NOTES

PAROLE REVOCATION AND THE RIGHT TO COUNSEL

In the American criminal justice system, there are two procedures under which a convicted criminal is permitted to serve all or part of his or her sentence outside the confines of prison. These procedures are probation and parole.[1] Probation may be defined as a disposition of a case following conviction whereby sentence is suspended for a specific period of time, and imprisonment avoided. Conditions of probation which limit the freedom of the offender are imposed to control and assist in the rehabilitation of the prisoner.[2] Parole is the release of a prisoner from a penal institution prior to the expiration of his or her sentence. The prisoner is given supervision and guidance by a parole officer and agrees to follow a series of release conditions.[3]

The two procedures are similar because they both allow conditional liberty which can be revoked for noncompliance with the imposed conditions or the commission of a new substantive offense.[4] The similarities notwithstanding, probation and parole have clear-cut differences. Probation is characteristically a judicial process initiated by suspending imposition of a sentence, or by imposing a sentence and then suspending its execution.[5] All conditions of probation, their modification, and the initiation of revocation proceedings for their violation are instituted by the court.[6] Similarly, the probation officer who supervises the prisoner acts directly for the court.[7] In contrast, parole is an administrative process. All decisions concerning conditions and duration of parole, manner of supervision, and initiation of revocation proceedings are made by a state or federal parole board, which is a part of the correctional, not the judicial system.[8]

Traditionally, both the parolee and the probationer were viewed as

1. P. Tappan, Crime, Justice and Correction 539, 709 (1960).
2. *Id.* at 539; N.M. Stat. Ann. § 41-17-14(A) (2d Repl. 1972).
3. Tappan, *supra* note 1, at 709; N.M. Stat. Ann. § 41-17-14(B) (2d Repl. 1972).
4. Fisher, *Parole and Probation Revocation Procedures after Morrisey and Gagnon,* 65 J Crim. L. & Criminology 46 (1974).
5. *Id.* at 46.
6. *Id.*
7. *Id.*
8. *Id.*

having virtually no due process rights.[9] A variety of theories were followed by courts and parole boards to explain this phenomenon. Three of the most prominent theories were: (1) the grace theory, (2) the contract theory, and (3) the custody theory.[10] Under the grace theory, probation and parole were defined as privileges or acts of mercy by the court or parole board, and not rights. Since parole and probation were gifts, they could be taken away without giving the prisoner notice of the reason for revocation or an opportunity to present a defense.[11] Under the contract theory, the conditions of release were viewed as terms in a contract, which the prisoner was theoretically free to accept or reject. Rejection most certainly meant a denial of parole or probation, however. Release on parole or probation indicated that the prisoner had accepted the terms, and was consequently estopped from complaining when the conditional liberty was taken away.[12] And the breach of any condition was equivalent to a breach of the contract of release. Under the custody theory, the parolee and probationer were viewed as constantly under the custody of the parole board or court, even while at liberty in the community. The prisoner was not considered free, but rather one who had lost the right to expect the due process rights of a free person. Thus, when parole or probation was revoked, the court or parole board was merely substituting one type of custody for another.[13]

In recent years, these traditional views have begun to change, and a series of cases has begun to give parolees and probationers due process rights, particularly by granting them the right to notice of alleged parole and probation violations[14] and the right to a hearing prior to actual revocation.[15] Additionally, there have begun to develop certain conditions under which probationers and parolees are entitled to counsel.[16] Initially, because probation was considered a part of the criminal prosecution process,[17] courts were willing to find a right to counsel at probation revocation hearings,[18] while they

9. Note, *Due Process, Equal Protection and the New Mexico Parole System,* 2 N.M. L. Rev. 234, 240 (1972).

10. Fisher, *supra* note 4, at 47-48.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.,* Morrisey v. Brewer, 408 U.S. 471 (1972).

15. *Id.* at 495, 498.

16. *See* Mempa v. Rhay, 389 U.S. 128 (1967); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

17. Mempa v. Rhay, 389 U.S. 128 (1967).

18. *Id.,* Blea v. Cox, 75 N.M. 265, 403 P.2d 701 (1965). *Mempa* and *Blea* limited the right to counsel at probation revocation hearings to those hearings which could be con-

refused to do so for parole revocation hearings[19] on the grounds that parole was not part of a criminal prosecution and was thereby not subject to the sixth amendment protections. At present, however, there is growing authority for the proposition that under certain circumstances parolees, too, are entitled to counsel at revocation hearings.[20]

Some states continue, nevertheless, to follow the traditional doctrines which deprive parolees of the right to counsel at revocation hearings. New Mexico is one such state. The New Mexico Legislature and the New Mexico Supreme Court have declared that parolees have no right to counsel, either appointed or retained.[21] This comment will show the questionable constitutionality of such a position in view of the United States Supreme Court decision in *Gagnon v. Scarpelli*[22] and other decisions, and encourage the New Mexico Legislature to reform its laws to allow at least a case-by-case determination of the right to counsel[23] at parole revocation hearings, if not an absolute right to counsel at such hearings.[24]

Section 41-17-27 of the New Mexico Statutes Annotated provides: "The [parole] board shall not be required to hear oral statements or arguments by attorneys or other persons not connected with [*sic*] correctional system."[25] In *Robinson v. Cox*[26] the New Mexico Supreme Court interpreted this section of the statute and explained its position concerning the right to counsel at parole revocation hearings. The Court considered whether there was a constitutional right to counsel at parole revocation hearings, and if not, whether New Mexico law required appointment of counsel or allowed parolees facing revocation of parole to employ counsel at their own expense. Those questions were answered negatively.[27] In reaching this decision, the Court held that due process did not require parolees to have appointed or retained counsel[28] and concluded that if there was any right to counsel it would have to be found in

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sidered a part of the criminal prosecution process, where the *imposition* of a sentence has been held in abeyance for a period during which the prisoner is on probation.

19. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966).

20. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Fisher, *supra* note 4, at 46.

21. Robinson v. Cox, 77 N.M. 55, 57-58, 419 P.2d 253, 255-257 (1966); N.M. Stat. Ann. § 41-17-27 (2d Repl. 1972).

22. 411 U.S. 778 (1973).

23. *Id.*

24. *See* note 63 *infra.*

25. N.M. Stat. Ann. § 41-17-27 (2d Repl. 1972). This section applies to hearings on both parole applications and parole revocations. Note, *supra* note 9, at 236.

26. 77 N.M. 58, 419 P.2d 253 (1966).

27. *Id.* at 57, 419 P.2d at 256.

28. *Id.* at 57-58, 419 P.2d at 256-257.

legislative fiat.[29] Addressing its attention to section 41-17-27, the Court held that it was "clear that the legislature not only did not intend to require the appointment of counsel to represent an indigent parolee, but to the contrary, expressly provided that the board need not permit any counsel to appear before it."[30] *Blea v. Cox*,[31] a case holding that an indigent was guaranteed the right to counsel by the federal and New Mexico constitutions at a hearing to revoke a suspended sentence, was distinguished on the facts. In so doing, the Court relied heavily on the distinction between a hearing to revoke parole and a hearing to revoke a suspended sentence, saying:

> A release on parole is an act of clemency or grace resting entirely within the discretion of the parole board. One who is paroled is not thereby released from custody, but is merely permitted to serve a portion of his sentence outside the walls of the penitentiary. . . . A paroled prisoner is not discharged from the custody of the prison authorities, but is at all times under the complete custody and control . . . of the parole board . . . whereas in the case of a suspension of sentence, the person has never commenced service of the sentence and has, therefore, the right to personal liberty.[32]

Robinson seems, therefore, to adopt two traditional propositions of correctional law: While free from prison, a parolee remains in custody and has no judicially cognizable claim to continued liberty. In this view revocation of parole and return to prison is merely the substitution of one form of custody for another. Secondly, differences in the natures of parole and probation are sufficient to justify a right to counsel at hearings to revoke a suspended sentence, but not at hearings to revoke parole. It is submitted, however, that neither of these propositions is currently adequate to support denial of access to counsel at parole revocation hearings.

In *Morrisey v. Brewer*[33] the United States Supreme Court considered at length the nature of parole and the rights of parolees. It held that parolees were entitled to certain minimum due process rights and outlined what those rights were with regard to parole revocation. In reaching this decision, the Court explicitly addressed and rejected the argument that a parolee was not really at liberty while under parole, but rather was still in custody, his or her freedom being a matter of grace, not of right. The Supreme Court in *Morrisey*

29. *Id.* at 57, 419 P.2d at 255.
30. *Id.* at 58, 419 P.2d at 255.
31. 75 N.M. 265, 403 P.2d 701 (1965).
32. 77 N.M. at 59, 419 P.2d at 256.
33. 408 U.S. 471 (1972).

reaffirmed its position in *Graham v. Richardson*[34] that "this court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege,' " and concluded 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 and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the fourteenth amendment.[35]

Similarly, many cases and articles have firmly denounced the argument that the differences between the purpose and administration of probation as opposed to those of parole are sufficiently great to justify having a right to counsel at probation revocation hearings but not at parole revocations.[36] As one commentator has stated,

> These technical differences should not receive constitutional importance. Procedural protections cannot be denied to parolees solely because different labels are used to describe what is done to them when they are forced to return to prison and because different bodies administer the revocation. The similarities between parole and probation revocations are much more impressive than their differences.[37]

The Supreme Court, addressing the same point in *Gagnon v. Scarpelli*,[38] concluded that the "petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one."[39]

The foregoing discussion shows that the two major arguments relied on in the *Robinson* case to hold that parolees have no right to counsel are without substantial support. However, the mere negation of these two arguments does not lead inexorably to the conclusion that parolees do have a right to counsel at revocation hearings. It is

34. 403 U.S. 365, 374 (1971).
35. 408 U.S. at 483.
36. *See* People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 380, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 453-54 (1971); People v. Vickers, 8 Cal.3d 451, 105 Cal. Rptr. 305, 310-311, 503 P.2d 1313, 1321, (1973); Dyke, *Parole Revocation Hearings in California: the Right to Counsel,* 59 Cal. L. Rev. 1215, 1241, (1971); Burkholder, *Due Process Rights in Parole and Probation Revocations: Gagnon v. Scarpelli,* 411 U.S. 778 (1973), 6 Conn. L. Rev. 559; Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).
37. Dyke, *supra* note 36, at 1241.
38. 411 U.S. 778 (1973).
39. *Id.* at 782.

clear, however, from a reading of the decision in *Gagnon* that an absolute rule that parolees are not entitled to appointed or retained counsel for revocation hearings is unconstitutional.

The Court in *Gagnon* discussed the issue of a parolee's right to counsel at revocation hearings. While they declined to find an absolute right to counsel in all hearings,[40] they did hold that in some cases a parolee would have a right to counsel at such proceedings.[41] The majority admitted that in most cases counsel would be "both undesirable and constitutionally unnecessary."[42] But in some cases where the revocation hearing would require the resolution of different versions of a disputed set of facts, the consideration of complex documentary evidence, cross-examination of witnesses,[43] or the presentation of substantial reasons for mitigation of an admitted parole violation,[44] a parolee could not be expected to fairly present his or her arguments without assistance of counsel.[45] The Court adopted a case-by-case approach to the right to counsel,[46] and the state authority charged with the responsibility for administering parole was empowered to determine the need for counsel.[47]

The *Gagnon* decision makes it clear that section 41-17-27 as it now stands confers upon the parole board an unconstitutionally broad discretion. The statute grants the parole board the power to refuse to permit counsel to appear before it. This power would include cases where under the *Gagnon* standard the parolee would have a right to counsel.[48] Thus, at the very minimum, section 41-17-27 should be changed to reflect the holding in *Gagnon* to allow a case-by-case determination of the need to counsel at parole revocation hearings, and in those instances where the state parole hearing board determines that there is a need for counsel, the board should be required to hear them. This change would help to notify attorneys and prisoners who might be unaware of the holding in *Gagnon,* and further, the Legislature would be supporting strict com-

40. *Id.* at 787.
41. *Id.* at 788.
42. *Id.* at 790.
43. *Id.* at 786.
44. *Id.* at 787.
45. *Id.* at 788.
46. *Id.* at 790.
47. *Id.*
48. It is true that section 41-17-27 does not categorically prohibit appearance of counsel at revocation hearings. It allows the parole board to use their discretion as to when to allow or refuse to allow representation by counsel. However, the statute, as interpreted in *Robinson v. Cox,* gives the parole board so much discretionary power, that the potential for abuse is great.

pliance with the Supreme Court decision. However, *Gagnon* suggests only the bare minimum of what should be done with regard to parolees' rights to counsel. Before instituting any change, the arguments in favor of an absolute right to counsel[49] at parole revocation hearings should be examined. To understand these arguments it is first necessary to return to *Gagnon.*

As mentioned above, the Court in *Gagnon* declined to hold that there was an absolute right to counsel at parole revocation hearings. The Court feared that such a right to counsel would "impose direct costs and serious collateral disadvantages"[50] and would lead to the state demanding its own counsel, an escalation which would destroy the informal nature of the revocation hearing, long considered vital.[51] The majority believed that a constitutional right to counsel at revocation hearings would mean that the parole board's "decision-making process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial."[52] Despite the fears of the *Gagnon* court there are strong arguments in favor of having a right to counsel at all revocation hearings. In several states where there is a right to counsel at revocation hearings, commentators and judges have failed to observe the adverse effects predicted in *Gagnon,* and indeed have been critical of the case-by-case approach adopted therein.[53]

In a recent case before the Second Circuit, the Court of Appeals criticized the State of Connecticut's arguments that the presence of counsel would be deleterious to the parole process, saying:

> [T]he state has demonstrated no respect in which the presence of counsel for the limited purpose of developing and evaluating relevant events of a parolee's history on parole, and of recommending alternative dispositions to revocation, will tend to inhibit or constrict the parole process. Indeed, representation of parolees at revocation hearings should advance, not retard the "modern concept of individualized punishment" and rehabilitation.[54]

Similarly, in *People ex rel. Menechino v. Warden, Green Haven State*

49. See Note 63 *infra,* and accompanying text.
50. 411 U.S. at 787.
51. *Id.* at 788.
52. *Id.*
53. People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079 (2d Cir.), *vacated as moot,* 404 U.S. 879 (1971).
54. U.S. *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1088 (2d Cir.), *vacated as moot,* 404 U.S. 879 (1971).

Prison,[55] the New York Court of Appeals in holding that parolees had an absolute constitutional right to counsel at revocation hearings, failed to find any evidence to indicate that a right to counsel would have an adverse effect on the parole system.[56] An absolute right to counsel is not dangerous to the informal operation of parole boards because the role of counsel at the hearing is to be very limited. As the *Menechino* court stated, "participation by counsel need be no greater than is required to assure, to the board as well as to the parolee, that the board is accurately informed of the fact before it acts. . . ."[57] This concept was developed at length in *United States ex rel. Bey v. Connecticut State Board of Parole,*[58] where the court stressed that the parole board conducting the revocation hearing has, and should exercise, the power to prevent parolee's counsel from turning the informal hearing into a courtroom battle, saying:

> To the extent that a lawyer who misconceives his role in the parole process might resort to dilatory or distracting tactics, or equate it with his role in the trial of a case, the board does not lack the power to so structure the proceedings as to maximize the lawyers contribution and minimize his potential for disruption. . . .
>
> We stress once again that the participation of the lawyer at a parole hearing should be limited to investigating and explicating to the board, evidence bearing on the occurrence or nonoccurrence of events during the parolee's period of release and their significance, provided these are relevant to the disposition of the prisoner's case. . . . We emphatically stress that our decision does not detract in the least from the Board's power to limit counsel's participation in revocation hearings so that parole hearings do not become legal battles. Counsel's proper role is to *assist* the Board, not to impede it, and the Board may take appropriate measures to assure that the counsel appreciates his limited role and presents his client's case accordingly.[59]

So long as the parole board, the parolee, and counsel are aware of the limited purpose and role of counsel at the hearing, and so long as the parole board appreciates its power to control the conduct of the hearing, the prediction of unmanageable time delays, the transformation of the revocation hearing into an adversary proceeding, and the need for the state to be represented by counsel, all articulated in *Gagnon,* are exaggerated.

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55. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).
56. *Id.* at 385, 267 N.E.2d at 243, 318 N.Y.S.2d at 456.
57. *Id.* at 383, 267 N.E.2d at 242, 318 N.Y.S.2d at 455.
58. 443 F.2d 1079 (2d Cir.), *vacated as moot,* 404 U.S. 879 (1971).
59. *Id.* at 1088-1089.

Further, the case-by-case approach proposed in *Gagnon* itself has been subject to attack. In *Hewett v. State of North Carolina*[60] the court rejected such an ad hoc approach, because the "articulation of where the line should be drawn between those who should have been supplied with counsel and those who may be denied counsel, would be difficult, if not impossible."[61] But a problem even more important than the administrative difficulties of such a system is that "[e]ven the most superficially frivolous proceedings may reveal to competent counsel procedural or substantive irregularities which require correction in order to safeguard the interests of a probationer."[62]

The resolution of the debate over the merits of a case-by-case determination of the need for counsel at parole revocation hearings, as opposed to an absolute right, need not be attempted in a vacuum. At least nine states and the District of Columbia provide for a right to counsel at parole revocation hearings either by statute or through case law, offering models for the New Mexico Legislature to examine in addressing the problem.[63]

This discussion has been designed to show the constitutional inadequacy of section 41-17-27. Clearly, the *Gagnon* decision alone warrants a change to the case-by-case determination of the right to counsel at parole revocation hearings. However, in revising section 41-17-27, the New Mexico Legislature has an opportunity to do more than adopt the bare minimum which the United States Supreme Court has mandated. The experience of several states has shown the efficacy of an absolute right to counsel at parole revocation hearings. It is strongly urged that the New Mexico Legislature recognize the need to change section 41-17-27, by adopting an absolute right to counsel at parole revocation hearings.

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60. 415 F.2d 1316 (4th Cir. 1969).

61. *Id.* at 1324-1325; *See* Fisher, *supra* note 4, at 54.

62. Hewett v. North Carolina, 415 F.2d 1316, 1325 (4th Cir. 1969).

63. People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); Warden v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969); People v. Vickers, 8 Cal.3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1973) (dictum); State v. Boggs, 49 Del. 277, 114 A.2d 663 (1955); Ala. Code tit. 42, § 12 (1958); D.C. Code Ann. § 24-206 (1973); Fla. Stat. Ann. § 947.23(1) (Supp. 1974); Mich. Comp. Laws Ann. § 791.240(a) (Supp. 1975); Mont. Rev. Codes Ann. § 94-9835 (1947). *See* Annot., 36 L.E.2d 1077, 1117 (1974). A recent attempt at reform of parole laws was S. 3993, 92d Cong., 2d Sess. § 4207 (1972).