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COMMENTS


Parole officers have long enjoyed broad powers to search parolees under their supervision.1 In *United States v. Bradley*, the Fourth Circuit Court of Appeals extended to parolees significant protection from warrantless searches of personal residences by parole officers. This protection previously had not been provided by any federal court or by the highest court of any state.2

*Bradley* held 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 . . . .”4 The warrant requirement is not obviated even when, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer.5 Noncompliance with this procedural safeguard results in the exclusion of evidence obtained in the search from any new criminal prosecution.6 By excluding illegally obtained evidence from new prosecutions, the court in *Bradley* extended to parolees the same fourth and fourteenth amendment protections afforded other citizens, with one possible variation. The court did not decide whether the standard of probable cause that must be shown to secure a warrant to search a parolee’s home is as rigorous as must be shown for a warrant to search a suspect’s home in an ordinary criminal investigation.7

Appellant George Bradley was paroled in 1976 after serving four years of a sentence received as a result of a state conviction.

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2. 571 F.2d 787 (4th Cir. 1978).
4. 571 F.2d at 789.
6. 571 F.2d at 790 n.6. The court was not presented with and therefore did not address the exclusion of illegally obtained evidence at a parole revocation hearing. Id. In *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978), the court did discuss the exclusion of illegally obtained evidence at a probation revocation hearing. See text accompanying notes 67-68 infra.
7. See text accompanying notes 16-25 infra.
Pertinent conditions of his parole agreement included that he obey all municipal, state, and federal laws, that he refrain from possession of a firearm without permission, and that he permit his parole officer to visit his home or place of employment. Consent to searches during these visits was not a parole condition. Early one morning Bradley's parole officer, Karen Murphy, received information from a reliable informant that Bradley was in possession of a loaded firearm. Six hours later, at approximately nine in the morning, Murphy and another parole officer conducted a search of Bradley's residence. No warrant had been sought. During the search, Murphy found a firearm in a suitcase that was located behind a door.

In addition to having his parole revoked, Bradley was convicted of violating federal firearms laws. His only assignment of error on appeal was that the district court denied his motion to suppress introduction of the firearm at that trial as the fruit of an unlawful search and seizure. The court of appeals reversed and remanded.

Except in California, the search and seizure rights of parolees infrequently have been litigated. Courts that have considered the issue generally agree that a parolee's fourth amendment rights are more limited than those of an ordinary citizen, and that although a warrantless search of a parolee's home must be reasonable under the fourth amendment, the standards of reasonableness which apply are not as rigorous as those applied to an ordinary person. Two considerations that underlie decisions of the courts are the extent of police, as opposed to parole officer, partic-
ipation in a warrantless search of a parolee's home, and the quantum of probable or reasonable cause required prior to initiation of a warrantless search of a parolee's home.

In examining the effect of police participation on the validity of parole searches, it is important to note that warrantless searches by a parole officer of a parolee's person and premises are often justified by the special relationship that exists between the two. Because this special relationship is nonexistent between a police officer and a parolee, police must afford parolees the same constitutional protections that are afforded ordinary citizens. This distinction makes the role of police critical in determining the validity of a warrantless search of a parolee. When police officers are merely assisting, rather than directing, a parole officer in conducting a warrantless search of a parolee's home, such assistance will not invalidate the search. In all but one reported case, warrantless searches by parole officers, acting on their own knowledge or suspicion have been held to be reasonable, even though the parole officers were accompanied by police officers.

Courts also differ greatly on the quantum of probable cause that must be present to conduct a valid warrantless search of a parolee's residence. The view of California courts, among others, is that neither probable nor reasonable cause is required if the parole officer conducts the search in good faith, at a reasonable hour, and in a manner that is not otherwise arbitrary or oppressive. This approach, which offers the parolee protection from only the most egregious fourth amendment violations, was adopted by the Ninth Circuit in Latta v. Fitzharris. The plurality in Latta held that even a mere prior hunch can justify search by a parole officer and that "[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." This view is the least protective of the parolee's rights

15. For the exception, see State v. Cullison, 173 N.W.2d 533 (Iowa), cert. denied, 398 U.S. 938 (1970).
17. 521 F.2d 246 (9th Cir.), cert. denied, 423 U.S. 897 (1975).
18. Id. at 250.
19. Id.
in the spectrum of those views advanced by the various jurisdictions.

More protective is the majority view, that reasonable cause is required to conduct a valid warrantless search of a parolee’s home. 20 The standard announced in People v. Anderson 21 requires that the parole officer have “reasonable grounds to believe that a parole violation has occurred.” 22 In Anderson the court employed the rationale that “the parole authority must be vested with the power to investigate a parolee to ascertain whether a parole violation has occurred if it is to fulfill its statutory function.” 23 Though falling far below the traditional probable cause standard, this reasonable cause view does provide the parolee with meaningful fourth amendment protection.

At the other, most protective, end of the spectrum, only one jurisdiction prior to Bradley had indicated clearly that parolees are protected by the same fourth amendment standards that protect other citizens. In State v. Cullison, 24 the Iowa Supreme Court held that a parolee in Iowa loses only two constitutional rights: to hold public office and to vote. The court thus implied that parolees were afforded full fourth amendment protections. The court, however, invalidated a search because “the pre-search reasonable or probable cause, essential to its validity, was not present or established,” 25 not because a warrant was not obtained. The distinction is critical because the Iowa court asserted that all fourth amendment rights apply to parolees, but by its loose wording, indicated that a warrantless search of a parolee might be held valid if prior reasonable or probable cause exists. It may be questioned, therefore, whether the standard announced in Cullison differs from that developed in Anderson. The final point that should be made in examining the development of case law prior to Bradley, is that no jurisdiction had held invalid a search conducted by a parole officer alone, acting either on his personal knowledge 26 or on a tip from persons other than the police. 27

22. Id. at 305.
23. Id. For a discussion of other rationales employed by courts to justify stripping parolees of their fourth amendment protections, see Note, supra note 5, at 704-20.
25. Id. at 540.
27. E.g., People v. Taylor, 253 Cal. App. 2d 574, 61 Cal. Rptr. 638 (1967). See Annot.,
The question presented in Bradley was of first impression in the Fourth Circuit. Though contrary to the great weight of decisions from other jurisdictions, the holding that a warrant is required to search a parolee's residence is not totally without support. The difficulty with the Bradley opinion is that the rationale of the court does not appear to be fully developed. A complete understanding of both the plurality and dissenting opinions of the Ninth Circuit in Latta is essential to establish a proper framework for analyzing Bradley, because the Fourth Circuit drew heavily from the dissent in that case.

In Latta a parole officer had reason to believe that Latta was violating the terms of his parole and arrested him at the house of an acquaintance. When arrested Latta was holding a pipe containing marijuana. Six hours after the arrest, the parole officer, accompanied by two police officers, conducted a warrantless search of Latta's home, which was located approximately 30 miles from the scene of the arrest. Latta did not contend that the parole officer was acting as "a stalking horse for the police." A four and one-half pound brick of marijuana discovered during the search was used in Latta's subsequent state conviction for possession with intent to distribute. A plurality of the court held that searches of parolees must pass the fourth amendment standard of reasonableness, that the purposes of the parole system and resultant duty of the parole officer may justify a search on less than probable cause grounds, even on a hunch, and that a warrant was not required. In holding that a warrant was not required, the court drew support from Supreme Court cases that upheld warrantless administrative searches, and from the prop-

29. The legality of the arrest was not questioned. 521 F.2d at 247.
30. Id. See text accompanying notes 13-15 supra.
31. 521 F.2d at 248-49.
32. Id. at 250.
33. Id.
34. United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United
osition that the traditional authority of the parole officer coupled with a minimum showing of cause before a magistrate would reduce the warrant to a "paper tiger." The court also held that because the search was not unreasonable in a constitutional sense, the use of the evidence in a new criminal prosecution was not proscribed.

The plurality in Latta seemed to approach the problem backwards. It first determined the standards of reasonableness and then determined whether a warrant was mandatory if those standards were met. The court in Bradley, incorporating Judge Hufstedler's dissent in Latta, took a more conventional approach by ascertaining first whether a warrant was required.

Though not articulating each step of logic, the Fourth Circuit apparently began with the proposition that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Those exceptions to the warrant requirement fall into three categories: "consent searches, a very limited class of routine searches and certain searches conducted under circumstances of haste that render the obtaining of a search warrant impracticable." Absent one or more of these limited exceptions, the test is not solely whether the search was reasonable, but whether it was reasonable to secure a warrant. With this groundwork established, the court in Bradley went on to attack the various justifications for obviating the warrant requirement that were offered by the plurality in Latta.

The Fourth Circuit found unpersuasive the argument of the plurality in Latta that the special relationship between the parolee and parole officer and society's interest in having the parolee properly supervised obviated the need for a warrant. Though it recognized the important governmental interests involved, the court in Bradley denied that these interests provided

35. 521 F.2d at 252.
36. Id.
39. 521 F.2d at 255-56 (Hufstedler, J., dissenting).
adequate justification for abrogating the constitutional rights of parolees.\textsuperscript{40}

The court in \textit{Bradley} was equally unpersuaded by the attempt of the plurality in \textit{Latta} to analogize the warrantless search of a parolee's home to the limited exceptions carved out of the warrant requirement by the Supreme Court for administrative inspections or searches.\textsuperscript{41} The general rule on whether a warrant is required in an administrative search was announced in \textit{Camara v. Municipal Court}.\textsuperscript{42} In \textit{Camara} a health inspector was required to inspect residences to ensure compliance with minimum housing standards. One resident denied the inspector entrance and was subsequently convicted for refusing to allow the inspection. The Supreme Court reversed, holding that a warrant was required when voluntary admittance was denied,\textsuperscript{43} even though the likelihood of abuse was small and the governmental interest in securing minimum standards was great.

The Fourth Circuit also rejected the view of the plurality in \textit{Latta} that \textit{Camara} was inapposite and that the parole cases were controlled by the principles announced in \textit{Colonnade Catering Corp. v. United States}\textsuperscript{44} and \textit{United States v. Biswell}.\textsuperscript{45} In \textit{Colonnade} and \textit{Biswell}, the Court announced a narrow exception to the \textit{Camara} rule: a warrant is not required when express statutory authorization exists for a warrantless search\textsuperscript{46} and when the discretion of the administrative official is suitably restricted by either the authorizing statute or an implementing regulation.\textsuperscript{47}

Though it conceded that parole searches might be similar to administrative searches, the court in \textit{Bradley} found an absence of statutory authority or guidelines.\textsuperscript{48} Following the reasoning of the dissent in \textit{Latta}, the court concluded that judicial decisions are inadequate substitutes for the missing statutes and regulations.\textsuperscript{49} Parole searches, therefore, cannot be forced into the limited \textit{Colonnade-Biswell} exception.

\textsuperscript{40} 571 F.2d at 790.
\textsuperscript{42} 387 U.S. 523 (1967).
\textsuperscript{43} \textit{Id.} at 540.
\textsuperscript{44} 397 U.S. 72 (1970).
\textsuperscript{45} 406 U.S. 311 (1972).
\textsuperscript{46} In \textit{Biswell}, the authorizing statute was 18 U.S.C. \textsection 921 (1976). In \textit{Colonnade}, the authorizing statute was 26 U.S.C. \textsection 5146(b) (1976).
\textsuperscript{47} 406 U.S. at 317-18.
\textsuperscript{48} 571 F.2d at 789.
\textsuperscript{49} 521 F.2d at 256 (Hufstedler, J., dissenting).
Cases other than those mentioned in Bradley and Latta suggest additional reasons why Colonnade-Biswell cannot control. In Almeida-Sanchez v. United States the Supreme Court invalidated a warrantless search by the Border Patrol of petitioner's automobile approximately twenty-five miles from the border. In so doing, the Court rejected the government's contention that Colonnade-Biswell, not Camara, should control. The Court reemphasized the requirement that a search be statutorily restricted to escape the proscription of Camara: "The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in Camara . . . ." In the absence of a prior judicial determination of probable cause and the issuance of a suitably restricted warrant, a parole officer could exercise the "unfettered discretion" specifically rejected in Almeida-Sanchez. The court then discussed the rationale behind the Colonnade-Biswell exception to Camara by explaining that "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." While it can be argued by analogy that the parolee likewise consents to parole searches, the contract-consent theory, which formerly was advanced by courts in abridging the fourth amendment rights of parolees, has been widely discredited and abandoned. It is untenable to suggest that the contract-consent theory, one of questionable constitutional validity, could be resurrected by forcing parole searches into the Colonnade-Biswell mold.

Since Bradley was decided, the Supreme Court again has refused to expand the exceptions to Camara. In Marshall v. Barlow's, Inc. the Court held that warrantless inspections made pursuant to section 8(a) of the Occupational Safety and Health Act of 1970 were unconstitutional. The Court determined that inspections of businesses that are not licensed or otherwise regulated cannot be justified as "responses to [the] relatively unique

50. 413 U.S. 266 (1973).
51. Id. at 270.
52. Id. (emphasis added).
53. Comment, supra note 28, at 807. For a discussion of the three traditional theories of parole and their weaknesses, see Note, supra note 5, at 703-20.
54. See Note, supra note 5, at 709.
circumstances" present in Colonnade and Biswell. As the Supreme Court further restricts the Camara exceptions, it becomes increasingly doubtful that warrantless searches by a parole officer, even if authorized by a properly limited statute, could fit within the narrow confines of Colonnade and Biswell.\(^{58}\)

In holding that the warrant requirement is applicable to searches of a parolee's home, the court in Bradley did not decide what showing of cause would be necessary to secure the warrant.\(^{59}\) The court stated, "we do not imply 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."\(^{60}\) The question that remains is what standard the court will adopt when confronted squarely with the issue. The first of two possibilities is that the court will adopt the balance of interests approach offered by the dissent in Latta\(^{61}\) that "theoretically demands a sliding scale of probability standard, varying with the level of intrusion in each type of situation."\(^{62}\) This flexible probable cause theory, though not receiving uniform support, has been developed by the Supreme Court in both Camara and, in the criminal context, in the Terry v. Ohio,\(^{63}\) stop-and-frisk line of cases. In the context of parole searches, the balance of interests approach would be similar to the current majority view that reasonable cause is a condition precedent to a warrantless search of a parolee's home by his parole officer.\(^{64}\)

The second possibility is the traditional probable cause standard with a parolee's past providing only one factor in the determination of probable cause.

Just as a past arrest record is one factor which courts consider in determining whether probable cause existed for an arrest or

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57. 436 U.S. at 313.
58. It may be questioned whether any other business or activity may ever join Colonnade and Biswell as exceptions to the general rule of Camara. The Court indicates, without identifying the industry, that there may be such additional businesses or activities. Id. at 321.
59. 571 F.2d at 788 & n.1.
60. Id.
61. 521 F.2d at 256-57 (Hufstedler, J., dissenting).
63. 392 U.S. 1 (1968). For a discussion of the flexible or variable probable cause theory, see Greenberg, supra note 62, at 1016.
64. See text accompanying notes 20-23 supra.
search, so a parolee's criminal history can supply one factor to be taken into account in deciding whether normal probable cause standards have been met in a particular parole-officer search.\textsuperscript{65}

This theory undoubtedly provides the parolee with greater protection than the balance of interests approach. These protections, however, as indicated by the development of the flexible probable cause standard by the Supreme Court, are not constitutionally mandated and would unduly hamper the supervisory functions and efficiency of the parole officer, forcing him to divert his energies to police investigative work.\textsuperscript{66} When faced squarely with the issue, the Fourth Circuit is likely to adopt the flexible probable cause approach, rather than adhering to the traditional probable cause standard in the issuance of search warrants for a parolee's residence.

Given that a warrant is required, absent exigent circumstances, to conduct a legal search of a parolee's home, what should the remedy for noncompliance be? In reversing Bradley's conviction, the Fourth Circuit summarily determined that the denial of fourth amendment protections in the present case mandated exclusion of the evidence in a new criminal prosecution. Use of the evidence for parole revocation was not in issue. Since Bradley was decided, the Fourth Circuit, in \textit{United States v. Workman},\textsuperscript{67} has extended application of the exclusionary rule to federal probation revocation hearings. In \textit{Workman} the federal probation officer obtained evidence that the probationer possessed an illegal distillery, which constituted a violation of his probation conditions. This evidence was obtained without a warrant but with probable cause. Relying primarily on Bradley, the court concluded that the warrantless search was illegal and the fruits of the search could not be used at a probation revocation hearing. In light of the \textit{Workman} decision, the Fourth Circuit apparently would have applied the exclusionary rule to Bradley's parole revocation hearing, had the court been presented with the issue.\textsuperscript{68}

\textsuperscript{65} Note, supra note 28, at 136.


\textsuperscript{67} 585 F.2d 1205 (4th Cir. 1978).

\textsuperscript{68} The Court in Bradley was not presented with the issue. 571 F.2d at 790 n.6. Further development of case law concerning probationers, probation officers and probation revocation proceedings is beyond the scope of this case comment. \textit{Workman}, therefore, will be considered only for its development and extension of the decision in Bradley.
Because other, though less attractive, remedies for noncompliance with the warrant requirement were available to the Fourth Circuit, the application of the exclusionary rule to both parole revocation hearings and new criminal prosecutions merits some examination. The primary purpose of the exclusionary rule is to deter official conduct inconsistent with fourth amendment protections by removing the incentive for such misconduct—the use of illegally gathered evidence in criminal prosecutions. "The exclusionary rule is simply a tool to be employed in whatever manner is necessary to achieve the amendment's regulatory objective by reducing undesirable incentives to unconstitutional searches and seizures," for without the rule the fourth amendment would be reduced to "a form of words." The Supreme Court, however, has refused to apply the exclusionary rule when the deterrent effect would be incremental at best.

The application of the above principles to cases involving parole searches weighs heavily in favor of invoking the exclusionary rule. Whether a parole officer perceives himself as one who helps and aids the rehabilitation of the parolee, or as a policeman-enforcer, substantial deterrent benefits can be realized.

Conscientious parole officers will not be greatly impeded in their daily routines and will, when a parole violation is reported or suspected, protect the constitutional rights of their charges by securing a proper warrant. In the instance of an overzealous pa-


70. See Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1914). The court in Workman expanded the meaning of "criminal prosecutions" to include all "criminal adjudicative proceedings," which include revocation proceedings. 585 F.2d at 1209-11.

71. Amsterdam, supra note 38, at 437.

72. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).


74. Application of the exclusionary rule, though placing an added burden on the parole officer, does not mean that the officer must procure a warrant before each visit or risk exclusion of any subsequently seized evidence. No warrant is required when the visit is truly "routine" and there is no prior reason to believe a parole violation is taking place. Officers who discover a violation while conducting routine visits may act as any police officer would in exigent circumstances, 585 F.2d at 1208, "with the substantial advantage that the parole officer, unlike a policeman, can gain warrantless entry for visiting purposes." 521 F.2d at 258 (Hufstedler, J., dissenting).

75. 521 F.2d at 249.

76. Id. at 258 (Hufstedler, J., dissenting).
role officer, the deterrence of the warrant requirement will be most effective. If the officer wishes to have his parolee incarcerated for a suspected parole violation, the procedural safeguards announced in Bradley as extended by Workman must be followed. Noncompliance would result in exclusion of the evidence from both a new criminal prosecution and a parole revocation hearing. The holding in Bradley, as extended by Workman, supports application of the exclusionary rule by advancing its major policy consideration, safeguarding fourth amendment protections.

On balance, the decision of the Fourth Circuit in Bradley may prove to be both a boon and a disappointment in the development of greater fourth amendment protections for parolees. Bradley is to be lauded for recognizing that efforts to maintain a viable parole system neither justify nor necessitate minimizing the fourth amendment rights of parolees. The unfortunate aspect of Bradley is that its strength is in the holding, not in the opinion as a whole. Because the opinion itself is exceedingly brief and incomplete in its reasoning, courts of other jurisdictions may well be reluctant to cite Bradley with force and authority. Reappraisal of the constitutional rights of parolees, however, has been long overdue. Hopefully the foothold provided by Bradley will spur further positive changes in parolees' fourth amendment rights.

Harry D. Brown

In *Penn Central Transportation Co. v. New York City*¹ the United States Supreme Court upheld the constitutionality of New York City's Landmark Preservation Law² as applied to Grand Central Terminal. In applying the ordinance, the city had refused to allow Penn Central to construct a fifty-five story office building on top of the Terminal, a structure of French Beaux Arts design that first opened in 1913.³ The decision has been heralded as a victory for individuals and organizations interested in preserving buildings having historical or architectural significance.⁴ Nevertheless everyone interested in the cause of historic preservation should read the Supreme Court's decision narrowly and with caution for if the exact posture of this case as it reached our nation's highest court is not borne in mind, preservationists may receive great disappointments in the future.

Penn Central Transportation Company did not raise the underlying issue of whether preservation of structures having historic or architectural significance was a permissible or appropriate objective for the city of New York. The Supreme Court stated specifically that this question was not an issue in the case.⁵ Penn Central’s position, both in the New York courts and the United States Supreme Court, was that the *method* of preservation chosen by the city was unconstitutional because it was a taking of property without just compensation. Future litigants, therefore, will still be faced with this threshold question.

To understand the Court's decision, the development of historic preservation in the United States must first be examined. Preservation of the nation's cultural resources has been a concern at the federal level since the effort in the late nineteenth century to preserve the Gettysburg battlefield as a national monument,⁶ and has been the subject of several congressional enactments,⁷

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4. We Won—Supreme Court Rules in Favor of Grand Central Terminal, Preservation News, August 1978, at 1, col. 1-2.
5. 438 U.S. at 129.
7. Fowler, Federal Historic Preservation Law: National Historic Preservation Act,
including one specifically on passenger railroad terminals. All fifty states have legislation on historic preservation and some state constitutions provide for historic preservation.

Many reasons have been advanced for historic preservation. Many of the ordinances creating historic districts have been justified because of the districts' commercial importance and relation to the tourist industry. One ordinance lists as purposes of the city's historic districts the economic and general welfare of the people, the preservation of property values, and the attraction of tourists and residents. Historic preservation has also been justified and advocated for reasons more intangible than economic importance. Historic structures have been deemed useful as educational tools that can significantly augment textbooks, as in the use of house museums to teach social history. Historic structures have also been said to improve the quality of life, provide lessons from the past, capture priceless aspects of American heritage, provide examples of excellence for the present, create a sense of satisfaction and pride within society, and give individuals a feeling of continuity with their past. In the National Historic Preservation Act of 1966, Congress stated that an important reason for historic preservation is the "sense of orientation" it gives to the American people.

State statutes and city ordinances commonly create historic districts and regulate the use and alteration of all property within the district. To perpetuate its pre-1860 architecture, the city of Charleston, South Carolina, passed an ordinance in 1931 that created the first historic district in the United States. This ordinance was passed pursuant to a South Carolina enabling statute

Executive Order 11593 and Other Developments in Federal Law, 12 WAKE FOREST L. REV. 31 (1976).
12. 438 U.S. at 103.
15. Id.
that gave cities the power to regulate the construction and use of buildings and land in promotion of the health, safety, morals and general welfare of the community.\textsuperscript{17} Several authors have suggested that state statutes that enable municipalities to create historic districts are an effective way to promote historic preservation;\textsuperscript{18} these ordinances may be less useful, however, in preserving individual urban landmarks.\textsuperscript{19}

Legislation to preserve individual landmarks differs from historic districting in that historic districting functions almost like zoning by regulating the use of property within a wide area. In contrast, landmarks legislation classifies individual pieces of property to be regulated according to their historical and architectural significance; therefore, the properties that are regulated as landmarks may be scattered throughout a city.\textsuperscript{20} The operation of a landmarks law to restrict individual properties in ways that are not applicable to neighboring land may lead to claims that the ordinance denies landmark owners equal protection.\textsuperscript{21} Preservationists, however, believe that these individual landmarks need protection. By 1970 over half of the 12,000 buildings listed by the federal government in its Historic American Buildings Survey, begun in 1933, had been demolished.\textsuperscript{22} High land values in urban areas make city landmarks especially vulnerable to demolition.

The stubborn reality underlying the landmarks dilemma is that landmark ownership in downtown areas of high land value is markedly less profitable than redevelopment of landmark sites. Hence there is an incessant trade-off — injurious to the urban environment — of buildings of unique architectural distinction for glass and steel towers that are crammed with as much renta-

\footnotesize

\textsuperscript{18} Note, supra note 13, at 522-24; Note, supra note 17, at 310-12.


\textsuperscript{21} Costonis, supra note 19, at 602 n.93 (1972).

\textsuperscript{22} Conti, Preserving the Past, Wall St. J., Aug. 8, 1970, at 1, col. 1.
ble floor area as local zoning permits and as the market will absorb.23

Many of these old buildings are suited to a lifestyle that is outmoded, yet they are not easily adapted to a new use. This problem is compounded by the continual rise in property taxes.24

Unfortunately, acquisition of landmarks by local governments through the power of eminent domain is unlikely. In addition to the costs of acquisition and the loss of tax revenues when the property is taken out of private hands, maintenance may be expensive;25 consequently, landmark preservation generally receives low priority in municipal goals and budgets.26 Furthermore, private owners' continued operation of historic buildings as economically viable parts of the community may be preferable to government ownership and operation as museums.27 In addition to the development of historic preservation, some of the more unusual features of New York City's Landmark Preservation Law, the situation of Penn Central, and the particular issues actually before the Supreme Court must be examined to understand the impact that Penn Central Transportation Co. v. New York City will have on future controversies between property owners and preservationists, and on the future power of landmark commissions.

New York City's Landmark Preservation Law28 (Landmarks Law) was passed in 196529 pursuant to an enabling statute passed by the New York Legislature.30 It provides for the creation of a Landmarks Commission composed of eleven persons including three architects, one historian, one realtor, and one city planner or landscape architect.31 The stated purpose of the city ordinance is to prevent further irreparable loss of the many structures of architectural excellence produced during various periods of the city's history.

23. Costonis, supra note 19, at 575. See also Note, Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historic Landmarks, 1975 Duke L.J. 999.
26. Costonis, supra note 19, at 582 n.33, 583-84.
27. 438 U.S. at 109 n.6.
30. N.Y. GEN. MUN. LAW § 96a (McKinney 1977).
It is the sense of the council that the standing of this city as a worldwide tourist center and world capital of business, culture, and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.\textsuperscript{32}

The ordinance further declares that preservation of these structures is "a public necessity and required in the interest of the health, prosperity, safety and welfare of the people."\textsuperscript{33}

The Landmarks Commission has the power, after public hearings on the matter, to designate as landmarks\textsuperscript{34} structures that meet the statutory definition.\textsuperscript{35} This designation is subject to judicial review at the owner's request.\textsuperscript{36} Following designation of a building as a landmark it is unlawful to alter, reconstruct, or demolish the structure without first obtaining from the Landmarks Commission a certificate approving the alteration.\textsuperscript{37}

The ordinance provides for three types of certificates. A certificate of "no exterior effect" is granted if the commission determines that the proposed construction will not change or affect the architectural features, or be out of harmony with the character of the landmark.\textsuperscript{38} A certificate of "appropriateness" is granted if the commission determines that the proposed alteration would not be inconsistent with the purposes of the ordinance.\textsuperscript{39} The third type of certificate may issue when an owner of nontax-exempt property requests a certificate of "appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return." For this certificate the owner establishes that his property is incapable of producing a reasonable return on his investment, and shows that he is in good faith seeking approval for alteration of the landmark to make the property economically productive. The commission must develop a plan to alleviate the hardship,\textsuperscript{40} which the owner may accept or reject.\textsuperscript{41}

\textsuperscript{32} Id. § 205-1.0a.
\textsuperscript{33} Id. § 205-1.0b.
\textsuperscript{34} Id. § 207-2.0a(1).
\textsuperscript{35} Id. § 207-1.0k defines a landmark as "[a]ny improvement, any part of which is 30 years or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state, or nation . . . ."
\textsuperscript{36} 438 U.S. at 132-33.
\textsuperscript{37} NEW YORK, N.Y., ADMIN. CODE §§ 207-4.0 to 207-8.0 (1965).
\textsuperscript{38} Id. § 207-5.0.
\textsuperscript{39} Id. § 207-6.0.
\textsuperscript{40} Id. § 207-8.0b.
\textsuperscript{41} Id. § 207-8.0f(2).
If he rejects the plan, the city must either acquire the property by eminent domain or issue a "notice to proceed" with the alteration. If the property has received full or partial exemption from payment of real property tax for the preceding three years, however, this third alternative is not available, except in a few situations. One of the unusual features of the Landmarks Law is a provision for "transferable development rights." This provision allows owners who have not developed their property to the extent allowed by the zoning laws to transfer their authorized but unused rights to develop that space to nearby pieces of property that they own. Consequently, an owner may build larger or taller structures on the second site than would otherwise be allowed by applicable zoning restrictions.

Penn Central should be viewed in light of the historical development of landmarks preservation and the legal framework of the ordinance. In 1967, following a public hearing, Grand Central Terminal was designated as a landmark over the objection of its owner, Penn Central Transportation Company. The Landmarks Commission found that the Terminal was a magnificent example of French Beaux Arts architecture; that it is one of the great buildings of America, that it represents a creative engineering solution of a very difficult problem, combined with artistic splendor; that as an American Railroad Station it is unique in quality, distinction and character; and that this building plays a significant role in the life and development of New York City.

42. Id. § 207-8.0g.
43. Id. § 207-8.0. Subsection (2) specifies that if the tax exemption is received pursuant to one of several sections of the Real Property Tax Law, and the applicant meets certain other requirements, this alternative is still available.
45. Costonis, The Disparity Issue: A Context for the Grand Central Terminal Decision, 91 Harv. L. Rev. 402 (1977). The author discusses the social aspect of property value which was accepted in the N.Y. Court of Appeals decision of this case. For other articles discussing transferable development rights, see Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L.J. 75 (1973); Note, The Unconstitutionality of Transferable Development Rights, 84 Yale L.J. 1101 (1975); Note, Development Rights Transfer in New York City, 82 Yale L.J. 338, 349-59 (1972).
Judicial review of the commission’s decision was available, but Penn Central did not pursue it.47

The following year, Penn Central entered into a lease with a British corporation, UPG Properties, Inc., allowing UPG to construct an office building on top of the Terminal. Pursuant to the requirements of the Landmarks Law,48 Penn Central and UPG submitted for approval plans drawn by Marcel Breuer and Associates.49 The first plan, known as Breuer I,50 would not have altered any of the existing facades of the building and had the merits, in the commission’s words, of enhancing “the exterior . . . by providing a quieter and more dignified base to support the monumental columns . . . [and] would unquestionably improve pedestrian access to the . . . subway.”51 The commission ultimately denied applications for both “no exterior effect” and “appropriateness” certificates stating that while it had

no fixed rule against making additions to designated buildings — it all depends on how they are done . . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. . . . [It] would reduce the Landmark itself to the status of a curiosity.52

A second plan, which called for stripping some of the architectural features of the Terminal, was given less serious attention and certificates of approval were denied.53 Although Penn Central could have appealed the denial of each certificate, it did not seek judicial review of either of them, but rather chose to file suit in the New York Supreme Court alleging a taking of its property

47. 438 U.S. at 116.
48. New York, N.Y., Admin. Code § 207-4.0c(2).
49. This well known architectural firm has received numerous awards for its distinctive designs. Justice Lupiano of the New York Supreme Court believed that the firm’s reputation and the design plan of Breuer I to preserve the south facade of the Terminal evidenced Penn Central’s good faith effort to preserve the Terminal while making the property profitable for the corporation. 50 A.D.2d 265, 276, 377 N.Y.S.2d 20, 31 (1976) (Lupiano, J., dissenting).
50. For an artistic sketch of this proposal, see Preservation News, April 1978, at 1, col. 1-2.
51. 50 A.D. 2d at 276, 377 N.Y.S.2d at 31 (Lupiano, J., dissenting).
52. 438 U.S. at 117-18.
53. Id. The commission stated: “To protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.” Record at 2255. For a sketch of this proposal, see Preservation News, August 1978, at 8, col. 3.
without just compensation. 54

The Trial Term of the New York Supreme Court found that the Landmarks Law constituted a taking of private property for public use without just compensation. It also found denials of both equal protection and due process 55 because the Landmarks Law created, without any apparent reason, three classifications of property for purposes of administrative relief. 56 Penn Central receives a tax exemption for its passenger railroad property. 57

The owner of a nontax-exempt landmark may apply for a certificate of appropriateness on the ground of insufficient return. If he meets the requirements of the ordinance, the commission must offer him a plan for relief from the hardship. If he refuses the offer, the commission must either condemn the landmark or issue a notice to proceed with the alteration. This provision is not generally available to tax-exempt property, unless specifically listed as an exception in the ordinance. The exceptions cover religious, charitable, cultural and public service organizations, 58 but do not include those receiving the tax exemption for passenger railroad property received by Penn Central. Hence, owners of nontax-exempt property and twenty-three categories of tax-exempt property are eligible for relief under this section. Owners of tax-exempt property that is not within an exception, including Penn Central, are not eligible for any relief from the economic burdens created by designation of their property as landmarks. 59 These classifications were held to violate the principles of due process and equal protection.

The Appellate Division of the New York Supreme Court applied the test it uses in zoning cases, that is, whether the claimants had been deprived of all beneficial use of their property

54. 438 U.S. at 119.
56. 50 A.D. 2d at 288, 377 N.Y.S.2d at 41 (Lupiano, J., dissenting).
58. NEW YORK, N.Y., ADMIN. CODE § 207-8.0(2) provides that an owner of tax-exempt property may receive relief for insufficient return if the tax exemption is received "pursuant to §§ 420, 422, 424, 425, 426, 427, 428, 430, 432, 434, 436, 438, 440, 442, 444, 450, 452, 462, 464, 468, 470, 472, or 474 of the Real Property Tax Law" and if the owner meets certain other conditions.
so that they were incapable of earning a reasonable return from their property. The court reversed the decision of the trial term, holding that Penn Central had not established that the application of the Landmarks Law to its property imposed a sufficient burden to constitute a compensable taking of property. This decision was affirmed by the New York Court of Appeals and ultimately by the United States Supreme Court.

The issue of whether no further administrative relief for tax-exempt property constituted denials of equal protection and due process was not raised at subsequent levels of the appellate processes. If this issue had been raised, the United States Supreme Court might have found that the commission could not constitutionally prevent owners of tax-exempt property from demolishing unprofitable buildings. The Court indicated that owners of tax-exempt property do have available judicial relief if their property cannot produce a "reasonable return." Furthermore, "[t]he city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have changed such that the Terminal ceases to be, in the city council's words, 'economically viable,' appellants may obtain relief." The Court seemed to consider remote the possibility that the commission and the state courts would require an owner to maintain without alteration a patently unprofitable landmark.

The only issue actually decided by the Supreme Court was that Penn Central's property had not been taken unconstitutionally. In deciding this issue, the Court considered "the severity of the impact of the law on appellants' parcel" by making "a careful assessment of the impact of the regulation on the Terminal site." Because the Court found that no taking had occurred, it did not have to decide whether the transferable development rights alone would constitute just compensation to Penn Central.

The Supreme Court distinguished this case from others in

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60. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975). Comment, Grand Central Station—Landmark at the End of the Line, or End of the Line for Landmarks?—New York City's Landmark Law in the Courts, 37 U. Prrr. L. Rsv. 81 (1975) discusses the trial term's decision and several other cases arising under the city's Landmarks Law.
62. 498 U.S. 104.
63. Id. at 112-13 n.13.
64. Id. at 138 n.36 (referring to Tr. of Oral Arg. 42-43).
65. Id. at 136.
66. Id. at 138.
which plaintiffs claimed takings of their property without just compensation by noting that the Landmarks Law "does not interfere in any way with the present uses of the Terminal." While the Court is correct in its observation that Penn Central may, consonant with the restrictions now imposed on the Terminal, continue to use the Terminal as a railroad station, it is debatable whether the Terminal as originally constructed is adequately suited to the kinds of railroad traffic it serves today.

Penn Central had suffered losses in recent years that ultimately rendered it bankrupt. The lease with UPG was an effort to increase revenues from the Terminal. For purposes of appeal to the Supreme Court, however, Penn Central admitted that the Terminal was capable of earning a reasonable return on its investment and that the transferable development rights were valuable. These admissions may have been crucial to the Court's determination that the impact of the law on Penn Central's property was not severe enough to constitute a taking. The Landmarks Law defines "reasonable return" generally as a six percent annual return on the assessed valuation currently set by the city. Because Penn Central did not raise the issue, the Supreme Court did not discuss whether this was actually a reasonable return for commercial property in New York City. The effect of Penn Central's failure to raise these issues on appeal to the Supreme Court is obvious in the Court's statement that "[o]ur holding today is on the present record which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion." "[W]e must regard the New York City law as permitting Penn Central not only to profit from the Ter-

67. Id. at 136.
68. Grand Central was built in an age when railroads were a popular and primary mode of long-distance passenger travel. Now, the Terminal's passenger traffic is largely confined to commuters whose rush hour onslaughts cannot safely be accommodated. Interview with Frederick M. Gertz, Assist. Prof. of Law at the Univ. of S.C. School of Law, in Columbia, S.C. (Sept. 1978).
70. 438 U.S. at 129. In his dissent to the decision of the New York Supreme Court, Justice Lupiano discussed the profitability of the Terminal and questioned whether these rights are actually of any value to Penn Central. 50 A.D. 2d at 277-84, 377 N.Y.S.2d at 33-38 (Lupiano, J., dissenting).
71. NEW YORK, N.Y. ADMIN. CODE § 207-1.0. This general definition is subject to exceptions and changes by the Landmarks Commission. Professor Gertz, supra note 68, suggests that this is substantially below the expectations of a commercial property owner in New York City.
72. 438 U.S. at 138 n.36.
minal but to obtain a ‘reasonable return’ on its investment.” Had Penn Central presented the details of its financial situation and the costs of maintaining the Terminal, the Court might have found that the burden imposed by designation under the city’s Landmarks Law constituted a taking of property without just compensation.

In the opinion of the Supreme Court, Penn Central had exaggerated the degree of interference with its air rights above the Terminal occasioned by the commission’s refusal to approve the proposed construction. One reason given by the Court for its opinion was that the commission never told Penn Central that any construction above the Terminal would be prohibited. The original design for the Terminal included a twenty-story office tower and the foundation was designed to include columns to support such a tower, although it was never built. Because the commission’s report stressed that construction of an addition above the Terminal would be approved if it were in harmony with the character and scale of the landmark, there was no reason to suppose that the commission would not approve an addition similar to the one proposed in the original plans. Penn Central, however, did not submit plans for any structure smaller than fifty-three stories and, therefore, the Court did not need to decide what the company’s rights would be in another situation.

The second reason the Court believed Penn Central had exaggerated the impact of the commission’s finding on its air rights was that “[t]heir ability to use these rights has not been abrogated; they are made transferable . . . .” The Supreme Court did not consider whether these transferable development rights would be just compensation to Penn Central if a taking had occurred. Rather, the Supreme Court considered these transferable development rights as a factor mitigating any financial burdens imposed on Penn Central by designation of the Terminal as a landmark and, therefore, as a factor to be considered in the severity of the impact of the Landmarks Law on the property. Be-

73. *Id.* at 136.
74. *Id.*
75. *Id.* at 115.
76. *Id.* at 137. The company is now considering applying for approval of a smaller structure, as well as selling the transferable development rights. *Preservation News,* August 1978, at 1, col. 2, at 8, col. 1.
77. 438 U.S. at 137.
78. *Id.* For a discussion of changes made in the New York City laws on transferable
cause Penn Central did not argue that these rights were not valuable, the Court assumed that they were, and found that no taking had occurred.\textsuperscript{79}

One of Penn Central's major contentions was that the law created unconstitutional spot zoning.\textsuperscript{80} Penn Central argued that because of the lack of physical proximity between New York City's hundreds of landmarks, the burdens and benefits of the law could not be distributed fairly, unlike cases of zoning or historic districting. The majority was correct, however, in distinguishing the Landmarks Law from spot zoning because the city has a comprehensive plan for the preservation of historic structures that categorizes buildings by their architectural merit, rather than by location, as is characteristic of zoning. The fact that over four hundred landmarks and thirty-one historic districts are now protected under the law suggests that the city does indeed have a comprehensive plan, and is not merely imposing arbitrary restrictions.\textsuperscript{81}

Several factors make this case appear to be a victory for the New York City Landmarks Commission and the preservationists. Significantly, it is the first case decided by the United States Supreme Court on historic preservation and landmarks legislation. In addition, the definition of "reasonable return" set by statute is fairly low, particularly because Grand Central Terminal is in a city where land and air rights are extremely valuable. Furthermore, the value of the lease for the proposed tower—a minimum of $3,000,000 per year\textsuperscript{82}—was quite substantial, especially for a company trying to recover from bankruptcy.

On the other hand, the transferable development rights, which the Court viewed as mitigating the impact of the New York City Landmarks Law, are not available in a majority of American cities. The issue actually before the Court was very narrow: whether taking of property had occurred because the Landmarks Commission rejected Penn Central's proposal to construct a fifty-

\textsuperscript{79} 438 U.S. at 129 and 137.

\textsuperscript{80} Spot zoning is usually defined as zoning that singles out a parcel for different, more favorable treatment than that afforded surrounding land; the definition used by the Supreme Court of "less favorable treatment" is less frequently used. 2 Rathkopp, The Law of Planning and Zoning 26-4 (2d ed. 1977). See generally Note, Public Regulation of Land Use in South Carolina, 10 S.C.L.Q. 485, 490-94 (1958).

\textsuperscript{81} 438 U.S. at 134.

\textsuperscript{82} Id. at 116.
five story office tower atop the Terminal. The Court decided that
"the New York law is not rendered invalid by its failure to provide
'just compensation' whenever a landmark owner is restricted in
the exploitation of property interests, such as air rights, to a
greater extent than provided for under applicable zoning laws."83
The Court gave no indication of how it would decide if Penn
Central subsequently petitioned the commission for permission to
demolish the Terminal. It merely held that the value of the trans-
ferable rights helped to mitigate the loss to Penn Central and that
there had been no compensable taking of air rights. Justice
Brennan made reference to the familiar zoning standard estab-
lished by the Court in Euclid v. Ambler Realty Company84 when
he said that "[t]he restrictions imposed are substantially related
to the promotion of the general welfare . . . ."85 The Court did
refuse to reject the determination of the New York City Council
that "the preservation of landmarks benefit [sic] all New York
citizens and all structures, both economically and by improving
the quality of life in the city as a whole . . . ."86 The holding in
Penn Central, however, certainly does not preclude the Court
from finding a compensable taking of property in a future case
in which an owner alleges that a designation as a landmark im-
poses a severe economic burden, or that the structure is no longer
suitable for its original purposes, or that little or no other property
in the community is subject to similar restrictions. The Supreme
Court held that no taking had occurred when the owners wanted
to redevelop the property, leaving the landmark intact. Yet ironi-
cally for the commission and all those interested in preservation,
the possibility remains that the Court's answer may have been,
or may be, different if Penn Central had requested, and was re-
fused, approval for demolition on the grounds of economic hard-
ship.

Jane W. Trinkley

83. Id. at 136.
(1974); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Construction Indus. Ass'n of
Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S.
934 (1975); Steel Hill Dev., Inc. v. Town of Sanborton, 338 F. Supp. 301 (D.N.H. 1972);
of Miami Beach, 213 So. 2d 281 (Fla. 1968); Tulsa Rock Co. v. Bd. of City Comm'rs of
Rogers County, 831 F.2d 351 (Okla. App. 1974); Bob Jones Univ., Inc. v. City of Green-
ville, 243 S.C. 351, 133 S.E.2d 843 (1963); City of Houston v. Johnny Frank's Auto Parts
85. 438 U.S. at 138.
86. Id. at 134.