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PAROLE REVOCATION HEARINGS— PRO JUSTICIA OR PRO CAMERA STELLATA?

The need to improve the nation's penal system is becoming increasingly recognized. In a recent address Chief Justice Warren E. Burger stressed the need for rehabilitation rather than revenge in the penal process:¹

[The nation must] do something about the most neglected, the most crucial and probably the least understood phase of the administration of justice, [the penal system] We find lawyers and judges becoming so engrossed with procedures and techniques that they tend to lose sight of the purpose of a system of justice. We should stop thinking of criminal justice as something which begins and ends with a final judgment of guilt.²

The Chief Justice's attitude is a welcome variance from the traditional "hands off" policy of the United States Supreme Court in this field.³ The Court's disinterest in securing fair treatment for convicts is mirrored by the indifference of the American public. One area which cries out for reform is the parole system.

Parole, as defined by the California Supreme Court, is the release of a prisoner prior to the expiration of his term of imprisonment, conditioned upon his continuing good behavior.⁴ This comment will consider the action taken by the state when it believes the parolee has violated his parole. Specifically, this comment will explore parole revocation procedures which result in a denial of the right to counsel, the right to confront witnesses, the right to utilize the subpoena power, the right to local hearings, and the right to the benefit of the exclusionary rule.

PAROLE REVOCATION PROCEDURES

Parole revocation in California is essentially a three-step procedure which begins with the parole agent's report of a violation.⁵ A convict is free to remain on parole until he violates one of the

¹ "Last week he reaffirmed his concern with prison reform in two tough speeches—to the Association of the Bar of the City of New York and the American Bar Association in Atlanta." *TIME*, March 2, 1970, at 66.

² *Id.*

³ Rubin, *Administrative Response to Decisions*, 15 *CRIME & DELINQUENCY* 377, 380 (1969). See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *YALE L.J.* 506 (1963); *Rose v. Haskins*, 388 F.2d 91, 102 (6th Cir. 1968).

⁴ *In re Peterson*, 14 Cal. 2d 82, 85, 92 P.2d 890, 891 (1939).

⁵ Parole Agent's Manual, ch. 4, 1964.

parole conditions⁶ or commits a crime. If a condition is violated, the parole agent has the discretionary power to issue a report of the

⁶ CALIFORNIA CDC Form 1515:

CONDITIONS OF PAROLE

1. **RELEASE:** Upon release from the institution you are to go directly to the program approved by the Parole and Community Services Division and shall report to the Parole Agent or any other person designated by the Parole and Community Services Division.
2. **RESIDENCE:** Only with approval of your Parole Agent may you change your residence or leave the county of your residence.
3. **WORK:** It is necessary for you to maintain gainful employment. Any change of employment must be reported to, and approved by, your Parole Agent.
4. **REPORTS:** You are to submit a written monthly report of your activities, including any arrests, on forms supplied by the Parole and Community Services Division unless directed otherwise by your Parole Agent. This report is due at the Parole Office not later than the fifth day of the following month, and shall be true, correct, and complete in all respects.
5. **ALCOHOLIC BEVERAGES:** The unwise consumption of alcoholic beverages and liquors is a major factor in parole failures.
 - *A. You shall not consume alcoholic beverages or liquors to excess.
 - B. You shall not consume *ANY* alcoholic beverages or liquor.

*Strike out either A or B, leaving whichever clause is applicable.
6. **NARCOTICS AND DANGEROUS AND HYPNOTIC DRUGS:** You may not possess, use, or traffic in any narcotic drugs, as defined by Division 10 of the Health and Safety Code, or dangerous or hypnotic drugs, as defined by Section 4211 of the Business and Professions Code, in violation of the law. If you have ever been convicted of possession, sale, or use of narcotic drugs, or have ever used narcotic drugs, or become suspected of possessing, selling, or using narcotic drugs, you hereby agree to participate in anti-narcotic programs in accordance with instructions from your Parole Agent.
7. **WEAPONS:** You shall not own, possess, use, sell, nor have under your control any deadly weapons or firearms.
8. **ASSOCIATES:** You must avoid association with former inmates of penal institutions unless specifically approved by your Parole Agent; and you must avoid association with individuals of bad reputation.
9. **MOTOR VEHICLES:** Before operating any motor vehicle you must secure the written permission of your Parole Agent, and you must possess a valid operator's license.
10. **COOPERATION:** You are to cooperate with the Parole and Community Services Division and your Parole Agent at all times.
11. **LAWS:** You are to obey all municipal, county, state, and federal laws, and ordinances.
12. **PERSONAL CONDUCT:** You are to conduct yourself as a good citizen at all times, and your behavior and attitude must justify the opportunity granted by this parole.
13. **CIVIL RIGHTS:** A number of your Civil Rights have been suspended by law. You may not engage in business, sign certain contracts, or exercise certain other Civil Rights unless your Parole Agent recommends, and the Adult Authority grants the restoration of such Civil Rights to you. There are some Civil Rights affecting your everyday life which the Adult Authority has restored to you, *BUT* you may not exercise these without the approval of your Parole Agent. You should talk to your Parole Agent about your Civil Rights to be sure you do not violate this condition of your parole. The following are some of the Civil Rights which have been restored to you at this time:
 - A. You may make such purchases of clothing, food, transportation, household furnishings, tools, and rent such habitation as are necessary to maintain yourself and keep your employment. You shall not make any purchases relative to the above on credit except with the written approval of your Parole Agent.
 - B. You are hereby restored all rights under any law, relating to employees, such as rights under Workmen's Compensation Laws, Unemployment Insurance Laws, Social Security Laws, etc. (Reference is here made to Adult Authority Resolution No. 199)

violation to the parole unit supervisor.⁷ If the parole agent and the unit supervisor decide that the violation is serious, parole is suspended and the parolee is taken into custody.⁸ However, if the parole violation is the commission of a crime the revocation procedure differs. If the crime is a misdemeanor and the parolee is sentenced to eighty-nine days or less, the procedure is the same as for a non-criminal violation.⁹ If the crime is a misdemeanor and the parolee is sentenced to at least ninety days but less than six months, the violation is reported to the Adult Authority for disposition. Regardless of the sentence, the agent must report any sex or narcotics offense or any arrest for a large-scale fraudulent scheme.¹⁰ If the crime is a felony or a misdemeanor for which the parolee is sentenced to six months or more, parole is automatically suspended.

The second step in the revocation procedure is the *ex parte* Parole and Community Service ("P&CS") Hearing.¹¹ Here the written report and other pertinent information is presented to the hearing board. The parole agent's report not only contains a suggested disposition of the case, but a sketch of the parolee's history.¹² Neither parole agent nor parolee are present; the report is submitted to the board, usually by the unit supervisor.¹³ The composition of the hearing board usually consists of one Adult Authority member and one hearing representative.¹⁴ Upon consideration of the report, the board can recommend either continuation on parole or a formal revocation hearing.¹⁵ If a formal hearing is recommended, the parolee is transferred from the county jail, to the Reception-Guidance Center at Vacaville, California.¹⁶ Usually the parolee is not informed of the official charges against him until he is transferred to Vacaville.¹⁷

14. CASH ASSISTANCE: In time of actual need, as determined by your Parole Agent, you may be loaned cash assistance for living expenses or employment; or you may be loaned such assistance in the form of meal and hotel tickets. You hereby agree to repay this assistance; and this agreement and obligation remain even though you should be returned to prison as a parole violator. Your refusal to repay, when able, may be considered an indication of unsatisfactory adjustment.

15. SPECIAL CONDITIONS: [As listed].

⁷ Parole Agent's Manual, ch. 4, 1964.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, 1970 REPORT ON PAROLE REVOCATION PROCEDURES, Feb. 19, 1970, at 2. [Hereinafter cited as: 1970 COMM. REPORT.]

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

The final step in the revocation process is the actual revocation hearing which is conducted by two hearing representatives, normally within three weeks of the "P&CS"¹⁸ Hearing. The board gives the parolee an opportunity to plead to the alleged violation, then proceeds to review his record.¹⁹ Due to the large number of cases the board hears each day, the usual procedure is for one hearing representative to question the parolee while the other reviews the next case.²⁰ By utilizing this method, the board hears many more cases each day. After considering the parolee's testimony, the "P&CS" Hearing report, and other reports in the parolee's file, the board renders its decision. The hearing board either reinstates or revokes parole.²¹ If parole is revoked the maximum prison term is imposed.²²

SHORTCOMINGS OF THE REVOCATION PROCEDURE

During the entire revocation procedure, from the time the parole agent submits his report to the actual revocation, the parolee is never afforded the protection of basic Constitutional rights which are guaranteed to ordinary citizens. It is established California law that the parolee need be given neither notice nor a hearing when his parole is revoked.²³ Even though a parolee receives a hearing, he does not have any of the following rights: To counsel,²⁴ to present adverse witnesses,²⁵ to cross-examine witnesses,²⁶ or to have a local hearing.²⁷ The deprivation of these rights renders the parolee's defense impotent.

The "P&CS" Hearing is especially devoid of due process protections. The ex parte nature of this hearing should not be taken

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 4.

²³ CAL. PEN. CODE § 3060 (West 1956) provides: "The Adult Authority shall have full power to suspend, cancel, or revoke any parole without notice, and to order returned to prison any prisoner upon parole. The written order of any member of the Adult Authority shall be a sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner." *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968); *In re McLain*, 55 Cal. 2d 78, 84, 357 P.2d 1080, 1084, 9 Cal. Rptr. 824, 828 (1961), *cert. denied*, 368 U.S. 10 (1961).

The California Supreme Court *recommended* affording parolees notice and hearing in order to discourage needless judicial review and impart a sense of fairness in the state's dealings with parolees. *In re Gomez*, 64 Cal. 2d 591, 594 n.1, 414 P.2d 33, 35 n.1, 51 Cal. Rptr. 97, 99 n.1 (1966).

²⁴ *Mead v. California Adult Authority*, 415 F.2d 767 (9th Cir. 1969); *Williams v. Dunbar*, 377 F.2d 505 (9th Cir. 1967), *cert. denied*, 389 U.S. 866 (1968); *In re Schoengarth*, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967).

²⁵ *Williams v. Dunbar*, 377 F.2d 505 (9th Cir. 1967), *cert. denied*, 389 U.S. 866 (1968).

²⁶ *Id.*

²⁷ 1970 COMM. REPORT at 2, *supra* note 11.

lightly, even though it is preliminary. Actually the "P&CS" Hearing is more important than the revocation hearing, because this hearing effectually determines whether parole will be revoked. Once the case reaches the revocation stage, 98 percent of the cases result in revocation.²⁸ The parolee could protect his interests better if present at this hearing, since it is here that the actual determination is made. The later revocation hearing is essentially a "rubber stamp" procedure.

Although present at the revocation hearing, the parolee is denied the right to counsel.²⁹ The inaccessibility of witnesses and an unfamiliarity with the law impose upon the parolee a tremendous burden in attempting to defend himself. Because the revocation hearing is held at the state prison in Vacaville, the parolee is often unable to afford the luxury of having his witnesses testify at the hearing. The distance to the prison from the witnesses' homes can very often make it impossible for them to attend the hearing. In addition, the parolee is not able to compile evidence on his own, because he is in prison without bail. The inability of the parolee to present a potent defense is not the only unfair aspect of this hearing. The added fact that the parolee has no effective means of challenging any spurious evidence against him makes the proceedings much more one-sided. The evidence against the parolee consists of numerous reports which cannot be questioned,³⁰ hence there is no opportunity for the parolee to verify the testimony of those who spoke against him. The "faceless witnesses" who are not present at the hearing may have a prejudicial interest to serve by their testimony. There is also the possibility that the parole agent was less than objective in his analysis of the facts.³¹ California parole revocation hearings are so devoid of basic Constitutional protections that they are reminiscent of "Star Chamber" proceedings.

Confrontation of Witnesses

For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished

²⁸ *Id.* at 3.

²⁹ Cases cited note 24 *supra*.

³⁰ 1970 COMM. REPORT at 2, *supra* note 11.

³¹ *Id.* at 5. "Parole agents are human and it is possible that friction between the agent and parolee may have influenced the agent's judgment. In fairness to the violator, this is a possibility which should be investigated by some higher authority. . . ." Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S., 175, 196 (1964) (quoting from Attorney General's 1939 Survey of Release Procedures).

by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.³²

The right to cross-examine and challenge the testimony presented against a person is not only indigenous to our society, but it was also recognized in early Christian history.³³ Our Constitution via the sixth amendment guarantees the right to confront witnesses in a criminal trial. Constitutionally, however, this right is not extended to all administrative hearings, even though many administrative proceedings have the same results as criminal trials.³⁴

California parole revocation proceedings do not allow the parolee to confront the witnesses against him.³⁵ The testimony at the hearings is presented by written reports and documents, which are not susceptible to cross-examination. California courts consistently maintain that the parolee does not have the right of confrontation since parole revocation is an administrative action.³⁶

The United States Supreme Court has held that confrontation is essential at administrative hearings when the loss the defendant stands to suffer is of sufficient magnitude. The Court allowed confrontation of witnesses in *Greene v. McElroy*³⁷ when an engineer lost his security clearance. There, it was established that revocation of a security clearance would, in fact, preclude the engineer from working in a wide field of employment.³⁸ The United States Supreme Court's willingness to protect employment rights should be extended to the protection of a much more basic right,³⁹ personal freedom.

Confronting an adverse witness not only allows the parolee to test the witness' reliability, but it also allows the hearing board to consider the demeanor and attitude of the witness.⁴⁰ False and self-serving statements are less likely to be made in the presence of the

³² J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

³³ When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have said: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him." Acts 25:16.

³⁴ Juvenile proceedings, proceedings for the commitment of the mentally ill, proceedings for those who have communicable diseases, as well as parole revocation hearings very often result in confinement.

³⁵ *Williams v. Dunbar*, 377 F.2d 505 (9th Cir. 1967), cert. denied, 389 U.S. 866 (1968).

³⁶ *Id.*

³⁷ 360 U.S. 474 (1959).

³⁸ *Id.*

³⁹ *Id.* at 486, 487.

⁴⁰ *Rittenour v. District of Columbia*, 163 A.2d 558 (D.C. Muni. Ct. App. 1960).

accused. Although the parole agent is responsible for verifying statements made by witnesses, he is often unable to do so adequately, presumably because of his enormous case load.⁴¹ Even if the majority of witnesses are truthful, cross-examination should be extended to discredit those who are not.

Cross-examination would also allow the parolee the opportunity to question the parole agent. Since the agent is responsible for the instigation of revocation proceedings, it is important to ascertain whether or not he was biased in his report.⁴²

Subpoena Power

The sixth amendment also provides the basis for the right to subpoena witnesses at criminal proceedings. The United States Supreme Court has considered very few cases which involve the right of compulsory process at administrative hearings, because the power is granted to most significant agencies, and when not conferred is usually not needed.⁴³ However, in *Missouri ex rel Hurwitz v. North*⁴⁴ the Court found that the subpoena power is basic to a hearing, no matter what form or procedure the hearing assumes.⁴⁵ In *Jewell v. McCann*,⁴⁶ the Ohio Supreme Court declared unconstitutional an administrative procedure because it did not provide for compulsory process.⁴⁷ *Jewell* involved the revocation of a doctor's license to practice medicine. Impressed by the consequences of such a revocation, the court found a fair hearing inherently required compulsory process.⁴⁸

California does not provide for compulsory process at the parole revocation hearing. If the power to subpoena witnesses existed, the parolee would be able to secure testimony which would have a substantial effect on the Adult Authority's revocation decisions. Subpoena power would increase the parolee's chance of remaining on parole. Furthermore, the revocation hearing would neither be seriously hampered nor restrained by the extension of the power to subpoena witnesses.

⁴¹ R. CLEGG, PROBATION AND PAROLE, PRINCIPLES AND PRACTICES (1964).

⁴² *Supra* note 31.

⁴³ W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 613 (4th ed. 1960).

⁴⁴ 271 U.S. 40 (1926).

⁴⁵ *Id.* at 42. *North* is not squarely on point however, because the Court found that the right to introduce compelled depositions is substantially equivalent to the subpoena power. In parole revocation hearings, the parolee does not even possess the power to have depositions compelled.

⁴⁶ 95 Ohio St. 191, 116 N.E. 42 (1917).

⁴⁷ *Id.* at 193, 116 N.E. 43 (1917).

⁴⁸ *Id.*

Location of the Hearings

California "P&CS" Hearings are held in Los Angeles and San Francisco,⁴⁹ while formal revocation hearings are held in Vacaville.⁵⁰ Hearings are conducted at these locations for the convenience of the Adult Authority. By conducting the hearings at the present locations, the state is effectively denying the parolee vital evidentiary sources.⁵¹ The parolee is faced with formidable obstacles in obtaining or presenting evidence in his favor. As previously noted, the parolee cannot avail himself of the subpoena power. Therefore the distance to be traveled and the resulting loss of time and wages, if employed, is a deterrent to witnesses who would otherwise voluntarily appear on his behalf.

This disadvantage is recognized in federal government proceedings. Chief Justice Burger, then of the District of Columbia Circuit Court, ruled that federal parole revocation hearings must be conducted at or near the location of the alleged violation.⁵² Localized hearings would contribute to an atmosphere of fairness if they were granted in California revocation proceedings.

There is no doubt that local hearings would impose greater demands upon the Adult Authority, perhaps even requiring an expansion of the Authority with a resulting increase of cost to the state. However, the cost factor must be weighed against the unfairness to the parolee of conducting the hearings at the present locations, where he cannot present a meaningful defense. Hearings, then, must be localized in order for California revocation hearings to project even a minimal amount of fairness.

Right to Counsel

The sixth amendment right to representation by counsel is not extended to the parolee at the parole revocation hearing. However, the right to counsel, in this type of proceeding, is assured in eighteen states by statute.⁵³ The right to counsel is also guaranteed at federal parole revocation hearings.⁵⁴

⁴⁹ 1970 COMM. REPORT at 2, *supra* note 11.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963). The court saw the vital need for a local hearing, and concluded that a local hearing is within the congressional scheme of fairness. However, *Hyser* is not California law. *Id.* at 243-44.

⁵³ Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 499 (1968).

⁵⁴ *Fleming v. Tate*, 156 F.2d 849 (D.C. Cir. 1946); now the right to counsel in federal hearings is granted by statute.

In 1963 the United States Supreme Court interpreted the due process clause of the fourteenth amendment to include the protections of the sixth amendment.⁵⁵ However, at first the Court was reluctant to extend the right to counsel beyond the actual criminal trial. Recent decisions expanded this rule so that the defendant is now given the right to representation by counsel at all "critical periods" before and after the actual trial.

*Mempha v. Rhay*⁵⁶ extended the "critical period" to include the probation revocation hearing. Advocates of the right to counsel at the parole revocation hearing were encouraged by the *Mempha* decision because of the similarities between parole and probation.⁵⁷ However, courts refuse to extend *Mempha* to parole revocation hearings⁵⁸ because *Mempha* protects the probationer prior to sentencing; in parole proceedings the sentencing has already taken place.⁵⁹

Until recently courts would not extend representation by counsel to administrative hearings. The first administrative hearings which required representation by counsel were those involving commitment for mental deficiency or communicable disease.⁶⁰ Recent judicial opinion sees the controlling factor to be the commitment proceeding, not the classification of the proceeding. Deprivation of liberty compels the right to representation by counsel.⁶¹

In California parole revocation hearings are administrative hearings which almost invariably result in reimprisonment. The Court's willingness to extend the sixth amendment right to counsel to other administrative proceedings should also apply to parole revocation hearings. The parolee stands to lose much more than the mentally ill, since a return to prison means a loss of most Con-

⁵⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁶ 389 U.S. 128 (1967). The United States Supreme Court, in holding that a convicted criminal has a right to counsel at a probation revocation hearing, reasoned that probation is a deferment of the actual sentencing, which is within the critical period. The Court also emphasized the probationer's need for assistance in marshalling the facts, introducing evidence of mitigating circumstances, and aiding and assisting the defendant to present his case at the sentencing stage. *Id.* at 135-37.

⁵⁷ *Ex parte Anderson*, 191 Ore. 409, 230 P.2d 770 (1951).

⁵⁸ *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968); *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968); *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968).

⁵⁹ *Id.*

⁶⁰ *Dooling v. Overholser*, 243 F.2d 825 (D.C. Cir. 1957); *Howard v. Overholser*, 130 F.2d 429 (D.C. Cir. 1942); *Richey v. Superior Court*, 59 Wash. 2d 872, 371 P.2d 51 (1962); see also, Comment, *Civil Commitment of the Mentally Ill in California: 1969 Style*, 10 SANTA CLARA LAW. 74, 82-86 (1969); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966).

⁶¹ *Hereyford v. Parker*, 396 F.2d 393 (10th Cir. 1968). "[W]e think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability. . . . It is the likelihood of involuntary incarceration . . . which commands observance of the Constitutional safeguards of due process." *Id.* at 396.

stitutional rights in addition to the parolee's loss of liberty. Nevertheless, California persists in denying the right to counsel at parole revocation hearings on the basis that these are administrative proceedings.⁶²

*Gideon v. Wainwright*⁶³ extended the sixth amendment to the states because of a defendant's inability to properly defend himself. The Court reasoned that a defendant who is uneducated in the law and unable to procure witnesses is, in the absence of counsel, denied an adequate defense.⁶⁴ Its reasoning in *Gideon* is also applicable to the parolee's situation at the revocation hearing. Because of the denial of counsel, the parolee is denied an adequate defense.⁶⁵ At the parole revocation hearing, the parolee can do little more than protest his innocence. Although a parole revocation hearing is an administrative procedure, the *Gideon* rule should nevertheless be applicable, as the consequences are of the same magnitude.⁶⁶

Those who oppose representation by counsel at the revocation hearing often do so on the ground that the hearing will become a battleground between parole authorities and the attorney.⁶⁷ This very argument was presented to the District of Columbia Circuit Court in *Fleming v. Tate*⁶⁸ and rejected as unfounded. That court believed that more harm than good would result from the denial of counsel.⁶⁹

In a revocation hearing without the aid of counsel, there is a very real danger that parole will be revoked without "good cause."⁷⁰

⁶² Cases cited note 24 *supra*.

⁶³ 372 U.S. 335 (1963).

⁶⁴ *Id.* at 341.

⁶⁵ 1970 COMM. REPORT at 4-5, *supra* note 11.

⁶⁶ *Jones v. Rivers*, 338 F.2d 862, 877 (4th Cir. 1964) (concurring specially). "[A]t stake in a revocation hearing, when the parolee denies the violation, are issues no less momentous than in the original trial." *Id.*

⁶⁷ Chappell, *Due Process of Law as it Relates to Corrections*, FEDERAL PROBATION, Sept. 1965, at 3. "[The parole and penal system] is a sensitive area. In fact there is a danger that it might become a battle area, with lawyers and the courts on one side and social workers and persons in the correctional field on the other. The difficulty with such a conflict is that if anyone wins at all, it is bound to be a Pyrrhic victory. . . ."

⁶⁸ 156 F.2d 849 (D.C. Cir. 1946).

⁶⁹ *Id.* at 850.

⁷⁰ CAL. PEN. CODE § 3063 (West 1956) provides: "No parole shall be suspended or revoked without cause, which cause must be stated in the order suspending or revoking the parole."

In re Smith, 33 Cal. 2d 797, 205 P.2d 662 (1949), suggests that although "good cause" is required for there to be grounds for a revocation, this requirement is loosely interpreted; e.g., in *Williams v. Dunbar*, 377 F.2d 505, 506 (9th Cir. 1967) *cert. denied*, 389 U.S. 866 (1968), someone entered parolee's home with a key and destroyed several hundred dollars worth of his wife's clothes, while leaving his untouched. Parolee was at home a short time later, but made no report to parole agent

The presence of an attorney would greatly increase the assurance that the parolee is not reincarcerated without "good cause." The presence of an attorney, furthermore, would materially aid the rehabilitative ends of parole.

Certainly no circumstances could further that purpose [the rehabilitation of a parolee] to a greater extent than a firm belief on the part of such offender in the impartial, unhurried, objective, and thorough processes of the machinery of the law.⁷¹

The extension of the right to counsel to parole revocation hearings would be in the best interest not only of the parolee but also of the state.

The Exclusionary Rule

The California Supreme Court recently held, in the case of *In re Martinez*,⁷² that the Adult Authority could consider illegally seized evidence at the parole revocation hearing. It allowed the hearing board to consider evidence, the illegality of which earlier resulted in a reversal of the criminal charge. The court supported its holding on two bases: That extension of this rule would strangle the Authority in legalistic niceties while exposing the public to parole violators freed on technicalities and that it would not substantially achieve the deterrence of illegal police activity.⁷³ The court discussed the exclusionary rule only in relationship to the deterrence of illegal police activity.⁷⁴ It did not consider the more important reasons for the exclusionary rule: Vindication of the right itself,⁷⁵ and the maintenance of judicial integrity.⁷⁶ The court seems to have overlooked the fact that the primary purpose of the rule is to protect the accused, not to discourage illegal police activity.⁷⁷

The court's concern for the safety of the public is a dubious excuse for denying the extension of the rule.⁷⁸ Not only should pro-

of the events. This led parole authority to believe parolee was not co-operating with them. The Adult Authority found that the alleged non co-operation was sufficient cause to merit revocation of parole.

⁷¹ *Fleming v. Tate*, 156 F.2d 849, 850 (D.C. Cir. 1946).

⁷² 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970).

⁷³ *Id.* at 650, 463 P.2d at 740, 83 Cal. Rptr. at 388.

⁷⁴ *Id.*

⁷⁵ Brennan, *Court Decisions and Crime*, 15 CRIME & DELINQUENCY 449, 451 (1969). The author of this article is United States Supreme Court Associate Justice William J. Brennan.

⁷⁶ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Elkins v. United States*, 364 U.S. 206, 223 (1960). "[E]xistence of the government will be imperiled if it fails to observe the law scrupulously. . . . Crime is contagious. If the government becomes a law breaker, it breeds contempt for law. . . ." *Id.*

⁷⁷ Brennan, *supra* note 75, at 451-52.

⁷⁸ California Assembly Committee Progress Report on Criminal Procedures, Crime

tection of the public not be controlling, but the court's fear is also the type which is prevalent whenever there is a liberalization of criminal procedure. This "stock" recitation of fear for the public is similar to the apprehension which shrouded *Escobedo v. Illinois*⁷⁹ and *Miranda v. Arizona*.⁸⁰ The court's fear in *Martinez* is probably just as unfounded as the fear expressed by the losing argument in *Miranda*.⁸¹

Extension of the exclusionary rule would further impress the parolee with the fairness of the revocation hearing and strengthen his impression of judicial integrity.

The Denial of Due Process

Parole administrators are adamant in their denial of a need for due process because they feel that it will only hinder and encumber their efforts.⁸² The right to counsel creates special problems for administrators because they fear that the presence of an attorney at the hearing will result in an adversary proceeding laced with legal formalities.⁸³

Courts are much more analytical in their reasoning. Some simply state that due process, an elusive concept, varies with the nature of the proceeding, the right involved, and the possible burden on that proceeding.⁸⁴ Others cite one of four theories for the denial of due process: The contract theory, *parens patriae*, right-privilege distinction and the theory of constructive custody.

The contract theory, per se, is not espoused by the California Supreme Court as one of the reasons for denying due process. The court does allude to the existence of a contract between the parolee and the Adult Authority in a number of decisions.⁸⁵ However, these

and Penalties in California, at 41 (May, 1968). "[C]alculations of the actual size of the impact of parolee crime also suggest that the consideration of public safety perhaps need not or can not be the controlling element in parole policy." *Id.*

⁷⁹ 378 U.S. 478 (1964).

⁸⁰ 384 U.S. 436 (1966).

⁸¹ Seeburg & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967); Medalie, Zietz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Robinson, *Police and Prosecutor Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425.

⁸² Burdman, *The Conflict Between Freedom and Order*, 15 CRIME & DELINQUENCY 371-75 (1969).

⁸³ *Id.*

⁸⁴ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

⁸⁵ *In re Peterson*, 14 Cal. 2d 82, 92 P.2d 890 (1939). See also *In re Schoengarth*, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967); *People v. Denne*, 141 Cal. App. 2d 499, 297 P.2d 451 (1956). In the case of *In re Tenner*, 20 Cal. 2d 667, 674, 128

decisions usually involve an early release conditioned upon the parolee's agreement to return to another state for criminal prosecution.⁸⁶ If the parolee accepts parole he must surrender himself to the officials of another state; if he rejects the offer, he must then remain in prison.

The contract theory in some other states rests on the waiver principle. The parolee waives his right to a fair hearing by accepting the conditions of parole.⁸⁷

The contract theory is of dubious legality due to the coercive nature of the waiver. It is questionable whether the parolee is able to consent to the waiver in view of the precarious position he is in. Furthermore, the idea of waiver suggests that the parolee would otherwise have a right to a hearing and the protections of the Constitution. If the parolee does not possess the right to a hearing, what purpose does the waiver serve?

The most recent theory espoused for the deprivation of due process at parole revocation hearings is *parens patriae*,⁸⁸ first applied in *Hyser v. Reed*,⁸⁹ and resting upon the assumption that the Adult Authority, in revoking parole, occupies the role of a parent withdrawing a privilege from an errant child, not as punishment, but for misuse of the privilege.⁹⁰

The viability of the *parens patriae* theory is very much in doubt since the United States Supreme Court rejected it as the reason for deprivation of due process in juvenile hearings.⁹¹ The Court's action would seem to be equally applicable to parole revocation hearings, since in both instances the individual's liberty is at stake.

The most recited reason for depriving the parolee of due process is the right-privilege distinction. The foundation for this theory stems from *Escoe v. Zerbst*,⁹² which states that parole is a statutory creation with no basis in the Constitution; therefore, statutory law is binding.⁹³ Implicit in this theory is the notion that the Adult

P.2d 338, 341 (1942), the court stated: "One convicted of crime has the right to reject an offer of parole, but once having elected to accept parole, the parolee is bound by the express terms of his conditional release."

⁸⁶ *In re Kilmer*, 37 Cal. 2d 568, 233 P.2d 902 (1951); *In re Tenner*, 20 Cal. 2d 670, 128 P.2d 338 (1942); *In re Peterson*, 14 Cal. 2d 82, 92 P.2d 890 (1939).

⁸⁷ *In re Lorette*, 126 Vt. 286, 228 A.2d 790 (1967); *Fuller v. State*, 122 Ala. 32, 26 So. 146 (1899).

⁸⁸ *In re Martinez*, 275 Cal. App. 2d 55, 79 Cal. Rptr. 686 (1969), *vacated*; *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963).

⁸⁹ 318 F.2d 225 (D.C. Cir. 1963).

⁹⁰ *In re Martinez*, 275 Cal. App. 2d 55, 61, 79 Cal. Rptr. 686, 692 (1969), *vacated*.

⁹¹ *In re Gault*, 387 U.S. 1 (1967).

⁹² 295 U.S. 490 (1935).

⁹³ *Id.* at 492.

Authority is doing the parolee a favor by granting a parole; further, that the parolee should not impose upon the Authority by seeking due process. However, the theory that a privilege can be withdrawn in any manner the grantor may choose has come under increasing attack. The United States Supreme Court recently decided that although one may not possess a certain right, once the right is granted it can be revoked only by means consistent with due process.⁹⁴ The Court has also attacked the right-privilege concept through the equal protection clause of the fourteenth amendment⁹⁵ and the right to procedural due process, which necessitates a hearing to substantiate the claimed violation.⁹⁶

The majority of California decisions rely on the concept of "constructive custody" when they deny due process at the parole revocation hearing.⁹⁷ "Constructive custody" is a legal fiction which maintains that the parolee is always in the custody of the Adult Authority, via the parole agent.⁹⁸ Because the custody is not actual custody, and, in fact, not custody at all, it is called "constructive custody." An Alice in Wonderland fantasy, the court speaks of "constructive custody" as being the extension of the prison walls to the whole world; for this reason they compare the parolee to a prison "trustee."⁹⁹

Recent court decisions discount the "constructive custody" theory, and instead speak of "conditional freedom."¹⁰⁰ A legal definition of "conditional freedom" does not exist; however, there is no doubt that it envisions parole in a more realistic light. "Conditional freedom" is a term which places the parolee between actual freedom and "constructive custody." The parolee does not possess the rights of an ordinary citizen, yet he is not a "trustee." "Conditional freedom" probably means that the parolee is a free man except for the conditions of parole.

PROPOSED LEGISLATIVE CHANGES

Humanizing the parole system presents no easy task. The California Legislature in 1969 discussed eight different bills which

⁹⁴ *Greene v. McElroy*, 360 U.S. 474 (1959).

⁹⁵ See *Douglas v. California*, 372 U.S. 353 (1963); *Brown v. Board of Education*, 347 U.S. 398 (1954); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

⁹⁶ See *Greene v. McElroy*, 360 U.S. 474 (1959); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

⁹⁷ *People v. Contreras*, 154 Cal. App. 2d 321, 315 P.2d 916 (1957); *People v. Denne*, 141 Cal. App. 2d 499, 297 P.2d 451 (1956).

⁹⁸ See authorities cited in note 23, *supra*.

⁹⁹ *People v. Denne*, 141 Cal. App. 2d 499, 508, 297 P.2d 451, 457 (1956).

¹⁰⁰ *In re Martinez*, 1 Cal. 3d 641, 646, 463 P.2d 734, 737, 83 Cal. Rptr. 382, 385 (1970); *Rose v. Haskins*, 388 F.2d 91, 98 n.2 (6th Cir. 1968).

sought to change the parole system; however, none became law.¹⁰¹ The current California Legislature Committee on Criminal Procedures recently published its final report on parole revocation in which it recommended that the parolee be given early notice of the alleged violation, that he should have a speedy hearing, that he should have a right to be present at his hearing, that he should have a right to have counsel represent him, that a hearing should be held in the county of his residence or in the county where the alleged violation took place, and that parole conditions should relate to conduct which is reasonably connected with the parolee's potential criminality.¹⁰² If the Legislature is amenable to these recommendations, California will have one of the fairest procedures for revoking parole.

CONCLUSION

The California parole revocation procedure gives the appearance of providing a modicum of fair treatment to an accused parole violator through the "P&CS" and revocation hearings. This appearance of fair play is, however, illusory. Beyond denying fair play, whether or not the accused is technically entitled to the constitutional safeguards accorded "first class" citizens, the present parole revocation procedures undoubtedly thwart the purposes of our penal system, defeating rather than benefiting the purposes of rehabilitation. Not only is the person injured, society as a whole is offended.

The position taken by the Chief Justice of the United States Supreme Court indicates the possibility, if not the likelihood, of vast changes in the realm of parole. Hopefully, the dawning of a change in our applied penal psychology is just a matter of time. The change is imminent. The question is: How much longer must parolees wait?

Rodney J. Blonien

¹⁰¹ Comment, *Rights Versus Results: Quo Vadis Due Process for Parolees*, 1 PACIFIC L.J. 321, 323 (1970).

¹⁰² 1970 COMM. REPORT at 5-7, *supra* note 11.