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PAROLE AND PROBATION REVOCATION PROCEDURES AFTER MORRISSEY AND GAGNON

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I. *Introduction*

The status of parole or probation is one of conditioned liberty.[1] The purpose of parole and probation is to permit a person convicted of a crime to live outside a prison facility so long as that person observes certain rules during the term of his sentence.[2] In this way, a person may be rehabilitated and become a constructive member of society without being incarcerated for his entire sentence. Although parole and probation were not within the contemplation of the authors of the Constitution and Bill of Rights, parole and probation emerged in the nineteenth century as part of an egalitarian movement that found rehabilitation a more satisfactory solution to crime and punishment than the retributive approach of the Puritan ethic.[3] Today, parole and probation are integral parts of the penological system.

Probation and parole procedures are sharply distinguishable. In the federal system, a court grants probation as part of the sentencing process upon entering a judgment of conviction. A court in ordering probation may impose a sentence of imprisonment and suspend its execution or may suspend the imposition of sentence.[4] It is the court which judicially sets the conditions, determines the period of probation (normally up to five years), modifies probation during its continuance, transfers probation jurisdiction to another judicial district when necessary, issues a warrant for the probationer's arrest on an alleged probation violation and conducts the probation revocation hearing.[5] The probation officer acts directly for the court in supervising probation.[6]

Parole is another form of conditional release in the federal system; it rests within the jurisdiction of the United States Board of Parole, an administrative body.[7] In the course of the sentencing process, the court may designate a definite time minimum for parole eligibility less than the normal one-third of the maximum term imposed (which would otherwise obtain as the minimum time).[8] The court may also fix a maximum period to be served and may specify that the prisoner may become eligible for parole at such time as the Board of Parole may determine.[9] This type of "indeterminate sentence" gives the Board of Parole the maximum freedom in determining the period of incarceration. Regardless of the court's precatory declarations in the sentencing order, the ultimate decision as to the length of the parole term is left within the discretion of the Board of Parole.[10]

The Board of Parole administratively establishes the parole conditions and any modifications thereof.[11] Federal probation officers supervise parolees as well as probationers, but in overseeing parolees, they are acting for the Department of Justice and not for the courts.[12] It is the Board, or

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[1] Parole is:

> . . . the release of an offender from a penal or correctional institution after he has served a portion of his sentence, under the continued custody of the state and under conditions that permit his reincarceration in the event of misbehavior.

S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 546 (1963).

Probation is:

> . . . a disposition that allows the convicted offender to remain free in the community while supervised by a person who attempts to help him lead a law-abiding life.

Id. at 176.

See generally, for a discussion of the historical basis of probation and parole, D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE (2d ed. 1969); F. FIARDINI, THE PAROLE PROCESS (1959); C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS (3d ed. 1968).

[2] Morrissey v. Brewer, 408 U.S. 471 (1972).

[3] Rubin *et al.*, *supra* note 1, at 176–79, 543–46.

[4] 18 U.S.C. § 3651 (1971).

[5] 18 U.S.C. §§ 3651, 3653 (1971). Probation for a juvenile may last for a period not exceeding his minority. 18 U.S.C. § 5034 (1971).

[6] 18 U.S.C. §§ 3654, 3655 (1971).

[7] 18 U.S.C. §§ 4201–10 (1971).

[8] 18 U.S.C. § 4208(a)(1) (1971). The standard minimal time for parole eligibility is set forth in 18 U.S.C. § 4202 (1971).

[9] 18 U.S.C. § 4208(a)(2) (1971).

[10] 18 U.S.C. § 4203 (1971).

[11] *Id.*

[12] 18 U.S.C. § 3655 (1971) (final paragraph).

a member thereof, which issues a warrant for a parole violation.[13] Although the two procedures, one judicial (probation) and the other administrative (parole), follow different patterns of procedure, both procedures involve one status—the conditional liberty of an offender who is free to live his life within orderly restrictions. Failure to observe parole or probation conditions may produce the same result at the conclusion of a revocation proceeding—the loss of liberty.[14]

Obviously, probation or parole revocation is a serious matter for the probationer or parolee. Upon forfeiture of his conditional liberty, he will be returned to prison, often to serve the remainder of his sentence. Recent Supreme Court decisions[15] have recognized that, in view of the serious consequences which flow from a finding that an offender has violated his probation or parole, due process protections must be provided to the offender during the revocation proceeding. This article will review those decisions, compare them with existing rights provided to probationers and parolees at revocation hearings in the federal system, and make reference to several proposals to reform parole and probation revocation procedures.

II. *The Anomalous Status of Conditioned Liberty*

The status of the probationer or parolee is difficult to analyze. Any analysis must scrutinize the basic rationale for supervising a convicted man, for monitoring his way of life and for imposing restraints on his lifestyle that would be considered unwarranted intrusions into the ordinary citizen's privacy. Beyond such analysis, however, it is necessary to justify the procedures which support the termination of an offender's liberty when he breaches the conditions of his release. Courts have relied on several theories to restrict the parolee's or probationer's right to due process protections. Courts commonly refer to these rationales as the grace theory, the contract theory, the custody theory and the parens patriae theory.

The grace theory provides that the prisoner's release is not a right to which he is entitled, but rather is a privilege, a merciful act by the court or by the parole board.[16] Through the grace theory, courts have justified the denial of minimal legal protections to probationers and parolees. Since parole or probation is a gift, it may be limited with conditions imposed by the grantor of parole or probation.

The contract theory arises from the fact that offenders must sign forms specifying the conditions of their liberty. This theory holds that an agreement similar to any business contract exists between the prisoner and the state. The contract theory asserts that acceptance of the contract requirements by the prisoner estops him from complaining about its terms, since the prisoner was free to reject the restrictions on his liberty which were offered to him.[17]

Probationers are in the custody of the court and parolees are in the custody of the Board of Parole.[18] Chief Justice, then Judge, Burger set forth the custody theory in *Hyser v. Reed*,[19]

> A paroled prisoner can hardly be regarded as a "free" man; he has already lost his freedom by due process of law and, while paroled, he is still a convicted prisoner whose tentatively assumed progress toward rehabilitation is in a sense being "field tested". Thus it is hardly helpful to compare his rights in that posture with his rights before he was duly convicted.[20]

The custody theory restricts the prisoner's status to that of a "quasi-prisoner" and shields him from judicial review on non-constitutional

[13] 18 U.S.C. § 4205 (1971).

[14] The Supreme Court recognized in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), that in determining the procedural guarantees mandated by the due process clause for revocation hearings, probation and parole revocations would be treated in the same manner since, although neither procedure is part of a criminal prosecution, both result in the loss of liberty. Thus, in discussing the due process protections to be provided an offender in a revocation proceeding, the rights of the probationer and parolee will be considered together.

[15] Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

[16] The grace theory derives from Justice Cardozo's dictum in *Escoe v. Zerbst*, 195 U.S. 490, 492 (1935), that "... [p]robation or suspension of sentence comes as an act of grace." *See* Fuller v. State, 122 Ala. 32, 26 So. 146 (1899), Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1 (1964), *cert. denied*, 380 U.S. 958 (1965); People v. Marks, 350 Mich. 495, 65 N.W.2d 698 (1954).

[17] *See* United States v. Wilson, 32 U.S. (7 Pet.) 149 (1833); United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10, 15–16 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971); *Ex parte* Edwards, 78 Okla. Crim. 213, 219–20, 146 P.2d 311, 314 (1944).

[18] Thompson v. United States Board of Parole, 375 U.S. 957 (1963); Padilla v. Lynch, 398 F.2d 481 (9th Cir. 1968); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); Dillingham v. United States, 76 F.2d 35 (5th Cir. 1935).

[19] 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

[20] *Id.* at 235.

grounds. A corollary of the custody theory is the parens patriae theory. The parens patriae theory holds that the goals of the Board of Parole or court are in union with the goals of the parolee or probationer. Both parties desire the offender's rehabilitation; therefore, judicial examination of procedures employed against the probationer or parolee becomes unnecessary.[21]

The above theories which support the denial of due process protections to a probationer or parolee have been eroded to a great degree by judicial decisions. The Supreme Court in *Morrissey v. Brewer*[22] rejected the entire right/privilege rationale which supported denial of due process in parole revocation hearings. The Court recognized that parole revocation is not part of a criminal prosecution and that parole revocation deprives an individual not of absolute liberty but only of the conditional liberty which hinges on compliance with parole restrictions. However, the Court recognized that "... this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." [23] In addition, the Court has determined that the loss which the individual will suffer must control the extent to which procedural protections will be provided for the individual.[24] Parole and probation have become accepted parts of the criminal justice system. To view probation or parole as an "act of grace" is to ignore the correctional goals of the penological system.

In addition to the downfall of the right/privilege distinction, many courts have questioned the constructive custody theory announced in *Hyser v. Reed*.[25] These courts indicate that there is not a complete loss of due process protections upon a criminal conviction.[26] The custody concept also conflicts directly with the practice of forfeiting release time upon violation of a parole or probation condition. If one sentenced or reincarcerated for a violation of his conditioned liberty agreement receives no credit for his time spent on probation or parole, how can it be said that he was "in custody" during the period of conditional liberty?

The parens patriae theory, an alternative basis for denying parolees counsel at a revocation hearing in *Hyser* is also subject to question. *In re Gault*[27] contains the basic theoretical attack upon the view that, in correctional situations, the government and the individual pursue identical goals. In *Gault*, the Court overturned the use of informal juvenile court proceedings and required that specific due process protections be provided to a juvenile in proceedings which might lead to the juvenile's commitment. The Supreme Court accepted arguendo the respondent's contention that procedural guarantees were unnecessary because the juvenile was in the state's custody for benevolent reasons. However, the Court determined that "... unbridled discretion, however benevolently motivated, is ... a poor substitute for principle and procedure." [28] The argument against providing procedural protections to probationers and parolees is comparable to the argument offered by state officials in *Gault*. There is no reason that the *Gault* rationale, denying effect to the parens patriae theory, ought not apply to the use of that argument in parole and probation revocation proceedings.

The basic flaw in the aforementioned contract theory is that there is no bilateral negotiation of terms and that the person seeking release does not have the option to refuse restrictions on his liberty. The court in *Hahn v. Burke*[29] noted that "... probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state." [30]

Having reviewed the validity of the theories which support the denial of due process protections to individuals who face revocation of their probations or paroles, it is necessary to

[21] *See generally* concerning theories relied upon by courts to justify the denial of due process rights to probationers and parolees, Van Dyke, *Parole Revocation Hearings in California*, 59 CALIF. L. REV. 1215, 1243–54 (1971); Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963); Comment, *The Parole System*, 120 U. PA. L. REV. 282, 286–95 (1971).

[22] 408 U.S. 471 (1972). *See* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909).

[23] Gagnon v. Scarpelli, 411 U.S. 778, 782, n.4 (1973); Graham v. Richardson, 403 U.S. 365, 374 (1971); Hewitt v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).

[24] Goldberg v. Kelly, 397 U.S. 254 (1970).

[25] 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

[26] *See, e.g.*, Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part, modified in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

[27] 387 U.S. 1 (1967).

[28] *Id.* at 18.

[29] 430 F.2d 100 (7th Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

[30] *Id.* at 104. *See* Burns v. United States, 287 U.S. 216 (1932); Weihofen, *Revoking Parole, Probation or Pardon Without a Hearing*, 32 J. CRIM. L. & C. 531, 533 (1942).

investigate the extent to which the erosion of those theories has caused an expansion of due process protections to probationers and parolees in revocation proceedings. A review of statutory procedures required in the federal system and of constitutional protections mandated by the Supreme Court will indicate how far government has advanced in providing procedural safeguards for a person on the verge of forfeiting his conditioned liberty.

III. *Morrissey and Gagnon*

In *Morrissey v. Brewer*[31] and *Gagnon v. Scarpelli*,[32] the Supreme Court announced the due process protections which an individual must be granted in a revocation proceeding. The due process requirements set forth by the Court serves to flesh out the federal statutes relating to parole and probation and to specify the minimal procedural protections which the states must provide to parolees and probationers in their revocation hearings. Both decisions employ a balancing of interests test to determine the procedural protections to be provided an individual without imposing an unacceptable burden on the governmental body granting the hearing.[33]

The issue in *Morrissey* was whether the due process clause as applied to the states by the fourteenth amendment "... requires that a State afford an individual some opportunity to be heard prior to revoking his parole." [34] After discussing the role of parole in the criminal justice system and rejecting the theory that constitutional rights turn on whether the government benefit provided to a citizen is either a right or a privilege,[35] the Court determined that parole revocation was not a part of a criminal prosecution and, thus, a state need not provide the full panoply of rights due a criminal defendant.[36]

However, Chief Justice Burger, writing for the Court, stated that the termination of a parolee's conditioned liberty does result in a "grievous loss" and falls under the protection of the due process clause. The revocation process must be orderly even though it might be considered informal when compared to a criminal prosecution.[37] The Court perceived two critical stages in the revocation process which required the imposition of some procedural guarantees.

Chief Justice Burger viewed the arrest and preliminary hearing as the first critical stage of revocation procedure, since there might be a significant time lapse between arrest and a final revocation decision. In addition, the parolee may be arrested at a place distant from a state institution.[38] For these reasons, the Court found that due process required that an inquiry be conducted as soon after arrest as was possible while evidence and sources were readily available. The hearing would determine whether there was probable cause to believe that the parolee had violated parole conditions. Since the failure of a parolee may involve a failure on the part of the parole officer to insure compliance with parole restrictions, due process required that an officer not personally involved with the parolee make the probable cause determination.[39]

The Court decided that certain procedural protections should be provided the parolee at the preliminary hearing stage. The parolee must receive notice that a hearing will be held to determine whether there is probable cause to believe he has committed a parole violation. The notice must allege acts which constitute parole violations. At the hearing, the parolee must have the opportunity to appear and to speak in his defense; "... he may bring letters, documents, or individuals who can give relevant information to the hearing officer." [40] The parolee may also request that persons who have provided information which supports the revocation action be questioned in his presence.[41] The hearing officer

[31] 408 U.S. 471 (1972). *See* Cohen, *A Comment on Morrissey v. Brewer*, 8 CRIM. L. BULL. 616 (1972); Note, *Morrissey v. Brewer*, 22 CATH. U.L. REV. 715 (1973); Note, *Parolee's Right Under the Due Process Clause of the Fourteenth Amendment to an Opportunity to Be Heard Prior to Revoking His Parole*, 11 DUQUESNE L. REV. 693 (1973); Note, *An Endorsement of Due Process Reform in Parole Revocation: Morrissey v. Brewer*, 6 LOY. L. REV. 157 (1973).

[32] 411 U.S. 778 (1973).

[33] Gagnon v. Scarpelli, 411 U.S. 778, 787–90 (1973); Morrissey v. Brewer, 408 U.S. 471, 481–82 (1972).

[34] Petitioner Morrissey served one year on a charge of drawing false checks and was paroled. Seven months after parole, authorities arrested and jailed petitioner for parole violation. The Iowa Parole Board revoked petitioner's parole on the basis of the parole officer's written report. Petitioner asserted that he received no hearing prior to the revocation of his parole. Morrissey v. Brewer, 408 U.S. 471, 472–73 (1972).

[35] *Id.* at 477–81.

[36] *Id.* at 480.

[37] *Id.* at 482.

[38] *Id.* at 485.

[39] The person who determines whether there exists probable cause that a parole violation has been committed need not be a judicial officer. *Id.* at 486.

[40] *Id.* at 487.

[41] *Id.* The hearing officer need not subject a witness to confrontation if the witness would be endangered by having his identity exposed.

has the duty to make a summary of the documents and responses which emerged at the preliminary hearing. Based on the summary, the officer should determine whether there is probable cause to send the parolee before the Board for a final revocation decision. Although the finding need not be formal, the officer must "... state the reasons for his determination and indicate the evidence he relied on ...." [42]

The Court required many of the same procedural protections at the revocation hearing, the second stage of the revocation process, if the parolee desires that a hearing be held. The revocation hearing, during which contested facts are considered, results in a revocation determination. The parolee must be provided an opportunity to demonstrate, if he can, that he did not violate parole conditions; or, if he did violate his parole, that mitigating circumstances exist which suggest that the violation does not warrant revocation.[43]

Noting that each state must design its own code of procedure, the Court set forth the minimum requirements of due process that must be afforded to the parolee:

> (a) a written notice of the claimed violations of parole; (b) disclosure to the parolee of the 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, the members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole.[44]

In setting forth procedural requirements for the revocation process, the Court cautioned that it had no intention of equating the proceeding with a criminal prosecution. The Court viewed the revocation process as "... a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial." [45]

In *Gagnon v. Scarpelli*,[46] the Supreme Court decided an issue which it declined to consider in *Morrissey*, the right of a probationer or parolee to appointed counsel at a revocation proceeding. Justice Powell, the author of the Court's opinion, recognized that the purpose of probation and parole is to rehabilitate offenders and to return them to society as soon as possible. In reviewing the functions of the parole officer, the Court found that the officer's role required that he both supervise the offender's rehabilitation and recommend revocation of probation when, in his broad discretion, such a course of action seemed necessary. Of necessity, a probation officer who recommends revocation compromises his role as counselor to the probationer.

When the officer's and probationer's views concerning the alleged violation differ, due process requires a resolution of the divergent views before there can be an informed revocation decision.[47] Both the parolee or probationer and the state have interests in an accurate determination of whether a parole or probation violation has occurred. The individual does not wish to lose his freedom without careful consideration of his conduct and the state does not wish to endanger the safety of the community by allowing an individual, who violates legitimate correctional restrictions, to remain free. Justice Powell noted that the procedural protections announced in *Morrissey* serve as substantial protection against erroneous revocation determinations.

The Court believed, however, that "... the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess." [48] Although the revocation proceedings lack formality, the probationer or parolee

[42] *Id.*, quoting Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
[43] 408 U.S. at 488.
[44] *Id.* at 488–89.
[45] *Id.* at 489.
[46] 411 U.S. 778 (1973). In *Gagnon*, petitioner received a suspended sentence on a charge of armed robbery. Petitioner's probation was revoked without a hearing after petitioner was convicted of burglary. Petitioner contended on appeal that he gave the confession on which his second conviction was based under duress and that the denial of both a probation revocation hearing and the right to counsel at that hearing constituted violations of due process. *Id.* at 779–80.
The Court held that *Morrissey v. Brewer*, 408 U.S. 471 (1972), required that petitioner be provided a preliminary and final revocation hearing with the procedural protections announced in that case. 411 U.S. at 782. In discussing the right to counsel issue, the Court pointed out that petitioner did not attempt to retain counsel and, therefore, the Court in *Morrissey* refused to decide the issue of whether an individual had the right to retained counsel at a revocation proceeding. *Id.* at 783 n.6.
[47] 411 U.S. at 785.
[48] *Id.* at 786.

might experience difficulty in presenting his version of the facts in situations which require the examination or cross-examination of witnesses or the presentation of complex documentary evidence. However, the Court found that, while situations would arise in which the need for the expertise of counsel would exist, there was no constitutional requirement that counsel be provided in all revocation proceedings.[49]

The Court noted that the introduction of counsel into revocation proceedings would substantially alter the nature of the proceeding. The body making the revocation determination would surrender its traditional role as a fact finder and assume the role of a judge at trial less concerned with the offender's rehabilitative needs. As a result of the adversary nature of the proceedings, "... the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate (rather) than to continue nonpunitive rehabilitation." [50]

In light of the narrow range of situations in which an individual would require the assistance of counsel, necessitating changes in the particulars of the revocation hearing, the Court held that due process did not require that informal revocation procedures be abandoned entirely. Instead, the Court adopted a case by case approach similar to the method announced in *Betts v. Brady*[51] for determining when the right to the assistance of counsel would attach in a revocation proceeding. The Court left to the governmental body responsible for administering parole and probation revocation the burden of determining on a case by case basis the circumstances which required the appointment of counsel.[52] The Court's analysis concluded that it would not be possible to formulate a precise set of guidelines to determine when due process would require the appointment of counsel.

The Court, while refusing to announce constitutional standards which would govern the appointment of counsel, did suggest that, in certain fact situations, a state must carefully consider the appointment of counsel. Such circumstances include (1) when the parolee or probationer claims that he has not committed the alleged violation of the conditions upon which he is at liberty or (2), if the violation is a matter of public record, when there are compelling reasons which justified or mitigated the violation and when the reasons mitigating against revocation are complex and difficult to present. The Court stressed that the individual's ability to speak effectively for himself should be weighed by the state agency.[53] Finally, the Court required that the reasons supporting a refusal to appoint counsel be set forth in the record whenever a request for counsel is denied.[54]

In rejecting the circuit court determination that the Constitution required the states to provide counsel for indigents in all revocation proceedings, the Court determined that such a rule "... would impose direct costs and serious collateral disadvantages without regard to the need or likelihood in a particular case for a constructive contribution by counsel." [55] If counsel were appointed in all cases, the state would, of necessity, be represented by counsel. Furthermore, the Court determined that since criminal prosecutions differ from revocation proceedings, the sixth amendment, as interpreted in *Gideon v. Wainwright*[56] and *Argersinger v. Hamlin*[57] does not require the application

[49] The Court noted that, in many cases, the probationer or parolee had been convicted or had admitted committing a crime at the time of the revocation hearing. In such instances, the Court determined that there was no need to appoint counsel to present evidence in mitigation on behalf of the offender. *Id.* at 787. *See generally*, Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 192–93 (1964).

For other Supreme Court decisions denying the right to counsel, *see* Kirby v. Illinois, 406 U.S. 682 (1972); Schmerber v. California, 384 U.S. 757 (1966).

[50] Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).

[51] 316 U.S. 455 (1942). The Court in *Gagnon* asserted that there are "critical" differences between criminal trials and revocation proceedings. The Court found that the right to counsel at revocation hearings arose not from the nature of the proceeding but rather from the peculiar circumstances of a case. 411 U. S. at 788–89.

[52] 411 U.S. at 789. 18 U.S.C. § 3006A(c) (1971) provides for the appointment of counsel for indigent defendants in federal criminal cases: "A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before a United States magistrate through appeal." It is now mandatory that the assistance of counsel be offered a probationer in federal probation revocation proceedings. 18 U.S.C. § 3006A(b) (1971). Title 18 of the United States Code is silent as to whether a parolee is entitled to appointed counsel at a federal parole revocation proceeding. 18 U.S.C. §§ 4201-10 (1971).

[53] 411 U.S. at 789.

[54] *Id.* at 791.

[55] *Id.* at 787.

[56] 372 U.S. 335 (1963).

[57] 407 U.S. 25 (1972). In *Argersinger*, the Court extended the right to appointment of counsel to any situation wherein the defendant could be imprisoned as a result of a conviction. *See also* Comment, *Argersinger v. Hamlin: For Better or For Worse?*, 64 J. CRIM. L. & C. 290 (1973).

of a per se rule regarding the appointment of counsel in revocation proceedings.

The Supreme Court's analysis and decision in *Gagnon* is contrary to that of the Court of Appeals for the Second Circuit in *United States ex rel. Bey v. Connecticut State Board of Parole.*[58] The court in *Bey* held that it was a violation of due process for Connecticut to revoke the petitioner's parole without affording him the right to counsel. An analysis of the reasoning by the court in *Bey* may serve to challenge the rationale relied upon by the Supreme Court in *Gagnon*. In deciding the right to counsel issue, the court considered three factors: (1) petitioner's stake in the parole revocation proceeding; (2) the importance to the fairness of the proceeding of the right to counsel; and (3) the anticipatable effect on state institutions of recognizing the right to counsel.[59]

The court, in discussing the first factor, determined that petitioner's interest in the proceeding was the loss of his conditioned freedom. Comparing Bey's plight to that of petitioner in *Mempa v. Rhay*,[60] the court found that both petitioners risked the loss of "... a status that is considerably more desirable than that of a prisoner. When revocation is threatened, they all have the same interest in maintaining that status." [61] The court also stated that a parole revocation will mar the parolee's employment opportunities and standing in the community upon his ultimate release from imprisonment. The court's conclusion was that substantial rights were involved in the revocation proceeding, rights which required the assistance of counsel.

The second factor investigated by the *Bey* court concerned the lawyer's role in a parole revocation proceeding. The court recognized that a revocation proceeding will often involve the application of knowledge from experience in several disciplines such as psychology, sociology and penology. In this phase of the revocation hearing, the court found no need for a lawyer's special skills.[62] However, the hearing board must determine that events between the prisoner's release and the hearing justify the forfeiture of the prisoner's conditioned liberty. Whether Bey would lose his liberty depended upon a narrow interpretation of a specific factual situation. The court determined that the lawyer's training qualified him "... to analyze and organize for the benefit of an impartial tribunal evidentiary matter bearing on the occurence of nonoccurence as well as the significance of past events." [63] The lawyer may be able to point to mitigating circumstances and facts not revealed in the parole officer's report. At the very least, a lawyer could emphasize facts favorable to his client or suggest disciplinary

[58] 443 F.2d 1079 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971). Other cases preceding *Gagnon* which discussed the right to counsel in revocation proceedings include United States *ex rel.* Martinez v. Aldredge, 468 F.2d 684 (3d Cir. 1972) (denying right to counsel); Flint v. Hocker, 462 F.2d 590 (9th Cir. 1972) (requiring counsel at probation revocation proceeding deemed an "integral" part of the sentencing process); Dennis v. California Adult Authority, 456 F.2d 1240 (9th Cir. 1972) (erecting case by case approach to right to counsel); Barber v. Nelson, 451 F.2d 1017 (9th Cir. 1971) (requiring counsel at proceeding wherein probation is revoked and an original sentence is imposed); Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971) (denying right to counsel); Serviss v. Mosely, 430 F.2d 1287 (10th Cir. 1971) (right to counsel when violation is contested); Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970) (denying right to counsel); Alverez v. Turner, 422 F.2d 214 (10th Cir. 1970) (requiring right to counsel); Rose v. Haskins, 388 F.2d 91, *cert. denied*, 392 U.S. 946 (1968) (denying right to counsel); Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967) (denying parolee the rights to counsel, summon witnesses and cross-examine adverse witnesses); Brown v. Warden, 351 F.2d 564, *cert. denied*, 382 U.S. 1028 (1965) (denying right to counsel); Gaskins v. Kennedy, 350 F.2d 311 (4th Cir. 1965) (denying right to counsel); Welsh v. United States, 348 F.2d 885 (6th Cir. 1965) (denying right to counsel).

[59] 443 F.2d at 1086.

[60] 389 U.S. 128 (1967). In *Mempa*, the Court held that an indigent probationer must be represented by appointed counsel at a combined revocation and sentencing hearing. The Court reasoned that counsel must be provided "... at every stage of a criminal proceeding where substantial rights of the accused may be affected ...." *Id.* at 134. The Court determined that sentencing was such a stage even when accomplished at a probation revocation proceeding.

[61] United States *ex rel.* Bey v. Connecticut State Board of Parole, 443 F.2d 1079, 1087 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971), quoting Rose v. Haskins, 388 F.2d 91, 103 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968) (Celebrezze, J., dissenting).

[62] 443 F.2d at 1087.

[63] *Id. See* Specht v. Patterson, 386 U.S. 605 (1967), where the Court suggested that a formal hearing with counsel is required in any proceeding affecting the present or future liberty of any of its citizens.

A hearing on revocation becomes an adversary proceeding once the parolee disputes the charges against him. As the court stated in *Menechino v. Warden*, 27 N.Y.2d 376, 380, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 453–54 (1970):

> Can there be, in such a case, any reasonable doubt as to the value of counsel in developing and probing factual and legal situations which may determine on which side of the prison walls appellant will be residing?

Even in a non-adversary situation, there remains a need for counsel to articulate the parolee's worthiness for parole. Bearden v. South Carolina, 443 F.2d 1090, 1094 (4th Cir. 1971); Martin v. United States, 182 F.2d 225, 227 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950).

procedures short of outright parole revocation. However, the court cautioned that trial tactics permitted in an adversary proceeding should not be used. The role of counsel is to facilitate, not impede, the flow of information to the Board. The court concluded that the "... [B]oard may take appropriate measures to assure that the counsel appreciates his limited role and presents his client's case accordingly." [64]

The final factor which the court considered in *Bey* was the impact of granting the right to counsel upon the state's parole system. The court found that the state had failed to demonstrate that providing counsel to develop and evaluate relevant events bearing on a revocation decision would inhibit the parole process.[65] The court believed that the presence of counsel would aid the flow of pertinent information and would guard against distortion and error. Further, there would be no effect upon the relationship between the parolee and the parole officer since the right to counsel would not arise until revocation of the parole became an imminent possibility.[66] The court dismissed the contention that the presence of counsel would result in fewer paroles. Such a suggestion improperly assumed that Parole Board members would "... react vindictively to spite the legal process ...." and deny paroles to those who would normally receive them.[67] In summary, the reasoning in *Bey* indicates that an individual's possible loss of liberty outweighs the burden on the state to provide counsel for indigents at revocation hearings.

While the Court in *Gagnon* did provide for the right to counsel when circumstances so required, the *Betts v. Brady* approach[68] to the right to counsel must be considered subject to criticism. Over the twenty-one year period during which *Betts* stood, the Supreme Court was required to review numerous fact situations to determine whether due process required the appointment of counsel. In *Townsend v. Burke*,[69] the Court held that counsel must be provided at a sentencing after a plea of guilty when false assumptions were made concerning petitioner's criminal record. In that case, the Court felt that counsel could make certain that conviction or sentence was not based on erroneous information.

In 1957, the Court in *Moore v. Michigan*[70] required that counsel be appointed at a hearing following the entry of a guilty plea when the defendant had not "... intelligently and understandingly" waived counsel before pleading guilty. Next, the Court in *Hamilton v. Alabama*[71] mandated that counsel be appointed at an arraignment although the defendant entered a plea of not guilty. Due process required the appointment of counsel in the Alabama proceeding since certain defenses had to be raised or abandoned at that stage of the prosecution. Finally, the Court overruled the special circumstances test of *Betts* in *Gideon v. Wainwright*[72] wherein the Court held that the sixth amendment as applied to the states through the fourteenth amendment necessitated an absolute right to appointment of counsel in felony cases. In light of the treatment given *Betts* by the Court, it is understandable that the Court of Appeals for the Fourth Circuit in *Hewitt v.*

[64] 443 F.2d at 1089. The ninth circuit in *Williams v. Dunbar*, 377 F.2d 505, 506 (9th Cir. 1967), found that allowing counsel to appear at a parole revocation hearing might impede the parole process. However, Michigan allows retained counsel and many due process protections at parole revocation hearings and retains a very high parole rate. MICH. STAT. ANN. § 28.2310(1) (1972); Warren v. Michigan Parole Board, 23 Mich. App. 754, 179 N.W.2d 664 (1970). *See generally*, Sklar, supra note 49.

[65] A court has suggested that requiring the appointment of counsel in revocation proceedings would overcome the resources of the bar. *In re* Tucker, 5 Cal. 3d 171, 182, 486 P.2d 657, 663, 95 Cal. Rptr. 761, 767 (1971). However, Mr. Justice Brennan's concurrence in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), suggested that an increased demand for lawyers could be satisfied. He indicated that increased enrollment in law schools together with supervised student participation in criminal matters could "... be expected to make a significant contribution, quantitatively and qualitatively, to representation of the poor in many areas ...." *Id.* at 41 (Brennan, J., concurring).

[66] 443 F.2d at 1088.

[67] *See* Rose v. Haskins, 388 F.2d 91, 102 n. 15 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968) (Celebrezze, J., dissenting); Sklar, *supra* note 49 at 175 n.157.

[68] 316 U.S. 455 (1942). In *Betts*, the Court held that the due process clause did not require appointment of counsel for indigents in criminal cases. The Court adopted the following test:

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial.

Id. at 462. *See* J. Israel, *Gideon v. Wainwright: The "Art" of Overruling* in THE SUPREME COURT REVIEW, 1963 (P. Kurland ed. 1963); Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962).

[69] 334 U.S. 736 (1948).

[70] 355 U.S. 155 (1957).

[71] 368 U.S. 52 (1961).

[72] 372 U.S. 335 (1963).

North Carolina[73] rejected the *Betts* approach in requiring that counsel be appointed for indigents in all probation revocation proceedings,

> . . . if we were to adopt a case by case approach, articulation of where the line should be drawn between those who should have been supplied with counsel and those who may be denied counsel, would be most difficult if not impossible. Even the most superficially frivolous proceeding may reveal to competent counsel procedural or substantive irregularities which require correction in order to safeguard the interests of a probationer.[74]

The Supreme Court encountered difficulty in applying the *Betts* approach to criminal cases in which the accused's liberty was at stake. Whether the Court will be able to sustain a case by case approach in cases in which the conditioned liberty of a probationer or parolee is at issue remains open to question. It can be argued that due process demands that counsel be provided at revocation hearings since ". . . society has further interest in treating the parolee (or probationer) with basic fairness: a fair treatment in parole revocations will enhance the chanc of rehabilitation by avoiding reactions to arbitrariness." [75]

The Supreme Court rejects the view that a revocation hearing is a step in the criminal process which requires furnishing the defendant with full procedural protections. As a result, the probationer or parolee will not receive the full benefit of the fourth amendment protection against unreasonable searches and seizures.[76] Although the law surrounding the application of the exclusionary rule[77] to parole and probation revocation proceedings is not completely settled, the general view is expressed in *United States ex rel. Sperling v. Fitzpatrick*.[78] In *Sperling*, the petitioner contested the use of illegally seized evidence to prove a parole violation. The court held that the exclusionary rule was not applicable in parole revocation hearings. The court grounded its decision on the fact that the Parole Board has wide discretion, consistent with due process, to use reliable evidence in making its revocation determination. The appellant did not dispute that the illegally seized evidence constituted proof of a parole violation.[79]

In *United States ex rel. Lombardino v. Heyd*,[80] the court upheld the probation revocation even though the evidence on which the revocation was based was illegally seized, requiring dismissal of the criminal charge. Conceding that probationers are entitled to basic constitutional rights, the court perceived the issue to be the extent of those rights. The court refused to equate an accused's rights in a criminal prosecution and an individual's rights in a revocation proceeding.

At present, the degree of proof necessary for probation revocation is less than that required for a criminal conviction in which proof of guilt must exist beyond a reasonable doubt.[81] Typically,

[73] 415 F.2d 1316 (4th Cir. 1969).

[74] *Id.* at 1325. The logic supporting the view expressed in *Hewitt* remains despite the Supreme Court's opinion in *Gagnon*. The fourth circuit adopted a case by case approach to the appointment of counsel at parole revocation hearings in *Bearden v. South Carolina*, 433 F.2d 1091 (4th Cir. 1971).

[75] Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

[76] In *Morrissey*, the Court indicated that, while the due process clause required a two stage revocation proceeding, it did not mandate the imposition of rigid rules concerning the admissibility of evidence. The revocation process should be flexible enough to admit evidence which would ordinarily be excluded from a criminal proceeding. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

Williams v. New York, 337 U.S. 241 (1949), provides further support for the view that flexibility will govern proceedings outside the criminal process. In *Williams*, the Court affirmed the sentence of a trial judge who overruled a jury recommendation of life imprisonment and imposed a death sentence after considering presentencing information. In sanctioning this exercise of judicial discretion in the consideration of presentence information, the Court held that due process did not require the application of strict rules of evidence in sentencing proceedings.

See generally White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167 (1969); Note, *Extending Search and Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129 (1969).

[77] The exclusionary concept as applied in criminal proceedings is set forth in Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914).

[78] 426 F.2d 1161 (2d Cir. 1970).

[79] The concurring opinions of Judges Lumbard and Kaufman, *id.* at 1164, 1166, indicated that the goals of the parole system could be best achieved without a strict application of the exclusionary rule.

The First Circuit Court of Appeals adopted the *Sperling* rule in *Baxter v. Davis*, 450 F.2d 459 (1st Cir. 1971). In *Baxter*, two grand jury indictments were returned against the parolee, but the county district attorney declined to prosecute. The court held that the Parole Board could consider the findings of probable cause and the return of indictments against the parolee in a revocation proceeding.

However, in *Cottle v. Wainwright*, 338 F. Supp. 819 (M.D. Fla. 1972), the district court excluded from evidence in a parole revocation hearing, two North Carolina convictions on the ground that the indigent parolee was not represented by counsel at the trials.

[80] 318 F. Supp. 648 (E.D. La. 1970), *aff'd*, 438 F.2d 1027 (5th Cir. 1971). *See also* United States v. Hill, 447 F.2d 817 (7th Cir. 1971).

[81] United States v. D'Amato, 429 F.2d 1284, 1286 (3d Cir. 1970); United States v. Nagelberg, 413 F.2d 708, 709 (2d Cir. 1969).

a district judge in the federal system "... need only be reasonably satisfied that terms of probation have been violated and the sole question on review is whether he abused his discretion in revoking probation." [82] The rationale for a lesser standard of proof is the same as in other areas where full due process protections are denied to a parolee or probationer—"... a revocation proceeding is not a trial of a criminal case." [83] In probation revocation proceedings, the Parole Board wields broad discretion in revoking a conditional release.[84] Although a Parole Board must comply with procedural rights established by statute and by *Morrissey*, a review court will not intervene unless a board has clearly abused its discretion in revoking a parole or mandatory release.[85] Indeed, judicial decisions seem to indicate that the Parole Board's judgment is virtually unreviewable.[86]

IV. *Present Revocation Procedures in the Federal System*

Although probation and parole are vital facets of the criminal justice system, to this time Congress has determined not to legislatively prescribe specific parole and probation revocation procedures. Congress, as part of its general program of regulating prisoners in the federal system and of preparing them for re-entry into society, established the United States Board of Parole and provided it with the authority to develop procedures relating to parole revocation.[87] Since the enabling legislation requires only that an arrested parolee be given the opportunity to appear before "the Board, a member thereof, or an examiner designated by the Board," [88] parole revocation is basically an administrative procedure.

The Board of Parole has the sole authority to issue a warrant for the retaking of a parolee.[89] The warrant issues when a member of the Board believes that the facts alleged in the complaint,[90] if proved, demonstrate "satisfactory evidence" of a parole violation.[91]

After the arrest, the Probation Officers Manual[92] sets forth the procedures to be followed.

> The probation officer, acting not as a judicial officer, but as an agent of the Justice Department, interviews the parolee. The parolee receives two forms to be completed and signed. C.J.A. Form 22 requests him to list those charges contained in the Parole Board warrant that he wishes to contest, those he declines to contest, and any convictions received since the Board granted mandatory release or parole to him. This form also advises him that he may apply to the United States District Court for the appointment of an attorney to represent him at his revocation hearing. "If the United States magistrate or the court determine that the interests of justice so require" and if he is found to be indigent, the request for appointment of counsel will be granted.[93]

The alleged violater is then asked to complete the Preliminary Interview and Revocation Hearing Form[94] which offers him one of three choices: postponement of the preliminary interview, a local revocation hearing, or a hearing at a federal institution if he is not released after the initial interview.

The preliminary interview will be postponed by the hearing officer if the alleged violator requests additional time to secure the presence of an attorney and/or witnesses at the interview. The preliminary interview will also be delayed if the

[82] Amaya v. Beto, 424 F.2d 363, 364 (5th Cir. 1970).

[83] Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

[84] Parole revocation hearings are informal and flexible proceedings. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). *See also*, concerning a parole board's discretion to revoke parole, Earnest v. Mosely, 426 F.2d 466, 468 (10th Cir. 1970); Hyser v. Reed, 318 F.2d 225, 234 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

[85] Earnest v. Mosely, 426 F.2d 466, 468 (10th Cir. 1970); Clark v. Stevens, 291 F.2d 388 (6th Cir. 1961); Freedman v. Looney, 210 F.2d 56 (10th Cir. 1954).

[86] Shelton v. United States Board of Parole, 388 F.2d 567, 576 (D.C. Cir. 1967); Hyser v. Reed, 318 F.2d 225, 240 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

[87] 18 U.S.C. §§ 4201–10 (1971). *See generally* Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705 (1968).

[88] 18 U.S.C. § 4207 (1971).

[89] 18 U.S.C. § 4205 (1971).

[90] Private citizens, the parolee's family members and police are sources of information concerning parole violations. Hyser v. Reed, 318 F.2d 225, 240, *cert. denied*, 375 U.S. 957 (1963). The parole officer will bring to the attention of the Board information concerning a parolee's failure to conform to technical conditions imposed by the Board. *Parole Revocation in the Federal System*, *supra* note 87, at 709.

[91] 28 C.F.R. § 2.35 (1967). UNITED STATES BOARD OF PAROLE, RULES at 22 (1965). The issuance of an arrest warrant based on a criminal charge is sufficient evidence to support the issuance of a parole warrant. Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

[92] UNITED STATES PROBATION OFFICERS MANUAL, Probation Division, Administrative Office of the United States Courts, §§ 8.41–46 (1973).

[93] C.J.A. FORM 22 (February, 1971); Statement of Parolee on Mandatory Release Concerning Appointment of Counsel Under Criminal Justice Act. The alleged offender may retain his own counsel to represent him at the preliminary interview and any subsequent revocation hearing.

[94] PRELIMINARY INTERVIEW AND REVOCATION HEARING FORM (Parole Form F-2, Rev. June, 1973).

parole officer requests the appearance of adverse witnesses to be cross-examined by the parolee, provided that he has not been convicted of a new criminal charge and that he denies all charges of parole violation.[95] The adverse witness should be produced upon a determination by the hearing officer that the witness would face no risk of harm if his identity were disclosed.[96] During the preliminary interview, the accused may present documents and voluntary witnesses on his behalf, and cross-examine adverse witnesses.[97] At the conclusion of the preliminary hearing, the hearing officer must decide whether or not there is probable cause that the alleged offender violated his parole conditions. A finding of probable cause will necessitate a revocation hearing.

The revocation hearing will be conducted locally upon completion of the initial interview if the parolee has denied violation of his conditioned liberty agreement and if he has not been convicted of a new violation while under supervision. The Board then may conduct a revocation hearing in the community where the alleged violation took place, if the accused requests the services of an attorney or the attendance of adverse witnesses.[98] In addition, the Preliminary Interview and Revocation Hearing Form provides, "Where appropriate, a local revocation hearing may take the place of a preliminary interview." [99] The meaning of this sentence is unclear. Will the preliminary hearing to determine probable cause be consolidated with the revocation hearing to determine a de facto violation? Or will the preliminary hearing be eliminated in some circumstances?

The accused will be returned to a federal institution for his revocation hearing, if, after the preliminary interview, the Parole Board has not ordered release and the alleged violator admits or does not deny that he is guilty of violating the conditions of release, or if he has been convicted of violating a law since his release. Even though he denies guilt and has no new convictions, the accused will be returned to a federal institution, if he requests that his revocation hearing be held there, and if he desires to waive his right to cross-examine adverse witnesses.[100]

If the prisoner refuses to sign the Revocation Election Hearing Form, he has not waived the right to a hearing with an attorney or the right to present witnesses. The probation officer simply notes on the form that the parolee "was advised of his rights but refused to sign the form." [101] The parole officer then prepares a summary of the preliminary interview, informs the prisoner of the alleged violations and records the parolee's comments. This summary is sent to the Parole Board.

The final step of the revocation process is a hearing before the Parole Board,[102] which decides whether the parole should be revoked or modified. The revocation hearing is normally non-adversarial in nature. The decision to revoke or to modify must be based on "sufficient evidence" and on the Board's belief that revocation relates to whether the parolee is a good risk to remain in the community.[103] The procedural safeguards established by the *Morrissey*[104] and *Gagnon*[105] decisions must be complied with throughout the preliminary interview and revocation hearing proceedings. Any determination resulting from a parole revocation hearing may be appealed to a regional and a national parole board.[106]

Probation revocation procedures in the federal criminal justice system derive from separate statutory authority.[107] A probation officer may arrest a probationer for cause without a warrant or a court of proper jurisdiction may issue a warrant for arrest for alleged violation of probation.[108] Then, enforcement authorities are ordered

[95] *Id.*

[96] Morrissey v. Brewer, 408 U.S. 471, 487 (1972).

[97] PRELIMINARY INTERVIEW AND REVOCATION HEARING FORM (Parole Form F-2, Rev. June, 1973).

[98] *Id.*

[99] *Id.*

[100] UNITED STATES PROBATION OFFICERS MANUAL, Probation Division, Administrative Office of the United States Courts, § 8.46 (1973). In a situation in which the parolee admits the alleged violations, and does not request that witnesses appear on his behalf at the preliminary interview, but does request that witnesses be interviewed who might present mitigating information to the Parole Board, the probation officer should make a "reasonable effort" to obtain this information by personal interview or by mail and to present it to the Board. *Id.*

[101] *Id.*

[102] 18 U.S.C. § 4207 (1971).

[103] Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); Moore v. Reid, 246 F.2d 654 (D.C. Cir. 1957).

[104] 408 U.S. 471 (1972).

[105] 411 U.S. 778 (1973).

[106] As of October 1, 1973, a parolee in Parole Board Region 1 may appeal a parole board revocation determination to the Regional Director and then to the National Appellate Board. Region 1 is comprised of the following states: Maine, New Hampshire, Massachusetts, Vermont, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia. 28 C.F.R. 184, §§ 2.20, 2.21, 2.23, 2.43 (1973).

[107] 18 U.S.C. § 3653 (1971).

[108] *Id.*

to bring the probationer "as speedily as possible" before the court of the district having jurisdiction over him. The court then decides whether to revoke the probation and to require the probationer to serve the sentence which was imposed at trial, or a lesser sentence, or, if imposition of sentence was suspended, to impose any sentence which could have been originally imposed.[109]

The Administrative Office of the United States Courts has revised the rather informal probation revocation procedures to incorporate the requirements of *Morrissey* and *Gagnon*.[110] The preliminary hearing must be held before a federal judge or magistrate. The following procedural rights are incorporated at this stage: 1) notice of the alleged violations of probation including a statement of the allegations relied on for revocation; 2) the opportunity to appear personally; 3) the opportunity to present witnesses in his own behalf; 4) the right to confront and cross-examine adverse witnesses unless the hearing officer determines that disclosure of a witness' identity would subject him to risk of harm; 5) a written report of the hearing including a determination as to whether there is probable cause to hold the probationer for the final revocation hearing; 6) the appointment of counsel at the preliminary hearing to represent the probationer at the final revocation hearing; and 7) the right to bail at the discretion of the judicial officer pursuant to Rule 32(f) of the Federal Rules of Criminal Procedure.[111]

Two additional rights are provided the accused at the final revocation hearing: disclosure of the evidence against him and a written statement by the fact finders as to the evidence relied on and the reasons for revoking probation, should it be revoked.[112]

V. *Proposed Reforms of Revocation Procedures*

In recent years, the unfairness which exists in present probation and parole procedures has become evident to certain commentators and legislators. President Johnson's Commission on Law Enforcement and Administration of Justice noted that:

> [T]he correctional strategy that presently seems to hold the greatest promise, based on social science theory and limited research, is that of reintegrating the offender into the community. A key element in this strategy is to deal with problems in their social context, which means in the interaction of the offender and the community. It also means avoiding as much as possible the isolating and labeling effects of commitment to an institution. There is little doubt that the goals of reintegration are futhered much more readily by working with an offender in the community rather than by incarcerating him.[113]

The American Bar Association Advisory Committee on Sentencing and Review supports the above conception of corrections. As Draft of Standards Relating to Probation[114] recommends sweeping changes in the probation system. The Advisory Committee offers a new definition of probation: "... any sentence which does not involve confinement and which is conditional in the sense that the defendant remains subject for a period of time to the control of the court." [115] The new definition eliminates the differences in terminology relating to the imposition of a sentence and suspension of its execution versus the suspension of the imposition of sentence. The ABA report views probation not as a substitute for a sentence but rather as a sentence in itself.[116]

Probation is a sentence, to the ABA Committee, designed to achieve a specific end—the orderly reintegration of an individual into society by imposing restrictions on his activities. That the probationer may be subjected to imprisonment upon a violation of his probation does not necessitate a definition of "probation" which includes such a possibility. Adverse consequences may result from a broad definition of probation. If a jurisdiction requires that a sentence be imposed and then suspended before probation may be granted, the imposed term may limit sentencing discretion upon a subsequent probation violation. The Advisory Committee believed that a manda-

[109] *Id.*

[110] *See* "Memorandum to All Chief Probation Officers and Officers in Charge of Units," August 27, 1973, issued by the Administrative Office of the United States Courts.

[111] FED. R. CRIM. P 32(f), provides:
The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

[112] *See* "Memorandum," *supra* note 110.

[113] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 28 (1967).

[114] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION (1970) [hereinafter referred to as ABA PROBATION].

[115] ABA PROBATION 9.

[116] *Id.* at 25.

tory sentence upon probation revocation is undesirable and should not be a part of the probation revocation process.[117]

There is another reason for amending the definition of "probation." When an offender is sentenced to probation with a suspended period of incarceration, he is loathe to appeal his conviction, however riddled with error the record may be. In effect, the case is open-ended until the point of revocation is finally reached. There is no need to include a period of suspended imprisonment among the conditions of probation.

There are two benefits to be derived from granting probation without a suspended period of imprisonment. First, the probation need not be considered a "conviction," carrying with it the "ex-con" stigma that is a death blow for rehabilitation in many cases.[118] Second, the time of probation revocation rather than the time when probation commences is the appropriate moment for setting a prison sentence since the offender's personality may have changed in the interim.

The Advisory Committee recommend a reformation in probation assumptions to facilitate the use of probation in appropriate cases because:

> (1) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of the law; (2) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts; (3) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community; (4) it greatly reduces the financial cost to the public treasury of an effective correctional system; (5) it minimizes the impact of the conviction upon innocent dependents of the offender.[119]

Two bills,[120] introduced during the second session of the 92d Congress, propose to apply a similarly enlightened view toward the parole system. H.R. 13118 provides for the establishment of a National Parole Institute,[121] the purpose of which is to serve as a national clearing house of information and a lobbying organization. It would sponsor research in new parole techniques, recommend innovations in the parole process to all levels of government, encourage competent people to enter the parole field, and promote the employment of ex-offenders. The bill would also establish an independent Board of Parole[122] in the executive branch to coordinate national parole policy. S. 3993 provides for the creation of an Advisory Corrections Council[123] and a United States Parole Commission[124] in the Department of Justice. The Council would suggest innovations in the administration of criminal justice and the Parole Commission would perform functions similar to the aforementioned National Parole Institute.

H.R. 13118 and S. 3993 provide, in most cases, for release on parole after an offender has served one-third of a definite term or terms of over one hundred and eighty days or after serving ten to fifteen years of a life sentence or of a sentence of more than forty-five years. Release should be granted unless the Board finds that the individual's liberty is incompatible with the welfare of society or that he will not abide by the conditions of parole.[125] Both bills provide that the conditions of parole be reasonably related to the prisoner's previous conduct and present situation, that liberty be deprived only where "necessary for the protection of the public welfare," and that the conditions be "sufficiently specific to serve as a guide to supervision and conduct." [126]

The ABA Advisory Committee recommends that the conditions imposed by the court on a probationer aid him in living within the bounds of the law. "They should be reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion. They should not be so vague or ambiguous as to give no real guidance." [127] The conditions should be sufficiently specific "so that probation officers do not in fact establish them." The Advisory Committee also recommends that the probationer be allowed to petition the court for a clarification or change of conditions. This is important as the success of probation as a cor-

[117] *Id.*

[118] New legislation relating to simple possession of soft drugs is a device for avoiding the onus of a final conviction. 21 U.S.C. § 844(b)(1972).

[119] ABA PROBATION 27.

[120] H.R. 13118, 92d Cong., 2d Sess. (1972) (introduced by Representative Kastenmeier); S. 3993, 92d Cong., 2d Sess. (1972) (introduced by Senator Burdick).

[121] H.R. 13118, 92d Cong., 2d Sess. § 4232 (1972).

[122] H.R. 13118, 92d Cong., 2d Sess. § 4201 (1972).

[123] S. 3993, 92d Cong., 2d Sess. § 5002 (1972).

[124] S. 3993, 92d Cong., 2d Sess. § 4201 (1972).

[125] H.R. 13118, 92d Cong., 2d Sess. § 4205 (1972); S. 3993, 92d Cong., 2d Sess. § 4202 (1972).

[126] H.R. 13118, 92d Cong., 2d Sess. § 4211 (1972); S. 3993, 92d Cong., 2d Sess. § 4202 (1972).

[127] ABA PROBATION 44–45.

rectional procedure is closely related to the "flexibility within which it is permitted to operate." [128]

Proposals for change include modifications in present revocation procedures. The ABA Advisory Committee took exception to the federal statute which permitted a probation officer to arrest a probationer for cause, wherever found, without a warrant.[129] The Advisory Committee believed that warrants based on probable cause should be required to support a probationer's arrest unless the probation violation involved the commission of another crime or other standards for arrest without a warrant have been met. In addition, the Committee would eliminate the authority of probation officers to arrest probationers.[130]

The ABA Advisory Committee concluded that a probationer must account for any alleged violation of probation conditions. Although such violations would widen the scope of conduct which would permit an arrest, an alleged probation violation ought not support a relaxation of protections against the abuse of ordinary arrest procedures.[131] Relaxing the standards on which an arrest is based neither instills a respect for law in the probationer nor aids him in leading a law-abiding life, which is the purpose of probation. While the Advisory Committee accepted the view that a probation officer must have the power to "bring in" the probationer, the officer's dual role as law enforcer and counselor to the probationer caused the Committee to conclude that the officer ought not have the power to formally arrest his charge. The officer's authority is more properly exercised in securing issuance of the warrant; normal arresting personnel should execute the warrant.

H.R. 13118 and S. 3993 provide that a parolee be retaken upon issuance of a warrant by the Board of Parole, the current practice. A United States marshal customarily executes the warrant.[132] Both bills allow for the execution of the warrant by any officer of any federal penal or correctional institution, or any federal officer authorized to serve criminal process within the United States.[133]

The two bills provide for different parole revocation hearing procedures. H.R. 13118 provides for the reincarceration of the parolee if, after a preliminary hearing, the Board has substantial reason to believe that the offender will not appear for his subsequent revocation hearing.[134] The parolee is not reimprisoned if he has been granted bail or otherwise released by the court having jurisdiction over the offense constituting the alleged parole violation. The preliminary hearing should be held as soon as possible after the parolee has been retaken.

S. 3993 does not provide for a preliminary hearing similar to that of H.R. 13118; it states that a parolee, shall be granted a hearing before a United States magistrate as soon as possible after being retaken on a warrant.[135] Unlike the existing statute,[136] retained or appointed counsel will be provided to the parolee. In addition, the parolee may present witnesses on his behalf and cross-examine adverse witnesses. The magistrate then prepares a summary and makes a recommendation to the Parole Commission based on facts presented at the hearing. The Commission must make a recommendation concerning each alleged violation. Such determination may consist of one of the following: a dismissal of revocation proceedings; a reprimand; an alteration of parole conditions; a referral to a residential community treatment center for all or part of the remainder of the original sentence; a formal revocation of probation; or "any other action deemed necessary for successful rehabilitation of the violator, and which promotes the ends of justice." [137]

The revocation hearing under H.R. 13118 is held not before a magistrate, but before a member of the Parole Board.[138] The same rights are granted to the parolee as under S. 3993. Should the Board find that the parolee did violate a condition of his parole, it must inform him within ten days of the hearing. The Board's determination may consist essentially of the same alternatives available to the Parole Commission under S. 3993.[139] Should the parolee's alleged violation consist of being charged with a criminal offense, H.R. 13118 stipulates that no hearing shall be held, but that the Parole Board will render a determination on revocation

[128] *Id.* at 48.
[129] 18 U.S.C. § 3653 (1971).
[130] ABA PROBATION 59–60.
[131] *Id.* at 61.
[132] UNITED STATES PROBATION OFFICERS MANUAL § 8.44 (1973).
[133] H.R. 13118, 92d Cong., 2d Sess. § 4217(d)(1972); S. 3993, 92d Cong., 2d Sess. § 4206 (1972).
[134] H.R. 13118, 92d Cong., 2d Sess. § 4217(f) (1972).
[135] S. 3993, 92d Cong., 2d Sess. § 4207(a) (1972).
[136] 18 U.S.C. § 3006A (1971).
[137] S. 3993, 92d Cong., 2d Sess. § 4207 (1972).
[138] H.R. 13118, 92d Cong., 2d Sess. § 4218(d) (1972).
[139] H.R. 13118, 92d Cong., 2d Sess. § 4218(e) (1972).

after final judgment by the trial court having jurisdiction over the criminal offense.[140] Acquittal will result in dismissing the warrant, while conviction is prima facie evidence of the violation of the conditions of parole by the parolee.[141] A prisoner whose parole is revoked and who is subject to having his parole "good time" forfeited or to being assigned to reside in or participate in the program of a residential community treatment center or similar facility may, according to H.R. 13118, file an appeal within ten days after the Board's determination.[142] At least five members of the Board will consider the appeal and the parolee has the right to consult an attorney concerning his appeal. Finally, H.R. 13118 provides for judicial review of Parole Board decisions.[143]

The ABA Advisory Committee proposal concerning probation revocation procedures is similar to the proposed legislation concerning parole revocations. The Committee supports the view expressed in H.R. 13118 that a revocation determination must be postponed until disposition of the criminal charge in those situations in which a revocation proceeding depends solely on the commission of another crime.[144] The ABA proposal would permit the probation court in its discretion to detain the probationer without bail pending disposition of the criminal charge. An indictment would constitute probable cause which would support detention.[145] The Committee would find it "unseemly" for a probation court to revoke probation when the trial court acquits the probationer of the charge. However, action on the parole violation need not be deferred when the criminal charge "involves an incidental violation of the conditions of the probation."[146]

In addition to the specific protections which Supreme Court decisions provide to the parolee, the Committee included the right to representation by retained or appointed counsel, proof of a violation by a preponderance of the evidence if the facts of the violation are contested, a record of the proceedings, and the right to appeal an order revoking parole.[147] The Committee considered these procedural rights essential to "assure the integrity of the revocation proceedings as a truth-seeking inquiry."[148]

VI. *Conclusion*

The United States Constitution does not specifically provide for the application of due process of law to parole and probation revocation proceedings. These forms of conditional liberty developed in the nineteenth century from the egalitarian movement that considered rehabilitation a more effective solution to crime than retribution.

The conditioned liberty status has been offered as a privilege, an act of grace by the government, not a right to which an individual is entitled. Numerous theories have been formulated to explain the relationship between the prisoner and the state: the concepts of grace, contract, custody and parens patriae. Upon analysis these theories appear inconsistent, at odds with one another, and unrealistic in relation to the purpose of probation and parole—the orderly reintegration of the individual into society. Although the logic of each theory is different, the result upon applying each theory is the same—the insulation of the individual from the procedural protections available in criminal proceedings.

The Supreme Court in *Morrissey* and *Gagnon* has required that parolees and probationers be provided with limited due process rights in revocation proceedings. In *Morrissey*, the Court established certain procedural safeguards in the parole revocation process. In *Gagnon*, the Court applied these safeguards to probation revocation, and granted to both parolees and probationers the right to counsel in limited circumstances. The federal government has revised its established procedures accordingly.

[140] H.R. 13118, 92d Cong., 2d Sess. § 4218(f) (1972).
[141] *Id.*
[142] H.R. 13118, 92d Cong., 2d Sess. § 4219(a) (1972).
[143] H.R. 13118, 92d Cong., 2d Sess. § 4221 (1972).
[144] The ABA Advisory Committee believed that postponement was necessary:

> The relative informality of a probation revocation proceeding, as compared to the trial of an original criminal charge, underlines the danger. Relaxation of rules of admissibility of evidence, the absence of a jury, a lesser burden of proof—factors such as these can lead to an abuse of the proceeding by basing revocation upon a new criminal offense when the offense could not be proved in an ordinary criminal trial. Additional complexity is introduced by the position in which the probationer is put as regards his privilege against self-incrimination: a revocation proceeding before trial of the charge on which it is based well could compromise the assertion of this fundamental constitutional right.

ABA PROBATION 63.
[145] *Id.* at 62–63.
[146] *Id.* at 65.
[147] *Id.*
[148] *Id.* at 67.

The *Gagnon* decision, however, may well raise more questions than it answers. The Supreme Court's return to the special circumstances test of *Betts v. Brady* seems a philosophical retreat to the early development of due process of law. It also places on the Court the task of determining which circumstances warrant the right to counsel. *Betts* placed this same burden on the Court more than thirty years ago.

The Court's refusal to grant the right to counsel in all contested probation and parole revocation proceedings is based on the determination that probation and parole revocation are not part of the criminal prosecution process. However, the loss of liberty is threatened in these proceedings as much as in a criminal prosecution. The fact that the liberty is "conditioned" makes it no less a substantive right than the liberty at stake in any criminal trial. The consequence of a revocation decision is much more like the consequence of a finding of guilty in a criminal trial than the result of an ordinary administrative proceeding.

The goal of both probation and parole is the orderly reintegration of the individual into society. The recommendations of the ABA Advisory Committee on Sentencing and those embodied in H.R. 13118 and S. 3993 of the 92d Congress present standards of due process that protect the rights of the individual while allowing the state to regulate his activities. Defining probation as a sentence, thus eliminating the concept of a suspended period of imprisonment, granting the right to retained or appointed counsel, allowing the operation of the exclusionary rule, proving a contested violation beyond a reasonable doubt or by a preponderance of the evidence, and securing judicial review of orders revoking conditioned liberty would make a substantial contribution to the factual inquiry—whether the alleged offender did indeed commit a violation of his conditioned liberty agreement.

In *Morrissey* and *Gagnon*, the Supreme Court announced its view of the due process protections to be provided in revocation proceedings. Therefore, the duty to provide the full range of procedural protections necessary to protect the liberty of a parolee or probationer passes to the Congress and to the state legislatures.