THE IMPACT OF MORRISSEY V BREWER ON PAROLE REVOCATION IN MICHIGAN

By

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ABSTRACT

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Legal Impact Research has measured the effect of laws upon institutions, groups, and individuals in society. Such institutions as police agencies, schools, prisons, and welfare agencies have been studied. The results of such research has been utilized by courts, administrators, and public interest groups.

Legal Impact Research as regards the Criminal Justice system has primarily concerned itself with assessing the compliance of police agencies to legal mandates. The prosecution, courts, and prisons have been largely ignored.

This thesis researchs the impact of Morrissey v Brewer, a 1972 United States Supreme Court Decision, on parole revocation in Michigan. Morrissey granted a due process hearing, i.e., statement of charges, reasons for decision, written copy of final judgment, to parolees jailed with the prospect of parole revocation.

Five procedures or methodological techniques were used in this thesis. They are: 1) legal framework, 2) interviews, 3) data analysis, 4) questionnaire, and 5) empirical observation. The historical, legal, and conceptual development of parole/probation and parole/probation revocation was researched, correctional data for seven years was

analyzed, over 100 questionnaires were sent to correctional personnel (primarily parole agents), interviews were conducted with the Parole Board and Department of Corrections staff and Parole Revocation Hearings were observed (primarily at the State Prison for Southern Michigan).

The Michigan Department of Corrections was found to be in compliance with the mandates of Morrissey and Hawkins, without having to institute major organizational or procedural changes, without having to allocate significant monies, and without having any major impairment to delivering correctional services. Because the Michigan Department of Corrections had implemented a due process hearing for parole revocation over two decades prior to Morrissey, this might be the ease with which Morrissey was received and implemented.

Morrissey had no discernable effect upon parole release, or parole revocation, but Hawkins greatly increased the number of attorneys present at revocational hearings. Most correctional personnel felt that Morrissey and Hawkins did not cripple or severely limit their discretion, autonomy, or effectiveness, but if anything improved the operation of the Department of Corrections.

DEDICATION

This thesis is dedicated to my father, the late Mr. Wendell Phillip Simms, and my mother, Mrs. Ella R. Jackson Simms, who gave me life and love and instilled in me courage, fortitude, determination, and a rational view of the world; and to my elementary school teachers, who taught me to read, write, and figure in the midst of malevolent social forces.

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An especial "thanks" is extended to the Michigan Department of Corrections for their cooperation in permitting me access to their records and files. I am endeared to the Michigan Parole Board, Mr. Leonard McConnel, chairman, for permitting me to observe and record the proceedings of parole revocation hearings. And I am indebted to the field agents who promptly answered and returned the questionnaires.

I also wish to thank Mr. Chester Hawkins, Judge Gordon W. Britten, and attorney Myron M. Sanderson, for granting me interview time.

My brother-in-law, Dr. James B. Hamilton, and my sister, Dr. Ruth Simms Hamilton, and their children and my nephew and niece, Bromlett and Priscilla, respectively, were instrumental in providing me encouragement, love, and some good home cooking.

A note of appreciation is extended to Mr. Eugene Kendrick and his family for their warmth and kindness and for his hints on physical fitness, particularly weight weighting, which increased my intellectual stamina.

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STATEMENT

Since this thesis was completed in June 1976, other judicial decisions affecting due process rights at parole revocation have been rendered. This thesis does not encompass those decisions.

CHAPTER I

INTRODUCTION

> "Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive."
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> --C. S. Lewis, God in the Dock: Essays on Theology and Ethics, Ferdmans Publishing Company, Grand Rapids, Michigan, 1970, p. 292.

"This government", according to a favorite American maxim, given greater credence by the Watergate affair, "is one of laws not of men". It is hard to imagine a government without men. What this phrase meant to the Eighteenth Century rationalists and optimists, most notably, the framers of the United States Constitution, and what it means today, may be of two different persuasions. To the earliest people under the constitution it might have meant the absence of kings and queens, dukes and barons, landlords, and for a few slave owners, while contemporarily, it might explain the increasing impersonal nature of government. This phrase is--and always will be--ambigious, but it has mythical value: it articulates the ideal of "objective" government, government minus the self-interests of men who have the power or influence to manipulate other men. Nevertheless, whatever changes have been wrought in the two hundred year old travesty of this ideal, this much is true: the

government may be of laws, but laws are enacted, implemented, rescinded, and finally, broken by men.

The presence of a law does not insure automatic implementation or compliance or even compliance in the manner intended or desired. If a law is to be effective it must be complied with, and this failing, enforced. Critics of The Voting Rights Act of 1965, for instance, contend that it is a perfunctory provision, first because the states involved largely refused to adhere to it, and secondly, because of only nominal enforcement by the United States Department of Justice. The act sits on the books while the other books, the voter scrolls, are void of would be voters. One such critic asserts that "The Justice Department's foot-dragging provokes the simple proposition that a law is only as effective as its enforcers [and compliers], only so many dead words into which life must be breathed."[1] (Italics added.)

The journey--the life and effectiveness--of a Supreme Court decision from Washington to say Dothan, Alabama or even closer to a point like Fairfax, Virginia, may be impeded by several factors. The decision must be channeled through judicial jurisdictions--Federal Circuit Court of Appeals and United States District Courts--and it must be understood and implemented by parties at the most elementary level. Regional and local values, norms, and practices, sometimes a component of national standards, operate on national law to strengthen it or weaken it, to promote conformance or opposition, to enhance equality or

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[1]Alex Poinsett, "Why Blacks Don't Vote," Ebony Magazine 31 (March 1976), p. 40.

inequality. Jeffersonian democracy, that is decentralized government and local decision making, may yet be the dominant force in American life, sometimes with ominous overtones:

> law to some extent is what Aristotle argued it was--"right reason unaffected by desire"--as well as what Lenin believed it to be--"politics." Once again, as with justice, we see in law as precise rules a normative urge towards a universal fixed standard of rightness and an empirical consideration of law as precise rules shaped by dominant forces and interests in the community, the dominant will is asserted in both the making and enforcing of the law, which is never the completely neutral vessel of Aristotelian right reason. It operates to the advantage of some and the disadvantage of others in ways that reflect self-interest as well as objective truth. For example, laws everywhere proscribe murder. But the murder of a black man by a white man (in most parts of) the United States up to now has often evoked application of the law in a manner supporting the superior/inferior relationship of whites and blacks rather than reflecting community support for the even-handed application of the letter of the law punishing murder . . . law and order often comes to mean no more than the maintenance of inequitable human relationships.[1]

The Supreme Court, beginning the third quarter of this century, in particular, has issued decisions on subjects affecting the very heart, the very pulse, of American life; decisions that loom down to the local level, and affect the day-to-day life of the average American citizen. Long standing practices, practices thought by many to be the "American way", and indeed, germane to the "American Identity", were found to be at odds with the constitution, and even more so, repugnant to human rights. The Supreme Court decided questions on the separation of church and state, racial inequality, and law enforcement behavior, which forced many people out of traditional patterns of relating, "upsetting the

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[1]James R. Klonoski and Robert L. Mendelsohn (editors), The Politics of Local Justice (Boston: Little, Brown, and Company, 1970), p. LVII.

applecart", so to speak.[1] Studies were undertaken to study the impact of these decisions, and a number of results have been recorded.[2]

There are other areas that affect our lives, even profoundly, but not as directly and persistently as race, religion, and law enforcement. Because of remoteness and objectionability (distastefulness), the average citizen infrequently comes into contact with these facets of life, and only in times of crises. Corrections is one of these areas. The President's Commission on Law Enforcement and Administration of Justice said nearly a decade ago that "Corrections remains a world almost unknown to law abiding citizens, and even those within often know only their own particular corner."[3] Yet nearly 330,000 offenders, 150,000 personnel, in some 3,000 institutions at the federal, state and local level have their lives circumscribed by corrections.[4] Corrections, however, has increasingly come to the attention of the public due to national task force reports, activism on the part of reformists, rising crime, overcrowded institutions, and budget constraints.

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[1]See for example: Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948); Abington Township School District v. Schempp, 374 U.S. 203 (1963); Brown v. Board of Education, 347 U.S. 483 (1954); Mapp v. Ohio, 367 U.S. 643 (1961); and Miranda v Arizona, 384 U.S. 436 (1966).

[2]See Theodore L. Becher and Malcolm M. Feeley, The Impact of Supreme Court Decisions: Empirical Studies (New York: Oxford University Press, 1973).

[3]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (Washington, D.C.: U. S. Government Printing Office, 1967), p. 1.

[4]U. S. Department of Justice, Law Enforcement Administration, National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics 1974, pp. 120, 129, 459.

The successful redress of violations of constitutional rights has most often come from federal courts. The same has held true for offenders, but with a twist. Few complaints and grievances of offenders reach the courts at all, much less The Supreme Court, due to the deference of the courts to correctional autonomy, the relative powerlessness of offenders to initiate suits, and public inertia:

> The number of such cases reported by the courts is small compared to the total number of inmates held in state and federal prisons. . . . A substantial number of petitions to the courts are disposed of by ruling but without opinion, and even written opinions may be omitted from the published court reports because they are not of general interest.[1] (Italics added.)

The courts have granted relief to offenders concerning visitation and use of mails, isolated confinement, legal services, and medical treatment, to name a few.[2] However, the courts have by and large supported the correctional position. Despite the fact that the ultimate effect upon correctional discretion is to be weighed qualitatively, rather than quantitatively, i.e., the number of petitions may not be decisive since it takes only one suit to have far reaching effects, the offender is likely to lose:

> In most cases, the petitioner is unsuccessful and the correctional position is upheld. Even when the ruling is in his favor the petitioner may win no more than a hearing on his allegations. In only about eight percent of the reported cases has the decision entitled the prisoner to release or to

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[1] Edward L. Kimball and Donald J. Newman, "Judicial Intervention in Correctional Decisions: Threat and Response," Crime and Delinquency, 14 (January 1968), p. 3.

[2] See John W. Palmer, The Constitutional Rights of Prisoners (Cincinnati: W. H. Anderson Company, 1973).

> some other substantial benefit. In another four percent he obtained a formal revocation, but it may well have been revoked nevertheless.[1] (Italics added.)

The correctional milieu, then, provides a dramatic setting for the study of legal impact research: the field has been relatively free of judicial intervention, it has been largely out of the public's attention, and it is almost universally a state function. A Supreme Court decision would appear to be beset by a multitude of impediments. All that is needed is a decision. Morrissey provided that decision.

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[1] Kimball and Newman, op. cit., p. 3.

CHAPTER II

CONCEPTUAL FRAMEWORK

A. Legal Background

The decade of the 1960's, spurred by the black movement, witnessed a resurgence for the respect of human rights, expressed in traditional legal terms by such phrases as "due process" and "equal protection of the law". The nation was forced to confront the issues of civil rights, student rights, welfare rights, prisoners' rights, etc. In the same manner that the Supreme Court struct down racial segregation and discrimination in public schools and thereby restricted the discretion of educational administrators, so the courts have circumscribed the traditional autonomy of administrators in welfare agencies, hospitals, and correctional agencies. Goldberg v. Kelley,[1] a welfare rights case, summarizes this phenomenon:

> The constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a right (citation omitted). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' (citation omitted), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. According . . . (citation omitted) consideration of what procedures due process may

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[1] 397 U.S. 254 (1970).

> require under any set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.[1]

Prior to Goldberg--and the historical developments that preceded it--prisoners' rights in general, and parolees' rights in particular, were limited by several rationales, including the "hands-off" doctrine, the grace or "privilege" theory, the "contract" theory, and the "custody" theory. The "hands-off" doctrine has been the term to describe historical judicial deference towards the autonomy of correctional (prison) administrators. The majority opinion in Powell v. Hunter,[2] expressed the attitude of the "hands-off" doctrine when it said "the federal prison system is under the administration of the attorney general and not of district courts which have no power to interfere with the conduct of the prison or its discipline."[3] Another federal court of appeals case, Garcia v. Steele,[4] decided in 1951, two years after Powell, is equally illustrative of the "hands-off" doctrine. The court in Garcia said:

> The prison system of The United States is under the administration and supervision of The Attorney General, and courts have no supervisory jurisdiction over the conduct of various institutions provided by law for confinement of federal prisoners committed to custody of The Attorney General, and may release only a prisoner who is shown to be illegally detained.[5]

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[1] Ibid., at 262.

[2] 172 F. 2d 330 (10th Cir. 1949).

[3] Ibid., p. 331.

[4] 193 F. 2d 276 (8th Cir. 1951).

[5] Ibid., p. 278.

The finding by the Garcia court that The Attorney General "may release only a prisoner who is shown to be illegally detained" is also the recognition that while prisoners are bereft of most of their rights, the rights of the general populace, they are not deprived of all of them. Indeed, interspersed with the "hands-off" doctrine was a restriction on arbitrary and capricious official behavior and a limited recognition of prisoners' rights. Prisoners, for example, had and continue to have protection against cruel and unusual punishment. The concept of prisoners' rights was expressed by The Sixth Circuit Court of Appeals in Coffin v. Reichard,[1] with the admonition that:

> A prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion.[2]

A later case, United States v. Jackson,[3] further acknowledged the conditional rights of a convicted offender when it asserted that "a convicted prisoner remains under the protection of The Fourteenth Amendment except as to those rights expressly or by necessary implication taken from him by law." Lesser constructs of the "hands-off" doctrine, however, served to effectively limit an offender's rights, throughout and after his incarceration, which included parole (and parole revocation).

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[1] 143 F. 2d. 443 (6th Cir. 1944).

[2] 143 F. 2d. 443, 445.

[3] 235 F. 2d. 925 (8th Cir. 1965).

The granting of probation[1] and parole has normally been viewed by the courts as "an element of grace" or a "privilege" rather than a "right"; therefore, the conditions of probation or parole and the revocation of each, is thought less open to criticism, challenge, or judicial review. A privilege is thought as discretionary, a right as mandatory. The Supreme Court set the tone for this definitive approach in 1932:

> Probation is . . . conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on specific showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain . . . (a)n exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.[2]

The Supreme Court also in Burns, denied the Petitioner's request for certain procedural safeguards, i.e., a notice of specific charges and a formal hearing, and held that the panoply of formal due process did not apply at probation revocation, but that the revocation procedure must be rational. By inference, this reasoning could be easily extended to parole revocation. Nevertheless, the relevant sections of the opinion, quoted below, remained in force until the early 1970's:

> There is no suggestion . . . that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. There are no limiting requirements as to the formulation of charges, notice

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[1] Probation and parole are frequently considered jointly, since both involve conditional liberty; probation conferred in preference to incarceration, parole in lieu of continued imprisonment.

2 [2] Burns v. United States, 287 U.S. 216 (1932).

> of charges or manner of hearing or determination. The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles concerning the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action . . . while probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.[1] (Emphasis added.)

The holding of Burns, supra, was reiterated and reinforced in Escoe v. Zerbst,[2] in which The Supreme Court held that a hearing prior to revocation of federally-granted probation was statutorily required. The Burns and Escoe dictates remained relatively immune to change for thirty-two years until Mempa v. Rhay,[3] when The Supreme Court held that a probationer had a right to counsel at a combined probation revocation or deferred sentencing. The Mempa case had concomitant consequences for parole revocation, particularly since it was considered jointly with Walking v. Washington State Board of Prison Terms and Paroles.[4]

Putting the litigation in the federal courts and the extension question aside for the moment, the state of Michigan was not immune to due process arguments concerning probation/parole. As early as 1912,

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[1] 287 U.S. 216.

[2] 295 U.S. 490 (1935).

[3] 389 U.S. 128 (1967).

[4] Walking was sentenced to the maximum term of fifteen years for burglary in the second degree, as required by Washington state law. The actual length of time to be served however is determined by the parole board, who almost with certainty act upon the recommendations of the sentencing judge and prosecutor, also as required by legislative statute.

The Supreme Court of Michigan decided the case of People v. Dudley,[1] comparable in statewide impact to Burns. The court denied the respondent's request for counsel, confrontation with witnesses, and trial by jury at probation revocation. Utilizing arguments that were to become commonplace in later years, the court asserted that the rights requested by Dudley were "only given by the constitution in criminal proceedings. The violation of the terms of probation is not a crime necessarily, and is not treated as a crime, but is rather in the nature of a breach of contract.[2] (Early reference, it should be noted, was made to the "contract theory".)

A later Michigan case, People v. Marks,[3] reaffirmed the holding in Dudley, quoting from the latter that "probation is not a matter of right but rests in the sound discretion of the court."[4] Marks limited the conditions the probation department could place upon the probationer while supporting judicial discretion, i.e., the authority of the court to extend the probationary period and include restitution as a condition of probation.

People v. Roberson[5] is significant because it extended due process, that is, a copy of charges and a hearing, to juveniles at probation

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[1] 138 N.W. 1044.

[2] 138 N.W. 1044, 1047.

[3] 65 N.W. 2d 698 (1959).

[4] Ibid., p. 700.

[5] 177 N.W. 2d. 712 (1970).

revocation. Because Michigan provided a revocation hearing for adult probationers,[1] The Michigan Court of Appeals reasoned that the same should hold true for juveniles. Relying on the "equal protection" argument of In Re Gault,[2] the court said "The legislature has provided certain rights to adult probationers and we see no reason why the same rights should not be afforded to juveniles under The Youthful Trainee Act,"[3] thus revoking the Holmes Youthful Trainee Act.[4]

The contract theory provided a stronger rationale for the limitations upon parolee rights, but was nevertheless, faulty. Because the parolee must sign forms specifying the conditions of his liberty, e.g., cannot leave state without written permission, must check monthly with parole officer, his status has been likened to that of a businessman consenting to a "contract". Simply, the contract theory "holds that an agreement similar to any business contract exists between the prisoner and the state. The contract theory asserts that the acceptance of the contract requirements by the prisoner stops him from complaining about its terms, since the prisoner was free to reject the restrictions on his liberty which were offered him."[5] For instance, based upon the contract

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[1] M.C.L.A. Sec. 771.4 (Stat. Ann 1954 Rev. Sec. 28.1134).

[2] 387 U.S. 1 (1967).

[3] 177 N.W. 2d. 712, 714.

[4] M.C.L.A. Sec. 762.11 (Stat. Ann. 1970, Com. Supp. Sec. 28.853 (11)).

[5] H. Richmond Fisher, "Parole and Probation Procedures After Morrissey and Gagnon," The Journal of Criminal Law and Criminology 65 (March 1974), p. 47.

theory, the court in The United States v. Follette,[1] held that the search of a parolee's apartment incidental to arrest for another offense, which provided evidence for a narcotics charge, was legal. The court said:

> The agreement made by (the parolee) to procure his release was a consent to a search of his residence premises by a parole officer at reasonable hours. While the agreement does not specifically state that a consent to a search is given, such seems to (be) the clear meaning of the permission in the agreement to visit me at my residence.[2]

Obviously, the "contract theory" cannot "hold much water". The parolee is not "free" to reject the terms of his release. The alternatives to the parolee are not reasonable: he can elect to remain incarcerated or opt for conditional release. He is, in effect, "coerced". Furthermore, unlike most business contracts, the parolee has no input. The terms are dictated to him. In no sense can his agreement be labeled "free" or "willing". The parolee consents to the contract, but he does not participate in the terms of his release. If the parolee's status is analogous to a person "freely" entering a contract, he most closely resembles a small businessman, who in the face of competition by a multi-national corporation, "willingly" or "freely" sells out.

The custody theory is a much more cogent argument for limiting parolee rights. The custody theory views the parolee as a "quasi-prisoner" or "quasi-free man", depending on one's particular bent. The custody theory was articulated in Hyser v. Reed:[3]

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[1] 282 F. Supp. 2 (1968).

[2] 282 F. Supp. 2, 15.

[3] 318 F. 2d. 225 (P.C. Cir.), cert. denied 375 U.S. 957 (1963).

> A paroled prisoner can hardly be regarded as a "free" man; he has already lost his freedom by due process of law and, while paroled, he is still a convicted prisoner whose tentatively assumed progress toward rehabilitation is in a sense being "field tested." Thus it is hardly helpful to compare his rights in that posture with his rights before he was duly convicted.[1]

Hyser v. Reed is significant not only for its definition of the "custody theory", but also for its nearly total denial of parolee rights.[2] The opinion, written by now Supreme Court Chief Justice Warren Burger, categorically extinguished any due process rights for parolees. It appears paradoxical that Morrissey should emerge from "the Burger court".

Underlying all three theories--the "grace", "contract", and "custody" theories--and the authority and power of the parole board, is the parens patriae theory.[3] The parens patriae theory holds that:

> The goals of the Board of Parole or court are in union with the goals of the parolee or probationer. Both parties desire the offenders rehabilitation; therefore, judicial examination of procedures employed against the probationer or parolee becomes unnecessary.[4]

The parens patriae theory is reminiscent of the in loco parentis defense used by educational administrators to limit the due process rights of students. The parens patriae argument also assumes that the

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[1]318 F. 2d. 225, 235.

[2]318 F. 2d. 225, 226, 227, 228 (holdings).

[3]Parens patriae, according to Webster's Third International Dictionary means ". . . the legal guardian of persons not sui juris and without natural guardian, of heir to persons without natural hairs, and of protector of all citizens or subjects unable to protect themselves."

[4]H. Richmond Fisher, op. cit., p. 48.

parole revocation process is neither a "criminal prosecution" nor an "adversary proceeding". A finding that the revocation process is adversarial, or sometimes adversarial, could possibly eliminate the parens patriae theory.

The rationales for limiting parolee rights aside, Mempa, while bridging the rigid constraints placed on the probationer at revocation hearings, did not decide other critical issues, namely, whether the probationer is entitled to complete procedural and substantive rights and if its holding applied to situations where sentence had been imposed and then suspended (in Mempa sentencing was suspended to be imposed upon violation of probation). The latter point has been seized upon to circumscribe the spirit, if not the letter, of Mempa. Less than a year after Mempa The Supreme Court of North Dakota concluded:

> Where sentence is pronounced and then suspended . . . the trial court loses jurisdiction of the defendant, and, thereafter, the only authority to revoke the probation is in The Parole Board. On the other hand, if imposition of sentence is deferred . . . there has, in effect, been no sentence passed, and the trial court retains jurisdiction of the defendant for the purpose of passing sentence at some future date, should it become necessary. . . . Mempa v. Rhay . . . is clearly distinguishable from the case at bar. In the present case, sentencing had been completed, the criminal proceeding had ended, and petitioner had been accorded conditional liberty by legislative grace . . . a probation or parole revocation hearing (except where sentencing had been deferred) is not encompassed by the phrase "criminal prosecution," and, therefore, the constitutional right of counsel . . . does not apply.[1]

A more prudent or generic application of Mempa would have extended the right to counsel at parole revocation, thus invoking the question of a parole revocation hearing. The controversy over due process rights

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[1]John v. State, 160 N.W. 2d. 37, 42-45.

at parole revocation would have, for all intents and purposes, been terminated. Probation and parole are more similar than disjunctive, a point seized upon by many courts. Both the probationer and parolee stand convicted and both enjoy conditional freedom which is subject to revocation. The opponents to the extension of Mempa to parole revocation argue that parole is not a criminal proceeding, that the parole board hearing is "non-adverserial" or "non-adjudicative" and the board states an interest akin to the parolee, in spite of the fact that the judge and parole board serve a similar function upon parole violation--to resentence the parolee, or at least, to further restrict his freedom. The Sixth Circuit Court of Appeals, for instance, three months after Mempa, declared a sharp distinguishing difference between probation revocation and parole revocation:

> We do not regard the recent decision of The Supreme Court in Mempa v. Rhay [citations omitted] as throwing light on our problem. In that case sentencing in the state court had been deferred subject to probation. The case was still pending in state court. The Supreme Court held that the defendant was entitled to counsel at the sentencing when probation was revoked. In the present case, the sentencing had been completed . . . Jurisdiction of the state court had terminated . . . no question is involved as to validity of the judgments of conviction or sentencing. Involved here is not judicial power, but state prison discipline administered by the state parole board.[1]

In terms of conceptual effect, after Mempa, Goldberg was decided, supra, which in turn prefaced the expanded, but nevertheless, insufficient mandates of Morrissey v. Brewer.[2] The Supreme Court decided that

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[1]Rose v. Haskins, 388 F. 2d. 91, 97 (1968).

[2]408 U.S. 471 (1972).

a parolee whose status was subject to revocation was entitled to two due process hearings: 1) a "preliminary hearing" to determine if the parolee indeed violated his parole conditions, if probable cause exists, and 2) a final revocation hearing. The parolee retains the normal trial due process requirements, e.g., notice of charges, right to present favorable witnesses and evidence, right to cross-examine adverse witnesses, and a written factual basis of the parole board's decision, with the exception of the right to counsel.[1] The court did not rule against the presence of counsel but avoided the issue by saying "we do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent."[2] Perhaps The Supreme Court avoided the issue because it did not want to create a full-blown trial proceeding out of parole revocation proceedings, limit the discretion and flexibility of parole boards, or create an additional financial burden with the requirement to provide counsel for indigents. Fred Cohen, noted corrections law scholar, concludes that the shortcoming of Morrissey makes its impact minimal:

> In ducking the right to counsel issue, the court avoided a holding which might have brought substantial change to the process. In New York, for example, an alleged violator has a right to counsel and the experience of The Legal Aid Society of New York City is that their mere presence leads to dismissals, favorable dispositions, the frequent discovery of extremely poor preparation by the parole authorities, and where parole officials have been arbitrary and abusive in the past, their behavior improves

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[1] 408 U.S. 471.

[2] Ibid.

> considerably . . . [o]n the whole, I would expect Morrissey's immediate importance to be symbolic and doctrinal rather than operational. As the word spreads, parolees may come to believe they have some rights never before enjoyed. Doctrinally, lawyers will discover they have a foundation for raising other compelling issues . . . [i]f parole authorities are under few substantive constraints then procedural innovation does not reallocate power or discretion, it simply requires ceremonial adjustment.[1]

The case[2] that synthesized due process requirements for probation revocation and parole revocation occurred in 1973--with a familiar blemish--the lack of the absolute right to counsel. The Supreme Court extended its holding in Morrissey to probation revocation (curing the shortcoming of Mempa) on the basis that the petitioner, Gagnon did not:

> . . . [c]ontend 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. Probation revocation, like parole revocation, is not a stage of criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey v. Brewer. . . .[3]

The only discernible difference between the right to counsel in Morrissey and the right to counsel in Gagnon, is that the implicit references in the former case became explicit in the latter, yet not unqualified. The Supreme Court clearly stated that a need for counsel will arise from time-to-time:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think rather, that the decision as to the need for counsel

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[1]Fred Cohen, "A Comment on Morrissey v. Brewer: Due Process and Parole Revocation," Criminal Law Bulletin 8 (September, 1972), p. 616.

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

[3]Ibid., p. 782.

> must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness--the touch-stone of due process--will require that the state provide at its expense counsel for indigent probationers or parolees.[1]

Nevertheless, a striking dichotomy continues to exist between due process rights for parole revocation and probation revocation because of Mempa. The Supreme Court must have abdicated its hindsight in considering Gagnon. Mempa, already and unequivocally, guarantees the right to counsel at probation revocation, "whether it be labeled a revocation of probation or a deferred sentencing." The only obvious quality lacking in Mempa was that it:

> . . . curiously . . . makes no specific mention of the right to a hearing in a probation revocation proceeding . . . the format for an effective performance by counsel is a hearing, thus it seems plain that Mempa's express requirement of counsel carries with it an implied right to a fair revocation hearing.[2] (Morrissey provided the hearing.)

The only way to avoid the contradiction between Morrissey and Gagnon, is to conclude, as The Supreme Court of North Dakota did in John, supra, that Mempa applies only in the case of deferred sentencing--continued criminal prosecution--which the Supreme Court has not affirmatively decided. Gagnon, however could broadly be interpreted as implicitly overruling Mempa, because the Court said "probation

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[1] Ibid., p. 790.

[2] Fred Cohen, The Legal Challenge to Corrections (College Park, Md.: American Correctional Association, Copyright 1972), p. 13.

revocation, like parole revocation, is not a stage of criminal prosecution. . . ."[1] Either The Supreme Court should distinguish Mempa or issue a generic definition of probation revocation, and thus facilitate a correction of the discrepancies between rights at probation revocation and rights at parole revocation. Mempa, in the least, is confusing.

One of the most recent Supreme Court decisions on parole revocation Wainwright v. Cottle,[2] is yet another comment on the right of counsel controversy. On an appeal from the state of Florida, which had previously appealed from an unfavorable federal district court decision, the Supreme Court vacated and remanded the decision for further consideration in light of Gagnon. The Fifth Circuit Court of Appeals[3] and the United States District Court for the Middle District of Florida,[4] had previously upheld Cottle's (petitioner) claim that "under the equal protection clause, the state was obliged to appoint counsel for indigent parolees at parole revocation hearings" in view of a state statute that provides that a parolee with means may be represented by counsel at his parole revocation.[5] A similar holding had previously been rendered in

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[1] 411 U.S. 778, 782.

[2] 414 U.S. 895 (1974).

[3] Cottle v. Wainright, 477 F 2d. 269 (1973).

[4] Cottle v. Wainright, 338 F Supp. 819 (1972).

[5] Hawkins v. Michigan Parole Board, 45 Michigan App. 529 (1973), gave indigents the right to counsel via the equal protection clause of The Fourteenth Amendment and on the basis of an existing state statute.

California[1] and the equal protection argument for counsel, under consideration by many courts, appears to be the most volatile issue in regards to parole revocation.

Another issue that approaches the equal protection argument for counsel in intensity is whether the arraignment or preliminary hearing of a parolee on new criminal charges can substitute for the preliminary hearing as mandated by Morrissey. The courts are divided on the issue. The court in the case of In re La Croix[2] held that the preliminary hearing provided by Morrissey could not be obviated by conviction of another crime. In yet another California case, however, a different court said the opposite. The majority opinion reasoned that:

> When a parolee is arrested and prosecuted on criminal charges, the criminal prosecution itself is adequate protection against the evils and dangers Morrissey was designed to protect . . . [c]onviction of crime by a court under stringent standards of proof, stricter procedural requirements, and the antiseptic atmosphere of the courtroom afford the parolee far more protection than the preliminary pronounced in Morrissey. . . .[3]

There appears to be a better than average chance that the entire panoply of due process rights will be available for probationers and parolees at revocation hearings, if the movement to secure these rights is analyzed in the same historical vein as the recognition of prisoners' rights, the elevation of the "privilege" concept to an equal status as

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[1] Earnest v. Willingham, 406 F 2d. 681 (CA 10, 1969).

[2] 108 Ca. Rptr. 93 (1973). The Supreme Court of California agreed but reversed on the harmless error doctrine, 155 Cal. Rptr. 344.

[3] In re Edge, 33 Cal. App. 3d 149, 108 Cal. Rptr. 757 (1973).

the "right concept", and the retention of counsel in other legal areas. The Supreme Court, for instance, twenty years ago, held in Griffin v. Illinois[1] that a state with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide "means of affording adequate and effective appellate review to indigent defendants" and the spirit of Argersinger v. Hamlin[2] which held that "absent a knowing and intelligent waiver, no person may be imprisoned[3] for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial," would surely appear to encompass parole revocation.

The reluctance of the present Supreme Court to issue a comprehensive degree granting these rights may be due to the composition of the court and the political and economic climate of the times. The "conservative" label of the court, overcrowded prison conditions, budgetary cuts, and hard-pressed parole boards might render the universal right to counsel at parole revocation an unlikely proposition. The best bet is that full due process rights will be awarded parolees at revocation over a period of time, where relations have evolved insidiously between the courts, parole board, and parolee. Perhaps a different Supreme Court--in composition and philosophy--will complete the process.

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[1] 351 U.S. 12, 20 (1955).

[2] 407 U.S. 25 (1971).

[3] Italics mine.

B. Plea Bargaining Aspect of the Revocational Hearing

The criminal justice system, particularly the courts and the prosecutor, is generally viewed as an adversary rather than an administrative system. The trial and conviction process is clouded with this type of perception (and conception). Popular television shows (Petrocelli, Perry Mason, The Law, etc.), the elaboration of trial rights in the Constitution (5th and 6th Amendments), and the confirmation of these rights by the courts,[1] in addition to the separation of the judicial and prosecutorial functions, have helped to portray the question of innocence or guilt as a contest between antagonistic opponents. In reality, close to 90 percent of all criminal convictions are by pleas of guilty,[2] yet the myth of general disposition of criminal offenses by trial persists:

> Despite the fact that the large majority of criminal cases are disposed of by guilty plea, the major focus of attention to the criminal process traditionally has been upon disputed cases. We have made substantial modifications in the investigatory stages of the process and are devoting ever-increasing attention to pretrial and trial procedures in order to assure a fairer resolution of disputed issues at trial. Far less attention has been devoted to the dynamics of the quilty plea and its impact on later stages of the proceedings.[3]

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[1]Compare Gideon v. Wainright, 372 U.S. 335 to Betts v. Brady, 316 U.S. 455.

[2]Donald J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (Boston: Little, Brown, and Company, 1966), p. 115.

[3]Arnold Enker, "Perspectives on Plea Bargaining," appendix to The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, by Nicholas deB. Katzenbach, chairman (Washington, D.C.: Government Printing Office, 1963), p. 108.

The guilty plea has been recognized as an integral part--an indispensable part--of the judicial process. Without it, the present system of justice would possibly collapse. Even the Supreme Court has recognized the quilty plea as a necessary legal-administrative tool:

> The disposition of criminal charges by agreement between prosecutor and the accused . . . is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the states would need to multiply by many times the number of judges and court facilities.[1]

Further, the courts have given the plea bargain legal status,[2] holding that the plea must be voluntary,[3] the prosecutor must abide by his agreements,[4] and the judge must determine the voluntariness of the defendant's plea.[5] The President's Commission on Law Enforcement and The Administration of Justice has gone on record as supporting the plea bargain, with modifications and safeguards.[6] A year after the President's Commission report, The American Bar Association published a similar set of proposals.[7] The National Advisory Commission on Criminal

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[1]Santobello v. New York, 404 U.S. 257, 260 (1971).

[2]Shelton v. United States, 246 F. 2d 571 (5th Cir. 1957); Brady v. United States, 397 U.S. 742 (1970).

[3]Walker v. Johnson, 312 U.S. 275 (1940); Waley v. Johnson, 316 U.S. 101 (1941); Teller v. United States, 263 F. 2d 871 (6th Cir. 1959).

[4]Santobello v. New York, 404 U.S. 257 (1971); Machibroda v. United States, 368 U.S. 486 (1962).

[5]Brown v. Peyton, 435 F. 2d 1352 (4th Cir. 1970).

[6]Task Force Report: The Courts, op. cit., p. 12.

[7]American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, Approved draft (Chicago: American Bar Association, 1968).

Justice Standards and Goals, however, has recommended the gradual abolition of the practice.[1]

Corrections follows the courts in the linear scheme of the criminal justice system. The correctional component, in regards to parole revocation, shares a function analogous to the prosecution and courts: to investigate the behavior of the parolee to determine if he violated the law or his parole contract, to mete out justice, to impose penalty, possibly reincarceration. The question arises, "is the parole revocation process similar to the trial process, with many of the implications of the latter?" A concomitant question to the first asks, "is the revocation process adversary or negotiative?"

The Supreme Court in Gagnon with reference to Morrissey said ". . . parole revocation . . . is not a stage of the criminal prosecution, but does result in a loss of liberty."[2] The stakes then, for an offender, whether faced with a trial or a revocation hearing, whether before the Bench or the Board, are the same: a loss of liberty. Indeed, if the parolee has committed a new offense while on parole, the Bench and the Board have equal jurisdiction over him. The parolee is caught between Scylla and Charydis, with the proposition, "You can see me now or see me later."

The Court in Morrissey appeared to have reasoned that a revocation process based on a judicial model would best serve the needs of due

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[1]National Advisory Commission on Criminal Justice Standards and Goals: The Courts, by Russell W. Peterson, chairman (Washington, D.C.: Government Printing Office, 1973). p. 46.

[2]Gagnon v. Scarpelli, 411 U.S. 478, 482 (1973).

process. The structure of the revocation process--the preliminary hearing and final revocation hearing--as mandated by Morrissey, bears a striking similarity to the criminal trial process. Substantially, the absence of the absolute right to counsel for parolees is the most salient deficiency of the revocation process when compared to the trial process. Also, the state is held to a lesser standard of proof.[1]

A parolee faced with the prospect of parole revocation and one confronted with a conviction by trial may share similar experiences. They may each be held by law enforcement (arrested--detained), receive an evidentiary hearing (preliminary examination--preliminary hearing), and have a final adjudication (trial--parole board hearing). The plea bargain, as is now well-known, inevitably obviates the need for a trial. In Michigan, at least, the election of an "immediate hearing" before the parole board constitutes a practice similar to the guilty plea. The "immediate hearing" is akin to the plea bargain in the refusal of the parolee to elect the full panoply of due process rights at parole revocation, in this instance, a hearing with an attorney and witnesses. The "immediate hearing" is not an agreement, but like the plea bargain, it is an efficient, time-saving administrative device.

In Michigan, between 85 and 90 percent of all parole revocation dispositions are by the "immediate hearing"--a hearing without an attorney and witnesses.[2] The hearings are efficient, usually lasting no

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

[2]See parole revocation and parole grant data, Chapter VIII.

longer than 15 minutes.[1] Twenty or more hearings of this type may be heard in a single working day. The hearings, however, are in accordance with the Morrissey due process standards for findings of fact; the parolee is given ample opportunity to defend himself, and no time limit is imposed upon the hearing.

"Formal" revocation hearings--hearings with an attorney and/or witnesses--on the other hand, are considerably longer and more complex. The Michigan parole board usually allocates an entire afternoon (three hours) for a formal revocation hearing. It is rare if more than one formal revocation hearing is conducted in a single day. The two formal hearings the author observed, each on a separate day, were each over an hour in length and terminated without a final disposition. Both hearings were rescheduled for production of more evidence and witnesses.

Preliminary hearings too, demand more attention than "immediate" revocation hearings. The case is fresh and the search for evidence is apt to be more profound. The two preliminary hearings the author observed were each over an hour in length, the parolees presented meticulous evidence to support their innocence, and the hearing examiner was very thorough.

The preliminary hearing may yet be another instrument to gauge the adversary nature of the revocation process, certainly the impact of Morrissey. In criminal cases, a considerable amount of cases are dismissed at the preliminary examination. In Detroit Recorder's Court, for

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[1] See "Characteristics of Revocation Hearings," length of Hearing, Chapter VII.

instance, approximately 20 percent of all criminal cases are dismissed at the preliminary examination.[1] The Michigan Department of Corrections estimates that probable cause is found in 95 percent of the revocation cases that reach the preliminary hearing and a similar percentage of cases are channeled to latter stages of the revocation process.[2] Further still, nearly a third of the parolees observed, who reached the regular (final) hearing stage, had waived the preliminary hearing. In regard to parole revocation, significant waiver of legal rights is not only evident at the final hearing stage, but also at the preliminary hearing stage.

Since the Michigan Department of Corrections does not have a de jure or de facto (as far as can be ascertained) policy to grant concessions to parolees who waive legal rights, why is it that the right to counsel and witnesses go largely unutilized? The plea bargain may provide some insight.

The defendant who pleads guilty is likely to receive a lighter sentence than one who goes to trial. The ABA has approved shorter sentences for defendant's who plead guilty[3] and some courts have said as much.[4] According to the Attica Report, differential penalties due to

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[1]Herbert Jacob and James E senstein, "Sentences and Other Sanctions Imposed on Felony Defendants in Baltimore, Chicago, and Detroit," revised version of paper presented at the 1974 meetings of the American Political Science Association in Chicago on August 31, 1974.

[2]See Chapter VI.

[3]Standards Relating to Please of Guilty, op. cit.

[4]United States v. Wiley, 184 F. Supp. 679 (1960).

the plea bargain are common in New York:

> In Upstate New York, where court calendars make pressures for plea bargaining less intense, sentences tend to be more severe than in New York City. An inmate who commits a property crime, such as burglary, may find himself in a cell next to an inmate who committed a violent crime but who, because of a plea bargain, was permitted to plead to a lesser offense and received a shorter sentence. . . .[1]

Such a practice as the plea bargain has the potential for gross abuse. There have been instances where two defendants, prosecuted for one and the same offense, have received different sentences because one pleaded guilty and the other did not.[2] The defendant who pleaded guilty invariably received the lighter sentence. Differential sentencing, based on "standing policies" designed to reward those offenders who do not pursue an adversary course, has been held to be a violation of due process.[3]

The parolee, as criminal defendant, more than likely was sent to confinement on a plea of guilty. The plea bargain establishes a precedent in any subsequent action that relates to his freedom. The parolee has been conditioned by the plea bargain. The parolee as inmate may speculate that the guilty plea may facilitate an early release from confinement. The parolee confronted with the possibility of a revoked parole, drawing on his previous experience (he may have "copped" a guilty plea) may decide that the option of a hearing with an attorney

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[1] Attica: The Official Report of The New York State Special Commission on Attica, by Robert B. McKay, chairman (New York: Bantam Books, Inc., 1972), pp. 30-31.

[2] United States v. Wiley, 278 F. 2d 500 (7th Cir. 1960).

[3] Thomas v. United States, 368 F. 2d 941 (5th Cir. 1966); North Carolina v. Pierce, 395 U.S. 711 (1969).

and witnesses, "putting the board out of its way", is not worth the price. Considering his path to confinement, it would not be strange for him to believe that the exercise of a Morrissey/Hawkins type hearing would result in a longer "flop" or a lengthier stay in prison before he is granted parole.[1] The genesis of such a frame of thought, if it exists, develops not from any external prompting from the parole board, but from prior experience with the prosecution and the courts.[2]

Alternatively, the parolee may feel that an "immediate hearing" before the parole board is fair and just, as well as appropriate. The Michigan parole board has clear, concise, and written guidelines for conducting revocation hearings, preliminary and final, and a policy to review revoked paroles every 12 months. A parolee returned for less than 12 months, and who will not complete his sentence within that period, stands an excellent chance to receive a parole at the termination of his "flop".

Broadly, the administrative needs of corrections are no different from those of law enforcement, the courts, and the prosecutor. The criminal justice system has become "a complex bureaucracy preoccupied with its 'capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders whose offenses become known' and guided by

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[1]The author found no evidence--data was not available--to determine if parolees who elected an "immediate hearing" received a shorter "flops" or quicker paroles than parolees who elected a "formal hearing". See Chapter V, "Limitations of Thesis".

[2]See Chapter IX.

the need for speed and finality."[1] The character of the conviction process may very well determine the form and substance of due process in the correctional milieu, for administrative and behavioral reasons. To say this is not to give wholehearted support to the plea bargain or the waiver of constitutional rights in favor of bureaucratic needs. But it is fanciful to expect that a criminal defendant at trial who does not pursue an adversary course, will reverse direction and exercise his constitutional rights at parole revocation.

Notwithstanding the right to trial, defense by an attorney, and the determination of innocence or guilt by jury, criminal defendants overwhelmingly waiver these rights in favor of "administrative adjudication"--disposition that does not resort to adversary due process. Parolees--former criminal defendants--are likely to waive similar rights at parole revocation in Michigan. Administrative adjudication, for criminal conviction as well as for parole revocation, appears to be the rule rather than the exception.

The subsequent revocation of parole on one and the same criminal offense--unaccompanied by additional violations of the parole contract--for which the parolee was not convicted in court, as a result of acquittal or dismissal of the charges, particularly due to violation of the parolee's constitutional rights by law enforcement officers, may become a controversial legal issue in the future. In this specific instance, dual jurisdiction by the courts and the parole board over the parolee may be challenged as in violation of the Fifth Amendment's prohibition

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[1] "The Unconstitutionality of Plea Bargaining," Harvard Law Review 83 (March/June 1970), pp. 1387-1388.

that no person shall "be subject to the same offense to be twice put in jeopardy of life or limb". In defense, the parole boards and courts may argue that their position parallels the prosecution of an offender by the federal government and state government when he violates simultaneously the law of each jurisdiction. The situations are distinguishable, however. The federal government can only prosecute violation of federal law and states only of their domain while the parole board has no such limitations.

The Framers of the Constitution no more envisioned parole board jurisdiction as a contravention to the Fifth Amendment safeguard against double jeopardy than they did electronic surveillance as a circumscription of the Fourth Amendment's prohibition against "unreasonable searches and seizures". But time and technology do not necessarily invalidate constitutional safeguards. The Supreme Court said in Katz v. United States, 389 U.S. 347 (1967), that electronic surveillance, although not involving in many instances actual physical intrusion upon person or property, falls within the purview of the exclusionary rule because the "Fourth Amendment protects people, not places". Given such a precedent, dual jurisdiction appears destined to be limited in scope by judicial sanction. The constitutional concept, not the mode, is dominant and binding.

CHAPTER III

CRIMINAL JUSTICE IMPACT RESEARCH

Mapp v. Ohio[1] set the tempo that was to characterize the relationship between the Supreme Court and law enforcement for the decade of the sixties, and inadvertently, initiated the contemporary interest in legal impact research. The Supreme Court imposed the exclusionary rule on the states, theretofore applicable only to action by federal law enforcement agencies,[2] and extended previous recognition (dictum) of the exclusionary rule as binding on the states into concrete application.[3] The exclusionary rule mandates that evidence obtained in an unreasonable search and seizure by law enforcement officers is inadmissible at trial. Critics of the exclusionary rule alleged that it would encourage criminality because offenders and potential offenders would feel a greater chance of escaping conviction,[4] therefore studies were undertaken to measure the effect of Mapp.

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[1]367 U.S. 643 (1961).

[2]Weeks v. United States, 233 U.S. 383 (1914).

[3]Wolf v. Colorado, 338 U.S. 25 (1949).

[4]Fred Inbau and Yale Kamisar, "Public Safety v. Individual Civil Liberties" (four-article debate) 53 Journal of Criminal Law, Criminology, and Police Science (1962), pp. 85, 171, 329, and 453.

Nagel (1963), in a tour de force of impact research, measured the effect of Mapp on police behavior, judicial behavior, and criminal behavior (crime rates).[1] The effect on police behavior and judicial behavior was accomplished through questionnaires, comparing states that had an exclusionary rule before Mapp with those that did not (which implemented the exclusionary rule as a result of Mapp).[2] He measured the effect on crime rates by comparing non-exclusionary states (hypothesized to have lower crime rates) with exclusionary states (hypothesized to have higher crime rates). The findings indicated a general "increase in police adherence to the requirements for legal search and seizure" but seventy-five per cent of the respondents from the initiating states . . . reported increased adherence, whereas only fifty-seven per cent of the respondents from non-initiating states reported such increases."[3] Nagel, however, reported that other possible reasons for the increased compliance to legal search and seizure could be attributed to the presence of such groups as the ACLU and the NAACP. Even though search and seizure was increasingly raised as a defense, the judiciary reported "no change in the quantity of searches and seizures declared illegal," that is, the proportion of cases favoring the defense remained

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[1] Stuart S. Nagel, "Testing the Effects of Excluding Illegally Seized Evidence" (1965) Wisconsin Law Review, p. 283.

[2] Questionnaires numbering 250 were mailed to police chiefs, prosecuting attorneys, judges, defense attorneys, and an official of the ACLU in every state.

[3] Op. cit., p. 287.

relatively constant.[1] Twenty-four percent of the search and seizure cases favored the defense three years before Mapp, and three years after Mapp, a slight increase, twenty-six percent, favored the defense.[2] Utilizing two techniques, a one-point-in-time approach and before-and-after approach, Nagel attempted to assess the effect of Mapp on crime rates. He found that "thirty-three per cent of the twenty-four non-exclusionary states had a total quantity of crimes per 100,000 population that was above the average state crime rate in 1960" and the same for "fifty-seven per cent of the twenty-three exclusionary states."[3] He attributed the differences between the two groups to factors such as urbanism and regionalism. The before-and-after approach indicated that "both the newly initiating and non-initiating states underwent on the average an approximate five per cent increase in crime rates." The only reasonable conclusion to draw from Nagel's study is that the exclusionary rules' impact was minimal, if at all.

Oaks work, is perhaps, the most exhaustive study of the exclusionary rule.[4] Three methods were used, the before-after method, the multiple-area method, and the field observation method, and five areas (cities); Chicago, District of Columbia, Cincinnati, New York and

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[1] Ibid., p. 289.

[2] Ibid., p. 291.

[3] Ibid., p. 293.

[4] Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," University of Chicago Law Review 37 (Summer 1970), p. 665.

Toronto, Canada, were employed to collect data. Oaks' findings were varied but he attempted to relate them with some consistency. He found, for instance, that "more than half of the motions to suppress in the District of Columbia and Chicago concerned narcotics and weapons offenses,[1] that with these offenses "the exclusionary rule does not deter the Chicago police from making illegal searches and seizures".[2] Twelve years of statistics for law enforcement in Cincinnati showed:

> (a) that the adoption of the exclusionary rule had no apparent effect upon the number of arrests or convictions in narcotics, weapons or gambling offenses and
>
> (b) that the adoption of the exclusionary rule had no immediate affect on the per cent of stolen property recovered, but there was a gradual decrease commencing several years later after the Mapp decision.[3]

Oaks found, the same as Nagel, that although there was increased police adherence to the exclusionary rule, it was greatest in states forced to adopt it.[4] In Canada "improper police behavior is controlled by internal police discipline, by command conduct that is partly responsive to the prosecutor, and by or relatively effective tort remedy."[5] While in New York a sharp decrease (twenty-seven percent) was reported in narcotic arrests, Oaks suggest that evidence indicates that the police attempted to compensate for the difference by "fabricating

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[1] Ibid., p. 706.

[2] Ibid.

[3] Ibid., p. 707.

[4] Ibid., p. 708.

[5] Ibid.

testimony in order to comply with arrest formalities and circumvent the exclusionary rules."[1] Despite his conclusions, Oaks hastens to admit, and rightfully so, that "comparisons of law enforcement statistics in various areas can be misleading because of differences in the criminal justice system of cities and states."[2]

In spite of the abundance of data and statistics, the thrust of Oaks' work is not empirical or quantitative, but qualitative or descriptive. More than half of his article (fifty-eight pages), is devoted to discussing the short term and long term effects of the exclusionary rule, its limitations, and its negative effects. The disadvantages or negative effects of the exclusionary rule were surmised to outweigh the advantages or positive intent; a thought shared by other observers:

> The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police.[3]

Finally, he concludes that "as a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure," but "(it) should not be abolished until there is something to take its place. . . ."[4] (Emphasis added.)

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[1] Ibid.

[2] Ibid., p. 707.

[3] Ibid.

[4] Ibid.

Miranda v. Arizona,[1] on the heels of Escuebedo v. Illinois (right to counsel on arrest),[2] is another case in point. Miranda, which extended the Fifth Amendment prohibition against self-incrimination, i.e., right to remain silent, to persons arrested or in detention, is perhaps the most controversial court decision to affect law enforcement in this century, and indeed, the criminal justice system. Like Mapp, as expected, "most police and prosecutor spokesmen greeted the announcement of Miranda with forecasts of doom for law and order in the United States. At the very least, it was predicted that confession rates would radically decline."[3] Miranda, subsequently, by all accounts, should have made the "system" more adversarial and beneficial to all parties. As one writer suggests:

> If we may be said to have enunciated a rationale for our 'system,' it is that it is adversary, a kind of legal extension of the free enterprise system. From this evolving concept much of our current procedural law derives. It is perhaps through understanding the dynamics of the adversary process, and the legal factors that participate therein, that we may seek greater comprehension on the part of the police.[4]

For the most part, the prognostications of "legal chaos" on the part of police and prosecutors are no more believable than the admonitions of Cassandra. Yet some evidence supports their position, it only

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[1] 384 U.S. 436 (1966).

[2] 378 U.S. 478 (1964).

[3] Cyril D. Robinson, "Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, Duke Law Journal 1968 (June 1968), p. 464.

[4] Ibid., p. 425.

minuscular. Seeburger and Wetlich investigated the impact of "Miranda in Pittsburgh", and concentrated on changes in 1) confessions rates, 2) conviction rates, and 3) clearance rates.[1] They found that, following Miranda, there was a twenty percent decline in confessions.[2] Nevertheless, confessions were obtained "in more than one-third of the cases and from more than one-quarter of the suspects."[3] The conviction rate was alleged to have declined approximately four percent based on the tenuous assumptions that: 1) the use of a confession would have resulted in a conviction, 2) the same percentage of cases were being processed to trial, and 3) Miranda was the cause of the twenty percent decrease in confession rates.[4] The figures of Seeburger and Wetlich do not support the claim or hypothesis that Miranda would lower the clearance. As a matter of fact, there was one percent increase in post-Miranda clearances over pre-Miranda clearances, although there was a three percent decrease in clearance for the second half of 1966 over the first half of 1966 (Miranda was decided June 13, 1966). Similarly, the percentage of cases disposed by guilty pleas increased 2.9 percent for all crimes since Miranda.[5] Their study terminated with the statement

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[1]Richard H. Seeburger and R. Stanton Wetlick, Jr., "Miranda in Pittsburgh--A Statistical Study," University of Pittsburgh Law Review 29 (October 1967).

[2]Ibid., p. 23.

[3]Ibid.

[4]Ibid.

[5]Ibid., p. 22.

that "the Pittsburgh figures collected through this study support the generalization that Miranda has not impaired significantly the ability of the law enforcement agencies to apprehend and convict the criminal."[1] (Emphasis added.)

A study of the impact of Miranda on law enforcement in New Haven, Connecticut,[2] an intermediate city of less than 200,000, parallels many of the findings of the Pittsburgh study. Interrogations, for example, were found to be necessary to solve a crime "in less than ten per cent of the felony cases,"[3] just half of the requirement for Pittsburgh. The number of people who gave some form of incriminating evidence declined approximately ten to fifteen percent from 1960 to 1966, with the greatest drop in written statements.[4] Yet, the clearance rate remained relatively unimpaired.[5]

The New Haven study, in addition, measured the effect of Miranda on the participants involved in the interrogation process: suspects, detectives, and defense attorneys. According to the data, suspects continued to confess at substantially high rates; the detectives, in at least twenty-two percent of the cases gave no Miranda warnings at all; and attorneys, by and large, were not present at the stationhouse, but

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[1] Ibid., p. 26.

[2] Michael Wald (editor), "Interrogations in New Haven: The Impact of Miranda," The Yale Law Journal 76 (July 1967), p. 1519.

[3] Ibid., p. 1523.

[4] Ibid., p. 1573.

[5] Ibid.

preferred to communicate with their clients by telephone, most often recommending silence. The opinions of the detectives and lawyers were solicited by questionnaire. The detectives universally disapproved of Miranda and adopted a cynical attitude towards their work.[1] The majority of attorneys indicated they would 1) advise a minor to confess, 2) recommend a client to talk if apprehended for narcotics or moral offenses, misdemeanors, or domestic disputes, 3) advise against a client making any statement at time of arrest, 4) urge immediate cooperation if obviously guilty, to facilitate effective plea-bargaining.[2] Only twenty percent of the attorneys said they would never advise cooperation.[3] Extraneous factors, however, could account for the difference.

Interrogations, therefore, were minimal in solving crimes and the police continued to question suspects frequently, in violation of Miranda, with successful results. One succinct conclusion is in order: "not much has changed after Miranda. Despite the dark predictions by the critics of the decision, the impact on law enforcement has been small."[4]

Witt's study further dampens the arguments of Miranda opponents. This study in Seaside City (a pseudonym) revealed that while law enforcement officers (165%) believed "no alternate method could substitute for

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[1] Ibid., p. 1611.

[2] Ibid., p. 1603.

[3] Ibid., p. 1604.

[4] Ibid., p. 1613.

interrogation," interrogation "was found to be 'necessary,' i.e., 'essential' or 'important,' in only twenty-four per cent of the cases reviewed."[1] He further discovered that 1) confessions declined only two percent following Miranda,[2] 2) the conviction rate dropped nine percent,[3] and 3) the clearance rate declined three percent.[4] Witt, however, as most other researchers, could not absolutely assess the decline to Miranda, because of the presence of other variables. He decided that "the impact of Miranda on law enforcement in the jurisdiction studies was slight," and substituted the findings of related studies.[5]

Medalie, Leitz, and Alexander (1968), in their massive study of the implementation of Miranda in Washington, D.C.--the study par excellence on the subject--found that the right to remain silent had little or no effect on pre-existing and existing police interrogation practices.[6] Qucting Carl Becker to philosophycally support their findings, the trio reported that while the warning of rights "rose from slightly

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[1] James Witt, "Non-coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality," The Journal of Criminal Law and Criminology 64 (September 1973), pp. 320, 324.

[2] Ibid., p. 325.

[3] Ibid., p. 329.

[4] Ibid., p. 331.

[5] Ibid., p. 332.

[6] Richard J. Medalie, Leonard Leitz, and Paul Alexander, "Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda," Michigan Law Review 66 (May 1968), p. 1422.

over fifty per cent before the Miranda decision to seventy-five per cent after Miranda,"[1] the percentage of dependants giving statements to the police, inculpatory and exculpatory, only decreased from forty-three percent after Miranda.[2]

Whereas most researchers have sought to exonerate or challenge the critics of Miranda, by design or default, the D.C. researchers have sought to examine the impact of Miranda on defense counsel and defendant--the intended beneficiary of the decision. Rather than concentrate on the impact of Miranda on the police and prosecutor, the study focused on the behavior of the defendant and his counsel. The study found that 1) close to two-thirds of the defendants who received the warning of the right to stationhouse counsel did so, one-third did not,[3] 2) sixty percent of the defendants who received the warning of right to silence gave no statements, while forty percent gave statements,[4] 3) fifteen percent of the eighty-five defendants failed to understand the right to silence warning, eighteen percent failed to understand the warning of the right to the presence of counsel, and twenty-four percent failed to understand the warning of the right to appointed counsel,[5] and 4) sixty-six percent of those who understood the stationhouse counsel warning and sixty percent of those who understood the silence warning did not give

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[1] Ibid., p. 1362.

[2] Ibid., p. 1414 (Table E-1).

[3] Ibid., pp. 1371-72.

[4] Ibid., p. 1372.

[5] Ibid., p. 1374.

statements.[1] The data suggests that a definite relationship existed between the giving of the warnings of right to silence and counsel, and the decision to exercise these rights and the same relationship between understanding the warnings and exercising them. Although the data is encouraging, fully a third of the defendants did not opt to utilize their rights. On its face, the data also suggests that neither the intent of the proponents of Miranda nor the predictions of its critics were realized. The interrogative process appeared to reach a point of equilibrium.

The question inevitably arises as to why a significant percentage of the defendants did not exercise their rights. In addition to the answers provided by the Washington, D.C. study, Griffith and Ayers, in their study of the application of Miranda to draft protesters, gave some plausible answers. The problem was one of naivety or "not knowing", even though the draft protesters were highly educated and intelligent middle-class college students and professors at Yale:[2]

> . . . even though the suspects understood that they could refuse to answer whenever they choose, they had only the vaguest intuition about how to decide whether to answer a given question. Their decision whether to waive their right to remain silent was made on hunch alone, without any of the knowledge or understanding required to make it 'knowing and intelligent.' Their waiver of the right to a lawyer's advice was even less informed, since their ignorance of the significance of the right to silence was compounded by their

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[1] Ibid., p. 1376.

[2] Richard E. Ayres and John Griffith, "A Postscript to the Miranda Project: Interrogation of Draft Protestors," The Yale Law Journal 77 (November 1967), p. 300.

> ignorance of the functions a lawyer might have performed for them.[1]

The behavior of defense counsel was less than impressive, the greatest disappointment of all the parties, since the intent of Miranda revolved around counsel. The data showed that 1) only twenty-five (eight percent) spent more than an hour with the accused, two percent spent more than two hours, twenty-seven percent spent no more than fifteen minutes, and two percent spent no more than five minutes, and 2) the attorneys usually confined their services to "giving legal rights, warnings and advice along with other services."[2] The poor showing of defense counsel was in part the result of their own lethargy and police hindrance:

> . . . (attorney/s) were often unavailable at the critical point in time necessary to protect the defendants' rights because of the delays between the time of arrest and the time the attorney arrived at the station and because of the reported failure of the police to curb interrogation until the defendant could have access to an attorney. Moreover, because so few attorneys ever thought of telephoning the defendant directly before setting out for the stationhouse and because so many spent so short a time with the defendants, little headway was made in mitigating the consequences of the time delays and police practices.[3]

The D.C. study also reported that police behavior ran counter to Miranda. In addition to interrogating witnesses before the arrival of defense counsel, the police failed often to give warnings and to observe the spirit and the letter of Miranda, with "half the defendants reported

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[1] Ibid., p. 311.

[2] Medalie, Leitz, and Alexander, op. cit., p. 1388.

[3] Ibid., p. 1395.

not being given the silence warning, somewhat fewer than two-thirds reported not being given the station house counsel warning, and over two-thirds as not being given all four Miranda warnings.[1] The police, of course, cannot be expected to act as interrogator and counsel, advocate and adversary, at one and the same time. As the Yale study asserted:

> (Police) cannot be expected to give warnings in a sympathetic way or to assume full comprehension and appreciation in the suspect. It is hardly realistic to expect an interrogator to have the solicitude for the interest of the suspect which is required if the suspect is to be able to appreciate the significance of his rights in the context of what is at stake in the interrogation. To ask a detective . . . to act both as interrogator and as counsel for the defense is to require a capacity for schizophrenia as a qualification for the job.[2]

The studies, data, observations, and conclusions of the legal impact research on Mapp and Miranda appear to universally support the thought that law enforcement agencies have not been unduly hampered nor have defendants been greatly aided by Supreme Court due process decisions. The non-compliance of the police and the timidity and naiveté of the defendant, undoubtedly has brought the new practice to a point of compatibility with the practices it was supposed to replace. Furthermore, confessions are only significant in a minimal number of cases. Though it would be unwise to overrule Mapp or Miranda, more critical areas of the arrest and interrogative process should be studied for possible judicial intervention. Also, the research on Mapp and Miranda should offer some clues as to the possible impact of Morrissey.

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[1] Ibid., p. 1394.

[2] Ayers and Griffiths, op. cit., pp. 309-10.

Legal impact research--empirical research--on Supreme Court decisions affecting corrections are for all intent and purposes, virtually nonexistent. To be sure, few suits pertaining to corrections have reached the Supreme Court. Most of these suits go no further than Federal Circuit Courts of Appeal. Even Morrissey, which parallels Mapp and Miranda in profundity, has been largely ignored by researchers.

Literature on Morrissey is limited, generally confined to legal periodicals. These articles assess its impact in abstract, non-empirical terms. They focus on the requirements of Morrissey, its historical development in the law of corrections, and its relationship to current correctional legal decisions. Loewenstein (1974), for instance, discusses the specific aspects of Morrissey (preliminary hearing, notice of charges, presentation of witnesses, disclosure of adverse evidence and the right to cross-examine adverse witnesses, impartial hearing board, written judging of facts), concomitant issues (burden of proof and counsel), and parolee challenges to have these rights exercised.[1]

Among the legal issues discussed in Loewenstain's article are 1) the retroactive application of Morrissey,[2] 2) the question of whether a preliminary revocation hearing jeopardizes a defendant who forces criminal charges by exposing evidence against him,[3] 3) the question of

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[1]Ralph H. Loewenstain, "Accelerating Change in Correctional Law: The Impact of Morrissey v. Brewer," Clearing House Review 7 (January 1974), pp. 528-535.

[2]Richardson v. New York State Board of Paroles, 41 App. Div. 2d 179, 341 N.Y.S. 2d 825 (1973).

[3]State v. Huges, 200 N.W. 2d 559 (Iowa 1972).

whether a detainer issued by a parole board simultaneously while a parolee faces criminal charges, thereby prohibiting bail, is constitutional,[1] and 4) the question of whether conviction of a new crime negates the need for a preliminary hearing.[2] The question of counsel was discussed jointly with Gagnon v. Scrarpelli. In addition, Loewenstein discusses the extension of Morrissey to disciplinary proceedings, transfer to or from treatment, parole recision, parole release, prison transfers and censorship of incoming mail and publication. Loewenstein believes the greatest impact of Morrissey has been more indirect than direct, that is, Morrissey has been most beneficial in assailing the rights-privilege doctrine and in the extension of due process to other areas as those mentioned previously.[3] The article ends on an optimistic note, Loewenstein proclaiming that "the future of Morrissey is even brighter than the past."[4]

Fisher (1974), in the manner of Loewenstein, but more specifically, examined the interrelationship of Morrissey and Gagnon, and dwells extensively on the legal issues generated by them, especially the question of the right to counsel. Sullivan (1974) examines an extension subject incorporated by Loewenstein and Fisher--disciplinary hearings. Sullivan is one of the few writers to focus on the implications of

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[1]People

[2]In re La Croix, 32 Cal. App. 3d 319, 108 Cal. Rptr. 93 (1973).

[3]Loewenstein, op. cit., p. 533

[4]Ibid., p. 535.

Morrissey in one particular state, in his case, Indiana. He illustrates how Morrissey was applied analytically and logically by the courts to prison disciplinary hearings. The courts wedded disciplinary hearings to parole revocation by holding that good time (usually lost in part or whole by disciplinary procedures) "is clearly analogous to revocation of parole in that both directly affect the total length of imprisonment." Sullivan also invokes analogies of Morrissey to disciplinary hearings in terms of 1) notice and timing of the hearing, 2) opportunity to be heard, 3) confrontation and cross-examination of accusers, 4) impartial and detached hearing board, 5) counsel and counsel substitutes, and 6) written statement of findings.

Oregon's response (1974) to Morrissey has also been chronicled. Oregon, a state which prior to Morrissey only conducted parole revocation hearings at the discretion of the parole board, is an absorbing story of contrasts. Oregon's adaptation to Morrissey is at one and the same time a study of adjustment, and one of legislative modification.[1] The Oregon empirical research on Morrissey is skimpy, or at least, not liberally documented. The literature provides little or no evidence of the possible impact of Morrissey upon revocation rates, parole behavior (e.g., request for counsel and witnesses) nor parole agent adaptation (e.g., attitudinal adjustment and an increase or decrease in the number of revocation recommendations). Any definitive statement regarding the

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[1]The legislature constituted the preliminary hearing and final revocation hearing suggested by Morrissey into one disposition, instituted a qualified right to contest adverse witnesses, and provided for a limited right to counsel.

impact of Morrissey must look to these type of questions.

The research on Mapp and Miranda hints at the likely impact of Morrissey. The latter, unfortunately, has not received the attention lavished upon the former two, which is needed.

CHAPTER IV

DISCUSSION OF LEGAL IMPACT RESEARCH

Legal impact research is an effort to assess the effect of law upon society; specifically, the effect upon individuals, groups, agencies, institutions, and ideas. A legal impact study has been defined as:

> . . . (a)n attempt to ascertain how a particular law affects the conduct attitude of those individuals, groups or other relevant units located in jurisdictions where the law is in force. By its very nature such a study involves one essential comparison; the comparison between actual behavior patterns in jurisdictions having the law in question and the behavior patterns which would have existed in those same jurisdictions had the law in question never been enacted.[1]

The primary problem facing the legal impact theorist, whether he is concerned with a single jurisdiction or a set of jurisdictions is "how to estimate best what the behavior patterns would have been in a certain jurisdiction had the law in question never existed."[2] Opinions and attitudes, however, may be as important as behavior.

Law has been seen as a means to change behavior, not necessarily attitudes. It appears that while the effect of law on behavior is more absolute, the effect of law on attitudes is less substantial, and more

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[1]Richard Lempert, "Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses," Law and Society 1 (November 1966), p. 111.

[2]Ibid., pp. 111-112.

strikingly, the effect of behavior on attitudes is less discernible, but nevertheless, occurs. That attitude, in turn, affects behavior is the most nebulous conclusion of all, and the most elusive facet for the legal impact researcher. What then, is the value of studying and assessing the effect of attitude upon behavior? Such observations increase the accuracy of prediction, the prediction of future behavior. Attitudes are the harbinger of action, and are useful in consolidating theoretical knowledge, an area of concern for contemporary legal scholars and social scientists, as one authority asserted:

> . . . [the] legal process has pervasive effects in all aspects of life and society, [and] gives rise to another characteristic which is of fundamental importance for . . . research . . . that characteristic is the enormous need of [sic] legal process for intelligence. By intelligence [one does not] mean merely factual information . . . but also all the intellectual aids needed to resolve the decisional problems presented to legal process so that the actual impacts of decisional outcomes are consistent with community policies. More specifically, legal process needs intelligence with which to formulate accurate, realistic conceptions not only of the problems with which it is presently confronted but also on future problems with which it may be confronted.[1]

Intelligence implies more than mere speculation and formulation of problems; it goes a step farther. Intelligence precedes decision making. With reasonable intelligence, i.e., a factual and theoretical framework, alternative legal policies can be decided with greater confidence and assurance. Legal impact research can provide:

> . . . a systematic analysis of the effects of an adopted policy . . . useful in providing information relevant to repealing or modifying the policy. Such an analysis can also be useful in

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[1] Ernest M. Jones, "Impact Research and Sociology of Law: Some Tentative Proposals," Wisconsin Law Review (Spring 1966), p. 334.

> making the policy more respectable if the analysis reveals the effects considered beneficial are greater than the effects considered detrimental. In addition such an analysis could conceivably be useful to other countries that are still debating the desirability of the policy. It can also be relevant to debates on analogous policies.[1]

Because compliance or non-compliance comprises a large part, perhaps the most salient part, of legal impact research study, compliance (or a lack of it) has been used interchangeably with impact. But the two are not the same. Compliance with a particular law deals only with the specific problem, legal issue, or party the law is intended to regulate. Compliance ignores concomitant effects, indirect charges, and "spinoffs". The law, besides generating a response from a particular entity, may spill over into other areas with analogous legal issues. To concentrate solely on compliance is to limit one's perspective, for "in dealing with compliance, [one is] clearly interested in something narrower than the total impact of the decision and to use one where we mean the other will not assist [one's] work. Supreme Court rulings . . . may invoke a range of responses. To use the term compliance to characterize this process is rather unfortunate, for this seems to suggest a single approved response to a court ruling. In certain instances, to be sure, such a view would be entirely satisfactory."[2]

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[1]Stuart S. Nagel, "Testing the Effects of Excluding Illegally Seized Evidence," Wisconsin Law Review (Spring 1965), p. 307.

[2]Stephen L. Wasby, The Impact of the United States Supreme Court: Some Perspectives. (Homewood, Illinois: The Dorsey Press, 1970), p. 28.

Impact, on the other hand, is much broader. It seeks a more objective stance than compliance, and tends toward the theoretical effect of a particular law. For instance, take the case of Brown v. Topeka Board of Education.[1] One could have speculated--and Southerners did correctly--that Brown would not only affect education, but a way of life. Brown, indeed, was the initial national legal assault against not only segregated and inferior education, but also against the "separate but equal" doctrine, the legal segregation of the races. It was the writing on the wall. Blaustein and Ferguson, for example, accurately prognosticated that:

> The rule of law that state imposed racial discrimination is unconstitutional may well result in decisions of future supreme courts declaring the invalidity of the racial discrimination now practiced legally by privately operated schools, privately operated businesses and privately operated clubs. This can be done in one of two ways: either by applying the existing law to new factual situations, or by changing the present legal meaning of state action.[2]

This same analogy can be extended to the criminal justice system. Mapp v. Ohio,[3] barring illegally seized evidence by the states, no doubt, attitudinally influenced the Supreme Court's decision in Miranda v. Arizona,[4] granting persons arrested the right to remain silent, and

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[1]Brown v. Topeka Board of Education, 349 U.S. 294 (1954).

[2]Alpert P. Blaustein and Clarence C. Ferguson, Jr., Desegregation and the Law (New Brunswick, N. J.: Rutgers University Press, 1957), pp. 265-268, cited by Theodore L. Becker and Malcolm M. Feely, The Impact of Supreme Court Decisions: Empirical Studies (New York: Oxford University Press, 1973), p. 108.

[3]Mapp v. Ohio, 367 U.S. 643 (1961).

[4]Miranda v. Arizona, 384 U.S. 436 (1966).

likewise, Morrissey v. Brewer,[1] the object of this thesis, which granted due process rights to parolees faced with the prospect of parole revocation, certainly gave birth to Gagnon v. Scarpelli,[2] which extended the same rights to probationers faced with the prospect of probation revocation.

Methodologically, impact as opposed to compliance, presents complications. How does one measure impact? The initial tendency may be to utilize techniques or to observe changes that measure visible or obvious activity--compliance or noncompliance. Wasby asks, "for example, do we measure the impact of the school desegregation decisions in terms of the percentage of Negro students attending classes in previously all-white schools? Or in terms of the percentage of school districts with some Negroes in integrated classes? Or in terms of the movement of whites to the suburbs from the core of cities of metropolitan areas?"[3] Or take the cases of Mapp and Miranda. Is the impact of Mapp to be measured in terms of the number of cases thrown out of court or in terms of the falsification of testimony by the police or in the shift of cases to particular judges? Do we measure the impact of Miranda by the changes in confessions or by the changes in arrests, or both? The same speculations can be applied to Morrissey, the subject at hand. The impact of Morrissey might well be measured in terms of changes in

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

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

[3]Wasby, op. cit., p. 37.

parole release, as well as changes in parole revocation, or say, in terms of the efforts of corrections departments and legislatures to impose more stringent conditions for parole. Counter responses, within and outside the parameters of authority, should be examined as impact.

Several scholars, Wasby, Blaustein and Ferguson among them, have injected the responses of avoidance and evasion into legal impact research as an almost universal residual effect of litigation, particularly decisions adversely affecting agencies and institutions in a traditional milieu. Avoidance and evasion are attempts to avoid the law or its full force, on the one hand or to superficially give the appearance of adhering to the law, while covertly circumventing its mandates. The sophisticated electronic surveillance methods, e.g., wiretaps and electronic eaves-dropping, employed by government agencies comes to mind. In court litigation, the agencies have argued that they were not in violation of the Fourth Amendment's prohibition against "unreasonable searches and seizures" by using wiretaps to monitor a particular suspect, since they did not physically enter his premises. While technological advances may have out-distanced the literal meaning of The Fourth Amendment, as understood by its framers, the broad intent--privacy and freedom from unwarranted and unethical government intrusion--has remained intact. The Supreme Court has upheld the view that wiretaps and electronic eaves-dropping fall within the purview of The Fourth Amendment by declaring that "The Fourth Amendment protects people, not places."[1] An earlier, famous (or infamous) example, is the

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[1]Katz v. United States, 389 U.S. 347 (1967).

notorious "grandfather clauses" enacted by Southern legislatures during the demise of reconstruction to strangle The Fifteenth Amendment and to prevent Blacks from voting. Louisiana established the pace and the pattern in 1898, with the absurd fiat that the unqualified right to vote was reserved only for citizens whose fathers or grandfathers were on the voter registration roles prior to January 1, 1867. Obviously, few or no Blacks were on the voter rolls prior to this date. If Blacks were to vote, they would have to meet stringent educational and property requirements--a standard as effective as night terrorism in stifling the exercise of constitutional rights. The Supreme Court declared the "grandfather clauses" unconstitutional in 1915,[1] and yet the Voting Rights Act of 1965 is commentary on the effectiveness of Southern methods, "legal" and extra-legal, from gerrymandering to lynching, to circumvent the law and to restrict the right of Black citizens to vote.

Legal impact research has most often been associated with "applied" as opposed to basic research, primarily because of its reliance upon compliance and empirical data as a measure of impact. Applied research is more practical and related to the solution of immediate problems, whereas basic research is more theoretical, predictive, and future-oriented. Ernest Jones said:

> While sociologists are accustomed to distinguishing basic research from applied research, many law-trained persons are not. . . . The generalized goal of basic research is the building of basic theory that bears such a relationship to the world of cause and effect and probabilities, that understanding, prediction, and control are to some extent

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[1]Quinn v. United States, 238 U.S. 347 (1915).

> improved. Thus, although it is based upon empirical data, basic research addresses itself to questions of theoretical significance.[1]

Applied research is the antecedent of basic research. One could not exist without the other. And just as practice initially feeds theory, and theory reciprocally improves practice, so does applied research and basic research contribute to each other.

Wasby, Krislov,[2] Becker, and Levine[3] have hurdled the applied research label and surged forward into legal impact theory, termed "explanatory theory". These pioneers have invested the "explanatory theory" with certain characteristics and hypotheses, forged from the analysis of numerous legal impact research studies, i.e., applied research. Some of these characteristics and hypotheses, increasingly more indispensable to legal impact research are 1) traits (a line of cases will have greater impact than a single case; noncompliance will be greater when dissenting and/or concurring opinions exist than in unanimous decisions, etc.); 2) communication (reporting of immediate negative reaction tends to increase noncompliance, etc.); 3) political environment (the greater the number of levels of government or the number of people affected, the greater the noncompliance; compliance will be delayed more if resisters see a chance of victory than if they do not, etc.); 4) follow-up (where past decisions have not been enforced,

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[1]Jones, op. cit., p. 332.

[2]Samuel Krislov, "The Perimeters of Power: Patterns of Compliance and Opposition to Supreme Court Decisions," Paper presented at the Annual Convention of the American Political Science Association, 1963.

[3]James P. Levine, "Methodological Concerns in Studying Supreme Court Efficacy," Law and Society 4 (February 1970), pp. 283-611.

resistance to present decisions will be less great than where they have been enforced, etc.); 5) those responding (the greater the discretion of local officials, the lower the compliance; federal court judges are more likely to comply with Supreme Court decisions affecting the states than are state judges, etc.); 6) beliefs and values (greater information about court decisions brings greater disapproval, etc.).[1]

In summary, legal impact research has progressed from the narrow concern of compliance, to the expanded one of impact, to the even broader one of theory. Compliance only seeks to understand direct changes, while impact considers indirect as well as direct response, and the present stage, theory, seeks to comprehend legal impact research in the aggregate, i.e., hypotheses and characteristics derived from historical analysis. Emphasis has shifted from objective digestion of decisions, quantitative changes, and empirical data to subjective responses, qualitative adjustment, and development of theory.

In the future, the possibility exists for the development of subsets of "explanatory theory", that is, theory that reflects the characteristic adjustment of particular disciplines, e.g., criminal justice, to law. These disciplines, in turn, may be further refined by examining the traits of their components, e.g., corrections within the criminal

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[1]Theodore L. Becker and Malcolm M. Feeley, The Impact of Supreme Court Decisions: Empirical Studies (New York: Oxford University Press, 1973), pp. 215-217, citing Stephen L. Wasby, The Impact of The United States Supreme Court: Some Perspectives (Homewood, Illinois: The Dorsey Press, 1970), pp. 216-268.

justice system. More impact research in these disciplines is obviously required, but through the processes of induction and deduction, interpolation and extrapolation, current theory can serve as a spring-board.

CHAPTER V

METHODOLOGY AND STATEMENT OF PROBLEM

This thesis will examine the impact of Morrissey v. Brewer[1] on parole revocation in Michigan (see Appendix for complete digest). Morrissey's impact will be examined in terms of 1) policy, law, and procedures, 2) revocation rates, 3) parole grant rates, and 4) the receptibility and reaction of corrections personnel. Three groups of correctional personnel connected with the revocation process--administrators in the Bureau of Field Services (responsible for parole and probation), field personnel (parole and parole/probation agents), and parole board--will be analyzed individually and interrelatedly. The three groups will be analyzed in relation to one another to see if involvement with the revocation process at a particular point affects the reception of Morrissey differently. Obviously, such an analysis

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[1]Morrissey v. Brewer, 408 U.S. 471 (1972). This decision granted a preliminary hearing and final revocation hearing to parolees faced with the prospect of parole revocation. The purpose of the preliminary hearing is to determine if "there is probable cause to hold the parolee for the final decision of the parole board on revocation. The final hearing is to determine revocation or not. The due process rights granted were a) written notice of the claimed violations of parole; b) disclosure to the parolee of evidence against him; c) opportunity to be heard in person and to present witnesses and documentary evidence; d) the right to confront and cross-examine adverse witnesses, e) a "neutral and detached" hearing body, f) a written statement of the evidence and reasons for parole revocations. The right to counsel was not decided.

would provide clues as to what group Morrissey affected the most. In addition, Morrissey will be considered in conjunction with Hawkins v. Michigan Parole Board[1] (see Appendix for complete digest), a Michigan case which expanded Morrissey and added an extra dimension to the revocation process.

The central question is whether Morrissey changed or altered the revocation process in existence on July 1, 1972, and if so, how much (Morrissey was decided June 29, 1972). Other questions include attitudinal and behavioral changes in corrections personnel (alluded to above) in relation to parole revocation as a result of Morrissey/Hawkins in particular and judicial intervention in general, whether changes in parole grant and parole revocation rates can be attributed to Morrissey, and whether correctional adaptation to Morrissey approximates law enforcement adaptation to Mapp v. Ohio[2] and Miranda v. Arizona[3] (see Chapter III).

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[1]Hawkins v. Michigan Parole Board, 45 Michigan App. 529 (1973). A post-Morrissey Michigan case, which, in effect, gave Michigan parolees the full panoply of due process rights, i.e., it extended the due process right to counsel left undecided by Morrissey. This requires further clarification, however. M.C.L.A. (791.240) (a)0, 35 years prior to Morrissey, provided counsel for parolees with means. Hawkins, adopting an "equal protection" stance, mandated that counsel be available for parolees with means and appointed for indigents in all cases "other than conviction of a felony or misdemeanor punishable by imprisonment." In addition, the Hawkins court ordered that 1) the circuit court in the county in which the prisoner is confined shall determine indigency, 2) the same court shall appoint counsel, and 3) the cost of counsel shall be paid from the operating budget of the Department of Corrections until such time as the legislature shall otherwise provide.

[2]Mapp v. Ohio, 384 U.S. 426 (1966).

[3]Miranda v. Arizona, 367 U.S. 643 (1961).

A. Method

Study Design

This study will essentially utilize the time series design advocated by Lempert to analyze and evaluate data on parole revocation, parole release, and inmate population. The time series design is a variation--an improvement--on the one-group pre-test post-test design where "the law is the experimental variable and the two observations are a pre-test and post-test." In legal impact research terms "the pre-test and post-test equivalents will ordinarily take the form of statistical reports of the behavior which the law is designed to regulate at two points in time (before and after the passage of the law under study)."

Although the time series design is a more precise instrument of measurement than the one-group pre-test post-test design, it too has several weaknesses. The time series design is preferable because it controls for maturation, regression, and certain selection and interaction effects. However, its most serious defect is the lack of a control population. Furthermore, like the one-group pre-test post-test design, the time series design does not control for independent historical variables, for history—selection interaction effects which are the results of the expressive function of the law, or the advent of non-legal variables.

OXO--One-group pre-test post-test design

OOOXOOO--Time series design

B. Procedures Used in Study

Legal Framework

The legal framework appears in Chapters III and IV. The purpose of Chapter III is to shape the historical, legal, and conceptual development of parole/probation and parole/probation revocation. Chapter IV examines legal impact studies within criminal justice.

Interview

A personal taped interview was conducted with each of the five parole board members, four administrators within the Bureau of Field Services, the Director of the Program Bureau (Department of Corrections), and the Hearing Examiner for districts three and four, based in East Lansing, Michigan. The four administrators within the Bureau of Field Services were: 1) the Director of the Bureau, 2) Deputy Director of Operations, 3) Administrative Assistant for Parole Revocation, and 4) the Inter-State Compact Administrator. All the interviews were conducted at the Department of Corrections, Steven T. Mason Building, Lansing, Michigan, and were an average of forty-five (45) minutes in length. The purpose of these interviews were to establish a framework of operation, to locate sources of information, i.e., policy directives, memorandums, supplementary sources of data, and to explain historical developments in the parole/parole revocation process in Michigan that was not documented. Interviews were also taped with Judge Gordon W. Britten, presiding judge of the 55th Circuit for Michigan (Jackson County), who appoints all counsel for indigent parolees at parole revocation, Attorney Myron M. Sanderson of Jackson, Michigan, a former

district attorney and veteran defender of parolees, both prior to and after Morrissey, and Mr. Chester Hawkins of East Lansing, Michigan, an ex-parolee active in corrections reform and the plaintiff of Hawkins v. Parole Board, the post-Morrissey decision that extended the right to counsel (appointment of counsel) to indigents. Judge Britten was interviewed in his chambers, Attorney Sanderson in his office, and Mr. Hawkins in his home and the interviews were twenty-five (25), thirty-five (35), and ninety (90) minutes in duration, respectively.

Data Analysis

Data on parole revocation, parole release, inmate population, and "formal" revocation hearings were collected, reviewed, and analyzed. Nine years of data on parole revocation, parole release, and inmate population, the years 1966-1975--six years prior to Morrissey and three years after Morrissey--were analyzed. The data on the aforementioned categories were obtained from the Program Bureau and the Management Series Division of the Department of Corrections. Although six years of the three categories of data prior to Morrissey was collected and analyzed, only the three years (1969-1971) immediately prior to Morrissey were considered for this study, because only three years have expired since Morrissey. The data permitted the researcher to review historical and contemporary trends in parole revocation, parole release, and inmate population, and to speculate whether any changes in these entities could be attributed to Morrissey.

Six years of data (1970-1975) on "formal" revocation hearings, hearings with attorneys and/or witnesses, were collected, reviewed, and

analyzed. This data was obtained from the desk of the Administrative Assistant for Parole Revocation. Although six years of data were available, only the last four years (1972-1975) were considered in this study, to achieve a balance between pre-Hawkins and post-Hawkins periods (Hawkins was implemented on January 1, 1974 after an unsuccessful appeal by the state of Michigan from the initial decision on March 23, 1973). The data enabled the researcher to speculate whether any changes in "formal" revocation hearings, or requests for attorneys, could be attributed to Hawkins. All data is presented in Chapter VI.

Questionnaire

The questionnaire addressed itself to the receptibility and adjustment of Morrissey/Hawkins by corrections personnel in particular, and to judicial intervention and prisoner's rights in general. The questionnaire was sent to 120 people and parole/probation agents,[1] including district supervisors. The 120 figure represents the total number of parole personnel within the Bureau of Field Services, as extracted from the roster. Sixty-four (64) parole personnel (55%) returned the questionnaire after a partial telephone follow-up. The ten persons interviewed within the Department of Corrections were also given the questionnaire (they were returned immediately following the interviews).

The questionnaire to the ten persons also served as a pre-test (all the interviews were completed at least three weeks prior to mailing

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[1]Some agents, particularly those in districts VI and VII--the sparsely populated areas--double as probation and parole agents and are usually responsible for two or more counties.

the questionnaire to the field agents and parole agents). The questionnaire was modified twice before the final version, growing from sixteen, to twenty-nine, and finally to fifty questions. Based on the suggestions of the interviewers, some questions were added and some were reworded to provide clarity, but the substance of the questions remained unchanged. The pre-test will be considered in the final data.

The final version of the questionnaire consists of fifty questions, nine of them biographical, e.g., working district, age, length of service with Michigan Department of Corrections, and the remaining twenty-nine (29) classificatory, on the subject of the thesis. A section for comments was available at the end of the questionnaire.

Empirical Observation

Forty-one parole revocation hearings--thirty-seven regular, two preliminary, and two formal--were observed. The thirty-seven regular hearings, and two formal hearings, were observed at the State Prison for Southern Michigan at Jackson, Michigan. One preliminary hearing was observed at the Jackson County Jail in Jackson, Michigan and the other at the Ingham County Jail in Mason, Michigan. The hearings enabled the researcher to evaluate policy procedure against practice and to observe the exchange and interaction between the parole board, parolees, attorneys, and witnesses. The hearings not only provided a forum to observe the participants in the revocation process, but to supplement data, e.g., requests for attorneys and to get a perspective on data that was unavailable, i.e., waivers of the preliminary hearing.

C. Scope of Study

The scope and goals of this research are presented below, along with limitations:

1. Examine the interaction between judicial authority and administrative authority;
2. Evaluate the "success" or "failure" of the law, i.e., Morrissey, in providing due process rights to parolees;
3. Analyze the perceptions, i.e., adaptability, of correctional personnel to the law in question from various areas of responsibility.
4. To determine if correctional implementation and adaptability to Morrissey parallels law enforcement adjustment to Supreme Court decisions.

D. Limitations of Thesis

The scope of this research will be limited by the following factors:

1. The absence of impact research in corrections. Within the criminal justice discipline, legal impact research has been almost totally confined to Supreme Court decisions that affect law enforcement, most notably, Mapp v. Ohio[1] and Miranda v. Arizona.[2]

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[1]Mapp v. Ohio, 367 U.S. 643 (1961).

[2]Miranda v. Arizona, 387 U.S. 436 (1966).

2. The absence of a "before study" on the attitudes of correctional personnel to judicial intervention, that is, a study before Morrissey. Although the questionnaire in this thesis attempts to measure the attitude of correctional personnel involved with parole prior to Morrissey, it is afterall, administered after Morrissey, and therefore, the conclusions will be less original.

3. The absence of specific data, for instance:

   a. the lack of data on the number of preliminary hearings; the number of preliminary hearings conducted by hearing examiners as opposed to field personnel; the number of preliminary hearings waived,

   b. the number of parolees recommended for return as opposed to the number actually returned, that is, the number considered by the parole board in comparison to the number revoked by it,

   c. the disposition, i.e., release, return, and length of return of parolees who opt for a formal revocation hearing,

   d. the average length of return or "flop" prior to Morrissey and the average length after Morrissey.

E. Definitions

History--specific events occurring between measurements in addition to the experimental variable, e.g., a change in parole board membership or a change in the number of violation/offenses committed by parolees.

History-Selection Interaction--historical events interacting that influence the introduction of the experimental variable, so much so, that the experimental variable is only an expression of perceived changes, e.g., changes in the inmate population may have already led to policy changes in regards to parole revocation and parole release.

Maturation--processes within the entity studies operating as a function of the passage of time per se (not specific to the particular events, e.g., aging).

Non-legal Variable--variable that is not related to the law in question but nevertheless affects the entity that the law is suppose to change, e.g., parolees may find more or less employment.

Regression--a stochastic probability that extreme phenomena will appear less extreme upon remeasurement, i.e., a change attributed to a law may have occurred intermittently at similar points in time.

Pre-test--measurement or observation of an entity before the introduction of an experimental variable, in this case, the measurement or observation of parole release, parole revocation, and inmate population data before the introduction of Morrissey.

Post-test--same as pretest except measurements or observations are after introduction of the experimental variable.

Parole Board--an administrative body, usually three to seven persons (five in Michigan), empowered by state statutes to grant or revoke parole.

Parole--conditional freedom of an offender for the remainder of his sentence.

Parole Agent--a state agent, one in Michigan assigned to the Bureau of Field Services, empowered to supervise parolees.

Minimum Term of Confinement--the minimum term an offender must serve for a single conviction, i.e., an indeterminate sentence, before he is eligible for release, i.e., parole.

Maximum Term of Confinement--the maximum time an offender must serve on a conviction, therefore, obviating parole.

Technical Violation of Parole (TVP)--violation of the conditions of parole without commission of an offense, e.g., failure to inform parole agent of a change of address or failure to report on a monthly basis.

Parole Violation With New Sentence (PVNS)--commission of a new offense with or without concomitant violations of parole (commission of a new offense is ipso facto a violation of parole and conviction on new criminal charges while on parole is ipso facto a revocation of parole).

Return, "Pass" or "Flop"--the time a parolee must serve following a revocation of parole for technical violations before he is eligible, i.e., will be considered for a new parole. In Michigan, usually four months to one year.

CHAPTER VI

PAROLE REVOCATION PROCESS IN MICHIGAN: HISTORIC AND PRESENT

Since 1895 Michigan has statutorily authorized parole.[1] The power to parole initially rested solely with the governor of the state who was empowered to issue parole to offenders who met the following criteria:

> Any convict . . . imprisoned in any of the prisons of (the) state, under a sentence other than life sentence, who may have served the minimum term provided by law for the crime for which he was convicted, and who has not previously served two terms of imprisonment in any penal institution for felony.[2]

The statute did not provide for a revocation hearing nor for other due process rights such as a notice of charges, counsel, reasons for revocation, etc. Neither, however, did the statute prohibit such a hearing. It is conceivable that the governor or his representative did permit a hearing or appeal on a revocation charge. Barring this, the parolee was simply returned to custody.

Eight years later (1903)[3] the Michigan legislature authorized probation for an offender who had "never before been convicted in this state or elsewhere, of a crime or misdemeanor, after a plea or verdict

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[1]This is not to be confused with pardon or executive clemency, which have been the perennial power of the governor.

[2]Mich. Public Acts (1895), No. 218, p. 506.

[3]Mich. Public Acts (1903), No. 91, p. 116.

of guilty in any case where the commission of a crime or misdemeanor is charged. . . ." The statute was praised as beneficial to the rehabilitation of the offender as well as "the public good".

In 1921, the Michigan legislature created the office of "Commissioner of Pardons and Paroles" to assist the governor in administrating pardons and paroles. The position of commissioner evolved out of a body known since 1885, among other titles, as the "advisory board in the matter of pardons".[1] Three significant changes, therefore, occurred in May 1921: The pardons board was abolished, the position of commissioner created, and the duties were expanded to include parole as well as pardon. The power to grant parole was shared jointly by the governor and the commission, with the former, nevertheless, in command. Also, the legal distinction between pardons and parole was lacking in clarity.[2]

In 1937 the Michigan Department of Corrections was formed,[3] with several bureaus, which included a Bureau of Probation and a Bureau of Pardons and Paroles, the predecessors of the current Bureau of Field

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[1]Mich. Public Acts (1885), No. 200, p. 280.

[2]M.C.L. 17521 (1929). "Authority to grant parole . . . is hereby conferred exclusively upon the governor in all cases of murder, actual forcible rape, . . . offenses by public officers in violation of their duties . . . , and all persons convicted and serving sentence for conspiracy to defraud public municipalities. In all other cases such authority is hereby conferred upon the advisory board in matters of pardons. The governor and the advisory board in the matters of pardons acting jointly shall have authority to adopt such rules as may . . . be deemed wise or necessary to properly carry out the provisions of this act. . . ."

[3]Mich. Public Acts (1937), No. 255, Chapter 1, p. 425.

Services. The Bureau of Pardons and Paroles incurred the sole power to grant parole, and in regards to pardons, made recommendations to the governor. The parole board, a body of three, was an appendage of the Bureau of Pardons and Paroles, and had as its chairman the Assistant Director in charge of the Bureau.[1] The other two members were appointed by the newly created Corrections Commission, a five person body appointed by the governor.

In the same year (1937), parolees received the right to a hearing before the parole board when charged with a technical violation of parole and faced with subsequent parole revocation.[2] Parolees convicted on new criminal charges were not eligible for a hearing. The parolee was entitled to "be heard by counsel of his own choice, at his own expense, and may defend himself, and he shall have the right to produce witnesses and proof in his favor and to meet the witnesses that are produced against him."[3] The parolee was granted an additional benefit. In the event a parolee could satisfy the board that a material witness was pertinent to his defense and he could not afford to summon such a witness, the board could "in its discretion, cause a subpoena to be served upon such a witness."[4] The witness was subpoenaed and paid as if he had performed "in behalf of the people", that is, as if he had been

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[1] Ibid., Chapter III, p. 431.

[2] Ibid., p. 433.

[3] Ibid.

[4] Ibid.

subpoenaed to testify in a court of law.[1] The board's power of subpoena was rescinded by the state legislature in 1968.[2] The parole board was not compelled to hear the parolee within a time limit until 1953, when a 30 day limitation to hear the parolee from time of apprehension was imposed by the state legislature[3] (by the same act, the parole board became a separate entity within the Department of Corrections, apart from the Bureau of Pardons and Paroles, and directly responsible to the Corrections Commission in the person of the Director of the DOC. At the same time, the board members commenced being appointed from "within the state civil service", and the membership was increased to the present number, five).[4]

Policy, prior to the late sixties, as evidenced by the lack of available documents and the accounts of career administrators, was largely informal. For the Bureau of Field Services, memorandums were the primary means of disseminating policy. One administrator, when requested to produce obsolete policy directives replied, "We only recently started to use written policy directives with any regularity."

The parole board, at least since 1950 and possibly earlier, has kept a verbatim account of parole revocation hearings, first through

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[1] Ibid.

[2] Mich. Public Acts (1968), No. 192, p. 291. "Section 40 of Act 232 of the Public Acts of 1953, being section 791.240 of the Compiled Law of 1948, is repealed."

[3] Mich. Public Acts (1953), No. 232, Chapter III, p. 415.

[4] Ibid., p. 413.

the use of shorthand clerks and later by recording devices.[1] Michigan, as of January 1972 (six months prior to Morrissey), was one of only 27 jurisdictions to keep a verbatim record of parole revocation hearings.[2] Parolees in the remaining 27 jurisdictions,[3] prior to Morrissey, had no record--or only a partial one--of their fate (parole revocation). The consequences of this defect are obvious: the parolee was sorely challenged, on judicial review, to contest the revocation hearing on procedural or substantive grounds. Absent witnesses, whose testimony could only be termed moderately effective at best, it was the word of the parolee against that of the parole board. Given the weight of the various doctrines ("privilege", "hands-off", "custody", etc.) at that time, and the almost universal integrity attributed to parole boards--administrative bodies--the parolee was at a distinct disadvantage. In regards to verbatim records at revocation hearings, parolees in Michigan were accorded a relative extra measure of due process.

A written document, drafted the latter part of 1965, provides some insight into pre-Morrissey revocation procedures in Michigan.[4]

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[1]Interview with Parole Board Chairman by author, Lansing, Michigan, October 7, 1975.

[2]Vincent O'Leary and Joan Nuffield, The Organization of Parole Systems in The United States (Hackensack, New Jersey: National Council on Crime and Delinquency, October 1972), p. XLVIII.

[3]In addition to the 50 states, this number includes four more jurisdictions composed of California women, Indiana women, District of Columbia, and U.S. Parole Board.

[4]Michigan Department of Corrections Memorandum to Michigan Solicitor General, "Parole Violation Procedure", Lansing, Michigan, November 22, 1965.

The parole officer investigated the alleged violation(s), formulated the charges, and forwarded his findings to the Assistant Director, Bureau of Pardons and Paroles, in Lansing, the state capital. The parole officer determined whether arrest and confinement was necessary while the charges were investigated. A parolee confined on technical violations of parole, by a detainer, was not entitled to bail.[1] If the parole officer's recommendation was for return, the Assistant Director reviewed the charges and upon concurrence, issued a warrant for return to a penal institution. By 1970, in accordance with departmental policy and standard administrative practices for state agencies, a parolee, upon return to an institution for a parole revocation hearing, received a copy of the charges against him.[2] Later, shortly before Morrissey, parolees received a copy of the charges at the initial site of detention.[3] The Assistant Director also forwarded a copy of his disposition to the parole board. The parole board scheduled a hearing at the institution in which the parolee was incarcerated. The hearing by the parole board had to be conducted at least 30 days from the time the parolee became available to the DOC, i.e., from the time the parolee

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[1] O'Leary and Nuffield, op. cit., p. 72.

[2] Michigan Department of Corrections, Policy Statement, "Parole Board: Paroles, Pardons, Reprieves, Commutation of Sentence" (filed with Secretary of State), Lansing, Michigan, May 21, 1970. See also, Mich. Public Acts (1969), No. 306, Chapter 4, p. 571.

[3] Interview with Inter-State Compact Administrator (formerly held the position of Assistant Administrator for Parole Violators) by author, Lansing, Michigan, November 19, 1975.

was served with charges or after the disposition of new criminal charges, or upon obtaining bail (a detainer against a parolee simultaneously with new criminal charges pending, almost universally obviated bail),[1] or the board loses jurisdiction over the parolee for the contested charges.[2] Also, the state did "not have to assure his [the parolee's] physical presence in order to conduct a parole violation hearing,"[3] where he was confined on separate criminal charges.

At the hearing, the parolee was advised of his right to an immediate hearing before the two board members present or to a "formal" hearing--a hearing with witnesses and retained counsel. If the parolee declined the "formal" hearing, he was given an immediate hearing, and the two board members reached a decision by such criteria as "his attitude, his reasons for misconduct, and his reasoning in regard to a further order and programming [sic]."[4] In the event of revocation, the parolee could have been reconfined up to his maximum sentence, but by policy, he was regularly considered for a new parole at 18 month

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[1]There is presently no legal barrier to bail in this instance, but bondsmen are hesitant in giving bail to a man with a present criminal record. However, a bill pending in the Michigan Legislature, would deny "bail to persons who are charged with a felony while on . . . probation or parole from a prior felony conviction." See "committee Okays Constitutional Amendment Denying Bail", Michigan Report 15 (May 13, 1976), p. 4.

[2]Stewart v. Parole Board, Department of Corrections, 170 N.W. 2d 16 (1969); 382 Michigan 474 and Lobaido v. Department of Corrections, Parole Board, 194 N.W. 2d 444 (1971); 37 Mich. App. 171.

[3]Ward v. Parole Board, Department of Corrections, 192 N.W. 2d 537, 540 (1971); 35 Mich. App. 456.

[4]Michigan Department of Corrections Memorandum to Michigan Solicitor General, "Parole Violation Procedure", op. cit., p. 2.

intervals.[1] The decision of the two board members was later discussed in executive session, at which at least three of the five board members (including at least one of the two that originally heard the case) were in attendance, and a final decision was rendered.[2]

If the parolee opted for a "formal" hearing, a rarity, averaging no more than two a month prior to 1970 (see data, Chapter VII), the parole board adjourned without further discussion of the facts or issues, and forwarded the parolee's file to the Assistant Director. The Assistant Director contacted the state Attorney General to serve as counsel for the Bureau of Pardons and Paroles, a Bill of Particulars was forwarded to the parolee and his attorney, usually ten days prior to the hearing, and witnesses were summoned. Subpoenas, issued by the Assistant Director, were served to compel attendance of witnesses, if the parole board deemed it necessary for the hearing or if the parolee was without means. Two parole board members (not necessarily the two who originally heard the case) conducted the hearing, and later at executive session, a final disposition was rendered.

A. Revocation Process After Morrissey

Approximately one month after Morrissey,[3] August 2, 1972, the Attorney General of Michigan sent a memorandum on the subject of parole

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[1] Ibid.

[2] Ibid.

[3] Morrissey was decided June 29, 1972.

revocation to the Bureau of Field Services and the Parole Board.[1] The Attorney General advised the parties on the substance of Morrissey with instructions that there were to be no automatic parole revocations upon conviction on new criminal charges; that findings of fact, conclusions, and ultimate disposition were to be in writing, and specified the time limits for ex post facto application of Morrissey. Six months later, the requirements of Morrissey were formally incorporated into the Bureau of Field Services' Manual of Operating Procedures.[2]

District supervisors, senior parole agents, or parole agents conducted the preliminary hearings prior to the advent of hearing examiners in December 1973.[3] The newly appointed hearing examiners were senior parole agents employed with the Bureau of Field Services. There were and are only two hearing examiners. The two hearing examiners are responsible for conducting preliminary hearings in four of the seven districts;[4] districts one, two, three, and four. The hearing examiners,

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[1]Michigan Attorney General Memorandum to Bureau of Field Services and Parole Board, Michigan Department of Corrections, "Temporary Parole Violation Procedures," Lansing, Michigan, August 2, 1972.

[2]Michigan Department of Corrections, Bureau of Field Services, Manual of Operating Procedures, " Parole Violating Reporting Procedure," Section 4.7(1), February 1973.

[3]Interview with hearing examiner for districts three and four by the author, Lansing, Michigan, November 15, 1975.

[4]The Detroit (Wayne County) area, because of its large parolee population, has been organized into a region. Other districts are to follow. The regional concept facilitates decentralization. Preliminary hearings, for example, are conducted by the hearing examiner and senior parole agents, depending on the workload. Also, warrants for return are issued by the regional director rather than the Administrative Assistant for Parole Violators, in Lansing, Michigan.

nevertheless, account for approximately 75 percent of the preliminary hearings, because of the large parolee population in these areas. Districts one, two, three, and four are the most populated and industrialized areas, occupying Southeast, Central, and Southwest Michigan, but comprises only a small fraction of the land area[1] (see Appendix, page 162).

The revocation process commences when a parole agent learns of an alleged violation by a parolee, investigates the infractions, and finding sufficient evidence, elects to file violation charges against the parolee. The parolee is usually held in custody[2] by a local law enforcement agency by a detainer (today, as before Morrissey, a detainer usually precludes bail when the parolee is held on new criminal charges). Before the charges are served (usually one to three days following arrest or detention), however, the parole agent secures the concurrence of the Senior Parole Agent, where applicable.[3] This is a review procedure to check for cogency of charges and of the need to process the case for return, i.e., if the charges are serious or if the parolee has a history of parole violations.

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[1]The regional concept (see organizational chart) is to replace the district concept later in 1976. Each region will have a regional administrator and area manager. The area managers, in addition to supervising parole agents, will conduct all preliminary hearings for parole revocation. They will also replace the present two hearing examiners.

[2]At this point the statutory 30 day time limit for disposition of the revocation charges begins, barring apprehension of the parolee on new criminal charges. Included in the 30 day limit are both the preliminary hearing and final revocation hearing.

[3]Michigan Department of Corrections, Bureau of Field Services, Manual of Operating Procedures, "Parole Violation Reporting Procedure," op. cit., Part II, No. 1.

If the Senior Parole Agent concurs, the parolee is served with charges (an acknowledgement of receipt is not an admission of guilt by the parolee) on a standard departmental form entitled "Parole Violation Charges", and simultaneously on another form entitled "Election of Preliminary Hearing", the parolee decides either to 1) waive the preliminary hearing, 2) request a preliminary hearing, or 3) request postponement of the preliminary hearing. The waiver of the preliminary hearing, like the acknowledgement of receipt, is not a declaration of guilt, but only speedily processes the parolee to a hearing before the board. At the preliminary hearing the parolee is permitted to testify, and to present witnesses and other evidence in his own behalf. Counsel is not presently permitted,[1] however, in conjunction with Gagnon, the Department of Corrections has a pending policy to permit retained counsel and to appoint counsel for indigents in "extraordinarily complex cases and in cases involving persons not capable of speaking effectively for themselves."[2]

The infraction by the parolee may be PVNS, that is, a new criminal charge (or charges) accompanied by one or more technical violations of parole, or a strictly technical violation of parole, that is, violation of the conditions of parole without a new criminal offense. An example of a PVNS would be an arrest for possession of a pistol (new criminal

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[1]Michigan Department of Corrections, Policy Directive No. PPE-10, "Preliminary Parole Revocation Hearing," March 13, 1974 (new).

[2]Michigan Attorney General opinion to Director, Michigan Department of Corrections, "Counsel to Indigents at Preliminary Parole Revocation Hearings," Lansing, Michigan, August 14, 1975.

charge) while in the company of a known felon (condition of parole). A typical technical violation of parole (TVP) is failure to report monthly to one's parole agent or absconding, i.e., to leave the state without permission of one's parole agent.

A parolee incarcerated with pending criminal charges receives a preliminary hearing if he elects, but the 30 day time limit does not commence until the parolee is available to the Department of Corrections, that is, until disposition of the criminal charges or until he obtains bail.[1] Where the parolee is confined on a separate criminal charge and demands a hearing on an alleged violation, i.e., a revocation hearing before the parole board, it is his burden to make himself available by obtaining bail or liberty.[2]

The hearing examiner in Michigan determines only probable cause;[3] he does not directly rule on the decision to return, although probable cause in the estimation of one hearing examiner is found in approximately 95 percent of the cases that are heard. The hearing examiner forwards his findings to the Administrative Assistant for Parole Violators at the Bureau of Field Services, who decides if a warrant is to be issued for return of the parolee to SPSM for a hearing before the board. The duties of the Administrative Assistant for Parole Violators (AAPV)

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[1] Ward v. Parole Board, Department of Corrections, 192 N.W. 2d 537 (1971); 35 Mich. App. 456.

[2] Ibid., p. 539.

[3] Michigan Department of Corrections, Policy Directive No. PPE-10, "Preliminary Parole Revocation Hearing," March 13, 1974 (new).

and hearing examiner are not only separated functionally, but organizationally as well. The hearing examiner, administratively, is attached to the parole board while the AAPV is attached to the Bureau of Field Services. Although their functions require coordination with one another, one is not subordinate to the other. The findings of the hearing examiner are not reviewable, i.e., changeable, by the parole board or the Bureau of Field Services, although the AAPV may decide not to issue a warrant. Just as the hearing examiner may decide that probable cause exists, but recommend to a parole agent that the charges be dropped because they are minor or mitigating circumstances surround them, the AAPV may decline to issue a warrant for the same reasons. If the AAPV does issue a warrant, he orders the parolee returned to SPSM for a hearing before the board.

The parolee is heard in SPSM by two members of the parole board. At the hearing the parolee is given the options of 1) retaining counsel, 2) having counsel appointed, 3) having witnesses and counsel, or 4) receiving an immediate hearing before the two board members. The latter three options (any one of them) necessitates a postponement of the proceedings and the scheduling of another hearing--a "formal" revocation hearing.

All appointed counsel comes from Jackson County, since all revocation hearings (except some women cases) are held at SPSM, where all parolees, faced with the prospect of parole revocation after the preliminary hearing, are incarcerated. One attorney, a former prosecutor,

handles over 50 percent of the appointed cases.[1]

Present at the "formal" hearing, in addition to the parolee with witnesses and/or counsel and the parole board, may be witnesses for the Bureau of Field Services, and the AAPV, who functions as counsel for the board. The witnesses for the Bureau may include the parole agent bringing violation charges, the senior parole officer in his (the parole agent's) office, and frequently law enforcement officers. The state Attorney General's Office formerly served as counsel for the board until 1972, when the AAPV assumed the role.

B. Summary

Even though Michigan had granted due process rights to parolees at parole revocation for more than a quarter of a century prior to the introduction of Morrissey, the revocation process was nevertheless affected by The Supreme Court decision. Michigan, of its own volition, thirty-five years before Morrissey, had statutorily given parolees faced with the prospect of parole revocation the due process rights of 1) a hearing, 2) right to defend himself, 3) right to present favorable witnesses and evidence, 4) right to confront adverse witnesses and evidence, and 5) right to retain counsel. For a stretch of time--some

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[1]The court in Hawkins did not assume, or did not consider it relevant, that parolees would be transferred out of jurisdiction of arrest to another district--one district of consolidation--for a final revocation hearing. Hawkins mandated that "the circuit court in which the parolee is confined shall determine indigency (and) appoint counsel." This procedure saves travel time for the board but handicaps parolees, who must arrange for transportation of witnesses, at their expense, to Jackson County.

thirty-five years--the parole board had the power to subpoena witnesses for the parolee and in its own behalf. Several years before the advent of Morrissey, in conformance with standard administrative procedures for state agencies as required by legislative statute, parolees were served a notice of charges, initially at the reception center at Jackson State Prison and later at the site of arrest or detention.

Morrissey's impact on the revocation process in Michigan was more profound procedurally than substantially. Morrissey altered, supplemented, and improved the existing process. The two-stage hearing--the preliminary and the final--precipitated an elaborate internal review procedure. A parolee may receive up to five different "judgments" or "determinations". First, the parole agent's charges are reviewed for validity by a senior parole agent and/or district supervisor. Secondly, the charges are examined for probable cause, and probable cause only, by the hearing examiner. Thirdly, the hearing examiner forwards his findings to the Administrative Assistant for Parole Violators (AAPV) who decides whether a warrant is to be issued. Fourthly, if the parolee is returned on the orders of the AAPV, he may elect to have a hearing before two members of the parole board, that is, a hearing without an attorney or witnesses. Fifthly, the parolee may opt for a "formal" revocation hearing, that is, a hearing with an attorney and/or witnesses.

Each stage of "judgment" is independent of the succeeding one, that is, although each stage requires coordination with the other, the decision at one stage cannot be changed, i.e., ordered to be changed, by another. For instance, the AAPV cannot "order" the hearing examiner to review his findings nor can the parole board "order" the AAPV to issue

or not to issue a return warrant. Each successive stage, however, can veto the decision of the preceding stage. This does not mean, however, that the AAPV, for example, will find probable cause where the hearing examiner did not. Simply, a veto is effective on a preceding decision to find the parolee at fault, not on one in his favor.

Admittedly, the findings at one stage are seldom contradicted by another. Data is not available but administrators within the Michigan Department of Corrections estimate that probable cause is found in 95 percent of the charges submitted by agents and revocation of parole is likely in a similar percentage of cases. One possible reason for such a high percentage of concurrence may be found in the review procedure. The screening of the parole agent's charges by the senior parole agents and/or district supervisors may be so thorough that only valid instances of parole violation reach the hearing examiner and successive stages of review. Another reason may be found within the organization of the Department of Corrections. The members of the parole board, the AAPV and the hearing examiners, have each at one point or another, been employed within the Department of Corrections, usually as parole agents or prison staffers. They have a close fraternity with each other. Their views and feelings concerning the necessity of certain actions are likely to be the same. The interchange of correctional personnel between functions, particularly say, the shift from prison staffer to parole board member, or simply review within the Department of Corrections, is an inherent conflict of interest to the establishment of "neutral and detached" determinations.

The Michigan Legislature and state courts have provided parolees with due process rights beyond the requirements or suggestions of Morrissey. The 30 day time limit imposed on the Department of Corrections for a final determination of parole revocation, once the department obtains jurisdiction, is a case in point. Morrissey said "the revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable."[1] The two stage hearing must be completed within 30 days or the parole board loses jurisdiction over the parolee for the contested violation charges.

While the Supreme Court in Morrissey did not "reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent,"[2] the Michigan Legislature decided the first half of the statement (retained counsel) thirty-five years earlier and the state appellate court decided the second half (appointed counsel) less than a year after Morrissey. Hawkins v. Michigan Parole Board[3] granted indigent parolees the right to appointed counsel at parole revocation hearings, thus giving Michigan parolees the full panoply of due process rights when faced with the prospect of parole revocation.

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[1] 408 U.S. 471, 488.

[2] Ibid., at 489.

[3] Hawkins v. Michigan Parole Board, 45 Michigan App. 529, 206 N.W. 2d 764 (1973).

CHAPTER VII

DESCRIPTION OF THE REVOCATION PROCESS AND CHARACTERISTICS OF THE PAROLEES INVOLVED

A. Description of the Actual Revocation Hearing in Michigan

All regular revocation hearings for the state of Michigan are held at the State Prison of Southern Michigan (SPSM) at Jackson, Michigan, except women cases, which are normally held at the Detroit House of Correction (DEHOCO). Sometimes, revocation hearings for women will be heard at SPSM when it is necessary to hear a case within the mandatory 30 day limit.

The hearings are held in a room of the main prison lobby. To get to the hearing room, which is in the interior of the prison, one must leave the guest lobby and pass through two steel doors, manned by security guards.

The room is spacious and comfortable, about 25' x 25'. It is carpeted wall-to-wall and two sides of the four walls are paneled. The room is also air-conditioned and well-lighted. The chairs are cushioned in the seat and arm supports. A large window gives almost a complete view of the lobby.

The two parole board members sit behind an executive desk; the size and type that would accommodate an executive board meeting of six to seven persons, and they are identified by name plates. A prison

security guard, attired in a gold-colored jacket and tie, sits at the table with the two board members. The security guard primarily operates the voice writer that records the hearing, insures that the parolee's prison file is present, and, if when necessary, quells any unruly behavior on the part of a parolee. The security guard is unarmed.

The parolees sit outside the room on benches in front of the large picture window, aligned in the order in which they are to appear before the board. For the most part, they are signaled by a buzzer operated by the security guard.

The parolee enters the room, is invited to have a seat ("please have a seat") and asked, "Your name is John Doe and your prison number if E000000, is that right?" Next, the parolee is informed that, "You are here because of an alleged parole violation charge (or charges). Have you received a copy of the charge(s)?" Usually, the parolee will produce a copy of the charges. The board then proceeds to inform the parolee of the board's function at the hearing: "We are here to determine if you did violate parole, and if so, how seriously. Is all of this clear to you?" After the board is confident that the parolee understands why he is before the board and the board's function, he is informed that before the hearing commences, he has one of four options:[1]

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[1]The four options, particularly the delineation between retained and appointed counsel, is in force as a result of Callison v. Michigan Department of Corrections, 56 Mich. App. 260 (1974), 223 N.W. 2d 738. The Michigan Court of Appeals said the statement by the board to the parolee that, ". . . you may have one of three kinds of hearings, a public hearing with counsel, also have a hearing with witnesses without counsel or you may have a public hearing before us here today," did not sufficiently apprise the parolee of the right to appointed counsel as provided by Hawkins.

1) he may retain an attorney, 2) have an attorney appointed, 3) have witnesses and an attorney, or 4) have an immediate hearing before the board. The options are presented in the order listed. If the parolee elects to have either one of the first three options, the hearing is postponed, without further discussion of the charges. Most parolees, 84 percent of those observed, elected option number four, an immediate hearing before the board.

Just before the charges are read, the parolee is actively encouraged to produce any documents, for example, pay stubs, W-2 forms, letters of recommendation, etc., to substantiate his employment and the character of his parole. Then, the number of charges and the substance of the charges are read entirely, without discussion. Normally, there are two or more charges, some of them felonies and misdemeanors pending in court. (The parole board does not review the revocation charges or the parolee's record before the hearing. In other words, prior to the hearing, the parole board members have no knowledge as to which parolees will be heard or the nature of the charges levied against them. The purpose of this procedure is not to prejudge the parolee.)

The charges are read again individually and the parolee is given an opportunity to respond to each charge. The parolee may speak at length with no time limit, although the hearings usually are over in ten to fifteen minutes. No parolee observed stood mute and only three of the forty-one admitted guilt with no defense. The three that did admit guilt with no defense had cases pending in court or had already been convicted and sentenced on new criminal charges.

After the charges are discussed, the parolee's history--the nature of his conviction or convictions and the general character of his parole or previous paroles--are reviewed and discussed, and the hearing is postponed or a recommendation for return and length of return is rendered. (The hearing may be postponed to gather more evidence; to await the disposition of new criminal charges; or to get the results of psychiatric evaluation.)

If the disposition is for return to prison, the parolee is cautioned that he is being recommended for imprisonment for so many months; recommended because the final decision for length of return must be discussed in executive session in which at least one other member, making a total of three members, must unanimously approve any final action. A parolee returned for less than twelve months is almost automatically assured a new parole at the expiration of his return (parolees, by direction of the Corrections Commission, must be considered for a parole at 12 month intervals with the exception of those who are within 18 months or less of their special good time maximum at the time of their last hearing, but this does not mean they will receive a parole grant).[1]

The revocation hearings are in keeping with standards for finding fact, but are not as sterile as a court. The hearings sometimes more resemble a counseling session, rather than an inquisition. The parolee is not "grilled". He may be told for instance that, "the circumstances

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[1]Michigan Department of Corrections, Policy Directive No. PD-DWA-45.05, "Parole Board Interview and Decision Criteria," June 1, 1975 (supersedes No. PD=DWA-45.05, 9-16-74).

strongly implied you had a gun. If you were in our place, what would you think?" Or, "you're a pretty good guy overall, why can't you keep out of petty trouble?" One parole board member will usually discuss the charges with the parolee, while the other reviews his past history. Thereby, the hearings are more efficient and the parolee is not "bombarded" with accusations and questions.

The parolee is usually addressed by his first name, and a board member, if addressed at all, is addressed as "sir". The interchange between the parolee and parole board frequently suggests fimiliarity, probably from a previous grant. Often the parolee and parole board will shake hands, particularly when both parties acknowledge that the return is a lenient one due to extremely mitigating circumstances. There was little or no evidence of parolee hostility towards the board and vice versa.

B. Characteristics of Revocation Hearings

The information which follows is based upon data collected from 38 regular revocation hearings over a six month period. The hearings were observed intermittently between October 19, 1975 and March 25, 1976 at the State Prison of Southern Michigan (SPSM) at Jackson, Michigan. The 38 hearings represent approximately 7 to 8 percent of the total number of revocation hearings for any given year.

Parolee Race and Ethnicity

The majority of the parolees (66%) at the hearings were Black and the remainder (34%) were White. No parolees of Spanish, Native American

(Indian), or oriental ethnicity were observed (could be distinguished as such). The racial composition at the revocation hearings approximates the racial composition of the state prison inmate population (54% non-white commitment in 1974).[1] It could not be ascertained, however, if the racial composition of the revocation hearings reflected the racial composition of the parolee population.

Age

Most of the parolees (76%) were 30 or less years of age. Only two--5 percent--of the parolees observed were over 51 years of age. The mean age for the entire group was 26-30. The largest single group, however, was 21-25 years of age (the parolees were grouped 18-20, 21-25, 26-30, 31-35, 36-40, 41-45, 46-50, and 51 and over). The age of the parolees at the hearings were consistent with the age of the inmate population (57% of all male commitments in 1974 were under the age of 25).[2]

Parolee Parole District

Ninety-two percent (92%) of the parolees came from the urban, industrialized, and heavily populated areas of the state--districts one, two, three, and four. The remaining 8 percent came from district five. Fifty percent (50%) alone came from the Detroit (Wayne County) area. None of the parolees came from districts six or seven.

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[1] MDC (Michigan Department of Corrections), Annual Report, 1974, pp. 20, 24.

[2] Ibid.

Number and Kind of Revocation Charges

Nearly all of the parolees (92%) were confronted with two or more violations of parole. Seventy-five percent (75%) were confronted with new criminal charges and/or technical violations of parole. The remaining twenty-five percent (25%) were solely charged with technical violations of parole. Fifty-three percent (53%) of the parolees were faced with two charges, 21 percent with three charges, 16 percent with four charges, 8 percent with five charges, and 3 percent with six charges or more. (The multiple violations, for the most part, were not cumulative infractions, i.e., they involved or were centered around one instance of parole violation.)

Incarceration at SPSM Prior to Revocation Hearing

Most parolees (54%) spent a week or less incarcerated at SPSM before they received a revocation hearing. Of the others, 24 percent spent 1-2 weeks, 16 percent spent 2-3 weeks, and 5 percent spent 3-4 weeks (this data does not include the initial period of arrest for a violation prior to return to SPSM).

Rights Parolees Exercise

Eighty-four percent (84%) of the parolees opted for an immediate hearing before the board. The remaining 16 percent requested: 1) witnesses (5%), 2) an attorney (6%), 3) an attorney and witnesses (5%). The requests for an attorney and/or witnesses--a formal revocation hearing--was slightly higher than the yearly figures for actual such hearings (formal revocation hearings are about 12 percent of the

total number of revocation hearings). However, some of the parolees will, no doubt, be unable to retain an attorney, refuse the services of an appointed attorney, or simply retract their requests for an attorney and witnesses.

Requests for a formal revocation hearing, by race, reflected the racial composition of the parolees. Sixty-six percent (66%) of the parolees who opted for an immediate hearing were Black, and 66 percent of those who requested a formal revocation hearing were Black. By age, all of the requests for a formal hearing, except one, came from the 26-30 group. The other came from the 36-40 age group. All of the requests for an attorney and/or witnesses came from parolees faced with new criminal charges.

Disposition by the Board

Most of the parolees (66%) were recommended[1] for return to prison, while the others (34%) had their hearings postponed. Nineteen percent (19%) of the postponements were for production of witnesses and/or attorneys, 11 percent for disposition of criminal charges in court, and 5 percent for psychiatric evaluation (the figure here for an attorney and/or witnesses is 3 percent higher than for the category "Rights Exercised by Parolees" because the parole board made a request to have witnesses present for a parolee).

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[1]The word recommendation is used because final disposition of the case must be decided at executive session in which at least three board members are present.

Length of Return

Forty-three percent of the parolees recommended for a revocation of parole were recommended for a return of four months or less, 18 percent for four to six months, 18 percent also for seven to nine months, and 21 percent for 10-12 months. About 20 percent of the parolees recommended for return to prison, would, if reincarcerated, complete their sentence (maxout).

Fifty percent (50%) of the parolees recommended for a return of four months or less were charged with technical violations of parole (TVP) only and 30 percent of them would maxout. Eighty percent (80%) of the parolees recommended returned 10-12 months were charged with new criminal offenses and 40 percent would maxout.

Length of Hearings

Eighty-two percent (82%) of the hearings were completed in less than 15 minutes and only one hearing was over 25 minutes in length. Nearly half, 45 percent, of the hearings were completed in 5-10 minutes, 37 percent in 11-15 minutes, 5 percent in 16-20 minutes, 11 percent in 21-25 minutes, and only 3 percent--one hearing--took over 25 minutes. All of the hearings over 15 minutes except one (21-25 minutes) concerned Black parolees.

Parolee Defense

Most parolees (84%) presented some sort of defense in the form of outright denial of all or some of the charges or in the form of extenuating circumstances. Nearly 50 percent of the parolees admitted some complicity or involvement in all of the violations charged to them.

Sixteen percent (16%) pleaded guilty to all the charges with no defense. However, all of those that did were charged with new criminal offenses.

Parolee Waiver of the Preliminary Hearing

Almost a third (26%) of the parolees at the hearings had previously waived the preliminary hearing (data was unavailable from other sources, i.e., was nonexistent). Forty percent (40%) of the parolees who waived the preliminary hearing were recommended returned to end of sentence, 60 percent were charged with new criminal offenses, 20 percent requested a formal revocation hearing, and 70 percent were Black.

Number and Kind of Conviction

The majority of parolees (63%) had only one conviction. Twenty-six percent (26%) had two convictions, 5 percent had three convictions, and 5 percent had four or more convictions. Only two of the parolees, 5 percent, had convictions that would amount to a capital offense; one involved rape and the other manslaughter.

C. Summary

The parolee at a regular revocation hearing in Michigan, from an initial observation, is likely to be a Black male less than 30 years of age from a metropolitan area. Over 90 percent of the time the parolee will be charged with two or more violations of parole and approximately 75 percent of the parolees will be charged with a new criminal offense. Nearly one-third of the parolees will have waived the preliminary hearing and most will spend a week or less incarcerated at SPSM prior to a revocation hearing.

At a hearing usually lasting a quarter of an hour (15 minutes) or less, parolees will generally offer some type of defense, denying all or some of the charges or giving extenuating circumstances to the charges in which they admit some complicity. Sixteen percent of the time parolees will defend themselves in the form of requests for attorneys and witnesses, however, a similar percentage of the time they will admit guilt with no defense. If the parolee requests an attorney or admits guilt with no defense, in all probability he is charged with a new criminal offense. The parolee is likely to be returned to prison--if returned at all--for less than twelve months.

CHAPTER VIII

IMPACT OF MORRISSEY: THE MICHIGAN PAROLE SYSTEM AND RETURN RATES

Post-Morrissey returns decreased fifteen percent or 633 over pre-Morrissey returns. The pre-Morrissey returns were 4,286 and the post-Morrissey ones were 3,653, for the first half and second half of the seven year period 1969-1975, respectively. Since Morrissey was decided June 29, 1972, and formally implemented in Michigan no later than a month after this date, the figures closely approach a precise division of action before and after Morrissey (instead of considering the three years on either side of Morrissey, the 1972 year can be equally divided for each period). Closer analysis, however, will present a more accurate picture of the nature of the post-Morrissey decline in parole revocations.

Return rates dropped dramatically in 1971, beginning in January of that year, at least a year and a half prior to Morrissey. The parole revocations for 1971 were 1,005, which represents a 407 or thirty percent decrease over the 1970 figure of 1,412, and a 312 or twenty-four percent decrease over the figure for 1969, 1,317. The number of parole revocations for 1972, 991, was even lower than the number for 1971, 1,005. After 1972, parole revocations either increased or remained relatively stable. The reasons for the sharp decline of 1971 are

speculative. One thing is certain, however: the decrease began well in advance of Morrissey.

The decline of revocation rules in 1971, carried over into 1972, might well have developed for two reasons--one philosophical, the other practical--neither mutually exclusive of the other. Practically, the dramatic increase in the prison inmate population may have mandated a decrease in the number of returns for parole violation and/or an increase in the number of parole releases (the parole releases for 1971 were the highest for any of the seven year period, outside of 1972 and 1975, the latter year being the most critical in terms of inmate overcrowding). The parole population presents one remedy, an ideal one, to the problem of prison space, since a great deal of discretion is involved in their release--and return. A parolee need not be returned for a technical violation of his (or her) parole. In all probability, a parolee would have to commit a series of technical violations, before he would be recommended for return. Closer scrutiny and evaluation of parole violation charges would result in dismissal of minor infractions, and suspension of borderline cases, with only the most incorrigible parolees processed for return to prison. Also, the fear of judicial intervention to prevent prison overcrowding, as a federal court recently ordered the state of Alabama to do, may have prompted state and corrections officials to decrease parole revocations and increase parole releases.

Philosophically, the state of Michigan and its Department of Corrections, perhaps imbued with modern concepts of prisoner's rights

and influenced by the due process and "human rights" explosion of the nineteen-sixties, sought to eliminate capricious behavior on the part of parole agents and give parolees the benefit of the doubt. Corrections personnel cannot expect to be totally immune to social movements and philosophies, and besides, Michigan has a record of historical initiative in granting due process rights to parolees.[1] Departmental administrators, however, attribute the sharp decline solely to the actions of the Director of Field Services at that time. The Director took it upon himself to personally review most of the recommendations submitted for revocation of parole. The sheer number of parolees returned, in the eyes of the Director of Field Services, mandated change.

The differences between parolees returned with new sentences (PVNS) and parolees returned solely for technical violations of parole (TVP), lends some credibility to the contention that the sharp decrease in revocations of parole can be attributed to the increase in the inmate population and/or the liberalism of the Department of Corrections, that is, action on the part of the Department of Corrections. The decrease in post-Morrissey in returns was solely the result of a decline in technical violations of parole, i.e., action by the parole board. The number of parolees returned PVNS, i.e., as a result of action by the courts, has actually increased successively each year since 1969--or at least remained constant--with the exception of 1972. Pre-Morrissey

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[1]See Ronald B. Sklav, "Law and Practice in Probation and Parole Revocation Hearings," The Journal of Criminal Law, Criminology, and Police Science 55 (June 1964), p. 172, 182 and Morrissey, p. 483.

returns by the parole board were 2,676, which is 809 or thirty-one percent more than the post-Morrissey return of 1,867; whereas the number of paroles returned by the courts prior to Morrissey was 1,610, which is 176 or 10 percent less than the number of parolees returned by the courts after Morrissey.

Although technical violations of parole after Morrissey amounted to only seventy percent of the pre-Morrissey TVP total, the sharpest decline was evident in the 1970-1971 year span. Technical violations of parole declined nearly fifty percent between 1970 and 1971, from 978 to 505, respectively, following a slight six percent increase from the 1969 to 1970 year span. Since 1972, however, with the exception of 1974, parole revocations via the parole board have been on the increase, although slightly for the most part. The 1975 figure of 587 parole revocations by the board was the highest for any single year since the 1970 total of 987, and the increase in TVP's from 1974 to 1975, fifteen percent, is the highest for any year-to-year period since 1972.

The increases for parolees returned with new sentences has been consistent, but slight. The single highest annual increase for PVNS was registered between the year 1970-1971--a pre-Morrissey year--from 434 to 500, a difference of sixty-six or fifteen percent. Since 1972, the annual number of parolees returned PVNS has ranged above 500.

The relationship between PVNS and TVP's was exactly the inverse, in 1969 and 1970, with the former increasing dramatically and the latter decreasing in the same manner. In 1971 revocations by the board and revocations by the courts were virtually even, 500 and 505, respectively.

Parolees returned TVP outnumbered parolees returned PUNS almost two and one-third times in 1969, and more than twice in 1970. On the other hand, parole revocations as a result of the courts and parole revocations as a result of the parole board have been relatively equal during the post-Morrissey period.

Another comment yet may be made about the relationship(s) of PUNS to TVP's. TVP's in relationship to PUNS were extremely high, inversely, during the pre-Morrissey period. In each of the two years, 1969 and 1970, TVP's more than doubled PUNS, but the two were nearly even in 1971. Proponents of Morrissey may be prone to argue that the relative evenness between returns for PUNS and TVP's is a result of the decision forcing the parole board to temper the practice of revoking the parole of parolees where they were found innocent of new criminal charges, or where the charges were dismissed, particularly where the charges were weak.[1]

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[1]Parole boards and prosecutors are part of the criminal justice process, involved in the guilt or innocence of parolees, the former for technical violations of parole, the latter in case of new criminal charges. The parole board and prosecutor often work hand-in-hand to return a parolee--a collaboration that must look like Charybdis meeting Scylla. A parolee, for example, may have committed a new criminal offense (carrying a concealed weapon) and in doing so, violated the conditions of his parole (not reporting monthly). (It must be noted that new criminal charges, are ipso facto, a technical violation of parole). Rather than prosecute the parolee, the prosecutor might opt for disposition by the Department of Corrections, since administrative adjudication requires a lesser standard of proof than judicial adjudication, in order to conserve manpower, money, and time, particularly when the evidence against the parolee is weak, or when the charges are dismissed for "unreasonable searches and seizures", or when charges are dropped for failure of law enforcement officers to extend a parolee his constitutional rights. Parolees, however, have had parole revoked by the parole board on the same criminal charges of which they were found innocent of in court, without concomitant, i.e., different charges of violating the

The speculation that Morrissey somehow affected parole release is a free-for-all. Two points of view are possible: one is that the parole board, influenced by the due process rights of Morrissey, "looking over its shoulder," so to speak, would grant similar rights to inmates at parole release hearings and thereby, increase the number of parole releases; the other, that the parole board would retaliate against the courts and parolees by decreasing the number of parole releases. Two facts can be said: since Morrissey, inmates are given reasons for denial or award of parole, and in the event of denial, a list of corrective actions to increase the chances of parole and; the pre-Morrissey figures for parole release and the post-Morrissey figures for parole release show constancy, that is, the years 1969-1971 each registered significant increases in parole release, while the years 1973-1975 each registered significant decreases in parole releases. Parole release increased an average of eleven percent each succeeding year during the three year period prior to Morrissey, and decreased an average of eleven percent each succeeding year after Morrissey. However, the number of parole releases prior to Morrissey and after Morrissey are virtually even. No consistent pattern could be found between parole revocation and parole release (a comparison was also made between parole

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conditions of parole. To be sure, the Department of Corrections can and does revoke parole for technical violations of parole aside from judicial proceedings. It is perfectly within its authority. However, no revocation of parole status on the same charges, and only the same charges, that the prosecutor declined to pursue, or that the judicial system found the parolee innocent of, or dismissed is the practice Morrissey is thought to have checked.

revocation and parole release (a comparison was also made between parole revocation, parole release, and inmate population at points in time for the seven years). The thought surfaces that as parole release goes, so goes parole revocation, in other words, if parole release increases, parole revocation does, likewise, and vice versa; a converse relationship is thought to exist. The data supported no such claim. The pattern, throughout the seven year period studies, was erratic,[1] sometimes both decreasing, and yet still, one increasing and the other decreasing.

An earlier research project found that extensive rights to offenders at parole revocation in Michigan did not adversely affect parole grants. The findings stated that "certainly Michigan, with one of the most liberal return hearing requirements also has one of the highest proportion of return grants,"[2] that is, ". . . Michigan statistics indicate that eighty-five per cent to ninety per cent of all prisoners released are first released on parole."[3] The Supreme Court reiterated this finding in Morrissey.[4] A similar pattern has prevailed after that

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[1]The erratic pattern throughout the seven year period, between parole revocation and parole release, is the result of fluctuations solely in parole revocation. Parole revocation almost alternately increased and decreased, although sometimes insignificantly, as the one percent decrease between 1971 and 1972, and sometimes significantly, as the 30 percent decrease between 1970 and 1971.

[2]David G. Davies, S. Ed. and John H. Hess, M.D., "Criminal Law--Insane Persons--Influence of Mental Illness on the Parole Return Process," Michigan Law Review 59 (March-June 1971), p. 1110.

[3]Ibid., p. 1102.

[4]Morrissey, p. 483.

study. Since 1969, annually, no more than fifteen percent of offenders released have been discharged on their maximum term of confinement without parole, or stated another way, eighty-five percent to ninety-five percent of all prisoners released were first released on parole.[1]

Does the inmate population affect parole grant and/or parole revocation so dramatically as to preclude or color the impact, if any, of Morrissey? Can a consistent relationship be found between the inmate population and parole grant and parole revocation? One way to probe these questions is to look at parole revocation and parole release, separately, as a percentage of the inmate population. Statistics show that at the beginning of January, annually, since 1969, parole revocation is an average of one percent of the inmate population; by the end of June, an average of six percent of the inmate population, and at the end of the year, an average of thirteen percent of the population. Parole release, for the same number of years, beginning in January of each year, is an average of three percent of the inmate population; by June, twenty-one percent of the inmate population; and at the end of the year, an average of forty-three percent of the inmate population. The standard deviation from the mean is very low for parole revocation and parole release, but it increases, sometimes greatly towards the end of the year. The month of December notwithstanding, this form of analysis shows consistency. Other forms of analysis present a different picture.

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[1] Criminal Statistics (Annual Reports), Michigan Department of Corrections; 1974, p. 71; 1973, p. 18; 1972, p. 25; 1971, Table C1; 1970 Table C1; 1969, Table C1.

For instance, although the inmate population at the end of the year for the year 1969 and 1972 were nearly even, parole revocations for 1969 were 326 or twenty-five percent more than parole revocations for 1972; and although the number of parole revocations at the end of June was identical for 1972 and 1973, the inmate population at that point in 1972 was 1,270 or fourteen percent more than for 1973.

Parole grant in January of 1974 and 1975 were virtually the same, yet the inmate population at that point for 1975 was 726 or a percent more than for 1974. Further still, although parole grant in January of 1973 was the highest for any year, the inmate population was the third lowest at that point.

The year 1975 contrasts most strikingly with the preceding years, 1969 in particular, in both the categories of parole revocation and parole grant. Although the inmate population by December 1975 was twenty-two percent or 2,264 more than the inmate population at the end of the year in 1969, the number of parole revocations in 1975 was fourteen percent less than in 1969, and parole grant in 1975 was five percent less than in 1969.

There is greater variance between parole grant as percentage of inmate population than between parole revocation as percentage of inmate population (parole grant and parole revocation, however, in both January and June of the two years, 1969 and 1975, were nearly identical as percentage of inmate population).

For the most part, year-to-year, whether measured from January to January, June to June, or December to December, parole revocations were a similar percentage of the inmate population, with only slight

deviations from the means. The same can be said for parole grants. Differences in parole revocation and parole grant as percentage of inmate population annually are most pronounced at the end of the years, in the month of December.

No consistent relationship can be said to exist between parole revocation and inmate population, and parole grant and inmate population, aside from parole revocation and parole grant as percentages of the inmate population, that is, an increase in inmate population does not necessarily produce an increase or decrease in parole revocation or parole re-grant and vice versa. Specifically, years where the inmate population are closely matched, show numerical, which are sometimes significant, percentage differences in parole revocation and parole release, and likewise, years of points-in-time, when parole revocation and parole grant are similar, the inmate population may be diverse.

Most corrections personnel felt that Morrissey and Hawkins had an impact on the corrections process in Michigan, albeit slightly. Morrissey was viewed as having a stronger impact than Hawkins and personnel with different, although related functions within the corrections process--parole agents, departmental administrators, and the parole board, assessed the significance of the impact of the two decisions differently.

Eighty-four percent of the corrections personnel said that Morrissey had a greater impact than Hawkins, but only 21 percent said that they did not anticipate a decision such as Morrissey or felt that it was necessary. Fifty-six percent of corrections personnel felt that the courts do and will continue to intervene in the corrections process,

while 27 percent said that court decisions had no impact at all.

Parole agents, the persons in the corrections process who first come into contact with the parole violator, tended to view the impact of the courts, Morrissey, and Hawkins more strongly than did departmental administrators and the parole board. Parole agents, as a unit, unanimously said that the courts had at least a little impact on the corrections process, while departmental administrators and the parole board came to the opposite conclusion.

Before Morrissey and Hawkins were decided, Michigan had a parole revocation procedure. The revocation procedure utilized many of the due process revocations mandated by these two decisions. Morrissey, however, granted a preliminary revocation hearing, which the Michigan revocation hearing did not. Morrissey made parole agents more prominent in the revocation process. Parole agents, more than formulating charges and having them channeled to departmental administrators and by them in turn to the parole board, must now present charges to the hearing examiner and testify at preliminary hearings. In other words, parole agents have had to present more cogent, more legally astute, and better written charges. The data supports the occurrence and significance of this point. For instance, all corrections personnel--whatever the level--parole agents, departmental administrators, and the parole board, said that the parole agent's charges played the most crucial role in the determination of whether a parolee violated the conditions of his parole, as against the preliminary hearing, the issuance of a warrant, or the final revocation hearing (conducted by the parole board).

Departmental Administrators and the parole board, the corrections personnel who succeed the parole agents in the corrections schema and who are farthest removed from the initial dynamic stages of the revocation process, attributed vitually "no impact" to judicial intervention, Morrissey, or Hawkins. The parole board, however, to the question, "Which stage of the revocation process do you find most crucial in the determination of whether a parolee violated the conditions of his parole?" concluded that its function was equal to that of parole agents. One could assume that the parole board reached this conclusion, in contradistinction to its other stances, because it renders the final decision as to whether a parolee violated his parole or not.

Post-Hawkins formal revocation hearings--hearings with an attorney and/or witnesses--were fourteen percent more than pre-Hawkins ones.[1] Formal revocation hearings numbered 107 and 124, for pre-Hawkins and post-Hawkins periods, respectively. Formal revocation hearings with attorneys after Hawkins were over two times as many as hearings with attorneys before Hawkins, numerically, eighty-seven to thirty-six. The number of hearings without an attorney was sixteen percent less for the post-Hawkins period and court appointed attorneys, first present in 1974, registered a twenty-seven percent increase for 1975.

The year 1973, although not included in the analysis of the pre- and post-Hawkins periods, is inconsistent with both periods, and

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[1] Post-Hawkins, for the purposes of this analysis, is defined as from January 1, 1974 to December 31, 1975 and pre-Hawkins is defined as from January 1, 1971 to December 31, 1972. The year 1973 is excluded from this analysis.

puzzling. The year 1973 notwithstanding, each successive year since 1971 registered an increase in hearings with attorneys, and a decrease in hearings without attorneys. Each year, 1973 included, registered an increase in the total number of formal revocation hearings (attorneys and/or witnesses) with the exception of 1974, which was only a slight five percent less than 1973. Even though the year 1973 recorded the second highest annual total of formal revocation hearings, it registered the highest number of hearings without an attorney, fifty-one, and the lowest number of hearings with an attorney, twelve. The next lowest number of hearings with attorneys is fourteen, and the next highest number of hearings without attorneys is twenty-three, both in the year 1971, the initial year of the five-year analysis. Irrespective of Hawkins, the trends would seem to indicate that the 1973 annum should have at best registered an increase, or at least, only a slight decrease. The dramatic decline in attorney presence at revocation hearings in 1973, at this point, can only be attributed to speculative causes.

One speculation is that Morrissey may have overlapped with Hawkins.[1] Parolees may have thought that the due process rights provided by Morrissey would adequately provide support for their positions and obviate the need for an attorney. Perhaps, they thought the board members and parole personnel would be less confident, less prone to

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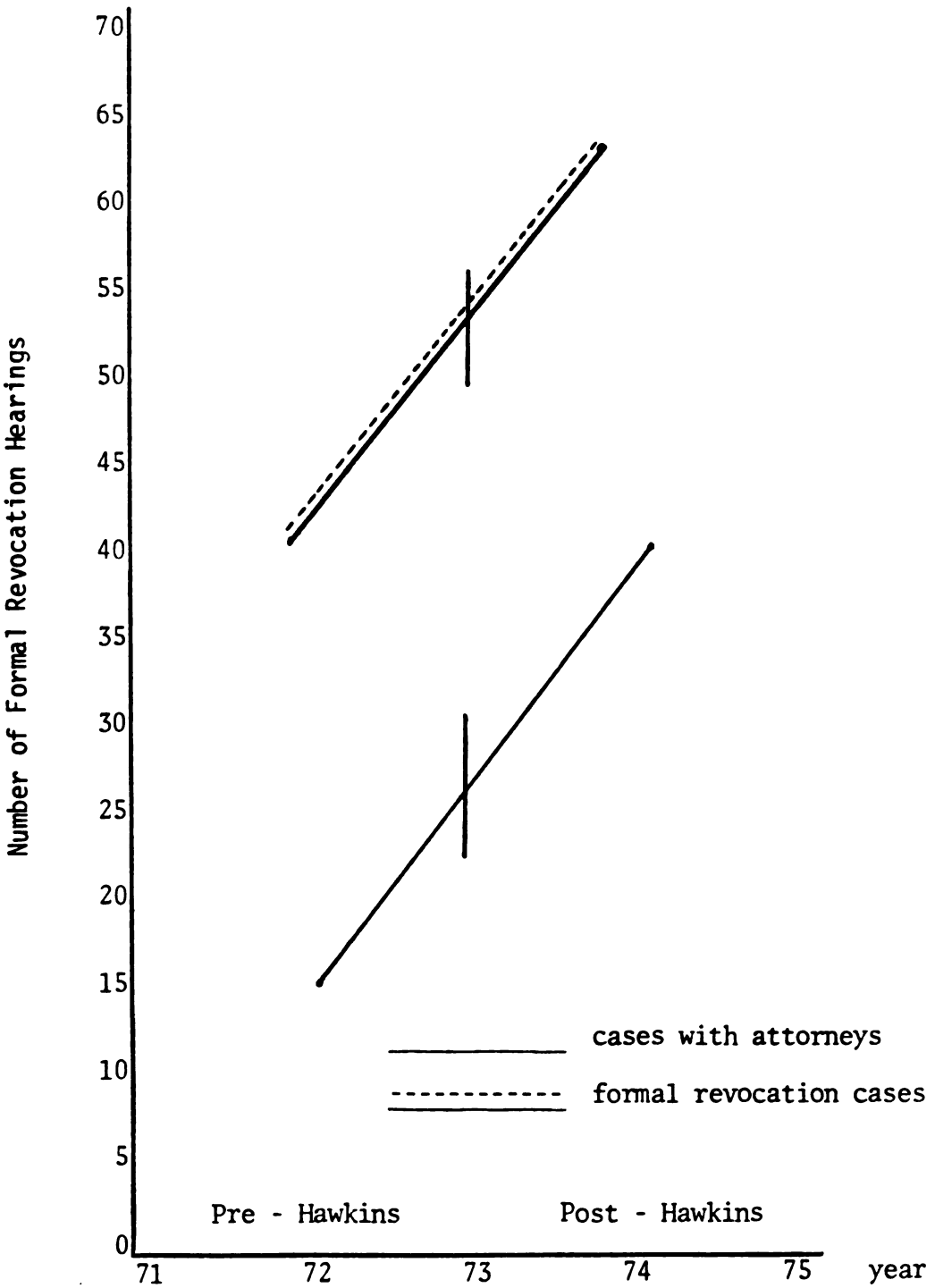
[1] Hawkins was decided by the Michigan Court of Appeals March 26, 1973, but pending an appeal by the state to the Michigan Supreme Court, which upheld the Court of Appeals, nine months later (December 18, 1973), it was not implemented until January 1974. See Hawkins v. Michigan Parole Board, 390 Mich. 469, 213 N.W. 2d 193 (1973).

probe for evidence for fear of violating their rights. Indeed, perhaps, only in 1973 did the impact of Morrissey, the two-stage hearing, the preliminary and final, weight upon the parolee population, or the bizarre results of 1973 might merely be coincidental.

In summary, each succeeding year since and including 1971, with the exception of 1973, has displayed a tendency to increase the number of attorneys at formal revocation hearings (and including 1973 to increase in total formal revocation hearings). Hawkins obviously affected attorney presence, since half of the attorneys at formal revocation hearings in 1974 and 1975 were court appointed. However, the number of years available for study limits the scope of the conclusions. More time must transpire for stronger, more valid conclusions.

Year	Returned With New Sentences	Parole Violations	Total Returned	Number on Parole	Percent Returned	Percent Change of Total Returns	Percent Returned Parole Violations	Percent Change Parole Violations Returns
1969	397	920	1317	3384	38		27	
						-8		-6
1970	434	978	1412	4677	30		21	
						-12		-12
1971	500	505	1005	5341	18		9	
						-2		-1
1972	478	513	991	6049	16		8	
						3		2
1973	515	541	1056	5428	19		10	
						3		1
1974	514	499	1013	4592	22		11	
						7		2
1975	558	587	1145	3918	29		15	

Trends for Pre- and Post-Hawkins Periods*



*This chart was computed by getting the average number of cases with attorneys and formal revocation cases for the year 1971-72 (Pre-Hawkins) and for the year 1974-75 (Post-Hawkins). The year 1973 was omitted.

Formal Revocation Hearings

Year	Number
1971	37
1972	44
1973	63
1974	60
1975	64

Formal Revocation Hearings by Attorney Presence

Year	W/A	WO/A	CA/A	TOTAL
1971	14	23		37
1972	22	22		44
1973	12	51		63
1974	39	21	19	60
1975	48	16	26	64

W/A -- With Attorney
WO/A -- Without Attorney
CA/A -- Court Appointed Attorney

Source: Office of Administrative Assistant for Parole Violations, Bureau of Field Services, Michigan Department of Corrections, "Formal Parole Violation Hearings".

Technical Violations of Parole (TVP)

Period	Number
Pre - Morrissey	2676*
Post - Morrissey	1867**
TOTAL	4543

Parole Violators Returned with New Sentences (PVNS)

Period	Number
Pre - Morrissey	1610*
Post - Morrissey	1786**
TOTAL	3396

Parole Grant

Period	Number
Pre - Morrissey	13494*
Post - Morrissey	13422**
TOTAL	26916

Revocations of Parole (PVNS + TVP)

Period	Number
Pre - Morrissey	4286*
Post - Morrissey	3653**
TOTAL	7939

*Figure is from January 1969 to first half of 1972, i.e., January 1, 1969-June 30, 1972. (Morrissey was decided by the U.S. Supreme Court June 29, 1972 and formally implemented in Michigan August 1, 1972).

**Figure is from July 1, 1972 to December 31, 1975.

Who do you believe has done the most to advance progressive concepts about punishment, treatment, penology, and prisoners' rights? (Please mark in order of importance by placing either a 1, 2, or 3, etc., after each category.)

Category	Mean	Ranking
Corrections Personnel	1.883	First
Courts	2.678	Second
Offenders	3.469	Third
Legislators	3.804	Fourth
Academicians	3.841	Fifth
Civic Groups	4.214	Sixth

Breakdown

Field Agents

Category	Mean	Ranking
Corrections Personnel	1.93	First
Courts	2.63	Second
Offenders	3.30	Third
Legislators	3.70	Fourth
Academicians	4.00	Fifth
Civic Groups	4.30	Sixth

Parole Board

Category	Mean	Ranking
Corrections Personnel	2.00	First
Courts	2.75	Third
Offenders	2.66	Second (tie)
Legislators	5.00	Fourth
Academicians	5.-3	Fifth
Civic Groups	2.66	Second (tie)

Departmental Administrators

Category	Mean	Ranking
Corrections Personnel	1.33	First
Courts	3.00	Second
Offenders	4.00	Fourth
Legislators	3.66	Third
Academicians	4.67	Fifth
Civic Groups	5.00	Sixth

Question 33: Who do you believe Morrissey has aided or improved the most within the Department of Corrections? (Please list in order of impact such as 1, 2, 3, etc.)

Category*	Mean	Ranking
Top Policy Makers**	1.846	First
Parole Board	1.872	Second
Parole Agents	2.171	Third

Breakdown

Parole Agents

Category	Mean	Ranking
Top Policy Makers	1.833	Second
Parole Board	1.763	First
Parole Agents	2.100	Third

Parole Board

Category	Mean	Ranking
Top Policy Makers	1.500	First (tie)
Parole Board	1.500	First (tie)
Parole Agents	3.000	Second

Departmental Administrators

Category	Mean	Ranking
Top Policy Makers	2.500	Second (tie)
Parole Board	2.500	Second (tie)
Parole Agents	1.000	First

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*The category "other" was included and eight agents said "nobody" was aided or improved by Morrissey. Although only eight agents said "nobody" it had a mean of 1.685.

**Top Policy Makers is the same as Departmental Administrators.

Question 38: Which stage of the revocation process do you find most crucial in the determination of whether a parolee has violated his parole? (Please mark in order of importance by placing a 1, 2, 3, or 4 after each category.)

Category	Mean	Ranking
Agent's Charges	1.379	First
Preliminary Hearing	2.113	Second
Issuance of Warrant	3.200	Fourth
Parole Board Hearing	3.157	Third

Breakdown

Parole Agents

Category	Mean	Ranking
Agent's Charges	1.33	First
Preliminary Hearing	2.00	Second
Issuance of Warrant	3.25	Fourth
Parole Board Hearing	3.10	Third

Parole Board

Category	Mean	Ranking
Agent's Charges	1.33	First (tie)
Preliminary Hearing	3.00	Second
Issuance of Warrant	4.00	Third
Parole Board Hearing	1.33	First (tie)

Departmental Administrators

Category	Mean	Ranking
Agent's Charges	1.55	First
Preliminary Hearing	2.25	Second
Issuance of Warrant	2.75	Third
Parole Board Hearing	3.50	Fourth

Scale 3 (Questions 29, 30, and 31): The Impact of Hawkins.
Alpha = .82519

Code	Freq	Adj Pct	Cum Pct	N = 70
1 Great Deal	0	0	0	
2 Fair Amount	14	20	20	
3 Little	34	48	68	
4 None At All	19	27	94	
5 Don't Know	4	6	100	
6 Missing Data	3			

Mean = 3.183 Mode = 3.000 Median = 3.132

Breakdown

Position	Mean	
Parole Agents	3.3710	N = 62
Parole Board	4.0000	N = 4
Departmental Administrators	3.7500	N = 4

Significance = .5685

Scale 4 (Questions 18, 27, and 37): Parolee Rights and Behavior.
Alpha = .61290

Code	Freq	Adj Pct	Cum Pct	N = 71
1 Great Deal	3	4	4	
2 Fair Amount	12	17	21	
3 Little	37	52	73	
4 None At All	15	21	94	
5 Don't Know	4	6	100	
6 Missing Data	3			

Mean = 3.070 Mode = 3.000 Median = 3.054

Breakdown

Position	Mean	
Parole Agents	3.3387	N = 62
Parole Board	4.0000	N = 4
Departmental Administrators	4.0000	N = 4

Significance = .3805

Scale 1 (Questions 11, 12, 13, and 14): The anticipation and Necessity of Morrissey. Alpha = .78478

Code	Freq	Adj Pct	Cum Pct	N = 68
1 Great Deal	5	7	7	
2 Fair Amount	16	24	31	
3 Little	31	46	76	
4 None At All	14	21	97	
5 Don't Know	2	3	100	
6 Missing Data	6			

Mean = 2.882 Mode = 3.000 Median = 2.919

Breakdown

Position	Mean	
Parole Agents		
Parole Board	4.5000	N = 4
Departmental Administrators	4.0000	N = 4

Scale 2 (Questions 22, 23, 25, 26, 27, and 28): The Impact of Judicial Intervention/Morrissey. Alpha = .67532

Code	Freq	Adj Pct	Cum Pct	N = 70
1 Great Deal	0	0	0	
2 Fair Amount	11	16	16	
3 Little	39	56	71	
4 None At All	19	27	99	
5 Don't Know	1	1	100	
6 Missing Data	4			

Mean = 3.143 Mode = 3.000 Median = 3.115

Breakdown

Position	Mean	
Parole Agents	3.3387	N = 62
Parole Board	4.0000	N = 4
Departmental Administrators	4.0000	N = 4

Significance = .3805

Question 24: Do you believe better "professionalism", i.e., more education and training of staff, more rights to parolees, and more written policy would have precluded Morrissey?

Code	Freq	Adj Pct	Cum Pct	N = 61
1 Strongly Agree	5	8	8	
2 Agree	25	41	49	
3 Strongly Disagree	5	8	57	
4 Disagree	26	43	100	
5 Don't Know	9			
6 Missing Data	4			

Mean = 2.852 Mode = 4.000 Median = 2.600

Breakdown

Position*	Mean	
Parole Agents	2.9200	N = 50
Parole Board	1.6670	N = 3
Departmental Administrators	2.7500	N = 4

Significance = .1479

Question 36: Which decision had the most impact on the parole revocation process in Michigan, Morrissey or Hawkins?

Code	Freq	Adj Pct	Cum Pct	N = 67
1 Hawkins	4	6	6	
2 Morrissey	56	84	90	
3 Equal Amount for Both	3	7	100	
4 Other	0	0	0	
5 Don't Know	5			
6 Missing Data	2			

Mean = 2.045 Mode = 2.000 Median = 2.027

Breakdown

Position*	Mean	
Parole Agents	2.0727	N = 55
Parole Board	2.0000	N = 4
Departmental Administrators	2.0000	N = 4

Significance = .8923

*District Supervisors are excluded from all breakdown analysis.

CHAPTER IX

CONCLUSION AND SUMMARY

A. Compliance

The practices and procedures of the Department of Corrections support a policy designed to implement and comply with Morrissey, in substance and in spirit. Several policies and operating instructions delineate this intent.

Firstly, the DOC has implemented the two-stage hearing as intended by Morrissey. Unlike the state of Oregon, Michigan has not consolidated the two-stage hearing into a single one. Parolees, however, may waive the preliminary hearing. Secondly, hearing examiners, as opposed to field agent, conduct the vast majority of preliminary hearings. In the future all preliminary hearings will be conducted by area managers, administrators (former field agents) who will not be connected with the supervision of parolees. Thirdly, the DOC has not extended the 30 day time limit for disposition of cases (although it may in the future) and parolees usually are not incarcerated more than a week at SPSM before they receive a hearing. Fourthly, the parole board does not review the parolees' files before the final revocation hearing, to lessen the chances of prejudicial judgment. Fifthly, at the preliminary and final hearings, the parolee is given a list of

options before the inquiry into his behavior, the parolee may speak at length, and no time limit is imposed upon the proceedings. Sixthly, all parolees at parole revocation, by legislative statute and judicial order, have a right to counsel and witnesses. Seventhly, a final decision on the parolee must be effected at "executive session", a meeting where at least three board members, one more than originally heard the case, discuss, review, and act on the findings. Eighthly, revoked paroles must be reviewed every twelve months for parole grant consideration, if applicable. Ninthly and lastly, the DOC has a pending policy for a limited right to counsel at preliminary revocation hearings.

The one practice that suggests a less than wholehearted effort by the Michigan Department of Corrections to conform to the spirit, if not the letter of the law in regards to parole revocation, is the transfer of parolees out of the original county of arrest following the preliminary hearing to Jackson county for a hearing before the parole board. This practice appears contrary to the literal language and intent of Hawkins. Hawkins, in reference to counsel for indigent parolees said, "the circuit court in the county in which the prisoner is confined shall determine if defendant is indigent"[1] and "upon a finding of indigency, the same court shall appoint counsel".[2] The decision did not specify Jackson county as "the" county, so one can only assume the court meant the various counties in Michigan. The petitioner, Hawkins, and the

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[1] Hawkins, 206 N.W. 2d 764.

[2] Ibid.

Michigan Court of Appeals, however, had ample opportunity to object to the one-county hearings, since the practice was in force long before Hawkins was decided.

Jackson county, where SPSM, the final hearing site is located, is central to the heavily populated areas of the state and is close (about 35-40 miles) to Lansing, the state capitol and seat of the parole board. From the State's point of view, the geographically consolidated hearings save travel time for the parole board, and in the process, provides a speedy hearing to parolees incarcerated at SPSM. If the parole board had to travel to each of the counties for individual revocation hearings, it probably could not meet the 30 day limit for disposition. On the other hand, parolees contend that they are deprived of witnesses that they cannot afford to summon who could substantiate their innocence.[1] Perhaps this dilemma reflects what Kadish and Kadish termed a "constraining rule of competence" under the concept of "legitimated interposition".

> When, in virtue of the institutionalization of a liberty, officials may justify departing from the rules of competence pertaining to their office, we shall say that we have encountered instances of legitimated interposition. In contrast to the concept of delegated discretion, which denotes an explicitly delegated legal power to act according to an agent's best judgment, within defined limits, and in contrast also to the concept of usurpation, which denotes an exercise of power in outright defiance of the legal system, the concept of legitimated interposition denotes instances where deviational discretion--power to act according to the agent's best judgment in ways that are unauthorized or even prohibited by rules of competence--has become imbedded in legal arrangements. . . .
>
> . . . Actions are legitimated for a role agent insofar as the role justifies an argument to appropriateness for action.

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[1]Chester P. Hawkins interview with the author, Lansing, Michigan, October 13, 1975.

> When a legal system presents an official with the liberty to depart from a rule that might work against his achieving the ends of his role, it legitimates the interposition between the rule and his action of his own judgment that departure from the rule best serves the prescribed end.[1] (Italics added)

B. Impact

The Michigan Department of Corrections has a revocation process consistent with and beyond the requirements of Morrissey. The State has complied with the law of the land with little or no evidence of avoidance or evasion. The DOC policies, operating procedures, practices, and procedures have buttressed the commitment to comply. But, has the act of compliance precipitated changes within the DOC and the revocation process? What is the impact?

Primary data, parole grant and parole revocation rates, suggest that Morrissey has had little impact. The number of parole grants prior to and after Morrissey are virtually even. Offenders primarily are still first released on parole. One may speculate, however, that parole grants would even have been higher had it not been for Morrissey. Post-Morrissey revocations decreased 15 percent over pre-Morrissey ones, but the decrease appears to be part of a historical trend, rather than an abrupt change instigated by Morrissey. Morrissey, more than likely, sustained the pattern of less parole revocations.

One can see a more concrete impact for Hawkins. At least half of the attorneys in 1974 and 1975, the two years Hawkins has been in effect,

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[1] Mortimer R. Kadish and Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules (Stanford: Stanford University Press, 1973), p. 66.

were court appointed. What cannot be determined at this point is whether Hawkins type hearings result in less revocations (percentage-wise), shorter "flops", and earlier parole grants. Also, Hawkins appears to sustain a tendency to increase the number of "formal" revocation hearings.

Secondary data and the responses of correctional personnel also suggest that Morrissey has had little impact on the revocation process and its participants. For instance, nearly 85 percent of the respondents indicated that Morrissey had changed little if any behavior on the part of parolees. Parolee, they said, had not become more unruly, uncooperative or prone to violate parole since Morrissey, and if they did, the change was attributed to "other sociological factors". The respondents indicated that their job had not been aided or impeded significantly by the presence of Morrissey. More than 80 percent of the respondents said Morrissey did little or nothing to lower their morale. They attributed very little impact to Hawkins.

The impact of Morrissey was felt most keenly by field agents rather than by departmental administrators or the parole board; the stages before the order to return the parolee. This is not surprising. The preliminary hearing is the only feature that distinguishes the structure of the revocation process after Morrissey from before Morrissey. The field agents felt the pressure to prepare for the preliminary hearing. Some of their statements mirror this. One agent said:

> In our office we were self-policing before Morrissey. The only real impact has been time pressure to prepare for

> the preliminary hearing, if requested. We have few requests for preliminary hearings but we have to prepare for each violator as if there would be a hearing.

Another agent said:

> I feel the two court decisions Morrissey and Hawkins you referred to were anticipated somewhat by the Department of Corrections, and thus were not a great shocker. Even prior to these decisions, especially Morrissey, there was a review process to evaluate the parole agent's decision to recommend revocation. I would like to think that Morrissey formalized what was already being informally done, except for the preliminary hearing.

Departmental administrators significantly thought that Morrissey improved field agents the most, while field agents significantly held that Morrissey aided or improved departmental administrators and parole board members the most. The parole board said departmental administrators were aided or improved the most. Agents supposedly meant that Morrissey did not increase the job pressure on administrators, while the latter, in turn may have meant that Morrissey improved the quality of work by field agents.

Morrissey, along with Hawkins, is indirectly responsible for the soon-to-be policy of a limited right to counsel at preliminary revocation hearings. Morrissey was used by the Supreme Court as a basis for Gagnon, which was in turn (with Hawkins) used as a reference point for the new policy. The new policy partially owes its life to Morrissey, because without Morrissey, there may have been no Gagnon.

Morrissey may, in the future, however, saddle Michigan parolees with a liability. Revocation hearings, by legislative statute, must be tendered within 30 days after the parolee is available to the DOC or the DOC loses jurisdiction over the parolee for the contested charges.

Both the preliminary and final revocation hearings must be held within this time period. The DOC, then, must conduct a two-stage hearing within a time limit designed to accommodate one hearing. As a result, the DOC has lost jurisdiction over a few revocation cases because it could not meet the mandatory deadline for disposition. One possible reason the system has continued to function within the time constraint is because parolees waive the preliminary hearing in significant numbers (see previous parole agent statement and data on "Characteristics of Parole Revocation Hearings"). In the foreseeable future, the DOC may request the legislature to extend the disposition period from 30 to 60 days. This proposal has been considered but not pursued within the DOC. Obviously, a 60 day period for disposition of revocation cases could mean a longer period of incarceration for parolees before they receive a revocation hearing, or an increase in anxiety over their fate. Of course, an increase in field agents and staff could accommodate a sharp increase in the demand for preliminary hearings by parolees.

C. Impact from a Criminal Justice Perspective: Some Comments

Correctional response to Morrissey in Michigan parallels to some extent law enforcement adaptation to Supreme Court decisions. Most of the studies in Chapter IV concluded that Supreme Court decisions did little to change the affectiveness and behavior of law enforcement. Nagel's study, because it looked at non-initiating states (states with an exclusionary rule prior to Mapp) and initiating states (states with

an exclusionary rule as a result of Mapp) in regard to Mapp, is particularly relevant. Nagel said:

> There has been an increase in police adherence to the requirements for legal search and seizure in both initiating and the non-intiating states. Seventy-five percent of the respondents from the initiating states, however, reported increased adherence, whereas only 57 percent of the respondents from the non-initiating states reported such increases.[1]

Michigan, with a solid revocation process prior to Morrissey, like states with an exclusionary rule prior to Mapp, was insulated against the full force of judicial intervention. Minor changes were needed to be in compliance. This might possibly explain why parole grant rates, parole revocation rates, and personnel were only minuscularly affected by Morrissey.

(The similarity--the nexus--between the revocation process and the arrest process, between law enforcement adaptation to Supreme Court decisions, particularly Mapp, and correctional response to Morrissey in Michigan, transcends comparison to form; it involves substance. Parole agents use local law enforcement facilities to detain parolees even in instances where there is only a technical violation of parole. Police are frequently the party that alert parole agents to the errant behavior of a parolee and vice versa. The DOC has the authority to revoke parole for a new criminal offense, where the charges were dismissed in court because of violation of the parolee's constitutional rights by the police, thereby canceling the malefactions of the latter.

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[1]Stuart S. Nagel, "Testing the Effects of Excluding Illegally Seized Evidence," Wisconsin Law Review (Winter 1965), pp. 283-310.

And in Michigan, approximately 20 percent of the parole agents had prior experience as law enforcement officers).

More research into states with and without a revocation hearing process prior to Morrissey is necessary before any concrete statements can be made about correctional adjustment to Morrissey, much less the similarities--or differences--between correctional and law enforcement adaptation to Supreme Court decisions. States with a pre-Morrissey revocation hearing, mandatory or discretionary, may display different tendencies from Michigan, and states without one react similarly to it. Michigan though, at a first glance, compares well with law enforcement adjustment to Mapp and Miranda.

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APPENDIX

MORRISSEY v. BREWER
408 U.S. 471 (1972)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.

Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967 pursuant to his guilty plea, and was sentenced to not more than seven years' confinement. He was paroled from the Iowa State Penitentiary in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his home town as a parole violator and incarcerated in the county jail. One week later, after review of the parole officer's written report, the Iowa Board of Parole revoked Morrissey's parole and he was returned to the penitentiary located about 100 miles from his home. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report on which the Board of Parole acted shows that petitioner's parole was revoked on the basis of information that he had violated the conditions of parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insurance company after a minor accident, and obtaining credit under an assumed name and failing to report his place of residence to his parole officer. The report states that the officer interviewed Morrissey, and that he could not explain why he did not contact his parole officer despite his effort to excuse this on the ground that he had been sick. Further, the report asserts that Morrissey admitted buying the car and obtaining credit under an assumed name and also admitted being involved in the accident. The parole officer recommended that his parole be revoked because of "his continual violating of his parole rules."

[A second consolidated case of Booker involved parole revocation for leaving his area without permission, obtaining driver's license under an assumed name, failing to keep gainfully employed].

* * *

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The State responded by arguing that no hearing was required. The District Court held on the basis of controlling authority that the State's failure to accord a hearing prior to parole revocation did not violate due process. On appeal, the two cases were consolidated.

The Court of Appeals, dividing 4 to 3, held that due process does not require a hearing.

I

Before reaching the issue of whether due process applies to the parole system, it is important to recall the function of parole in the correctional process.

During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.[2] The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society.

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically parolees are forbiden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarter, marrying, acquiring or operating a motor vehicle, traveling outside the community and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Arluke, A Summary of Parole Rules, 15 Crime and Delinquency 267, 272-273 (1969).

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior which is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.[3]

The enforcement leverage which supports the parole conditions derives from the authority to return the parolee to prision to serve out the balance of his sentence if he fails to abide by the rules. In practice not every violation of parole conditions autcratically leads to revocation. Typically a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity.[4] The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid

"undersirable" associations or correspondence. Cf. Arciniega v. Freeman, 404 U.S. 4 (1970). Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35-46% of all parolees are subjected to revocation and return to prison.[5] Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the indivi on the basis of a lesser showing by the State.[6]

Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the Board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

If a parolee is returned to prison, he often receives no credit for the time "served" on parole.[7] Thus the returnee may face a potential of substantial imprisonment.

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[2] See Warren, Probation in the Federal System of Criminal Justice, 19 Fed. Prob. 3 (Sept. 1955); Annual Report, Ohio Adult Parole Authority 1964/65, at 13-14, Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N.Y.U.L. Rev. 702, 705-707 (1963).

[3] Note, Observations on the Administration of Parole, 79 Yale L.J. 698, 699-700 (1970).

[4] Ibid.

[5] President's Commission on Law Enforcement and Administration of Justice, Corrections 62. The substantial revocation rate indicates that parole administrators often deliberately err on the side of granting parole in boderline cases.

[6] See Morrissey v. Brever, 443 F. 2d 942, at 953-954, n. 5 (CA8 1971) (Lay, J., dissenting); Rose v. Haskins, 388 F. 2d 91, 104 (CA6 1968) (Celebrezze, J., dissenting).

[7] Arluke, A Summary of Parole Rules -- Thirteen Years Later, 15 Crime and Delinquency 267, 271 (1969); Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705, 733 (1968).

II

We begin with the proposition that the 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. Cf. Mempa v. Rhay, 389 U.S. 128 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

We turn therefore to the question whether the requirements of due process in general apply to parole revocations. As MR. JUSTICE BLACKMUN has written recently, "This Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374. Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 154, 163 (1970). The question is not merely the "weight" of the individual's interest but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Fuentes v. Shevin, -- U.S. -- (decided June 12, 1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961.) To say that the concept of due process if flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.[8] He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation.[9] The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases the parolee faces lengthy incarceration if his parole is revoked.

We see, therefore, 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. Its termination calls for some orderly process, however informal.

Turning to the question what process is due, we find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Yet the State has no interest in revoking parole without some informal procedural guarantees. Although the parolee is often formally described as being "in custody," the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole.[10]

The discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful like within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See People ex rel. Menechino v. Warden, 27 N.Y. 2d 376, 267 N.E. 2d 238,239 and n. 2, 318 N.Y.S. 2d 449 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."[11]

Given these factors, most States have recognized that there is no interest on the part of the State in revoking parole without and any precedural guarantees at all.[12] What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

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[8] "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." Bey v. Connecticut Bd. of Parole, 443 F. 2d 1079, 1086 (CA2 1971).

[9] See, e.g., Murray v. Page, 429 F. 2d 1359 (CA7 1970) (parole revoked after eight years; 15 years remaining on original term).

[10] Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L., and P.S. 175, 194 (1964) (no decrease in Michigan, which grants extensive rights); Rose v. Haskins, 388 F. 2d 91, 102 n. 16 (CA6 1968) (Celebrezze, J., dissenting) (cost of imprisonment so much greater than parole system that procedural requirements will not change economic motivation).

[11] See President's Comm'n on Law Enforcement and Administration of Justice, Corrections 83, 88 (1967).

[12] See n. 15, infra. As one state court has written, "Before such a determination or finding can be made it appears that the principles of fundamental justice and fairness would afford the parolee a reasonable opportunity to explain away the accusation of a parole violation. [The parolee] . . . is entitled to a conditional liberty and possessed of a right which can be forfeited only by reason of a breach of the conditions of the grant." Chase v. Page, 456 P. 2d 590 (Okla. Crim. Apps. 1969).

III

We now turn to the nature of the process that is due, bearing in mind that the interest of both State and Parolee will be furthered by an effective but informal hearing. In analyzing what is due, we see two important stages in the typical process of parole revocation.

(a) Arrest of Parolee and Preliminary Hearing. The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole borad whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. Hyser v. Reed, 318 F. 2d 225 (CADC 1963). Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 U.S., at 267-271.

In our view due process requires that after the arrest, the determination that reasonable grounds exist for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee which destroys his neutrality; realistically the falure of the parolee is in a sense a failure for his supervising officer.[13] However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.[14] Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker to examine the initial decision.

This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In Goldberg, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional "neutral and detached" officer; it required only that the hearing be conducted by some person other than one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation. A State could certainly choose some other independent decisionmaker to perform this preliminary function.

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what transpires at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in Goldberg, "the decision-maker should state the reasons for his determination and indicate the evidence he relied on . . ." but it should be remembered that this is not a final determination calling for "formal findings of fact or conclusions of law." 397 U.S., at 271. No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.

(b) The Revocation Hearing. There must also be an opportunity for a hearing if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as the State suggests occurs in some cases, would not appear to be unreasonable.

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds.[15] Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of

parole; (b) disclosure to the parolee of ev dence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense; it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

We do notreach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.

We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. Control over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur. Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based onconviction of another crime.

In the peculiar posture of this case, given the absence of an adequate record, we conclude the ends of justice will be best served by remanding the case to the Court of Appeals for its return of the two consolidated cases to the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases.

We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and Remanded.

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[13] Note, Observations on the Admin. of Parole, 79 Yale L. J. 698, 704-706 (1970) (parole officers in Connecticut adopt role model of social worker rather than an adjunct of police, and exhibit a lack of punitive orientation).

[14] This is not an issue limited to bad motivation. "Parole agents are human, and it is possible that friction between the agent and parolee may have influenced the agent's judgment." 4 Attorney General's Survey on Release Procedures 246 (1939).

[15] Very few States provide no hearing at all in parole revocations. Thirty States provide in their statutes that a parolee shall receive some type of hearing. . .

[References to State statutes omitted].

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. . . Decisions of state and federal courts have required a number of other States to provide hearings. See Hutchinson v. Patterson, 267 F. Supp. 433 (Colo. 1967) (approving parole board regulations); United States ex rel. Bey v. Conn. Bd. Parole, 443 F. 2d 1079 (CA2 1971) (requiring counsel to be appointed for revocation hearings); State v. Holmes, 109 N.J. Super. 180, 262 A. 2d 725 (1970); Chase v. Page, 456 P. 2d 590 (Okla. Crim. Apps. 1969); Bearden v. South Carolina, 443 F. 2d 1090 (CA4 1971) (North Carolina and Virginia also subject to Fourth Circuit rule); Baine v. Beckstead, 10 Utah. 2d 4, 347 P. 2d 554 (1959); Goolsby v. Gagnon, 322 F. Supp 460 (ED Wis. 1971). A number of States are affected by no legal requirement to grant any kind of hearing.

[16] The Model Penal Code § 305.16 (Proposed Official Draft 1962) provides that "The institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel."

MR. JUSTICE BRENNAN, concurring in the result.

* * *

The Court, however, states that it does not now decide whether the parolee is also entitled at each hearing to the assistance of retained counsel or of appointed counsel if he is indigent. Goldberg v. Kelly, 397 U.S. 254 (1970), nonetheless plainly dictates that he at least "must be allowed to retain an attorney if he so desires." Id., at 270. As the Court said there, "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of" his client. Id., at 270-271. The only question open under our precendents is whether counsel must be furnished the parolee if he is indigent.

MR. JUSTICE DOUGLAS, dissenting in part.

* * *

If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail.[8] Rather, notice of the alleged violation should be given to the parolee and a time set for a hearing.[9] The hearing should not be before the parole officer, as he is the one who is making the charge and "there is inherent danger in combining the functions of judge and advocate." Jones v. Rivers, 338 F. 2d 862, 877 (CA4 1964) (Sobeloff, J., concurring). Moreover, the parolee should be entitled to counsel.[10] See Hewett v. North Carolina, 415 F. 2d 1316, 1322-1325 (CA4 1969); People ex rel. Combs v. LaVallee, 29 App. Div. 2d 128, 286 N.Y.S. 2d 600 (1968); Perry v. Willard, 247 Ore. 145, 427 P. 2d 1020 (1967). As the Supreme Court of Oregon said in Perry v. Williard, "A hearing in which counsel is absent or is present on behalf of one side is inherently unsatisfactory if not unfair. Counsel can see that the relevant facts are brought out, vague and insubstantial allegations discounted, and irrelevancies eliminated." Id., at 148, 427 P. 2d, at 1022. Cf. Mempa v. Rhay, 389 U.S. 128, 135.

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The hearing required is not a grant of the full panoply of rights applicable to a criminal trial. But confrontation with the informer may, as Roviaro v. United States, 353 U.S. 53, illustrates, be necessary for a fair hearing and the ascertainment of the truth. The hearing is to determine the fact of parole violation. The results of the hearing would go to the parole board--or other authorized state agency--for final action, as would cases which involved voluntary admission of violations.

The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitory aspects of modern penology. "Notice and opportunity for hearing appropriate to the case," Boddie v. Connecticut, 401 U.S. 371, 378, are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.[11]

We do not prescribe the precise formula for the management of the parole problems. We do not sit as an ombudsman, telling the States the precise procedures they must follow. We do say that so far as the due process requirements of parole revocation are concerned:[12]

(1) the parole officer--whatever may be his duties under various state statutes--in Iowa appears to be an agent having some of the functions of a prosecutor and of the police

(2) the parole officer is therefore not qualified as a hearing officer

(3) the parolee is entitled to a due process notice and a due process hearing of the alleged parole violations including, for example, the opportunity to be confronted by his accusers and to present evidence and argument on his own behalf

(4) the parolee is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board--or other authorized state agency--acts.[13]

The judgments are reversed and the cases are remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

* * *

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[8] As Judge Skelly Wright said in Hyser v. Reed, 318 F: 2d 225, 262 (CADC 1963):

"Where serious violations of parole have been committed, the parolee will have been arrested by local or federal authorities on charges stemming from those violations. Where the violation of parole is not serious, no reason appears why he should be incarcerated before hearing. If, of course, the parolee willfully fails to appear for his hearing, this in itself would justify issuance of the warrant." Accord, In re Tucker, 5 Cal. 3d 171, 199, 486 P. 2d 657, 676, 95 Cal. Rptr. 761, 780 (1971) (Tobriner, J.).

[9] As we said in another connection in Greene v. McElroy, 360 U.S. 474, 496-497:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases, the accused shall enjoy the right to be confronted with the withnesses against him. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny." (Citations omitted).

[10] American Bar Assn. Project on Minumum Standards of Criminal Justice, Standards Relating to Providing Defense Services (1968); Amer. L. Inst., Model Penal Code, § 301.4, § 305.15 (1); Dawson, Sentencing, The Decision as to Type, Length, and Conditions of Sentence, Report Amer. Bar Foundation's Survey of the Administration of Criminal Justice in the U.S. (1969). For the experience of Michigan in giving hearings to parolees see id., at 355. In Michigan it is reported that only one out of six parole violators retains counsel. One who cannot afford counsel is said to be protected by the hearing members of the board. Id., at 354. The number who ask for public hearings are typically five or six a year, the largest in a single year being 10. Michigan has had this law since 1937. Ibid. But the Michigan experience may not be typical, for a parole violator is picked up and returned at once to the institution from which he was paroled. Id., at 352-353.

By way of contrast, parole revocation hearings in California are secretive affairs conducted behind closed doors and with no written record of the proceedings and in which the parolee is denied the assistance of counsel and the opportunity to present witnesses on his behalf. Van Dyke, Parole Revocation Hearings in California: The Right to Counsel, 59 Calif. L. Rev. 1215 (1971). See also Note, 56 Geo. L. J. 704 (1968) (federal parole revocation procedures).

[11] The Brief of the American Civil Liberties Union, amicus curiae, contains in Appendix A the States that by statute or decision require some form of hearing before parole is revoked and those that do not. All but eight States now hold hearings on revocation of probation and parole, some with trial-type rights including representation by counsel.

[12] We expect of course the commission of another offense which from the initial step to the end is governed by the normal rules of criminal procedure.

[13] The American Correctional Association states in its Manual of Correctional Standards, p. 279 (3d ed. 1966) that:

"To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections, or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary."

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And it provides for parole revocation re earings:

"As soon as practicable after causing an alleged violator taken into custody on the basis of a parole board warrant, the prisoner should be given an opportunity to appear before the board or its representative. The prisoner should be made fully aware of the reasons for the warrant, and given ample opportunity to refute the charges placed against him or to comment as to extenuating circumstances. The hearing should be the basis for consideration of possible reinstatement to parole supervision on the basis of the findings of fact or of reparole where it appears that further incarceration would serve no useful prupose. Id., at 130.

The American Bar Association states in its brief amicus in the present cases that it is "in full agreement with the American Correctional Association in this instance. The position that a hearing is to be afforded on parole revocation is consistent with several sets of criminal justice standards formally approved by the Association through its House of Delegates."

Hawkins v. Michigan Parole Board
45 Mich. App. 529 (1973)

LESINSKI, Chief Judge.

Chester Hawkins was convicted in 1968 of indecent liberties, M.C.L.A. § 750.336; M.S.A. § 28.568, and sentenced to 3 to 10 years in prison. He was paroled on January 30, 1970. He was charged with parole violation on June 5, 1971. A hearing was held pursuant to M.C.L.A. § 791.240a; M.S.A. § 28.2310(1), at which parole was revoked. He now petitions this Court for a writ of mandamus to release him from custody.

Hawkins was charged with parole violation for allegedly moving from Holt to Eaton Rapids without the permission of his parole officer, and for violating a special condition of his parole for not refraining from "any association with minor females". At the parole revocation hearing Hawkins challenged these allegations. In defense he argued that his parole officer knew of and acquiesced in his move from Holt to Eaton Rapids. He further claimed that the officer knew he had briefly resided at his brother's house, where several minor females also lived. Hawkins stated that he had no close relationship with minor females at the Eaton Rapids address; although his employer's two stepdaughters lived in the same house, petitioner lived separately in a basement apartment.

Hawkins was not represented by an attorney at this hearing, allegedly because he was indigent. A review of the record reveals that the assertions made in defense by petitioner were not considered by the board.

The parties stipulate that the case be returned for *de novo* rehearing by the Parole Board. The Attorney General, representing the Parole Board, also agrees that counsel must be provided in this case.

On excellent briefs from both parties, two issues are raised:

1. Whether an indigent person has a right to counsel at public expense in proceedings to revoke his parole, and

2. What court or agency shall bear responsibility for providing counsel to represent an indigent parolee at his parole revocation hearing?

The relevant Michigan statute provides:

"Within 30 days after a paroled prisoner has been returned to a state penal institution under accusation of a violation of his parole, other than the conviction for a felony or misdemeanor punishable by imprisonment in any jail, a state or federal prison under the laws of this state, the United States or any other state or territory of the United States, he shall be entitled to a hearing on such charges before 2 members of the parole board. Hearings shall be conducted in accordance with rules and regulations adopted by the director, *and the accused prisoner shall be given an opportunity to appear personally or with counsel and answer to the charges placed against him.*" M.C.L.A. § 791.240a, *supra*. (Emphasis supplied.)

The hearing afforded by the statute is primarily to determine if a parole violation has occurred. Where a parolee is subject to having his conditional freedom ended, he has the same need of counsel as at any other critical stage in the proceedings against him. Hearsay, opinion, and fact all come before the board during the course of a revocation hearing. Presence of counsel is most important in that it aids in limiting the hearing to relevant facts and in eliminating irrelevancies, insinuations, and unsubstantiated allegations.

A recent case, Morrissey v. Brewer, 408 U.S. 471, 489; 92 S.Ct. 2593, 2604; 33 L. Ed.2d 484, 499 (1972), while refusing to find a due process right to counsel, established several minimal due process requirements in parole revocation hearings. The Court established minimal due process requirements as (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against

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

[1] We do not, however, rest our decision in this case on due process grounds. The Michigan Legislature has provided by statute for a right to counsel at parole revocation hearings. We hold today that this right cannot be limited to those who can afford to hire an attorney, but must be extended also to indigents. The Equal Protection Clause of the 14th Amendment requires that an indigent parolee who contests parole revocation be afforded the same right to counsel that a parolee of means enjoys. Warren v. Parole Board, 23 Mich.App. 754, 179 N.W.2d 664 (1970); Griffin v. Illinois, 351 U.S. 12; 76 S.Ct. 585; 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353; 83 S.Ct. 814; 9 L.Ed.2d 811 (1963), reh. den. 373 U.S. 905; 83 S.Ct. 1288; 10 L.Ed.2d 200 (1963).

As to the second issue, we have examined alternatives laid before us with great care. Convenience, costs, and judicial interest in rapid and fair adjudication of the parolee's case have all influenced us in arriving at the solution.

[2] We hold as follows: First, before the revocation hearing takes place, the parolee must be advised of his right to counsel, if his parole is being revoked for any reason other than conviction of a felony or misdemeanor punishable by imprisonment. Shadbolt v. Michigan Department of Corrections, 386 Mich. 232, 191 N.W.2d 344 (1971).

[3] Second, if the parolee alleges indigency and requests appointment of counsel, the circuit court in the county in which the prisoner is confined shall determine if defendant is indigent.

Third, upon a finding of indigency, the court shall appoint counsel.

[4] Finally, costs of counsel shall be ordered paid from the general operating budget of the Department of Corrections until such time as the Legislature shall otherwise provide.

[5] In this cause it is ordered that a hearing be held in the Jackson County Circuit Court to determine whether petitioner is indigent. Counsel is to be appointed if the petitioner is found to be indigent. Costs of appointed counsel are to be borne by the Department of Corrections. A *de novo* parole revocation hearing is to be held.

A proper parole revocation hearing not having been had within 30 days as required, mandamus compelling the Department of Corrections to release petitioner from custody pending the *de novo* parole revocation hearing is granted.

This Court retains no further jurisdiction.

DEPARTMENT OF

ATTORNEY GENERAL

MEMORANDUM

TO Director, Bureau of Field Services / Parole Board
Department of Corrections

August 2, 197?

FROM Criminal Division
Attorney General Department

RE: Temporary Parole Violation Procedures

The decision of the United States Supreme Court in Morrissey, et al v Brewer, 11 Cr L 3324, has mandated changes in parole violation procedure. The contents of this memo are temporary procedures to be followed until the ramifications of the decision are fully determined.

1. There are, for now, no automatic parole violations upon conviction.

2. Henceforth, every party to be returned P.V. is to be given a probable cause for issuance of a parole violation warrant hearing by a member of the Department not connected with that individual's case.

   Probable cause may be defined to include but not limited to:

   > Where the facts and circumstances within knowledge of which there is reasonably trustworthyness are sufficient in themselves to warrant a man of reasonable caution in the belief that a parole violation has been committed.

   The probable cause hearing may be waived by the parolee.

3. The preliminary hearing officer shall make written findings of fact and conclusions of probable cause if found and immediately forward same to the Director of Field Services.

4. Hearings shall be given as soon after the parolee is in custody on technical violations as possible; as soon as possible after a detainer or hold is placed against a parolee charged with a new crime either misdemeanor or felony.

5. At such preliminary hearing, the parolee may be represented by counsel and may present evidence and/or witnesses to refute the charge against him.

6. Alleged parole violation charges shall be given to the parolee as soon as possible and before the hearing.

7. Upon a determination of "probable cause" and the issuance of a parole violation warrant, every individual charged P.V. shall be heard by the parole board within thirty days of his return to the institution. The individual may have counsel at such hearing or may waive a formal hearing with witnesses and/or counsel and be heard by the board. In the cases of individuals appearing before the board with a conviction, either misdemeanor or felony, said conviction being the basis of the P.V. charge, the facts of the conviction may not be reargued. The board shall determine if the conviction constitutes parole violation and warrants revocation. The parolee shall be given an opportunity at the hearing to explain, mitigate, or defend against the charge.

8. Every individual returned to a penal institution with a new felony sentence who was on parole prior to June 29, 1972 and whose parole has been revoked subsequent to June 29, 1972, shall be given a formal, or if waived, informal hearing before the parole board to determine parole revocation and disposition.

9. Every individual charged P.V. as the result of a misdemeanor conviction who has been returned P.V. shall be given a probable cause hearing at the institution as soon as possible before being heard by the parole board.

10. Every technical violator since June 29, 1972 shall be given a probable cause hearing in the institution, if returned as of this date, before being seen by the parole board, or in the local community if not yet returned.

11. Henceforth, no parole violation warrants shall issue for any violations either technical or upon conviction without a "probable cause" hearing; for returning felons, this shall if possible be held in the county prior to return to the institution if parole violation is contemplated. For individuals with misdemeanor conviction, the hearing shall be held on site prior to the issuance of a warrant and/or return to the institution.

12. The parole board after hearings shall make a factual determination as to the basis of the charges, a finding as to whether or not parole violation has been established, and a disposition as to the individual. Findings of fact, conclusions, and ultimate dispositions shall be in writing.

13. These procedures are for immediate implementation and shall be followed until further notice.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

STANLEY D. STEINBORN
Deputy Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

August 14, 1975

Perry M. Johnson, Director
Department of Corrections
Stevens T. Mason Building
Lansing, Michigan

Dear Sir:

I have received your letter wherein you request advice as to whether it is necessary to furnish counsel to indigents at preliminary parole revocation hearings.

You refer to two letters bearing on this matter addressed to you by the head of my Criminal Division and suggest that they are contradictory. The first letter of January 16, 1974 was directed specifically to the question of complying with the mandate of Hawkins v Michigan Parole Board, 45 Mich App 529; (1973). Since that case considered only the question of counsel at final revocation hearings which under the holding of the case had to be furnished to all indigents, you were advised as to the need for compliance in terms of Hawkins. The Michigan Supreme Court affirmed and adopted the opinion of the Court of Appeals, Hawkins v Parole Board, 390 Mich 569; NW2d [illegible]1973), some seven months after Gagnon v Scarpelli, 411 US 778, 1973. Arguably, since the state Supreme Court decided Hawkins after Gagnon and had not discussed the Gagnon rule regarding counsel at preliminary hearings, it had concluded that Gagnon does not apply to the Michigan procedure. As noted, Gagnon was called to your attention on April 14, 1975, with the suggestion that you should follow the mandate of that portion of the opinion quoted in the letter describing the need to provide counsel to certain indigents at preliminary hearings.

However you should recall that the matter of counsel at preliminary hearings was brought up in a complaint for Mandamus in the Court of Appeals by one Fred Kazor in 1974. The Attorney General filed a brief in that court arguing that counsel was not necessary at preliminary revocations hearings and the Court of Appeals ruled agains Mr. Kazor. Subsequently the Michigan Supreme Court agreed to review the Court of Appeals ruling.

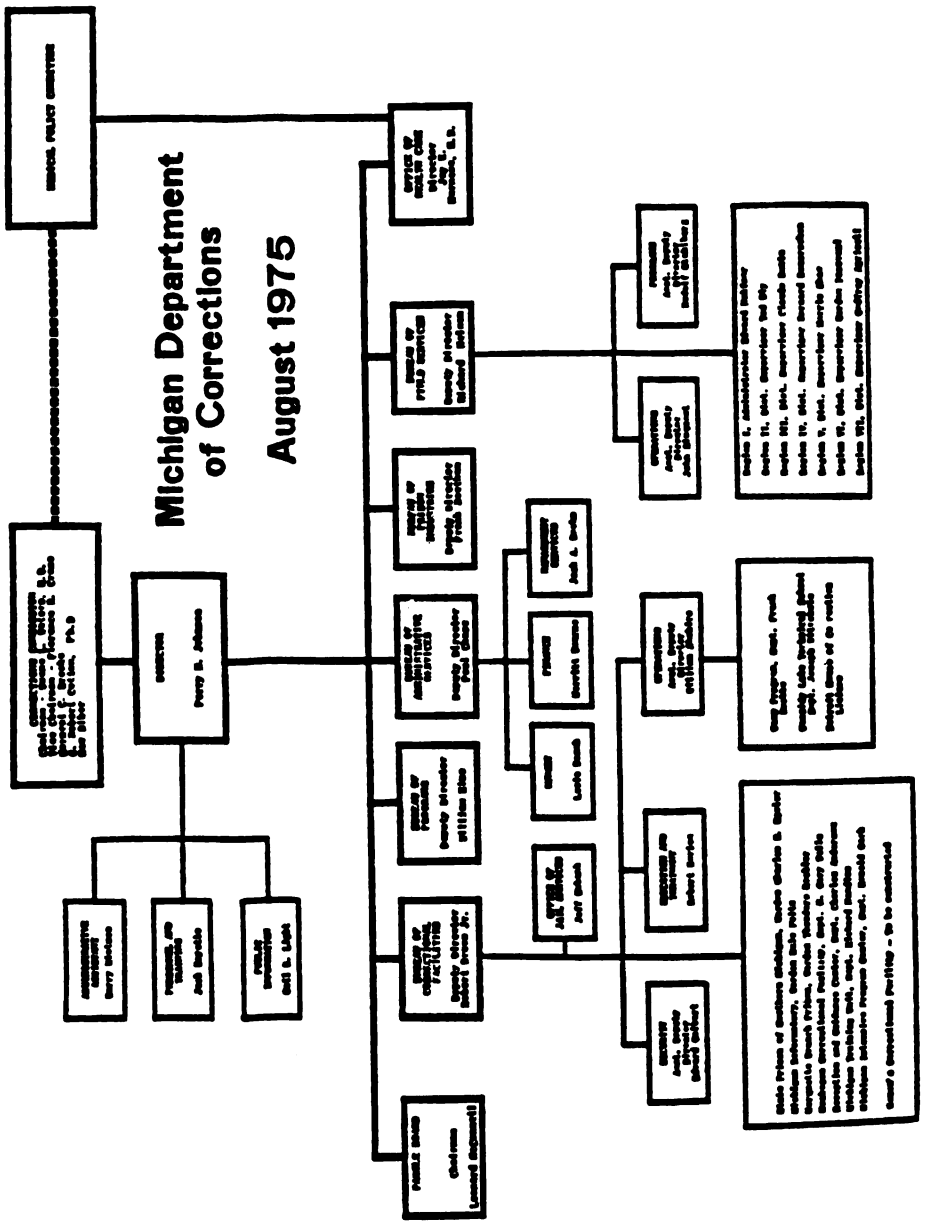
Although Kazor did not press his appeal and it could have been dismissed for this reason, the Supreme Court denied our motion to dismiss, gave him extra time and provided him appellate counsel. We concluded that the Court intended to give the matter very thorough consideration. On April 2, 1975, because Mr. Kazor had been released from custody, the Supreme Court dismissed the Kazor appeal as moot. On April 14, 1975 you received the second letter from us advising you to follow the Gagnon rule.

At that time, as it was deemed advisable to put the Department of Corrections in the most defensible legal position on a matter in which the state Supreme Court had expressed substantial interest, you were advised of the Gagnon rule and the need to implement it. Unlike Hawkins under which every indigent is given the right to counsel, Gagnon is not so broad. As the April 14 letter pointed out, Gagnon holds that counsel need be appointed only for special classes of indigents at preliminary revocation hearings; i.e. those with extraordinarily complex cases and in cases involving persons not capable of speaking effectively for themselves.

You are therefore advised that the United States Supreme Court decision in Gagnon as quoted in the letter of April 14, 1975 to the Department of Corrections from the Assistant in Charge of my Criminal Division is the opinion of this office.

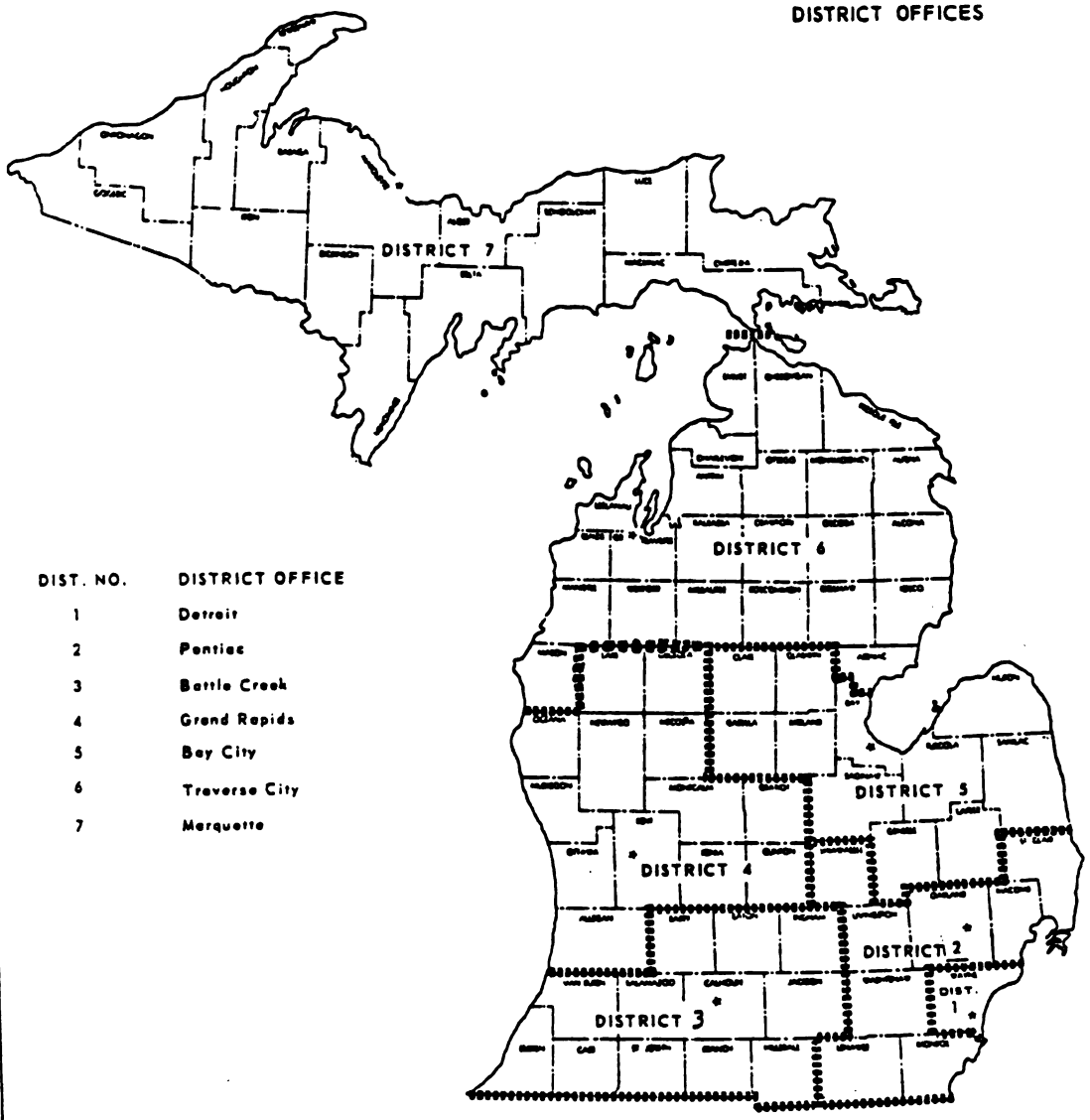
Very truly yours,

FRANK J. KELLEY
Attorney General

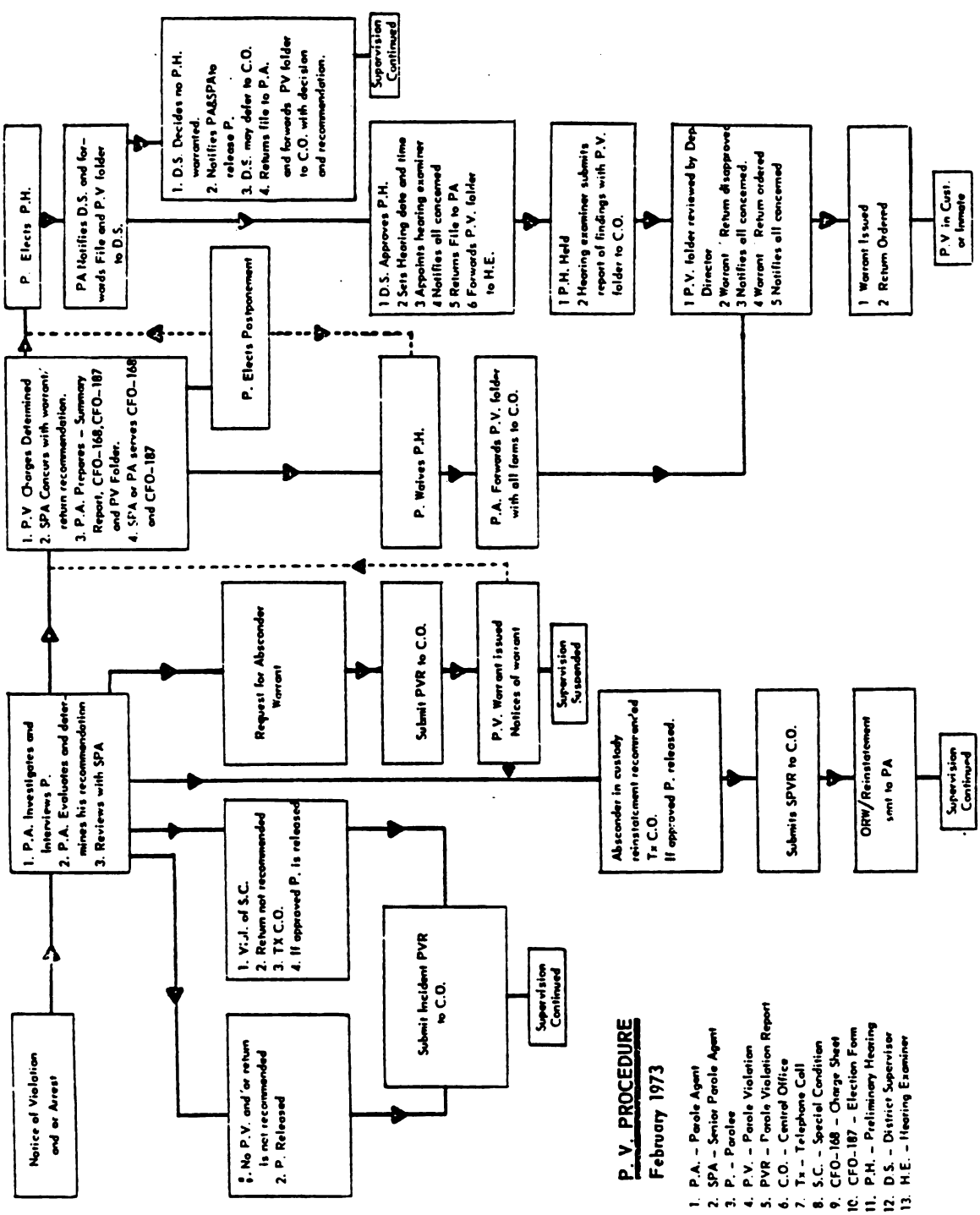

Michigan Department
of Corrections
August 1975

STATE OF MICHIGAN

DEPARTMENT OF CORRECTIONS
BUREAU OF FIELD SERVICES
DISTRICT OFFICES



DIST. NO.	DISTRICT OFFICE
1	Detroit
2	Pontiac
3	Battle Creek
4	Grand Rapids
5	Bay City
6	Traverse City
7	Marquette


Notice of Violation and or Arrest
1. P.A. Investigates and Interviews P.
2. P.A. Evaluates and determines his recommendation
3. Reviews with SPA
1. No P.V. and or return is not recommended
2. P. Released
1. V.J. of S.C.
2. Return not recommended
3. TX C.O.
4. If approved P. is released
Submit Incident PVR to C.O.
Supervision Continued
Request for Absconder Warrant
Submit PVR to C.O.
P.V. Warrant issued Notices of warrant
Supervision Suspended
Absconder in custody reinstatement recommended Tx C.O.
If approved P. released.
Submits SPVR to C.O.
ORW/Reinstatement sent to PA
Supervision Continued
1. P.V. Charges Determined
2. SPA Concurs with warrant/return recommendation.
3. P.A. Prepares – Summary Report, CFO-168,CFO-187 and PV Folder.
4. SPA or PA serves CFO-168 and CFO-187
P. Elects Postponement
P. Waives P.H.
P.A. Forwards P.V. folder with all forms to C.O.
P. Elects P.H.
PA Notifies D.S. and forwards File and P.V folder to D.S.
1. D.S. Decides no P.H. warranted.
2. Notifies PA&SPA to release P.
3. D.S. may defer to C.O.
4. Returns file to P.A. and forwards PV folder to C.O. with decision and recommendation.
Supervision Continued
1 D.S. Approves P.H.
2 Sets Hearing date and time
3 Appoints hearing examiner
4 Notifies all concerned
5 Returns File to PA
6 Forwards P.V. folder to H.E.
1 P.H. Held
2 Hearing examiner submits report of findings with P.V. folder to C.O.
1 P.V. folder reviewed by Dep. Director
2 Warrant ' Return disapproved
3 Notifies all concerned.
4 Warrant ' Return ordered
5 Notifies all concerned
1 Warrant Issued
2 Return Ordered
P.V in Cust. or Inmate
P.V. PROCEDURE
February 1973
1. P.A. – Parole Agent
2. SPA – Senior Parole Agent
3. P. – Parolee
4. P.V. – Parole Violation
5. PVR – Parole Violation Report
6. C.O. – Central Office
7. Tx – Telephone Call
8. S.C. – Special Condition
9. CFO-168 – Charge Sheet
10. CFO-187 – Election Form
11. P.H. – Preliminary Hearing
12. D.S. – District Supervisor
13. H.E. – Hearing Examiner

MICHIGAN DEPT. OF CORRECTIONS

POLICY DIRECTIVE

EFFECTIVE DATE	NUMBER
March 13, 1974	PPE-10
	SUPERSEDES NO. NEW
	DATED

SUBJECT

Preliminary Parole Violation Hearings

PAGE 1 OF 2

OBJECTIVES: To provide a preliminary hearing, conducted by an impartial individual, to determine whether there is probable cause to believe that a person placed on parole has committed an act or acts that constitute violation of parole.

APPLICATION: All persons charged with violation of parole.

POLICY: A basic purpose of parole is to protect the public from persons who have been sentenced to penal institutions. This can best be accomplished by assisting such persons with their reintegration into free society. It is necessary to monitor behavior so that appropriate corrective measures can be taken, including reincarceration. It is essential, therefore, that the system of revocation procedures permit the prompt confinement of parolees exhibiting behavior that poses a serious threat to others. At the same time, the revocation process must provide careful controls, fair methods of fact finding, and possible alternatives to safely retain as many offenders as possible in the community. Return to the institution should be used as a last resort, even when a factual basis for revocation can be demonstrated.

An on-site preliminary hearing will be conducted on all alleged parole violations, unless this right is specifically waived by the person charged. All persons charged must be informed of their right to a preliminary hearing. Waivers must be in writing and signed by the person charged.

In keeping with the concept of fairness, due process standards for administrative hearings will apply to all preliminary hearings. Minimum requirements for these hearings are as follows:

1. The hearing will be conducted by an employee designated by the Parole Board and who has not been previously involved in the case.
2. The person charged will be given written notice of the parole violation charges.
3. The person charged will be informed of all evidence used to substantiate parole violation charges.
4. The person charged shall have the right to present evidence and witnesses in his behalf.

CSO-216

DOCUMENT TYPE	EFFECTIVE DATE	NUMBER	PAGE 2 OF 2
Policy Directive	March 13, 1974	PPE-10	
		BUREAU/INST. NUMBER	SUPERSEDES NO.

5. The person charged shall have the right to confront and cross examine witnesses unless to do so would, in the judgment of the hearing officer, seriously jeopardize the welfare of the witness.

6. The hearing officer shall make a written summary of the hearing, indicating his findings on each count and the evidence relied on for each finding.

The preliminary parole revocation hearing is an administrative hearing and such does not require a finding "beyond a reasonable doubt". The hearing officer's decision should be based upon the degree of certainty that an ordinary prudent and reasonable person would use in making decisions in the conduct of his own affairs. Applying these standards the hearing examiner must find that probable cause exists to believe that a parole violation occurred and that the person charged committed the violation. If evidence presented at the hearing is insufficient to support probable cause finding, the person charged must be released immediately.

Counsel will not be permitted at preliminary parole violation hearings. A parolee has the right to retain counsel or appointment of counsel if he is indigent, at parole revocation hearings.

AUTHORITY: MCL 791.232, .238. ,239, .240a
Morrissey v Brewer 92SCt. 2576(1972)
Corrections Commission: March 13, 1974

Perry Johnson, Director — 3-22-74 Date

PJ:sb
3-6-73

CSO-219

MICHIGAN DEPT. OF CORRECTIONS

POLICY DIRECTIVE

EFFECTIVE DATE	NUMBER
July 3, 1974	PD-DWA-76.01
PAROLE BOARD FIELD SERVICES	SUPERSEDES: NO NEW
	DATED

SUBJECT

Parole Revocation Hearings

OBJECTIVES: To provide for a parole revocation hearing before the Parole Board that meets due process standards for the purpose of making objective, factual determination of parole violation charges and, if substantial evidence of a violation exists, to determine the efficacy of institutional confinement or other suitable disposition.

APPLICATION: All parolees returned to prison as alleged parole violators by the Bureau of Field Services, except those returned with new felony sentences. The Parole Board may elect to order a parole revocation hearing for PVNS's when in the Board's judgment the person is extremely dangerous.

POLICY: Inherent in the granting of parole is the need for proper control and safeguards to protect the public interest and the parolee's welfare. Parole should be viewed as a means of reintegrating the offender to the community and testing his readiness for this increased freedom. It is the Department's policy to keep as many offenders in the community as possible and to use return to the institution as a last resort, even when a factual basis for revocation can be demonstrated. Behavior that poses a serious threat to persons or property calls for prompt confinement in the interest of public safety. Therefore, the parole revocation procedure must be definite and timely.

Due process requirements for the parole revocation hearing are as follows:

1. The parolee shall have written notice of the alleged violation of conditions of parole.

2. He shall be advised of his right to be represented by counsel, including the right to appointed counsel if he is indigent.

3. He shall be advised of his right to present witnesses in his behalf whether or not he is represented by counsel.

4. He shall be advised of his right to be heard by the members present without counsel or witnesses.

5. He shall be advised of his right to cross examine adverse witnesses unless to do so would, in the judgment of the Parole Board, seriously jeopardize the welfare of that witness. (Not applicable if he chooses #4 above.)

DOCUMENT TYPE	EFFECTIVE DATE	NUMBER	PAGE 2 OF 2
Policy Directive	July 3, 1974	PD-DWA-76.01	
		BUREAU/INST. NUMBER	SUPERSEDES NO.
			NEW

6. He shall be advised of his right to challenge allegations or evidence presented by the State and may elect to submit additional evidence in his behalf.

7. If in the judgment of the Parole Board the parolee appears mentally incapable of understanding and assisting himself at the revocation hearing, it may postpone the proceedings until psychiatric clearance has been obtained.

8. The Parole Board shall provide a written statement of findings, reasons for the decision, and the evidence relied upon as well as a summary of the revocation hearing. The revocation hearing decision, as in all other Parole Board action, requires the support of a majority vote of three.

The parole revocation hearing is an administrative hearing and as such calls for substantial evidence in support of the findings but does not require a finding beyond a reasonable doubt.

If the evidence is insufficient to support the parole violation charge, the offender will be reinstated to parole status to the community as soon as possible. If, using the above standards, a violation of one or more of the conditions of parole is found the Parole Board may reinstate on parole, give time served as penalty, investigate release plans, request additional information, require further incarceration, or make other suitable disposition.

AUTHORITY: MCL 791.240A

APPROVED: _____ 7-3-74

Perry Johnson, Director — Date

PJ:sb
7-2-74

CSO-219

MICHIGAN DEPT OF CORRECTIONS

POLICY DIRECTIVE

EFFECTIVE DATE	NUMBER
October 1, 1975	PD-BWA-76.07
Bureau of Field Services, Parole Board	SUPERSEDES: NO New
	DATED

SUBJECT

PAROLE VIOLATION DECISION-MAKING

OBJECTIVE: To provide guidelines for revocation of parole.

APPLICATION: Parole Violation Desk, Bureau of Field Services Personnel, and the Parole Board.

POLICY: Parole is the final stage of the correctional continuum and serves both to aid in the reintegration of the offender into the community and to test his readiness to act as a responsible citizen. Each parolee must comply with certain standard conditions of conduct and such other special conditions as the Parole Board may fix in response to an individual's special problems. The parole agent monitors the parolee's behavior to assure that all parole conditions are met. If all conditions are met, then the parole is terminated after the designated period of time has elapsed, and the parolee is discharged from further liability on that particular sentence.

If one or more conditions are not met, then the parolee is considered in violation and subject to parole revocation. Revocation of parole is a serious matter which has been emphasized in recent years by several courts and the policy statements of the Department of Corrections. Affording due process is mandated.

A parole violation request must be written when the agent is reasonably certain that the charges can be proven. The report will include a recommendation to return or continue. The decision to return the parolee to an institution for a revocation hearing or to recommend continuance must be based on sound criteria uniformly applied. It may be that an adjustment in the parolee's program will be sufficient to support his continuance if the violation is relatively minor, or mitigating circumstances merit favorable consideration. A decision of this type, however, must be weighed against the individual parolee's propensity for violence or renewed criminal conduct. The final decision to return rests with the Deputy Director of Field Services or his designee. The final decision to revoke parole rests with the Parole Board. The decision to revoke is based on a number of considerations that span the concern for public safety to a humane consideration for the parolee.

The following criteria, listed in priority of importance, will be used in making this decision.

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		BUREAU/INST. NUMBER	SUPERSEDES NO
			New

. The adequacy of evidence supporting the violation(s).

. The potential for dangerousness perceived in the parolee's behavior.

. The amount of time remaining on the sentence.

. The similarity or relationship of the violation(s) to the parolee's previous criminal behavior.

. The availability of a suitable program to meet the parolee's needs if continued on parole.

. The likelihood of subsequent violations if continued on parole.

. The impact on the public's confidence in the system.

. The impact on the agent's effectiveness in fulfilling his job responsibilities.

Other factors will be considered that are even more subjective than some of the criteria listed. The parolee's attitude is the most common factor considered and could, conceivably, be one of the most significant. Care must be taken not to give the perception of a parolee's attitude more credence than it deserves in light of the criteria described above.

Whenever there is a violation of a special condition of parole imposed by the Parole Board, and it is decided not to return the parolee for a revocation hearing, the Parole Board is to be appraised of the details of the violation and the reasons for the decision.

AUTHORITY: 791.203 Compiled Laws of 1970; 791.231 Compiled Laws of 1970; 791.232 Compiled Laws of 1970.

APPROVED: _____ 8/15/75

Richard K. Nelson, Deputy Director — Date
Bureau of Field Services

RKN:cjr
8/11/75

ELECTION OF PRELIMINARY HEARING

Having read or been fully advised of the rules of the preliminary hearing as stated on the reverse side of this form, and having received a copy of the parole violation charges, I hereby:

_____ Waive preliminary hearing.

_____ Request a preliminary hearing.

_____ Request postponement of my preliminary hearing until _____ to allow me to _____

_____

_____

Please select one of the above options by writing your initials in front of it. If you are granted a postponement, the time lost thereby will not be counted against the statutory period allowed for parole violation hearings. You must make a hearing decision before the expiration of the postponement date.

_____ _____ _____

PAROLEE'S SIGNATURE INST. NO. DATE

_____

SIGNATURE OF WITNESS

CFO-187
Rev. 4/74

MICHIGAN DEPARTMENT OF CORRECTIONS
BUREAU OF FIELD SERVICES
LANSING, MICHIGAN

RULES FOR PRELIMINARY HEARING

1. Department of Corrections procedures provide that a parolee, whose return to prison is being considered is entitled to an informal Preliminary Hearing. The purpose of the hearing is to determine if Probable Cause exists to indicate violation of one or more parole conditions. Counsel will not be permitted at such hearing.
2. You have received a copy of the violation charge(s). If you elect a Preliminary Hearing, you will receive notice of its time and place. You will be allowed to testify, and present witnesses and other evidence in your own behalf. An impartial hearing examiner will be appointed to conduct such hearing, and he will give a liberal interpretation to rules of evidence. He may grant a hearing postponement if good cause is shown.
3. Waiver of the Preliminary Hearing, is not an admission of guilt; nor does it waive your right to a full revocation hearing before the Parole Board. In the event you are returned to a state institution, you have the right to a full revocation hearing before the Parole Board unless you have been convicted of a misdemeanor or a felony. At the hearing before the Board you may obtain counsel of your own choice, at your own expense, or you may have counsel appointed for you if you do not have funds to obtain such.

STATE OF MICHIGAN

DEPARTMENT OF CORRECTIONS

BUREAU OF FIELD SERVICES

DETAINER

To: _____ Date _____

Pursuant to section 39 of Act No. 192, Public Acts of 1968, please detain in your custody until further notice the parolee named below.

Name: _____ No: _____

CFO-108
REV. 5/69

Signature: _____
parole agent

MICHIGAN DEPARTMENT OF CORRECTIONS
BUREAU OF FIELD SERVICES

PAROLE VIOLATION CHARGES

_____
NAME & NO.

You are charged with violating the following conditions of parole:

I hereby acknowledge receipt of Notice of Parole Violation Charges. My signature does not in any way constitute an admission to the above charges.

_____ _____
Parolee's Signature Witness

_____
Date

Parole Violation Charges CFO-163 Rev. 11/72

STATE OF MICHIGAN

DEPARTMENT OF CORRECTIONS

PAROLE VIOLATION WARRANT

Number	Name	Date of Parole	Date of Delinquency

TO: Any Parole Agent, Probation Agent, Law Enforcement Officer, or any other Special Agent or Officer authorized to serve Criminal Process.

WHEREAS, the above named was granted a parole,

AND, WHEREAS, a showing of probable violation of this parole has been made to me,

THEREFORE, in accordance with Section 38 of Act No. 232 of the Public Acts of 1953,

I HEREBY DECLARE said parolee to be in violation of this parole and order the issuance of this warrant for the arrest and imprisonment of said parolee.

AND COMMAND YOU, in the name of the People of the State of Michigan to execute this warrant by apprehending and detaining said parolee pending return to such institution as shall be designated, and this shall be your authority for so doing.

Given by my hand and under the seal of the State Department of Corrections at Lansing, Michigan, this date _____

_____

DEPUTY DIRECTOR IN CHARGE OF
BUREAU OF FIELD SERVICES

COPIES:
ORIGINAL
FILE
CASE CONTROL

CFO-111 11/66

Parole Revocation as Percentage of Inmate Population
January (Beginning of Month)

Year	Parole Revocation*	Pct.	Inmate Pop.
1969	121	.02	7743
1970	91	.01	8409
1971	57	.01	9079
1972	114	.01	9547
1973	88	.01	8471
1974	88	.01	7874
1975	83	.01	8630

m = 1.00 sd = .38

June (End of Month)

Year	Parole Revocation*	Pct.	Inmate Pop.
1969	676	.08	8524
1970	746	.08	8924
1971	442	.05	9489
1972	552	.06	9339
1973	552	.07	8069
1974	535	.07	8226
1975	577	.06	9880

m = 6.71 or 7.00 sd = 1.07

* Includes PVNS and TVP

December (End of Month/Year)

Year	Parole Revocation*	Pct.	Inmate Pop.
1969	1317	.16	8409
1970	1412	.16	9079
1971	1005	.11	9549
1972	991	.12	8471
1973	1056	.13	7874
1974	1013	.12	8630
1975	1145	.11	10773
m = .13 or 13.00		sd = .02 or 2.00	

* Includes PVNS and TVP

NOTE: Comparisons in point-in-time were made between parole revocation and inmate population and parole grant and inmate population. The multiple comparisons were made to account for fluctuactions in the inmate population because the end of year figures for the inmate population do not necessarily represent linear cumulative totals, i.e., the end-of-year figure may be lower than the beginning-of-year one. The points-in-time are January, June, and December of each year of the seven year period studied.

January (Beginning of Month/Year)

Year	Parole Grant	Pct.	Inmate Pop.
1969	226	.03	7743
1970	266	.03	8409
1971	198	.02	9079
1972	284	.03	9547
1973	324	.04	8471
1974	237	.03	7874
1975	232	.03	8630

m = .03 or 3.0 sd = 38 or .38

June (Cumulative yearly total to end of month)

Year	Parole Grant	Pct.	Inmate Pop.
1969	1351	.16	8524
1970	1796	.20	8924
1971	1991	.21	9489
1972	2261	.24	9339
1973	2076	.26	8069
1974	1838	.22	8226
1975	1556	.16	9880

m = 20.71 or 21 sd = 3.51

Parole Revocation Data

Year	Returned/New Sentences	Returned/TVP	TOTAL
1969	397	920	1317
1970	434	978	1412
1971	500	505	1005
1972	478	513	991
1973	515	541	1056
1974	514	499	1013
1975	558	587	1145
TOTAL	3396	4543	7939

Parole Revocation - Parole Release Data

Year	Parole Revocation	Parole Release
1969	1317	3268
1970	1412	3848
1971	1005	4118
1972	991	4833
1973	1056	4070
1974	1013	3665
1975	1145	3114
TOTAL	7939	26916

Source: Management Services Division, Michigan Department of Corrections, "Bureau of Correctional Facilities Monthly Summary Report," CAO-156 Rev. 3/73.

NUMBER ____

DATE: _____

SITE: _____

BOARD MEMBERS

_____

_____

_____

_____

REVOCATION DATA FORM

I. OFFENDER

Race/Ethnicity W __ B __ O __

Age _____

Original Conviction _____

Original Sentence _____

Parole District (County) _____

Date Paroled _____

Date Returned _____

II. HEARING

Time (Length) _____

Rights Exercised

a. Onsite hearing ___

b. Witnesses ___

C. Attorney ___

III. REVOCATION CHARGES

F ___ _____

M ___ _____

TVP ___ _____

IV. PRELIMINARY DISPOSITION

A. Returned to Prison

1. Yes __ No __

2. Length _____

B. Lesser Charges Dropped

1. How many _____

2. Description _____

_____

_____

_____

_____

C. Postponed

1. Probable Cause __ _____

_____

2. Production of Witnesses and Attorney __

D. Released ____

V. NARRATIVE

_____

_____

_____

_____

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_____

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_____

_____

Dear Sir:

I, the undersigned, a Masters Degree candidate in Criminal Justice at Michigan State University, am engaged in research related to my Thesis. My Thesis is on the subject of the impact of court decisions on corrections in Michigan. You have randomly been selected to participate in this research as a questionaire respondent. The purpose of this questionaire is to solicit your feelings and attitudes towards judicial intervention into corrections, prisoners' rights, and the cases of Morrissey V. Brewer, 408 U.S. 471 (1972) and Hawkins V. Michigan Parole Board, 45 Michigan App. 529 (1973).

Morrissey V. Brewer granted a preliminary and final adjudication to parolees faced with the prospect of parole revocation. Due process rights accorded parolees at such a hearing included (1) notice of charges, (2) opportunity to be heard, (3) right to confront and cross-examine adverse witnesses, (4) right to present favorable witnesses, (5) impartial and detached hearing board, and (6) written statement of reasons for final disposition. Morrissey did not decide the right to counsel.

Hawkins V. Michigan Parole Board extended to indigents the right to counsel at parole revocation hearings provided by M.C.L.A. section 791.240(a), heretofore available only to parolees with means, with the exception of any parolee returned on "conviction of a felony or misdemeanor punishable by imprisonment". In addition, the Hawkins court ordered that (1) the circuit court in the county in which the parolee is confined shall determine indigency, (2) the same court shall appoint counsel, and (3) the costs of counsel shall be paid from the operating budget of the Department of Corrections.

Your name and the contents of your questionaire are completely confidential, to be used only by me. Any questions regarding this questionaire should be directed to me (at the address on the return envelope).

Attached is a self-addressed return envelope with postage. Please mail the completed questionaire, as soon as possible, preferablely, on or before December 20, 1975.

Your cooperation is greatly appreciated.

Thank You.

Respectfully yours,

Louis M Simms

Louis M. Simms

Instructions

Please mark an "x" for your answer in the appropriate blank except questions number 20, 33, and 38. In questions number 20, 33, and 38 place either a 1, 2, 3, or 4 after each catogery.

1. Name_____

2. Sex 1. Male_____ 2. Female_____

3. Age 1. 20-25_____ 2. 25-30_____3. 35-40_____4. 40-45_____5. 45-50____6. 50 and over_____

4. How long have you worked with the Michigan Department of Corrections?
   1. 0-6 months_____2. 6 months-1 year_____ 3. 1-5 years_____ 4. 5-10 years_____
   5. 10-20 years____6. 20-30 years_____

5. What is your present job title?
   1. District Supervisor_____ 2. Senior Parole Agent_____ 3. Parole Agent_____
   4. Parole/Probation Agent_____

6. How long have you held your present job title?
   1. 0-6 months_____ 2. 6 months-1 year_____ 3. 1-3 years_____ 4. 4-7 years_____
   5. 7-10 years_____ 6. 10 years and over____

7. What is the total-time you have worked in the area of corrections, if other than the Michigan Department of Corrections? (If not applicable, check "N/A" and go to question number 9)
   1. 1-5 years_____2. 5-10 years____3. 10-15 years____4. 15-20 years____5. 20 years and over____ 6. N/A_____

8. What did you do?_____

9. Have you ever worked as a law enforcement officer, i.e., policeman?
   1. Yes_____ 2. No_____

10. Do you favor unlimited access to the courts by inmates and parolees
    1. Great deal_____ 2. Fair amount____3. Little____4. None at all___5. Don't know _____

11. Did you anticipate a Supreme Court decision like that of Morrissey V. Brewer?
    1. Great deal_____2. Fair amount_____3. Little_____4. None at all____5. Don't know_____

12. Did your colleagues anticipate such a decision as Morrissey?
    1. Great deal_____2. Moderately_____3. Little_____4. None at all____5. Don't know_____

13. Did you feel Morrissey was necessary in Michigan when the decision became effective in 1972?
    1. Great deal____2. Fair amount____3. Little_____4. None at all____5. Don't know_____

14. Do you feel Morrissey is necessary in Michigan now?
    1. Great deal_____2. Fair amount_____3. Little_____4. None at all_____5. Don't know._____

15. How important would you say discretion is to your job?
    1. Greatly important_____2. Fairly important_____3. Little important_____5. Don't know_____

16. Do you believe judicial intervention into corrections will increase?
    1. Great deal_____2. Fair amount_____3. Little_____4. Remain the same____5. Don't know_____

17. How would you access the effect of the courts on corrections?
1. Greatly significant____2. Fairly significant_____3. Minimally significant____
4. Insignificant_____5. Don't know_____

18. In your opinion, do inmates and parolees seek the courts to harass or irritate corrections personnel?
1. Great deal____2. Fair amount_____3. Little___4. None at all____5. Don't know
_____

19. In your opinion, do the courts encourage or produce progressive concepts about punishment, treatment, penology, and prisoners' rights?
1. Great deal_____2. Moderately____3. Little____4. None at all_____5. Don't know
_____

20. Who do you believe has done the most to advance progressive concepts about punishment, treatment, penology, and prisoners' rights? (Please mark in order of importance by placing either a 1, 2, or 3, etc., after each category)
1. Corrections personnel_____2. Courts_____3. Legislators____4. Civic groups
_____5. Offenders_____6. Academicians_____7. Other_____

21. Do you believe the policies created by Field Services are realistic in light of your actual working situation(s).
1. Great deal____2. Fair amount____3. Little____4. None at all_____5. Don't know
_____

22. In your opinion, do the courts interfere with the exercise of your discretion?
1. Great deal_____2. Moderately_____3. Little____4. None at all___5. Don't know
_____

23. In your opinion, has Morrissey enhanced the fairness of the parole revocation process
1. Great deal____2. Fair amount____3. Little____4. None at all____5. Don't know
_____

24. Do you believe better "professionalism" i.e., more education and training of staff more rights to parolees, and more written policy would have precluded Morrissey?
1. Strongly agree_____2. Agree____3.Strongly disagree____4. Disagree____5. Don't know_____

25. Has Morrissey put you at a disadvantage in regards to parolees?
1. Greatly so____2. Moderately so____3. Little_____ 4. None at all___5. Don't know._____

26 Do you believe the courts interfere with the efficient supervision of parolees?
1. Great deal____2. Moderately___3. Little____4. None at all___5. Don't know___

27. Since Morrissey, have parolees become more unruly, uncooperative, or prone to violate parole?
1. Great deal____2. Fair amount___3. Little___4. None at all____5. Don't know
_____

28. Would you say that Morrissey has lowered your morale?
1. Strongly- agree_____2. Agree____3. Strongly disagree_____4. Disagree_____
5. Don't know-_____

29. In your opinion, does the presence of a lawyer lower the revocation rate?
1. Great deal_____2. Fair amount_____3. Little_____4. None at all___5. Dont know-_____

30. Does the presence of a lawyer increase a parolees confidence?
1. Great deal_____2. Moderately_____3. Minimally_____4. None at all____5.Don't know_____

31. Do you believe the presence of a lawyer at a revocation proceeding inhibits a parole agent or parole board member?
1. Great deal_____2. Fair amount_____3. Little_____4. None at all____5. Don't know_____

32. Has Morrissey improved your "professionalism", i.e., better justification and preparation of parole violation charges?
1. A lot____2. Moderately_____3. Little____4. None at all____5. Don't know_____

33. Who do you believe Morrissey has aided or improved the most within the Department of Corrections? (Please list in order of impact such as 1, 2, 3, etc.)
1. Top Policy makers_____2. Parole Board_____3. Parole Agents_____4. Other_____
5. Don't know_____

34. Have you used more disciplinary lock-up, i.e., "Weekend Lock-up", since Morrissey
1. Great deal____2. Fair amount____3. Little more_____4. No more_____5. Don't know_____

35. Have your colleague or fellow parole officers indicated that they have used more disciplinary lock-up, i.e., week-end lock-up", since morrissey.
1. Great deal more_____2. Moderately more_____3. Little more____4. No more____
5. Don't know_____

36. Which decision had the most impact on the parole revocation porcess in Michigan, Morrissey or Hawkins?
1. Hawkins_____ 2. Morrissey_____3. Equal amount for both_____4. Other_____
5. Don't know_____

37. Do you believe parolees have too many rights already when it comes to parole revocation?
1. Strongly agree_____2. Agree_____3. Strongly disagree_____4. Disagree_____
5. Don't know_____

38. Which stage of the revocation process do you find most crucial in the determination of whether a parolee has violated his parole? (Please mark in order of importance by-placing 1, 2, 3, or 4 after each category).
1. Agents charges_____2. Preliminary Hearing_____3. Issuance of warrant___
_____ 4. Parole Bond Hearing_____ 5. Don't know_____

COMMENTS:_____

_____

_____

_____

_____