
Perry M. Gould

The Sherman Act of 1890, in pertinent part, provides as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.¹

Since the enactment of this statute, the Supreme Court has developed two doctrines as standards² to be used in interpreting the Act: the per se rule³ to give a measure of certainty to the business community; and the rule of reason⁴ to allow business development.

¹. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1970). “Were [this section] to be read in the narrowest possible way, any commercial contract could be deemed to violate it.” United States v. Topco Assoc., 405 U.S. 596, 606 (1972). However, Congress did not intend to prohibit all such contracts, but only those that are undue restraints of competition. See REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 11 (1955).

². Basically, these two doctrines are standards as to the amount of evidence a defendant is allowed to introduce into the record.

³. The per se rule gives businessmen certain guidelines as to what practices are considered unlawful under the anti-trust laws and affords them some measure of assurance in planning their day to day business practices. The Government is also interested in having simplified standards of illegality so that it can more easily enforce the laws. Van Cise, The Future of Per Se in Antitrust Law, 50 VA. L. REV. 1165 (1964) [hereinafter cited as Van Cise]; Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 MICH. L. REV. 1130 (1952).

⁴. Professor Bork believes that Justice Peckham actually conceived of the rule of reason, although many other commentators believe it was first promulgated by Chief Justice White in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) and United States v. American Tobacco Co., 221 U.S. 106 (1911). Bork posits two divergent themes in the rule of reason: the “Peckham-Taft-White version” and the “Brandeis version.” The former is a consumer-oriented rule which permits agreements that foster general commercial efficiency, while the latter is a producer-oriented rule which allows agreements which provide greater comfort or security to producers. Bork, The Rule of Reason and the Per Se Concept, Part I, 74 YALE L.J. 775 (1965). Oppenheim recommends that Congress declare the rule of reason to be the standard used in evaluating business practices because the per se rule is now without value, having become far too rigid. Oppenheim, supra note 3.
The rule of reason allows the defendant to present evidence of all economic factors relevant to the market practice under review. The courts then analyze the particular practice, in the context of its economic market, and decide whether or not the practice is "in restraint of trade."  

The alternative to the rule of reason is the per se rule. A frequently quoted, and helpful, explanation of the per se rule is provided by Justice Black in *Northern Pacific Railway v. United States*:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or business excuse for their use.

As Justice Black makes clear, the rule precludes a defendant's introduction of evidence designed to show the effects of the practice on the business market, and thereby eliminates long, costly trials, voluminous records, and expansive inquiries into particular business practices.

Horizontal restraints are agreements between competitors, at the same level of market structure, to allocate territories in order to minimize compe-

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5. Under the "White version" of the rule of reason, the courts evaluate the purpose and effect of the agreement and relative power of the parties, to determine whether the practices are unreasonable restraints of trade. The above test is also the one used in the "Peckham and Taft versions" of the rule of reason to determine if the restraints are direct or indirect (Peckham) and if they are ancillary or non-ancillary (Taft). Bork, *supra* note 4.

6. One of the main justifications for the per se rule is that it instills a measure of certainty into the antitrust laws to help businessmen plan their day-to-day transactions. Both Van Cise and Oppenheim, *supra* note 3, believe that businessmen prefer the flexibility of the rule of reason, since it allows an inquiry into the effects of the market practices under review.


8. Id.

9. Oppenheim feels that "the rules of per se violation permit the government to sustain its burden of proof merely by showing the existence of the particular operative facts. The defendant, precluded from showing the effects of his business practice on the particular economic market, can only deny, if possible, the existence of the basic operative facts." Oppenheim feels that the per se rule presents constitutional problems, and would substitute a prima facie case of illegality. Under this approach, after the government shows the existence of the restrictive agreement, the defendant would then have the burden of proceeding with rebuttal evidence to show justification for the agreement. Oppenheim, *supra* note 3 at 1150-1151, 1156-1161. Van Cise believes that per se raises a rebuttable presumption, which the defendant may refute by a showing of a lawful main purpose. *Supra* note 3.


tition and are among the business arrangements proscribed by the per se doctrine. In the past, such restraints brought the per se rule into operation when combined with some other form of restricted practice. However, in the recent case of United States v. Topco Association, the Supreme Court held that horizontal market restrictions, standing alone, are per se violations of § 1 of the Sherman Act.

Topco is a food cooperative founded by a group of small grocery stores and grocery chains to increase their buying power, in response to the domination of the food industry by the large national chains. The chains, in an attempt to increase their profits, have marketed private label products—the familiar in-house brands, such as Ann Page (A & P) and Town House (Safeway). Small independent groceries and local chains, lacking the sales vol-

15. In United States v. Sealy, Inc., 388 U.S. 350 (1967), the only issue before the Supreme Court was Sealy's market allocations. However, the Court found that the territorial restrictions were such an integral part of the unlawful price fixing scheme, that both had to be considered together. Further, Justice Fortas, in Sealy, hypothesized the Topco case:

It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as per se unlawful.

388 U.S. at 357. For a discussion of Sealy, see McClaren, Territorial & Customer Restrictions, Consignments, Suggested Resale Prices & Refusals to Deal, 37 A.B.A. Antitrust L.J. 137 (1968).
16. The District Court filed extensive findings of fact with its opinion, which is found in United States v. Topco Assoc., 319 F. Supp. 1031 (1970). The brief for Topco filed with the United States Supreme Court gives extensive background information on the nature of the cooperative, its practices, and the nature of the food industry.
17. Led by A&P, the food industry has changed from a business characterized by the familiar "ma and pa" corner grocery store to one that is dominated by large national food chains. In 1970, A&P's 4,482 stores produced a retail sales volume of almost $6 billion. Second-ranked Safeway, with 2,204 stores, had a retail sales volume of over $4 billion, and third ranked Kroger, with 1,529 stores had a sales volume of about $3.5 billion. Chains Store Guide, Supermarket, Grocery and Convenience Store Chains (1971).
18. The chains either arrange their own sources of food supply or manufacture their own goods, and then place their trademarks on the finished products. The result is merchandise which yields higher profits than nationally advertised brands while selling for 20% less. Private labels allow the chains to experiment with loss leader and traffic building specials and help attract customer loyalty and good will.
An effective private label program requires an annual sales volume of $250 million or more. In 1967, Topco's individual member's sales volume ranged from $1.6 million to $182.8 million, and 18 of its then 26 members were well under $100 million.

The total number of grocery stores declined from a peak of 386,897 in 1937 to 244,833 in 1963.

Topco (incorporated name is Topco Associates, Inc.) is the successor to Food Cooperative, Inc. founded in 1944. It is a cooperative corporation organized under the laws of the State of Wisconsin.

Topco members also own preferred stock according to a formula based upon total retail sales for the previous year. Preferred stock (and bank credit) provide the working capital requirements of Topco.

There were never any allegations that Topco and its members were engaged in price fixing.

Topco members may expand whenever and wherever they choose, with as many stores as they wish. If they wish to use the Topco brands in the new stores, they then request a license from the cooperative.

Article IX § 2 of the Topco bylaws establishes three categories of licenses:

(a) Exclusive—the member is licensed to sell Topco products to the exclusion of all others.

(b) Non-exclusive—the member is licensed to sell Topco products, but not to the exclusion of others.

(c) Coextensive—two or more members are licensed to sell Topco products to the exclusion of all others.

ing a violation of §1 of the Sherman Act by its allocation of exclusive territories to members. The Government also challenged Topco's wholesaling agreements, but Topco objected on the grounds that this issue was not alleged in the complaint. The District Court heard evidence on this point, agreeing that if the Government proved their allegations, it could amend its complaint. The District Court did make findings and conclusions as to this issue, although the Government never formally amended its complaint. The Supreme Court struck down the wholesaling agreements, although all but one paragraph of the Topco opinion discussed the licensing agreements. United States v. Topco Assoc., 405 U.S. at 604, 612.

28. Top officers of a number of member stores testified "unequivocally that they would not spend the money, time, and energy necessary to establish . . . Topco brands in their stores if their substantial competitors could sell the same brands . . . and would not continue as members of Topco . . ." 319 F. Supp. at 1040.

29. Justice Taft's view of the rule of reason was that, to be lawful, an agreement eliminating competition must be subordinate and necessary to another legitimate trans-


30. 319 F. Supp. at 1040.

31. Id.

32. Id.

33. Id. at 1043.

34. Id. (emphasis added).
Thus, without so specifying, the lower court grounded its decision upon the
rule of reason.

The Supreme Court reversed the decision of the District Court, finding
Topco's licensing arrangements to be horizontal restraints of trade and, thus,
a per se violation of § 1. The application of the per se rule was defended
on the following grounds:

Whether or not we would decide this case the same way under
the rule of reason used by the District Court is irrelevant to the is-
 sue before us. The fact is that Courts are of limited utility in ex-
amining difficult economic problems. Our inability to weigh, in
any meaningful sense, destruction of competition in one sector of
the economy against promotion of competition in another sector
is one important reason we have formulated per se rules.

The theory presented, then, is that the courts, inherently ill-equipped to deal
with certain business practices, should not delve too deeply into economic
considerations.

To bolster the argument that horizontal restraints of trade have always
been considered illegal per se, the Court cited a line of cases, purportedly
illustrating that it has never inquired into the harm the practice has caused or
the validity of its existence. However, Chief Justice Burger, in his lone dis-
sent, distinguished each of these cases by showing that, prior to Topco, hori-
zontal restraints of trade have been declared per se violations of Sherman
One only when combined with some other proscribed business practice. The
Chief Justice maintained that, rather than following precedent, the Court had
established a new per se rule under which all horizontal restraints are pro-
hibited, even absent any findings of other illegal activities. Further, he ac-
cused the Court of abdicating its responsibilities in the antitrust field solely in
the interests of judicial economy, thereby leaving Congress to fill the void by
exemption of certain activities from the per se classification.

Both the majority and the dissenting opinions clearly illustrate the courts' feelings of discomfort with certain economic practices, when the ramifications for other segments of the economy are in doubt. This discomfort underscores many of the decisions in the antitrust field and has led to the application of the per se rule in order to avoid the lengthy probing needed to make an economic analysis. A noted commentator, Oppenheim, has written:

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35. The Government appealed directly to the Supreme Court pursuant to § 2 of the
37. Id. at 609.
38. Id. at 606-10.
39. Id. at 613-24.
There has been increasing resort to the rigid confines of per se violation rules—a delusive certainty through mechanized enforcement at the expense of the flexibility needed to deal with the actualities of imperfect competition and especially the problems of industrial concentration in big business units among both sellers and buyers. 40

Oppenheim would have Congress expressly adopt the rule of reason as the standard to be used in evaluating market practices, and abandon altogether the per se rule. He has also suggested that Congress declare that the competition it seeks to foster is “workable competition,” a concept allowing the consideration of all relevant market factors. 41 This suggestion, however, would not allay the courts’ fears that they are ill-equipped to deal with vast reams of economic data.

One way to avoid the difficulties inherent in antitrust cases is for the courts to appoint economists as special masters to assist in analyzing the complex economic problems presented in the antitrust field. Rule 53 of the Federal Rules of Civil Procedure expressly permits a master’s appointment when the issues are complicated (in a jury trial) or, when some exceptional condition requires it (in a non-jury trial). Surely antitrust suits would qualify, since the results, in these cases, have ramifications difficult to envision. Further, the use of special masters might end the judicial groping for a solution which Justice Marshall has characterized as “rambl[ing] through the wilds of economic theory.” 42 This suggestion contemplates the defendant’s presentation of all relevant economic data, such as market practices and market power, even if the government alleges a per se violation of the Sherman Act, and an evaluation made in light of the concept of “workable competition.”

There are several advantages to this approach. First, it would free the courts’ dockets by removing the lengthy antitrust litigation. Second, the term “competition” would become primarily an economic one, and the determination of its existence would be made by one who has the expertise and time to consider the possible ramifications of the market practice. Third, since the master’s findings would be accepted unless “clearly erroneous,” the lower courts will be spared the dilemma they had previously faced: i.e., either grant the government summary judgment on a complaint alleging a per se

40. Oppenheim, supra note 3, at 1145. Oppenheim was the co-chairman of the Attorney General’s National Committee to Study the Antitrust Laws.
41. Competition, in one sense, denotes the presence of more than one seller in a market and identifies a condition of rivalry among them. “Workable competition concentrates on the effective limits it sets on the power of the seller to control its prices. The concept of ‘workable competition’ considers all relevant market factors, such as size and strength of sellers, independence of rivals, rate of growth, and ability of other firms to enter the field.” EINHORN AND SMITH, ECONOMIC ASPECTS OF ANTITRUST 1968.
42. 405 U.S. at 610.
violation, which the Supreme Court may remand, seeking more information,\textsuperscript{43} or take evidence and compile a record, only to have the Supreme Court decide the case under the per se rule.\textsuperscript{44} Thus the economic evaluation becomes the basis of the lower court decision, leaving the issue on appeal whether the Sherman Act was correctly applied to the evaluation.

So long as the courts are reluctant to grapple with complex theories, the confusion that exists in the antitrust field will remain. \textit{Topco} is the perfect illustration of this. The grocery store business is already an oligopoly,\textsuperscript{45} with the big chains controlling the market. Yet the chains' private label programs can retain their exclusivity because the companies are vertically integrated. Topco's program, however, cannot retain its exclusivity because its members are not so integrated, even though its program promotes competition. Surely, Congress in passing the Sherman Act, did not contemplate that a concededly pro-competitive practice would be declared illegal because of the courts' adherence to the per se doctrine. If the approach suggested here had been utilized, there would have been no justification for invalidating Topco's practice since it did \textit{in fact} foster competition.

\textit{Joanne Sgro}

\textbf{CONSTITUTIONAL LAW—Right to Counsel—Absent Knowing and Intelligent Waiver, No Person May be Imprisoned for Any Offense, Whether Classified as Petty, Misdemeanor or Felony, Unless He Was Represented by Counsel at His Trial.—Argersinger v. Hamlin, 407 U.S. 25 (1972).}

In the state of Florida, Jon Argersinger, an indigent, was charged with carrying a concealed weapon, an offense punishable by a $1000.00 fine and imprisonment for up to six months.\textsuperscript{1} Despite the defendant's request made to the court, to have counsel supplied him, none was appointed; the defendant

\textsuperscript{43} See e.g., White Motor Co. v. United States, 372 U.S. 253 (1963).
\textsuperscript{44} United States v. Topco Assoc., 405 U.S. 596 (1972).
\textsuperscript{45} "Oligopoly markets" are defined as those where industrial concentration is manifested in the small number of relatively large sellers, who account for the major part of total production and sales, with proportionate power to influence market price appreciably through decreases or increases in output. Oppenheim, \textit{supra} note 3, at 1185.

\textsuperscript{1} FLA. STAT. ANN. § 790.01 (1965).
was found guilty, and sentenced to ninety days in jail. On the basis of the state's refusal to provide counsel, Argersinger brought a habeas corpus action in the Florida Supreme Court. The court denied the motion, following the reasoning of Brinson v. Florida, that the right to court-appointed counsel extends only to trials for non-petty offenses punishable by imprisonment of more than six months. The United States Supreme Court granted a writ of certiorari, and reversed saying: “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”

In the majority opinion of Argersinger v. Hamlin, Justice Douglas traced the applicability of the sixth amendment to the states in certain “fundamental” areas of due process. He noted that “[w]hile there is historical support for limiting the ‘deep commitment’ to trial by jury to ‘serious criminal cases,’ there is no such support for a similar limitation on the right to assistance of counsel.” Asserting that the sixth amendment extends the right to counsel “beyond its common law dimensions,” the decision rejects “... the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer.”

The Argersinger Court recognized the unique severity of incarceration per se, regardless of the length of sentence. Alluding to an earlier decision, Justice Douglas wrote: “[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or ‘petty’ matter and may well result in quite serious repercussions affecting his career and his reputation.” The Court does not direct the states in the matter of classifying crimes, but only requires that a defendant not be imprisoned for any offense unless he has had an opportunity to be represented by counsel.

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6. Id. at 27-29.
7. Id. at 30.
8. Id.
9. Id. at 30-31.
11. 407 U.S. at 38.
12. Strictly reading Argersinger, it holds not that counsel be appointed in all cases where incarceration is a statutory possibility, but that in cases where a defendant does go to jail he must have had the opportunity to have been represented by counsel. Thus, judicial economy can be served by courts making pre-trial determinations not to incarcerate. Chief Justice Burger, concurring in Argersinger, suggests that “the trial judge and prosecutor... engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term. The judge can preserve the option of a jail
stated, "[t]he assistance of counsel is often a requisite to the very existence of a free trial." The Court recognized certain problems that beleaguer the misdemeanant who is unable to afford counsel. For example, absent counsel, a defendant is often faced with what the Court calls "thorny constitutional questions," and must contend with the courts' "obsession for speedy dispositions" of misdemeanors, that results in "assembly-line justice." To meet the present and future need (presumably increased, in the wake of this decision) for legal counsel, Justice Brennan, in a concurring opinion, suggested that the increased participation of law students in clinical, in-court programs may be an added source of legal assistance.

Justice Powell, although stating in his concurring opinion that he is "...in accord with the Court that an indigent accused's need for the assistance of counsel does not mysteriously evaporate when he is charged with an offense punishable by six months or less," did not opt in favor of the rule expressed in the majority opinion. Rather, Justice Powell favored, "...the principle of due process that requires fundamental fairness in criminal trials, a principle which ... encompasses the right to counsel in petty cases whenever the assistance of counsel is necessary to assure a fair trial." Thus, Justice Powell did not consider it a given, as does Justice Douglas, that representation by counsel is the sine qua non of a fair trial, even in cases where incarceration is a possible outcome. Justice Powell further stated that he opposes the "mechanistic application" of the majority in Argersinger and is critical of fashioning "...a new constitutional rule with consequences of such unknown dimensions, especially since it is supported neither by history nor precedent."

14. 407 U.S. at 33. Justice Douglas cites Papachristou v. Jacksonville, 405 U.S. 156 (1972) as an example of a case dealing with such "thorny constitutional questions." There, a Jacksonville, Florida "vagrancy ordinance" was held "void for vagueness." Although Justice Douglas, writing the majority opinion in Papachristou, did not explicitly refer to the right to counsel, he did suggest the inference that lack of counsel could create a special burden when scrutinizing the constitutionality of a statute stating that "[t]he poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them." 405 U.S. at 162-63.
15. 407 U.S. at 34-36.
16. Id. at 41.
17. Id. at 47.
18. Id. (emphasis added).
19. Id. at 49.
20. Id. at 52. Justice Powell is perhaps overstating his fear. Since the Gideon decision it has been the practice in the states of Illinois, Massachusetts, Minnesota, New Hampshire, Oregon and Texas, to make counsel available to indigent criminal
Prior to Argersinger, the case law regarding the requirement of counsel in other than felony cases was divided. In March of 1963, in Gideon v. Wainwright, the United States Supreme Court held that the right to counsel is a fundamental prerequisite to a free trial.\(^{21}\) In Gideon, the Court quoted with approval from Justice Sutherland's opinion in Powell v. Alabama:\(^{22}\)

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.\(^{23}\)

Although Gideon dealt with an individual convicted of a felony, who had received a one year prison sentence,\(^{24}\) the language of the opinion was extremely general. Nowhere in the opinion is it stated that the right to counsel is restricted to non-petty offenses, or felonies.\(^{25}\) In fact, the word "felony" is never mentioned in any of the four Gideon opinions except in describing the offense under which Gideon was tried.\(^{26}\) The Gideon Court stated that "... in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."\(^{27}\)

Following the Gideon decision, several courts held that defendants in non-felony cases were entitled to state-appointed counsel. The broadest interpretation of Gideon granted counsel to all indigent defendants in all criminal cases, regardless of the penalty or charge. Notably, in the Fifth Circuit there were several decisions that interpreted Gideon to encompass all non-felony cases.\(^{28}\) Other courts have also elected to follow this expanded interpretation.

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21. 372 U.S. 335, 341-45 (1963). "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Id. at 344.
22. 287 U.S. 45 (1932).
24. Gideon was convicted of breaking and entering with intent to commit a misdemeanor. FLA. STAT. ANN. § 810.05 (1965).
25. See text accompanying note 31, infra.
27. 372 U.S. at 344 (emphasis added).
28. See, e.g., Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969); James v. Headley, 410 F.2d 325 (5th Cir. 1969); Goslin v. Thomas, 400 F.2d 394 (5th Cir. 1968); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).
The Washington Supreme Court applied *Gideon* to misdemeanors in the case of *City of Tacoma v. Heater* where it held: "... every defendant has a constitutional right to counsel in all criminal prosecutions. The [United States Supreme Court] in *Gideon* made no distinction between misdemeanors and felonies insofar as the applicability of this provision is concerned."

In contrast to those courts that interpreted *Gideon* as applying to all offenses, several courts took the approach that required the availability of court-appointed counsel only in cases where the defendant was charged with a "serious offense." Problems arose as to how to define "serious offense," and courts looked to "a variety of factors" in their determinations of "seriousness." The "serious offense" approach did not obviate all problems in interpreting *Gideon*. For example, a defendant in a New York case, with a possible period of incarceration of forty-two to 177 days, was denied counsel because the offenses charged were "traffic violations." This particular case calls special attention to such troublesome distinctions as "felony-misdemeanor," and "serious offense-petty offense." *Argersinger* addressed this problem in suggesting that titles should be disregarded in applying *Gideon*, the crucial point being jeopardy of incarceration.

This approach was followed by several pre-*Argersinger* courts that used only the criterion of threat of incarceration, in deciding whether or not to require the availability of counsel. The Supreme Court of Minnesota used

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31. Id. at 734, 409 P.2d at 869.
32. By 1970, twelve states were using this distinction. See, infra, note 33.
36. Letterio was sentenced to 42 days with an additional 135 days imprisonment if he were to default on a $1,030.00 fine. Bergan, J., concurring, explained the absence of a need of counsel, stating, "The basic concept of the traffic infraction is that a traffic violation is not a crime and the violator not a criminal." 16 N.Y.2d at 307, 213 N.E.2d at 670, 266 N.Y.S.2d at 672. What is the difference whether the charge is labeled a "crime" or a "traffic offense" if the result is the same? "The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious." Evans v. Rives, 75 U.S. App. D.C. 242, 247, 126 F.2d 633, 638 (1942).
37. Supra, note 10.
this standard when it held that the courts of that state must provide counsel "... in any case ... which may lead to incarceration in a penal institution ... [I]f the court is to impose a jail sentence, counsel should be furnished." Expanding somewhat on the interpretation of *Gideon* that applies only to cases of incarceration, an additional approach has been to make counsel available in cases where incarceration is a penalty and in cases where the offense charged is serious (e.g., the loss of a driver's license or simply, a conviction to which stigma might attach).

Despite the creativity with which *Gideon* had been construed, many courts were hesitant in reading too much into the *Gideon* opinion. Following Justice Harlan's assertion that *Gideon* did not extend counsel to all criminal cases, these courts applied *Gideon* strictly to its facts, requiring counsel only in felony cases. These courts did not consider the penalty as the determinative factor, but chose to follow the older distinction as to the type of crime being tried. The Florida Supreme Court, in the wake of the reversal of its *Gideon* decision, held, in a later case, that "... until authoritatively determined to the contrary by the Supreme Court of the United States, the rule in Florida is that there is no absolute organic right to counsel in misdemeanor trials." Notwithstanding the decisions of the fifth circuit, the Florida Supreme Court doggedly refused to apply *Gideon* to anything "less" than a felony. The court could "... find nothing conclusively, that [states that *Gideon*] was intended to apply to all crimes ..." Similarly, in the Supreme Court of Connecticut and, in an Ohio appellate court, indigent defendants in misdemeanor prosecutions were not entitled to appointed counsel.

In 1966, the United States Supreme Court had the opportunity to clarify *Gideon* but denied certiorari to two petitioners who had asserted that *Gideon* applied when a misdemeanor conviction could result in incarceration. Justice Stewart's dissenting opinion foreshadowed *Argersinger* in stating:

> In *Gideon* v. Wainwright ... we said that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair

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41. This view of approaching right to counsel problems on a case by case basis, is reflected in Justice Powell's concurring opinion in *Argersinger*, appointing counsel whenever it "... is necessary to assure a fair trial." 407 U.S. at 47.
42. 372 U.S. at 351 (concurring opinion).
43. Watkins v. Morris, 179 So. 2d 348 (Fla. 1965).
44. *Id.* at 349.
45. Fish v. State, 159 So. 2d 866 (Fla. 1964).
47. City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).
trial unless counsel is provided for him.” . . . No state should be permitted to repudiate those words by arbitrarily attaching the label “misdemeanor” to a criminal offense.\textsuperscript{49}

In a similar development, the Court denied certiorari to a Connecticut petitioner\textsuperscript{50} convicted of being intoxicated—an offense for which he could serve as much as thirty days in jail.\textsuperscript{51} Justice Fortas, dissenting, argued that the Court missed an important opportunity to decide whether the Gideon “. . . guarantee of counsel applies to . . . relatively ‘minor’ offenses or misdemeanors carrying significant penalties for their violation.”\textsuperscript{52}

Jon Argersinger’s petition for certiorari again gave the Court the opportunity to deal dispositively with Gideon. In some courts the Argersinger decision may be viewed as an expansion of Gideon; to others it is a restriction on the scope of the sixth amendment. Either view would hold that it represents a modification and change of Gideon. This writer views Argersinger as further defining what had previously been said concerning the right to counsel.\textsuperscript{53}

It does not restrict the scope of Gideon so much as it continues the groundwork previously laid by the Court. Argersinger v. Hamlin is a logical and just explication of the Gideon philosophy. The only remaining question is why the Burger Court, and not the Warren Court, produced this opinion.

\textit{Kenneth M. Trombly}


In a 1968 cease and desist order, the Federal Trade Commission attempted to halt the Sperry & Hutchinson (S&H) Company’s practice of “suppressing”

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\item \textsuperscript{50} Heller v. Connecticut, 154 Conn. 743, 226 A.2d 521, cert. denied, 389 U.S. 902 (1967).
\item \textsuperscript{51} CONN. GEN. STAT. REV. § 53-246 (1968).
\item \textsuperscript{52} 389 U.S. at 903.
\item \textsuperscript{53} According to Justice Douglas, the Gideon opinion “. . . did not limit . . . the need of the accused for a lawyer . . .” to felony cases. 407 U.S. at 31. Its application was apparently left to later judicial inferences, thus producing Argersinger.
\end{itemize}
the operation of unauthorized trading stamp exchanges.\(^1\) For many years S&H, a giant in the trading stamp industry, had waged legal battles, usually successful ones, in state courts against non-contracting local retailers and stamp exchanges which exchanged or redeemed S&H's well known "green stamps".\(^2\) Despite S&H's string of state court victories, the Federal Trade Commission charged that the company's interference with the "free and open" redemption of trading stamps was an unfair method of competition and an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act.\(^3\)

The Court of Appeals for the Fifth Circuit reversed the Commission order on the grounds that the Federal Trade Commission’s power under Section 5 was restricted to violations of the letter or spirit of the antitrust laws, and that no such violation had been demonstrated from S&H's conduct.\(^4\) On review,\(^5\) the Supreme Court unanimously voted (7-0) to modify and remand the case, not on the basis of the lower court's finding but rather on its misconstruction of the Commission's authority under Section 5. Speaking for the Court, Mr. Justice White agreed that no anti-trust violation was shown, but found that, in view of the legislative and judicial history of Section 5, the Federal Trade Commission's power to determine unfair or deceptive acts and practices was meant to extend beyond the realm of commercial competition to the area of consumer protection.\(^6\)

As originally enacted in 1914, Section 5 of the F.T.C. Act entrusted the Federal Trade Commission with the power to prevent "unfair methods of competition".\(^7\) The Commission was also to enforce the Sherman and Clayton Acts, the chief federal antitrust statutes. Congress had deliberately left Section 5 authority ambiguous because of the impossibility of encompassing all possible unfair trade practices in statutory form and the desire to create a flexible authority to deal with the imaginativeness of the business world.\(^8\)

In early decisions defining the sweep of the Commission's power, the Supreme Court was reluctant to construe that power much beyond the scope

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1. 73 FTC 1099 (1968).
2. From 1904 to 1966, S&H was involved in 43 actions in eight federal districts and 19 states to enjoin the unauthorized use of its trading stamps. The requested relief was granted in all 43 cases. Sperry & Hutchinson v. F.T.C., 432 F.2d 146, 149 (1970).
6. Id. at 244.
of the antitrust statutes which the Commission enforced. In a 1920 decision, *F.T.C. v. Gratz*,\(^9\) the Court restricted the Commission’s power to those practices previously determined to be “opposed to good morals because characterized by deception, bad faith, fraud . . . , or as against public policy because of their dangerous tendency to hinder competition or create monopoly”.\(^10\) Eleven years later, in *F.T.C. v. Raladam*,\(^11\) the Court held that the purpose of Section 5 was limited to

> the protection of the public from the evils likely to result from the destruction of competition or the restriction of it to a substantial degree; and this presupposes the existence of some substantial competition to be affected since the public is not concerned in the maintenance of competition which itself is without real substance.\(^12\)

The Court began a deviation from this line of reasoning in 1934 with its decision in *F.T.C. v. R. F. Keppel & Bros, Inc.*\(^13\) That case involved a candy merchandising scheme which exploited children by inducing their purchase of a cheaper candy with the chance of winning bonuses or prizes. The Court ruled that despite the fact this was not really an anti-competitive practice, it was “a competitive method . . . to exploit consumers” and contrary to public policy.\(^14\) In an abrupt switch, the Court reasoned that the absence of any clear antitrust restrictions in Section 5 indicated a legislative intent to extend Commission authority into such areas of immoral trade practices.\(^15\) The Court in *S&H* placed heavy emphasis on the *Keppel & Bros. opinion* and the subsequent addition of the Wheeler-Lea Amendment in 1938.\(^16\)

The Amendment added the phrase “unfair or deceptive acts or practices in commerce” to Section 5 and, the Court believed, left no doubt that Section 5 was meant to have a separate consumer protection nature.

Despite the Wheeler-Lea Amendment, the Federal Trade Commission remained unsure of its range of powers to protect consumers. During the next 30 years most Commission rulings invoking the Section 5 language were carefully grounded on evidence of any particular practice’s effect on competitors as well as consumers. Where little actual effect on competition could be demonstrated, the Wheeler-Lea term “unfair” was generally assumed to operate only in conjunction with such other terms as “deceptive,” “false” and “misleading”—indicating serious immoral practices. The Com-

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10. *Id.* at 427.
12. *Id.* at 647.
14. *Id.* at 312.
15. *Id.* at 310.
mission did not attempt to issue a cease and desist order outside the anti-competition area solely on the grounds of its power to determine and prevent "unfair" practices.

Not until the mid-1960's, in the cases of *Atlantic Refining Co. v. F.T.C.* 17 and *F.T.C. v. Brown Shoe Co., Inc.*, 18 did the Supreme Court take another significant stride forward in construing Section 5. Both cases involved franchise tie-in arrangements in which manufacturers offered special benefits to those retailers who would agree not to buy competitive lines of merchandise. The Court expressly rejected the old limitations laid down in *Gratz* and its progeny, and held the Commission had "broad powers to declare trade practices unfair," especially those conflicting with the basic antitrust policies.19 However, the Court also found serious antitrust violations in both cases.

In light of the *Brown Shoe* and *Atlantic Refining Co.* decisions, it might seem that the *S&H* ruling was no surprise. However, it must be noted that the *S&H* case was the first time the Court had addressed itself to the narrow issue of the Commission's power to determine "unfair practices" outside an antitrust setting. In fact, the Commission had issued its ruling against *S&H* on traditional antitrust grounds. Although Commission counsel argued the "unfairness to consumers" doctrine on appeal, the Court ruled it was bound to review the Commission's opinion as originally written. The Court agreed with the court of appeals that no anti-competition violation was demonstrated, but in remanding the case to the Commission for further rulings, the Court seemed to imply that all that was lacking was adequate explanation from the Commission of the basis for its determination that the *S&H* practice was unfair to consumers.20

The Court summarized its interpretation of Section 5 with the statement:

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a Court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws.21

In the wake of the *S&H* decision, several questions arise as to how the Commission will attempt to exercise this broad equity power. What guidelines will it use to make determinations of "public values" and "unfairness"? Will the "elusiveness" of the standard cause later courts to limit the reme-

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17. 381 U.S. 357 (1965).
19. Id. at 320-21.
21. Id. at 244.
dies available to the Commission? What type of trade practices can the Commission reach which it could not reach before?

Since the unfairness standard in Section 5 is so ambiguous it is not unreasonable to expect the Federal Trade Commission to make some attempt to produce a policy statement in this area. Since the S&H decision was handed down the Commission staff has retreated within its walls to formulate such a policy statement. The only evidence of the Commission's thinking to date is contained in the 1964 "Statement of Basis and Purpose of Trade Regulation 408" (Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazard Smoking) and cited by the S&H Court, which included questions as to:

1. whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise—whether, in other words, it is within at least the penumbra of common-law, statutory or other established concept of unfairness;
2. whether it is immoral, unethical, oppressive or unscrupulous;
3. whether it causes substantial injury to consumers (or competitors or other businessmen).22

Although such definitions might give some indication of the Commission's guidelines, it may not be of much help in the sense of evaluating any specific trade practices for the sake of uncertain businessmen. The business world, however, will be put on notice that the scope of the Commission's power has been greatly expanded in the direction of protecting consumer interests.

Clearly the Commission's unfairness standard will have to develop on a case-by-case basis and future courts will look carefully at any rationale used to apply such an uncertain doctrine.23 In the same sense, courts may be reluctant to mete out harsh punishments in cases, such as S&H, where the challenged practice was well within the previously established law.

There is much speculation as to the directions in which the Federal Trade Commission will move initially in applying the "unfairness" doctrine. One large area which may be considered is "unconscionability" with regard to contract provisions. Contracts, especially concerning credit, conditional retail sales and housing, have long been a consumer troublespot. The concept of unconscionability, itself rather elusive, could be embraced under the

22. 29 Fed. Reg. 8355 (1964); Id. at 244-45 n.5.
23. SEC v. Chenery Corp., 318 U.S. 80 (1943). According to the so-called Chenery Doctrine, proper judicial review of an administrative agency ruling "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." Id. at 94.
Commission's "equity" powers and wielded to strike down oppressive and unscrupulous contract provisions.

A great deal of the Commission's consumer protection efforts at the present time are focused on the field of advertising, specifically to produce less misleading and more informative ads. The misleading ads have been targets in the past, but the unfairness doctrine could now be arguably invoked in instances where the Commission believes advertisers have not supplied enough pertinent information to consumers.

In a speech before the American Marketing Association in April, 1972,24 one month after the S&H decision, Gerald T. Thain, Assistant Director of National Advertising in the Federal Trade Commission's Bureau of Consumer Protection, remarked that the case "sets up a new context" for Federal Trade Commission action. He asserted, however, that the broad range of standards granted the Commission would not necessarily lead to new exercises of authority but would certainly serve to reinforce present policies. Mr. Thain singled out several innovative Federal Trade Commission policies currently in question: the Commission's attacks on unfair claims of uniqueness, spurious product differentiation claims and corrective ad remedies. "We take the recent decision as an affirmation that the scope of our efforts has been proper," he stated.

The full impact of the S&H decision remains to be seen, but clearly the Supreme Court's recognition of the Federal Trade Commission's broad authority to determine "unfair" practices has given consumers a potentially powerful federal friend.

Thomas Gilliss

CRIMINAL LAW: Adams v. Williams: An Expansion of the Terry Rule; Reasonable Grounds for a Stop and Frisk; Use of Uncorroborated Informant; Probable Cause to Arrest; Possession of a Firearm—Connecticut Law

On July 12, 1972, the Supreme Court decided Adams v. Williams,1 a habeas


corpus proceeding based on the unconstitutionality of the respondent's frisk and arrest, and a search of his person and automobile incident to that arrest. Mr. Justice Rehnquist delivered the opinion of the Court, and Justices Douglas, Brennan, and Marshall dissented in separate opinions.

Robert Williams was convicted in Connecticut state court of illegal possession of a handgun found during a stop and frisk, and possession of heroin, found in the search of the respondent and his car incident to his arrest for illegal possession of a handgun. This conviction was affirmed by the Connecticut Supreme Court, and certiorari was denied by the United States Supreme Court.

Police Sergeant John Connolly was on patrol car duty in an area "noted for its high incidence of crimes of various kinds" in Bridgeport, Connecticut at approximately 2:15 A.M. "There he met a person known to him and considered by him to be trustworthy and reliable," who pointed out an automobile parked on the other side of the street and told Connolly that a person seated in the automobile had a pistol at his waist and narcotics in his possession. The informant, however, had given information only one time before and this did not involve firearms or illegal drug possession, but rather concerned homosexual activity. The information as to the latter was never substantiated, and no arrests resulted.

Connolly approached the vehicle, rapped on the window, and ordered the respondent to open the door. The engine was not running, and the respondent was sitting peacefully on the passenger side of the car. In response, the respondent rolled down the window. Connolly immediately reached to the occupant's waist and removed a .32-caliber revolver from his waistband, subsequently proven to have been fully loaded. He placed Williams under arrest for possession of a concealed weapon without a permit and thoroughly searched him and the vehicle. The search disclosed, among other things, twenty-one packets of heroin in Williams' wallet and six packets in his pocket.

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2. The writ of habeas corpus was denied by the United States District Court for the District of Connecticut; this denial was affirmed, 436 F.2d 30 (2d Cir. 1970); but en banc the Court of Appeals reversed, 441 F.2d 394 (2d Cir. 1971). Certiorari was granted, 404 U.S. 1014 (1972).

3. The Chief Justice and Justices White, Stewart, Blackmun and Powell joined in the majority opinion.


7. Id.

8. Id. at 36 (Friendly, J., dissenting).

The Supreme Court held that "[the heroin was] properly admitted at Williams' trial" because 1) the gun was seized pursuant to a stop and frisk squarely within the *Terry* rule; 2) the possession of the gun constituted probable cause to arrest for possession of a handgun without a permit; and 3) the search of Williams' car and his person was incident to that arrest. In *Terry v. Ohio,* the Court held:

... [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own . . . safety, he is entitled . . . to conduct a carefully limited search of outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

In *Terry,* the arresting officer had observed the defendant and two companions for a considerable length of time apparently "casing" a robbery. When he approached and asked them to identify themselves and their purpose, he received evasive mumblings. The officer then frisked the defendant by patting him on his outer clothing, felt a gun, reached inside to remove it, and placed him under arrest for possession of a concealed weapon. In the *Adams* opinion, Justice Rehnquist was satisfied that the gun seized from Williams pursuant to the stop and frisk was probable cause for arrest, also. He wrote: "[t]he loaded gun seized as a result of this intrusion [the reaching for the gun] was therefore admissible [under *Terry v. Ohio.* . . . ]"

The Court took great pains in *Adams* to satisfy the requirements established in the *Terry* holding. The facts in *Terry* appear to suggest that three indices are necessary for there to be reasonable grounds for a stop and frisk: a) personal observation by the police officer; b) suspicious activity that would lead him to believe that criminal activity is afoot; and c) reasonable

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12. **CONN. GEN. STAT.** § 29-35 provides:
   No person shall carry any pistol or revolver upon his person . . . without a permit to carry the same issued as provided in section 29-28.
*CONN. GEN. STAT.* § 29-37 provides for a penalty of not more than one thousand dollars or imprisonment for not more than five years or both, and the handgun is forfeited.
15. *Id.* at 30.
16. *Id.* at 5-7.
grounds for the police officer to believe that the person with whom he is dealing is armed.\textsuperscript{18}

Regarding personal observations by the policeman of the suspicious activity, the majority in \textit{Adams} states:

\textldots{} [W]e reject respondent’s argument that reasonable cause for a stop and frisk can only be based on the officer’s personal observation, rather than on information supplied by another person.\textsuperscript{19}

The court adds the observations by the police officer which made the frisk reasonable, namely: “the failure of the respondent to open the door and get out as requested made the revolver become an even greater threat;”\textsuperscript{20} and the fact that the revolver was found, where it was alleged to be, substantiated the informant’s tip.\textsuperscript{21} Obviously, the first observation relies on the veracity and reliability of the informant, and the second is circular.\textsuperscript{22} Justice Rehnquist did discuss the reliability of the informant in his opinion. He stated:

\ldots{} [W]hile the Court’s decisions indicate that this informant’s unverified tip may have been insufficient for a narcotics arrest or search warrant, \ldots{} the information carried enough indicia of reliability to justify the officer’s forcible stop of Williams.\textsuperscript{23}

\begin{footnotes}
\item[18] The majority in \textit{Terry} did not make it clear whether the frisk follows as a direct result of the stop, or whether the purpose of the stop is somewhat determinative of whether the frisk is reasonable, or whether the frisk requires a separate basis for determination of reasonableness. Justice Harlan attempted to clarify this point considerably in his concurring opinion:

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a \textit{forcible stop}. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty \ldots{} to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner’s protection. I would make it perfectly clear that the right to frisk \ldots{} depends upon the reasonableness of a forcible stop to investigate a suspected crime.

\ldots{} Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incidental to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

\item[19] 392 U.S. at 32, 33 (1968).
\item[21] Id.
\item[22] Id.
\item[23] The majority does not discuss, and seems to ignore, a long line of precedents which make it quite clear that the fruits of an illegal search do not cure the constitutional infirmity of that search. Chief Justice Warren stated quite clearly in \textit{Terry} v. Ohio that: “[w]e emphatically reject this notion [that stop and frisk is outside the Fourth Amendment].” 392 U.S. 1, 16 (1968).
\item[23] 407 U.S. 143, 147 (1972).
\end{footnotes}
Part of the indicies was what the frisk turned up, however.

The informant's tip again supplied the reasonable basis for believing criminal activity was underway. The majority gained some satisfaction from the fact that "under Connecticut law, the informant herself [sic] might have been subject to immediate arrest for making a false complaint."\(^{24}\)

Having justified the stop and frisk, the Court turned its attention to the probable cause for arrest. The Court stated that the discovery of the gun tended to corroborate the informant's tip (including the information regarding the heroin possession) and "together with the surrounding circumstances certainly suggested no lawful explanation for the possession of the gun."\(^{25}\) Therefore, there was probable cause to arrest for possession of a concealed weapon without a permit.\(^{26}\) In effect, the Court presumed that a person reportedly carrying heroin had no permit for a gun.\(^{27}\) Finally, the Court upheld the search as incident to that arrest.\(^{28}\)

Justice Rehnquist, in reliance on the informant's tip, established a far less constrained test of reasonableness for stop and frisk. He made it quite clear, however, that there was no probable cause to arrest at the time Sergeant Connolly approached the car.\(^{29}\) In the last analysis the majority answered the question as to whether or not an uncorroborated informant's tip is reasonable grounds for a stop and frisk in the affirmative. What the Court ignored, however, was the reasonableness of the stop in the first place, separately determined. Judge Friendly, in the Circuit Court of Appeals decision, felt that such a determination was the threshold problem of this case.\(^{30}\) And in his opinion, the determination should be against the reasonableness of the stop; and the frisk was based on that unreasonable stop.\(^{31}\) The Supreme Court, on the other hand, assumed the reasonableness of the initial stop; the frisk was based on the informant's tip.\(^{32}\)

The three dissenting Justices wrote separate opinions, but all agreed on two points: that Judge Friendly was correct below when he wrote that there were insufficient grounds for the initial stop of the respondent; and that \textit{Terry} was
intended to be narrowly applied. The majority rejected both of these conten-
tions.

Justice Douglas agreed with the lower court decision of Judge Friendly, but he added that mere possession of a concealed weapon in Connecticut is not probable cause to arrest without a prior determination of the question of a permit. Furthermore, such a determination cannot be made by a more intensified frisk. Such is outside the scope of Terry and not provided for by statute in Connecticut.\textsuperscript{33} In addition, Justice Douglas argued extensively that police protection and the fourth amendment would be better furthered by strict gun control legislation.\textsuperscript{34} He closed his dissent with a reiteration of the concern expressed by Judge Friendly:

If it [the \textit{Terry} rule] is to be extended . . . [to include possessory offenses] at all, this should be only where observation by the officer himself or well authenticated information shows "that criminal activity may be afoot." (\textit{Terry} v. \textit{Ohio}, 392 U.S. 1, 30 (1968)).\textsuperscript{35}

Justice Brennan also supported the reasoning of Judge Friendly that there were no reasonable grounds for the stop and frisk, but he merely quotes at length from the dissenting opinion below.\textsuperscript{36} The important points emphasized were that the informant was unnamed, was not shown to be reliable, and no information was given to show personal knowledge.\textsuperscript{37}

Justice Marshall's dissent is founded on two arguments: 1) there were no reasonable grounds for the stop; and 2) even if the stop and frisk was reasonable, there was no probable cause to arrest. With regard to the reasonableness of the stop, he said:

\textit{Terry} did not hold that whenever a policeman has a hunch that a citizen is engaging in criminal activity, he may engage in a stop and frisk. * * * When we legitimated the conduct of the officer in \textit{Terry} we did so because of the substantial reliability of the information on which the officer based his decision to act.\textsuperscript{38}

In Justice Marshall's opinion it is clear that the requisite reliability of the information was not present in the instant case. However, Justice Marshall

\begin{itemize}
  \item 33. \textit{Id.} at 149-50.
  \item 34. \textit{Id.} at 150-51. Justice Douglas uses the dissent in this case to reiterate his opinion that gun control legislation would be constitutional under the second amendment. Douglas feels that the governmental response to the high incidence of crimes should not be the diminishment of fourth amendment protections. In his opinion the Court has responded to society's fears and ignored the Constitution.
  \item 35. \textit{Id.} at 151 \textit{citing} 436 F.2d 30, 39 (Friendly, J., dissenting) (2d Cir. 1970).
  \item 36. The Second Circuit Court of Appeals en banc, 441 F.2d 394 (2d Cir. 1971), reversed the decision of a panel, 436 F.2d 30 (2d Cir. 1970). Judge Friendly's extensive opinion is found in the dissent in the earlier case.
  \item 37. \textit{Id.} at 151-53.
\end{itemize}
would also overrule the conviction on the grounds that there was no probable cause to arrest even if, *arguendo*, the stop and frisk was reasonable. The officer never asked whether or not the respondent had a permit to carry the gun. Without that information there was not a sufficient basis to assume that there was no permit. He concluded his dissent with a concession to Douglas' long dissent in *Terry*, in which he cautioned that "powerful hydraulic pressures . . . bear heavily on the Court to water down Constitutional guarantees. . . ." Professor of Law Wayne R. LaFave argues effectively that there is a balance between the extent of the intrusion upon fourth amendment protections and the reasonableness of the intrusion. In fact, Judge Friendly cited this article in his opinion. But in *Adams v. Williams*, the Court is too quick to affirm the conviction and fails to effectively delineate the reasonableness of the police action. The result has been a broadening of the *Terry* standards to such an extent that few police stops, and frisks incident to those stops, will be considered unconstitutional. The end result could be the watering down of the fourth amendment guarantees which Justice Marshall foreshadowed in his dissent. What cannot be justified as an arrest and search may well be justified as a stop and frisk, even if the justification is as shaky as that in *Adams v. Williams*.

*John G. Whelley, Jr.*


Respondent, an operator of community antenna television (CATV) systems, challenged a Federal Communications Commission (FCC) rule that "no

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41. 436 F.2d 30, 37 (Friendly, J., dissenting) (2d Cir. 1970).
CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting [i.e., originating programs].

The Court of Appeals set aside the regulation on the ground that the FCC had no authority to issue it. On review the Supreme Court reversed and held that the rule is within the FCC's statutory authority to regulate CATV to the extent that it is "reasonably ancillary" to the performance of the Commission's responsibilities as set out in *United States v. Southwestern Cable Co.*

The FCC was created by, and its various responsibilities and duties detailed in, the Communications Act of 1934. The specific powers and duties relied on by the Commission in formulating the rules on originating programs are those in 47 U.S.C. § 151 et seq. The broadest reading of FCC powers is found in § 303(g) which states that "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(g) Study new uses for radio, . . . and generally encourage the larger and more effective use of radio in the public interest;"

The "stream of communication" doctrine was used in *Southwestern* to ascertain the interstate character of CATV while also determining CATV to be within the Act's definitions of wire and radio communications.

After *Southwestern*, there was no further question as to the inclusion of CATV within the regulatory province of the FCC, as long as the regulation of CATV could be viewed as reasonably ancillary to the Commission's

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1. 47 C.F.R. § 74.1111(a) (1971). The regulation has been revised and now appears at 47 C.F.R. § 76.201(a) (1972).
2. 441 F.2d 1322 (8th Cir. 1971).
6. The Commission's *First Report and Order*, 20 F.C.C.2d 201, 223 (1969) cited as authority for its actions, §§ 2, 3, 4(i,j), 301, 303, 307, 308, 309, 315, and 317. Of those sections, §§ 2(a) 303 and 307 were recognized by the Court as directly applicable to the program origination requirement.
11. *Id.* at 168. The Act's definitions of communication by wire and by radio are found at 47 U.S.C. § 153(a,b) (1970).
regulation of television broadcasting. The controversy in the instant case arises from the challenge which the program origination requirement presents to the "reasonably ancillary" test and is based on the technical differences between CATV and television broadcasting. CATV systems have developed fundamentally in a reception mode, being primarily or exclusively engaged in either facilitating satisfactory reception of local stations or transmitting to subscribers the signals of distant stations beyond the range capabilities of local antennas. Television broadcasting, in contrast, involves the origination of the signal to be received. While some CATV systems have voluntarily engaged in program origination, the development of its recognized potential for such operation remains for the future.

As CATV systems have developed and played a rapidly increasing role in the nationwide communications network, the FCC has assumed regulatory authority in addition to that explicitly provided for in the Communications Act of 1934. The FCC has examined the newly developing systems from their beginnings and has conducted hearings concerning CATV in the normal course of its proceedings. The specific examination leading to the promulgation of the program origination requirement began in 1968, when the FCC issued its Notice of Proposed Rulemaking and Notice of Inquiry. This notice was followed by further hearings, submission of comments by interested parties, and final adoption of the program origination requirement on October 24, 1969. Thus, after the successful challenge of the adopted
order in the Court of Appeals, the question of the FCC's regulatory authority over CATV was once again before the Supreme Court.

In reversing, the Supreme Court carefully detailed what it considered to be the proper source of the FCC's authority in this instance. In supporting that authority, the Court involved itself in a close examination of the public interest asserted by the FCC while stepping quietly by the distinctions of Fortnightly Corp. v. United Artists Television, Inc. into the increasingly burdened "reasonably ancillary" test of Southwestern.

Prior to delving back into the "reasonably ancillary" test of Southwestern, the Court reasserts § 2(a) of the Communications Act as the basis of the FCC's regulatory authority by reading Southwestern to hold that: "... § 2(a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions... apply." The Court then repeats the admonitions of FCC v. Pottsville Broadcasting Co. and National Broadcasting Co. v. United States, as dictated in Southwestern, to the effect that the Communications Act conferred upon the FCC a regulatory authority with sufficient flexibility to adjust itself to the rapidly changing character of communications technology. The analysis of the Commission's authority continued with an evaluation of the objectives for which the Commission's regulatory power over CATV might be exercised. It is at this point that the issue of the case is cast into the "reasonably ancillary" test of Southwestern.

quire the program origination requirement to take effect on January 1, 1971. On petitions for reconsideration, the effective date was delayed until April 1, 1971; Memorandum Opinion and Order, 23 F.C.C.2d 825, 827 (1970). The petitions for reconsideration were denied and then, after the requirement was successfully challenged in the Court of Appeals, the effective date was suspended pending final judgment in the instant case.

20. In delivering its opinions the Court presents strange bedfellows on both sides of the fence. In light of the more prevalent division of the Court this term, it is a matter of at least some curiosity to see the Court divide as it does here. The decision can most properly be characterized as a 4-1-4 split rather than 5-4, with Chief Justice Burger being the reluctant fence-straddler concurring in the result. The prevailing opinion was delivered by Justice Brennan, joined by Justices White, Marshall, and Blackmun. Justice Douglas filed a dissent in which Justices Stewart, Powell, and Rehnquist joined.

21. See note 14, supra.
23. 406 U.S. at 660.
24. 309 U.S. 134, 138 (1940): "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." This is of special note here since CATV did not come into existence until well after the enactment of the Communications Act.
25. 319 U.S. 190, 219 (1943) stating that Congress gave the Commission "a comprehensive mandate" with "not niggardly, but expansive powers."
26. 392 U.S. at 172-73.
The explosive growth of CATV and its importation of distant signals is recognized by the Court here\(^\text{27}\) and in *Southwestern*\(^\text{28}\) as threatening an assumed public interest in the maintenance of local programming. The FCC, in the performance of its responsibilities for the regulation of television broadcasting, may issue "such rules and regulations and prescribe such restrictions and conditions" as "public convenience, interest, or necessity requires."\(^\text{29}\) Although the Court also cites § 303(g)\(^\text{30}\) "... [to] generally encourage the larger and more effective use of radio in the public interest....", and § 307(b)\(^\text{31}\), the licensing provisions, the subsequent analysis makes clear the public interest foundation of the reasonably ancillary claim.\(^\text{32}\) Once this foundation is laid, the structure of the "reasonably ancillary" argument is easy to discern.

The public interest recognized by the FCC is that of "... increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."\(^\text{33}\) *Associated Press v. United States* supported the basic tenet that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."\(^\text{34}\) The threat of CATV in its present developmental stage to the existence of local television broadcasting requires regulatory action in some manner to maintain these goals.\(^\text{35}\) It is thus the Commission's goal\(^\text{36}\) of maintaining the public's access to local broadcasting that allows the Court

\text{\begin{flushright}
27. 406 U.S. at 651.
28. 392 U.S. at 175.
30. Id. § 303(g).
31. Id. § 307(b).
32. The Court specifically refuses to consider basing the regulatory authority on 47 U.S.C. § 303. See 406 U.S. at 656-57, n.13. This section would base the grant of regulatory authority on the Commission's power to authorize CATV to engage in radio communications. The authority to engage in radio communications may be conditioned upon reasonable requirements related to the radio communication, [i.e., program origination].
34. 326 U.S. 1, 20 (1945). These same objectives were recognized in National Broadcasting Co. and given emphasis by the Court in the instant case, 406 U.S. at 668-69.
35. The threat of CATV is that a small number of the nation's television stations will be broadcast via cable throughout the nation, thereby limiting the public's choice of programming and access to local stations. This threat in a different manifestation was met by the FCC and upheld in the courts when the FCC passed its prime time access rule, 47 C.F.R. § 73.658j, k (1971), limiting the nation's television networks' control of prime television time. See Mt. Mansfield Television, Inc. v. F.C.C., 472 F.2d 470 (2nd Cir. 1971).
36. The FCC's goal is stated as follows in its SECOND REPORT AND ORDER, 2 F.C.C.2d 725, 746 (1966): "[O]ur goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States...." This goal is accepted as valid by the Court. 406 U.S. at 668.
\end{flushright}
to conclude, "In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.'” The Commission has asserted that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." The Court views this affirmative duty to further statutory policies to be sufficient justification for the FCC to enact its program origination requirement in spite of the difference in technical character between program origination and the traditional CATV reception and re-broadcast functions. The Court concludes its analysis by rejecting any importance of those differences by stating that "CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.”

Any attack on the Court's decision must be based on the ease with which the majority dismissed the broadcasting-reception distinction. The dissent would hold that the majority's decision strains the limits of FCC authority beyond allowable statutory limitations. Mr. Justice Douglas confined himself to the characterization of CATV as “simply a carrier” and bases that distinction on the Court's prior decision in *Fortnightly*. While seemingly well-founded, the dissent's reliance on the distinctions of *Fortnightly* must be put in the context of *Southwestern* and the time and purpose perspective of the two cases. *Southwestern* was handed down merely one week before *Fortnightly* and dealt specifically with FCC authority over CATV while *Fortnightly* was limited to an examination of the performance of copyrighted works as applied to CATV and in no way dealt with FCC regulatory authority. As the majority states, *Fortnightly* "... has no bearing on the 'reasonably ancillary' question". If *Fortnightly* is to be used against FCC assertion of authority over CATV, its arguments could presumably have been used by the Court in its consideration of the

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37. 406 U.S. at 670. The Court's opinion was divided into two sections; the first examining the FCC's statutory authority and the second determining whether substantial evidence supported the exercise of that authority. The first question is the decisive one since the Court is presented with more than substantial evidence that the regulation will promote the public interest. The Court goes so far as to say that the lower court's finding of a lack of substantial evidence was "patently incorrect in light of the record." 406 U.S. at 671.
38. 15 F.C.C.2d at 422. This assertion is strongly agreed to by the Court. 406 U.S. at 664.
40. Id. at 678.
41. Id. at 664.
Southwestern case when the “reasonably ancillary” test was being formulated. The conflict as presented by the dissent is not dependent on any issue which did not exist when Southwestern was heard.

The fears of the dissent as to excessive power of the FCC over CATV in the area of program origination are likely to become moot within a short time in any event. \(^4^2\) The technical advancement of CATV and its true potential \(^4^3\) are in the precise area in which the FCC, by virtue of the program origination requirement, is now causing the larger systems to develop and practice. As the benefits of CATV become more widely experienced, program origination and other technical services will likely become a matter of expectation rather than FCC requirement. It is in furthering this technical advancement that the FCC is best serving its statutory mandate to “generally encourage the larger and more effective use of radio in the public interest;” \(^4^4\).

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\(^4^2\) In a related area of FCC regulation, however, a basis for testing the strength and scope of the Midwest Video decision is already developing. FCC rules governing pay-cablecasting, found in 47 CFR § 76.225 (1972), are currently the subject of review. The rules were formulated in the FCC’s MEMORANDUM OPINION AND ORDER, 23 F.C.C.2d 825 (1970), and petitions for reconsideration directed to the pay-cablecasting rules were denied on July 24, 1972. However, a new rule-making proceeding to review the existing rules and consider changes was granted. In the current proceedings, challengers of the pay-cablecasting rules are denying that Midwest Video or Southwestern support the Commission’s attempt to adopt the pay-cablecasting restrictions. See, Comments of the Department of Justice, In the Matter of Amendment of Part 76, Subpart G, of the Commission’s Rules and Regulations Pertaining to the Cablecasting of Programs for Which a Per-Program or Per-Channel Charge is Made, Docket No. 19554, submitted on November 1, 1972. Should these rules eventually be challenged in court, the resulting decisions will of necessity further define the “reasonably ancillary” test of Southwestern and determine whether the outer limits of FCC jurisdiction over CATV have yet been reached.

\(^4^3\) See note 13, supra.


John J. Morrissey was paroled in June of 1968, and seven months later arrested as a parole violator. The Iowa Board of Parole reviewed the parole officer's written report and then revoked Morrissey's parole. After exhausting his state remedies, Morrissey petitioned the U.S. District Court for a writ of habeas corpus. He alleged his constitutional rights to due process were violated when his parole was revoked without a hearing. The District Court denied his petition, holding that a hearing was not required. The Court of Appeals affirmed. The Supreme Court granted a writ of certiorari, and reversed the lower courts, holding that a parolee's constitutional rights to due process are violated by revocation of his parole without a hearing observing certain minimal due process requirements.

Writing for the Court, Chief Justice Burger noted "that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Thus, the parolee's liberty, the Court held, is protected by the fourteenth amendment. The requirements of due process in a parole revocation hearing were then explained by the Court. The hearings are to be held in two stages. The first stage is a preliminary hearing held as promptly as convenient after the parolee's arrest and detainment. The purpose of this early hearing is to determine if there is probable cause or reasonable grounds

1. In January, 1967, Morrissey was convicted of forgery in an Iowa state court and was sentenced for a term of imprisonment not to exceed seven years.
2. In an unreported opinion, Morrissey's petition was denied because of the controlling authority of *Curtis v. Bennett*. In *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), *cert. denied*, 380 U.S. 958 (1965), the Supreme Court of Iowa held that a parolee had no constitutional right to a hearing before a parole board could revoke his parole. The eighth circuit adopted this view in *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965) noting, "Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard." 351 F.2d at 933.
3. *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971) (en banc). The Circuit Court consolidated Morrissey's appeal with that of G. Donald Booher. Booher's experience and claims mirror Morrissey's and the Supreme Court's decision covered both of their appeals, 408 U.S. 471, 473-74 (1972). The lower court opinion follows most of the standard reasons for denying a parole revocation hearing. These include the finding that parole is a privilege, not a right, the constructive custody theory, the contract theory and the importance of non-legal, non-adversary considerations in the revocation decision, etc.
6. *Id.* at 482.
to believe the parolee has violated his parole. In this regard due process requires: 1) notice to the parolee of its location and purpose; 2) notice to him of what parole violations are alleged; 3) an opportunity for him to appear and speak in his own behalf; 4) an opportunity to bring letters, documents or individuals who can present relevant information and 5) an opportunity for the parolee to question persons giving adverse information (except in instances where the informant would be subjected to the risk of bodily harm). In addition, the hearing officer must make a summary or digest of the evidence presented and state the reasons for his decision. The second stage, convened if desired by the parolee, is a revocation hearing held prior to the parole authority's final decision. This hearing will be a final evaluation of any contested facts and a final consideration of whether revocation is warranted. The procedure to be followed in this hearing is much like that to be followed in the first. The Court noted that the question of representation by counsel was neither reached nor decided. Justice Brennan, concurring in the result, felt that due process required that the parolee be allowed to retain an attorney if he desires one. Justice Douglas, dissenting in part, felt that if the parolee is accused only of violating parole conditions, rather than accused of an additional illegal act, then due process requires that no arrest or detainment be accomplished before the hearing is held. He also indicated that the parolee should be entitled to counsel.

In responding to the questions raised in this case, the Court first attempted to place the issue in focus. The Chief Justice wrote, "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." Breaking of the rules, or conditions, then, leads to revocation. The appropriateness of a two-step hearing procedure can be seen in the Court's exposition of what revocation entails.

Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual

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7. Id. at 486-87.
8. Id. at 489. But, note that the separate opinions of concurring Justices find that the parolee should be allowed to retain an attorney. See text accompanying notes 9-10 infra.
11. 408 U.S. at 477.
question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the condition does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex.\textsuperscript{12}

The Court then identified and evaluated the various interests involved. The rights-privilege distinction was held no longer dispositive of the question of whether due process applies to a particular situation.\textsuperscript{13} The parolee's interest is in his liberty, regardless of how that liberty is limited or conditioned.\textsuperscript{14} The state on the other hand has an "overwhelming interest" in being able to return the parolee to prison without the burden of a new criminal trial. But, the Court noted, this interest only arises when the parolee has in fact failed to abide by the conditions of his parole; the state has no interest in revoking a parole without at least some informal procedural guarantees.\textsuperscript{15} Society's interest is in restoring the parolee to a normal and useful life within the law. Therefore, it has an interest in preventing erroneous revocation of parole and in treating the individual with basic fairness. In the words of the Chief Justice, "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."\textsuperscript{16} Holding that the interests of all will be furthered by effective, informal hearings, the Court established the two-stage revocation hearing process. Two stages are required because certain preliminary questions should be answered relatively quickly after the arrest and detainment of the alleged parole violator and a hearing before a parole board can take time to organize.\textsuperscript{17} The first hearing is a minimal inquiry conducted at or near the place of arrest or alleged parole violations. This preliminary hearing should be convened "as promptly as convenient after arrest while information is fresh and sources are available."\textsuperscript{18} The hearing's purpose would be "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts which

\textsuperscript{12} Id. at 479-80.
\textsuperscript{13} 408 U.S. at 481. In other words, the question of whether parole is a right or a privilege was deemed irrelevant to the issue at bar. Goldberg v. Kelly, 397 U.S. 254 (1970). The Chief Justice does not cite Goldberg in this instance, but quotes Justice Blackmun's writing, "this court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'. Graham v. Richardson, 403 U.S. 365, 374 (1971)." 408 U.S. at 481.
\textsuperscript{14} 408 U.S. at 471, 482.
\textsuperscript{15} 408 U.S. at 483.
\textsuperscript{16} 408 U.S. at 484. The court below noted, "In holding that a prisoner has no constitutional right to a hearing upon revocation of his parole, we emphasize, however, that the parolee cannot be made the subject of arbitrary action." 443 F.2d at 950.
\textsuperscript{17} See text accompanying note 12 supra.
\textsuperscript{18} 408 U.S. at 485.
would constitute a violation of parole conditions." 19 This determination must be made by someone not directly involved in the case, i.e., not by the parolee's parole officer. The Court pointed out that the decision-maker need not be a judicial officer, because parole revocation is traditionally an administrative matter. Hence, another parole officer is acceptable as the hearing officer. 20 The second hearing must be held if requested by the parolee. It “must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.” 21 While the states will establish their own procedure for these hearings, the procedures must recognize the minimum requirements of due process. These requirements are quite similar to those of the first hearing, except that the parolee must be given written notice of the claimed violations of parole and the hearing must be held before a neutral and detached body. 22 It was stressed throughout the opinion that the Court is not envisioning a criminal process hearing in any sense. The Court said that parole revocation is not an instance of criminal conviction and that disposition of revocation hearings are better handled by administrative bodies rather than courts of law. 23

There has been a great deal of lower federal court action in recent years over state parole revocation procedures. 24 In most of these cases, a parolee whose parole had been revoked petitioned the court claiming that his rights were violated by the procedures used. The Morrissey decision will not ward off much of this court action, since it leaves important areas still open for de-

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19. *Id.*
20. *Id.* at 486.
21. *Id.* at 488.
22. 408 US. at 488-89. The other minimum requirements include: 1) disclosure to the parolee of evidence against him; 2) opportunity for the parolee to appear, be heard, and present witnesses and documentary evidence; 3) right of the parolee to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds a good cause for not allowing confrontation); and 4) a written statement by the fact-finders identifying the evidence relied on and the reasons for revoking parole.
23. 408 U.S. at 480.
24. Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970) (parole revocation without a hearing violates due process); Murray v. Page, 429 F.2d 1359 (10th Cir. 1970) (due process requires the right to be heard at a hearing before parole revocation); Alvarez v. Turner, 422 F.2d 214 (10th Cir. 1970) (a parolee is not entitled to rights of confrontation and cross-examination at a revocation hearing); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968) (Constitution does not require a hearing prior to the revocation of parole); Hodge v. Markley, 339 F.2d 973 (7th Cir. 1965) (parole revocation held proper despite the lack of counsel and the lack of a hearing in the district of alleged parole violation); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied sub nom.* Jamison v. Chappell, 375 U.S. 957 (1963) (due process does not require adversary hearings, appointment of counsel, or cross-examination to revoke parole); Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971) (due process requires a pre-revocation hearing and the appointment of counsel); Hutchison v. Patterson, 267 F. Supp. 433 (D. Colo. 1967) (revocation held proper despite the failure to give a statement of charges against the parolee).
bate and, perhaps, defers too much to the state's "overwhelming interest." For example, the Court refused to reach or decide the question whether due process requires counsel to be retained or appointed at a parole revocation hearing.\textsuperscript{25} Three members of the Court do say that, at least, the parolee should have counsel if he desires it,\textsuperscript{26} but the issue is left untouched by the majority. The Court's recognition of the state's "overwhelming interest" in avoiding the burden of a new criminal trial\textsuperscript{27} could explain why the question of counsel was not decided. The Court has recognized that counsel can perform valuable services at administrative hearings,\textsuperscript{28} but once parolees are allowed to retain counsel, the requirements of the equal protection clause may force states to appoint counsel to represent indigent parolees facing revocation.\textsuperscript{29} The Court seemed to fear that the burden of appointing lawyers would be too heavy for state parole boards to bear. Nonetheless, the issue will continue to be litigated and the Court will have to face it again.

During the last fifteen years, the concept of an individual's rights when facing the police, court and penal systems has been expanded by the Supreme Court.\textsuperscript{30} The \textit{Morrissey} case is an example of this, but a close reading of the decision reveals a change in emphasis from pre-1968 decisions. Generally, earlier decisions forced administrative apparatus to make drastic changes in day-to-day operating procedures; the "Miranda warnings" are the prime example in this area. However, in \textit{Morrissey} there is an overt attempt to avoid disruption of administrative procedure. This is defended on the grounds of the "overwhelming interest" of the state. Thus, the Court repeatedly stated that its intention is not to create a criminal hearing out of a parole violation proceeding.\textsuperscript{31} This is a notice to parole boards that they need not overhaul their revocation proceedings. The Court noted that the requirements set out

\textsuperscript{25} 408 U.S. at 489.
\textsuperscript{26} \textit{Id.} at 491 (Brennan, J., concurring), 498 (Douglas, J., dissenting in part). There are many lower court decisions on this question. See U.S. ex rel. Bey v. Connecticut, 443 F.2d 1079 (2d Cir.), \textit{vacated as moot}, 404 U.S. 879 (1971) (the parolee is constitutionally entitled to assistance of counsel during the revocation proceeding); Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971) (Constitution does not require the appointment of counsel for indigent parolees); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969) (a parole board must provide counsel for indigent parolees facing revocation); Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968) (the lack of counsel does not render the parole revocation invalid); Washington v. Hagan, 287 F.2d 332 (3d Cir. 1960), \textit{cert. denied}, 366 U.S. 970 (1961) (a parolee is not entitled to counsel at a parole revocation hearing); Martin v. U.S. Board of Parole, 199 F. Supp. 542 (D.D.C. 1961) (parolee is not entitled to have counsel present at a revocation hearing). See note 24 \textit{supra}.
\textsuperscript{27} \textit{See} text accompanying notes 14-15 \textit{supra}.
\textsuperscript{29} See Gideon v. Wainwright, 372 U.S. 335 (1963).
\textsuperscript{31} 408 U.S. at 480, 489.
should not impose a great burden on any parole system. Disruption is kept at a minimum by leaving such discretion to the various parole boards. For example, the requirement of notice for the first hearing is stated, “the parolee should be given notice.” But, for the second hearing, the requirements include “written notice of the claimed violations of parole.” Does this mean that written notice is not required in the first hearing? The opinion would appear to warrant such a conclusion. And, while this will not disrupt current revocation procedures, undoubtedly such procedures will be challenged for failing to give written notice of claimed violations at both hearings. The second hearing, the one which does determine whether to revoke parole, is held only when the parolee requests it. The Court does not answer the question whether the parolee must be told a second hearing is available. Here, too, the Court has inadvertently created new grounds for challenging parole revocation procedures. The Court gives hearing officers and parole boards their broadest discretion when the parolee seeks to confront those persons giving adverse information. At both hearings, persons giving adverse information, if the parolee requests, “are to be made available for questioning in his presence.” But this requirement need not be complied with, for “if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.” The criterion “that the informant would be subjected to risk of harm” is difficult to measure and subject to misuse. The threat of physical harm would be hard to disprove (or prove, for that matter) and the hearing officer could force an unnecessary acceleration of the revocation process.

The “overwhelming” nature of the state’s interest is properly characterized to the extent that in at least one instance it overwhelms even the fundamentals of the fourteenth amendment. Because of the state’s “overwhelming interest”, the Court sanctions a practice that the protections of due process were intended to eliminate. Without comment, the Court notes:

Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of

32. 408 U.S. at 490.
33. Id. at 486.
34. Id. at 489 (emphasis added).
35. Id. at 487.
36. Id.
37. Id.
38. The experience of confrontation and cross-examination could be excluded for the benefit of a waiving witness, also. Of course, should the parolee have any legitimate grievance about the manner in which his parole was revoked, he may petition for a writ of habeas corpus or take advantage of any available administrative appeals.
Here, the Court seems to be sanctioning the practice of sending an individual to prison for a crime he has not been convicted of. The individual has not even had a trial on the issue. This is not a case of the parolee, by his own volition, breaking the conditions of the parole. Here, he could be a completely innocent figure, arrested by police because he matched a description, had no alibi, and had a record. He then could be sent back to prison, without a criminal trial, possibly without even facing his accuser (threat of bodily harm), for a crime of which he was never convicted. The use of parole revocation as a short-cut circumventing the requirements of the fourteenth amendment should be condemned, not sanctioned, regardless of the interests involved. Throughout this opinion, the Court is very mindful of the state's interest, while the interests of the parolee have not been given their full accord. The *Morrissey* decision, because of the questions it leaves unanswered and the abuses it sanctions, surely will be questioned.

*Perry M. Gould*

39. 408 U.S. at 479.
40. The experience of accusation and arrest occurs more frequently to parolees and ex-convicts because of the police practice of including as suspects anyone in the area with a conviction for a similar crime.
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