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Rights of the Convicted Felon on Parole

Howard E. Hill
University of Richmond

RIGHTS OF THE CONVICTED FELON ON PAROLE

I. INTRODUCTION

The forfeiture of various civil rights upon conviction of a felony is no modern innovation. Conviction of a crime in the Roman Republic resulted in the deprivation of many of the same rights denied convicted felons today.[1]

Most statutes define a "felony" in terms of the possible punishment for a particular act rather than in descriptions of the actual conduct forbidden.[2] In Virginia "such offenses as are punishable with death or confinement in the penitentiary are felonies," while "all other offenses are misdemeanors."[3] One unfortunate enough to be convicted of a felony becomes subject to sanctions imposed by the state. In addition to bearing whatever punishment may be meted out at trial, the convicted felon perhaps surprisingly finds himself somewhat less than a citizen. By virtue of his new distinction he has lost certain civil rights and incurred particular civil disabilities. Upon parole[4] he will find additional restrictions placed on his freedom until his final release.

II. STATUTORY DEPRIVATION OF CIVIL RIGHTS

According to the Virginia Constitution, "[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."[5] This is the right most commonly denied the convicted felon.[6] The Virginia statute setting forth the qualifications for voter registration reiterates this provision.[7] In a case decided by the U.S. Supreme Court[8] similar provisions were

1. Note, *Criminals' Loss of Civil Rights*, 16 U. FLA. L. REV. 328, 329 (1963).

2. Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924, 925 (1969).

3. VA. CODE ANN. § 18.2-8 (Cum. Supp. 1978).

4. Parole is the conditional release of a convict from imprisonment, resulting in a discharge of the remainder of his sentence if he makes a good reentry to society and a return to prison to finish his term if he does not. It is usually within the administrative discretion of correctional authorities. *See* Morrissey v. Brewer, 408 U.S. 471, 477-78 (1972); Wolin, *After Release—The Parolee in Soceity*, 48 ST. JOHN'S L. REV. 1 (1973).

Probation, on the other hand, is a judicial act allowing one convicted of an offense to be awarded a suspended sentence and permitting him to remain at large as long as he exhibits good behavior. *See* L. CARNEY, PROBATION AND PAROLE: LEGAL AND SOCIAL DIMENSIONS 83-84 (1977).

5. VA. CONST. art. II, § 1.

6. Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924, 926 (1969).

7. VA. CODE ANN. § 24.1-42 (Repl. Vol. 1973).

8. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). "Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters." *Id.* at 51.

cited as being designed "to promote the intelligent use of the ballot,"[9] and it has been reiterated in later cases that such restrictions served that purpose.[10]

Concomitant to the loss of voting rights is the loss of the right to hold elective office. This loss is a result of a provision common to many state constitutions that one of the qualifications for holding a particular office is that one be qualified to vote for that office.[11] One already holding public office forfeits it upon the exhaustion of all his rights of appeal after conviction of a felony.[12]

The convicted felon also finds himself disqualified from serving as a juror in federal[13] and state[14] courts. Such statutory provisions have been deemed within the scope of a state's inherent powers.[15]

A few states have passed laws providing that an individual convicted of perjury is incompetent to serve as a witness.[16] In Virginia, however, a prior conviction of perjury or any other felony does not render one incompetent to testify, but one's credibility may be attacked by the admission of such evidence.[17]

Courts have been divided as to whether or not a parolee is included within statutes denying the convicted felon the right to bring a civil action.[18] The problem does not arise in Virginia since the convicted felon is subject to a disability to sue only during the period he is confined.[19]

In Virginia the convicted felon suffers a relatively minor loss if he is convicted under the motor vehicle laws, since he loses his driver's license.[20]

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9. *Id.*

10. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 673 (1966)(dissenting opinion Justice Black); Gray v. Sanders, 372 U.S. 368, 380 (1963).

11. *E.g.*, VA. CONST. art. II, § 5.

12. VA. CODE ANN. § 24.1-79.3 (Cum. Supp. 1978).

13. 28 U.S.C. § 1865(b)(5)(Cum. Supp. 1978).

14. VA. CODE ANN. § 8.01-338 (Repl. Vol. 1977).

15. *See, e.g.*, Duggar v. State, 43 So. 2d 860 (Fla. 1949); People *ex rel* Denny v. Traeger, 372 Ill. 11, 22 N.E.2d 679 (1939); Walter v. State, 208 Ind. 231, 195 N.E. 268 (1935).

16. *See, e.g.*, PA. STAT. ANN. tit. 28, § 315 (Pardon 1958); tit. 19, § 682 (Pardon 1964).

17. VA. CODE ANN. § 19.2-269 (Repl. Vol. 1975).

18. *See generally* Annot., 74 A.L.R.3d 680, 714-18 (1976).

19. VA. CODE ANN. § 8.01-2 (Repl. Vol. 1977). According to Almond v. Kent, 459 F.2d 200, 202 (4th Cir. 1972), only the confined felon's right to sue in an individual capacity is suspended. Upon motion of any interested party a committee is appointed for a prisoner which "may sue and be sued in respect to all claims or demands of every nature in favor of or against such convict." VA. CODE ANN. §§ 53-307 (Repl. Vol. 1974). Unlike many states, Virginia does not toll the statute of limitations during a period of incarceration; therefore, it is of paramount importance that a prisoner's committee institute any possible suits promptly. Almond v. Kent, 459 F.2d 200, 203 (4th Cir. 1972).

20. VA. CODE ANN. § 46.1-417 (Cum. Supp. 1978).

There exists a prohibition against reissuance of the license within one year after the Department of Motor Vehicle receives the record of conviction.[21]

In addition to loss of the above rights arising automatically by operation of law upon a felony conviction, the states may vest professional regulatory boards with the power to refuse the convicted felon permits or licenses required to engage in a particular occupation.[22] Such refusal, however, may not be based solely upon the "prior conviction of a crime, unless such criminal conviction directly relates to the trade, occupation or profession for which the permit . . . is sought."[23] If the prior conviction does not directly relate to the occupation concerned, the board may refuse to grant a permit "if based upon all the information available, including the applicant's record of prior convictions, it finds the applicant unfit or unsuited to engage in such occupation . . . ."[24] This right of the states to establish standards for entry into professions affecting the public interest has been acknowledged by the Supreme Court.[25]

The federal government also places professional limitations on the convicted felon, specifically in regard to military service.[26] By federal statute, a convicted felon is not permitted to enlist in any of the armed services unless the appropriate secretary authorizes an exception for a meritorious case.[27]

While in many states a felony conviction sharply limits the right to bear arms,[28] there exists no comparable statute in Virginia. However, under federal law it is illegal for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to receive,[29] "ship or transport any firearm or ammunition in interstate or foreign commerce."[30] The construction given to "interstate commerce" by

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21. *Id.*

22. *See generally* Note, *Criminals' Loss of Civil Rights*, 16 U. FLA. L. REV. 328 (1963); Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924 (1969).

23. VA. CODE ANN. § 54-1.15 (Cum. Supp. 1977).

24. *Id.*

25. Hawker v. New York, 170 U.S. 189 (1898). In reference to a state's power in this respect, the Court held that:

> It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practice . . . and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character. *Id.* at 191.

26. 10 U.S.C. § 504 (1975).

27. *Id.*

28. *See, e.g.*, FLA. STAT. ANN. § 790.23 (West Cum. Supp. 1977); N.Y. PENAL LAW § 400.00 (McKinney Cum. Supp. 1977-78).

29. 18 U.S.C. § 922(h)(1) (1976).

30. 18 U.S.C. § 922(g)(1) (1976).

two federal cases[31] makes the statute virtually applicable to any firearm; however, the convicted felon may make an application for relief from this law.[32]

III. Conditions of Parole

In addition to the statutory deprivation of particular civil rights, the convited felon on parole finds his freedom restricted by the conditions of his parole.[33] There exists in the United States today over fifty different conditions in the various parole systems, yet not one of them is universally employed in every jurisdiction.[34] The most prevalent conditions are those

31. In United States v. Bass, 404 U.S. 336, 347 (1971) the Court held that a nexus with interstate commerce must be shown for conviction of receipt or possession of a firearm under the federal statute. The Government had argued that that requirement applied only to the "transport" element. But in Scarborough v. United States, 431 U.S. 563 (1977), petitioner's argument that the nexus must be contemporaneous with possession was rejected. The Court stated that there was "no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. Furthermore, the Court felt that "Congress sought to reach possessions broadly . . . Indeed, it was a close question in *Bass*" whether any proof of a nexus was required. *Id.* at 577.

32. 18 U.S.C. § 925(a)(5)(c)(1976).

33. The courts are moving increasingly toward a greater recognition of the legal rights of prisoners and parolees. Many of the unreasonably restrictive conditions placed upon the parolee have been modified or eliminated by court decisions. The prediction is that this trend will continue and that conditions will tend to be reduced to the absolute minimum. Parole, however, can never be quite free from conditions. Conditions are the barometer by which parole adjustment is measured. The regulatory conditions, however, should be few, rational, and constitutional. They should be designed to facilitate rehabilitation. They should not serve merely as handicaps imposed by a rigid paroling authority.

L. Carney, Probation and Parole: Legal and Social Dimensions 168 (1977)[hereinafter cited as Carney].

34. Among the several states, the number of conditions have ranged from in excess of twenty in New Mexico, to four in progressive Washington.

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Illinois, Rhode Island, and New York have an oppressive number of conditions, each having in excess of sixteen, with multiple subsections. Georgia, Michigan, and Oregon are in the moderate range, with eleven, ten, and nine, respectively. Colorado, Idaho, North Dakota, and Wisconsin have but six conditions. Massachusetts has five broad-category regulations. The remaining states average in the neighborhood of fourteen conditions.

Carney, *supra* note 33, at 171. In Virginia there exist eleven general parole conditions. The parolee agrees that he will: (1) obey all municipal, county, state, and federal laws and ordinances; (2) report any arrests, including traffic tickets, within three days to the district parole officer; (3) maintain regular employment and support himself and his legal dependents to the best of his ability; (4) obtain written permission from his parole officer before buying or operating a motor vehicle; (5) submit in person or by mail a written report at the end of each month to his parole officer; (6) permit his parole officer to visit his home or place of

"regulating the parolee's movements (including interstate travel), involvement in criminal activities, drug abuse, association with undesirable companions, and the possession of deadly weapons. . . ."[35] Many states also provide for special conditions[36] permitting the imposition of special restrictions "such as prohibition against contacting a former wife, traveling to a particular area, or making overtures to the victims of the commitment offense."[37]

The constitutionality and legality of parole conditions have not been subjected to frequent litigation. Parole conditions have essentially remained unchallenged except for the areas of search and seizure (discussed in detail below) and freedom of speech and assembly.[38] In *Arciniega v. Freeman*[39] the Supreme Court held that parole conditions restricting the right of association are valid only as long as the restriction furthers rehabilitation.[40] It is, therefore, conceivable that other conditions such as those restricting travel and marriage could be struck down as violative of a judicially declared fundamental right,[41] unless the state shows that the conditions serve legitimate and demonstrated correctional objectives.[42]

IV. Search and Seizure Rights

As mentioned above, the fourth amendment[43] rights of parolees regard-

employment; (7) follow his parole officer's instructions and be truthful and cooperative; (8) not use alcoholic beverages to excess; (9) not illegally use, possess, or distribute narcotics, dangerous drugs, controlled substances or related paraphernalia; (10) not use, own, possess, transport or carry a firearm; and (11) not change his residence without the permission of his parole officer nor will he leave Virginia or travel ouside of a designated area without permission. Virginia Parole Board, Order of Release and Conditions of Parole, Parole Board Form 1 Revised 7/1/77).

35. Carney, *supra* note 33, at 172. Other common conditions regulate marriage, require steady employment, and restrict drinking and driving privileges. *Id.* at 172-74.

36. The Virginia Parole Board may impose special conditions of parole relative to travel, program participation, or special treatment. Virginia Parole Board Policy Manual 13 (April 20, 1976).

37. Carney, *supra* note 33, at 172-74.

38. *See, e.g.*, Porth v. Templar, 453 F.2d 330 (10th Cir. 1971); Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971); Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970).

39. 404 U.S. 4 (1971).

40. Except for Virginia and Wisconsin every state provides for the restriction of a parolee's association with "undesirables." Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 Crime & Delinquency 272-73 (1969).

41. *See* Wolin, *After Release—The Parolee in Society*, 48 St. John's L. Rev. 1, 8-9 (1973).

42. *See* Note, *Fourth Amendment Limitations on Probation and Parole Supervision*, 1976 Duke L.J. 71, 75-76.

43. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

ing search and seizure constitute one of the areas the courts have recently subjected to close examination. Previously the courts had virtually denied fourth amendment guarantees to parolees by invoking the "constructive custody"[44] and "act of grace"[45] doctrines or by relying on the parolee's express waiver of his rights.[46] For purposes of this analysis, the cases in which there existed the parolee's express waiver of his search and seizure rights will be disregarded, and the focus will be on those cases where such waiver conditions have not been imposed.

The first case to suggest that a released offender should not be completely denied protection of the fourth amendment was *Martin v. United States.*[47] There the court upheld a warrantless search of a probationer's garage, but acknowledged that the fourth amendment's standard of reasonableness must be applied in the evaluation of such searches.

Today, the varying approaches taken by the courts center primarily on the character of the standard of reasonableness to be applied.[48] All jurisdictions are in agreement that searches of parolees conducted by actual law enforcement officials must comply fully with the provisions of the fourth amendment. There is a split of opinion, however, when the parole officer conducts the search. The split evolves from differing attitudes toward the parole officer-parolee relationship and the nature of the parolee's conditional release. A distillation of opinion results in basically three differing views. The first view maintains that a warrantless search conducted by a parole officer is reasonable even in the absence of probable or reasonable cause.[49] The second view maintains that such a search is valid only if the

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shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. U.S. CONST. amend. IV.

44. *See, e.g.*, People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965). The thrust of the doctrine is that the parolee is still in custody, and, therefore, his rights should be "no different than one who remains in confinement." *Id.* at 149-50, 40 Cal. Rptr. at 104.

45. *See, e.g.*, Rose v. Haskins, 388 F.2d 91, 95-97 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10, 12-13 (S.D.N.Y. 1968). This doctrine relies on the premise that the government has no mandatory obligation to grant parole; therefore, the parolee has no standing to contend he is being deprived of his constitutional rights.

46. *See, e.g.*, People v. Mason, 5 Cal. 3d 759, 766, 488 P.2d 630, 634, 97 Cal. Rptr. 302, 306 (1971), *cert. denied*, 405 U.S. 1016 (1972); Marts v. Superior Court, 49 Cal. App. 3d 517, 519-20, 122 Cal. Rptr. 687, 689 (1975).

47. 183 F.2d 436 (4th Cir.), *cert. denied*, 340 U.S. 904 (1950).

48. *See generally* Annot., 32 A.L.R. FED. 155 (1977).

49. "Reasonable cause is said to require less evidence than probable cause, but requires some objective evidence sufficient to at least stimulate the parole officer's suspicion." *Id.* at 160.

parole officer has at least reasonable cause to believe that the parolee is violating or is about to violate the conditions of his parole.[50] Finally, the third view advocates a rigid, unchanging standard of reasonableness, applying equally to parolees and ordinary citizens.[51] A recent Fourth Circuit case[52] indicates, however, that there is an emerging fourth view. This approach appears to incorporate the concept of "variable probable cause"[53] with a warrant requirement.

The courts of California have adopted the first approach, essentially "upholding conditions which grant the correctional officer unlimited power to search."[54] In *People v. Hernandez*[55] a California court concluded that the requirement of reasonable cause is not applicable to a search of a parolee conducted by his parole officer.[56] The court held as follows:

> For the purpose of maintaining the restraints and social safeguards accompanying the parolee's status, the authorities may subject him, his home and his effects to such constant or occasional inspection and search as may seem advisable to them . . . . He may not assert [Fourth Amendment] guarantees against the correctional authorities who supervise him on parole.[57]

Unfortunately, there exists an inherent difficulty in the parole officer-policeman distinction: "the difficulty of protecting a released offender from police abuses without discouraging cooperation between correctional authorities and law enforcement officials."[58] For example, in *People v. Thompson*[59] a warrantless search was upheld even though it was precipitated by information supplied by the police and the parole officer involved

50. *Id.*

51. *Id.*

52. United States v. Bradley, 571 F.2d 787 (4th Cir. 1978).

53. *See* Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers,* 51 N.Y.U.L. REV. 800 (1976).

> The hallmark of the . . . variable probable cause standard is flexibility within the confines of historical fourth amendment requirements. That flexibility enables the standard to be tailored to the special problems encountered in particular types of searches . . . . Although parole status may justify the issuance of a search warrant on a reduced showing of probable cause, parole status alone should not justify the issuance of a warrant. *Id.* at 826.

54. Note, *Fourth Amendment Limitations on Probation and Parole Supervision,* 1976 DUKE L.J. 71, 81.

55. 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied,* 381 U.S. 953 (1965).

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

57. *Id.*

58. Note, *Fourth Amendment Limitations on Probation and Parole Supervision,* 1976 *Duke L.J.* 71, 82.

59. 252 Cal. App. 2d 76, 60 Cal. Rptr. 203 (1967), *cert. denied,* 392 U.S. 930 (1968).

was not the parolee's own. On the other hand, in *People v. Coffman*,[60] a warrantless search initiated by the police was invalidated even though a parole officer had accompanied them. The court concluded the police were simply taking advantage of the parole officer's ability to avoid the requirement of probable cause.

The most widely accepted view seems to be that a parole officer's warrantless search of a parolee is valid if the parole officer has reasonable cause to believe the parolee is violating or is about to violate the conditions of his parole. The nature of this standard of reasonableness, however, varies widely.

In *People v. Anderson*[61] the court concluded that as long as a parole officer has "reasonable grounds to believe that a parole violation has occurred" a search warrant is not required.[62] The Supreme Court of Missouri held that a search was not unreasonable where the parole officer possessed "sufficient information to arouse suspicion" of a parole violation.[63] The court in *State v. Simms*[64] held that an anonymous tip was not sufficient to create the "well founded suspicion" of a parole violation necessary for a warrantless parole officer search.[65] Finally, in *People v. Santos*[66] the appropriate standard required "a reasonable suspicion that the undertaken search would reveal evidence of parole violations."[67]

The Ninth Circuit, in *Latta v. Fitzharris*,[68] adopted an approach somewhat different from those above. The parole officer, having a reasonable belief that his parolee, Latta, had violated the conditions of his parole, arrested him at the house of a friend. There was no quarrel with the validity of the arrest. Six hours after the arrest, however, the parole officer

60. 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969).

61. 536 P.2d 302 (Colo. 1975).

62. *Id.* at 305. The court felt that "the measure of protection afforded to a parolee lies in a determination of what constitutes a reasonable search under the circumstances." *Id.* Unfortunately, the court provided no insight as to what those circumstances might be.

63. State v. Williams, 486 S.W.2d 468, 473 (Mo. 1972). It should be noted, however, that in addition to the information possessed by the parole officer, the court considered other factors in its determination of reasonableness, specifically, the parole officer-parolee relationship and the parole officer's responsibility to the public.

64. 10 Wash. App. 75, 88, 516 P.2d 1088, 1096 (1973). The court concluded that:

> [T]he Fourth Amendment requires, as a minimum, that before a parole officer may forcibly enter the residence of a parolee without a warrant, upon the tip of an informer, the information upon which the officer acts must at least carry some indicia of reliability to support an inference that the informant is telling the truth.

65. *Id.*

66. 82 Misc. 2d 184, 368 N.Y.S.2d 130 (Sup. Ct. 1975).

67. *Id.* at 192, 368 N.Y.S.2d at 138, *citing* People v. Randazzo, 15 N.Y.S. 2d 526, 254 N.E.2d 549 (1964).

68. 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975).

went to Latta's own home and conducted a warrantless search which yielded a four and one-half pound brick of marijuana. From a conviction of possession of marijuana with intent to distribute, Latta appealed, alleging that this warrantless search of his home violated his fourth amendment rights.

In reply, the court noted that the traditional view of parolees' rights espoused in *Hernandez* was not without its limits and that "under recent decisions parolees are entitled to Fourth Amendment protection in certain discrete situations."[69] After a dissertation on the nature and purposes of the parole system, the court articulated its standard of reasonableness:

> [T]he parolee and his home are subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties . . . . His decision may be based upon specific facts, though they be less than sufficient to sustain a finding of probable cause. It may even be based on a "hunch," arising from what he has learned or observed about the behavior and attitude of the parolee.[70]

In addressing the warrant requirement the court relied on precedent holding that a parole officer need not obtain a warrant before searching his parolee or his parolee's home.[71] The court felt its decision was consistent with two administrative search cases in which the Supreme Court ruled the warrant requirement was unnecessary.[72] In the court's view the uniqueness of the parole officer-parolee relationship justified the decision and provided a suitable substitute for the warrant requirement.[73] A final consideration was the probability that if a warrant was required, the minimal showing necessary to obtain it under the court's articulated standard of reasonableness would "reduce the warrant to a paper tiger" and afford "no real protection to the parolee."[74]

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69. *Id.* at 248.

70. 521 F.2d 246, 250 (9th Cir.), *cert. denied,* 423 U.S. 897 (1975). The court's rationale was that a parole officer "ought to know more about the parolee than anyone else but his family"; therefore, he is "in a better position than anyone else to decide whether a search is necessary." *Id.* In the court's view, a grant of such powers to the parole officer was not unreasonable under the fourth amendment.

71. *Id.*

72. In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Supreme Court held that a warrantless nonforcible entry of business premises to search for illegal liquor as provided by 26 U.S.C. § 5146(b) was valid. United States v. Biswell, 406 U.S. 311 (1972), held lawful a warrantless non-forcible search conducted in accordance with section 923(g) of the Gun Control Act of 1968.

73. 521 F.2d 246, 250-51 (9th Cir.), *cert. denied,* 423 U.S. 897 (1975). *See* Note, *Search and Seizure Rights of Parolees and Probationers in the Ninth Circuit,* 44 FORDHAM L. REV. 617, 627 (1975).

74. 521 F.2d 246, 251-52 (9th Cir.), *cert. denied,* 423 U.S. 897 (1975).

Despite this low standard of reasonableness the court asserted that searches for the purposes of harassment or intimidation could not be upheld, nor would "full-blown searches of parolees' homes" conducted by parole officers "whenever and as often as they feel like it" would be lawful.[75]

The view that parolees are entitled to the full fourth amendment rights of ordinary citizens has enjoyed limited acceptance. The only case to forthrightly adopt this approach was *State v. Cullison*,[76] in which the court found that a parole officer's warrantless search of a parolee's quarters was unreasonable. The court held that a parole officer must obtain a warrant upon a showing of probable cause before conducting such a search.[77]

A recent case[78] from the Fourth Circuit indicates that a new approach is emerging. This approach modifies somewhat the rigid probable cause requirement by its apparent adoption of a "variable probable cause" concept.[79] In *United States v. Bradley*[80] a parole officer received several calls from the landlady of her parolee, Bradley, informing her that Bradley possessed a loaded firearm. Such possession was in violation of federal law,[81] as well as the terms of his parole. Approximately six hours after receiving this information the parole officer went to Bradley's boarding house room and without securing either a search warrant or Bradley's consent conducted a search which yielded a loaded firearm. Upon conviction Bradley appealed, alleging that the warrantless search violated his fourth amendment rights. The Government urged the court to adopt the approach of the Ninth Circuit in *Latta v. Fitzharris* and hold that no warrant was required.[82] In rejecting the view of the majority in *Latta*, the court approved the "well-reasoned dissent" of Judge Hufstedler[83] and

75. *Id.* at 252.

76. 173 N.W.2d 533 (Iowa 1970), *cert. denied*, 398 U.S. 938 (1970). Although the Court did not elaborate on its finding a similar result seems to have been reached in Brown v. Kearny, 355 F.2d 199 (5th Cir. 1966).

77. 173 N.W.2d 533, 537-39 (Iowa 1970), *cert. denied*, 398 U.S. 938 (1970).

78. United States v. Bradley, 571 F.2d 787 (4th Cir. 1978).

79. *See* note 53 *supra*.

80. 571 F.2d 787 (4th Cir. 1978).

81. 18 U.S.C. § 922(h)(1)(1976). *See* notes 26 and 27 *supra*.

82. 571 F.2d 787, 789 (4th Cir. 1978).

83. *Id.* This endorsement of Judge Hufstedler's dissent indicates the court has adopted the "variable probable cause" concept. Hufstedler reasoned that while

> the Fourth Amendment requires a warrant to search, it does not dictate that the probable cause necessary to justify issuance of a warrant to a parole officer to search his parolee's home must be the same as that governing issuance of a warrant to a policeman to search a home. Latta v. Fitzharris, 521 F.2d at 255 (Hufstedler, J. dissenting).

Hufstedler felt that a parole officer should be given a warrant to search his parolee's residence

adopted the following approach:

> We therefore hold that unless an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer.[84]

The court maintained that reliance by the majority in *Latta* on two administrative search cases upholding warrantless searches was misplaced.[85] Rather, the court felt that *Camara v. Municipal Court*[86] which required "prior judicial approval to unconsented searches even in the face of reduced privacy interest" was the more persuasive authority,[87] and that the cases relied on by the *Latta* majority constituted narrow exceptions to that rule.[88]

Also rejected by the court was the contention in *Latta* that a warrant requirement would unreasonably disrupt the parole officer-parolee relationship. Relying again on Judge Hufstedler's dissent, the court felt that "abuse of discretion is more easily prevented by prior judicial approval than by *post hoc* judicial review."[89]

After asserting that the warrant requirements of the fourth amendment were applicable, the *Bradley* court considered the Government's contention that there existed exigent circumstances constituting an established

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upon a showing of probable cause "sufficiently flexible to accommodate the parole officer's supervisory obligations, but not so loose as to offer the parolee and his family no protection from arbitrary intrusions by the parole officer or from searches that are unjustifiably broad." Latta v. Fitzharris, 521 F.2d at 257 (Hufstedler, J., dissenting). Unlike the *Latta* majority, Hufstedler felt that such a requirement did not reduce the warrant to a "paper tiger." Rather, the consideration by the issuing magistrate of additional factors such as the extent of the violation of privacy, the type of parole violations suspected, and the existence of less intrusive means to fulfill the parole officer's supervisory responsibilities would provide a sufficient showing to maintain the substance and statute of the warrant requirement. *Id.*

84. 571 F.2d 787, 789 (4th Cir. 1978).

85. *Id.*

86. 387 U.S. 523 (1967). "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* at 528-29. The Supreme Court seemingly gave its imprimatur to the concept of "variable probable cause" by rejecting arguments that varying the probable cause test would authorize a "synthetic search warrant" and thereby "lessen the overall protections of the Fourth Amendment." 387 U.S. 523, 538-39 (1967). The Court held that "reasonableness is still the ultimate standard" and "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." 387 U.S. 523, 539 (1967).

87. 571 F.2d 787, 789-90 (4th Cir. 1978).

88. *Id.* at 789.

89. *Id.* at 790.

exception to those requirements. This argument was summarily dismissed by the court, since the parole officer had waited six hours after receipt of the information before conducting her search.[90]

If approbation of Judge Hufstedler's dissent was not enough to show that the court had adopted the concept of "variable probable cause,"[91] further evidence was provided in footnote one of the opinion. There the court conceded the presence of probable cause for the search in the case at hand; however, the court wanted it clearly understood that by that concession they were not implying "that the probable cause for a warrant to search a parolee's person or home is as demanding as the probable cause for a warrant to search a suspect's person or home in an ordinary criminal investigation."[92]

V. CONCLUSION

While the convicted felon on parole has historically been subject to the deprivation of particular civil rights, courts are split as to the extent of his entitlement to the guarantees of the fourth amendment. A few courts grant the parole officer unlimited power to search. At the other extreme are those courts which advocate a rigid, unchanging standard of probable cause applying equally to parolees and ordinary citizens. Both of these views appear clearly unsatisfactory. The latter denies the public suitable protection from the possible transgressions of a released convict, while the former completely eviscerates the guarantees of the fourth amendment. The most widely accepted view requires that the parole officer have reasonable cause to believe the parolee is violating or about to violate the terms of his parole, but even this approach provides only "illusory protection for the fourth amendment rights of . . . parolees."[93]

A view recently adopted by the Fourth Circuit offers the best balanced standard. It modifies the rigid approach by the combination of a warrant requirement with "variable probable cause," permitting "a judge to consider parole status as a justification for issuing a warrant upon a reduced showing of probable cause."[94] The warrant requirement is intended to serve as "a substantial deterrent to impulsive and arbitrary official conduct."[95] Contrary to the assertions of the *Latta* majority, there is nothing to indi-

90. *Id.*

91. *See* note 81 *supra.*

92. 571 F.2d 787, 788 (4th Cir. 1978).

93. Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U.L. REV. 800, 825 (1976).

94. *Id.* at 826.

95. *Id.* at 827.

cate that the warrant requirement should significantly impair the parole officer-parolee relationship, rather it should strengthen the relationship by promoting trust and confidence. This approach appears best suited to fulfill the needs of the public while safeguarding constitutional guarantees. Future cases of this nature should result in the adoption of the *Bradley* standard by other jurisdictions.

Howard E. Hill