Illinois Supreme Court acknowledged that the sight of the swastika "is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display."[18] However, the court considered it "entirely clear" that these circumstances did not justify a prior restraint on the Nazis' speech.[19]

The village had further argued that the display of the swastika in Skokie would amount to fighting words—"'more than speech', 'more than petition', [sic] just as genocide is more than murder. The assault upon Jews by evoking the bitter memory of mother, father, children, brothers and sisters slaughtered under the swastike [sic] exceeds in degree anything quoted heretofore as 'fighting words.'"[20]

The Illinois Supreme Court, however, refused to extend the fighting words doctrine to permit an injunction against the display of a political symbol, anywhere in the community of Skokie, to a group of forewarned viewers. By contrast, the fighting words doctrine arose in the context of subsequent punishment of verbal insults, spontaneously uttered to an unprepared individual listener in a direct, face-to-face confrontation.

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the swastika. In Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), the court held that the first amendment was violated by Skokie's ordinance requiring denial of a permit to prospective assemblages of more than 50 persons where $350,000 insurance bonding was not obtained. The court found that Skokie had not proved the necessity of the burdensome effect of the insurance, and that no principled standards were available for determining which organization would fall within the ordinance's exemptions.

The district court further found first amendment violations in two additional Skokie ordinances—both of which were criminal measures, and were also enforced through permit denial in accordance with the first ordinance. One prohibited "dissemination" (defined so as to include display) of material which intentionally incites racial or religious hatred. The court found that the "intentional incitement of hatred" standard was subjective and therefore unconstitutionally vague. It further found the ordinance to be overly broad, because it might have punished intemperate and emotional debate that could accompany any discussion of race and religion. *Id.* at 693. The court indicated that the statute might have passed constitutional muster if it had been sufficiently precise to focus only on those fighting words—personally abusive insults, as opposed to "ideas"—used in an abusive manner which present an actual danger of causing a breach of the peace. *Id.* at 690.

The third ordinance prohibited public demonstrations by members of political parties while wearing military-style uniforms. That was held an unconstitutional restraint on symbolic political speech.

[11] 69 Ill. 2d at 610, 373 N.E.2d at 22.

[12] Brief for Plaintiff-Appellee at 3.

[13] 69 Ill. 2d at 610, 373 N.E.2d at 22.

[14] *Id.* at 611, 373 N.E.2d at 22.

[15] 51 Ill. App. 3d at 290, 366 N.E.2d at 355.

[16] *Id.*

[17] Brief for Plaintiff-Appellee at 7 (emphasis in brief). (Schenck v. United States, 249 U.S. 47, 52 (1919), where the United States Supreme Court upheld a post factum conviction for wartime draft obstruction in connection with defendant's distribution of anti-draft materials.)

[18] 69 Ill. 2d at 615, 373 N.E.2d at 24.

[19] *Id.*.

[20] Brief for Plaintiff-Appellee at 10.

In the landmark case of *Chaplinsky v. New Hampshire*,[21] the United States Supreme Court upheld a conviction for defendant's calling an arresting police officer a "God damned racketeer" and a "damned Fascist." The conviction was based upon a statute prohibiting fighting words—those words with "a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."[22] According to the Court, the very utterance of fighting words tends to inflict injury or incite an immediate breach of the peace.[23] Although dictum in *Chaplinsky* indicated that "*prevention* and punishment" of fighting words has never been thought to raise any constitutional problem,[24] the Supreme Court has never had the occasion to determine the validity of a prior restraint of fighting words. Indeed, so long as courts hold the fighting words doctrine to its context of spontaneity, the prior restraint issue is not likely to arise.

Although *Chaplinsky* has never been overruled, the Supreme Court has never again invoked the fighting words doctrine to restrict speech. Rather, the Court has limited the doctrine in two significant ways. First, it has indicated that a line is to be drawn between unprotected fighting words and the protected communication of unpopular ideas, since "under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[25] Further, the Court has indicated that a second line is to be drawn between unlawfully inciting a breach of the peace and lawfully speaking to listeners who react unlawfully.[26] Although there are no clear standards to help determine on which side of the abstract lines a given case will fall, it is evident that the Court will tend to place its decisions on the side of free speech.

The United States Supreme Court has repeatedly held certain offensive expressions to be protected by the first amendment. For instance, *Terminiello v. Chicago*[27] held it unconstitutional to convict a speaker solely because "his speech stirred people to anger, invited public dispute, or brought about a condition of unrest." That finding, according to the Court, made it unnecessary to determine whether the defendant's anti-Semitic and pro-Fascist remarks, made in the vicinity of an angry and turbulent crowd, constituted fighting words. Similarly, in *Bachellar v. Maryland*,[28] the Court overturned a conviction because it could have been based solely on "the doing or saying ... of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." In that case, the Court declined to characterize as fighting words the slogans on placards which Viet Nam war protesters carried in front of a U.S. Army recruiting station: "Peasant Emancipation, Not Escalation" and "Make Love, Not War." In *Coates v. Cincinnati*,[29] the Court held unconstitutional an ordinance prohibiting groups of three or more persons from conducting themselves "in a manner annoying to persons passing by." And in *Cohen v. California*,[30] the Court held that the first amendment protected the offensive slogan, "Fuck the Draft," which had been written on the back of the jacket worn by the defendant in the Los Angeles courthouse.

The *Cohen* opinion shed some light on the fighting words doctrine by rejecting its application to the words on Cohen's jacket. The Court noted that the message was not personally directed at anyone, that no one actually or likely to be present could reasonably have considered the words a direct personal insult, and that the state was not attempting to exercise police power in attempting to prevent intentional provocation of a group to hostile

[21] 315 U.S. 568, 569 (1942).

[22] *Id.* at 573. The Court further described the fighting words "test" in objective terms: "What men of common intelligence would understand would be words likely to cause an *average addressee* to fight." *Id.* (emphasis added). The statute, as allowed by the New Hampshire Supreme Court, did "no more than prohibit face-to-face words plainly likely to cause a breach of the peace by *the addressee*, words whose speaking constitutes a breach of the peace." *Id.* (emphasis added).

[23] *Id.* at 572.

[24] *Id.*

[25] 69 Ill. 2d at 612, 373 N.E.2d at 23 (quoting Bachellar v. Maryland, 397 U.S. 564, 567 (1970), and Street v. New York, 394 U.S. 576, 592 (1969)).

[26] *See* note 5 *supra*. *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), discussed in note 10 *supra*. There the district court articulated a two part test for restraining fighting words. First, the speech must be objectively abusive and insulting—and not a communication of ideas. Second, it must present an actual danger of causing a breach of the peace. *Id.* at —. However, the court also noted that generally, when an audience becomes disorderly and attempts to silence a speaker, "it is the duty of the police to attempt to protect the speaker, not to silence his speech if it does not consist of unprotected epithets." The court further noted that "all the modern authority rejects the theory that even unprotected speech may be prohibited solely on the basis of its inherent tendency to cause violence." *Id.* at —.

[27] 337 U.S. 1, 5 (1949).

[28] 397 U.S. 564, 570 (1970).

[29] 402 U.S. 611 (1971).

[30] 403 U.S. 15 (1971).

reaction.[31] The opinion thus concluded that, in the context at bar, the jacket's message did not constitute fighting words—"those personally abusive epithets which, when addressed to an ordinary citizen as a matter of common knowledge, are inherently likely to provoke violent reaction."[32]

Similarly, in *Village of Skokie*, the Illinois Supreme Court chose to characterize the swastika as offensive speech rather than as fighting words.[33] The court's rationale was apparently expressed in its lengthy quotation from the *Cohen* opinion:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . .
>
> That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.*** '[S]o long as the means are peaceful, the communication need not meet the standards of acceptability.'. . .[34]

In upholding the Nazis' right to display the swastika in Skokie, the Illinois court refused to allow a potentially hostile audience to exercise advance censorship over what may be expressed in its presence. That finding is squarely consistent with decisions of other courts which have tended to find that, in the face of possible lawlessness on the part of hearers or viewers, a speaker ordinarily should be protected rather than prevented from communicating his ideas.[35]

For example, in *Kunz v. New York*,[36] the United States Supreme Court held it unconstitutional to impose a prior restraint upon the speech of one who had in the past caused some disorder by ridiculing certain religious beliefs, calling the Pope "the anti-Christ" and indicating approval of Hitler's incinerators.[37] The Court noted that there are "appropriate public remedies to protect peace and order of the community if appellant's speeches should result in disorder or violence."[38]

The Seventh Circuit Court of Appeals held it impermissible even to consider the threat of a hostile audience when ruling on a permit application or injunctive order. In *Collin v. Chicago Park District*,[39] a case involving some of the same individuals as in the *Skokie* case, the court said that the city's refusal to permit Nazis to rally in a Chicago park amounted to an unconstitutional prior restraint of their speech. The court emphasized that "it has become patent that a hostile audience is not a basis for restraining otherwise legal First Amendment activity."[40] If the actual lawless behavior of a crowd is not sufficient to convict a speaker, the court explained, "then certainly the anticipation of such events cannot sustain the burden necessary to justify a prior restraint."[41]

Similarly, the possibility of hostile spectators did not justify denial of a speaking permit to former Nazi leader George Lincoln Rockwell, even though Rockwell sought to speak at the congested Union Square Park in New York City, where approximately 2.5 million Jews resided. In *Rockwell v. Morris*,[42] a New York appellate court left open the possibility of stopping the speaker, or convicting him, if he were to incite a riot. However, the court emphasized that there is a distinction between a speaker's inciting a riot and "unlawful action from others who seek unlawfully to suppress or punish the speaker."[43] Further, *Rockwell* dictum indicated that a prior restraint might be justifiable in unusual circumstances where "it is demonstrable on a rec-

[31] *Id.* at 20.

[32] *Id.*

[33] The Illinois Supreme Court explained:

> The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of "fighting words."

69 Ill. 2d at 615, 373 N.E.2d at 24.

[34] *Id.* at 613–14, 373 N.E.2d at 23–24 (citations omitted) (quoting Cohen v. California, 403 U.S. 15, 24–26 (1971)).

[35] *See* Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536, 546–48 (1965).

[36] 340 U.S. 290 (1951).

[37] *Id.* at 296 (Jackson, J., dissenting).

[38] *Id.* at 294.

[39] 460 F.2d 746 (7th Cir. 1972).

[40] *Id.* at 754.

[41] *Id.*

[42] 12 App. Div. 2d 272, 211 N.Y.S.2d 25, *aff'd mem.*, 10 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 268, *cert. denied*, 368 U.S. 913 (1961).

[43] *Id.* at 281, 211 N.Y.S.2d at 35. However, the *Rockwell* court did not explicitly explain how a court might draw the distinction between a speaker inciting a riot and listeners unlawfully responding to the speech with violence.

ord that such expression will immediately and irreparably create injury to the public weal."[44]

The United States District Court for the Northern District of Illinois recently stated that the enjoyment of constitutional rights by the peaceable and law-abiding must not "depend on the dictates of those willing to resort to violence."[45] Thus, the court held it unconstitutional for Chicago officials to deny a permit for a peaceful civil rights march through a Caucasian neighborhood—a neighborhood that had previously reacted to a similar demonstration with rocks, bricks, pieces of concrete and explosive devices.

Although the United States Supreme Court did uphold a post factum conviction of a speaker, it arguably did so on the ground that certain inflammatory racial statements had gone beyond "the bounds of argument or persuasion" and amounted to incitement to riot. However, in *Feiner v. New York*,[46] other factors might have substantially contributed to justification of the conviction. Apparently, public safety was endangered because pedestrians were forced to walk in the street while traffic was passing, as a result of the crowd's blocking of the sidewalk and spilling over onto the street. Further, the defendant had refused to obey three police orders to stop speaking to the crowd.

Recently a federal district court sustained an injunction against a Nazi march planned to take place around Jewish synagogues during the High Holy Days. The result in *Jewish War Veterans of the United States v. American Nazi Party*[47] was partially based upon a finding "that a present danger did exist that riots would be incited. . . ." However, the court also stated that its decision was necessary to protect the constitutional rights of Jewish worshippers to practice their religion in safety.[48]

In sum, reversal of the injunction against displaying the swastika in Skokie clearly comports with established principles of free speech. Prior restraints are presumed to be invalid and courts tend to protect offensive speech by declining to characterize it as fighting words. To whatever extent the fighting words doctrine is grounded on the potential violence of the person insulted, that doctrine directly conflicts with the principle that speakers ought not be punished for the lawless actions of listeners. And generally, speech is not to be stifled merely because it represents the views of an unpopular minority—however likely it is that an angry majority may react unlawfully. As the *Rockwell* court concluded:

> [T]he unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in "restricted" areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most.
>
> . . . .
>
> Surely, there is risk in denying prior restraint. It is a price paid for liberty while order is to be preserved by the sanction of punishment after the fact. It is the price paid for not having the policeman or the Commissioner as censor, while leaving the courts, disciplined by appellate review and the rules of evidence, to provide punishment under criminal standards for the unlawful act already committed.
>
> But the risk is not so great as to be intolerable in a civilized, law-abiding community.[49]

[44] *Id.* at 277–78, 211 N.Y.S.2d at 32. The court did not give specific examples of the requisite "immediate and irreparable injury." *But see* Jewish War Veterans of the United States v. American Nazi Party, notes 40–41 *supra* and accompanying text.

[45] Dr. Martin Luther King, Jr., Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 677 (N.D. Ill. 1976).

[46] 340 U.S. 315, 321 (1951).

[47] 260 F. Supp. 452, 455 (1966).

[48] *Id.* at 456.

[49] Rockwell v. Morris, 12 App. Div. 2d at 282, 283, 211 N.Y.S.2d at 35–36, 37.

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WARRANTLESS SEARCHES OF PAROLEES

In November 1977, the highest courts of two states[1] considered the extent to which a parolee had rights under the fourth amendment to the Constitution.[2] Specifically the two courts addressed the issue of whether a warrantless parolee search which produces evidence for a new criminal prosecution meets constitutional standards. In the absence of a Supreme Court holding on this question, state and federal rulings have varied broadly. Although neither of the decisions discussed here extends this spectrum, they do illuminate further possible approaches and rationales open to a court considering parolee searches. In *Roman v. State*,[3] the Supreme Court of Alaska held that a warrantless search of a parolee is constitutional when the parolee has signed a condition agreeing to such a search, if the condition is reasonable and if the searching parole officer has reasonable grounds to believe that a parole violation is taking place.[4] The holding by the New York Court of Appeals in *People v. Huntley*[5] was broader: a parole officer's warrantless search of a parolee's residence does not offend the Constitution so long as the officer's conduct is "rationally and reasonably related to the performance of his duty as a parole officer."[6]

BACKGROUND

When the United States Supreme Court in *Morrissey v. Brewer*[7] held that parolees have some measure of federal constitutional rights, the majority of courts had to reconsider their analyses of parolee rights. Pre-*Morrisey* courts had, under several related theories including the theory of "constructive custody," withheld constitutional rights from parolees, reasoning that because a parolee was free only at the beneficence of the state, his rights were diminished.[8] The custodial approach was foreclosed by *Morrissey*'s recognition that although parolees do not possess the "full panoply of rights"[9] and although their liberty is merely "conditional,"[10] they are entitled to the constitutional protections of due process.

Since *Morrissey*, courts have had to proceed on the assumption that parolees have at least some fourth amendment rights. Because the freedom guaranteed under the amendment is protection from *unreasonable* search and seizure,[11] courts have had to decide which searches are reasonable when directed against a parolee and which searches he may justifiably protest. In answering this question, the courts initially had to consider whether a pa-

[1] Other states whose highest courts have ruled on the fourth amendment rights of parolees include: Arizona, State v. Montgomery, 566 P.2d 1329 (Ariz. 1977); California, People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972); Colorado, People v. Anderson, 536 P.2d 302 (Colo. 1975); Iowa, State v. Cullison, 173 N.W.2d 533 (Iowa), *cert. denied*, 398 U.S. 938 (1970); Missouri, State v. Williams, 486 S.W.2d 468 (Mo. 1972); Nevada, Himmage v. State, 88 Nev. 296, 496 P.2d 763 (1972); Wisconsin, State v. Tarrell, 74 Wis. 2d 647, 247 N.W.2d 696 (1976). One federal court of appeals has also ruled on the issue in Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975).

[2] U.S. CONST. amend. IV:

> 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.

[3] 570 P.2d 1235 (Alaska 1977).

[4] *Id.* at 1238.

[5] 43 N.Y.2d 175, 371 N.E.2d 794, 401 N.Y.S.2d 31 (1977).

[6] 401 N.Y.S.2d at 33, 371 N.E.2d at 796.

[7] 408 U.S. 471 (1972). In *Morrissey*, the Court held that because parolees retain some measure of fourteenth amendment due process rights, they are entitled to a hearing process before revocation of parole. The Court based its holding on the rationale developed in Goldberg v. Kelley, 397 U.S. 254 (1970), that when a "grievous loss" may be inflicted upon a citizen he is entitled to certain minimal procedural safeguards.

[8] *See, e.g.*, Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971); People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965). In *Randazzo* and *Hernandez*, the courts drew a distinction between the rights of parolees and those of probationers. Because the former had been in prison, they, like other prisoners, had lost their constitutional rights; the latter, never incarcerated, were not so stripped. Neither court, however, viewed a parolee as totally devoid of rights after he had left prison.

For a discussion of other pre-*Morrissey* theories concerning parolees' constitutional rights, see 68 J. CRIM. L. & C. 412, 421 (1977).

[9] 408 U.S. at 480.

[10] *Id.* at 482.

[11] Note 2 *supra*.

rolee has the same fourth amendment rights when the evidence of the search is used in a parole revocation hearing as he has when it is used in a criminal prosecution for a new crime. Universally, the courts have decided that the parolee does not have the same rights.[12]

For example, in *United States v. Winsett*,[13] the court held that the fourth amendment's exclusionary rule, which prohibits the incriminating use of evidence obtained as a result of an illegal search, is not applicable in a probation[14] revocation hearing. The court pointed out that the rule is designed not to protect individuals but rather to deter law enforcement personnel from proceeding unconstitutionally.[15] Only if the police knew the offender was on probation (or parole[16]) could they be deterred by application of the exclusionary rule to revocation proceedings. Additionally, the court reasoned that extending the rule to such proceedings would undermine the function of probation or parole—to rehabilitate the offender as well as to protect the public from further offenses—by keeping from the revocation hearing officers information vital to an informed decision-making process.

The issue still open concerns what searches are reasonable when they produce evidence for a new criminal prosecution against a parolee.[17] The theories that courts have used in making this determination are basically three:[18] (1) consent or waiver, (2) reasonable expectations of privacy, and (3) administrative search.

Since traditionally a warrant is not required under the fourth amendment when the search is consented to,[19] several courts have avoided the amendment's reasonableness requirement altogether where a condition to parole was a promise by the parolee to submit to a warrantless search at any reasonable time, by any law enforcement officer.[20] The condition was viewed as a consent to waive fourth amendment rights.[21] Other courts

[12] United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); State v. Sears, 553 P.2d 907 (Alaska 1976); Croteau v. State, 334 So. 2d 577 (Fla. 1976); People v. Dowery, 62 Ill. 2d 200, 340 N.E.2d 529 (1975); Stone v. Shea, 113 N.H. 174, 304 A.2d 647 (1973); Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973); Reeves v. Turner, 28 Utah 2d 310, 501 P.2d 1212 (1972); State v. Kuhn, 7 Wash. App. 190, 499 P.2d 49 (1972); *In re* Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382, *cert. denied*, 400 U.S. 851 (1970).

[13] 518 F.2d 51 (9th Cir. 1975). In *Winsett*, the defendant, a probationer, had been arrested by the border patrol *near the California-Mexico line;* he was transporting 100 pounds of marijuana. The search was invalidated as a border search, and defendant's motion to suppress the evidence was granted when a criminal prosecution was brought on the basis of the seized marijuana. The fruits of the illegal search were held admissible in the probation revocation hearing, however, and testimony of the border patrol agent allowed.

[14] The Supreme Court has extended the *Morrissey* rule to probationers in Gagnon v. Scarpelli, 411 U.S. 778 (1973), treating parole and probation as similar conditions. Therefore the rationales which support a court's ruling in one area are often used interchangeably in the other. *See, e.g.*, Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975), dealing with parole, and its companion case, United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975), dealing with probation.

[15] The *Winsett* court was relying here on the Supreme Court's reasoning in United States v. Calandra, 414 U.S. 338, 347 (1974).

[16] *See* note 14 *supra.*

[17] *See* note 14 *supra.*

[18] United States v. Consuelo-Gonzalez, 521 F.2d 259, 268 (9th Cir. 1975) (Wright, J., dissenting). In general, the nature or degree of the search at issue, *i.e.*, whether it is a search of the person, residence or property of the parolee, has not been a factor in a court's selection of a theory for analysis.

[19] Other exceptions to the fourth amendment's warrant requirement are (1)border search exception, (2) automobile exception, (3) search incident to arrest exception, (4) hot pursuit exception, (5) plain-view doctrine, (6) emergency doctrine, and (7) doctrine of exigent circumstances. The last is an umbrella exception which may cover other specific exceptions but may also be broader in certain situations. See United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973), for a partial list. *See generally* 68 J. CRIM. L. & C. 412, 420–26 (1977).

[20] In People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972), the court held reasonable a probation condition which permitted a day- or night-time warrantless search by either the probation officer or other law enforcement personnel. The court did require that the condition be related (1) to the crime of the probationer, and (2) to criminal conduct or conduct reasonably related to future criminality. Since the probationer's offense in *Mason* was narcotics possession, the condition passed muster.

A North Carolina court was less restrictive in its view that a condition allowing warrantless search by law enforcement officers at reasonable hours could function as consent. State v. Mitchell, 22 N.C. App. 663, 207 S.E.2d 263 (1974). The court held, however, that where the police had broken down the door of the probationers' residence without giving notice and demanding entry first, the fruits of the search could not be used, and suppression of evidence so obtained was required.

[21] As the court in People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied*, 405 U.S. 1016 (1972), pointed out, the Supreme Court has held

have refused to allow evidence from searches conducted under the "authority" of conditions they have deemed overbroad[22] or have upheld searches under an overbroad condition only when the search at issue was conducted within narrower parameters.[23] These courts have insisted that the condition be reasonably related to the objectives of probation or parole and thus have moved away from the consent theory and back to measuring the reasonableness of the search under the fourth amendment's standards. A final group of courts have rejected the fiction of consent entirely, pointing out that a choice between submitting to the parole condition and remaining in jail is no choice at all.[24]

The second theory utilized to analyze parolee searches, reasonable expectations of privacy, was explained in *Latta v. Fitzharris.*[25] Because parole officers need to know a great deal about their charges in order to aid the rehabilitation of the parolee as well as to protect the public and because interviews alone cannot give the parole officer all the information he needs, it is necessary that a parolee and his home be subject to search when the "officer reasonably believes that such a search is necessary."[26] Thus, a parolee must *expect* his privacy rights to be reduced by his parole status.

The *Latta* court also relied on the administrative search theory,[27] noting that the Supreme Court in *United States v. Biswell*[28] and *Colonnade Catering Corp. v. United States*[29] had reasoned that a search carried out under authority of a statute in a heavily-regulated area (gun sales and liquor sales, respectively) could also be justified under the diminished reasonable expectations of privacy rationale.[30]

No matter what theory the courts have used to analyze parolee searches, there are, in addition, recurring questions which must be considered. These questions deal with the nature and objectives of the parole (or probation) system itself. The objectives of parole or probation are dual and occasionally at odds:[31] to aid in the rehabilitation of the offender *and* to protect the public from future criminal acts.[32] The question of who may search a parolee without a warrant has been resolved fairly uniformly, at least where the parolee is not deemed to have consented to a search by one other than his parole officer.[33] Courts agree that while a warrantless search by the parole officer may be related to the dual functions of parole, a similar search by police in general is not so related; the latter need the usual fourth amendment requirement of probable cause[34] to make a search.[35] It follows then that

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that fourth amendment rights may be waived. Zap v. United States, 328 U.S. 624 (1946).

[22] *See, e.g.,* Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App. 1976), and United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975). In *Tamez,* a condition calling for searches anytime by either probation or other law enforcement officers was found overbroad and unreasonable in light of the goals of probation to rehabilitate or reform the offender. *Consuelo-Gonzalez* dealt with the Federal Probation Act.

[23] In United States v. Gordon, 540 F.2d 452 (9th Cir. 1976), the court determined that the search itself had been conducted in a proper manner and for a proper purpose.

[24] *See, e.g.,* United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975).

[25] 521 F.2d 246 (9th Cir. 1975), *cert. denied,* 423 U.S. 897 (1976). *See also* State v. Williams, 486 S.W.2d 468 (Mo. 1972).

[26] 521 F.2d at 250.

[27] *Id.* at 251.

[28] 406 U.S. 311 (1972).

[29] 397 U.S. 72 (1970).

[30] For an argument against the administrative search theory, see United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155, 1160 (W.D.N.Y. 1975).

On Feb. 1, 1978, ILL. REV. STAT. ch. 38, § 1003-3-7, dealing with parole conditions, and § 1003-14-2, dealing with the authority of parole agents, went into effect. Such a statutory scheme might better justify the use of the administrative search doctine.

[31] Judge Wright in his dissent to United States v. Consuelo-Gonzalez, 521 F.2d 259, 270 (9th Cir. 1975), points out that the probation officer's manual suggests that he de-emphasize his law enforcement role by *not* being the officer to make the arrest of his probationer. The author of Note, *Fourth Amendment Limitations on Probation and Parole Supervision,* 1976 DUKE L.J. 71, 78, notes that time constraints and heavy case loads all too often lead a parole or probation officer to function as a policeman rather than as a counselor.

[32] United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975).

[33] *See* note 20 *supra.*

[34] The Supreme Court defined probable cause in Beck v. Ohio, 379 U.S. 89 (1964):

> Whether that arrest was constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the . . . [arrestee] had commited or was committing an offense.

Id. at 91.

[35] *See, e.g.,* Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied,* 423 U.S. 897 (1975); United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975); People v. Anderson, 536 P.2d 302 (Colo. 1975); State v. Simms, 10 Wash. App. 75, 516 P.2d 1088 (1973); People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied,* 381 U.S. 953 (1965). For an argument

when a parole officer is seen to have lost sight of his rehabilitative function and to have become merely another law enforcement officer, the general rule allowing parole officer searches must be qualified. Such was the reasoning of the court in *United States v. Hallman*,[36] where the parole officer was seen to be the "tool, agent, or device"[37] of the police, who used him to make a search they could not. But this distinction is not clearly defined, for in later cases searches in cooperation with police officials[38] or even instigated by the police[39] have been upheld.[40]

Another question courts have dealt with concerns the purpose of the parole officer's search. Did the search take place as a result of a suspicion of a parole violation held by the officer or was it merely a routine search? In general, courts have held that a routine search may not be made without a prior purpose in mind,[41] although the evidence seized need not always be related to the suspected parole violation.[42] Certainly a search may not be made for the sole purpose of harassment,[43] but precisely what sort of suspicion may justify the parole officer's search is an open question. Courts have run the gamut, from allowing a mere hunch,[44] through well-founded suspicion[45] and reasonable belief[46] all the way to probable cause.[47] The two extremes noted here are represented by *Latta v. Fitzharris*,[48] where the court held that a parole officer's hunch could form the basis of his reasonable belief that a search was necessary, and *State v. Cullison*,[49] where the Iowa Supreme Court determined that parolees' rights are no different from those of other citizens, and therefore the usual probable cause standard had to be met in order to validate a parolee search. Even with a stricter standard, it is necessary to keep in mind that the status of a parolee or probationer may greatly affect what conduct is "reasonable" in relation to him.[50]

It is against this background of sometimes conflicting theories, differing emphases and occasional murky semantic distinctions (*e.g.*, "reasonable belief," "well-founded suspicion," "hunch") that the highest courts of Alaska and New York made their decisions concerning parolee searches. The two

that it is unrealistic to allow only parole or probation officers to search for parole or probation violations where the officer may be located miles from, say, a small-town offender, see United States v. Consuelo-Gonzalez, 521 F.2d 259, 271 (9th Cir. 1975) (Wright, J., dissenting).

[36] 365 F.2d 289 (3d Cir. 1966). *See also* Commonwealth v. Brown, 240 Pa. Super. Ct. 190, 361 A.2d 846 (1976).

[37] 365 F.2d at 292.

[38] United States v. Gordon, 540 F.2d 452 (9th Cir. 1976); Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); People v. Anderson, 536 P.2d 302 (Colo. 1975); State v. Culbertson, 29 Or. App. 363, 563 P.2d 1224 (1977).

[39] United States *ex rel.* Santos v. N.Y. State Bd. of Parole, 441 F.2d 1216 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); People v. Fortunato, 50 App. Div. 2d 38, 376 N.Y.S.2d 723 (1975); People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965).

[40] For the history of complications concerning the parole officer search rule in California, see Note, *Fourth Amendment Limitations in Probation and Parole*, 1976 DUKE L.J. 71, 82–84.

[41] The court in United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155, 1158 (W.D.N.Y. 1975), found offensive a "routine," "unfettered" search by a parole officer who thought it was his duty to conduct such searches from time to time. *See also* Commonwealth v. Brown, 240 Pa. Super. Ct. 190, 361 A.2d 846 (1976). Professor James Haddad of Northwestern University School of Law has pointed out in a memorandum to the author that these decisions may conflict with the rule that a parole officer may not act as just another police officer. If a prior purpose is necessary to validate the search, that may increase the chances that the parole authority is being used as a guise to search for criminal evidence. The rule is also at odds with parole conditions which require periodic blood or urine tests.

[42] People v. Anderson, 536 P.2d 302 (Colo. 1975).

[43] Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971).

[44] Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975).

[45] State v. Simms, 10 Wash. App. 205, 516 P.2d 1088 (1973).

[46] Latta v. Fitzharris, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975); People v. Anderson, 536 P.2d 302 (Colo. 1975).

[47] In State v. Cullison, 173 N.W.2d 533 (Iowa), *cert. denied*, 398 U.S. 938 (1970), the Supreme Court of Iowa held that a parolee's fourth amendment rights are identical to those of ordinary citizens; thus the test was the fourth amendment's probable cause requirement. An Oregon court also decreed the probable cause standard for a parolee search conducted in the absence of a circumscribed condition. State v. Culbertson, 29 Or. App. 363, 563 P.2d 1224 (1977).

[48] 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975).

[49] 173 N.W.2d 533 (Iowa), *cert. denied*, 398 U.S. 938 (1970).

[50] *See, e.g.*, State v. Tarrell, 74 Wis. 2d 647, 247 N.W.2d 696 (1976), where the court said, "The application of a less stringent standard for the probation agent's search or seizure is appropriate because of the nature of probation." *Id.* at 655, 247 N.W.2d at 701.

The *Latta* court stated that a "parolee is in a different position from that of the ordinary citizen," 521 F.2d at 249, and the court in *Randazzo* pointed out that what is normally unreasonable may be changed by the status of parole. 282 F. Supp. at 12.

courts' approaches are quite different, although they share certain basic assumptions. The Alaska court's opinion is well-researched, with nearly all the existing case law on the subject cited and all the current theories discussed. The New York court's opinion is less structured, and, on the surface, there is less reliance on the reasoning of other courts. The reasoning of both courts does, however, start with the nearly universally accepted propositions that the constructive custody doctrine of parolee rights is no longer viable and that only a parole officer may be justified in making a warrantless search based on less than probable cause.

CASES

In *Roman v. State*,[51] heroin was found on the person of the parolee after a search by his parole officer.[52] This search occurred at an airport after the parole officer had received a tip that Roman had recently used heroin.[53] The parole officer did not conduct the search until after Roman had told him that he was unable to give a urine sample,[54] as he had consented to do under the original parole conditions. A supplemental condition, signed by Roman just before the search, permitted the search of his person. The court held that the facts of Roman's imminent departure and his inability to produce the urine specimen, in combination with the information that Roman had recently used heroin, constituted reasonable grounds for a belief on the part of the parole officer that a parole violation was taking place. The trial court's denial of defendant's motion to suppress the heroin evidence was thus affirmed.

The court reasoned that while a parolee's status was justification for treating him differently from other citizens, that justification existed only where "valid purposes of parole require restrictions."[55] The court rejected both the pre-*Morrissey*[56] constructive custody rationale regarding parolees' rights[57] and the consent-to-conditions theory,[58] which requires that valid consent must be freely given in light of all the facts and circumstances involved.[59] Freely-given consent in the parole situation was not believed possible by the court. The court also rejected the administrative-search theory,[60] pointing out that since there was no statutory regulatory scheme in the parole area, the situations were not analogous.[61]

The court, however, did accept the premise that a parolee has diminished expectations of privacy, since conditions to submit to search have been imposed upon him. Such conditions would be allowed only if they conformed with standards enunciated by the court; the search so stipulated must be (1) reasonably related to the crime the parolee had committed,[62] and (2) conducted by the parole officer, since only his "mandate . . . to rehabilitate . . . and to protect society . . . justifies an intrusion into the privacy of the released offender."[63] The court called upon the state parole board to prescribe specific rules governing the time and manner of permissible searches in order to achieve uniformity among offenders and to prevent abuse.

Finally, the court pointed out in a lengthy footnote that its holding—essentially that a reasonable belief is necessary for a parolee search where a condition to parole allows search—was not to apply to a parolee search in which there was no condition requiring searches. In that situation, the probable cause standard would be required.[64]

In *People v. Huntley*,[65] the parole officer's search of a parolee's apartment turned up drugs and drug paraphernalia. The parolee was obligated under a "standard"[66] parole condition to submit to the

[51] 570 P.2d 1235 (Alaska 1977).

[52] Roman had been paroled following a conviction for possession of heroin. *Id.* at 1237.

[53] Roman had appeared earlier at a parole revocation hearing and, as a result of that proceeding, was required to sign supplemental parole conditions. After receiving a tip from a federal narcotics agent that Roman had used heroin the previous night, the parole officer went to the airport where Roman was taking off for his job on the northern Alaska pipeline, planning to obtain Roman's signature on the supplemental conditions as well as check out the tip. Roman's departure was not itself a parole violation. *Id.* at 1237–38.

[54] The court noted that the parole officer was not sure whether Roman had refused to produce the specimen or had been physically unable to do so. *Id.* at 1238.

[55] *Id.* at 1240.

[56] 408 U.S. 471 (1972). *See* note 7 *supra*.

[57] See text accompanying note 8 *supra*.

[58] See text accompanying note 20 *supra*.

[59] 570 P.2d at 1241 n.17. The court's consent requirement was that spelled out by the Supreme Court in Bumper v. North Carolina, 391 U.S. 543 (1968), and Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[60] See text accompanying note 27 *supra*.

[61] 570 P.2d at 1242 n.21.

[62] *Id.* at 1242–43. The court pointed out that a condition requiring submission to a search of the person would be inappropriate for one convicted of manslaughter or reckless driving, but perfectly reasonable for one whose offense was narcotics dealing or concealing stolen property.

[63] *Id.* at 1242 n.20.

[64] *Id.* at 1244 n.29.

[65] 43 N.Y.2d 175, 401 N.Y.S.2d 31, 371 N.E.2d 794 (1977).

[66] The court characterized the standard condition, apparently imposed on all New York parolees, as one subjecting the parolee to "searches of his person, residence

search. A parole violation warrant had been issued for Huntley after he had twice failed to make required weekly reports to his parole officer, and it was pursuant to this warrant that Huntley had been arrested in his apartment immediately before the search. The purpose of the search was to confirm the parole officer's suspicion that Huntley might be concealing a gun in his apartment, given his conviction for armed robbery.

The trial court had denied defendant's motion to suppress the seized evidence, and the appellate court affirmed.[67] The state's highest court, affirming also, reasoned that while a parolee did possess fourth amendment rights, the status of parole "is relevant and may be critical"[68] in evaluating what governmental intrusion upon those rights is reasonable under the amendment. The court noted that if the parole officer is the individual conducting a search, the assessment of reasonableness is further qualified. While the standard for a parolee search by a police officer is that of probable cause, the court found that the standard for similar conduct by a parole officer involves a finding of whether that conduct was "rationally and reasonably related to the performance of the parole officer's duty."[69] The relation must be more than a rational connection; it must be "substantial."[70] The court then defined a parole officer's duties as two-pronged: "[h]e has an obligation to detect and to prevent parole violations for the protection of the public from the commission of further crimes;[71] he also has a responsibility to the parolee to prevent violations of parole and to assist him to a proper reintegration into his community."[72] The latter duty differentiates the parole officer from other law enforcement personnel, but the court added a caveat that the parole officer did not have "carte blanche" as a result of his position.[73]

Addressing the facts of the case at bar, the court held that the series of failures to report and the facts that defendant, though able-bodied, had quit his job, had lied about his employment status and had accepted welfare without permission, rendered the officer's search permissible. Also significant, the court added, was the fact that the parole officers were not seeking evidence for a criminal prosecution. Finally, the court noted that the standard authorization for searches—the condition to parole signed by every parolee—could not be considered a consent to any sort of search or a waiver of constitutional rights.

A comparison of the Alaska and New York cases reveals at least one major difference in analysis and result. While the Alaska court looked at the relationship between the condition the parolee had agreed to and the objectives of parole, the New York court instead concentrated on the relationship between the nature of parole and the search itself as conducted by the parole officer. The New York court touched on the parole condition only as an afterthought. The Alaska court in *Roman* sought to protect the parolee's rights by mandating standards for parole conditions, while the New York court in *Huntley* sought the same result by regulating the parole officer's conduct. *Roman* attempts to limit the areas of human judgment; *Huntley* relies more heavily on the discretion of parole personnel. The Alaska court's insistence that a parole condition allowing searches be related to the parolee's offense requires a before-the-fact assessment of how best to achieve the objectives of parole, while the New York court's requirement that the search be related, albeit "substantially," to the parole officer's duties involves an inevitably after-the-fact finding.

The two courts' opinions do, however, share similar notions concerning the theory underlying a parolee's fourth amendment rights. Both courts rejected the constructive custody and consent theories. Both courts agreed that unconstitutional conditions may not be imposed upon parolees and that a waiver of or consent to a deprivation of constitutional rights may not be found in a parole condition. While the New York court made no explicit statement of its theoretical rationale, its remarks concerning the relevance of a parolee's status to a determination of the legality of conduct involving him may imply a view that there is a diminished right to privacy. Since the Alaska court relied on the expectations of privacy theory, the courts may be in more agreement fundamentally than they appear to be on the surface.

Neither *Roman* nor *Huntley* extends the range of existing law on parolee searches. In fact, the two cases illustrate the wide variance in courts' approaches to this question, since they rely on quite

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or property." 371 N.E.2d at 798, 401 N.Y.S.2d at 35.

[67] 53 App. Div. 2d 820, 386 N.Y.S.2d 353 (1976) (Mem.).

[68] 371 N.E.2d at 797, 401 N.Y.S.2d at 34.

[69] 371 N.E.2d at 797, 401 N.Y.S.2d at 34.

[70] 371 N.E.2d at 797, 401 N.Y.S.2d at 34.

[71] It is unlikely that the court here means to intimate that all parole violations are criminal. In fact, many parole violations do not involve illegal acts: a parolee may be required not to leave a given area without permission or not to associate with certain people. Indeed, the parole violations in *Huntley* were not criminal.

[72] 371 N.E.2d at 797, 401 N.Y.S.2d at 34.

[73] 371 N.E.2d at 797, 401 N.Y.S.2d at 34.

different sorts of reasoning. The only discernible "trend" in this area of the law is a movement toward the middle ground between the *Latta v. Fitzharris*[74] holding that a parole officer's hunch may validate a parolee search and the Iowa Supreme Court's *State v. Cullison*[75] ruling that only probable cause may do so. The New York court essentially adopted the "reasonable parole officer"[76] standard of *Latta*, and the Alaska court, considering its dictum that only a reasonably circumscribed condition to submit to search can reduce the usual probable cause standard to reasonable belief is further along the spectrum toward the Iowa rule.

The reasonable expectations of privacy rationale used in *Roman* would seem to be both consonant with the *Morrissey* holding and the most realistic of the three theories of parolee search commonly used today.[77] Even within that theory, however, enormous variations in rulings are possible, depending on how restrictively a court views a parolee's expectations. Also, how firmly a court holds to the idea that parole is punishment may affect its judgment proportionately, and this is true whether the court is attempting to judge a written parole condition or the conduct of a parole officer. Thus, even agreement among courts upon one theory is not likely to yield uniform standards for parolee searches.

[74] 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975). The court in State v. Culbertson, 29 Or. App. 363, 563 P.2d 1224 (1977), characterized the *Latta* standard as just short of harrassment.

[75] 173 N.W.2d 533 (Iowa), *cert. denied*, 398 U.S. 938 (1970).

[76] The court in *Coleman*, 395 F. Supp. 1155, referred to the *Latta* standard in these words.

[77] *See* text accompanying note 18 *supra*.