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AFTER RELEASE — THE PAROLEE IN SOCIETY

ROBERT E. WOLIN*

INTRODUCTION

In January and February of 1972 the New York State Special Commission on Attica interviewed nearly 2,000 Attica inmates and officers in an attempt to understand the influences and events that led to the bloodiest one-day confrontation between Americans in the twentieth century. When the information culled from inmate interviews was reviewed, it was apparent that the single overwhelming grievance named by Attica inmates was the operation of the New York State parole system.

Distrust and fear of the parole process in New York State was often a key element in an inmate's outlook on his prison existence, rehabilitative efforts and actual conduct while under community supervision. The lack of success of the parole system can in part be attributed to the manner in which parolees are supervised after their release from prison, and the conditions under which parole can be revoked.

Parole,¹ an offender's conditional release from a correctional institution to the supervision of a parole officer for the unexpired part of the original sentence, is the most common procedure by which

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¹ Parole is not the same as probation, although the two have similar purposes and are often confused. Probation is a device used by the courts after the defendant has been convicted or has pleaded guilty, and is then placed under the supervision of a probation officer to remain in the community during the period of suspended sentence imposed by the court. In New York, probation is administered by the courts on a local level while parole is administered by the Department of Correctional Services on a state-wide basis. While probation is a pre-institutional procedure, parole is part of the correctional process invoked after the offender has served a portion of his sentence in a correctional institution.

Parole is also radically different from pardon. A pardon blots out the very existence of guilt so that the person pardoned is thereafter considered as if he had never committed the crime. Parole is "not an act of clemency, but a penological measure for the disciplinary treatment of prisoners. . . ." *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897 (1942); *Gordon v. Gordon's Adm'r*, 168 Ky. 409, 182 S.W. 220 (1916).

inmates are released from state correctional facilities. In 1970 more than 90 percent of all inmates released from prison in New York State were released on parole;² in that year 8,171 new inmates were released to parole supervision in New York State, bringing the minimum number of men under active parole supervision during 1970 to 17,510.³

The modern methodology⁴ of parole in the United States had its inception in the 19th century when the dominant penal philosophy shifted from punishment to rehabilitation.⁵ The actual development of a functioning parole system, however, was dependent upon three elements: the implementation of the indeterminate sentence, voca-

² In 1970, 8,171 inmates were released from state correctional facilities to parole in New York. In the same year 598 inmates either died in prison, were released for medical reasons, or because they had completed their maximum sentences. Thus, in 1970, 92% of all inmates leaving New York state correctional facilities were released on parole. The figure of 92% marks an increase from the comparison year of 1964 when 86% of all prison releases in New York State were on parole. This data was supplied to the New York State Special Commission on Attica by Dr. John M. Stanton, Head of the Bureau of Statistics of the Department of Correctional Services. The national figures for 1964, indicate that New York State ranked 42nd out of 52 jurisdictions in percentage of prison releases on parole. The states having the highest percentage of total releases on parole were Washington and New Hampshire where parole constituted 100% of all releases in 1964. The state with the smallest percentage of inmates released on parole was South Carolina with 10%. The average national figure for 1964 was 60%. See FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS 35 (1964).

³ N.Y. STATE DEP'T OF CORRECTIONAL SERVICES, FACTS AND FIGURES FOR 1970 at 29 (1970). [hereinafter cited as FACTS AND FIGURES 1970].

⁴ The historical roots of parole date to the system of deportation or transportation developed by the English in the 17th century. The practice of deportation involved mitigation of a penal sentence and placement of a prisoner in a free community. One of the first to realize the penological benefit of a program of transportation was Captain Alexander Maconochie, often called the father of parole. It was his proposal that the duration of a prisoner's sentence be determined by the industry and good character of the prisoner. To implement his proposal, Maconochie developed a system of "marks" that could be used in connection with deportation. Under this approach a prisoner passed from strict imprisonment to conditional release and then to final and complete liberty. Maconochie believed that his system of gradual release was necessary because an inmate's sudden release from maximum custody directly into the community might produce a "violent reaction" on the part of inmates believed anxious to satisfy repressed desires. C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 9 (1958) [hereinafter cited as NEWMAN]. A contrary historical evaluation of Maconochie's prison reforms suggests that his system of "marks" was defective in that some inmates were

better fitted, bodily and mentally, to earn more marks than others, while quite a few of them might be fundamentally unfit to earn any marks at all.

G. PLAYFAIR, THE PUNITIVE OBSESSION 90 (1971).

⁵ The fundamental aim of penology remained the protection of society, but it was now felt that the most economical way of protecting society was to restore the offender to normal social functioning. See the 1876 Report of the New York Prison Association which stressed in part:

Increase in the numerical force and depredations of habitual criminals may not be prevented until the condition and management of convicts who are about to be released . . . and the discriminating concern for them as they go from the prisons into a free life, shall have been placed on a sound footing.

1 U.S. DEP'T OF JUSTICE, ATT'Y GENERAL'S SURVEY OF RELEASE PROCEDURES 785-86 (1939).

tional training for inmates, and the development of a method for supervising inmates once released to the community.

The single most important step toward the growth of the modern parole system was the implementation of the indeterminate sentence.⁶ The indeterminate sentence was designed to allow the court to sentence the offender to a minimum and maximum term of imprisonment rather than to a fixed or definite period of confinement. The actual length of confinement was to be determined by the correctional authorities within the limits established by the court. Prisoners would be selectively released when they were thought to be prepared to return to society. The second element contributing to the development of a parole system was the belief that prisoners should be educated and trained in useful skills before they were released from prison. Vocational training was to make an inmate a productive member of society and contribute to his overall fitness for early release under an indeterminate sentencing scheme.⁷ The third and final element necessary for a parole system was the development of a method for supervising inmates once they were released to the community.⁸ Early supervision efforts amounted to little more than placement services. New York approached the present concept of parole supervision in 1877 with the appointment of a state agent whose duty it would be to visit prisoners prior to their release and confer with them about their post-prison plans. The agent was to seek suitable employers and provide the inmates with necessary transportation, food, clothing, tools and advice after their release.⁹

These separate reforms were integrated into the nation's first

⁶ The indeterminate sentence was first used in the United States in 1825 at New York's House of Refuge for Juvenile Offenders. C. GIARDINI, *THE PAROLE PROCESS* 10 (1959). It was first applied to adult convicts by the State of Michigan in 1869. *Id.* at 11. New York followed in 1877 with its first adult indeterminate sentence law which was applicable only to males 16-30 years of age sentenced to the Elmira Reformatory. Law of April 24, 1877, ch. 173, § 2, [1877] N.Y. Laws 186.

⁷ Law of April 27, 1870, ch. 427, § 9, [1870] N.Y. Laws 973. One of the earliest programs for vocational training was instituted by the New York Legislature in the 1870 legislation which established the Elmira Reformatory and provided that agricultural and mechanical industry should be used to reform the prisoners sentenced to Elmira.

⁸ There were two possible early English models for community parole supervision. The first model was the indenture system used by the English House of Refuge. Under the indenture system the child-inmate was released to a master. The second model, the ticket-to-leave, had the released prisoner report to the community police for supervision. Both the indenture system and police supervision were felt to be unacceptable in the United States. The parole concept that flourished in the United States was release to the supervision of a "next-friend." The "next-friend" was originally a private citizen but soon became a state employee, the parole officer. See GIARDINI, *supra* note 6, at 10-11, and NEWMAN, *supra* note 4, at 19.

⁹ Law of June 6, 1877, ch. 424, §§ 1, 2, [1877] N.Y. Laws 481.

parole system by Z. R. Brockway at Elmira Reformatory in 1877. Adopting Brockway's system, the New York Legislature in 1877 instituted the indeterminate sentence and provided for selective release procedures and supervision of reformatory inmates released on parole.¹⁰ Brockway's "Elmira Plan" became the prototype for later parole systems in New York and throughout the United States.

In 1901 New York's parole system began functioning on a regular basis. In that year the indeterminate sentence law was restructured. The option¹¹ of imposing an indeterminate sentence was no longer available in every case; instead, it was mandatory if the defendant had never before been convicted of a crime punishable in a state prison and the maximum definite sentence which would have been imposed was five years or less.¹² Provisions were also made for the appointment of a parole officer at each prison, whose function it would be to aid prisoners in securing employment and to visit and supervise parolees.

This article will first follow the experience of parolees under community supervision, and attempt to determine whether New York State has met the goal of using the period of community supervision as one of rehabilitation and readjustment. It will then discuss parole revocation and analyze whether revocation serves the purpose of removing men from the community who cannot function peaceably within society or whether it reinstitutionalizes those who cannot function under the rules of the Department of Correctional Services.

¹⁰ Law of April 24, 1877, ch. 173, §§ 2, 5, 7, 8, 10, [1877] N.Y. Laws 186-9. The 1877 legislation was the first time the word parole was used in a legislative enactment. Section 5 of the act provided that:

The said board of managers shall . . . establish rules and regulations under which prisoners within the reformatory may be allowed to go upon parole outside of the reformatory. . . .

Section 10 added:

[S]aid managers may appoint suitable persons in any part of the state charged with the duty of supervising prisoners who are released on parole. . . .

¹¹ In 1889, parole release procedures spread from the state reformatory to state prison and the legislature enacted a law permitting the sentencing judge to impose an optional indeterminate prison sentence in the case of any felony offender. Law of June 6, 1889, ch. 382, § 74, [1889] N.Y. Laws 522. Prisoners sentenced to an indeterminate sentence under the option of 1889 were eligible to apply for parole and to appear before the prison's Board of Commissioners of Paroled Prisoners at the completion of the minimum term of their indeterminate sentence. It was the responsibility of the Board to determine if there was a "reasonable probability" that the applicant would remain at liberty without violating the law and, if so, to parole the applicant under the conditions prescribed by the Board. Law of June 6, 1889, ch. 382, § 78, [1889] N.Y. Laws 522-3. The judiciary was initially hostile to the concept of indeterminate sentence and parole. From 1899 until the law was amended in 1901, only 115 of the 13,000 plus prison sentences imposed in New York were indeterminate sentences. See Lewis, *New York State Board of Parole*, 2 J. CRIM. L.C. & P.S. 791, 794 (1912).

¹² Law of April 18, 1901, ch. 425, § 1, [1901] N.Y. Laws 1115.

PAROLE SUPERVISION

A parolee's¹³ readjustment to society¹⁴ after release is carefully and closely regulated by parole authorities. Before release from the correctional facility, the Institutional Parole Officer discusses the rules and regulations of parole supervision with the prospective parolee to ensure that he understands what is expected of him. As a prerequisite for parole, each inmate promises to obey the conditions of his parole; and a copy of these conditions is given to the parolee.¹⁵ When a parolee is not notified of the conditions of his parole he is not liable for a violation of those conditions.¹⁶

This section will analyze the supervision of parolees, both in the crucial initial period after release and during the subsequent supervision in the community. An inmate's release on parole can be more than merely an additional custodial stage, but rather should serve as a positive period of rehabilitation. With this goal in mind, emphasis will be placed first on an examination of the effectiveness and value of the rules that regulate the daily life of a parolee. Second, both the practical and theoretical ability of parole officers to function as effective catalysts in the rehabilitative process will be analyzed. The officer's ability to function effectively in the rehabilitative process will be examined by means of a comparison of the scope of his power to carry out a search and seizure of his parolee and his capacity to alleviate his parolee's job disability.

Conditions of Parole Supervision

As a first condition of parole, a parolee agrees to proceed, within 24 hours of release, to the area office of the Division of Parole to make his arrival report and to be placed under supervision.¹⁷ During either the arrival report or the initial interview,¹⁸ the parolee reviews and

¹³ The total number of parolees under Community supervision during all or part of 1970 was 14,637. *FACTS AND FIGURES 1970* at 20.

¹⁴ While under parole supervision, a parolee remains in constructive legal custody, subject at all times to the control of the Board of Parole. *See* *People v. Santos*, 31 App. Div. 2d 508, 509, 298 N.Y.S.2d 526, 528 (1st Dep't), *aff'd*, 25 N.Y.2d 976, 252 N.E.2d 781, 305 N.Y.S.2d 365 (1969), *cert. denied*, 397 U.S. 969 (1970); *People v. Adams*, 63 Misc. 2d 52, 53, 310 N.Y.S.2d 7, 11 (Schenectady County Ct. 1970).

¹⁵ N.Y. CORREC. LAW § 215 (McKinney Supp. 1972).

¹⁶ *See* *People ex rel. Marvin v. McDonnell*, 280 App. Div. 367, 369, 113 N.Y.S.2d 585, 586 (1st Dep't 1952), which held that a parolee could not be imprisoned for failure to make the necessary arrival report within twenty-four hours of his release when he had not received notice of his obligation to report.

¹⁷ N.Y. STATE MANUAL FOR FIELD PAROLE OFFICERS § 201.0 (1962) [hereinafter cited as *FIELD PAROLE*], provides for a waiver of making an arrival report within 24 hours where making such a report would entail travelling great distances or other hardships.

¹⁸ The arrival report and initial interview are often combined into one session.

discusses the rules and regulations of parole and what these rules and regulations mean in his particular case.¹⁹

There are five types of rules that control the daily supervision of a parolee. First are those rules derived from the initial classification of an individual case as either "intensive" or "active." Second, regardless of the classification, all parolees are subject to the fifteen general conditions established by the Board of Parole. Third, as the individual case warrants, the Parole Board stipulates specific provisions to supplement the general rules. Fourth, in his developing relationship with his parole officer, the parolee may be subject to the application of a full spectrum of additional rules imposed at the discretion of the officer. Fifth, there are the unwritten rules of parole.

Classification of Cases. The degree of supervision exercised over a parolee depends on which of three general classifications is assigned to his case: intensive supervision, active supervision or reduced supervision.²⁰

Following release from a correctional institution all parolees are placed on intensive supervision for a minimum period of three months.²¹ Intensive supervision means that a parolee must report to his officer on a weekly basis, a time-span which may be extended at the discretion of his parole officer up to, but not including, a monthly basis. Responsibilities for the parole officer include a minimum of one employment check per month, a minimum of one positive employment visit every three months and a minimum of one positive home visit every three months.²² If the Parole Board has specifically labeled the case as intensive, then it remains so until changed by the Board.²³ For

¹⁹ In addition to the discussion of the rules of parole the initial interview has four main objectives: (1) to establish a casework relationship; (2) to secure parolee's participation in an analysis of his problem; (3) to make constructive suggestions relating to parolee's problem; and (4) to leave the parolee with positive assurances as to what he may expect. FIELD PAROLE § 202.0.

²⁰ Research into the files of 61 men revoked from parole and present at Attica during the disturbances of September 9-13, 1971 indicate the pattern of supervision:

	Types of Supervision				Total
	White	Black	Puerto Rican	Indian	
Active	33	18	3	2	56
Intensive	1	3	0	0	4
Reduced	0	0	0	0	0
Sensitive	1	0	0	0	1
					—
					61

²¹ FIELD PAROLE § 204.0.

²² *Id.* § 204.0(I)(A).

²³ The Parole Board may choose not to make a final determination on the status of a particular case and designate it as intensive at the discretion of the Area Director or supervising parole officer. *Id.* § 204(II)(B).

the great majority of parolees, after three months of intensive supervision, their status automatically changes to active supervision, characterized by reduced reporting on the part of the parolee and reduced visitation by the parole officer.²⁴

Parolees are maintained under active supervision for a minimum period of two years before being considered for placement under reduced supervision. On reduced supervision the parolee reports quarterly or less frequently. Home visits by the parole officer are made with the same frequency that reports are required.²⁵ Data indicates that the use of a two-year base period for active supervision has value because it is during the first and second years on parole that over 90 percent of all recidivism occurs.²⁶ In light of the large and burdensome caseload borne by parole officers, which often does not allow for periodic review, the change of status to reduced supervision should be automatic unless the officer specifically states otherwise.

Area supervisors may, at their discretion, designate a case as sensitive.²⁷ The label sensitive is designed to indicate behavior which might result in widespread danger to the community should the individual revert to criminal activity.²⁸ Once placed in this category, the parolee usually remains in it for the duration of his parole period. The fact that a parolee is carried in the sensitive category will not necessarily affect the degree of his supervision, and supervision within this category may change from intensive to active.²⁹ The purpose behind the designation of a case as sensitive is one of record keeping, *i.e.*, of allowing the field authorities to keep an up-to-date list of their potentially most dangerous parolees.

General Rules of Parole Supervision. The New York Legislature has established only the very basic conditions which may be included in a parole agreement devised by the Board of Parole.³⁰ These con-

²⁴ Active supervision requires a parolee to report on a monthly basis, subject to reduction by his officer to a reporting basis of up to but not exceeding every two months, and requires a parole officer to make a minimum of one home visit per month, and one employment check every two months. *Id.* § 204(I)(B).

²⁵ *Id.* § 204(I)(C).

²⁶ See text accompanying note 112 *infra*.

²⁷ Sensitive cases are also referred to as Red Folder cases. FIELD PAROLE § 204 (II)(C).

²⁸ Crimes fitting this description include: gangsterism, racketeering, confidence operations and sexual offenses. For certain sexual offenses the sensitive classification is mandatory. *Id.*

²⁹ *Id.*

³⁰ N.Y. CORREC. LAW § 215 (McKinney Supp. 1972). *But cf.* CONN. GEN. STAT. ANN. § 123.20 (Supp. 1973), and 30 N.J. STAT. ANN. § 4:123.20 (1964), which stipulate no required or recommended provisions in compiling general parole regulations. See also FINAL REPORT OF THE U.S. NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAW § 3404 (1971), which takes the position that there is little to be gained by setting out permissible conditions of parole in a statute.

ditions stipulate that: the parolee shall not leave the state without the consent of the Board; he shall live in a suitable domicile; he shall support himself and his dependents; he shall make restitution³¹ for his crime; he shall give up his evil ways and associates; he shall undergo any necessary treatment for drug addiction; and he will follow the direction of his parole officer.³²

With the above recommended rules serving as a guide, the Board of Parole has the power to adopt the general rules of parole, and add any specific rules to govern a particular case.³³ The New York courts have given the Board great leeway in formulating conditions of parole.³⁴ The sole limitation imposed by the courts on parole conditions is that the Board cannot provide for conditions that are illegal.³⁵ An example of an illegal condition is any attempt by the Parole Board on its own initiative to impose a condition which would enlarge the parolee's sentence, thereby encroaching upon the power of the legislature and the authority of the courts.³⁶

The single outstanding point to be made concerning the constitutionality and legality of parole conditions is that this topic has not received the clarification or stringent legal analysis which results from frequent litigation. With the exception of the issues of search and seizure and freedom of speech and assembly,³⁷ the conditions of parole

³¹ Neither the Parole Board nor the judiciary has defined what the requirement of restitution involves.

³² N.Y. CORREC. LAW § 215 (McKinney Supp. 1972).

³³ *Id.*

³⁴ *Ochs v. La Valle*, 60 Misc. 2d 627 (Sup. Ct. Clinton County 1968), *modified*, 60 Misc. 2d 629 (Sup. Ct. Clinton County), *aff'd*, 33 App. Div. 2d 80, 307 N.Y.S.2d 982 (3d Dep't 1969). The Parole Board may require psychiatric care as a condition of parole if it deems such condition advisable. *People v. Ainsworth*, 32 App. Div. 2d 839, 302 N.Y.S.2d 308 (2d Dep't 1969).

³⁵ *People ex rel. Ingenito v. Warden*, 267 App. Div. 295, 46 N.Y.S.2d 72 (4th Dep't 1943), *aff'd*, 293 N.Y. 803, 59 N.E.2d 174 (1944).

³⁶ *Id.*

³⁷ The parolee's right to freedom of speech and assembly has been the subject of recent review in the federal courts. *See Hyland v. Procnier*, 311 F. Supp. 749 (N.D. Cal. 1970), where petitioner, a California state parolee, was denied permission by his parole officer to address a University of California student rally on conditions at Soledad prison. Fear of student-sponsored demonstrations outside the prison apparently was the reason given for denial of permission. The district court ruled that the Parole Board had not made a necessary showing of clear and present danger arising from the speech. The court determined that the permission-seeking procedures used in California would "inevitably involve a scrutiny by the parole officers concerned of the proposed content of petitioner's proposed speeches." *Id.* at 750. The court found "this would have an unwarranted chilling effect on the exercise by plaintiff of his undisputed rights". *Id.*

Similar legal issues were raised in *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971), involving the attempts of federal parolee Morton Sobell, to participate in peace demonstrations in Washington and to speak out on prison conditions at a banquet sponsored by a newspaper identified with the Communist Party. The District of Columbia Parole Board

have to a great degree remained unchallenged. For example, the condition requiring a parolee to receive permission before marrying may be of questionable validity, as it is arguably violative of the principles of *Loving v. Virginia*,³⁸ which speaks of marriage as one of the basic rights of man. It is to be hoped that more public interest in prisoners' rights will result in better development of the law as it pertains to parole conditions.

The trend in New York and other states has been to increase rather than decrease the number of general conditions rigidly applied to all parolees.³⁹ The theory behind this increase in rules stems from an apparent belief on the part of correctional authorities that since the courts have shown increased concern for prisoner and parolee rights, it may now be necessary to prove in court that specific regulations have been violated in order to revoke parole. The more specific the regulation, the easier it is to prove a violation. Thus, at least to some degree, parole rules are designed not to induce a stable and safe rehabilitation period for parolees, but to facilitate revocation of parole.

General Rules Governing Parole in New York⁴⁰

1. I will proceed directly to the place to which I have been paroled (spending funds only for necessities) and within twenty-four hours, I will make my arrival report to the Division of Parole.
2. I will not leave the State of New York or the community to which I have been paroled without the written permission of my parole officer.⁴¹
3. I will carry out the instructions of my parole officer, report

refused Sobell's request, justifying its decision on information that violence might occur at the peace demonstrations and that speaking at a banquet of a paper closely associated with the Communist Party would be incompatible with Sobell's rehabilitation. The district court decreed that before the Board could place restrictions on Sobell's rights of free speech and assembly, it had first to show a substantial and compelling interest which required the restrictions. Any reasons the Board might put forward in such a case would be subject to rigid scrutiny. The court concluded that in the instant case the Board had failed to show that its action was necessary "to safeguard against specific, concretely described and highly likely dangers of misconduct by [the parolee] himself." *Id.* at 1306.

³⁸ 388 U.S. 1, 12 (1967).

³⁹ See Arluke, *A Summary of Parole Rules — Thirteen Years Later*, 15 CRIM. & DELINQ. 267 (1969). As opposed to the 15 extensive parole conditions New York applies to each parolee, the English Criminal Justice Act of 1967 requires a parolee to do five things: (1) report to an office indicated; (2) place himself under the supervision of an officer nominated for this purpose; (3) keep in touch with his officer in accordance with the officer's instructions; (4) inform his officer at once if he changes his address or loses his job; and (5) be of good behavior and lead an industrious life. *Id.* at 274.

⁴⁰ Information supplied to the McKay Commission by the Division of Correctional Services.

⁴¹ In New York City, a parolee needs verbal permission to travel to Nassau County. FIELD PAROLE § 224.00(A).

as directed and permit him to visit me at my residence and employment. I will not change my residence or employment without first securing the permission of my parole officer. I understand that I am in the custody of the Board of Parole. I hereby consent to any search of my person, my residence or of any property or premises under my control which the Board of Parole or any of its representatives may see fit to make at any time in their discretion.

4. I will make every effort to maintain gainful employment and if for any reason I lose my employment I will immediately report this fact to my parole officer and will cooperate with him in his efforts to obtain employment for me. I will lead a law-abiding life and will conduct myself as a good citizen. I understand that this means I must not associate with evil companions or any individual having a criminal record,⁴² that I must avoid questionable resorts, abstain from wrongdoing, lead an honest, upright and industrious life, support my dependents, if any, and assume towards them all my moral and legal obligations, and that my behavior must not be a menace to the safety of my family or to any individual or group of individuals.
5. I will avoid the excessive use of alcoholic beverages. I will abstain completely if so directed by my parole officer.
6. I will not live as man and wife with anyone to whom I am not legally married⁴³ and I will obtain written permission from my parole officer before I apply for a license to marry.⁴⁴
7. I will surrender to my parole officer immediately after release any motor vehicle license which I have and will not apply for any motor vehicle license or own an automobile without the permission of my parole officer.
8. I will not purchase, own or possess firearms of any nature.
9. I will not carry from the institution from which I am released, or send to any correctional institution, any written or verbal message, or any object or property of any kind, unless I have obtained proper permission.
10. I will reply promptly to any communication from a member

⁴² Recognizing the need to make parole regulations realistic in operation, the National Conference on Reform of Federal Criminal Laws has suggested that the new Federal Criminal Code omit the rule that a parolee must not associate with persons engaged in criminal activities or having criminal records. FINAL REPORT OF THE U.S. NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAW § 3404 (1971).

⁴³ Prior to 1971, rule 6 included a provision that the parolee "[w]ill not have sexual relations with anyone not [his] lawful spouse."

⁴⁴ An example of the attempt of the Board of Parole and Department of Correctional Services to impose their moral philosophy on the parolee appears in the *Parole Officer's Field Manual* which states: "It is the intent of the law that marriage be a permanent institution." The *Manual* further advises the officer that prior to the granting of permission to marry that officer should interview both parties with this philosophy in mind. FIELD PAROLE § 206.01.

of the Board of Parole, a parole officer or other authorized representative of the Board of Parole.

11. I understand that any reports, either verbal or written, made to or submitted by me to my parole officer, which are subsequently found to be false, will be rejected by the Board of Parole, and in addition may be considered a violation of parole.
12. I will immediately report to my parole officer each and every time I am arrested or questioned by officers of any law enforcement agency.
13. I will not register or vote in any election as my right of franchise was revoked when I was sentenced to a State Prison.⁴⁵ This does not apply if I was given a reformatory sentence.
14. I understand that I may not accept employment in any capacity where alcoholic beverages are made or sold, without the written approval of the State Liquor Authority where necessary, and my parole officer.
15. Should the occasion arise, I will waive extradition and will not resist being returned by the Board of Parole to the State of New York.⁴⁶
16. Special Conditions (May be imposed by the Board of Parole).

New York's general rules of parole in the main resemble those in operation in many other states. The requirements that a parolee seek permission for out-of-county and -state travel, maintain gainful employment, have the consent of his parole officer before changing employment, abstain from any undesirable associations, and secure the consent of his parole officer to marry, mirror provisions in operation in most jurisdictions.⁴⁷ Two provisions of New York's general parole rules stand in sharp contrast to those prevailing nationally. New York is one of only three states⁴⁸ which makes searches of a parolee's person and property compulsory. Sixteen states provide only for compulsory visits by the parole officer, and in 31 other jurisdictions there is no written rule. Second, New York is one of only four states that prohibits suffrage among parolees.⁴⁹

⁴⁵ *But see* Laws of New York 1971, ch. 310, which provides for automatic restoration of voting rights of convicted persons upon discharge from parole or maximum expiration of sentence.

⁴⁶ *See Tennessee ex rel. Lea v. Brown*, 166 Tenn. 669, 64 S.W.2d 841 (1933), *cert. denied*, 292 U.S. 638 (1934), and *Ex parte Casamento*, 24 N.J. Misc. 345, 49 A.2d 437 (1946), which determined that the parolee's consent to the conditions of parole may constitute a waiver of the right to oppose extradition. The basis of extradition of a parolee is the crime for which he was originally convicted, not the violation of parole he commits by fleeing.

⁴⁷ *Id.* at 270. Arluke, *supra* note 39, at 267.

⁴⁸ Colorado and North Carolina are the others. *Id.* at 270-71.

⁴⁹ Illinois, Nevada, and Ohio also deny parolees the right to vote. *Id.*

Special Conditions of Parole. The sixteenth provision of the parole conditions requires that the parolee will follow, in addition to the general rules, any specific conditions applied by the Board in his particular case. Since the general rules of parole are applied to all parolees, it is through application of special conditions that the Parole Board attempts to deal with individual cases and problems. Unfortunately, special conditions are a negative rather than positive approach to individualization. They are negative in orientation because the conditions are denials of rights, *i.e.*, no drugs, no alcohol, no motor vehicle license, rather than positive grants of rights, such as stipulating that the application of a particular general rule is counterproductive to the rehabilitation of this specific parolee and therefore unnecessary.

Rules Designated by Parole Officers. In addition to those conditions applied by the Parole Board the individual parole officer may add rules he thinks advisable in the individual case.⁵⁰ These particular conditions may take different forms but usually involve curfews⁵¹ requiring the parolee to be at his residence on and after a particular hour, or economic controls forcing the parolee to report his expenditures in detail.⁵² There is little or no control over an individual parole officer's use of such "Delinquency Control Techniques"⁵³ as curfew. Supervisory approval is either not necessary or perfunctory in its application.⁵⁴

Unwritten Rules of Parole. Supplementing the four types of rules discussed above is a fifth class of rules, the unwritten rules of parole, that play a part in the general scheme of parole supervision. Although there are no statutory provisions or sections in a field manual that refer to the unwritten rules, they are important because parole officers freely admit their existence, and parolees "know they exist"⁵⁵ and change their behavior in reference to them.

One of the "unwritten rules" that the McKay Commission at-

⁵⁰ Interview with Irving Sokoloff, Supervising Parole Officer, New York State Department of Correctional Services, in New York City, March 25, 1972, on file at *St. John's Law Review*. Officer Sokoloff states that an officer by establishing a rigid system of his own rules can easily "break a parolee," that is, force him to violate his parole.

⁵¹ The use of a curfew is suggested as a disciplinary tool. FIELD PAROLE § 205.03.

⁵² *Id.* § 205.01. Economic controls can include a Bank Control Agreement authorizing the bank to refer all withdrawals from a parolee's account to the Department of Correctional Services for approval before releasing any funds. *Id.* § 205.01(3).

⁵³ *Id.* § 205.02(d). Additional Delinquency Control Techniques include police cooperation, night visits, surveys, plants and tailing.

⁵⁴ Interview with Irving Sokoloff, *supra* note 50.

⁵⁵ Attica inmate interviews conducted by McKay Commission, January through March 1972, on file with McKay Commission.

tempted to document was the claim that if a parolee asked of his parole officer some type of special permission, he then had a greater chance of being revoked than if he had not requested such permission. Statistics obtained by the McKay Commission⁵⁶ indicate that approximately 51 percent of the parole violations in the Commission's sample had, prior to their revocations, requested special dispensations from their officers. The Commission had planned to draw firmer conclusions from this data by comparing it with data culled from a sample of 400 former Attica inmates who are now on parole in New York. Unfortunately, the lack of response by these parolees made comparative data impossible.⁵⁷

Functions of the Rules of Parole. Approximately 90 percent of the parole revocations in New York are based on the parolee's infringement of the technical rules governing parole, rather than on the commission of a new criminal offense while under supervision.⁵⁸ If the parole system is to function effectively, all those whose parole had been revoked should have engaged in conduct that would in some manner imperil community safety, or evinced unwillingness to follow procedures and rules designed to aid in rehabilitation, thereby indicating an unfitness for continued parole. In New York, both parole officers and parolees have expressed the view that a parolee would have to be in a comatose state not to violate his parole rules in some respect.⁵⁹ Many of the technical violations are neither indications of potential criminality nor conduct impairing the rehabilitative purposes of parole. The imposition of these conditions simply restricts the parolee's personal life for no other reason than to see if he can obey orders.⁶⁰

⁵⁶ The data indicated that within the McKay Commission's sample group of 35 white parole violators, 16 had sought special permission, *e.g.*, to travel or change jobs, prior to their parole revocation. Four parolees made 2 requests each, bringing the total number of requests to 20. Thus, 46% of the white violators in this sample were those who requested special permission. Within the sample of 26 minority group violators, 15, or 57%, were characterized as having sought special permission from their parole officer.

⁵⁷ Approximately 400 letters were mailed to former Attica inmates presently on parole in New York State requesting that they be interviewed by the McKay Commission. When only 12 parolees responded indicating a willingness to participate, the project was abandoned.

⁵⁸ See text accompanying note 146 *infra*.

⁵⁹ Interviews with Jay Fellows, Donald Smith and George C. Record, Institutional Parole Officers, at Attica Correctional Facility, March 16, 1972.

⁶⁰ Harlan W. Eaton, a former Attica inmate expressed to the McKay Commission his thoughts on the conditions of parole in a letter entitled, "An Essay on Lessening the Burden." Eaton stated in part,

When the inmate is given parole . . . he is not treated in a manner to allow him self-respect or human dignity. The rules are such that the parolee feels he is treated more like a child. Not as a man or as a fellow human who has paid his

The period of parole supervision should serve the positive function of forming a bridge between the abnormal prison environment and community life. Certain rules of parole supervision, however, especially those relating to the supervision of moral behavior and daily transactions of business, perpetuate albeit without bars an unnatural, abnormal environment. In addition to serving no rehabilitative purpose, such rules are no longer relevant to community standards of behavior. Proliferation of such rules serving no rehabilitative or custodial function create deep psychological fears and hostility in the parolee who questions the need for such provisions and fears entrapment if he violates them.⁶¹ When conditions of parole are neither relevant to correctional needs and goals or to community standards, readjustment becomes an increasingly difficult process for the parolee.⁶²

The rules governing parole supervision have also failed in the rehabilitative process because the Board of Parole has not taken the opportunity to tailor the rules to the individual parolee. The legislature, by proffering only the barest of recommended rules, has recognized the leeway and discretion that the Parole Board needs in order to operate with its heterogeneous population; and at least one court⁶³ has supported the philosophy that the duty and degree of supervision varies with the case histories of the individuals to be released. In opting for the mandatory use of fifteen general rules, the scope of whose restrictions range from the denial of a drivers license⁶⁴ (preventing a parolee from working as a cab driver) to a prohibition against working in any business where liquor is sold,⁶⁵ (thus barring a parolee from work as a waiter) the Board of Parole has created a web of restrictions that benumbs the parolee. The general rules of parole, universally

debt to society and only wants a reasonable chance to make it on the outside The qualifications and restrictions that a parolee must abide by, are not only confusing but petty. Rules that in most instances are quite juvenile Rules such as no driving, no drinking, no sex, 11 o'clock curfew goes against even the most conservative thinker. In these modern days, can even the parole officer imagine himself abiding by these archaic and stringent rules and regulations The parolee is always reminded that this parole is a privilege and he had better never forget it.

Letter from Harlan W. Eaton to McKay Commission, March 10, 1972, on file at *St. John's Law Review*.

⁶¹ The majority of Attica inmates who stated to the McKay Commission that the parole system was one of their chief grievances, gave as their reason the psychological degradation accompanying active parole supervision in New York. Commission research indicated that it was not uncommon for parolees, because of their inability to abide by the rules of parole, to request voluntarily that they be removed from active parole status and returned to their correctional institution until their maximum sentence expired.

⁶² See generally Note, *Parole: Rights and Revocation*, 37 Bklyn. L. Rev. 550 (1971).

⁶³ *Taylor v. State*, 36 App. Div. 2d 878, 320 N.Y.S.2d 343, 345 (3d Dep't 1971).

⁶⁴ See text accompanying note 40 *supra*.

⁶⁵ See *id.*

applicable to the State's parole population, should be reduced to four or five basic conditions. Included among these conditions should be the following: that the parolee must seek permission before traveling out of state, that the individual must make every effort to secure gainful employment, that the parolee will cease to associate with criminal elements, and a formal recognition by the parolee that he is still under the custody of the Board of Parole. Other prohibitions should be added only as warranted by the individual case.

Immediate Post Release Supervision

Penologists and sociologists are in agreement that the most crucial phase of parole supervision is the first six months after release, for it is during this initial period of community contact that a large number of violations occur.⁶⁶ In recognition of the need to establish immediate post-release programs to strengthen chances for successful accommodation by the parolee on his return to the community, halfway houses for newly released parolees have been established in a number of jurisdictions. At present there are approximately 50 such programs patterned on Synanon's use of halfway houses in drug rehabilitation.⁶⁷

The support for a number of halfway house programs has come entirely from private groups,⁶⁸ although the best approach appears to be one that combines state financing with community involvement in staff supervision and counseling.⁶⁹

New York has established a temporary emergency residential facility⁷⁰ in New York City for newly released parolees, and federal

⁶⁶ D. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* (2d. ed. 1969); C. GIARDINI, *THE PAROLE PROCESS* (1959). Half the parole violations occur within 6 months after release. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 219 (1967).

⁶⁷ Breslin & Crosswhite, *Residential Aftercare: An Intermediate Step in the Correctional Process*, 27 FED. PROB. 37 (1963); Breslin & Crosswhite, *Bridging the Gap from Confinement to Freedom*, 23 FED. PROB. 46 (1959). The concept of halfway houses is not restricted to parolees, but has seen wide use in the treatment of addicts and the rehabilitation of former inmates who have completed their maximum prison terms.

⁶⁸ Two of the most highly regarded halfway house programs operated by private citizens are the Dismar House of Saint Louis established in 1959 by Rev. Charles Dismar Clark and the St. Joseph's House of Hospitality in Pittsburgh, established by a private group of attorneys. Advocates of private control and operation argue that it is only through such private control that a stultifying institutional atmosphere can be avoided and private citizens induced to contribute their time and effort. See Meiners, *A Halfway House for Parolees*, 29 FED. PROB. 47, 51 (1965).

⁶⁹ The "308" program in Delaware is an example of the effectiveness of joint state-private effort. The facilities for the 308 program were made available by the state and the federal government made a grant to help pay for the staff while the program was staffed and run by private groups. Breslin & Crosswhite, *Bridging the Gap from Confinement to Freedom*, 23 FED. PROB. 46, 49 (1959).

⁷⁰ FIELD PAROLE § 101.06.

funds have recently been made available⁷¹ to New York for an experimental residential treatment center for 150 parolees.⁷² Since 1966 the Department of Correction has been studying the feasibility of opening a multi-purpose treatment center that would improve upon that contemplated by most halfway houses. The proposed treatment center would contain residential facilities for parolees, staff quarters, educational and vocational training facilities for residents and non-residents and psychological, psychiatric and medical services.⁷³ At present, however, neither the State alone, nor the State in conjunction with private groups, has established the halfway houses necessary to improve the parolees' chances for success in the crucial first six months.

As the result of problems in financing and securing suitable housing, plus the natural reluctance of Parole Boards to allow parolees to take part in a program that is often in its embryonic stages, the number of parolees taking advantage of halfway house programs has been small.⁷⁴ However, those halfway house programs that have been in operation for a number of years have had great success in slowing the rate of recidivism among newly released parolees.⁷⁵ This achievement is attributable to a number of factors, including the availability of group counseling for psychological and employment difficulties, and the opportunity for the parolee to conserve his financial resources during this period of initial stress.

Supervision and the Establishment of a Social-Casework Relationship

After the initial interview, further personal interviews between the parole officer and the parolee continue at frequent intervals.⁷⁶ These interviews are designed to establish and foster the development of a social-casework relationship between officer and parolee in order to create the atmosphere most conducive to rehabilitation.⁷⁷ Although the

⁷¹ DEP'T OF CORRECTIONAL SERVICES, BUDGET REPORT, 233 (1971). The exact amount of money specifically earmarked for this program is not stipulated in the Budget Report.

⁷² FACTS AND FIGURES 1970 at 12.

⁷³ See note 59 *supra*.

⁷⁴ See note 67 *supra*.

⁷⁵ See Meiners, *supra* note 68, at 50, 52. Halfway houses are not a panacea for the problems that beset the system, but the St. Joseph's House of Hospitality, for example, has been able to show a success rate far in excess of that experienced in the State of Pennsylvania as a whole. In the three year period the St. Joseph's House had approximately a nine percent revocation rate compared to the state recidivism rate of approximately thirty percent. *Id.* at 50.

⁷⁶ The Department of Correctional Services confidently states, "Many parolees seek the advice of their supervising parole officers even after completion of the period of parole." N.Y. STATE DEP'T OF CORRECTIONAL SERVICES, FACTS AND FIGURES 1971 at 13 [hereinafter cited as FACTS AND FIGURES 1971].

⁷⁷ It is the objective of the Division of Parole, through a continuous social casework program in the correctional facility and under parole supervision in the community to provide each offender with the opportunity for constructive change

Department of Correctional Services has stressed the need to establish an effective social casework relationship between officer and parolee, there are a number of factors which mitigate against achieving this goal, including: the failure of the parties involved to regard their relationship as one of social casework; the large caseloads of the field parole officers which inhibit the establishment of any personal relationship, and the nature of the tools available to the parole officer, which emphasize the custodial at the expense of the social work and rehabilitative elements of the relationship. At the core of this problem is the conflict caused by the dual nature of the parole officer's function. Parole officers in New York State have been placed by the Department of Correctional Services into two often conflicting roles: officers serve simultaneously both as social workers, with the job of helping the individual parolee and as the community's guardians. Of these two roles, the latter unquestionably has taken precedence.

The parole officer is a professional social caseworker who at no time is permitted to put the rights of the individual parolee ahead of the rights of society At all times he takes every necessary precaution to insure the parolee's activities are not a threat to society.⁷⁸

How Officer and Parolee Regard the Role of Parole Officer. Any attempt at a viable social work relationship between officers and parolees is handicapped because of the non-voluntary relationship between staff and client.⁷⁹ The parolee-parole officer link is by nature the social anathema of a voluntary relationship.⁸⁰

Based upon the information from interviews conducted by the McKay Commission, it is clear that few, if any, parolees regard their officers as social workers. Newly released parolees have received their orientation about parole and parole officers not from any in-prison orientation program of the Department of Correctional Services, but from other inmates who have been revoked from parole. In many instances, their expectations of parole are shaped by the "horror stories" of parole violators. Once under active supervision, parolees see their officer as one who has authority to, and often does, invoke sanctions against them — not a role they associate with a social worker. Because of the officer's disciplinary power, parolees regard him not as a repre-

. . . . The provision of a program of social casework service . . . is one of the most important activities of the parole officer.

Id. at 16.

⁷⁸ *Id.*

⁷⁹ See H. PERLMAN, *SOCIAL CASEWORK* 17 (1957).

⁸⁰ See generally Note, *Observations on the Administration of Parole*, 79 *YALE L.J.* 698 (1970).

sentative of the State's interest in rehabilitation but as part of a prosecution-police-parole triumvirate representing the State's interest in criminal deterrence.

A third crucial factor militating against an effective casework relationship is that the parole officers themselves do not look upon their function as that of a social worker.⁸¹ Their official status is that of a peace officer,⁸² and this is how they tend to regard their jobs. The field parole officers are forced to work closely with police officers, whom they regard as their natural ally. In addition, some officers measure success through a result-oriented approach that concentrates solely on the ultimate fate of the parolee; success is defined in terms of how long a man is kept out of prison rather than in terms of any positive rehabilitative steps.⁸³

If the establishment of a social casework relationship between officer and parolee is to succeed, the parole officer must not have to choose between the goals of rehabilitation and control. Not until parole officers are deprived of their authority to invoke sanctions will the parolee, or the officers themselves, regard their function as rehabilitative.

Supervision Caseload. Throughout New York State, parole officers shoulder large caseloads. In the calendar year 1970, there was at all times a minimum of 12,156 parolees under supervision.⁸⁴ A field staff of 542, approximately one-seventh of whom were supervisory personnel, handled this caseload.⁸⁵ Under the optimal conditions of the minimum number of individuals under parole supervision and the maximum effort exerted by all staff members, including supervisory personnel, each officer⁸⁶ was supervising a minimum of 22 parolees at one time.

⁸¹ On a number of occasions, staff members of the McKay Commission were told by field parole officers to disregard, as they themselves had come to disregard, the comments and recommendations of institutional parole officers because they are "social work oriented." See also N.Y. STATE DEP'T OF CORRECTIONS, ANNUAL REPORT 1970 at 24 [hereinafter cited as 1970 ANNUAL REPORT], which notes that within all of the state's correctional facilities there are social workers whose sole function is to receive voluntary requests for social work assistance and make the necessary contacts in resolution of their problems.

⁸² Designation as peace officers permits parole officers to carry a gun. FIELD PAROLE § 213.04.

⁸³ See note 59 *supra*.

⁸⁴ 1970 ANNUAL REPORT, *supra* note 81, at 9. The maximum number of men under supervision during the year was 18,560 while the average figure was 14,211.

⁸⁵ *Id.* Supervisory personnel carry either a reduced caseload or no caseload at all.

⁸⁶ Parole officers in New York do not use group counseling techniques that have effectively been used in other jurisdictions to deal with the problems of large caseloads. See generally Mandel & Parsonage, *An Experiment in Adult-Group Parole Supervision*, 11 CRIM. & DELINQ. 313 (1965), which analyzes a Minnesota study reporting that parolees who had undergone group counseling experienced a higher success rate than the general parole community.

In addition to the number of cases,⁸⁷ a second index of the workload is the amount of actual time spent on supervision of parolees. The critical determinant is the number of "contacts" made in the furtherance of parole supervision. The term contact encompasses office interviews as well as home or employment visits. During 1970, the field parole officers in New York made a total of 520,916 contacts,⁸⁸ a figure so large that it would mean that every working day, every field parole officer, including supervisory personnel, made more than four supervisory contacts in addition to their normal complement of office work and investigations made in response to requests either by the Parole Board or institutional personnel.

It is doubtful that the field parole officers can effectively perform either their custodial or rehabilitative functions in light of their heavy caseload and the amount of work demanded by each case. A direct result of this difficult work load is that the parole officer and parolee experience inadequate personal contact. And it is conceivable that given the overburdened caseload, parole officers may be more willing to seek revocation of parole in more troublesome cases.

Inadequate Training. The parole staff's insufficient training inhibits the development of any more than custodial supervision of parolees. The majority of parole officers do not possess the skills necessary to deal with the highly specialized problems resulting from ghetto and drug cultures.⁸⁹

In recognition of the fact that the majority of parole officers lack the necessary educational background or job training, the Department of Correctional Services has established specialized caseloads. Officers assigned to these caseloads receive superior specialized training. For example, officers involved in the mental hygiene unit⁹⁰ receive

⁸⁷ THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON CORRECTIONS 70 (1967), refers to 25 cases per officer as an average caseload, and 20 cases per officer for special cases. For statistics concerning volume, cost and staffing of the parole supervision process, see *id.* at 189-90.

⁸⁸ 1970 ANNUAL REPORT at 9. The numerical breakdown of the contacts for 1970 indicates: 152,962 office interviews, 110,024 home visits, 17,942 employer visits, 55,681 other visits and 184,307 other contacts.

⁸⁹ N.Y. CORREC. LAW § 9. (McKinney Supp. 1972), provides that in order to be eligible for appointment as a parole officer one must be at least twenty-one years of age, possess a high school degree and be physically, mentally and morally fit. In addition, the statute allows the Commissioner of Correctional Services, acting in cooperation with the Board of Parole and the Civil Service Commission, to establish additional standards to govern selection and appointment of parole officers. Presently, parole officers are appointed by the Commissioner of Correctional Services from a list established by the State Civil Service Commission.

⁹⁰ The Mental Hygiene Unit Caseloads, the first such specialized caseloads, were established in 1967 to provide for superior supervision and treatment of parolees who present emotionally disturbing problems. The parole officers involved received training from psychiatric residents at Bellevue Hospital. 1970 ANNUAL REPORT, 11-14.

training from psychiatric residents. At present there are five specialized caseloads in operation in New York City: the mental hygiene unit, the retarded offenders unit, the young male offenders unit, the gifted offenders unit and the narcotics unit.⁹¹ However, while the training received by the parole officers assigned to these specialized units is superior, they must still bear an overburdened caseload schedule. In 1970, the 21 specialized narcotic parole officers in the New York City area supervised 800 parolees who were under intensive supervision because of histories of drug dependence.⁹²

A Comparison of the Parole Officer's Power to Order Search and Seizure and to Aid in Job Placement. A comparison of the power given to the parole officers to effectuate their role as guardian of the community with the power they possess to further their role in the social rehabilitation of a parolee is a further demonstration of the overwhelming emphasis placed by the state on the custodial at the expense of the rehabilitative. The broad search and seizure powers available to parole officers to insure community safety, are in stark contrast to the lack of tools available to secure employment for employees.

a. Search and Seizure. In his efforts to be the guardian of the community, the parole officer keeps a close eye on the individual under his supervision. Visits to the parolee's home are frequent and regular. The parolee's employer is interviewed to determine how the parolee is progressing in his job. The parole officer spot checks with law enforcement agencies for any possible illegal activities in which the parolee may be suspected of engaging. Where necessary the parolee may be placed under surveillance.⁹³

In their search for parole violations, parole officers are not bound by ordinary limitations on search and seizure.⁹⁴ The standard parole

⁹¹ *Id.* But cf. Czajkoski, *Functional Specialization in Probation and Parole*, 15 CRIM. & DELINQ. 238 (1969), which attacks the idea of functional specialization.

⁹² N.Y. STATE DEP'T OF CORRECTIONAL SERVICES, ANNUAL REPORT 1971 at 13 [hereinafter cited as 1971 ANNUAL REPORT]. Compare with the recommended special caseload figure, *supra* note 87.

⁹³ FIELD PAROLE § 205.02(5).

⁹⁴ See, e.g., *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970) (rule excluding illegally seized evidence does not apply to parolees); *People v. Langella*, 41 Misc. 2d 65, 68, 244 N.Y.S.2d 802, 805 (Sup. Ct. Kings County 1963) (the test of reasonableness of search and seizure with respect to parolee is not the same as when applied to person whose rights are not similarly circumscribed); *People v. Randazzo*, 37 Misc. 2d 80, 81, 234 N.Y.S.2d 740, 742 (Surr. Ct. N.Y. County 1962), *aff'd*, 20 App. Div. 2d 850, 248 N.Y.S.2d 203 (1st Dep't), *aff'd*, 15 N.Y.2d 526, 254 N.Y.S.2d 99, 202 N.E.2d 549 (1964), *cert. denied*, 381 U.S. 953 (1965). But cf. *United States ex rel. Randazzo v. Follette*, 418 F.2d 1319, 1322 n.7 (2d Cir. 1969), where the court stated that "[i]t is possible" that a formulation whereby a search by a parole officer of the person, residence or effects of a parolee is held not to be a violation of the fourth amendment is "too broad." A parolee is said to be entitled to "some quantum of fourth amendment protection against unreasonable searches and seizures." *Id.*

agreement provides for the consent to any searches which the Board of Parole or its representatives in their discretion may see fit to make of the parolee's person, residence or any property or premises under his control.⁹⁵

While the courts permit special intrusion by a parole officer into a parolee's privacy, his constitutional rights vis-à-vis the police remain intact,⁹⁶ and are entitled to the same protection as the constitutional rights of others. Although regular police agencies are denied direct use of search and seizure power of the magnitude available to the parole authorities, that power belonging to the parole officer often spills over the boundaries needed for proper parole supervision, to the benefit of the police. A prime consequence of this spill-over is that if a parole officer, while searching a parolee on suspicion of a parole violation, finds contraband or other evidence of a crime, the evidence seized is admissible both in the subsequent parole revocation hearing and in any criminal prosecution based on the evidence.⁹⁷ Often the police authorities take advantage of the search and seizure power of parole officers by providing the parole officer with information pointing to a violation, accompanying him on his visit to the parolee, ostensibly to protect the parole officer, and then participating in the search. This was the case in *People v. Adams*⁹⁸ where the evidence seized was admitted at the parolee's subsequent criminal trial. The admission of

⁹⁵ Use of the extensive power of search and seizure is not based solely on the waiver of rights secured in the parole agreement, but is supported by a number of legal theories including: (1) that the entire parole process is an act of grace controlled by legislative discretion rather than by constitutional necessity. See *Marchand v. Director, United States Probation Office*, 296 F. Supp. 532, 534 (D. Mass. 1969); *Woods v. Steiner*, 207 F. Supp. 945 (D. Md. 1962). Adoption of this position means that parole is construed solely by the standards provided by statute, which the parolee must accept with all its attendant restrictions, or not at all. Certain restrictions may be attacked as unwise, unnecessary or ungenerous, but they cannot be said to be unconstitutional. (2) that the test of reasonableness of a search is not the same when applied to a parolee. *People v. Santos*, 31 App. Div. 2d 508, 509, 298 N.Y.S.2d 526, 528 (1st Dep't), *aff'd*, 25 N.Y.2d 976, 252 N.E.2d 861 (1969), *cert. denied*, 397 U.S. 969 (1970); *People v. Pelow*, 59 Misc. 2d 424, 426, 299 N.Y.S.2d 20, 22 (Buffalo City Ct. 1969). (3) that extensive powers of search are dictated by a parole officer's duty to supervise the parolee, *People v. Langella*, 41 Misc. 2d 65, 69, 244 N.Y.S.2d 802, 806 (Supreme Ct. Kings County 1963).

⁹⁶ See, e.g., *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970).

⁹⁷ *United States ex rel. Randazzo v. Follette*, 418 F.2d 1319, 1323 (2d Cir. 1969), *aff'g* 282 F. Supp. 10 (S.D.N.Y. 1968). However, with regard to the fourth amendment it may be argued that it is reasonable and necessary if there is to be a system of parole to require that a parolee give up some of the protection normally afforded by the fourth amendment in order to effectuate the smooth operation of the parole system, but it is unreasonable to force him to give up more than is required to insure that the objectives of the parole system are met. Thus, a parole officer can make a search that intrudes upon a parolee's privacy only to the extent that the search is necessary to confirm or deny a suspicion that a parole violation has occurred, but any evidence he finds will not be admissible in a criminal proceeding.

⁹⁸ 63 Misc. 2d 52, 310 N.Y.S.2d 7 (Schenectady County Ct. 1970).

the evidence was justified by the court on the grounds that the defendant had consented to the search by parole officers and that the parole officers had a duty to make the search.⁹⁹

Once a parolee is arrested by the police for a crime the Parole Board loses jurisdiction over him until he is returned to prison after disposition of the charges.¹⁰⁰ Therefore, a parole officer cannot, after an arrest, commit a search to discover evidence which the police had no authority to seize or initially overlooked.

b. Employment Disability. The tools available to a parole officer to deal with a parolee's employment problems are neither equal to the task nor comparable in magnitude to the powers he possesses to search and seize a parolee's property to ensure community safety.

Parolees encounter three obstacles in their efforts to secure employment. First, the general conditions of parole contain employment restrictions.¹⁰¹ Second, various business and licensing laws bar a person convicted of a felony from being licensed or employed in a particular business.¹⁰² Third, the parolee's criminal record must be made known

⁹⁹ *Id.* at 54, 56, 310 N.Y.S.2d at 7, 10. *But see* United States v. Hallman, 365 F.2d 289, 291 (3d Cir. 1966), in which the court, in a strongly worded opinion, held that the mere presence of a parole officer during a search does not legalize that search where the parole officer is merely the agent of the police. A further recognition by the courts of possible collusion between police and parole officers is elucidated in *People v. Way*, 65 Misc. 2d 865, 872, 319 N.Y.S.2d 16, 24 (Nassau County Ct. 1971), where the evidence seized by a parole officer was held inadmissible in a general trial because the police who had had the defendant under observation as a robbery suspect called the parole officer and asked him to cooperate in a search. It was apparent that the parole officer was not acting under his own initiative; rather, the court emphasized that the search was instigated, initiated, directed, arranged, controlled and participated in by the police and its prime purpose was to further police investigation. In summation the court concluded:

With an awareness that parole officers and police officers may, and frequently do, cooperate with each other, as for example, a policeman may make an arrest upon a parole violation, or he may accompany a parole officer into a parolee's residence for his protection The police officer may not, however, when lacking the essential constitutional ingredient of probable cause to legally make a search by virtue of his own right, induce a parole officer to search a parolee's home so that he may accompany him and search for evidence of crime for use upon a prospective criminal prosecution.

Id. at 871-72, 319 N.Y.S.2d at 22-23.

¹⁰⁰ *Le Clair v. Oswald*, 21 App. Div. 2d 17, 19, 248 N.Y.S.2d 101, 103 (3d Dep't 1964); *People ex rel. Paqua v. Fay*, 8 App. Div. 2d 856, 190 N.Y.S.2d 384 (2d Dep't 1959), *aff'd*, 8 N.Y.2d 897, 168 N.E.2d 821, 204 N.Y.S.2d 145 (1960); *Perillo v. N.Y. State Bd. of Parole*, 4 App. Div. 2d 355, 358, 65 N.Y.S.2d 139, 142 (3d Dep't 1957), *aff'd*, 4 N.Y.2d. 1013, 1014, 152 N.E.2d 540, 541, 177 N.Y.S.2d 523, 524 (1958).

¹⁰¹ In addition to the employment restrictions necessitated by surrender of drivers' licenses and not working in any business where liquor is sold, the Division of Parole and Community Services has established a list of generally disapproved areas of employment which include poolrooms, racetracks, boxing, wrestling and employment on the New York City waterfront. FIELD PAROLE § 211.0(C). The Division of Parole and Community Services also frowns on self-employment by a parolee, both for the difficulty and hard work it would involve for the parolee and because it would involve the use of special supervisory techniques by the parole officer. FIELD PAROLE § 211.03.

¹⁰² *E.g.*, junk dealers (N.Y. GEN. BUS. LAW § 61 (McKinney 1970)); private investigators or guards (N.Y. GEN. BUS. LAW §§ 74(2), 81(1) (McKinney 1970)); billiard room opera-

to an employer¹⁰³ and may be considered by an employer in assessing character and fitness of the applicant for the job sought.¹⁰⁴

In judging the response by the Department of Correctional Services to employment difficulties two facts become apparent. First, the Department has not successfully engaged in joint action with other state agencies to broaden the scope of occupations in which parolees may be successfully employed. The only liaison established to allow a field parole officer to aid his parolee in securing employment is for the purpose of selecting and processing parolees for certification and licensing in barbering, hairdressing and cosmetology.¹⁰⁵

Second, the parole officer has at his disposal no simple and effective method of removing the statutory job disability from a parolee. The two methods presently available for removal of statutory disabilities, a Certificate of Relief from Disability and a Certificate of Good Conduct, have not proved effective on any large scale. A Certificate of Relief from Disability is issued to an eligible offender¹⁰⁶ by the sentencing court or by the Board of Parole if the offender has been sentenced to prison.¹⁰⁷ Granting of the Certificate is in the discretion of the court or Board of Parole; it is not within the discretion or power of the parole officer or supervising officer. A major handicap with the Certificate of Relief from Disability is that the parolee must be a first offender. A previous misdemeanor conviction, for example, will bar first felony offenders from eligibility.

Persons not eligible for a Certificate of Relief from Disability may

tors (N.Y. GEN BUS LAW §§ 461, 467 (McKinney 1970)); attorneys (N.Y. JUDICIARY LAW § 90(4) (McKinney 1970)); licensed cashiers of checks (N.Y. BANKING LAW § 369(6) (McKinney 1971)); insurance adjusters (N.Y. INS. LAW § 123(9) (McKinney Supp. 1972)); and any job where alcoholic beverages are involved (N.Y. ALCO. BEV. CONTROL LAW § 102(2) (McKinney Supp. 1972)). Restrictions are also placed on occupations such as auctioneers, pharmacists, barbers, medical doctors, dentists, dental hygienists, certified public accountants, undertakers and real estate brokers. For a discussion of the effect of a criminal conviction on one's capacity to obtain a license see Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 541-47 (1962).

¹⁰³ The parole officer has the responsibility to make employers aware of the criminal record and parole status of prospective employees. There are, however, certain situations when this is not an automatic obligation, for example, where the parolee secures his job through his own efforts and the nature of his criminal record does not present undue risk to the particular employer. FIELD PAROLE § 211.0(D).

¹⁰⁴ Under N.Y. CORREC. LAW § 701(3) (McKinney Supp. 1972), state agencies may rely upon a past conviction as a basis for the exercise of discretion to refuse to employ or license a parolee. *Posner v. Kennedy*, 20 Misc. 2d 231, 195 N.Y.S.2d 408 (Sup. Ct. N.Y. County 1959); *Tanner v. DeSapio*, 2 Misc. 2d 130, 150 N.Y.S.2d 640 (Sup. Ct. Cayuga County 1956); *Falvey v. Hays*, 205 Misc. 546, 133 N.Y.S.2d 446 (Sup. Ct. N.Y. County 1954), *aff'd*, 285 App. Div. 879, 139 N.Y.S.2d 239 (1st Dep't 1955).

¹⁰⁵ FIELD PAROLE § 207.04.

¹⁰⁶ N.Y. CORREC. LAW § 700(1)(a) (McKinney Supp. 1972). To be an eligible offender, the prisoner must have had no more than one felony conviction. *Id.*

¹⁰⁷ *Id.* § 701(1).

apply for a Certificate of Good Conduct from the Board of Parole. The Certificate will only be granted five years subsequent to the offender's release from penal confinement or suspension of sentence. Even when issued the Certificate may be granted to end a legal disability only if it is provided by law that the Certificate will remove the disability in question. The value of the Certificate is further diluted by the fact that the issuance of Certificates of Good Conduct does not limit the lawful discretion of any licensing board, body or authority, either to grant or refuse a license, even though the person desiring the license has been granted a Certificate of Good Conduct. The final determination as to licensing, employment or the right to practice a profession remains in the discretion of the licensing body.

PAROLE REVOCATION

In New York State during 1970, more than one of every five persons under parole supervision were declared delinquent by a member of the Parole Board.¹⁰⁸ The great majority of those declared delinquent, 77.8 percent, were returned to State Correctional facilities as parole violators.¹⁰⁹ The figures for parole delinquency and revocation have shown a steady percentage increase in the past thirteen years.¹¹⁰

It can readily be seen from the above statistics that parole revocation procedures play a significant part in the overall criminal justice system in New York State. To the parolees, the possibility of parole revocation looms as a continuing threat of loss of freedom and return to prison. Parole revocation also has considerable impact on society as a whole; on the one hand, parole revocation procedures are designed to protect society from offenders who cannot successfully cope with parole, on the other, termination of parole interrupts the critical transitional period between imprisonment and complete readjustment to society as a free citizen. It is of crucial importance that New York State's parole revocation procedures be carried out with efficiency, rationality and fairness for the benefit of both the individual and the community at large. Recent New York and Supreme Court decisions have substantially expanded due process protections of parolees mov-

¹⁰⁸ *FACTS AND FIGURES 1970* at 27. The rate for a year period is calculated by dividing the total number of parolees supervised during all or part of the year by the total number of delinquencies. In 1970 there were 14,637 parolees under active supervision during all or part of the year, and 3,086 declarations of delinquency.

¹⁰⁹ *Id.* at 27-28.

¹¹⁰ *Id.* at 26. In 1961, the percentage of the parole population that had been declared delinquent was 12%.

ing through the revocation process, but the full impact of these decisions probably has yet to be felt in New York State.

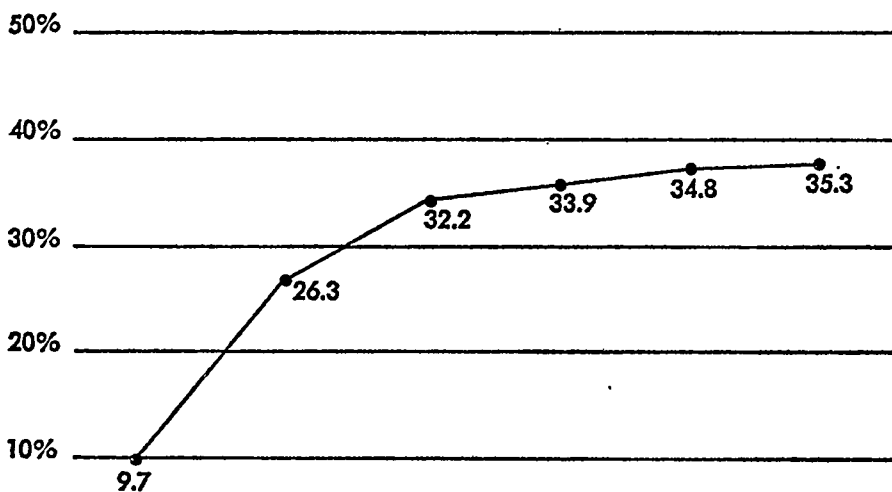
Before beginning a detailed evaluation of the New York Parole revocation process, a few further statistics regarding parolees subjected to this procedure may help to bring out the scale and impact of parole revocation in this state.

The parolee facing possible revocation is likely to be one released to parole supervision under conditional release status. Conditional releases violate their parole at a higher rate than parolees released to parole by action of the Board of Parole.¹¹¹ The parolee is most likely to be placed in delinquent status and be brought before the Board during his first full year under parole supervision.¹¹² The

¹¹¹ *Id.* at 27.

¹¹² *Id.* at 27-28.

YEARLY RATE OF REVOCATION FOR PAROLEES RELEASED
TO PAROLE SUPERVISION IN 1965



Years of Release	1st yr. after release	2nd yr. after release	3rd yr. after release	4th yr. after release	5th yr. after release
Rate (%)	9.7	26.3	32.2	33.9	34.8

This information was supplied to the McKay Commission by William C. Baker of the Department of Correctional Services. The 61 parole violators studied by the McKay Commission sample spent an average of 7.3 months under supervision before revocation.

parole violator is likely to have violated the conditions of parole on previous releases.¹¹³

Parolees convicted of a new crime while on parole supervision comprise an extremely small percentage of those returned to prison each year as violators. The figures for the period 1961-1970 indicate an average of less than two percent of those individuals revoked from parole in each year had committed a new crime while under community supervision.¹¹⁴ For example, in 1969,¹¹⁵ a total of 2,553 parolees were returned to prison in New York State. A categorial breakdown of this group indicates that 676 were returned because of purely technical violations, 309 were returned because of absconding, 1,314 were re-

¹¹³ The McKay Commission's sample study of parole violators indicate that the majority of men were repeat violators.

Previous Parole		
1. Never Before Paroled	24	
2. On Parole Once Before	18	
a. Violated Once		13
3. On Parole Twice Before	11	
a. Violated Once		4
b. Violated Twice		7
4. On Parole Three Times Before	3	
a. Violated Once		0
b. Violated Twice		0
c. Violated Three Times		3
5. On Parole Four Times Before	3	
a. Violated Once		0
b. Violated Twice		0
c. Violated Three Times		2
d. Violated Four Times		1
6. On Parole More Than Four Times	2	
a. Violated More Than Four Times		2

Thus, of the 37 previous paroles only 5 had been successful.

¹¹⁴ PAROLEES RETURNED TO NEW YORK STATE CORRECTIONAL FACILITIES WITH NEW SENTENCES AS FELONY OFFENDERS*

Year	No. of Parolees Returned to State Facilities as Convicted Felons**	% of Total Group Revoked From Parole
1961	209	1.5
1962	222	1.5
1963	256	1.7
1964	251	1.7
1965	212	1.4
1966	205	1.3
1967	219	1.3
1968	184	1.1
1969	254	1.6
1970	264	1.8

* This information was supplied to the New York State Special Commission on Attica by the Department of Correctional Services.

** These figures do not include those convicted of misdemeanors in New York and other states.

¹¹⁵ FACTS AND FIGURES 1970 at 27-28.

turned because of new arrests which resulted in no new commitment by the court, and 254, or 1.6 percent of the total, were returned for new arrests which resulted in new conviction and commitment.

Procedure for Parole Revocation

New York's parole revocation process comprises a series of steps taken by the Department of Correctional Services and the Parole Board: (1) to arrest and temporarily reincarcerate the parolee; (2) to bring charges against him for violations; (3) to collect and present evidence as to his alleged parole violation; and finally, (4) to determine whether the parolee will be returned to the correctional institution or returned to community supervision.

The New York Correction and Penal Laws provide a broad and rather vague framework within which the parole revocation process is carried out.¹¹⁶ These statutes outline in broad stroke the declaration of delinquency when there is reasonable belief that a parolee has violated the conditions of his parole, the personal hearing before the Board that follows a declaration of delinquency and the Board's decision either to return the parolee to the supervision of his officer or return him to prison. These statutory requirements are supplemented by court interpretations and by the Manual for Field Parole Officers used by the Department of Correctional Services to instruct and guide parole officers in the daily process involved in the supervision and revocation of a parolee.

The essential steps in New York's parole revocation procedures are summarized below as they existed in June, 1972.¹¹⁷

The initial impetus for the parole revocation machinery occurs when a parole officer has reasonable cause to believe one of the parolees

¹¹⁶ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972); *id.* § 216 (McKinney 1968), outline the course of conduct that the Board of Parole and the Department of Correctional Services must take when there is reasonable belief that violations of parole on conditional release have occurred. Section 216 provides the framework for the issuance of detention warrants and the actual temporary detention of the alleged parole violator. Section 212(7) provides that the Board of Parole shall at the first available opportunity permit the alleged violator to appear personally before a three member panel at a state correctional institution in order to explain the alleged violation, and the Board shall within a reasonable time make a determination either by revoking parole or dismissing the charge.

N.Y. PENAL LAW § 70.40(3) (McKinney 1971), states when and to what extent the tolling of a parolee's sentence is affected by a violation. These statutory provisions are augmented by 7 N.Y. CODES, RULES AND REGS., §§ 1.16-1.19 (1971), which discuss the proper proceedings on violation of parole, including issuance of warrants, procedure on new arrest and violation appearances at state operated correctional facilities.

¹¹⁷ The change in the parole revocation process occasioned by the decision of the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), will be discussed in detail in the text accompanying footnotes 152-185, 214-218.

he supervises has violated the conditions of his parole, or has lapsed or is about to lapse into criminal conduct.¹¹⁸ The parole officer then consults with a senior parole officer; collectively, they decide either simply to file a misconduct report since the infraction is not considered serious or alternatively, where a serious violation appears to have occurred, to issue a detention warrant signed by someone of at least the rank of a senior parole officer. If a warrant is issued, the parolee is temporarily detained pending a final decision.¹¹⁹ Within seven days after the detention warrant is issued a parole violation report prepared by the parole officer and signed by the senior parole officer is filed with a member of the Parole Board.¹²⁰ This report contains the parole officer's observations, specific charges, the parolee's defenses or explanation of the charges, and, if applicable, the statement of the arresting officer. The Parole Board member reviews the report and if any reasonable basis for the charge exists, makes a formal declaration of delinquency; this declaration is merely a statement of fact that the parolee is no longer in the constructive custody of the Parole Board and not a punitive determination.¹²¹ In addition, the Board member may recommend: (1) cancellation of the delinquency status, (2) return to community supervision, or (3) the Board member may feel that the violation report is an inadequate basis for making a decision and withhold recommendation until further investigation.

At this point in the parole revocation process the parolee is incarcerated, either at the institution to which he was sent under the return warrant, or to the place where he was detained under the original detention warrant. He has been charged and given a chance to respond to the charges in the parole violation report. This report has been reviewed by a single Parole Board member who has recommended how he believes the case should be resolved.

¹¹⁸ N.Y. CORREC. LAW § 216 (McKinney 1968). The Department of Correctional Services has given meaning to the words "[v]iolated the conditions of his parole in an important respect . . ." by emphasizing that a parole officer must give careful thought to a violation of parole report. No report should be submitted solely for the purpose of getting rid of a problem.

If there is some improvement in the parolee's situation over that which existed prior to his sentence, unless he had violated his parole in a very serious manner, the parole officer should not suggest his return before considerable effort has been made to affect a readjustment. This, however, would not prevail if the parolee constituted an actual serious risk in the community.

FIELD MANUAL § 215-01(3).

¹¹⁹ A parolee has no right to bail when he is detained by reason of lawful action of the Board of Parole pending ultimate determination of a charge that he has violated parole. *Hardy v. Warden*, 56 Misc. 2d 332, 335, 288 N.Y.S.2d 541, 544 (Sup. Ct. Queens County 1968).

¹²⁰ Sokoloff, *supra* note 50.

¹²¹ See note 153 *infra*.

Reasonable Cause for Issuance of a Detention Warrant

In order to issue a detention warrant for the suspected parole violator, the parole officer and his supervisor must have "reasonable cause" to believe that the parolee has either violated the conditions of parole, lapsed into criminal ways, or is about to lapse into criminal ways.¹²² The New York courts have given the parole officer and the senior officer with whom he consults, broad discretion in determining what constitutes reasonable cause. The Court of Appeals held, in *People ex rel. Natoli v. Lewis*,¹²³ that in determining the question of the power of a parole officer to issue a detention warrant after arrest of the parolee on a criminal charge, a reviewing court could not go behind the warrant to determine whether reasonable cause was present.¹²⁴ The court asserted that once the parole officer finds reasonable cause, there is no power vested in the Parole Board to prevent the issuance of a mandatory warrant.¹²⁵ The court concluded that the reasonable cause standard for a parole detention warrant is far less stringent than the standard of guilt necessary for an initial criminal arrest, reasoning that the power to issue a detention warrant stems from the parolee's original conviction and not for the new alleged crime for which the parolee is presumed innocent.¹²⁶ Consistent with the reasoning of the *Natoli* case, the New York Court of Appeals has recently held that reasonable cause to issue a warrant existed, where the parole officer, though not actually visiting the prisoner's home, had received information from the police that the parolee was suspected of a robbery and was not to be found at his home.¹²⁷

Once reasonable cause has been found, the detention warrant must be issued and signed by someone of at least the rank of senior parole officer. In exigent circumstances only, an emergency warrant effective for up to twenty-four hours may be issued by a parole of-

¹²² FACTS AND FIGURES 1970 at 24.

¹²³ 287 N.Y. 478, 481, 41 N.E.2d 62 (1942), *rev'g* 262 App. Div. 347, 29 N.Y.S.2d 544 (3d Dep't 1941). In the case of *United States ex rel. Randazzo v. Follette*, 418 F.2d 1319 (2d Cir. 1969), *aff'g* 282 F. Supp. 10 (S.D.N.Y. 1968), Judge Hays, speaking for the Second Circuit stated that the issuance of a detention warrant for parolees did not depend on a showing of probable cause, and those procedural safeguards sufficient in the case of a parolee would not be adequate in the arrest of an ordinary citizen. 418 F.2d at 1322.

¹²⁴ 287 N.Y. at 481, 41 N.E.2d at 64.

¹²⁵ *Id.* at 481, 41 N.E.2d at 64.

¹²⁶ *Id.* at 482, 41 N.E.2d at 64. Thus, a detention warrant once having been issued with reasonable cause cannot be lost because of a subsequent finding that the guilt of the crime charged was not established beyond a reasonable doubt.

¹²⁷ *People v. Simons*, 22 N.Y.2d 533, 240 N.E.2d 22, 293 N.Y.S.2d 521 (1968). Judge Keating, concurring, noted that the statements of the parolee's alleged accomplices would be insufficient to convict the parolee of robbery but would be sufficient to sustain a revocation of parole, thus justifying holding the defendant without beginning formal criminal procedures. *Id.* at 543, 240 N.E.2d at 27, 293 N.Y.S.2d at 529.

ficer without the authority of a senior parole officer.¹²⁸ Such a warrant is regarded as an extreme measure and issued only in rare instances where circumstances require immediate action.¹²⁹ Certain temporal constraints are placed on the issuance of a detention warrant. Specifically, if a warrant is issued after the expiration of a prisoner's maximum sentence, this warrant is ineffective.¹³⁰ However, if a warrant is issued and delivered to the police for execution before expiration of the maximum sentence, it is valid even though not actually executed until after such time.¹³¹ It is a general rule that unless due diligence is exercised by parole authorities in issuing and executing detention warrants, the violation is waived and jurisdiction lost.¹³² Due diligence was not exercised where the warrant was issued eight months after the alleged violation and was not executed until 16 months after that violation, 21 days after expiration of the maximum sentence.¹³³

If the parole officer and his superior determine that a warrant should not be issued, the matter may be dropped if the reasonable belief of parole violation arises from the parole officer's suspicions or observations. In those cases where reasonable cause arises from the arrest of the parolee by the police, it is the responsibility of the parole officer to prepare a misconduct report when no warrant is issued.¹³⁴

The determination of reasonable cause and the issuance of a detention warrant are primarily administrative matters left in the hands of parole officers. The courts have neither interfered with this determination nor allowed this determination to be subject to review by a parole board member. It is clear that administrative efficiency has been deemed to outweigh the need for safeguards to the parolee. And

¹²⁸ 7 N.Y. CODES, RULES & REGS. § 1.17(a) (1971), provides that a warrant can only be issued by a "Board member or a designated officer." The term "designated officer" includes senior parole officers, officers of the Department of Correctional Services holding a title above senior parole officer, and any officer who is designated by a superior to act in any of the prescribed titles. *See also* *People v. Way*, 65 Misc. 2d 865, 319 N.Y.S.2d 16 (Sup. Ct. Nassau County 1971), which held that the authority to execute a detention warrant belongs to the police as well as parole officers.

¹²⁹ Sokoloff, *supra* note 50.

¹³⁰ *People ex rel. La Placa v. Heacox*, 238 App. Div. 217, 220, 263 N.Y.S. 407, 410 (4th Dep't 1933).

¹³¹ *Id.*

¹³² *People ex rel. Grosso v. Additon*, 185 Misc. 670, 671, 59 N.Y.S.2d 357, 358 (Sup. Ct. Westchester County 1945).

¹³³ *Id.* In *People v. Valle*, 7 Misc. 2d 125, 164 N.Y.S.2d 67 (N.Y.C. Ct. Special Sessions 1957), the court held that the failure to execute a warrant from December 26, 1956 to March 15, 1957, seven days after the probation period had ended, without either showing in the record that the appellant was hiding or evading service of the warrant or was incarcerated after a conviction for another crime on offense, is tantamount to a waiver of the parolee's failure to report to his probation office.

¹³⁴ FIELD PAROLE § 215.

while the effect of the reasonable cause determination in itself is not a final decision to revoke parole, the immediate impact on the parolee is one of arrest and reincarceration. This complete concentration of decision-making power among parole officers, without recourse to some independent authority, raises the possibility of abuse.

The Parole Violation Report and Initial Review

The parole violation report which is filed with a member of the Parole Board within seven working days after the issuance of the detention warrant, is designed to serve as a documentation of all information relevant to the case.¹³⁵ Apart from the personal appearance of the parolee and the calling of witnesses before the Parole Board, this report serves as the sole factual basis upon which a final decision will be rendered.

The report consists of the general history and background of the parolee, including a history of the parole supervision and the parolee's general adjustment to parole, the delinquency date,¹³⁶ the circumstances and nature of the violation in terms of specific charges, and the police officer's statement or affidavit if the parolee was arrested by the police.¹³⁷ The report will also contain the details of the violation with an explanation, elaboration and proof of charges, the parolee's statement,¹³⁸ which may include defenses and explanations of the charges, the present status of the case, indicating the whereabouts and status of the parolee, and the original detention warrant.¹³⁹

The parole violation report is written by the field parole officer but must be countersigned by the senior parole officer.¹⁴⁰ In the New York City area, the report is routinely reviewed and signed by a supervising parole officer.¹⁴¹ At the conclusion of the violation report, each parole officer who has signed the report will make a terse recommendation either to "restore" the parolee to supervision or "return" him to the correctional institution.¹⁴²

¹³⁵ 7 N.Y. CODES, RULES & REGS. § 1.17(b) (1971).

¹³⁶ In setting the delinquency date, it is the parole officer's duty to select the earliest date that can be maintained. Sokoloff, *supra* note 50.

¹³⁷ When a new crime is allegedly committed by a parolee, the parole officer responsible for that parolee does not make an independent investigation but relies on information supplied by the police. Sokoloff, *supra* note 50.

¹³⁸ FIELD PAROLE § 215.01.

¹³⁹ *Id.*

¹⁴⁰ *Id.* § 216.

¹⁴¹ *Id.*

¹⁴² *Id.* § 215.01(G). The parole officer may express his opinion concerning disciplinary or delinquency action. However, the recommendation must not be stated so as to preclude any action by a Board member. For example, according to the Department of Correctional

Types of Violations. The parole violation report may contain allegations of one or more of three types of violations, classified as New Arrest, Technical Violation and Absconding.¹⁴³ A new arrest involves the arrest of a parolee for any kind of new offense.¹⁴⁴ A technical violation involves infractions of the 15 standard rules and regulations of parole or of any additional stipulated parole conditions.¹⁴⁵ Absconding occurs when a parolee has been absent from his approved parole residence for a protracted period of time and a subsequent investigation fails to locate him.

Data collected by the McKay Commission at Attica indicates that parole is most frequently revoked for technical violations.

FIGURE 1:
TYPE AND FREQUENCY OF VIOLATIONS WHICH ENDED LAST PAROLE OF 1971¹⁴⁶

	Whites	Blacks	P.R.	Indians	Total
1. Technical Violation Only	13	8	0	1	22
2. Technical Violation & Suspicion of Crime	3	3	0	0	6
3. Technical Violation & Crime	0	6	1	0	7
4. Absconding Only	8	1	2	1	12
5. Absconding & Suspicion of Crime	1	0	0	0	1
6. Absconding & Crime	4	1	0	0	5
7. New Crime	2	1	0	0	3
8. Suspicion of Crime (no charge brought)	3	1	0	0	4

The parole violation report usually contains more than one violation.¹⁴⁷ This is especially true when a new crime has been committed, since the Department of Correctional Services has emphasized

Services, the following presentation is acceptable: "It is the opinion of the parole officer that further leniency may result in recidivism or absconding. It is, therefore, suggested that consideration be given to the return of the parolee to prison." The following presentation is unacceptable: "It is impossible to supervise or control the parolee and, therefore, he should be returned to prison." *Id.*

¹⁴³ *Id.* § 215.

¹⁴⁴ *Id.* § 215.01(2). If a new offense were committed in another state that offense would have to be considered as a felony in New York in order for full application of revocation procedures. See *People ex rel. King v. Morhous*, 286 App. Div. 925, 142 N.Y.S.2d 672 (3d Dep't 1955) (mem.), citing that section.

¹⁴⁵ See *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971), where the court determined among other things that the Parole Board had unlimited discretion in determining whether technical violations would be sufficient to return a parolee to prison.

¹⁴⁶ The figures for the New York State Correctional System as a whole indicate that the majority of delinquencies in any one year are for technical violations and absconding. In 1971 less than 10% of the parolees whose parole was revoked had been convicted of new felony offenses while under community supervision. *FACTS AND FIGURES 1971* at 24.

¹⁴⁷ *FIELD PAROLE* § 215.01(E)(1).

to its parole officers the great importance of listing all possible violations in order to protect the Board's freedom of action should the parolee be acquitted from the new criminal charge and seek a writ for release from continued detention.¹⁴⁸ For example, if a parolee is charged with robbery committed while he was intoxicated and in the early hours of the morning, the intoxication and late hours are charged separately to strengthen the position of the parole authorities. Similarly, when a parolee absconds, the fact that he failed to report, left his residence without permission and quit his job are reported as separate counts.

Review by Board Member. The completed and approved violation report is sent to a single Parole Board member for initial review and recommendation. If reasonable basis for the charges exist, the Board member makes a formal declaration of delinquency which is merely a statement of fact that the parolee is no longer in constructive custody of the Parole Board and is not a punitive determination.¹⁴⁹ Following issuance of the formal delinquency declaration and an examination of the report, the Board member will recommend one of the three possible actions to be taken on the basis of the violation report.¹⁵⁰ If the Board member recommends that the parolee be returned to the correctional facility for detention until his case is reviewed by a three-member Parole Board panel, the Board member will issue a return warrant ordering that the parolee be returned to the appropriate correctional institution.¹⁵¹ The parolee's delinquency status will be cancelled, if the Board member so recommends. The Board member can withhold recommendation until further investigation is made of the case if he feels that the violation report is an inadequate basis for making a decision.

The recommendation of the Parole Board member is supposed to take into consideration the well-being of the individual and the community, as well as the details of the violation. Although New York

¹⁴⁸ *Id.*

¹⁴⁹ In *Harris v. State*, 21 Misc. 2d 89, 91, 197 N.Y.S.2d 122, 124 (Ct. Cl. 1960), the court stated that:

A prisoner is not entitled to credit for the time which elapsed between the date of his delinquency as fixed by the Parole Board and the date when he is returned to prison. During that time his absence from prison was unlawful and he was no longer in the custody of the Board of Parole and thus the time could not constitute actual or constructive service of his time of imprisonment.

Id. at 91, 197 N.Y.S.2d at 124, quoting *People ex rel. Dote v. Martin*, 294 N.Y. 330, 333, 62 N.E.2d 217, 218 (1945). See also *Freeman v. New York State Correction Dep't*, 20 App. Div. 2d 825, 247 N.Y.S.2d 415 (3d Dep't 1964) (per curiam).

¹⁵⁰ See text accompanying note 121 *supra*.

¹⁵¹ 7 N.Y. CODES, RULES & REGS. § 1.17(b) (1971).

courts have supported Board action in returning a parolee to prison solely for violation of technical rules of parole, the Department of Correctional Services prides itself on the Board's willingness to consider whether the technical violation truly presents a threat either to the individual or to the community, and if no such threat exists, to recommend that the parolee be restored to supervision in the community.

The Preliminary Hearing — Due Process

The landmark Supreme Court decision, *Morrissey v. Brewer*,¹⁵² handed down on June 29, 1972, *inter alia* introduced the constitutional requirement of a preliminary hearing following the detention of parolees suspected of violations. This case clarified the application of due process rights and protections to the entire revocation process, it marks a sharp departure from the previous administrative and legal approach to parole revocation.

The Pre-Morrissey Arguments Against Due Process in Parole Revocation. Before *Morrissey*, the majority position in the United States was that due process protections did not apply to parole revocation procedures.¹⁵³ This approach is supported by several different theories. First, it has been argued that protections warranted in a courtroom are not necessary at the parole revocation hearing, which is non-adversarial in nature.¹⁵⁴ This theory rests on the premise that all those pres-

¹⁵² 408 U.S. 471 (1972).

¹⁵³ Until very recently, most New York courts had denied most due process protections at parole revocation hearings. *See, e.g.*, *People ex rel. Allen v. Follette*, 33 App. Div. 2d 1051, 309 N.Y.S.2d 128 (2d Dep't 1970); *People ex rel. Brock v. La Vallee*, 33 App. Div. 2d 722, 307 N.Y.S.2d 981 (3d Dep't 1969); *People ex rel. Ochs v. La Vallee*, 33 App. Div. 2d 80, 307 N.Y.S.2d 982 (3d Dep't 1969); *People ex rel. Smith v. Deegan*, 32 App. Div. 2d 940, 303 N.Y.S.2d 789 (2d Dep't 1969); *People ex rel. Johnson v. Follette*, 58 Misc. 2d 474, 295 N.Y.S.2d 565 (Sup. Ct. Dutchess County 1968). The fourth department of the appellate division was the only one which had found a constitutional right to representation by counsel, but this right was based on the state constitution not the federal. *People ex rel. Combs v. La Vallee*, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't), *app. dismissed*, 22 N.Y.2d 857, 239 N.E.2d 743, 293 N.Y.S.2d 117 (1968). It should be noted that the denial of counsel was statutory and these cases all passed on the constitutionality of that statute. *See also* *People ex rel. Frisbie v. McEvoy*, 64 Misc. 2d 840, 844 N.Y.S.2d 684, 688 (Cortland County Ct. 1970), which held that the right to counsel was available to a parolee in a situation where a decision to revoke the prisoner's conditional release might result in reincarceration for a term in excess of that to which the parolee had been sentenced. *See also* *Buchanan v. Clark*, 446 F.2d 1379 (5th Cir. 1971); *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *Barnes v. United States*, 445 F.2d 260 (8th Cir. 1971); *Heezen v. Daggett*, 442 F.2d 1002 (8th Cir. 1971); *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968); *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); *Richardson v. Markley*, 339 F.2d 967 (7th Cir. 1965); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); *Washington v. Hagan*, 287 F.2d 332 (3d Cir. 1960), *cert. denied*, 366 U.S. 970 (1961).

¹⁵⁴ *People ex rel. Smith v. Deegan*, 32 App. Div. 2d 940, 303 N.Y.S.2d 789 (2d Dep't 1960). In *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971), the court expressed concern

ent at the hearing are concerned with the rehabilitation of the parolee. The Parole Board is seen as parent withdrawing a privilege for the well-being of the parolee, rather than as an administrative body meting out punishment.¹⁵⁵ The validity of this approach appears to have been already greatly weakened by the Supreme Court's ruling in *In re Gault*,¹⁵⁶ which held that a tribunal's parental attitude is no substitute for the protections of procedural due process.

A second argument, the constructive custody theory, considers the parolee to be in the legal custody of the Parole Board until the expiration of the maximum sentence.¹⁵⁷ Revocation of parole would thus merely exchange one form of custody for another, and thereby negating any need for full due process protections.¹⁵⁸ This approach ignores the very real differences between conditional freedom and incarceration.

The contract theory, a third approach, regards the parolee and the Parole Board as parties to a contract under which the parolee promises not to violate the rules of parole in consideration for his release.¹⁵⁹ This theory is highly unrealistic in its assumption that the parolee actually "negotiates" or "accepts" a contract since his refusal to accept those conditions would result in continued incarceration.

The right-privilege distinction is a fourth justification that has been used to deny the applicability of due process to parole revocation. The Supreme Court's decision in *Escoe v. Zerbst*¹⁶⁰ has been cited for the proposition that where mere privileges which are a matter of grace are involved, as opposed to rights, they may be taken away without due process protections. The right-privilege distinction has lost much of its force in recent years, as for example in the decision of the Supreme Court in *Goldberg v. Kelly*,¹⁶¹ which disavowed the distinction and

that an adversary hearing with the full range of rights given defendants accorded in criminal proceedings would destroy the *parens patriae* function of the parole board. *Id.* at 949.

¹⁵⁵ Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963).

¹⁵⁶ 387 U.S. 1 (1967).

¹⁵⁷ N.Y. CORREC. LAW § 212(6) (McKinney Supp. 1972). See Jones v. Cunningham, 371 U.S. 236, 241-42 (1963), where the Supreme Court found such custody as sufficient to enable the parolee to maintain a habeas corpus proceeding.

¹⁵⁸ United States *ex rel.* Nicholson v. Dillard, 102 F.2d 94, 96 (4th Cir. 1939); People *ex rel.* Ochs v. LaValle, 33 App. Div. 2d 80, 307 N.Y.S.2d 982 (3d Dep't 1969).

¹⁵⁹ People v. Randazzo, 37 Misc. 2d 80, 82, 234 N.Y.S.2d 740, 743 (Sup. Ct. N.Y. County 1962), *aff'd*, 20 App. Div. 2d 850, 248 N.Y.S.2d 203 (1st Dep't), *aff'd*, 15 N.Y.2d 526, 202 N.E.2d 549, 254 N.Y.S.2d 99 (1964), *cert. denied*, 381 U.S. 953 (1965). See also United States v. Wilson, 32 U.S. 150 (1833), which held that a pardon was a contract which a prisoner was free to accept with the conditions imposed on it or to reject it.

¹⁶⁰ 295 U.S. 490 (1935).

¹⁶¹ 397 U.S. 254 (1970). See also Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). See also *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 67-68 (1970).

substituted a balancing test measuring the impact of the loss on the individual against the interest of the government in summary adjudication.

Part of the hesitancy of the courts to expand due process protection to the parole revocation hearing has of course been based on the fear of overburdening the administration of the correctional system,¹⁶² and the courts which have the duty of reviewing such administrative determinations.¹⁶³ Opponents of expanded due process protection point to the right to counsel as a prime area where administrative concerns of efficiency and expense are seen to outweigh the benefits derived by the parolee. Judge Breitel, dissenting in *People ex rel. Menechino v. Warden*¹⁶⁴ predicted that if right to counsel were granted, due process would be extended to all aspects of the hearing which would take on all the characteristics of an adversary proceeding before a judicial tribunal. Judge Breitel further warned that expanded due process protection would result in practical problems of lack of sufficient funds, personnel and facilities to properly administer an expanded concept of parole revocation.¹⁶⁵ He and Judge Scileppi, in a separate dissenting opinion, also argued that the legislature is better equipped than they to order changes in the operation of the parole system.¹⁶⁶

The Morrissey Decision. The Supreme Court in *Morrissey* did not accept any of the traditional theoretical arguments against the extension of due process protections to parole revocation procedures. The court viewed parole revocation as a two-step process. The first step consists of a factual determination of whether there has in fact been

¹⁶² See generally *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 394-95, 267 N.E.2d 238, 249-50, 318 N.Y.S.2d 449, 464-65 (1971) (Breitel, J., dissenting).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 394-95, 267 N.E.2d at 249, 318 N.Y.S.2d at 464. Judge Breitel predicted that following the granting of such due process protection as the right to counsel, issue would be raised as to:

Are the hearings to be recorded? Where will they be held? Who is to assign counsel for indigent parolees? . . . Will hearsay evidence be admissible? . . .

Id. The accuracy of Judge Breitel's prophesy has yet to be seen, for cases extending *Menechino's* application have left the limits of its due process protections intact. In *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971), the court held that juvenile delinquents who had been paroled from training school were entitled to a hearing and assistance of counsel if there was action taken to revoke parole. The court limited due process protections to "notice, a hearing and the aid of counsel," all within the scope of protections imposed by *Menechino*. Thus while the *Menechino* doctrine was applied to a new situation, juvenile delinquent parole revocation, the due process rights advanced were not in and of themselves expanded.

¹⁶⁵ 27 N.Y.2d at 395-97, 267 N.E.2d at 250, 318 N.Y.S.2d at 465-66. He also noted that this is especially true in New York State with its unique problems of population, urbanization, crime rate and already overburdened Parole Board. *Id.*

¹⁶⁶ *Id.* at 392-95, 267 N.E.2d at 248, 318 N.Y.S.2d at 462-45 (Scileppi & Breitel, JJ., dissenting).

a violation of parole. Only if a violation is found to exist does the second step take place, a determination whether, based upon the violation, the parolee should be reincarcerated. Making this decision calls for the use of some facts, but primarily involves the Board's ability to judge the probable future success of parolees.¹⁶⁷

The basic question confronting the Supreme Court in *Morrissey* was whether due process applies, in any form, to the parole revocation process. The Court's initial bench mark was that "revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."¹⁶⁸ The court did not stop at this point but proceeded to recognize that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee"¹⁶⁹ The liberty of parole, whether it is considered a right or a privilege, "is valuable and must be seen as within the protection of the Fourteenth Amendment."¹⁷⁰ The revocation of parole calls for "some orderly process, however informal, which will embody that protection."¹⁷¹

Once the court had determined that some due process protections were applicable it moved to the second question, how much process was due. The Court emphasized the flexible nature of due process protections, a flexibility determined by the particular situations. To determine the extent of due process applicable to parole revocation the Court compared the interests of the State with those of the parolee and of society in general. The Court recognized the State's "overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial,"¹⁷² and in having their parole boards operate with sufficient discretion; but the Court declared a simple factual hearing would not interfere with the Board's exercise of discretion and in fact, the discretionary aspect of parole revocation is not reached until after there has been a determination of a violation. The Court could find no state interest in revoking parole by summary treatment.¹⁷³ The Court also referred to society's interest in the prevention of the termination of the parolee's liberty based on erroneous information, and in the treatment of the parolee with basic

¹⁶⁷ *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972).

¹⁶⁸ *Id.* at 480.

¹⁶⁹ *Id.* at 482.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 483.

¹⁷³ *Id.* at 483-84.

fairness in order to enhance his chance for rehabilitation by avoiding a feeling of arbitrariness on the part of the parolee.¹⁷⁴

The *Morrissey* Court concluded that most states have recognized that they have no interest in revoking parole without procedural guarantees.¹⁷⁵ What is needed is an effective, but informal, hearing structured to ensure that the findings of violation will be based on proven facts and that the exercise of discretion will be an educated one. Thus, due process first requires that a prompt preliminary hearing be held promptly after the parolee's arrest. The preliminary hearing would determine "whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."¹⁷⁶ This determination would be made by an independent hearing officer, that is, one not having taken part in the initial decision to institute revocation proceedings.¹⁷⁷

The rights accorded the parolee at the preliminary hearing include notice stipulating: (1) that the hearing will take place, (2) what the alleged violation is, and (3) that the purpose of the hearing is to determine whether there is probable cause to believe the parolee has committed the violation alleged. At the hearing the parolee may appear and testify in his own behalf, present evidence or witnesses favorable to him and request confrontation of those who have given adverse information on which revocation might be based and question them except where such confrontation would expose the informants to harm. The hearing officer is required to make a summary of all that happens at the hearing and based on that information determines if there is probable cause to hold the parolee for the decision of the Parole Board on revocation. The hearing officer, in rendering his decision, must state both the reasons and the evidence underlying the decision.¹⁷⁸ The *Morrissey* case then went on to require a revocation hearing by the Parole Board.¹⁷⁹

The initial judicial reaction to *Morrissey* has been to hold in *People ex rel. Van Burkett v. Montanye*¹⁸⁰ that the *Morrissey* mandate that the Parole Board must follow due process of law in revoking

¹⁷⁴ *Id.* at 484.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 485.

¹⁷⁷ *Id.* at 486.

¹⁷⁸ *Id.* at 486-87.

¹⁷⁹ See text accompanying notes 216-18 *infra*.

¹⁸⁰ 70 Misc. 2d 907, 335 N.Y.S.2d 196 (Wyoming County Ct. 1972).

parole shall be selectively retroactive.¹⁸¹ Although in the *Morrissey* decision the Supreme Court said nothing about its retroactive application, the New York Court of Appeals felt that its decision in *People ex rel. Maggio v. Cassles*¹⁸² to apply on a selectively retroactive basis the *Menechino* rule, which established the right to counsel in parole revocation hearings in New York, provided precedent for the selective retroactivity of *Morrissey*.¹⁸³ The Supreme Court in *Morrissey* had not dealt with the applicability of the right to counsel at any stage of the revocation process, however, the New York State Supreme Court in *Richardson v. New York State Board of Parole*¹⁸⁴ fully reviewed the *Morrissey* and *Menechino* holdings and declared the right to counsel applicable to the preliminary hearing as well as to the revocation hearing. The court reasoned that the right to counsel was necessary at the preliminary hearing because it was at this stage in the proceedings that the essential charges of parole revocation are crystallized.¹⁸⁵

The Parole Revocation Hearing

The Parole Board has the authority to make all final determinations regarding parole violations.¹⁸⁶ After review of the parole violation report by a single Board member, the parole revocation hearing is the final stage where binding decisions are made.

A hearing in a parole revocation case is mandated by statute.¹⁸⁷ Unlike the initial hearing, it is designed to examine and determine the validity of specific, disputed factual charges on the basis of evidence presented. Thus, the hearing has been characterized as an accusatory proceeding where the parolee's freedom or reimprisonment depends upon the panel's factual findings regarding alleged misconduct.¹⁸⁸

Recent years have seen considerable ferment in the area of extension of due process protections to parole revocation hearings. Decisions

¹⁸¹ *Id.*

¹⁸² 28 N.Y.2d 415, 271 N.E.2d 517, 322 N.Y.S.2d 668 (1971).

¹⁸³ The court in *Van Burkett* did not set boundaries for selective retroactivity. However, it did state that the petitioner who had a hearing in January of 1972, which was insufficient by due process standards, was entitled to the protection of *Morrissey*. 70 Misc. 2d at 909, 335 N.Y.S.2d at 198.

¹⁸⁴ 71 Misc. 2d 36, 335 N.Y.S.2d 764 (Sup. Ct. N.Y. County 1972).

¹⁸⁵ *Id.* at 41-42, 335 N.Y.S. 2d at 770.

¹⁸⁶ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972). Compare the current law with N.Y. PRISON LAW § 218 (McKinney 1924), which provided for determination of parole revocation by a jury trial rather than Parole Board action.

¹⁸⁷ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972).

¹⁸⁸ *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 381, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 453 (1971).

extending the scope of such protections have left unclear the exact boundaries of due process in this context. There is no doubt, however, that New York's parole revocation hearing must be substantially modified and expanded to comply with newly expounded constitutional requirements.

General Description of the Hearing. The revocation hearing usually takes place at the correctional institution where the parolee has been interred under the return warrant.¹⁸⁹ The revocation hearing follows review by a single Board member¹⁹⁰ at the first available opportunity.¹⁹¹ Usually a minimum of four weeks elapses between the initial review by a single Board member and the parole revocation hearing.¹⁹² The enabling act also provides that the hearing be held before a panel of three Board members,¹⁹³ but in practice the panel may consist of two Board members other than the single member who initially reviewed the violation report.¹⁹⁴

The accused violator has a right to appear personally before the panel,¹⁹⁵ and has the right to appear with counsel.¹⁹⁶ The parolee is not given written notice of the charges pending against him, his only information stems from communication with his parole officer.¹⁹⁷ However, at the time of the hearing the parolee and his attorney have access to the violation report written by the parole officer.¹⁹⁸ The parolee may confront his parole officer or witnesses marshalled against him, as well as present witnesses on his own behalf. When measured by

¹⁸⁹ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972), stipulates that the hearing shall be either at an institution under the jurisdiction of the Department of Correction or at such other place as may be designated. The New York State Parole Officers Field Manual states that parolees placed in delinquent status will be returned to the nearest prison authorized to receive violators. FIELD PAROLE § 217(4)(A). Compare New York's requirement with the federal system where the parolee can request that the hearing take place either locally or at the federal institution to which he will be returned.

¹⁹⁰ 7 N.Y. CODES, RULES AND REG. § 1.17(b) (1971).

¹⁹¹ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972).

¹⁹² Sokoloff, *supra* note 50.

¹⁹³ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972).

¹⁹⁴ Sokoloff, *supra* note 50.

¹⁹⁵ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972). *But see* Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197-98 (1970), where the author points out that in 25 states the parolee does not have any opportunity to be heard at revocation hearings as these states either do not require a hearing or require only *ex parte* proceedings for parole revocation.

¹⁹⁶ *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

¹⁹⁷ In the federal system the warrant application states the charges and the evidence in sufficient detail to give notice and permit preparation of effective defense. *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972).

¹⁹⁸ Sokoloff, *supra* note 50.

the number and type of questions asked, the hearings are perfunctory in nature.¹⁹⁹

The Parole Board panel reviews the recommendation of the single Board member and either affirms the recommendation or makes a new decision as to the parolee's disposition. Only a majority of the panel is needed to make a final decision to return a parolee to a correctional institution,²⁰⁰ however, where a parolee is to be restored to super-

199 QUESTIONS IN NON- <i>Menechino</i> VIOLATION HEARINGS				
Number of Questions		Number of Inmates		
1-10		23		
11-15		12		
16-20		4		
21-25		3		
26-30		1		
31-35		2		
		—		
		45		

TYPE OF QUESTIONS ASKED AT NON- <i>Menechino</i> VIOLATION HEARING				
Total Number of Questions Asked	Violation	Drug/ Alcohol Problem	Other Moti- vational Analysis	Misc.
9	9			
10	10			
11	8			3
18	7		8	3
9			9	
5	2		2	1
9	5		4	
7	4		3	
21	21			
22	15		3	4
12		12		
10			2	8
31	10		14	7
15	7		6	2
11	11			
28	13	15		
9	2	5		2
11	11			
21	7		14	
8	6			2
10	6			4
20	4	5	7	4
7	2		2	3
16	6		10	
14			14	
34	28		6	
11	7		3	1
10	10			
8	4		1	3

²⁰⁰ The courts interpreted former section 219 of the Correctional Law to mean that the Board had no choice but to send the parolee back to prison for the remainder of his

vision, or the delinquency cancelled, such action can be taken only upon unanimous consent of the three members considering the case.²⁰¹ The parolee is notified of the Board's decision by written notice received within a few weeks after the hearing. Notification of the Board's decision usually does not explain the reasons behind it.

The fact that an individual's parole has once been revoked does not automatically preclude parole at a later date for present or future offenses.²⁰² Credit is given to the reincarcerated parolee for the time spent on parole, and previously earned good time credits are not lost by revocation. However, a conditional release violator does not receive credit for time spent under parole supervision, and he loses the accumulated good behavior time earned before he had been conditionally released.²⁰³ There is no periodic schedule for the rehearing of a reincarcerated parolee. The next hearing date is set on an individual basis by the Board.

New York courts have restricted themselves to only a limited review of a parole revocation hearing. The accepted judicial posture is that the Parole Board has absolute discretion in its decisions as long as they do not violate a positive statutory requirement.²⁰⁴ Federal courts similarly have consistently ruled that the reviewing court cannot substitute its judgment for that of Parole Boards or inquire into the sufficiency or reliability of the information upon which the court based its decision.²⁰⁵

maximum term when he was convicted of a new offense. *People ex rel. Treadway v. Morhous*, 276 App. Div. 812, 93 N.Y.S.2d 231 (3d Dep't 1949), *motion for leave to appeal denied*, 276 App. Div. 934, 94 N.Y.S.2d 187 (3d Dep't), *cert. denied*, 339 U.S. 924 (1950); *People ex rel. Dayes v. Morhous*, 267 App. Div. 851, 45 N.Y.S.2d 756 (3d Dep't 1944). However, under the new section 219, which has since been repealed, the case law, as seen in *Seible v. Oswald*, 32 App. Div. 2d 696, 300 N.Y.S.2d 708 (3d Dep't 1969), grants the Board discretion as to whether the violator must serve out the balance of his first sentence.

²⁰¹ Sokoloff, *supra* note 50.

²⁰² N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972).

²⁰³ *Id.* § 212(5).

²⁰⁴ *Hines v. New York State Bd. of Parole*, 293 N.Y. 254, 56 N.E.2d 572 (1944); *Mumiami v. New York State Bd. of Parole*, 5 App. Div. 2d 923, 171 N.Y.S.2d 1018 (3d Dep't 1958); *People ex rel. Mahon v. Warden of N.Y.C. Dep't of Correction*, 1 Misc. 2d 267, 274-75, 144 N.Y.S.2d 837, 844-45 (Sup. Ct. Bronx County 1955).

²⁰⁵ *Juelich v. United States Bd. of Parole*, 437 F.2d 1147 (7th Cir. 1971); *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); *Richardson v. Markley*, 339 F.2d 967, 970 (7th Cir.), *cert. denied*, 382 U.S. 851 (1965); *Rogoway v. Warden*, 122 F.2d 967, 969 (9th Cir. 1941), *cert. denied*, 315 U.S. 808, *rehearing denied*, 316 U.S. 707 (1942). *See also Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), which stated:

Judicial review of Board action with respect to a finding of parole violation is admittedly narrow and limited. Even more limited is judicial review of the Board's judgment as to what it should do about the violation. Once the violation is established . . . the exercise of discretion in determining whether or not parole should be revoked, represents a very high form of expert . . . administrative judgment

Due Process and the Parole Revocation

The Right to Counsel. Since the New York Court of Appeals decision in *People ex rel. Menechino v. Warden*,²⁰⁶ New York has been among the minority of jurisdictions which give parolees a limited right to have counsel and to introduce testimony at parole revocation hearings.²⁰⁷ The court adopted this position contrary to both judicial

and the expert appraisal of the Parole Board in this area can be regarded as almost unreviewable.

Id. at 240. *But see* *Arciniega v. Freeman*, 404 U.S. 4 (1971), in which the Federal Parole Board revoked Arciniega's parole because of association with other ex-convicts. Arciniega petitioned for habeas corpus claiming there was no evidence in support of this charge in the record. The Court of Appeals for the 9th Circuit upheld the Board's determination on the basis that he worked at a bar with two other ex-convicts. 439 F.2d 776 (9th Cir. 1971). The Supreme Court reversed per curiam, holding that "[w]e do not believe that the parole condition restricting association was intended to apply to incidental contacts between ex-convicts in the course of work on a legitimate job. . . ." 404 U.S. at 4. The Court further stated that such occupational association by itself was not sufficient evidence of any other association in violation of parole restrictions. The *Arciniega* decision may mark a new willingness on the part of the Court to review the adequacy of the evidence at revocation hearings.

206 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971). *See* 35 ALA. L. REV. 818 (1971). *See also* *People ex rel. Maggio v. Cassacles*, 28 N.Y.2d 415, 271 N.E.2d 517, 322 N.Y.S.2d 668 (1971), in which the Court of Appeals ruled that *Menechino* should be selectively retroactive. To require a new hearing for the thousands of prisoners affected would impose a "purposeless and impossible burden on the parole board." To qualify for a rehearing, the prisoner would have to show the Board failed to comply with due process in revoking parole. If the record showed either a conviction for another crime or an "unexplained *substantial* violation" of parole conditions, or fully established that a condition was violated or a parolee's explanation was false, no new revocation inquiry would be granted. "[U]nexplained *technical* violations in inadequately developed contested cases" would be sufficient to require reconsideration of the prisoner's parole revocation. *Id.* at 417-18, 271 N.E.2d at 519, 322 N.Y.S.2d at 671-72 (emphasis in original).

207 The minority rule establishing the right to counsel at parole revocation hearings was first adopted by the Supreme Court of Pennsylvania in *Commonwealth v. Tinson*, 433 Pa. 328, 249 A.2d 549 (1969). Previously, the Maryland Court of Appeals in *Warden, Maryland Penitentiary v. Palumbo*, 214 Md. 407, 135 A.2d 439 (1957), held that the parolee was entitled to counsel at a revocation hearing. This holding was based on a statute which required a hearing and the court's view that a fair hearing necessarily included the right to have counsel present. The *Tinson* court based its reasoning on the proposition put forth in *Mempa v. Rhay*, 389 U.S. 128 (1967), that counsel is "required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Id.* at 134. Since a parolee faces the possibility of being returned to prison, the parole revocation hearing must be defined as a critical stage within the protection of *Mempa*. The court rejected the argument that parole revocation was distinct from the situation in *Mempa*, since sentencing had already taken place. The court took the position that artificial labels attached to types of proceedings should not determine an individual's constitutional rights. 433 P. at 332-33, 249 A.2d at 551-52. A majority of federal courts have held that the right to counsel is not required in a parole revocation hearing. The Tenth Circuit in *Firkins v. Colorado*, 434 F.2d 1232, 1233-34 (10th Cir. 1970), relying on an earlier case, *Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969), which had stated the concept that probation is a matter of grace, has held that a state may choose to bar counsel from a revocation hearing. The Ninth Circuit in *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968), and *Williams v. Dunbar*, 377 F.2d 505 (9th Cir. 1967), has rejected claims to various procedural protections including the right to counsel at a parole revocation hearing on the reasoning that such compliance would make a parole system rigid and un-

history²⁰⁸ and statutory enactments²⁰⁹ which had specifically denied parolees this right.

The court reached its decision by giving full effect to *Mempa v. Rhay*, which had held that counsel is "required at every stage of a

wildly. The Sixth Circuit in *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968), denied the right to counsel at parole revocation hearings on the basis that the administration of the state's penal system is exclusively a state function under the reserve powers in the Constitution. The Third Circuit has taken the position that denial of counsel does not violate due process when the revocation is premised on either irrefutable evidence of a parole violation, *United States ex rel. Halprin v. Parker*, 418 F.2d 313, 315 (3d Cir. 1969), or on a criminal act conviction prior to parole revocation, *United States ex rel. Heacock v. Myers*, 251 F. Supp. 773, 774 (E.D. Pa.), *aff'd on opinion below*, 367 F.2d 583 (3d Cir. 1966), *cert. denied*, 386 U.S. 925 (1967). *See also* *Buchanan v. Clark*, 446 F.2d 1379 (5th Cir. 1971); *Barnes v. United States*, 445 F.2d 260 (8th Cir. 1971); *Bear-den v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *Richardson v. Markley*, 339 F.2d 967 (7th Cir. 1965); *Hysler v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). Many state courts have denied the right to counsel at parole revocation hearings. *Johnson v. Stucker*, 203 Kan. 253, 256, 453 P.2d 35, 39, *cert. denied*, 396 U.S. 904 (1969); *Wingo v. Lyons*, 432 S.W.2d 821, 823 (Ky. Ct. App. 1968); *Mottram v. State*, 232 A.2d 809, 813-14 (Me. 1967); *Baxter v. Commonwealth*, 268 N.E.2d 670, 673-74 (Mass. 1971); *Robinson v. Cox*, 77 N.M. 55, 59, 419 P.2d 253, 255 (1966); *John v. State*, 160 N.W.2d 37, 44 (N.D. 1968); *Murray v. State*, 444 P.2d 236, 237 (Okla. Crim. App. 1968), *cert. denied*, 393 U.S. 1059 (1969); *Beal v. Turner*, 22 Utah 2d 418, 419, 454 P.2d 624, 625 (1969).

²⁰⁸ Prior to this decision, the lower New York courts had been virtually unanimous in denying a parolee any due process guarantees at a hearing before the Board to consider revocation of parole. *See* *People ex rel. Allen v. Follette*, 33 App. Div. 2d 1051, 309 N.Y.S.2d 128 (2d Dep't 1970); *People ex rel. Ochs v. LaVallee*, 33 App. Div. 2d 80, 307 N.Y.S.2d 982 (3d Dep't 1969); *People ex rel. Brock v. LaVallee*, 33 App. Div. 2d 722, 307 N.Y.S.2d 981 (3d Dep't 1969); *People ex rel. Smith v. Deegan*, 32 App. Div. 2d 940, 303 N.Y.S.2d 789 (2d Dep't 1969); *People ex rel. Johnson v. Follette*, 58 Misc. 2d 474, 477, 295 N.Y.S.2d 565, 571 (Sup. Ct. Dutchess County 1968). *But cf.* *People ex rel. Combs v. LaVallee*, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't), *appeal dismissed*, 22 N.Y.2d 857, 239 N.Y.S.2d 743, 293 N.Y.S.2d 117 (1968), which stated that a hearing to revoke parole involves the right of a person to remain at liberty. Since the potential for deprivation of liberty at such a hearing was just as significant as it was during the original criminal proceeding, due process guarantees of the New York State Constitution were applicable.

Prior to the *Menechino* decision, a Cortland County court held that an individual was entitled to counsel at a revocation hearing involving conditional release. The court noted that due process required representation by counsel where a decision to revoke a conditional release might well result in reincarceration for a term in excess of that required by the sentencing court. Such a decision resembled the "deferred sentencing procedures [of *Mempa*] where substantial rights . . . may be affected" and therefore counsel must be provided. *People ex rel. Frisbie v. McEvoy*, 64 Misc. 2d 840, 843-44, 317 N.Y.S.2d 684, 686-88 (Cortland County Ct. 1970).

²⁰⁹ N.Y. CORREC. LAW § 212(7) (McKinney Supp. 1972) (emphasis added):

Whenever there is reasonable cause to believe that a person who is on parole or conditional release has violated the conditions thereof, the board of parole as soon as practicable shall declare such person to be delinquent. Thereafter, the board shall at the first available opportunity permit the alleged violator to appear personally, *but not through counsel* or others, before a panel of three members and explain the alleged violation.

After the Court of Appeals' holding in *Menechino*, a bill was introduced into the New York State Assembly which would amend the Correction Law to include the right to assistance of counsel at a parole revocation hearing. If the inmate were indigent, counsel would be assigned to him and expenses paid out of funds appropriated by the office of the state administrator of the Judicial Conference. The bill is currently under consideration by the Assembly's Committee on Rules.

criminal proceeding where substantial rights of a criminal accused may be affected."²¹⁰ The Court determined that parole revocation proceedings involving deprivation of a parolee's liberty and confinement in prison, were of a nature requiring the presence of counsel to develop and present matter of fact and law.²¹¹ Where individual liberty is at stake, essential due process guarantees are applicable regardless of whether the proceeding is classified as civil, criminal or administrative.²¹² The majority in *Menechino* also argued that denying a parolee the right to counsel at a parole revocation hearing would seriously hamper rehabilitative efforts since that parolee is likely to believe the decision to reimprison him was arbitrary.²¹³

The Court of Appeals in *Menechino* gave serious consideration to the possible difficulties inherent in granting assistance of counsel to parolees at revocation hearings and accordingly defined the role of counsel as a limited one, to be dealt with on a case-by-case basis. The Court stated that counsel was not to act solely as an adversary of the Board, use "trial tactics," or attempt to delay the presentation; rather he was to assist the Board and the parolee by limiting his actions to informing the Board accurately of the facts, and limiting the parolee's testimony to only that necessary for the same end.²¹⁴ The Parole Board was deemed to retain full authority to decide the ultimate significance

²¹⁰ 389 U.S. 128, 134 (1967).

²¹¹ Certainly a "parole court" or a parole board panel may not be permitted—simply because it is an administrative body rather than a judicial tribunal—to base its determination, having so serious an impact on the lives of the individuals who appear before it, on a possibly mistaken view of the facts owing to the parolee's inability to make a proper factual presentation.

People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 382, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 454 (1971).

²¹² *Id.* at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 454. Compare *Menechino* with *United States ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079 (2d Cir. 1971), where the Second Circuit, reflecting the minority position in support of counsel at parole revocation hearings, emphasized the critical nature of the proceeding, the appropriateness and necessity for a lawyer to deal with the narrow factual issues in such a proceeding, and the lack of a showing that allowance of counsel at revocation proceedings would significantly impede the state's correctional process. *Id.* at 1086-90.

The *Bey* case, however, emphasized that the right to counsel not only was limited but did not attach until parole status was threatened with termination. *Id.* at 1088. See also *Goolsby v. Gagnon*, 322 F. Supp. 460 (E.D. Wis. 1971).

²¹³ 27 N.Y.2d at 385-86, 267 N.E.2d at 243-44, 318 N.Y.S. at 456-57:

[T]he parole system is an enlightened effort on the part of society to rehabilitate criminals. Although few circumstances could better further that purpose than a belief on the part of such offenders in a fair and objective parole procedure, hardly anything could more seriously impede progress toward that important goal than a belief on their part that the law's machinery is arbitrary, too busy or impervious to the facts.

See also Note, *International Law: Parole Status and the Privilege Concept*, 1969 DUKE L.J. 139, 144-45.

²¹⁴ 27 N.Y.2d at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

of the facts brought before it. The Court held that this restricted role of counsel would be sufficient to protect the parolee and assure a fair hearing.²¹⁵

Beyond the Right to Counsel — Morrissey v. Brewer. In addition to introducing the requirement of a preliminary hearing into the parole revocation process, the *Morrissey* decision substantially expanded due process procedures at the final parole revocation hearings. Having held that parole qualifies to some extent as a liberty protected by the fourteenth amendment, the Court turned its attention to the issue of what specific protections should be provided at the Parole Board revocation hearing.

The revocation hearing, as the second step in the total revocation process, is designed to determine whether there was a violation and whether that violation warrants revocation. It should follow within a reasonable time the arrest of the parolee. The parolee should be allowed to show that he did not violate parole or that there were mitigating circumstances surrounding the violation. The minimum due process requirements for proper conduct at this hearing include:

written notice of the claimed violations . . . ; disclosure . . . of any evidence against [the parolee]; opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses . . . ; a 'neutral and detached' hearing body . . . ; and a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole.²¹⁶

The Court avoided the issue of right to counsel during the revocation process stating, "we do not reach or decide . . . whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent."²¹⁷ However, the Court emphasized that it was not writing a full code of procedure for the States, and had but outlined minimum due process requirements.²¹⁸

CONCLUSION

The parole revocation process in New York has been characterized by a series of rules and regulations which leave with the Board of Parole and the Department of Correctional Services personnel a large degree of discretion. The lack of procedural safeguards provided the

²¹⁵ *Id.* at 384, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.

²¹⁶ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

²¹⁷ *Id.*

²¹⁸ *Id.*

parolee have, in the past, been justified by the non-adversarial and rehabilitative nature of parole, the fact that the parolee is already a convicted felon and by administrative necessity. The recent disturbances at the Attica Correctional Facility indicate that these reasons are no longer accepted by inmates as sufficient to justify denial of due process.

The recent Supreme Court decision in *Morrissey v. Brewer* marks a broad attempt by the Court to rectify many of the injustices which can result from the absence of procedural safeguards at parole revocation hearings. *Morrissey* heralds a new era for New York in the administration of parole revocation. Preliminary hearings must be held and notice of the revocation hearing provided the parolee, who must be given the opportunity to present witnesses and to confront and cross examine adverse witnesses. For the first time in New York, the fact-finders are required to present a written statement as to the evidence relied on and their reasons for revoking parole. It is important to note that the Supreme Court in *Morrissey* was establishing only the minimum qualifications necessary to comport with due process and as such emphasized it was not replacing or obviating the need of the states to formulate statutes embodying these and additional protections. The need for the Legislature to act upon the problems in this area is especially important because of indications that due to lack of funds, trained personnel and appropriate organization, the Department of Correctional Services is ill-equipped to put into full practice the protections mandated by *Morrissey*. Significant change in the administration of our penal system can best follow from unified action of courts and legislature.