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THE IMPACT OF MORRISSEY AND GAGNON ON PAROLE REVOCATION PROCEEDINGS*

VINCENT O'LEARY** AND KATHLEEN HANRAHAN***

Prior to 1960, following an established "hands-off" doctrine, courts were reluctant to intervene in the affairs of the correctional system.¹ Then, spurred by a series of Supreme Court decisions in the early 1960s, the lower courts altered their stance.² The change occurred slowly at first, but continued with increasing vigor until virtually all aspects of the correctional system had been subjected to judicial scrutiny.³ Clearly the scope of court activity in the past decade has been dramatic. Whatever the direction or dimension of future legal rulings, the time is ripe to assess the effectiveness of that activity. To that end, this article attempts to trace the impact of two important Supreme Court decisions on one segment of the correctional system—parole.

The future of the institution of parole today is uncertain. In several states, proposals are before legislatures to modify parole practice substantially or eliminate it entirely. In one state, parole has

been abolished,⁴ and in another it has been dramatically curtailed.⁵ However, it is not our purpose here to assess development in parole and sentencing theory and practice.⁶ The fact that the agencies under analysis are parole boards is incidental. What is important is that we have an opportunity to study the response of an important set of criminal justice agencies to significant judicial rulings.

Parole was relatively late in receiving attention from the courts, and, as noted by Newman,⁷ they did not treat it as a unitary whole. Rather, the courts responded to separable elements of the parole process: the grant hearing, the conditions of supervision and revocation. Of these elements, revocation has received the most extensive and detailed court regulation. Within one year, the Supreme Court handed down decisions in *Morrissey v. Brewer*⁸ and *Gagnon v. Scarpelli*.⁹

In *Morrissey*,¹⁰ the Court set aside the traditional right/privilege distinction in parole litigation. It declared that liberty was at stake in revocation proceedings and "must be seen as within the protection of the Fourteenth Amendment."¹¹ The Court then established the now familiar two-stage process for revocation of parole.¹²

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¹ For a discussion of the "hands-off" doctrine, see Notes and Comments, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

² The exact point at which the court system reversed its position is difficult to determine. Sullivan and Tiftt locate the shift in opinion in the Warren Court "with the determination that 'critical stages' are not only preadjudicatory stages." Sullivan & Tiftt, *Court Intervention in Correction—Roots of Resistance and Problems of Compliance*, 21 CRIME AND DELINQUENCY 213, 215 n.10 (1975).

³ For a review of some of the areas of court review, see Newman, *Court Intervention in the Parole Process*, 36 ALBANY L. REV. 257 (1972); Plotkin, *Recent Developments in the Law of Prisoners' Rights*, 11 CRIM. L. BULL. 405 (1975); and Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA L. REV. 841 (1971).

⁴ ME. REV. STAT. tit. 17-A, §§ 47-53 (1976).

⁵ 1976 Cal. Legis. Serv. ch. 1139.

⁶ For a discussion of these issues, see, V. O'LEARY & K. HANRAHAN, *PAROLE SYSTEMS IN THE UNITED STATES* (1976) and O'Leary, Gottfredson, & Gelman, *Contemporary Sentencing Proposals*, 11 CRIM. L. BULL. 555 (1975).

⁷ Newman, *Court Intervention in the Parole Process*, 36 ALBANY L. REV. 257, 261 (1972).

⁸ 408 U.S. 471 (1972).

⁹ 411 U.S. 778 (1973).

¹⁰ *Morrissey*, an Iowa parolee originally convicted on bad check charges, was returned to prison accused of violating several of the conditions of his parole by allegedly buying a car and obtaining credit under an assumed name, failing to report his place of residence to his parole officer and giving false information about his address and insurance company to the police after an accident. He was granted no hearing until two months after his parole was revoked. *Morrissey* filed a writ of habeas corpus claiming that he had been denied due process because he had received no hearing prior to the revocation of his parole.

¹¹ 408 U.S. at 482.

¹² *Id.* at 484-89.

The first stage of that process consists of a preliminary hearing held at or reasonably near the place of the alleged parole violation. The hearing is to be conducted "as promptly as convenient after arrest while information is fresh and sources are available."¹³ Its purpose is to determine if there is probable cause or reasonable grounds to believe that a violation of parole has occurred. The hearing is to be conducted by an individual not directly involved in the case, and the parolee is to receive advance written notice of the hearing, its purpose, and the parole violations which are alleged. At the hearing, the parolee may present letters, documents and individuals with relevant information and, upon his request, individuals who have supplied information adverse to his case are to be made available for questioning in his presence.¹⁴ The individual conducting the hearing is to prepare a summary of the proceedings. If probable cause is found the parolee may be returned to an institution to await the final revocation proceeding.

The second stage, the final revocation hearing, is held to evaluate any contested facts and to determine if the facts warrant revocation. This hearing is to be conducted by a "neutral and detached" hearing body such as a parole board.¹⁵ The procedures for notice, evidence and confrontation are substantially the same as those of the preliminary hearing. In addition, the evidence against the parolee must be disclosed to him and the hearing body must prepare a written statement of the evidence relied upon and the reasons for the revocation of parole.

Chief among the issues left unresolved by *Morrissey* were attorney representation at revocation hearings and the appointment of counsel for indigent parolees. Although both Justice Brennan in his concurring opinion and Justice Douglas in his partial dissent supported attorney representation,¹⁶ the holding in *Morrissey* specifically did not address the question. The issue was positively resolved subsequently in *Gagnon v. Scarpelli*.¹⁷ Although the

Court permitted parole authorities to decide whether to allow counsel at specific revocation hearings, it also established the following presumptive criteria:

[C]ounsel 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 the 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. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.¹⁸

Measuring Reaction to Morrissey and Gagnon

The Court's imposition of procedural requirements before revocation raised two related sets of concerns, particularly with respect to *Morrissey*. The first concern was the burden to the parole system that implementation of the decision might entail. Many feared that the added procedural requirements would create cost problems for parole administration and would serve to restrict parole personnel. Some suggested that the net result might be a decrease in the number of inmates paroled.¹⁹

The second set of concerns arose with regard to compliance. Open evasion of the ruling was not anticipated, but there was some skepticism about the degree and nature of implementation of the procedural requirements. Similar efforts of the Court, notably *Mapp*,²⁰ *Miranda*²¹ and *Gault*²² had not been greeted by the affected agencies with enthusiastic compliance.²³ A common concern was that implementation of *Morrissey* would be more symbolic than operational, possibly through the use of waiver²⁴ and other evasive techniques.

¹⁸ 411 U.S. at 790-91.

¹⁹ See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, 83-84 (1967).

²⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²² *In re Gault*, 387 U.S. 1 (1967).

²³ For a brief description of the literature on non-compliance with these rulings, see Sullivan & Tift, *supra* note 2, at 218-19.

²⁴ Cohen, *A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616, 620-21 (1972).

¹³ *Id.* at 485.

¹⁴ If the preliminary hearing officer determines that the informant would be subject to risk of harm if identified, he or she need not be made available for cross-examination. *Id.* at 487.

¹⁵ *Id.* at 489.

¹⁶ *Id.* at 491, 498.

¹⁷ *Scarpelli*, while on probation in Wisconsin for an armed robbery conviction, was charged with subsequently committing a burglary for which his probation was revoked without a hearing. *Scarpelli* applied for a writ of habeas corpus claiming that revocation of probation without a hearing and without counsel was a denial of due process.

Similar issues could be raised with respect to the *Gagnon* ruling. However, that decision lacks the specificity of *Morrissey*. The Court recognized that "considerable discretion must be allowed the responsible agency in making the decision"²⁵ about the need for attorney representation during parole revocation.

In spite of the interest in implementation of the Court's rulings, national data on the compliance of parole boards with *Morrissey* and *Gagnon* has been largely unavailable. In 1973, the American Bar Association attempted to collect information on compliance with *Morrissey*,²⁶ but was unable to elicit the cooperation of all parole boards. The results of that survey, based upon the responses of forty-five paroling authorities, indicated that:

[M]ost of [the boards] are in formal compliance with most of the *Morrissey* requirements. The pattern of compliance is highest with respect to those due process elements which are most certain and specific (e.g. written notice of charges, right to confront and cross-examine adverse witnesses, etc.). Concerning issues such as the promptness of the revocation hearing, parole board practices are more diverse.²⁷

The report of the ABA also noted some variation in the boards' approach to the spirit of the decision²⁸ and expressed concern with the issue of waiver.²⁹ Emphasizing the preliminary nature of its findings, the ABA study suggested that "*Morrissey* has had the effect of 'shaking up' many parole practices and it will be some time before the dust finally settles."³⁰

In the four years since *Morrissey*, there have been significant changes in revocation procedures. Some records of those changes are available through two surveys of parole practices conducted by the National Parole Institutes.³¹ The first was conducted in 1972 shortly before the Supreme Court decided *Morrissey*. Detailed questionnaires were mailed to fifty-four adult paroling authorities,³² and a de-

scription of each board was developed from the responses. Once the descriptions had been verified by each board, they were compiled and published,³³ preserving a detailed description of pre-*Morrissey* and *Gagnon* revocation procedures.

Due to the changes that have occurred in parole since 1972, and the current interest in the parole process, a similar project was undertaken by the writers in 1976. Fifty-two³⁴ adult parole boards were contacted and asked to update the 1972 description of their practices and to complete a questionnaire concerning revocation procedures. Final drafts of each board's description were mailed for verification in June of 1976.³⁵

An additional source of information on board reactions to *Morrissey* and *Gagnon* is the *Parole Board Opinion Survey* mailed to all board members and chairpersons in the United States early in the summer of 1976, under the auspices of the National Parole Institutes. This survey contained a set of items concerning attitudes toward attorney representation at revocation hearings, and a set of items concerning attitudes toward selected elements of the *Morrissey* decision and its perceived impact on the revocation process. At this time, approximately two-thirds of the 273 board personnel³⁶ who received the Survey have responded.

Compliance with Morrissey and Gagnon

Prior to the *Morrissey* and *Gagnon* decisions, the majority of states returned parolees suspected of parole violation to the institutions from which they had been released, or to some other state facility. Only seven boards held the revocation hearing locally near the site of the alleged violation. And as Table 1 demonstrates, the hearings given did not comply with a number of specific requirements of *Morrissey* and *Gagnon*.

These deviations from the requirements of *Gagnon* and *Morrissey* obviously required changes in

²⁵ 411 U.S. at 790.

²⁶ ABA SURVEY OF PAROLE REVOCATION PROCEDURES (1973). The survey also included items on attorney representation, but these data pre-date the *Gagnon* ruling.

²⁷ *Id.* at 1.

²⁸ *Id.* at 8.

²⁹ *Id.* at 9.

³⁰ *Id.* at 7-8.

³¹ The National Parole Institutes are federally funded training programs for parole board members, administered by the National Council on Crime and Delinquency.

³² The 54 jurisdictions included the adult parole boards of the 50 states, the District of Columbia, the Federal board and specialized boards in two states.

³³ V. O'LEARY & J. NUFFIELD, THE ORGANIZATION OF PAROLE SYSTEMS IN THE UNITED STATES (2d ed. 1972).

³⁴ Additional specialized boards in two states which were included in the 1972 survey were excluded from the recent survey. In the sections that follow, those two boards are eliminated from the 1972 data to permit comparison with the recent information.

³⁵ The information was collected during the recent series of National Parole Institutes. The full results are presented in V. O'LEARY & K. HANRAHAN, PAROLE SYSTEMS IN THE UNITED STATES (1976).

³⁶ The survey was mailed to the members and chairpersons of the 50 state adult boards, the District of Columbia, the Federal Parole Commission, and three specialized boards in California.

Table 1
Practices at Revocation: 52 Jurisdictions

Practice:	1972	
	Yes	No
Notice of specific charges	34	18
Disclosure of violation reports	18	34
Counsel permitted at hearing	37	15
Parolee allowed witnesses	32	20
Parolee allowed to confront opposing witnesses	28	24
Reasons for the decision recorded	4	48

Table 2
 Average Time Between the Arrest or Detention of the Parolee and the Preliminary Revocation Hearing

<u>Hearing Conducted Within:</u>	1976	
	<u>Number of Jurisdictions</u>	
One week	15	
1 to 2 weeks	23	
2 to 3 weeks	7	
3 to 4 weeks	5	
90 days	1	
"as promptly as convenient"	1	
Total ...	52	

practice in a number of jurisdictions. The results of the 1976 survey suggest that parole boards did make those changes. All fifty-two boards reported compliance with the requirements of a two-tiered revocation process, notice, presentation of witnesses, confrontation of adverse witnesses and a summary of the preliminary revocation hearing.

Other procedural requirements established in *Morrissey* and *Gagnon* are of a less specific nature than those listed in the survey. For instance, the Court held in *Morrissey* that the preliminary revocation hearing was to be conducted "as promptly as convenient after arrest while information is fresh and sources are available."³⁷ As demonstrated by Table 2, this time period has been interpreted differently, and in one case literally, but most boards hold the hearing within two weeks of the parolee's arrest or detention.

The Court was also non-specific in setting standards for the nature of hearing bodies at preliminary and final revocation proceedings. The preliminary hearing is to be conducted by someone not

directly involved in the case, "such as a parole officer other than the one who has made the report of parole violations or has recommended revocation."³⁸ Similarly, the final hearing is to be conducted by a "neutral and detached" hearing body such as a traditional parole board.³⁹

Parole boards have developed a variety of ways to meet the requirements. In twenty-three jurisdictions, the preliminary hearing is conducted by parole staff of various supervisory positions. Nineteen boards delegate that duty to hearing officers attached to the board.⁴⁰ Of the remaining jurisdictions, four boards have delegated the preliminary hearing to hearing officers of other state depart-

³⁸ *Id.* at 486.

³⁹ *Id.* at 489.

⁴⁰ While the titles vary across jurisdictions, hearing officer, as used in this report, refers to a specific and formal position whose job description includes conducting hearings as a board representative. Several states refer to the parole staff who conduct revocation hearings as "hearing officers"; we have attempted to distinguish between those less formal designations and the formal positions in the course of the survey.

³⁷ 408 U.S. at 485.

Table 3
Composition of Hearing Bodies at Revocation

1976			
<u>Preliminary Hearing</u>	<u>No. of Boards</u>	<u>Final Hearing</u>	<u>No. of Boards</u>
Parole supervisory staff	24	Full board	14
Board hearing officer	18	Two members/ majority of Board	23
Hearing officer, other dept.	3	At least one board member	7
One board member ^a	3	Board hearing officer(s)	6
Probation staff	1		
Other ^b	3	Other ^c	2
Total ...	52	Total ...	52

- a. In Alaska the Executive Director of the Board may conduct hearings.
 b. Colorado: Court of Record; Ohio: the attorney for the Parole Board; New Hampshire: either parole or probation supervisory staff.
 c. Oklahoma: the Deputy Director of the Division of Community Services and Legal Aid; Ohio: either three Board members or one board member and two hearing officers.

ments,⁴¹ one board to probation staff and three boards to others.

Final revocation hearings are typically conducted by either the full board (fourteen jurisdictions) or some part of the board (thirty jurisdictions). In at least six jurisdictions, the hearings are conducted by board hearing officers. Two boards have developed alternate hearing bodies as indicated in Table 3.

The revocation questionnaire included two additional questions bearing on the *Morrissey* requirements. The first concerned disclosure of the evidence against the parolee. Boards were asked if they permitted the parolee direct access to pertinent official records prior to revocation hearings. It was thought that this item was broader than the *Morrissey* requirement of disclosure,⁴² since *Morrissey* could be met in a number of ways, including a verbal description of evidence upon which the violation charges rested. The majority of boards reported that they do permit direct access to official materials. Twenty-eight boards usually do so prior to the preliminary hearing and two additional boards permit the parolee access to official materials if they feel it is advisable. Prior to the final hearing, thirty-four boards allow the parolee to view relevant official materials. This is a rather

substantial increase over the practice in 1972. At that time, only eighteen boards permitted the parolee to read the violation report prior to the revocation hearing.

The second item concerned the means by which reasons for the revocation decisions were transmitted to parolees. *Morrissey* requires "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole."⁴³ Boards were asked if the parolee received an explanation of the reasons for the decision, either verbally, in writing, or both. While most would interpret the Court's holding as requiring a written statement, apparently not all paroling authorities agree with that interpretation. All jurisdictions reported providing an explanation of the decision, but six of those boards provided the explanation verbally.

It was assumed that parole boards would comply with the letter of *Gagnon v. Scarpelli*, since the Court established a case by case procedure relying only on the "sound discretion" of the agency administering the parole system. Therefore, each paroling authority was not asked if it fulfilled the requirements of *Gagnon*, but rather if it permitted attorney representation and appointment of counsel for indigents at revocation *in general*. As indicated in Table 4, almost all parole boards permit attorneys at the hearings and a majority routinely provide for appointed counsel for indigent parolees. This

⁴¹ Again, these hearing officers are distinct from the hearing officers attached to the parole boards.

⁴² 408 U.S. at 489.

⁴³ *Id.*

Table 4
Attorney Representation at Revocation Hearings

Preliminary Hearing	1976			Total
	Yes	No*	Not Applicable	
Attorney permitted	47	5	-	52
Attorney appointed	25	22	5	52
<u>Final Hearing</u>				
Attorney permitted	50	2	-	52
Attorney appointed	29	21	2	52

*No includes those cases where attorneys are permitted or appointed only if the parolee meets the requirements of Gagnon v. Scarpelli or similar criteria, or where respondents indicated that attorneys are not generally permitted at the hearings.

again is a substantial increase over the practices reported in 1972. As mentioned, thirty-seven boards permitted attorney representation at that time. (Information on the appointment of counsel was not collected in the 1972 survey).

In summary, with one exception, paroling authorities report compliance with those aspects of *Morrissey* and *Gagnon* included in this survey. Paroling authorities have instituted the two-stage hearing process, and with respect to the preliminary hearing, they report compliance with the requirements of notice, presentation and confrontation of witnesses, composition of the hearing body and preparation of a summary of the hearing. Boards also reported compliance with the requirements of presentation and confrontation of witnesses at the final hearing. Information on assistance of counsel, appointment of counsel, disclosure of evidence prior to both hearings, and the time period between arrest and the preliminary hearing suggests that boards have met those requirements as well. One item with which boards are not in full compliance is provision of a written statement of the reasons and the evidence relied upon for the revocation decision. All boards report an explanation of the decision, but in six cases the explanation is verbal rather than written.

Other Effects of Morrissey and Gagnon

Earlier two related sets of issues were raised with respect to agency compliance with the *Morrissey* and *Gagnon* rulings. The first concerned increased costs and the possibility that these costs, combined with more procedural restrictions, would lead to fewer paroles. The second issue concerned the possibility that the requirements of those decisions would be met by a surface compliance only.

Specific information on increased costs was not

collected. However, there are some indirect measures which suggest *Morrissey* did increase the cost of parole administration. One indication is an increase in personnel allocated to the parole process. In 1972, twenty-eight boards were full-time, eighteen part-time, and six were a combination of the two—chairperson full-time, members part-time. In 1976, thirty boards had become full-time,⁴⁴ eighteen remained part-time, and four were a combination. Of those four, one had two of its four members serving full-time in addition to the chairperson.

The size of parole boards has also increased. In 1972, there were 240 parole board members and chairpersons in the fifty state parole boards surveyed. In 1976, that number had increased to 259. Furthermore, there had been an increase in the number of jurisdictions employing hearing officers.⁴⁵ In 1972, only six jurisdictions reported routinely using hearing officers.⁴⁶ In 1976, twenty-nine paroling authorities employed 155 hearing officers. Although a number of these were personnel who carried out other duties, such as supervising parole officers, there has nonetheless been a substantial increase in the number of personnel available to conduct hearings.

The evidence is more ambiguous regarding a decrease in paroles due to the added procedural requirements. The best data on parole practices in the United States is gathered by the Uniform Parole Reports system. Through that system it is

⁴⁴ Hawaii indicated in communications with the staff of the National Parole Institutes that it anticipated reorganization into a full-time board within the near future.

⁴⁵ *Supra* note 40.

⁴⁶ A few others (exact number unavailable) mentioned limited use of hearing officers. However, there is no indication of the formality of those positions, thus limiting the comparability of the information.

Table 5

UNIFORM PAROLE REPORTS
NUMBER RELEASED, NUMBER PAROLED, AND PERCENT PAROLED
ADULT PRISON AND REFORMATORY RELEASES IN 42 STATES
1965-1974

Year	Number Released	Number Paroled	Percent Paroled
1965	84,803	51,594	61%
1966	82,977	50,200	61%
1967	81,491	49,954	61%
1968	79,644	48,783	61%
1969	79,765	49,608	62%
1970	86,129	52,991	62%
1971	89,863	57,529	64%
1972	95,829	62,917	66%
1973	96,209	62,316	65%
1974	96,438	61,933	64%
Total	873,148	547,825	63%

Table 6

Survey Item	% Yes	% No	% Don't Know or No Response
Do you think it is more difficult to revoke parole in your state since the <u>Morrissey</u> decision?	44.8	48.5	6.7
Since the <u>Morrissey</u> decision, do you personally feel more reluctant to release "borderline cases?"	22.1	73.6	4.3

possible to track the degree to which parole was employed in forty-two states in the ten-year period between 1965 and 1974.⁴⁷ Table 5 describes these trends.

The data show an interesting pattern when it is recalled that the Supreme Court handed down its decision in *Morrissey* in June, 1972. Up to that year, the number paroled and the proportion released by parole (out of the total released through all methods) had shown a consistent increase since 1968. Then in 1973 and 1974 there was a modest, but consistent, drop in both the number of persons paroled and rate of parole.⁴⁸ Whether this decreased use of parole is related to *Morrissey* or other factors is not known. However, a significant mi-

⁴⁷ NATIONAL PROBATION AND PAROLE INSTITUTES, UNIFORM PAROLE REPORTS—NEWSLETTER (1976). The reason that only 42 states are listed is that eight jurisdictions sometime during that period did not report on all cases.

⁴⁸ The proportion of parolees returned to prison for reasons other than conviction of a new felony also declined slightly in 1973 and 1974 according to the UNIFORM PAROLE REPORTS, *supra* note 47. Whether this decline can be attributed to more stringent due process requirements, a decline in the number of parolees in higher risk categories or other factors is impossible to determine from the data available.

nority of parole board members apparently would agree that such an association exists. They were asked two items related to that question on the *Parole Board Opinion Survey*. Respondents were asked if revocation had become more difficult and if they were more reluctant to release inmates they considered "borderline" since the *Morrissey* decision. The responses, presented in Table 6, indicate that while board members are fairly evenly divided in their opinion of the ease or difficulty of revocation since that decision, the majority (73.6%), feel they are no more reluctant to release borderline cases than before the decision. However, 22.1% do indicate an increased reluctance to parole such cases.

In general the evidence seems to indicate that there have been increased costs associated with parole personnel and lawyers in carrying out the mandate of the Supreme Court. Further, there does seem to be a modest diminution in the rate and use of parole since those decisions, a decrease arguably related to *Morrissey* and *Gagnon*.

Indirect Measures of Compliance

As earlier suggested, an appearance of compliance is one thing, actual practice may be quite another. In order to assess the paroling authorities'

Table 7
Estimated Percentage of Waiver of Revocation Hearings

Estimated Percentage of Waiver	Number of Jurisdictions	
	Preliminary Revocation Hearing	Final Revocation Hearing
0 - 10	27	43
11 - 20	5	4
21 - 30	5	2
31 - 40	3	-
41 - 50	1	2
51 - 60	2	1
61 - 70	2	-
71 - 80	4	-
81 - 90	3	-
91 - 100	-	-
Total ...	52	52

Table 8
Routine Revocation in the Case of Felony or Misdemeanor Convictions

Felony	Number of Jurisdictions		
	Yes	No	Total
1972	19 ^a	33	52
1976	14 ^b	38	52
<u>Misdemeanor</u>			
1972	3 ^c	49	52
1976	1 ^c	51	52

- a. Four jurisdictions: usually
b. Three jurisdictions: usually
c. One jurisdiction: usually

acceptance of the Court's intervention, a number of approaches were used.

One rather direct measure is the use of waiver. This is a fairly common and effective means of resistance to procedural regulations. Paroling authorities were asked if they permitted waiver of either or both of the revocation hearings, and to estimate, roughly, what percentage of parolees utilize waiver. Forty-five of the fifty-two boards surveyed permit waiver of the preliminary hearing, while only about half permit waiver of the final hearing.

As Table 7 demonstrates, the extent of waiver is not consistently high for the preliminary hearing and is considerably lower for the final revocation hearing. The higher incidence of waiver of the preliminary hearing in both policy and practice may indicate evasion of the *Morrissey* ruling in some jurisdictions. However, large scale waiver attempts of the type feared do not seem to have emerged.

An additional method of undermining the intent of the Court is to institute policies which effectively negate the procedural requirements. One item included in both surveys of parole practices concerned the routineness of revocation for those con-

victed of a new felony or misdemeanor. Such a policy might serve to evade the substance of *Morrissey* and *Gagnon* by making whatever hearings were held in those cases mere formalities. However, as Table 8 demonstrates, there has been a slight decrease in the number of boards that routinely revoke under those circumstances.

In addition, information on the attitudes of parole authority members with respect to *Morrissey* and *Gagnon* was collected in the *Parole Board Member Opinion Survey*. Respondents were asked to rate the positive or negative effect of those decisions on parole in their jurisdictions. Table 9 presents the opinions of board members and chairpersons concerning selected elements of the *Morrissey* decision.

Clearly the majority of respondents assessed the value of the specific elements of *Morrissey* listed in Table 9 as positive. Further, when these board members were asked to rate the overall value of the decision in terms of its effect on parole in their state, the results were again favorable. Fully 62.6% of the respondents rated the effect of the decision as positive, while 27.0% rated the effect as neutral, and 4.9% rated the effect as negative (5.5% did not respond).

Table 9

Parole Board Opinion Survey
Effect of Selected Elements of Morrissey Decision

Selected Element	Percentage Responses ⁴⁹			
	Positive	Neutral	Negative	No Response
Conducted an on-site hearing	79.7	15.3	2.4	2.5
Allowing the parolee to present individuals and evidence in his favor	76.1	17.8	4.3	1.8
Allowing the parolee to confront individuals who have supplied information adverse to his case	58.9	25.2	12.9	3.1
Conducting a second, final hearing	68.7	15.3	12.8	3.1
Allowing the returned parolee to present individuals and evidence in his behalf	68.8	17.8	9.2	4.3
Stating the evidence relied upon and the reasons for the decision	88.4	8.6	1.8	1.2

Table 10

Attorney Representation at Revocation

	Percentage of Responses ⁵⁰			
	Should	Neutral	Should Not	No Response
Permit attorneys to represent inmates at the on-site revocation hearings	73.6	15.3	10.4	.6
Permit attorneys to represent inmates at the final revocation hearing	70.0	15.3	13.5	1.2

Board members also favored attorney representation. As indicated in Table 10, the majority of respondents supported the presence of counsel at the revocation hearings. Interestingly, when respondents were asked to indicate their assessment of the effect of attorney presence on the revocation decisions, the majority, 59.5%, indicated that attorney presence has "little effect one way or another," 24.5% rated the presence of counsel as

"helpful" and 9.2% as a "hindrance," (6.7% failed to respond).

Summary and Conclusion

It would appear overall that paroling authorities have complied with *Morrissey* and *Gagnon*. With few exceptions, the fifty-two adult boards surveyed reported practices consistent with those elements of the decisions included in the questionnaire. Clearly, one should be cautious about accepting a self report study, such as this, as a totally satisfactory basis for obtaining an accurate picture of "reality." Undoubtedly there are individual board members, and perhaps even parole boards, who seek to avoid or subvert the implementation of *Morrissey* and *Gagnon*. But personal and fairly close contacts that the writers had with about 150 parole board members during a series of training sessions, conducted at the same time that the nationwide questionnaires were being administered, lends a

⁴⁹ The original scale ranged from 1) Very Positive to 5) Very Negative. For ease of presentation, the scale has been collapsed; points 1) and 2) have been designated "Positive," point 3) "Neutral," and points 4) and 5) "Negative."

⁵⁰ The original five-point scale ranged from "Definitely Should" to "Definitely Should Not." For presentation, "Definitely Should" and "Preferably Should" have been designated "Should;" "Definitely Should Not" and "Preferably Should Not" as "Should Not;" while the central category, "May or May Not," has been re-labeled "Neutral."

good deal of support to a view that compliance with *Morrissey* and *Gagnon* was general and full.

Beyond this, none of the indirect measures supports the concerns of those who predicted widespread evasion of the rulings. While the limitations of the data prevent a final conclusion, most parole boards report reasonable use of waiver and a decline in the number of automatic revocation policies following conviction for a new offense. Boards also appeared to expand the rulings of the courts in some areas, such as a general provision for attorney representation at revocation.

Finally, there is evidence from the opinion survey that movement in the direction of greater due process protection in parole is supported by a significant group of board members. The majority of respondents to that survey rated the elements of both *Morrissey* and *Gagnon* as having a favorable, or at least neutral impact on the revocation process and decision.

The survey of parole practices did yield indirect evidence of increased costs in shifts from part-time to full-time boards, an increase in board size, and the addition of personnel in the form of hearing officers. Data also suggests there has been some decline in the use of parole since the holdings of the Supreme Court with a small but significant number (22%) of board members feeling more reluctant to parole questionable cases than before the decisions.

Why were the parole boards so quick to comply with the Court's mandate when other Court decisions met with resistance? Several items differentiate parole board activities from other agency matters affected by court decisions. The first has to do with the position of the agency. Unlike the

police or juvenile courts, parole boards tend to be highly centralized agencies, thus reducing the distance between administrative and line personnel and easing the difficulty of implementing uniform procedures. Their position also makes their activities more visible than are the proceedings of numerous juvenile courts or the behavior of individual police officers.

Secondly, revocation is often viewed as evidence of the failure of the system, and particularly of the parole system. It is in the interest of the parole board and agency to keep revocation rates as low as community safety permits. Procedural regulations could not threaten the system with increased revocation rates, and might provide an excuse for late revocation.

Finally, unlike the juvenile courts, who saw large segments of their discretion curtailed by the procedural requirements of *Gault*,⁵¹ or the police whose professional behavior became subject to court review due to *Mapp*⁵² and *Miranda*,⁵³ the discretion of parole boards was left largely intact by *Morrissey* and *Gagnon*. Both this autonomy, and the availability of adequate funds to administer the new standards, go a long way to explaining the substantial compliance reflected in this survey.

⁵⁰ The original five-point scale ranged from "Definitely Should" to "Definitely Should Not." For presentation, "Definitely Should" and "Preferably Should" have been designated "Should;" "Definitely Should Not" and "Preferably Should Not" as "Should Not;" while the central category, "May or May Not," has been re-labeled "Neutral."

⁵¹ 387 U.S. 1 (1967)

⁵² 367 U.S. 643 (1961).

⁵³ 384 U.S. 436 (1966).