ering aspects of the parole release process, and to guard against abuse of administrative discretion by the Authority. While the court has adopted a more cautious approach toward extending due process protections in parole release hearings than in other post-conviction proceedings, it has made clear that Authority action will not remain entirely beyond the scope of the court's review. It is difficult to predict just how active the court will be in extending procedural due process further into the parole release setting, but one thing is apparent—the court may proceed slowly, but it will continue to examine Authority procedures and actions. This decision takes one more step toward the day when the California penal system becomes a criminal rehabilitation and correction system.

Earl J. Waits

B. Due Process in Parole Revocation Proceedings

In re *Love*;[1] In re *Bye*;[2] In re *Valrie*;[3] In re *La Croix*.[4] Three of the four cases noted, *In re Love, In re Valrie*, and *In re La Croix*, are parole revocation cases; the fourth, *In re Bye*, deals with the analogous problem of administrative revocation of outpatient status in the civil addict program.[5] The cases address two important issues: first, the necessity of a *Morrissey* prerevocation hearing to establish probable

1. 11 Cal. 3d 179, 520 P.2d 713, 113 Cal. Rptr. 89 (1974) (Wright, C.J.) (unanimous decision).

2. 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382 (1974) (Wright, C.J.) (unanimous decision).

3. 12 Cal. 3d 139, 524 P.2d 812, 115 Cal. Rptr. 340 (1974) (Wright, C.J.) (unanimous decision).

4. 12 Cal. 3d 146, 524 P.2d 816, 115 Cal. Rptr. 344 (1974) (Wright, C.J.) (unanimous decision).

5. *See* CAL. WELF. & INST'NS CODE § 3000, *et seq.* (West 1972). The California civil addict program was established in 1965. Its purpose is stated in Section 3000:

> It is the intent of the Legislature that persons addicted to narcotics . . . shall be treated for such condition and its underlying causes, and that such treatment shall be carried out for nonpunitive purposes not only for the protection of the addict . . . but also for the prevention of contamination of others and the protection of the public.

Admission to the program is by court order, entered after criminal or civil commitment proceedings. *Id.* §§ 3050, 3100. Those who have been committed are not at liberty to reject confinement in a rehabilitation center; attempted escape is a crime. *Id.* § 3002. They may, however, challenge their commitment in a jury trial at which the sole issue submitted to the jury is the addiction of the accused. *Id.* §§ 3050, 3051, 3108. If found to be addicted, the individual is committed under the original order and remains in custody either until released on outpatient status, or until the statutory commitment period expires. *Id.* §§ 3150-52, 3200-01. While on outpatient status, the individual is supervised by the Department of Corrections and remains subject to the same type of summary suspension of status as the parolee. *Id.* § 3151, CAL. PENAL CODE §§ 3056, 3060 (West 1972).

cause to hold the parolee or outpatient for formal revocation proceedings, and second, the right of the parolee to be represented by retained or appointed counsel at a revocation hearing.

I. PREREVOCATION HEARINGS: NECESSITY AND REQUIREMENTS

a. The constitutional background: Morrissey v. Brewer[6]

In *Morrissey* the United States Supreme Court considered the question of procedural rights in the context of a parole revocation hearing. The Supreme Court recognized that parole revocation involves a grievous loss of liberty, and that although the parolee's liberty is limited by the conditions of parole, it is nonetheless within the reach of the fourteenth amendment.[7] Thus, to protect a parolee's conditional liberty from unfair revocation and lengthy post-revocation incarceration,[8] the revocation process was split into two parts: a prerevocation hearing before an independent hearing officer to determine whether probable cause exists to support a determination that the parolee violated some condition of parole,[9] and a formal revocation hearing to resolve the factual controversy and determine whether the findings warrant the revocation of parole.[10]

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6. 408 U.S. 471 (1972).

7. *Id.* at 481-82.

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. . . . He . . . may be living a relatively normal life at the time he is faced with revocation.

Id. at 482 (footnotes omitted).

8. *Id.* at 482.

9. *Id.* at 485-86. The parolee is also entitled to notice of the hearing's purpose and of the alleged violations. He is entitled to be present and to be heard, to submit documentary evidence and to call witnesses, and to confront and cross-examine adverse witnesses, unless the hearing officer determines that such confrontation would so endanger the witness. The hearing officer is required to make a summary of the hearing and of the evidence adduced, and to record the findings and reasons upou which his determination is based. *Id.* at 487.

For a discussion of notice requirements, access to adverse evidence, and the opportunity to be heard, see notes 34-36 *infra* and accompanying text.

10. *Id.* at 487-88. To comply with the "minimum requiremeuts of due process" the revocation hearing procedure must include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

In *Valrie* and *LaCroix*, the California Supreme Court clarified the extent to which due process requires a prerevocation hearing in situations not explicitly confronted in *Morrissey*. The former involved a parolee charged with the commission of a crime;[11] the latter a parolee who pleaded guilty to a misdemeanor drunk driving charge.[12] In both cases the alleged illegal conduct would have constituted a violation of parole; in neither case, however, was the parolee afforded a prerevocation hearing.

The state argued in both cases that there was no need for a prerevocation hearing when a "parole hold"[13] was based upon conduct charged as a new crime or upon which a criminal conviction had been founded. While some support for this argument could conceivably be drawn from the language of *Morrissey*,[14] the California Supreme Court

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Id. at 489; *accord*, People v. Vickers, 8 Cal. 3d 451, 457, 503 P.2d 1313, 1318, 105 Cal. Rptr. 305, 310 (1972).

11. *In re* Valrie, 12 Cal. 3d 139, 524 P.2d 812, 115 Cal. Rptr. 340 (1974).

While on parole, petitioner was arrested on a federal narcotics charge, and released on bail. Subsequently he was arrested as a suspected parole violator under California Penal Code section 3056 (parole hold). No prerevocation hearing was held. The State contended that the hearing could be delayed until after the pending criminal charges had been resolved, regardless of the length of the delay, and that *Morrissey* was inapplicable when the alleged parole violation had also been charged as a new criminal offense.

12. *In re* La Croix, 12 Cal. 3d 146, 524 P.2d 816, 115 Cal. Rptr. 344 (1974).

According to the reports of his parole officer, La Croix had: (1) passed a bad check in order to purchase an automobile, (2) vacated his apartment without giving the required notice to his parole officer, and (3) been arrested for the misdemeanor of drunk driving under California Vehicle Code section 23102(a). After his failure to appear in court to answer the drunk driving charge, he was arrested on a parole hold as a parole violator; he subsequently pleaded guilty to the drunk driving charge.

No prerevocation hearing was held, notwithstanding petitioner's timely request for one. Instead, he was transferred directly to prison pending a final hearing on the merits of the alleged parole violations. The state relied upon the ruling of the court of appeal in *In re* Scott, 32 Cal. App. 3d 124, 108 Cal. Rptr. 49 (4th Dist. 1973), in which the court had held that a prerevocation hearing was unnecessary when the revocation was based upon conviction for a new crime.

13. *In re* La Croix, 12 Cal. 3d 146, 524 P.2d 816, 115 Cal. Rptr. 344 (1974). *See, e.g.*, CAL. PENAL CODE §§ 3052-53 (West 1972).

In California the parolee, though conditionally at liberty, is considered at all times to be in the custody of the Adult Authority and subject at any time to a "parole hold." *Id.* §§ 3056, 3060. A parole hold is placed by a parole agent or other representative of the Adult Authority who causes the parolee to be taken into custody or otherwise restrained independently of Authority action. *See In re* Law, 10 Cal. 3d 21, 24 n.2, 513 P.2d 621, 623 n.2, 109 Cal. Rptr. 573, 575 n.2 (1973):

> [A "parole hold"] occurs (1) when the parole agent believes that the parolee has violated a condition of parole, (2) when the parolee has been arrested on a new criminal charge . . . or (3) when a parolee is completing a local jail sentence during which time the Authority may determine whether to maintain parole status in view of the conviction which results in the jail sentence.

14. "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

rejected the broad and indiscriminate standard urged by the state. It opted instead for an inquiry into the specific circumstances of each case, a ruling which further defines the boundaries of the prerevocation hearing requirement.

b. The opportunity to be heard

The delay and distance of eventual revocation hearings and the potential for unjustified interim incarceration were among the court's foremost concerns.[15] The parole revocation process is dependent upon findings of fact sufficient to warrant denial of the parolee's conditional liberty. In order to comply with the requirements of procedural due process, the Adult Authority must give the parolee an opportunity to participate in the factfinding process, and to introduce fresh, relevant evidence which might lead to exoneration. Subjecting a parolee to long delays before the hearing commences furthers no valid state interest, and may severely disadvantage the accused who must organize and prepare a defense to the alleged violations. A parolee, especially an indigent one, may be similarly disadvantaged if transported miles from the community in which the alleged violations occurred. It is only in this community that witnesses to the disputed events will be readily available.[16] As the court recognized, the problems of delay and distance are best avoided by the implementation of a statewide policy of promptly held, in-community prerevocation hearings.[17]

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15. In *Valrie* the parolee was indicted by a grand jury; no preliminary hearing was held. He was in the custody of California authorities from approximately June 25, 1973, until the court ordered the termination of the parole hold on July 25, 1974. The trial on the federal narcotics charges scheduled for April, 1974, was never held since the charges had been dismissed. 12 Cal. 3d at 141, 524 P.2d at 813, 115 Cal. Rptr. at 341. It is interesting to note that the federal grand jury determination of probable cause and its indictment were not held sufficient to fulfill the due process requirements of the post-*Morrissey* prerevocation hearing.

In *La Croix* the parolee was arrested as a parole violator on July 31, 1972. 12 Cal. 3d at 149, 520 P.2d at 819, 115 Cal. Rptr. at 347. After pleading guilty to a drunk driving charge, he served 30 days in the county jail. While this term ran, the Adult Authority reordered the suspension of La Croix's parole and his return to prison. Despite a timely request for a prerevocation hearing, no preliminary hearing was held. The parolee was returned to prison, and, thereafter, an in-prison revocation hearing was finally held. The parolee had been incarcerated from approximately October 15, 1972, until February 9, 1973, without any hearing serving as part of the parole revocation process. *Id.*

16. [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.

Morrissey v. Brewer, 408 U.S. 471, 485 (1971).

17. *See In re* Valrie, 12 Cal. 3d 139, 145, 524 P.2d 812, 816, 115 Cal. Rptr. 340, 344 (1974); *In re* La Croix, 12 Cal. 3d 146, 156-57, 524 P.2d 816, 823-24, 115 Cal. Rptr. 344, 351-52 (1974).

The court did allow an exception to the requirement of in-community prerevocation hearings in the case of outpatients in the narcotic addict rehabilitation program: *In re Bye*[18] held that, notwithstanding the desirability of in-community hearings, the danger of imminent relapse into narcotics use justifies prompt return to a rehabilitation center. The court viewed the prompt return policy as a critical element in the success of the rehabilitation program mandated by medical considerations, and a corollary of the early release orientation of the Narcotic Addict Evaluation Authority.[19] The court held that due process would be satisfied by holding a single revocation hearing "as soon as reasonably possible" after the addict's return to the California Rehabilitation Center.[20]

The court went on to imply that the same revocation procedure might be applicable to outpatients "taken into custody for purported violation of conditions of their outpatient status which do not indicate an imminent return to narcotics."[21] While it may seem reasonable to subordinate the need for a prompt prerevocation hearing to the need for immediate medical treatment when an outpatient is suspected of imminent relapse, it is incongruous to deny an outpatient *not* suspected of resumed narcotics use the benefit of an in-community prerevocation hearing when there is no need for immediate medical attention. The few remaining distinctions between the parolee and the outpatient are hardly material. The higher percentage of revocation in the civil addict program[22] may be discounted by the fact that in the great majority of cases the cause for revocation was the resumption of illegal drug use.[23] The differences in the probability of a lengthy period of detainment,[24] while a relevant consideration of the consequence of the revocation hearing and decision, should not affect the due process requirement of

18. 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382 (1974). Petitioner Bye was involuntarily committed to the civil addict program in 1968. During the period from 1969 to 1973 he was released from and returned to the program approximately five times. At the time of the trial he was again an outpatient. Upon each revocation of his outpatient status, petitioner was transported to a rehabilitation center for further treatment without the benefit of a local prerevocation hearing. The justification for this procedure was the asserted need for swift action to treat an addict in danger of relapse.

19. 12 Cal. 3d at 107-08, 524 P.2d at 861-62, 115 Cal. Rptr. 389-90.

20. 12 Cal. 3d at 109, 524 P.2d at 856, 115 Cal. Rptr. at 390.

21. 12 Cal. 3d at 109-10, 524 P.2d at 862-63, 115 Cal. Rptr. at 390-91. *But cf.* an earlier statement by the court:

> By not requiring an in-community prerevocation hearing in all cases where CRC outpatient status may be revoked, we accord great weight to the need of an immediate return of a defaulting outpatient to the treatment facilities at CRC.

Id. at 107, 524 P.2d at 862, 115 Cal. Rptr. at 390.

22. *Id.* at 104-05, 524 P.2d at 859-60, 115 Cal. Rptr. at 387-88.

23. *Id.* at 106-07, 524 P.2d at 861, 115 Cal. Rptr. at 389.

24. *Id.*

a prompt inquiry into the evidence of probable cause to believe a condition of continued liberty was violated. The outpatient's interest in continued liberty is one within the protection of the fourteenth amendment.[25] It is difficult to conceive of any "benefit of the prompt return policy"[26] accruing to the outpatient apprehended on suspicion of activity not related to resumed narcotics use which would justify relaxing the protection afforded to the outpatient's interest in continued liberty by an in-community prerevocation hearing. The court mentioned no such benefits, and thus it seems that the non-relapsing outpatient should be entitled to the same procedural protections as the parolee.[27]

While the court highlighted the requirement of a prerevocation hearing in *Valrie* and *La Croix*, such a preliminary proceeding is not always required to revoke parole in a manner consistent with due process. If probable cause to revoke parole were to be established at a preliminary hearing on a felony charge,[28] or at a misdemeanor trial in which the parolee was given adequate notice[29] and opportunity to defend his parolee status, then no prerevocation hearing would be required. If no factual issues were in controversy,[30] or if the parole violation were charged only after conviction of a new crime,[31] a summary resolution of the issue of probable cause would suffice.[32]

c. Notice requirements

Under *Morrissey* a parolee is entitled to notice of the alleged viola-

25. *Id.* at 103, 524 P.2d at 858, 115 Cal. Rptr. at 386; *cf.* Morrissey v. Brewer, 408 U.S. 471, 481 (1971).

26. 12 Cal. 3d at 109, 524 P.2d at 863, 115 Cal. Rptr. at 391.

27. To hold otherwise would be to imply that the rights of an accused parolee who had once been an addict should differ from those of a non-addict when both are accused of an offense unrelated to the use of illegal narcotics. It is interesting to note that the court was willing to extend the full measure of due process protections to a former narcotics violator indicted on a narcotics charge by a federal grand jury in *In re* Valrie, 12 Cal. 3d 139, 524 P.2d 812, 115 Cal. Rptr. 340 (1974).

28. *See In re* La Croix, 12 Cal. 3d 146, 150-51, 524 P.2d 816, 819, 115 Cal. Rptr. 344, 347 (1974).

29. *See id.* at 151, 524 P.2d at 820, 115 Cal. Rptr. at 348.

30. *Id.*

31. *See id.* at 152 n.2, 524 P.2d at 820-21 n.2, 115 Cal. Rptr. at 348-49 n.2.

32. *In re* La Croix, 12 Cal. 3d 146, 151-52, 524 P.2d 816, 820, 115 Cal. Rptr. 344, 348 (1974).

The court, however, did not reach the question of the procedural sufficiency of promptly-held, in-community *revocation* hearings. Such hearings have been approved in other states and given the court's discussion of the factors motivating the requirement of prerevocation hearings in these cases it seems fair to assume that they would be approved in California. *See In re* La Croix, 12 Cal. 3d 146, 153 n.3, 524 P.2d 816, 821 n.3, 115 Cal. Rptr. 344, 349 n.3 (1974). *See also* Richardson v. New York State Bd. of Parole, 41 App. Div. 2d 179, 341 N.Y.S.2d 825 (1973) (hearing held 19 days after arrest); Walczak v. Department of Corr. Serv., 73 Misc. 2d 369, 342 N.Y.S.2d 146 (1973) (21 days).

tions and of the nature and purpose of the prerevocation hearing.[33] Such notice is essential to the preparation of an adequate defense. In *La Croix*, the court attached great weight to the need for proper notification of the purpose of the proceedings. Even though the parolee had pleaded guilty to the misdemeanor drunk driving, that proceeding, absent notice of the state's intent to revoke parole, could not effectively satisfy the due process requirement of a prerevocation hearing.[34] While the right to a prerevocation hearing may be waived by a knowing failure to assert it in a timely manner,[35] this was not the situation in *La Croix*, where the parolee actually requested the additional hearing.[36] Thus, notification of the right to a prerevocation hearing provides a basis for a knowing and effective waiver of the right.

In its discusssion of the necessity for in-community prerevocation hearings the California Supreme Court expressed its concern that the parolee be given the opportunity to produce fresh, relevant evidence which might negate a finding of probable cause to revoke parole.[37] *In re Love* dealt with another important aspect of the parolee's right to produce evidence in his own behalf, the right to discover the nature and scope of the state's evidence. In *Love* the issue was nondisclosure of a "special confidential report" prepared by a parole officer.[38] The state vigorously contended that disclosure was not necessary in the absence of Adult Authority reliance upon any part of the report in its decision. The court rejected this contention, stating that a contrary holding would amount to authorization for the Authority to deny access to information which could vindicate a parolee accused of wrongdoing. Thus, in the context of revocation hearings, *Love* assures the broadest possible discovery against the state when the Adult Authority asserts no judicially cognizable privilege.[39]

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33. 408 U.S. at 486-87.

34. 12 Cal. 3d at 151, 524 P.2d at 820, 115 Cal. Rptr. at 348.

The court has often expressed reluctance to allow misdemeanor trials to serve as the probable cause hearing mentioned in *Morrissey*. *See id.* at 150-51, 524 P.2d at 819-20, 115 Cal. Rptr. at 347-48.

Its concern over possible delay was underscored by its discussion of misdemeanor trials in *Valrie*, a case which involved delay resulting from a federal narcotics charge under a grand jury indictment. The utility of a misdemeanor trial as a substitute for prerevocation required by *Morrissey* was also called into question in *Law*, where the court expressed equal concern over the unavailability of a written record which characterizes most misdemeanor proceedings. *In re* Law, 10 Cal. 3d 21, 28, 513 P.2d 621, 626, 109 Cal. Rptr. 573, 578 (1973).

35. 12 Cal. 3d at 152-53, 524 P.2d at 821, 115 Cal. Rptr. at 349.

36. *Id.* at 153-54, 524 P.2d at 821-22, 115 Cal. Rptr. at 349-50.

37. *In re* Valrie, 12 Cal. 3d 139, 144, 524 P.2d 812, 815, 115 Cal. Rptr. 340, 342 (1974).

38. *In re* Love, 11 Cal. 3d at 184, 520 P.2d at 716, 113 Cal. Rptr. at 92.

39. *Id.* The court did not expand upon its use of the phrase "absent some privilege," but it appears broader than the *Morrissey* privilege designed to protect the informer. Its exact bounds are left for resolution in future cases.

In the context of prerevocation hearings, however, the law remains unclear. *Love* did not deal with the responsibilities of the state *prior* to the prerevocation hearing.[40] Since, as the court recognized, the state has no interest in reincarcerating parolees not deserving of such a drastic remedy, neither does it have an interest in delaying disclosure until the prerevocation hearing or later. The court should have imposed an affirmative duty upon the Adult Authority to disclose any information or evidence within its knowledge prior to the prerevocation hearing. The ultimate issue at the prerevocation hearing is whether or not the parolee should remain in custody pending a full revocation hearing. Since loss of liberty is the result of a finding of probable cause, the parolee has a substantial interest in obtaining any materials which would tend to negate such a finding. The same reasons supporting the requirement that evidence be disclosed prior to the revocation hearing apply with equal force to the prerevocation hearing.

d. Denial of a prerevocation hearing

While the court found no circumstances to justify the Adult Authority's denial of a prerevocation hearing in *La Croix*, it did not view that procedural irregularity as unfair or prejudicial to the parolee.[41] The court was unwilling to presume prejudice,[42] and remarked repeatedly that the prior practices of the Adult Authority should be given the benefit of any ambiguity which had arisen from the language in *Morrissey*.[43]

Although the court held that no prejudice had been shown in this case, it enunciated a broadly protective standard by which to judge future denials of timely prerevocation procedure: before the denial can be " 'held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' "[44]

II. THE RIGHT TO COUNSEL AT REVOCATION HEARINGS

a. The constitutional background: Gagnon v. Scarpelli

When the United States Supreme Court decided *Gagnon v. Scarpelli*,[45] a California parolee did not have a right to be represented by

40. In *Love* the existence of the "special confidential report" was not disclosed to the parolee until the prerevocation hearing. 11 Cal. 3d at 183, 520 P.2d at 715, 113 Cal. Rptr. at 91.

41. *Id.* at 154-55, 524 P.2d at 822, 115 Cal. Rptr. at 350.

42. *Id.*

43. *Id.* at 155 n.7, 524 P.2d at 823 n.7, 115 Cal. Rptr. at 351 n.7.

44. *Id.* at 155, 524 P.2d at 823, 115 Cal. Rptr. 351, *quoting* Chapman v. California, 386 U.S. 18, 24 (1967).

45. 411 U.S. 778 (1973).

counsel at revocation hearings.[46] In *Gagnon*, the Supreme Court recognized that the *Morrissey* safeguards may, in some instances, require that the accused be assisted by counsel, either retained or appointed, in order to implement and protect both the interest of the state in the efficient administration of its penal rehabilitation system, and the interest of the probationer or parolee in the continued enjoyment of liberty.[47] *In re Love* adopted the *Gagnon* rationale without modification,[48] thus bringing California law into line with current federal standards of procedural due process.

b. Application of Gagnon in California: In re Love

The right to counsel at parole revocation proceedings exists under the *Love* holding when the effective presentation of the parolee's defense to the alleged violations of parole requires the use of "skills which the . . . parolee is unlikely to possess."[49] While it can be argued that this describes most, if not all, revocation proceedings, the California Supreme Court identified only a limited number of situations in which the right to counsel would arise "presumptively"[50]: (1) where the parolee denies the commission of the alleged violations, (2) where the parolee admits the violations, but asserts complex matters in mitigation, and (3) where the parolee admits the violations, but claims that the admissions were coerced.[51] In all other cases the "decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the [Adult Authority]."[52]

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46. *In re* Tucker, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971).

47. 411 U.S. at 786-87.

48. *In re* Love, 11 Cal. 3d at 176, 186-87, 520 P.2d 713, 716-17, 113 Cal. Rptr. 89, 92-93 (1974).

49. 11 Cal. 3d at 186, 520 P.2d at 717, 113 Cal. Rptr. at 93, *quoting* Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

50. 11 Cal. 3d at 186, 520 P.2d at 717, 113 Cal. Rptr. at 93.

In *Gagnon*, The United States Supreme Court refused to formulate a precise test but stated:

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

411 U.S. at 790-91.

51. Although neither court held the parolee in this last situation to be "presumptively" in need of the assistance of counsel, it is difficult to imagine a more complex matter asserted in mitigation of the admission. The court's statement that the right to counsel should be "seriously considered" in such a situation is tantamount to a directive on the point. 11 Cal. 3d at 186, 520 P.2d at 717, 113 Cal. Rptr. at 93.

52. *Id.* at 185, 520 P.2d at 718, 113 Cal. Rptr. at 94.

Although the California Supreme Court recognized that "in some or perhaps many instances the circumstances are such that fairness requires that the parolee be represented by an attorney,"[53] it held that this fact, standing alone, did not warrant the extension of an absolute right to counsel in all situations where the parolee faces revocation.[54] In reaching this conclusion the court relied heavily upon the reasoning of *Gagnon*, yet the opinions in *Gagnon* and *Love* have distinctly different effects upon the availability of the right to counsel in actual practice. *Gagnon* expressly left open the question of "whether a probationer or parolee has a right to be represented at a revocation hearing by retained counsel in situations *other* than those where the State would be obliged to funish counsel for an indigent."[55] Therefore, when faced with one of these "other" situations, state courts were left free to determine that such a right does exist.[56] *In re Love*, however, expressly reaffirmed those portions of *In re Tucker*[57] which deny the existence of an *absolute* right to counsel,[58] and thus has the effect of leaving to the legislature any further extension of the right in California.[59]

Such a narrow view of the need for counsel at all stages where an individual's liberty is at stake is inconsistent with the court's protection of the right to counsel in the context of probation revocation proceedings. In *People v. Vickers*,[60] as well as in *Love* itself,[61] the court recognized that there is no material distinction between parole and probation revocation, a view echoed by the United States Supreme Court in *Gagnon*.[62] Having held in *Vickers* that the right to counsel exists in probation revocation cases as a judicially declared rule of procedure, the distinction the court drew in *Love* between parole and probation is dubious. Although the court's refusal to grant an absolute right to counsel in the parole context is buttressed by economic and procedural considerations, it rested its adherence to the last vestiges of *Tucker* more upon a recognition that in California parole revocation is an exec-

53. *Id.* at 189-90, 520 P.2d at 719, 113 Cal. Rptr. at 95.

54. *Id.*, 520 P.2d at 719-20, 113 Cal. Rptr. at 95-96. Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973).

55. 411 U.S. at 783 n.6 (emphasis added).

56. Were the right to retained counsel extended to all parolees, it would appear that considerations of equal protection would require the appointment of counsel for the indigent. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

57. 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971).

58. 11 Cal. 3d at 190-91, 520 P.2d at 719-20, 113 Cal. Rptr. at 95-96.

59. *See In re* Rixner, 38 Cal. App. 3d 535, 113 Cal. Rptr. 404 (3d Dist. 1974); *In re* Oglesby, 36 Cal. App. 3d 629, 111 Cal. Rptr. 866 (3d Dist. 1974).

60. 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).

61. 11 Cal. 3d at 186, 520 P.2d at 717, 113 Cal. Rptr. at 93 (citing both *Gagnon* and *Vickers*).

62. 411 U.S. at 782, 786-87.

utive rather than a judicial function.[63] This distinction, however, is not relevant in terms of procedural due process.[64]

The need for the assistance of counsel at revocation hearings arises from the nature of the proceedings themselves and from the peculiar interests of the parties involved. The state obviously has an interest in ensuring that the parole process fulfills its basic function—rehabilitation. Likewise the parolee has a vital interest in protecting his liberty to the greatest extent possible. Both the examination of the facts surrounding the alleged parole violations and the exercise of the fact finder's discretion over the parolee's future must be conducted properly if both interests are to be served.

c. Right to counsel as a matter of due process

One of the major concerns underlying the court's refusal to extend an absolute right to counsel to a parolee was its fear that by injecting counsel into an otherwise informal hearing a full-blown adversary proceeding would result.[65] While the court is correct in assuming that a proceeding with counsel would be more formal than one without, its argument presupposes that informal proceedings are essential to the overall aims of the parole program. The intent of the parole process is to place a prisoner back into the community where the dual purposes of rehabilitation and reassimilation may be completed.[66] The revocation process itself bears witness to the underlying purposes of parole through its two-tiered inquiry into the necessity and utility of revoking the parolee's liberty.

A parolee approaches the "informal" revocation hearing with the knowledge that a finding of a parole violation may subject him to the maximum prison sentence prescribed for the original conviction. It is difficult, in terms of result, to distinguish the hearing from a regular criminal trial. Even though the ultimate issues may be different, the result of either proceeding is the same—the person is acquitted or goes

63. 11 Cal. 3d at 185 n.5, 520 P.2d at 716 n.5, 113 Cal. Rptr. at 92 n.5.

64. *See* People v. Vickers, 8 Cal. 3d 451, 458-59, 503 P.2d 1313, 1318-19, 105 Cal. Rptr. 305, 310-11 (1972):

> Although we are not confronted with a revocation of parole but rather with proceedings for the revocation of probation granted after conviction and imposition of sentence, we cannot distinguish such proceedings in principle insofar as the demands of due process are concerned. . . .

65. 11 Cal. 3d at 188, 520 P.2d at 718, 113 Cal. Rptr. at 94.

66. In Gagnon v. Scarpelli, 411 U.S. 778, 784-85 (1973), the Court recognized that the need for the power to suspend the conditional liberty status of the probationer or parolee arises from the nature of the rehabilitative process:

> Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.

to prison. The revocation hearing, like the criminal trial, pits the individual against the state, with the latter clearly the more powerful. The addition of counsel to such a proceeding balances this power somewhat, ensures a fair and comprehensive examination of the facts, and may persuade a reluctant hearing officer to exercise the discretion involved in the revocation process.[67] By assigning so much weight to the possible simplicity of the disputed factual issues, the court glosses over the aspect of the process closest to the overall purpose of parole—the prediction of a need for incarceration.

Parole is a calculated risk taken in the hope that the parolee will become a productive member of society. It serves no useful societal purpose to reinstitutionalize a parolee unless his antisocial conduct would subvert the purposes of release. The issue before the court in *Love* was not merely the utility of counsel in the presentation of simple factual issues, but also the utility of the advocate in the proper functioning of the parole program. The basic interest of society is that the parolee remain a free and productive member of society; the parolee's interest is the same. If it can be shown that the parolee's actions are not incompatible with this goal, if counsel can be of assistance in such a showing, it is in the interests of both the parolee and society that counsel be present.

The usual parole revocation hearing may present quite simple factual questions, but the presentation of the relevant facts in a coherent and logical progression is a formidable task for the person whose liberty is at stake.

> [The probationer] often lacks the training and poise to present to either his probation officer or the court his explanation in a persuasive manner, although or perhaps because the stakes are high. Trained counsel . . . "can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of" his client. With counsel's assistance the proceeding will move to an orderly, just conclusion in the best interests of both the probationer and the People.[68]

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67. If it is assumed that the presence of counsel at the revocation hearing is for the purpose of rendering assitance to the parolee who may lack the poise aud skill to present a case effectively, the court's reasons for denying the right to counsel lack relevance to the due process issue.

First, the presence of counsel for such a limited purpose will do nothing more than meet the parolee's admitted need of assistance. Second, the representatives of the Adult Authority are not likely to need the assistance of experienced counsel: presumably they are quite experienced in their own right. Third, the mere presence of "administrative burdens" should not affect the availability of a fair proceeding. The court does not identify just what these "burdens" will be if counsel is permitted to be present at all revocation hearings.

68. People v. Vickers, 8 Cal. 3d 451, 461, 503 P.2d 1313, 1321, 105 Cal. Rptr. 305, 313 (1972).

There can be no doubt that "just a few words, if spoken effectively enough, by counsel"[69] could aid the parolee, as well as the hearing board, in ascertaining the facts and arriving at a just and equitable solution.[70]

It does little to advance the interests of either the parolee or the state to attach controlling weight to legislative classifications. The proceedings in question have equal impact upon the life of the individual,[71] and, therefore, the issue should be viewed as one of procedural due process. *Mempa v. Rhay*[72] requires the presence of counsel "at every stage of a criminal proceeding where the substantial rights of the accused may be *affected.*"[73] Since there can be no doubt that parole revocation affects the substantial rights of the accused parole violator, only artificial distinctions between probation and parole will support the argument that *Mempa* is inapplicable to parole revocation. The Supreme Court relied upon such a distinction in *Gagnon* when it attempted to distinguish revocation of probation from that of parole by characterizing the latter as a noncriminal proceeding.[74] The California Supreme Court relied on a similarly artificial distinction in *Love* by giving controlling weight to the executive-judicial distinction.

To argue that parole revocation is not a criminal proceeding is absurd; it can be nothing else. The conclusion of the original trial and the passing of sentence do not signal the end of the criminal process. Were it not for the original sentence the parolee would not be a parolee

69. Commonwealth v. Tinson, 433 Pa. 328, 333, 249 A.2d 549, 552 (1969): "There can be little doubt as to the value of counsel in developing and probing the factual and legal situations which may determine on which side of the prison walls [a parolee] will be residing."

70. Other jurisdictions have recognized the usefulness of counsel in the probation-parole context. *See, e.g.*, People v. Price, 24 Ill. App. 2d 364, 164 N.E.2d 528 (1960); Warden of Maryland Penitentiary v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957); Williams v. Commonwealth, 350 Mass. 732, 216 N.E.2d 779 (1966); People *ex rel.* Menchino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); Perry v. Willard, 247 Ore. 145, 427 P.2d 1020 (1967); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969). *See also* PA. STAT. ANN. tit. 16, § 9960.6(a)(6) (1974) (Public Defender Act). *See generally* MODEL PENAL CODE § 305.15 (Prop. Off. Draft, 1962).

71. *See* People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 381-82, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 453 (1971). The New York Court of Appeals rejected the administrative-judicial distinction, noting that the impact of the decision is equally serious in either case. *See generally* Tobriner & Cohen, *How Much Process is Due? Parolees and Prisoners*, 25 HAST. L.J. 801 (1974). Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215, 1249-54 (1971); Note, *Constitutional Law—Right to Counsel—Alleged Parole Violator Has Right to Counsel at a Parole Revocation Hearing*, 18 BUFF. L. REV. 607 (1969).

72. 389 U.S. 128 (1967).

73. *Id.* at 134.

74. Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973). The Court's position in this regard is clearly in conflict with previously decided cases where the criminal-civil label was rejected as not dispositive of the issues involved. *See, e.g., In re* Gault, 387 U.S. 1 (1967).

and the Adult Authority would not have continuing jurisdiction over his activities. The parolee faces a step in the criminal process when he must prove his worthiness to remain free on parole or face reincarceration for an extended term. Parole revocation affects the substantial rights of the accused; procedural due process should require that *Tucker* be overruled in its entirety. A right to counsel at parole revocation hearings should be recognized as constitutionally compelled.

CONCLUSION

The decisions of the California Supreme Court in *In re Love, In re Bye, In re Valrie,* and *In re La Croix* present an interesting mixture of constitutional and practical analysis. While the court did an admirable job in its discussion of the overall need for prerevocation hearings, it fell short of the mark in its discussion of the parolee's right to counsel. In its discussion of *Morrissey*'s procedural requirements the court prohibited interference with the implementation of constitutional requirements unless strong countervailing reasons can be advanced. In its discussion of the parolee's right to counsel in revocation proceedings, the court deemed the benefits of an absolute right to counsel more than outweighed by the practical effects of the exercise of such a right.

By leaving the existence of a right to counsel dependent upon the ad hoc determinations of the Adult Authority, rather than formulating a blanket rule as it did with probation, the court failed to consider the importance of the right to counsel in the proper functioning of the parole revocation process.

The court took several steps in the right direction by extending the *Morrissey* safeguards to parolees. It is indeed unfortunate that it then stopped short.

Robert A. Destro

C. Prohibition of Consideration for Parole as Cruel or Unusual Punishment

In re Foss.[1] Upon a petition for a writ of habeas corpus, the California Supreme Court ruled that a mandatory minimum statutory sentence of 10 years without possibility of parole for the sale or furnishing of narcotics by a repeat offender[2] violates the California constitu-

1. 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (Burke, J.) (5-2 decision).

2. Ch. 274, § 3, [1961] Cal. Stats. 1303 (now CAL. HEALTH & SAFETY CODE § 11352 (West Supp. 1974)). At the time of Foss's conviction Health and Safety Code section 11501 provided: