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

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Gerald Scarpelli, an indigent probationer, was arrested following a burglary. After he admitted involvement in the crime, Scarpelli's probation was summarily revoked and he was incarcerated to begin serving a previously imposed sentence. Scarpelli later sought a writ of habeas corpus, alleging that the state's failure to provide a hearing and appointed counsel prior to revocation of probation had precluded consideration of his claim that the admission was given under duress. The District Court for the Eastern District of Wisconsin held that revocation of probation without a hearing constitutes a denial of fourteenth amendment due process of law, and that appointment of counsel to represent the probationer is required in all cases. The court of appeals affirmed. The Supreme Court, speaking through Justice Powell, held that due process requires that a probationer be afforded both a preliminary and a final revocation hearing. Holding further that the need for appointed counsel at revocation hearings is to be ascertained on a case-by-case basis, the Court remanded for determination of whether counsel should have been provided for Scarpelli.

1. In July 1965, Scarpelli pleaded guilty to a charge of armed robbery in Wisconsin. He was sentenced to serve 15 years imprisonment, but the sentence was suspended and he was placed on probation for seven years. Under an interstate compact, he was allowed to live in Illinois under the supervision of Illinois probation authorities. Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973).

2. The grounds for revocation were that Scarpelli had associated with known criminals, an association expressly forbidden by his probation regulations, and that he had been involved in and arrested for a burglary. Id. at 780.

3. At the conclusion of the trial, Scarpelli was sentenced and imposition of the sentence was suspended. An alternative practice, whereby sentencing is deferred altogether until probation is revoked, is within the ambit of Mempa v. Rhay, 389 U.S. 128 (1967), and thus outside the issue presented in Gagnon.

4. After the petition was filed, but prior to the time the petition was acted on, the respondent was released on parole. The district court held that the action was not moot since the revocation carried with it collateral consequences, "presumably including the restraints imposed by his parole." See 411 U.S. at 780.


7. 411 U.S. at 781-82. The Court was unanimous in its decision that the denial of a revocation hearing constituted a denial of due process.

8. Id. at 783-91.

9. Id. at 791. Justice Douglas, dissenting in part, would have required appoint-
Traditionally a probationer faced with the revocation of his conditional liberty has been denied procedural safeguards on the theory that probation is merely a privilege, not a constitutional right. The principal authority for denying the existence of constitutional rights attendant to probation lay in dicta in *Escoe v. Zerbst*, a 1935 Supreme Court decision labeling probation "an act of grace." Analogizing to this privilege concept, most courts have concluded that, since there is no right to be placed on probation, there is consequently no right to remain on probation. Furthermore, judicial reliance on the right-privilege distinction has resulted in decisions holding that, like the decision to grant probation, the manner in which probation is revoked is solely within the discretion of the state. Recognizing, however, that the right-privilege distinction can no longer be used to deny constitutional rights, the *Gagnon* Court disposed of this argument by footnote.


Probation provides the basic alternative to imprisonment for persons convicted of felonies and serious misdemeanors; fines provide the primary alternative to imprisonment for those convicted of petty offenses. For discussion of the criteria for the imprisonment-or-alternative decision, see F. Miller, R. Dawson, G. Dix & R. Parnas, *Criminal Justice Administration and Related Processes* 912-45 (1971); *CORRECTIONS* 38-44. While probation is the basic alternative to imprisonment, it is not the only one. Recent developments in prison alternatives are sketched in *CORRECTIONS* 38-44.


12. 295 U.S. 490 (1935). While interpreting the Federal Probation Act, Justice Cardozo explained that "we do not accept the petitioner's contention that the privilege [of hearing] has a basis in the Constitution, apart from any statute." *Id.* at 492. Years earlier, the Supreme Court similarly had stated that parole itself was a privilege. *See Ughbanks v. Armstrong*, 208 U.S. 481 (1908).

13. 411 U.S. at 782 n.4. The *Gagnon* Court relied on the authority of *Morrissey v. Brewer*, 408 U.S. 471 (1972), to dispense with the "act of grace" proposition. In *Morrissey*
The Court specifically rejected the contention, prompted by its opinion in *Mempa v. Rhay*, that revocation of probation, absent sentencing, is a critical stage of the prosecution. Rather, the Court drew heavily upon *Morrissey v. Brewer*, wherein Chief Justice Burger had observed that, while revocation of parole is not a critical stage, the loss of liberty accompanying parole revocation is a serious deprivation requiring that the parolee be accorded due process. While noting that practical distinctions exist between probation and parole, the Court in *Gagnon* concluded that for due process purposes no distinction may be drawn between parole and probation revocation proceedings. Thus, due process also must be satisfied when the state seeks to revoke probation.

The Court established that the right-privilege distinction was no longer creditable in regard to the rights of a parolee. The initial demise of the doctrine may be found in cases in which the realization of a benefit or status was conditioned upon an implied or explicit agreement by the beneficiary of the agreement to forbear in the exercise of some right expressly guaranteed by the Constitution. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (freedom of religion); *Speiser v. Randall*, 357 U.S. 513 (1958) (freedom of speech).


Yet a third method of avoiding the privilege concept is based upon an assertion that procedural due process must be afforded in determining whether violation of a condition, upon which the continued existence of the privilege depends, has occurred. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971); *Greene v. McElroy*, 360 U.S. 474 (1959).

14. 389 U.S. 128 (1967). In *Mempa* the Court held that a combined sentencing and probation revocation hearing is a critical stage of the prosecution requiring that counsel be appointed. *Id.* While interpreting a Florida procedure by which probation revocation and sentencing occurred in bifurcated hearings, one court in reliance on *Mempa* wrote that "[c]ertainly the decision to deprive a probationer of his freedom is as critical as the subsequent imposition of sentence." *Greene v. McElroy*, 360 U.S. 474 (1959). 15. 408 U.S. 471 (1972).

16. The Court reasoned that parole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions. *Id.* at 480.

17. 411 U.S. at 782 & n.3. While the Court recognized that no distinctions relevant to due process exist, there are practical distinctions between parole and probation. Generally, a probationer will not have served any part of his sentence in actual confinement, whereas a parolee will have obtained his conditional liberty only after serving some part of his sentence. Secondly, the decision to grant or revoke probation is a judicial one, usually made by the trial court, but the decision to grant and revoke parole is an administrative one, made by a parole commission. Finally, while probation may be viewed as a cor-
In *Morrissey* the Court determined that when the state attempts to revoke parole, due process mandates that two hearings be provided. First, a preliminary hearing must be convened to determine whether probable cause exists to revoke liberty. Probable cause arises when a subsequent crime is committed or when a violation of conditions occurs. The final hearing, which occurs only if probable cause is first established, focuses upon the question of whether revocation and reincarceration is the appropriate sanction for the proved violation. In reaching this discretionary decision, the hearing body considers both the nature of the violation and any mitigating evidence that might make revocation inappropriate. Based upon its initial determination that due process considerations are involved when the State seeks to revoke probation, the Court applied the *Morrissey* rationale to require that these same two hearings be provided for probationers.

Correctional alternative to institutionalization, parole may be considered as a correctional alternative to continued institutionalization.

Despite these differences, both parole and probation serve the same purpose—to rehabilitate the individual. Probationers and parolees alike are subject to supervision, surveillance and conditions, and for both the correctional arena is the community. See Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215, 1241-43 (1971); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 198 n.182 (1964).

With regard to the preliminary hearing, the Court stated in *Morrissey* that "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." 408 U.S. at 485. While these requirements seem clear enough, those terms that are subjective may provide troublesome questions. For example, what is "reasonably near"? By way of dictum one court indicated that the answer is dependent upon "consideration of all the circumstances." Richardson v. Board of Parole, 341 N.Y.S.2d 825, 828 (App. Div. 1973). Further definition of the "prompt hearing" requirement also may be necessary.

In *Gagnon* the Court viewed this preliminary hearing as having five components: "notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." 411 U.S. at 786.

The final hearing to determine whether revocation is the proper rehabilitative disposition embraces six procedural elements. First, "written notice of the claimed violations of parole [or probation]" must be provided. 408 U.S. at 489. This requirement needs refinement at two points. First, what degree of particularity of the charges must be provided? One court has offered the following answer:

While the allegations in a motion to revoke do not require the same particularity of an indictment or an information, in all fairness, the allegations as to a violation of probation should be fully and clearly set forth in the revocation motion and a copy timely served on the probationer so that he might be informed as to that upon which he will be called to defend.


Additionally, the question arises as to what is sufficient notice for the probationer.
or parolee adequately to prepare a defense. Obviously the answer is dependent upon
the individual circumstances. In one case two-day notice was held to be a denial of due
process "by the failure to give . . . adequate and prior notice to enable [the probationer]
to prepare his defense." Kuenstler v. State, supra at 370. But one-day written notice
was held to be sufficient where the parolee previously had been put on notice (orally)
that a hearing would be conducted within the next two weeks. See People ex rel. Calloway
other court found that one-day notice, absent prior oral notice, was violative of the fair

Due process, secondly, requires "disclosure to the parolee [or probationer] of evidence
against him." 408 U.S. at 489. That this requirement has not spawned litigation based
upon failure to disclose may be indicative of compliance with the requirement.

The third component required by due process is "opportunity to be heard in
person and to present witnesses and documentary evidence." ld. Here again, the
lack of cases on this point probably indicates substantial compliance. In Gagnon the
Court explained this requirement in greater detail. Addressing the problem of difficulty
and expense of procuring witnesses who reside at great distances from the place of the
hearing, the Court wrote:

While in some cases there is simply no adequate alternative to live testimony,
we emphasize that we did not in Morrissey intend to prohibit use where ap-
propriate of the conventional substitutes for live testimony, including affidavits,
depositions, and documentary evidence. Nor did we intend to foreclose the States
from holding both the preliminary and the final hearings at the place of violation
or from developing other creative solutions to the practical difficulties of the
Morrissey requirements.

Morrissey provides as a fourth requirement "the right to confront and cross-examine
adverse witnesses." 408 U.S. at 489. But this is not an unconditional right. The hearing
officer may for good cause refuse to allow confrontation. ld. This refusal is usually
predicated upon fears of reprisal by the probationer or parolee against the witness and
by additional concern that if a witness expected disclosure of his identity, he would
refrain from providing information. These fears, although similarly present, have not
been suggested to deny the right of confrontation at criminal trials. See Sklar, supra
note 17, at 195. Moreover, the opportunity for spurious allegations against probationers
or parolees will be substantial if such informants go unidentified. "Faceless informers,"
according to Justice Douglas, "are often effective if they need not take the stand."

As a corollary to the right to confront witnesses, the Florida Supreme Court has
stated that the hearing body has "no right to treat as evidence material not introduced
as such or to consider any information outside the record in its disposition of the
case." Jackson v. Mayo, 73 So. 2d 881, 882 (Fla. 1954) (relying in part on a Florida
statute); cf. Senk v. Cochran, 116 So. 2d 244 (Fla. 1959).

The fifth due process requirement is "a 'neutral and detached' hearing body such
as a traditional parole board, members of which need not be judicial officers." 408
U.S. at 489. This type of hearing body is necessary to avoid the possibility of revocation
based solely upon the opinion of the supervisor, who through mistake or prejudice may
seek revocation unnecessarily. See 411 U.S. at 785.

The sixth and last element of the final hearing is "a written statement by the fact-
finders as to the evidence relied on and reasons for revoking parole [or probation]." 408 U.S. at 489. One court has interpreted this language to require that the reasons
stated in the report must be sufficient to establish grounds for revocation. Garcia v.
State, 488 S.W.2d 448 (Tex. Crim. App. 1972). See also People ex rel. Angell v. Lynch,
supra.

The Seventh Circuit has created an additional procedural safeguard by granting
parolees the right to object prior to final adoption of the order. See Zizzo v. United States,
The Court then addressed a more complex issue, which its *Mempa*
decision had beclouded and its *Morrissey* opinion had specifically
refused to reach;20 namely, "whether an indigent probationer or parolee

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470 F.2d 105 (7th Cir. 1972). In *Zizzo* the court construed *Morrissey* to imply
that the written statement must be made known to the parolee, and it would
seem logical to us, where the statement is first tentatively compiled by a single
officer and later adopted by a board, it must be made known to the parolee,
and he given an opportunity to object by written submission before adoption.

*Id.* at 108.

Neither the *Morrissey* nor the *Gagnon* decision speaks to the burden of proof
standard to be utilized at the revocation hearings. As a result, varying standards have
been developed. One court has stated that at a revocation hearing, unlike a criminal
trial, there is no presumption of innocence. See *People ex rel. Calloway v. Skinner,* *supra*
at 41. "[W]e are dealing here with people who have been convicted of a crime. There
is no presumption of innocence attached. That presumption has long since disappeared.
In its place we have criminals who now seek to enjoy the same privileges that they
enjoyed before they were adjudicated such." *Id.; accord,* United States *ex rel. Mason v.
Amico,* 360 F. Supp. 1344, 1345 (W.D.N.Y. 1973). Another court has stated that "[a]ll
that is required is that the grounds for revocation be clearly and satisfactorily shown.
They need not be established beyond a reasonable doubt." *People v. Ruelas,* 106 Cal.
Rptr. 132, 134 (Ct. App. 1973).

Generally, the burden of going forward with evidence of probation or parole viola-
tions is upon the board. See *Tinsley v. Board of Parole,* 342 N.Y.S.2d 259 (Sup. Ct.
1973), where the court wrote: "[W]here no evidence is presented by the parole board
which has the burden of going forward in the face of a denial of the charges, a re-
vocation cannot be sustained." *Id.* at 266; *accord,* People *ex rel. Warren v. Mancusi,* 332
*Jackson v. Mayo,* 73 So. 2d 881 (Fla. 1954).

For additional analysis of the *Morrissey* decision and the hearing requirements, see
*The Supreme Court, 1971 Term,* 86 *Harv. L. Rev.* 1, 95 (1972); *Note, An Endorsement

20. As to the problems flowing from the failure of the *Mempa* decision to enunciate
clearly the scope of its decision, see note 22 *infra.* In *Morrissey,* the Court failed to reach
two questions; namely, "‘whether the parolee is entitled to the assistance of retained
counsel or to appointed counsel if he is indigent.’" *411 U.S. at 783 n.6,* *quoting from*
408 U.S. at 499. Of course, the *Gagnon* decision answers the latter half of this question—
whether a right to appointed counsel exists. As to the former half—whether there is a
general right to retained counsel at revocation hearings—the Court has yet to provide
an answer.

In *Morrissey,* Justice Brennan, joined by Justice Marshall, concurring, wrote that
hearings occur, a parolee "at least ‘must be allowed to retain an attorney if he so
wishes.’" *411 U.S. at 783 n.6,* *quoting from* 408 U.S. at 491 (Brennan, J., concurring).
At least one other justice agrees that a right to retained counsel exists. *See* 408 U.S. at
498 (Douglas, J., concurring).

Yet another question remains unanswered concerning the right to counsel at revoca-
tion hearings. This question, based upon the equal protection clause, is whether an indigent has a right to appointed counsel whenever, through either judicial ruling
or statutory provision, there exists a right to retained counsel. This issue was litigated
in *Cottle v. Wainwright,* 477 F.2d 269 (5th Cir.), *vacated,* 414 U.S. 895 (1973). Cottle
was a parolee under the supervision of the Florida Parole Commission. On two occa-
sions he was arrested and convicted of public drunkenness. The Florida Parole Commissi-
on, on the basis of these two convictions, sought to revoke his parole. Hearings were
has a due process right to be represented by appointed counsel at [revocation] hearings.\textsuperscript{21} Many lower courts, in reliance upon the Supreme Court’s \textit{Mempa} opinion, had held that a combined sentencing and probation revocation hearing is a critical stage of the prosecution requiring the appointment of counsel.\textsuperscript{22} But the \textit{Gagnon} Court con-

then undertaken to obtain such determination. Fla. Stat. § 947.23 (1971) provides that at such hearings the parolee, if he so desires, may be represented by counsel. Cottle appeared at the hearing alone because he was indigent. The Commission, over Cottle’s denials of guilt, revoked his parole.

Cottle petitioned the United States District Court for the Middle District of Florida for a writ of habeas corpus, alleging that “the failure of the state to appoint counsel to represent him at his parole hearing constituted a denial of equal protection.” 477 F.2d at 271. The District Court agreed with Cottle and ordered that “at any subsequent parole revocation hearing Cottle should be afforded the services of counsel.” Id.; see Cottle v. Wainwright, 338 F. Supp. 819 (M.D. Fla. 1972).

On appeal, the Fifth Circuit affirmed in part, holding that Cottle’s equal protection claim was valid:

While absolute equality between rich and poor is not required by the Constitution, we think that indigent parolees at least are entitled to as adequate a parole revocation hearing as those who have means, and in this respect representation by counsel is likely to be of substantial importance to the poor as well as the rich. The very fact that the Florida Legislature has seen fit to permit representation by counsel, at least to non-indigents, we think attests to its efficacy. 477 F.2d at 272.

On certiorari, the Supreme Court summarily vacated the judgment and remanded the case “for further consideration in light of Gagnon v. Scarpelli.” Wainwright v. Cottle, 94 S. Ct. 221 (1973). But \textit{Gagnon} had been decided on due process considerations, no equal protection challenge having been made. Therefore the Court’s summary disposition shed no light on the merit of Cottle’s equal protection argument. Justice Douglas, with whom Justice Blackmun concurred, expressed his dismay at the Court’s disposition of \textit{Cottle}:

[T]he only issue in this case is whether the court below was correct in holding that the Equal Protection Clause requires the right to appointed counsel at parole revocation hearings in cases where, unlike Gagnon v. Scarpelli, . . . a solvent parolee has a statutory right to the presence of retained counsel. \textit{Gagnon} is inapposite. . . . Whether in such cases the Equal Protection Clause demands that indigent parolees be afforded the same representation rights was not answered in \textit{Gagnon}.

\textit{Id.} 21. 411 U.S. at 783.

22. See 389 U.S. at 133-34. Arising from the cryptic \textit{Mempa} opinion were two problems. First, was there a right to appointed counsel at a revocation hearing at which no new sentence was imposed? A majority of post-\textit{Mempa} decisions did not view the imposition of a new sentence as essential to the right and, instead, required the appointment of counsel whenever probation was revoked. See, e.g., Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Gargan v. State, 217 So. 2d 578 (Fla. 4th Dist. Ct. App. 1969); Herrington v. State, 207 So. 2d 323 (Fla. 2d Dist. Ct. App. 1968); State v. Holiday, 153 N.W.2d 855, modified, 155 N.W.2d 378 (Neb. 1967); cf. State v. Brusenhan, 438 P.2d 174 (N.M. Ct. App. 1968); State v. Saavedra, 253 A.2d 677 (Conn. Cir. Ct. 1968). However, a substantial number of courts emphasized the act of sentencing and held that where no new sentence is imposed, no right to counsel exists. See, e.g., Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); Cole v. Holliday, 171 N.W.2d 603 (Iowa 1969); State
cluded that a revocation hearing, absent sentencing, is not a critical stage, and indicated that a right to appointed counsel could not be predicated upon the *Mempa* rationale. Rather, the Court focused upon the distinctive nature of probation and parole.

Probation and parole are typically characterized as benevolent alternatives to incarceration, designed to rehabilitate those under supervision. The probation or parole officer generally represents his client's best interests, as long as those interests do not constitute a threat to the equally important goal of community safety. However, when the rehabilitative program is unsuccessful, the field officer's attitude of "benevolent supervision" may be modified. Upon recommending revocation, the officer can no longer be considered dedicated to what the probationer or parolee would call his best interests. Assuming this characterization, the Court noted that the hearings it had mandated were necessary to overcome any bias or error on the part of the field officer and to provide an impartial consideration of the revocation decision. While these hearings usually will prevent ill-considered revocation, the Court surmised that in some instances "the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence." When such a situation occurs, the assistance of counsel is necessary to satisfy due process.

However, the recognition that counsel must in some instances be appointed did not lead the Court to accept Scarpelli's contention that

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24. *See* 411 U.S. at 783-87.

25. *Id.* at 787.

26. *Id.*
counsel must always be appointed. Viewing flexibility as essential to the rehabilitative process and permissible under due process, the Court instead stated that the state agency responsible for parole and probation administration is to make the appointment decision on a case-by-case basis. Characterizing any attempt to formulate precise guidelines as "neither possible nor prudent," the Court stated only that, presumptively, counsel should be provided when, after being apprised of his right to request counsel, the probationer or parolee makes such a request, coupled with a timely and colorable claim that he is innocent of the alleged violation. Even when the violation is uncontroverted, counsel nevertheless might be necessary if factors mitigating or justifying the violation exist, and if those factors "are complex or otherwise difficult to develop or present." Additionally, the probationer's or parolee's ability to speak effectively for himself should be of paramount concern to the appointment decision.

In effect, the hearing body will have absolute discretion over the appointment decision. It will determine whether a claim is "timely" or "colorable." The body will also decide, without exposition by counsel of the probationer's or parolee's position, whether mitigating considerations are complex or difficult to present. Traditionally, appellate review of such discretionary determinations has resulted in reversal only upon an abuse of discretion. The Court did attempt to provide some protection against abuse of discretion by requiring, for purposes of review, a written statement of reasons for denial of appointed counsel. However, it is difficult to understand why a hearing body that decides counsel is unnecessary would provide reasons for its decision which, when reviewed, would evince an abuse of discretion. Furthermore, several observers have recognized the virtual impossibility of determining when a particular revocation proceeding will be sufficiently complex to require appointment of counsel. It would appear, then, that under the case-by-case approach to the appointment decision very few denials will ever be disturbed on appeal.

27. Id. at 790.
28. Id.
30. 411 U.S. at 791.
31. See, e.g., ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 5.4, Commentary at 68 (Approved Draft 1970). When faced with the issue of appointment of counsel at revocation hearings, one court adopted the Gagnon case-by-case approach, but in doing so wrote: "[A]rticulation of where the line should be drawn between those who should have been supplied with counsel and those lawfully refused such assistance is a most difficult undertaking." Bearden v. South Carolina, 443 F.2d 1090, 1095 (4th Cir. 1971); cf. Chewning v. Cunningham, 368 U.S. 443 (1962).
A similar ad hoc approach to appointment of counsel was adopted by the Court in *Betts v. Brady*. The *Betts* "totality of circumstances" test for the desirability of counsel in state felony prosecutions was later rejected in *Gideon v. Wainwright*, since it had proved ineffective in providing for appointment when necessary. *Gideon* recognized that no reviewing court can examine a hearing record and divine with any precision whether the petitioner was denied an adequate defense by lack of counsel. Recognizing this earlier failure, the *Gagnon* Court attempted to bolster its decision by stating that the inadequacy of the rule as applied to criminal trials does not necessarily indicate that the same rule will be inadequate when applied to non-criminal and discretionary probation or parole hearings. Focusing on the differences between criminal and non-criminal proceedings, the Court indicated that the need for counsel in the former case derives principally from the adversary nature of a criminal trial and from the need for presentation of facts before untrained jurors. A revocation proceeding, on the other hand, is conducted before a body well-versed in parole or probation matters, and the state is represented not by an adversary, but by a probation or parole officer whose principal interest is rehabilitation. Therefore, the Court concluded, "[t]he need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases."

Unfortunately, the Court's characterization of the "rehabilitative ideal" may not be an accurate assessment of the real-world context in which most revocation hearings occur. A candid appraisal of the parole and probation systems reveals that rehabilitation generally remains an unachieved goal. Indeed, the "rehabilitative" process in

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32. 316 U.S. 455 (1942).
34. See Standards Relating to Probation, supra note 31, at 68.
35. The Court stated that "the State is represented not by a prosecutor but by a parole officer with the orientation described above." 411 U.S. at 789. In this context, the "orientation" referred to must be the officer's role as counsellor acting in the best interests of the parolee or probationer. Previously, however, the Court justified the requirement of a revocation hearing by emphasizing that, in spite of rehabilitative orientation, once the decision to revoke has been made, the officer's "role as counsellor . . . is then surely compromised." Id. at 785. Curiously, while this relationship was sufficiently adversary to justify a revocation hearing, it was at the same time sufficiently non-adversary to justify rejection of an absolute rule for the appointment of counsel.
36. 411 U.S. at 789. This analysis, however, seems to presuppose the answer.

It is important to stress the dichotomy between the professed objectives—treat-
some instances has proved harmful. Implicit in the Court's analysis are the presumptions that the field officer charged with supervision is sufficiently trained and that the magnitude of his caseload does not preclude adequate supervision of his clients. Neither of these presumptions is correct. Only a small number of supervisors possess even the minimum desirable education or on-the-job training. Typical caseloads are often twice the manageable number. Further, parole and probation systems remain severely underfunded, resulting in

ment and rehabilitation—and the actual uses made of probation . . . . For a variety of reasons, many of them traceable to a lack of community and political support, probation supervision is more a process of verification of the probationer's behavior than it is a process of modification of the probationer's behavior. In any event, the circumstances under which probation may be granted, the conditions that are likely to be imposed, and the paucity and allocation of existing resources make it clear that probation is actually used to achieve objectives other than treatment and rehabilitation.

Id. at 29 (footnote omitted).

38. See Bailey, Correctional Outcome: An Evaluation of 100 Reports, 57 J. Crim. L.C. & P.S. 153 (1966). An analysis of 100 correctional outcome reports revealed that in almost one-quarter of the studies the correctional process resulted in either harmful effects or no effect at all. Id. at 156.

39. Minimally, the probation officer, if he is effectively to serve a rehabilitative purpose, should possess a college education with heavy emphasis on behavioral or social sciences. The preferred standard of training is completion of graduate study in social work. Of 250 counties surveyed, 35% reported that they had no educational requirements at all or required only a high school education. Remarkably, less than 1% of all counties require graduate study by their probation officers. See CORRECTIONS 174-74.

Similarly, the survey revealed that 21 states have no educational minimum or require only that prospective parole officers hold a high school diploma. In-service training does not exist in 23 states, and only in four or five states is in-service training seriously and systematically pursued. Id. at 190.

In-service training programs for probation workers exist in only 51% of the surveyed counties. Of those counties that have programs, only 37% have training as frequently as once a month. CORRECTIONS 174-75.

40. The manageable caseload of a probation officer is defined as 50 work units (a probationer under supervision constitutes one "unit"; each presentence investigation per month constitutes five "units"). Yet, 96.9% of felony probationers under supervision are handled by officers with caseloads in excess of that standard, and 67.05% of those cases are a part of caseloads of over 100 work units, double the standard. The average caseload is 103.8. CORRECTIONS 173-74.

The caseload of parole officers, though not as unmanageable as that of probation officers, is on the average in excess of the recommended 50 work units. Only 8% of all parolees are part of supervision caseloads of 50 or less, while 19% are part of caseloads over 90. Id. at 189-90.

The impact of such overly burdensome caseloads on the supervisor's ability to provide close personal supervision is obvious. One writer persuasively suggests that supervision under these conditions cannot be viewed as supervision resulting in modified rehabilitated behavior; such conditions produce only a scheme of behavioral verification. Diana, What is Probation?, 51 J. Crim. L.C. & P.S. 189, 202 (1960).

41. See COHEN 30. "The national profile of corrections reveals that about 80 percent of all 'correctional' costs are expended on institutions, with 14.4 percent of all
insufficient institutional resources and research and, thus, a widening of the gap between potential and achieved rehabilitation.\textsuperscript{42} In view of these facts, it is difficult to comprehend how a hearing body, in determining whether to revoke probation or parole, can assess realistically an individual's demonstrated progress toward rehabilitation. Rather, it would seem that the determination is more likely to turn upon the narrower question of whether specific acts of the probationer or parolee reflect a sufficient propensity for crime or violence to warrant his removal from society. In this context, then, it cannot be said that there is no adversary relationship between the state and a parolee or probationer when the latter disputes a claimed violation.\textsuperscript{43}

Moreover, the parens patriae\textsuperscript{44} characterization of revocation proceedings has been criticized in recent years,\textsuperscript{45} particularly in light of the Court's decision in \textit{In re Gault}.\textsuperscript{46} In extending due process rights to juveniles the \textit{Gault} Court rejected the contention that, because of the parens patriae relationship between the state and the child, only informal safeguards were necessary to satisfy due process at juvenile court proceedings. Conceding that rehabilitation was the major goal of the juvenile court system, the Court nevertheless found the gap between professed purpose and actual achievement sufficiently wide to

\textit{costs going to probation and only 3.5 going to adult parole.}" Id., citing \textit{Corrections} 115-212.


\textsuperscript{43} As Cohen puts it:
The point of all this is not to discredit probation and parole but to demonstrate the fallacy—engendered by the benevolent purpose doctrine [rehabilitative attitude]—of drawing conclusions about the need for legal safeguards in corrections from a conceptually inaccurate description of the goals of corrections and from a factually inaccurate description of their accomplishments.

\textit{Cohen} 31.

\textsuperscript{44} The term is used to refer to the state's sovereign power of guardianship over persons under a disability. \textit{Black's Law Dictionary} 1269 (4th rev. ed. 1968). The classic example is that of state and child. The concept was applied to the parole revocation situation by Chief Justice (then Judge) Burger in \textit{Hyser v. Reed}, 318 F.2d 225, 237 (D.C. Cir.), \textit{cert. denied}, 375 U.S. 957 (1969):

\textquote{T}here is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child . . . .

\textsuperscript{45} \textit{Van Dyke, supra} note 17, at 1246.

\textsuperscript{46} 387 U.S. 1 (1967). For arguments applying \textit{Gault} to all parens patriae relationships, see \textit{Van Dyke, supra} note 17, at 1246-48; note 48 \textit{infra}; to corrections generally, see \textit{Cohen} 3-4.
require imposition of constitutional safeguards on those proceedings.\textsuperscript{47} Assuming the existence of a similar gap between purpose and goals of probation and parole, a strong case can be made for extending constitutional safeguards to revocation proceedings as well.\textsuperscript{48}

The Court did concede that, even in a rehabilitative atmosphere, "under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer."\textsuperscript{49} Thus, unwarranted reincarceration might sometimes result, the antithesis of the rehabilitative goals of the probation and parole systems. The Court justified this potentiality, however, by stating that "we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime."\textsuperscript{50} In a footnote, the Court rationalized with the same statement the differing treatment of juveniles and "differently situated" probationers or parolees.\textsuperscript{51}

The Court's belief that counsel generally could provide no constructive contribution to either revocation hearing was central to its rejection of a per se rule—requiring appointment of counsel in every instance—in favor of a case-by-case approach. In determining whether a violation of conditions had occurred, the Court argued, counsel usually would be non-contributive because in most cases the "probationer or parolee has been convicted of committing another crime or has admitted the charges against him."\textsuperscript{52} Likewise, counsel is usually unnecessary at the final hearing, where appropriateness of revocation

\textsuperscript{47} 387 U.S. at 17-20. "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." \textit{Id}. at 18.

\textsuperscript{48} One author has framed the argument thus: \textit{Gault} must extend to all \textit{parens patriae} relationships where there is a possibility of incarceration, because the essence of \textit{Gault} is that even in the most classic of the \textit{parens patriae} relationships—that of state and child—certain procedural safeguards heretofore associated with strictly adversary proceedings are constitutionally required. Without question the state-parolee relationship is inherently more adversary than is that of state-child. Therefore, if the right to counsel is to be extended to the latter it is a fortiori required to be extended to the former. \textit{Van Dyke}, supra note 17, at 1247. It must be noted, however, that the Court in \textit{Gagnon} distinguished the juvenile's situation from that of the parolee or probationer. \textit{See} note 51 and accompanying text infra.

\textsuperscript{49} 411 U.S. at 789.

\textsuperscript{50} \textit{Id}.

\textsuperscript{51} \textit{Id}. at 789 n.12, stating: "A juvenile charged with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection."

\textsuperscript{52} \textit{Id}. at 787.
is determined, since any mitigating evidence justifying a violation of conditions "is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel." In addition, the Court suggested that the presence of counsel would produce detrimental alterations in the nature of the hearing process, and would increase substantially the costs to the state. The Court feared the adversary atmosphere that surely would arise from the presence of counsel would result in the hearing body's becoming "more akin to . . . a judge at trial, and less attuned to the rehabilitative needs of the individual probationer or parolee." Indeed, the Court believed that this adversariness might result in a higher rate of reincarceration because of the hearing body's "greater self-consciousness of its quasi-judicial role."

But the Court's view of the detrimental effects of counsel is not shared by all who have considered the issue. Congress has required the presence of counsel at all federal probation revocation hearings. By statute ten jurisdictions authorize the retention of counsel by probationers or parolees and, in a national survey, over half the jurisdictions responding indicated that retained counsel would be permitted at the hearing. The American Bar Association has recommended that a probationer be accorded a revocation hearing with "representation by retained or appointed counsel." If counsel can in fact be contribu-

53. Id.
54. "[T]he financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." Id. at 788.
55. Id. at 192-93. Thirty-six (69%) jurisdictions responded regarding parole while 55 (90%) jurisdictions responded regarding probation. Id. at 191 n.132. Almost all jurisdictions reporting on probation indicated that retained counsel would be permitted but only slightly over half indicated that counsel would be assigned for indigents. Id. at 193. No jurisdictions indicated that counsel would be assigned to an indigent parolee. Id. at 192.
56. ABA Project on Standards for Criminal Justice, Standards Relating to Probation § 5.4(a)(ii) (Approved Draft 1970). The ABA argues that a case-by-case approach is insufficient since
tive, as Congress, many states and the ABA apparently believe, rejection of a per se appointment rule should not be based solely on the rationale of administrative efficiency. Increased adversariness, longer hearings and higher costs, while likely to occur, may not be significant and do not themselves justify denial of due process rights. Implicit in the approval of a right to counsel at revocation hearings is the recognition that the benefits of counsel's presence would outweigh the burdens imposed on the hearing process. Thus, if the Court erred in its initial evaluation of the need for counsel, its additional objections to the presence of counsel do not seem sufficient to justify rejection of a per se appointment rule.

While a probationer or parolee must always be afforded a revocation hearing, the appointment of counsel at the hearing remains a matter of discretion. But the Court's characterization of the nature of the hearing process appears to be more theoretical than real. Much of the benefit gained by a probationer or parolee through a revocation hearing therefore may be lost, because the assistance of counsel, probably helpful and sometimes necessary, will not always be available.

[There is always—at least on the judgmental question involved in every case, if not on whether the violation in fact occurred—the potentiality of prejudice which cannot be weighed or assessed in retrospect.]

Id. at 68. The ABA adopts the view that exactly the same considerations involved in the criminal trial and sentencing stage of the original prosecution are involved in the two-stage revocation proceeding, and that, therefore, counsel is not only contributive but necessary at this latter stage. Id. at 68-69. For further discussion of this view, see Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 MINN. L. REV. 803 (1961).

61. See Van Dyke, supra note 17, at 1252.

62. The adversariness may already be present. See COHEN 30-31. In California in 1968, the increase in cost for appointed counsel for the 4,404 parolees who had their parole suspended or revoked at revocation hearings would have been quite insignificant when compared to the cost of appointing counsel for the estimated 500,000 indigents who required appointed counsel at trial. Van Dyke, supra note 17, at 1252-53.

63. In Florida, the probationer's or parolee's right to a revocation hearing is assured both statutorily and judicially. Moreover, a probationer or parolee is statutorily entitled to retained counsel at that hearing. See FLA. STAT. § 947.23(1) (1971) (parole); FLA. STAT. § 948.06(1) (1971) (probation); Keller v. Epperson, 265 So. 2d 497 (Fla. 1972); Jackson v. Mayo, 73 So. 2d 881 (Fla. 1954) (parole, relying in part on the above statute). Due in large part to Mempa v. Rhay, however, the Florida courts have yet to answer adequately the question of whether an indigent has a right to appointed counsel at a parole or probation revocation hearing. The Florida Supreme Court has never been faced with the issue.

Florida courts as late as 1964 stated that there was no constitutional mandate requiring appointment of counsel for indigent probationers, since the revocation hearing was not considered a "crucial step" in criminal proceedings. See, e.g., Phillips v. State, 165 So. 2d 246 (Fla. 2d Dist. Ct. App. 1964); Thomas v. State, 163 So. 2d 328 (Fla. 3d Dist. Ct. App. 1964). When sentencing occurred simultaneously with the revocation