any and all circumstances.[37] As women's rights have increased, the need for their protective blanket has diminished.[38] However, there still remains a tendency to give greater benefits to the mother in alimony and child support decrees. It appears that the *Moore* court devised its guidelines to help combat the possible inequitable decisions that may have resulted. This may not be the panacea; however, this result is a step toward uniformity of decisions and is in line with the trend toward equilization of the rights of men and women.

ROBERT Y. NAGATA

PAROLE—EXCLUSIONARY RULES—DETRIMENTAL EFFECT ON THE REHABILITATION OF PAROLEES NOT CONSIDERED IN HOLDING THAT EXCLUSIONARY RULES HAVE NO APPLICATION TO PAROLE REVOCATION PROCEEDINGS. *In re Martinez* (Cal. App. 1969).

While released on parole, Martinez was arrested, charged with and found guilty of possession of heroin.[1] The Court of Appeal, Second District, subsequently reversed the conviction[2] on the grounds that the search involved was illegal and the statements used against him were obtained without constitutional warning. The petitioner's parole had previously been revoked,[3] after a hearing at which he was present, on the following grounds: (1) The conviction (which was subsequently reversed); (2) driving a motor vehicle without consent of his parole agent; and (3) using alcoholic liquors to excess. Martinez's applications for parole were annually heard and denied; the Adult Authority[4] took cognizance of the

37. 37 CAL. JUR. 2d, *Parent and Child* § 21 (1957); B. ARMSTRONG, CALIFORNIA FAMILY LAW at 1098.

38. Women today have the ability to provide for themselves, thereby lessening the need for the husband's support. *See*, M. TURNER, WOMEN AND WORK (1964).

1. The record discloses that petitioner is now confined in Folsom State Prison. On May 12, 1955, petitioner was convicted in the Los Angeles Superior Court of violation of section 11500 of the Health and Safety Code (sale of narcotics—heroin), sentenced and committed to state prison. He had admitted a prior narcotics conviction. He was released on parole on June 14, 1962. In February, 1963, he was arrested and charged with possession of heroin. In October he was found guilty, sentenced to state prison and committed to the California Department of Corrections, in whose custody he has remained. *In re* Martinez, 275 Adv. Cal. App. 55, 57, 79 Cal. Rptr. 686, 687 (1969).

2. People v. Martinez, 232 Cal. App. 2d 796, 43 Cal. Rptr. 197 (1965).

3. Petitioner's parole on the 1955 conviction was canceled November 15, 1963, and formally revoked February 13, 1964. See note 1 *supra*.

4. Reference to the "Adult Authority" throughout this note refers specifically to California's parole board.

reversal of his conviction, but denied parole on the basis of his parole behavior.

On July 23, 1969, the Court of Appeal, Third District, heard the petitioner's writ of habeas corpus, alleging that cancellation of parole and refusal to grant parole were the result of the Authority's consideration of illegally obtained evidence and, therefore, were not for cognizable cause. *Held,* writ denied: The exclusionary rules, prohibiting use of evidence obtained as a result of unconstitutional search and seizure and statements obtained without constitutional warning, do not apply to proceedings to determine the granting or revocation of parole. *In re Martinez,* 275 Adv. Cal. App. 55, 79 Cal. Rptr. 686 (1969).

Acknowledging that the Adult Authority had considered the illegally obtained evidence,[5] the court first turned to *In re Brown,*[6] involving a parolee's first degree robbery conviction, reversed for the use of statements obtained without constitutional warning. *Brown* held that although the Authority could not use the invalid conviction as cause for parole revocation, reversal did not foreclose further inquiry into the subject matter of the conviction. "The Adult Authority may properly, *under its own procedures,* determine whether defendant has engaged in conduct that constitutes cause for parole revocation."[7]

The *Martinez* court then relied on an earlier case,[8] involving a parolee who was acquitted of a charge of possession of a deadly weapon, to the effect that an "acquittal was not binding on the Adult Authority nor was evidence of the petitioner's innocence . . . . [T]he Authority had the right to determine for itself the acts upon which the criminal charge had been founded."[9] The court therefore concluded, a fortiori, that the Adult Authority had fulfilled its obligation, upon the reversal of Martinez's conviction, by reconsidering the facts surrounding his parole revocation.[10] A question arises, however, as to the desirability of substituting the

5. 275 Adv. Cal. App. at 59, 79 Cal. Rptr. at 688.

6. 67 Cal. 2d 339, 431 P.2d 630, 62 Cal. Rptr. 6 (1967).

7. *Id.* at 342, 431 P.2d at 632, 62 Cal. Rptr. at 8.

8. *In re* Anderson, 106 Cal. App. 2d 670, 237 P.2d 720 (1951).

9. 275 Adv. Cal. App. at 59, 79 Cal. Rptr. at 688.

10. *Id.* The surrounding facts considered by the Adult Authority were the driving of a motor vehicle and the use of alcoholic liquors; both, in the context of a conviction for possession of heroin, appear de minimus.

judgment of an administrative agency for a jury's fact finding determination, or a court's verdict of not guilty.

Traditionally, courts have been reluctant to interfere with penal or parole management; this philosophy of judicial abstainance has been called the "hands-off" doctrine.[11] This doctrine silently underlies the court's reference to the Adult Authority as having functions "entirely separate from that of the police, prosecution, and the trial courts."[12] While the Authority may not suspend or revoke parole without cause,

> courts *may not interfere* with decisions made by the Adult Authority unless there has been error of law. . . . "[T]he decision to grant or deny parole is committed entirely to the judgment and discretion of the Adult Authority."[13]

This hands-off attitude has heretofore allowed the Adult Authority to operate in a state of virtual autonomy.

Perhaps the most influential reason for affirming such broad discretionary power is the Adult Authority's duty to protect the public.[14]

> [A]pproximately one-half of all California parolees return to prison within five years, either as the result of parole revocation or a new felony commitment . . . . Criminal acts by parolees evoke public resentment and criticism . . . . Close supervision, surveillance and control not only minimize the social risks inherent in parole, but safeguard the system for those who make good . . . .[15]

A premium is thus placed on the parole board's determination of whether it is safe to leave a prisoner outside the prison walls. Judges, generally, do not have the time, experience or background to ascertain whether or not a particular individual should be

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11. *See* 22 VAND. L. REV. 657 (1969); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

12. 275 Adv. Cal. App. at 61, 79 Cal. Rptr. at 689.

13. *Id.* at 58, 79 Cal. Rptr. at 687, *quoting In re* Schoengarth, 66 Cal. 2d 295, 300, 425 P.2d 200, 203, 57 Cal. Rptr. 600, 603 (1967) (emphasis added). *Schoengarth*, unfortunately, upheld prison rules prohibiting inmates from assisting one another in the preparation of legal documents.

14. 275 Adv. Cal. App. at 61, 79 Cal. Rptr. at 689.

15. 275 Adv. Cal. App. at 63, 79 Cal. Rptr. at 690, *quoting from* People v. Hernandez, 229 Cal. App. 2d 143, 149-50, 40 Cal. Rptr. 100, 104 (1964), *cert. denied*, 381 U.S. 953 (1965).

returned to prison, so "parole legislation essentially involves a delegation of sentencing power to the parole board."[16] Aside from providing a substantial savings to taxpayers,[17] parole offers the means of field-testing the flow of prisoners back into society.[18] Parole is something of a contractual relationship in that the parolee is deemed to have consented to the conditions and restrictions imposed upon his release; thus, if a parolee reverts to his former way of life he may be returned to the prison for further treatment.[19]

The state's interest in protecting society can best be achieved through the rehabilitation of criminals. An enlightened parole system should recognize that rehabilitation can be accomplished through the creation of a parolee's mutual trust and respect for the law; this goal could be facilitated through the parolee's realization that his interests are being weighed equally with those of the Adult Authority. Fundamental notions of fairness and justice require the assurance that any factual basis concerning a parolee's behavior will be arrived at fairly and accurately. As a first step in this direction, therefore, the Federal statute requires that a parolee "shall be given an opportunity to appear before the Board . . . ."[20] In *Martinez,* however, the court relied on existing

16. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 86 (1967) [hereinafter cited as TASK FORCE REPORT].

17. To maintain an individual in prison costs California taxpayers over $2400 per inmate per year. CORRECTIONAL PROGRESS IN CALIFORNIA, BIENNIAL REPORT, DEPT. OF CORRECTIONS, 29 (1965-66) [hereinafter cited as PROGRESS REPORT]. The costs of supervising a parolee may be estimated at around $650 per parolee per year. "No one who pays taxes would realistically advocate that most convicted persons remain in prison for the rest of their lives. The cost would be phenomenal." Milligan, *Parole Revocation Hearings in California and the Federal System,* 4 CAL. WEST. L. REV. 18, 19 (1968). Another commentator reached the conclusion that factors such as overcrowded prisons and the cost of feeding and clothing the inmates renders economics "the primary consideration underlying parole." Comment, *Due Process and Revocation of Conditional Liberty,* 12 WAYNE L. REV. 638, 640 (1966).

18. One of the most important reasons for parole is that more than ninety percent of all prisoners are eventually released from prison. Milligan, *supra* note 17, at 19.

19. The "contract" theory, one of several theories of parole status to be hereinafter mentioned, involves the assertion that a parolee accepts the condition of summary revocation of his status at the time of the parole grant and that he thereby waives all claim to his right to due process. *See, In re* Lorette, 126 Vt. 286, 228 A.2d 790 (1967). While ironically recognizing that there is a right to due process which has been waived, this theory is negated in that obviously the waiver is coercive and thus invalid. Furthermore, the Supreme Court earlier stated that a parole grant is a matter of favor, not of contract. Burns v. United States, 287 U.S. 216, 220 (1932).

20. 18 U.S.C. § 4207 (1964). Under the federal statute an adult prisoner is eligible

California law: "Although a parolee is not a prison inmate in the physical sense, he is constructively a prisoner under legal custody . . . and may be returned to the prison walls *without notice and hearing.*"[21] If trust and respect for the law are accepted as necessary to rehabilitation, the question arises whether a parolee can be expected to trust a system which leaves him in the precarious position of being returned to prison at any time "without notice or hearing." Since a parolee's liberty, albeit a conditional liberty,[22] is threatened by revocation of parole, he should be afforded an opportunity to rebut accusations and present mitigating circumstances, such as good character evidence or the involuntariness of his breach.[23] Furthermore, a parolee has an interest in safeguarding his employment and any personal

for parole after serving one-third of his total sentence, or after 15 years if his sentence is for more than 45 years or for life. 18 U.S.C. § 4202 (1964).

21. 275 Adv. Cal. App. at 60, 79 Cal. Rptr. at 688, *quoting from* People v. Hernandez, 229 Cal. App. 2d 143, 149, 40 Cal. Rptr. 100, 104 (1964) (emphasis added). *See*, CAL. PENAL CODE § 3060 (West 1956), stating that "[t]he 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." California courts have heretofore concluded: "No statute requires that the Adult Authority . . . give the prisoner notice or a hearing." People v. Dorado, 62 Cal. 2d 338, 359, 398 P.2d 361, 375, 42 Cal. Rptr. 169, 183 (1965). Notice and hearing were required in California until 1941 under CAL. PENAL CODE § 1168(4) which has subsequently been recast into numerous sections, none of which reinstated the requirement of notice and hearing. *See* CAL. PENAL CODE §§ 3060 (West 1956), 3020, *as amended* (West Supp. 1968); *In re* McLain, 55 Cal. 2d 78, 84-85, 357 P.2d 1080, 1084-85, 9 Cal. Rptr. 824, 828-29 (1960). Although no parole revocation hearing is granted the parolee as a matter of right, the Authority does generally grant such a hearing in practice. *See* PROGRESS REPORT, *supra* note 17, at 22; *In re* Cleaver, 266 Adv. Cal. App. 148, 158-59, 72 Cal. Rptr. 20, at 27 (1968). "[A]ffording parolees notice and hearing and a reasonable opportunity to rebut the charges against them before final revocation of parole will not only discourage needless judicial review but will impart a sense of fairness in the state's dealings with its parolees." *In re* Gomez, 64 Cal. 2d 591, 594, 414 P.2d 33, 35, 51 Cal. Rptr. 97, 99 n.1 (1966).

22. The conditions imposed on a parolee's release from prison ought to bear a reasonable relation not only to the community's protection but to the success of the parolee's rehabilitation as well. *See*, Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368 (1962).

23. As recently stated, "[t]he question of whether notice and hearing are procedural steps requisite to a constitutionally valid revocation of such conditional liberty produces a clear-cut conflict of authority." Note, *Control and Treatment of Narcotic Addicts: Civil Commitment in California*, 6 SAN DIEGO L. REV. 35, 46 (1969). State statutory provisions relating to the procedural requirements necessary at parole revocation proceedings differ widely. A majority of the states explicitly require a hearing. In a small number of jurisdictions the legislatures have provided procedural safeguards such as confrontation, cross-examination, and presence of counsel. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964) [hereinafter cited as Sklar].

reputation he has regained in the community.[24] Otherwise, the parolee who believes that he did not receive fair treatment at the hands of the law because the law is arbitrary and impervious to facts, would become a more difficult subject for rehabilitation.[25]

The parolee's status of remaining "constructively a prisoner under legal custody" illustrates the penal theory that parole is merely an annex of the jail or a "prison without bars."[26] In deciding *Martinez,* the court pointed out that "the prisoner, by reason of his conviction has *lost his civil rights* . . . . [P]arole is a matter of grace and not of right."[27] Any rights which descend to a parolee have thus been deemed to be "creatures of a statute, not of constitutional directive."[28] The Court further noted that "[a] parole hearing is not an adversary proceeding, and there is no federally-protected right of counsel, or confrontation of witnesses at such hearing."[29] Since a parolee has already "lost his liberty and is subject to complete control and supervision of his parole officer,"[30] parole is not a matter of right, but is a mere privilege.[31]

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24. Note, *Constitutional Law: Parole Status and the Privilege Concept,* 1969 DUKE L.J. 139, 146 [hereinafter cited as *Parole Status*].

25. *See* Note, *Parole Revocation in the Federal System,* 56 GEO. L.J. 705, 723 (1968). A convicted criminal not only is likely to be socially maladjusted; he is also likely to feel that he has already been abused by society. Such factors indicate the need for the parole board's being careful not only to treat him fairly, but also in such a manner that he will recognize the fairness of his treatment. *See* Baine v. Bechstead, 10 Utah 2d 4, 9-10, 347 P.2d 554, 559 (1959) (probation); Sklar, *supra* note 23.

26. As one court observed: "The parole system, as an enlightened penological technique, enables the parolee to pay his debt to society in a *prison without bars.* But he continues at all times to remain in penal custody . . . . Parole has simply pushed back the prison walls for him, allowing him wide mobility and greater personal opportunity while serving his sentence." People v. Denne, 141 Cal. App. 2d 499, 508, 297 P.2d 451, 457 (1956) (emphasis added).

27. 275 Adv. Cal. App. at 61, 79 Cal. Rptr. at 689 (emphasis added). A prison sentence "suspends all the civil rights of the person so sentenced." CAL. PENAL CODE § 2600 (West 1956). *See also* People v. Ray, 181 Cal. App. 2d 64, 69, 5 Cal. Rptr. 113, 115 (1960), in which the appellant vehemently attacked the constitutionality of the indeterminate sentence system and the Adult Authority.

28. 275 Adv. Cal. App. at 59, 79 Cal. Rptr. at 688. *See* Dunn v. California Dept. of Corrections, 401 F.2d 340, 342 (9th Cir. 1968).

29. *Id. See also* Hyser v. Reed, 318 F.2d 225, 238 (D.C. Cir. 1963), *cert. denied* 375 U.S. 957 (1963).

30. 275 Adv. Cal. App. at 62, 79 Cal. Rptr. at 690. This theory rests upon a dual foundation: First, that the parolee was originally deprived of his liberty according to due process of law; second, that the state has complete freedom to require a prisoner so convicted to remain in prison for the length of the term set by the sentencing judge. *See, e.g.,* Sklar, *supra* note 23, at 193.

31. *See, e.g.,* People v. Denna, 243 N.Y.S.2d 797, 40 Misc. 2d 717 (1963), holding

The traditional "privilege" view, relied upon in *Martinez*, is being gradually eroded by the present trend toward an expanding interpretation and realization of fourth, fifth, and sixth amendment rights. The judicial philosophy underlying this trend recognizes that prisoners retain certain civil and constitutional rights. The "retained right" doctrine[32] implies that a "prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law."[33] Thus, prisoners have obtained court review of claims alleging abuse or denial of their rights to religious freedom,[34] essential medical treatment,[35] and access to the courts for redressing legal wrongs.[36]

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that information alleged to have emanated from an illegal search and seizure was not used by parole officers to convict the petitioner of a crime, but merely to recall a privilege. No constitutional right was invaded by the parole board. *Accord*, Eason v. Dickson, 390 F.2d 585 (9th Cir. 1968); Williams v. Patterson 389 F.2d 374 (10th Cir. 1968); Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968). A majority of jurisdictions still view parole as being entirely regulated by statute, and therefore invoke the privilege-right distinction to counter all claims to procedural due process. *Parole Status, supra* note 24, at 140 n.6. The initial erosion of the privilege-right distinction appears to have been in those areas in which the grant of the benefit or status was conditioned upon the grantee's agreement to abstain from the exercise of some right protected by an express clause in the Constitution. *See* Sherbert v. Verner, 374 U.S. 398 (1963). A further method of circumventing the privilege-right distinction has been through the equal protection clause. Regulations limiting eligibility for a "privilege" to that class of persons willing to conform to "unreasonable" rules of conduct have been consistently struck down as arbitrary and discriminatory and therefore in violation of the fourteenth amendment. *See* Douglas v. California, 372 U.S. 353 (1963); Brown v. Board of Education, 347 U.S. 483 (1954). Finally, and most importantly, certain decisions indicate that the distinction may be circumvented by relying on an independent right to procedural due process which requires at least minimum procedural standards (such as a hearing) to help assure that a condition of the "privilege" has in fact been violated. *See* Greene v. McElroy, 360 U.S. 474 (1959); Van Alstyne, *The Demise of the Privilege-Right Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

32. *See* 22 VAND. L. REV. 57, 658 (1969). Running counter to the absolute "hands off" attitude suggested in *Martinez*, are decisions such as Lee v. Washington, 263 F. Supp. 327 (M.D. Ala. 1966), *affd per curiam*, 390 U.S. 333 (1968), in which the court declared "[I]t is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law." *Id.* at 331.

33. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944). *Accord*, Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (equal protection and due process available despite loss of other rights and privileges).

34. *E.g.*, Cooper v. Pate, 378 U.S. 546 (1964) (religious beliefs cannot be basis for denying prisoner right to purchase certain religious publications and for denying him privileges granted to other prisoners); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (prisoner has absolute right to religious belief of his choice).

35. *E.g.*, Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); United States v. Ragen, 337 F.2d 425 (7th Cir. 1964).

36. In Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967), the court struck down a prison

In *Mempa v. Rhay*[37] the Supreme Court held that a convicted criminal has a right to counsel at a proceeding for revocation of probation. There is a vital "necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances, and in general aiding and assisting the defendant to present his case as to sentence . . . ."[38] Both parole and probation revocation proceedings threaten a basic personal interest in freedom. Since parole essentially involves a delegation of the sentencing processes, the *Mempa* rationale appears equally applicable to parolees and parole revocation proceedings.[39]

A recent federal court case, *Campbell v. Pate*,[40] involving the postponement of a prisoner's parole because of the discovery of a powdered milk drink alleged to be contraband in his cell, held that relevant facts "must not be so capriciously or unreliably determined that, in effect, the inmate is deprived of equal protection of the laws."[41] If the fourteenth amendment reaches even those prisoners still incarcerated, the question arises whether a parolee, still a "prisoner under constructive custody," can possibly have fewer legal rights than his former cellmate. A parolee, a fortiori, is entitled to have facts concerning his behavior fairly and accurately determined; when such a procedure is denied, his complaint constitutes a justiciable cause.[42]

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regulation which permitted a one year delay in parole consideration for inmates who sought relief through a writ of habeas corpus and were denied relief.

37. 389 U.S. 128 (1967).

38. *Id.* at 135.

39. *See* TASK FORCE REPORT, *supra* note 16, at 88; *Parole Status, supra* note 24, at 147.

40. 401 F.2d 55 (7th Cir. 1968) (petitioner Campbell is an inmate at the Illinois State Penitentiary).

41. *Id.* at 57. Further evidence of arbitrary action was found in the prison staff having first informed Campbell that his parole would be considered in 1968 and later changing the date to 1969.

42. The President's Commission on Law Enforcement recently reported its similar conclusion:

> The offender threatened with revocation should therefore be entitled to a hearing comparable to the nature and importance of the issue being decided. Where there is some dispute as to whether he violated the conditions of his release, the hearing should contain the *basic elements of due process*—those elements which are designed to ensure accurate fact finding . . . [It should include] such essential rights as reasonable notice of the charges, the right to present evidence and witnesses, the right to representation by counsel—including the right to appoint counsel—and the right to confront and cross-examine opposing witnesses.

TASK FORCE REPORT, *supra* note 16, at 88 (emphasis added).

The *Martinez* court relied, *inter alia,* upon *People v. Hernandez,*[43] also involving a heroin possession conviction, which held that "the requirement of reasonable or probable cause does not apply to [the] search of a paroled prisoner when conducted by his parole supervisors."[44] Unfortunately the parolee, a convicted criminal, does represent a potential harm to the community. *Hernandez,* therefore, concluded that

> the authorities may subject him, his home and his effects to such constant or occasional inspection and search as may seem advisable to them . . . . If this constitutional fact strips him of constitutional protection against invasions of privacy by his parole officer, the answer is that he has at least as much protection as he had within the prison walls.[45]

The *Martinez* application of this prison without bars illustration to searches by police officers,[46] however, overlooks the consideration that a parolee is likely to interpret unreasonable searches of his person and effects as police harassment. Continual searches may also provoke the irascibility of parolees who have not yet socially adjusted to the requirements of close communication with parole officers. Persons on probation are protected from unreasonable searches by the fourth amendment.[47] Recent cases have likewise afforded the parolee fourth amendment protection,[48] indicating that a parolee has the same personal interest in freedom from entirely unwarranted interference with his enjoyment of privacy. Some respect for his interest, albeit limited, would be conducive to developing the parolee's reciprocal respect for the law. The imposition of a criterion of "slight cause" for

43. 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied* 381 U.S. 953 (1965).

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

45. *Id.* at 150, 40 Cal. Rptr. at 104.

46. The court concluded that "[i]n view of the foregoing restrictions on the rights of a parolee, we see no reason why the exclusionary rules should apply to the determination of whether he has violated the terms of his parole, even though the violation of exclusionary rules is done by police rather than parole officers."
275 Adv. Cal. App. at 60, 79 Cal. Rptr. at 689.

47. Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950).

48. A parolee is not without basic constitutional rights. United States v. Hallman, 365 F.2d 289, 291 (3rd Cir. 1966). A parolee is entitled to constitutional protection from illegal search and seizure. Brown v. Keraney, 355 F.2d 199, 200 (5th Cir. 1966). *See also* People v. Belvin, 275 Adv. Cal. App. 1073, 80 Cal. Rptr. 382 (1969); United States v. Lewis, 274 F. Supp. 184 (S.D.N.Y. 1967). Each of these cases dealt with criminal proceedings, without reaching the question of application of the exclusionary rules in parole revocation proceedings.

searching a parolee, as contrasted to the court's implication of "no cause," therefore, might better achieve the state's interest in rehabilitation, thus eventually eliminating the potential harm from which the public seeks protection.

In deciding *Martinez,* the court acknowledged that a fair statement of the parole proceedings indicated that, in addition to considering the other facts relating to the petitioner's arrest, the Adult Authority had considered the evidence obtained by an illegal search and the statements obtained without constitutional warning.[49] After noting that the exclusionary rule's purpose has been held to *deter*—to compel respect for the constitutional guaranty of freedom from unreasonable searches by removing the incentive to disregard it,[50] the court emphasized the separate nature of the Adult Authority's functions from those of the police and concluded: "To apply the exclusionary rules to parole hearings would *not* necessarily implement the deterrent policy."[51] An illegal search of a parolee's person, home or car by a police officer does not relieve the parolee of any criminal responsibility. The court therefore decided that although the evidence may not be used against him in a criminal prosecution, no good reason exists why it may not be used by a parole officer.[52]

> The suggestion that police officers might knowingly violate the law to gain evidence inadmissible in a criminal proceeding in order to turn it over to the Adult Authority to be used for parole revocation, is an extremely remote possibility. If a police officer learns of the violation of law by a parolee, such officer is as anxious, if not more so, of providing legal evidence for a conviction of the crime, as of assisting in the revocation of parole.[53]

This reasoning appears fallacious.

Police officers are not only influenced by exclusionary rules, but more importantly, by a feeling of duty to protect the public by apprehending criminals. Police officers are also individuals, influenced by subjective likes and dislikes; they are not necessarily

49. 275 Adv. Cal. App. at 59, 79 Cal. Rptr. at 688.
50. Elkins v. United States, 364 U.S. 206, 217 (1960).
51. 275 Adv. Cal. App. at 61, 79 Cal. Rptr. at 689 (emphasis added).
52. *Id.* at 62, 79 Cal. Rptr. at 689-90.
53. *Id.*, 79 Cal. Rptr. at 690.

devoid of prejudice.[54] Psychologically, some element of antipathy towards former criminals is not an "extremely remote possibility," nor is a police officer's subsequent cooperation with parole officers. Where it is difficult to obtain evidence legally, then other evidence, which will nevertheless be considered by a parole board, suffices to accomplish the same result. The public will be protected, albeit through illegally obtained evidence, and a criminal will be returned to prison; the exclusionary rule's deterrent effect will be entirely circumvented.

The denial of exclusionary rules to parole hearings results in another unfortunate consequence. The court, by affirming the Adult Authority's use of the evidence in parole procedures, is in effect ratifying its illegal acquisition.[55] Since a parolee is expected to learn to respect and obey the law, the situation becomes similar to requesting him to refrain from illegal activity while his parole officer simultaneously enjoys the fruits of other illegal activities. A parolee can not easily be expected to trust or respect a system which picks and chooses who is to be penalized for disobeying the law.

In contrast, a very cogent reason for denial of the application of the exclusionary rules in *Martinez* is the court's statement that:

> Even though police officers might produce evidence inadmissible in a criminal prosecution, it is necessary that such evidence be available to the parole board in determining whether it would be safe to leave an admitted law violator outside the prison walls.[56]

Serious parole violations constituting criminal acts not only

54. The Supreme Court in an opinion delivered by Chief Justice Warren recently acknowledged this problem.

> Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either *have no interest in prosecuting* or are willing to forego successful prosecution in the interest of serving some other goal. . . . The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

Terry v. Ohio, 392 U.S. 1, 14-15 (1968) (footnotes omitted) (emphasis added).

55. As found by *Terry*: "A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Id.* at 13.

56. 275 Adv. Cal. App. at 65, 79 Cal. Rptr. at 692. *See also* note 15 *supra*, and accompanying text.

threaten the community's citizens, evoking public criticism of the parole authorities,[57] but may also threaten the community's pocket book.[58] The Adult Authority must be cognizant of a parolee's criminal activities, such as Martinez's possession of heroin, before any reflective decision may be reached concerning his parole revocation. If evidence is withheld from the Authority because of unconstitutional search and seizure, the public will remain a victim of continued criminal activity.[59]

One of the court's primary considerations in *Martinez* was that "[T]he administration of the parole system must be realistic, and not strangled in *technical niceties*;"[60] otherwise, "there would be a deterrent effect on the granting of parole . . . ."[61] The court stated:

> The Adult Authority now admits to parole prisoners who perhaps appear on the borderline as to their ability to behave in the outside world because the Authority has great discretion in returning them to prison . . . . If, however, returning them is to be hidebound with technicalities . . . , granting of parole will be greatly restricted and discouraged.[62]

In carrying this argument to its logical conclusion, the court noted that the parole system would become impractical and would have to be abandoned. The parolee's release from prison would be substantially equivalent to the discharge of his sentence. "[T]he prison authorities would be required, in a hearing before a judge, with all the concomitants of a non-jury criminal trial, to justify their resumption of in-prison custody . . . ."[63]

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57. *Id.* at 63, 79 Cal. Rptr. at 690.

58. Wasserstein v. State, 56 Misc. 2d 225, 288 N.Y.S.2d 274 (1968), recently held the State of New York liable in tort for the failure to expeditiously pick up a known parole violator for whom a warrant had been issued for absence from home and school. The State's negligence was determined to be the proximate cause of a subsequent shooting which resulted in the loss of the plaintiff's eyesight.

59. The Supreme Court conceded that "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and efforts to prevent crime." Terry v. Ohio, 392 U.S. 1, 15 (1968). The "practices" referred to are those of "wholesale harassment by certain elements of the police community." *See* note 54 *supra.*

60. 275 Adv. Cal. App. at 62, 79 Cal. Rptr. at 690, *quoting from* People v. Denne, 141 Cal. App. 2d 499, 510, 297 P.2d 451, 458 (1956) (emphasis added).

61. 275 Adv. Cal. App. at 61, 79 Cal. Rptr. at 689.

62. *Id.*

63. *Id.* at 65, 79 Cal. Rptr. at 692, *quoting from* Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir. 1967).

Martinez further described the parole hearing as an "informal setting,"[64] which is "not an adversary proceeding."[65] In the analogous area of juvenile courts, however, the Supreme Court recently rejected a similar argument that juvenile proceedings are non-adversary and recognized that adverse interests may in fact lurk beneath the *parens patriae* surface.[66] While acknowledging the need for judicial deference to administrative expertise,[67] *In re Gault* nevertheless condemned the "unbridled discretion" of juvenile courts. Since an individual's freedom was dependent upon the fact-finding proceeding, due process was found to require notice of the charges, representation by counsel, confrontation and cross-examination of witnesses, and sufficient specificity of findings.[68] In a second analogous area of administrative proceedings, the commitment of narcotic addicts to the Department of Corrections for placement at the California Rehabilitation Center, the *Martinez* court distinguished *People v. Moore*.[69] Although that case was discarded on the qustionable premise that while "[n]arcotic addict proceedings involve a loss of liberty,"[70] a parolee, by reason of his conviction, "has already lost his liberty,"[71] it is significant for its holding that narcotic proceedings, "although technically classified as civil proceedings, must be considered criminal proceedings for purposes of the Fourth Amendment."[72] Evidence obtained in violation of the rule against unlawful search and seizures was therefore excluded.[73] A parolee shares one thing in common with a probationer, juvenile, or narcotic addict: His relative freedom of choice and action is

64. 275 Adv. Cal. App. at 59, 79 Cal. Rptr. at 688. "Information may be considered by the parole board in an informal setting without strict observance of technical rules of evidence." *Id. See* Hyser v. Reed, 318 F.2d 225, 240 (D.C. Cir. 1963).

65. 275 Adv. Cal. App. at 59, 79 Cal. Rptr. at 688. *See* Dunn v. California, 401 F.2d at 342; Hyser v. Reed, 318 F.2d at 238.

66. *In re* Gault, 387 U.S. 1 (1967). The argument expressed in Hyser v. Reed, 318 F.2d at 238, that the parole commission acts as *parens patriae* of the parolee and that therefore the protections of due process are unnecessary, seems by analogy to have been entirely undercut.

67. 387 U.S. at 25-26.

68. *Id.* at 31-58.

69. 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968).

70. *Id.* at 79, 446 P.2d at 805, 72 Cal. Rptr. at 805.

71. The court stated: "Parole proceedings determine where he has to undergo that loss of liberty, in prison or without. If without, his liberty is nevertheless restrained." 275 Adv. Cal. App. at 66, 79 Cal. Rptr. at 692.

72. 69 Cal. 2d at 680, 446 P.2d at 804, 72 Cal. Rptr. at 804.

73. *Id.* at 682, 446 P.2d at 806, 72 Cal. Rptr. at 806.

substantially curtailed by incarceration or any other form of involuntary isolation from whatever joy or sorrow society furnishes. Realistically speaking, a parolee's *liberty* is dependent upon the fact finding process, whether it be labeled "informal," "adversary," "criminal" or "administrative."

A penumbra of the *prison without bars* philosophy surrounds the *Martinez* holding that the exclusionary rules, prohibiting the use of evidence obtained from unconstitutional searches and seizures and statements obtained without constitutional warning, have no place in parole hearings. The court found comfort in the practical presumption that "[i]t is extremely doubtful, also, if there ever was a convict who spent any time in a prison who needs to be told that any statement he might make could be used against him."[74] Since a parolee "is not entitled to representation by counsel, in such matters, nothing need be said to him about a lawyer."[75] In this conclusion, however, and *inter alia,* the conclusions that a parolee has been stripped of his civil rights, assumes the risk of being subjected to continual searches and may be returned to prison at any time without notice and hearing,[76] the court strays entirely too far from basic notions of fundamental fairness and justice. The Adult Authority's interest in expediency of case disposition, without the hinderance of "technical niceties," must be balanced against the parolee's interest in receiving minimal due process.[77]

The truth and accuracy of any factual determination concerning a parolee's behavior must be assured, even at the risk of imposing certain procedural safeguards upon otherwise autonomous administrative proceedings. A parolee has certain rights, not the least of which is an interest in enjoying his conditional liberty or freedom from the prison walls, at least to the extent that the potential harm he represents to the community

74. 275 Adv. Cal. App. at 67, 79 Cal. Rptr. at 692-93.

75. *Id.* at 66-67, 79 Cal. Rptr. at 692.

76. *Id.* at 60, 79 Cal. Rptr. at 688.

77. One writer has suggested that in order that procedural safeguards are not rendered illusory, the parole board should be required to establish the "factual basis for revocation by something akin to the 'preponderance of evidence' rule" in civil cases. Cohen, *Legal Norms in Corrections* 72 (unpublished study submitted to the President's Commission on Law Enforcement and Administration of Justice, 1967). Note, *Parole Revocation in the Federal System,* 56 GEO. L.J. 705, 739 (1968). *See also* TASK FORCE REPORT, note 42 *supra* (concluding that a hearing should contain the basic elements of due process); *cf.* cases cited in note 48 *supra.*

remains only potential. Respect for these rights will encourage the parolee's reciprocal trust and respect for the law, thereby facilitating the state's interest in the achievement of rehabilitation. Exactly where the delineation of procedures necessary to protect the parolee's rights should be made remains a question of due process, an ephemeral concept.[78] The current trend toward realization of fundamental rights through due process, however, is permeating even those proceedings cloaked in administrative cover; fortunately, the days of *Martinez* are numbered.

MICHAEL V. MILLS

TAXATION—FEDERAL INCOME TAX—EXCLUSION OF SCHOLARSHIP AND FELLOWSHIP GRANTS FROM GROSS INCOME HELD NOT TO APPLY TO GRANTS FOR WHICH A SUBSTANTIAL QUID PRO QUO WAS EXTRACTED FROM THE RECIPIENT. *Bingler v. Johnson* (U.S. 1969).

The Westinghouse Electric Corporation, under a jointly funded program with the Atomic Energy Commission (AEC), allowed certain employees educational leave of absence to pursue formal education. Johnson[1] availed himself of this program and studied, full time, for his doctoral degree. During the period he was on leave he was paid a stipend by Westinghouse, which, depending on certain factors, was 70 to 90 percent of the former salary. Westinghouse treated these payments as indirect labor costs and withheld federal income tax. Johnson retained all of his employee benefits and seniority. Before commencing the educational leave he was required to sign a contract agreeing to return to the employ of Westinghouse.[2] In addition, Johnson was required to make periodic progress reports to Westinghouse and to submit his thesis topic to Westinghouse and the AEC for approval.

Johnson brought suit claiming a refund of federal income taxes withheld while he was attending school, contending that

78. *See e.g.*, Gideon v. Wainwripht, 372 U.S. 335, 339 (1963).

1. The respondents consisted of Johnson and two co-workers who will hereinafter be referred to as Johnson.

2. Respondent Wolfe did not sign a contract, but he was advised that he was expected to return to Westinghouse. He honored the obligation. Bingler v. Johnson, 89 S.Ct. 1439, 1441 n.7 (1969).