POST-CONVICTION CRIMINAL RIGHTS: PAROLE AND PROBATION REVOCATION AND BAIL

Criminal rights in post-conviction proceedings have long been in a state of flux. Since parole and probation are not part of the actual criminal prosecution, the law has been slow in recognizing constitutional rights applicable to criminal citizens. Somewhere in the criminal prosecution, the convicted felon loses part of this protection.

Parole and probation both allow the convicted felon to live in society, under supervision, before his sentence is completed. As a convicted criminal, his rights are subject to the courts and agencies to whom the state has given its custodial power. Neither the courts nor the legislators have agreed on how much constitutional protection the releasee shall be afforded, but he is subject to a large amount of external control by his probation officer and the terms of his parole or probation.¹

A difficult problem arises when there is an alleged violation of his parole or probation. The violation may be either a new crime or failure to follow a condition of release. The parolee or probationer is then arrested and must wait in jail pending a revocation hearing to decide whether he shall remain free or be sent to prison. Under various systems, this jail time might be a few days, or a few months,² depending on the parole board or judge and how soon his case can be considered.

This comment will discuss a brief period in the revocation hearing procedure, the time between the revocation arrest and the full hearing and decision by the revocation board or judge. Historically, the probationer or parolee awaits the hearing in jail. The comment will investigate the government's motivations for summary incarceration and the constitutional problem of administrative arrest and detention without judicial review. The due


² One writer has suggested the point of reasonableness to be three months. 56 GEO. L.J. 705, 717 (1968); see, e.g., United States *ex rel.* Buono v. Kenton, 287 F.2d 534, 536 (2d Cir. 1961), cert. denied, 368 U.S. 846 (1961) (113 days); United States *ex rel.* Hitchcock v. Kenton, 256 F. Supp. 296, 300 (D. Conn. 1966) (141 days); United States *ex rel.* Vance Kenton, 252 F. Supp. 344, 346 (D. Conn. 1966) (123 days).
process standards which are mandated prior to the revocation hearing will be explored both from the interest of the state and the interest of the convicted felon.

This comment will also examine the reasons why continued confinement is or is not necessary after the revocation arrest. The federal system and various state solutions will be analyzed. A model legislative standard will be proposed.

THE PROBATION AND PAROLE PROCESSES

After the guilty verdict, the judge places the convicted felon upon probation or sentences him to prison. Probation is in lieu of a sentence in the penitentiary; the felon remains free as long as the conditions of probation are followed. These conditions, which may be general or quite specific, are imposed by the judge according to the individual case. Judicial discretion considers the defendant's background, his particular crime, and the pre-sentence report.

If a condition is broken or a new crime committed, the release is subject to revocation. An arrest warrant is issued when there is reason to believe a violation has occurred. The revocation hearing will determine whether the probationer merits further release. If the judge decides to revoke probation, the felon is placed in prison.

A similar revocation procedure is followed in parole. Parole is granted after the defendant has served a part of his sentence in the penitentiary. The state may require a minimum portion of the sentence to have run before parole can be granted. The board of parole, an agency of the executive branch, will consider the individual's case on the record and his performance in prison. If the prisoner is granted parole, he will be released subject to certain conditions. Though free, the law has typically considered the parolee to be under the custody of the warden. If parole conditions are broken or a new crime is committed, the parole is subject to revocation. If the parole board believes a cause for revocation exists, an arrest warrant is issued, the parolee is incarcerated, and awaits his revocation hearing. Upon revocation, the parolee is returned to prison to complete his sentence. As Professor Van Dyke has pointed out, probation differs from parole only as to the time it is applied in the correctional process and by whom it is administered. Though this grant of conditional free-

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4. Van Dyke, Parole Revocation Hearings in California: The Right
dom is made by different decision makers, the effect is the same. A person is provisionally free who would otherwise be in jail.

The United States Supreme Court in *Gagnon v. Scarpelli*\(^5\) has noted that parole and probation, and their respective revocations, are constitutionally indistinguishable.\(^6\) Only minor differences of time and application exist.

State statutes and lower courts, however, continue to treat parole and probation differently. These differences will be examined in the materials that follow.

In *Hyser v. Reed*,\(^7\) Chief Justice Burger (then judge), when comparing parole and probation revocation stated that:

> [W]hile there are distinguishing factors between probation and parole, the underlying purposes are closely allied. . . . Congress, which is the source of both of these penological devices has given no indication that the revocation of parole should be more difficult or procedurally different than revocation of probation.\(^8\)

Rehabilitation and integration into society are the same goals for parole and probation. When parole or probation is revoked, the loss of conditional freedom is the same. Both require a determination of culpability for revocation. The distinction between parole and probation is one of categorization and actual time spent in prison; it is not a distinction of purpose, philosophy, or constitutional standard.

**SUPREME COURT GUIDELINE: MORRISSEY V. BREWER**

In *Morrissey v. Brewer*\(^9\) defendant challenged the state procedure which was used to revoke his parole. The United States Supreme Court established in this case due process standards for state and federal parole revocations.\(^10\)

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\(^5\) Id. at 782 n.3.
\(^6\) Id. at 236.
\(^7\) 408 U.S. 471 (1972) [hereinafter cited as *Morrissey*].
\(^8\) 411 U.S. 778 (1973) [hereinafter cited as *Gagnon*].
\(^10\) There are signs that the court is willing to extend at least some of the criminal prosecution rights to the post conviction proceedings. In *Mempa v. Rhay*, 389 U.S. 128 (1967), the court held that sentencing after probation revocation was a critical stage in the criminal process which required the assistance of appointed counsel, which had typically been only part of the actual criminal prosecution. Vital legal rights could be lost in sentencing which justified this requirement. However, many lower courts have treated *Mempa* as only a sentencing case. *E.g.*, *Knight v. State*, 7 Md. App. 313, 255 A.2d 441 (1969). In *Mempa*, the initial determination of a
Morrissey requires a two-step procedure. The first is an informal inquiry into the probable cause of the parole violation, an inquiry conducted by an impartial officer after the parolee has been given proper notice of the hearing. The parolee must have an opportunity to confront the adverse witnesses and present relevant information. If probable cause is found, a written statement must be issued.\(^{1}\)

The next step is a revocation hearing within a reasonable time after arrest. At the revocation hearing the parolee must be given written notice, evidence against him must be disclosed with a right to confront it, and there must be an opportunity for the parolee to be heard. Again, the decision of the board must be in writing if the parole is revoked.\(^{12}\) However, whether the detained person might be admitted to bail or released during this temporary incarceration has avoided Supreme Court review.\(^{13}\)

Sentence was made at the termination of probation. Other courts have decided that the sixth amendment right to counsel is dependent on the critical nature of probation revocation. The test in these courts is a balancing of the interest of the individual which the state seeks to invade. There is no distinction as to the stage of the criminal proceeding. \textit{E.g.}, Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Perry v. Williard, 247 Ore. 145, 427 P.2d 1020 (1967).

A similar split exists on the right to counsel at parole revocation, a proceeding further removed from criminal prosecution. In Riggins v. Rhay, 75 Wash. 260, 450 P.2d 806 (1969), the court held that a parolee is not entitled to counsel at a parole revocation hearing. Other courts disclaim the attachment of labels, i.e., parole or probation, in describing the proceeding and state that the nature of the proceeding is controlled by the significance of the right, here, individual liberty. Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969); Warren v. Michigan Parole Bd., 23 Mich. App. 754, 179 N.W.2d 664 (1970). \textit{See also}, \textit{In re Gault}, 387 U.S. 1 (1967), where the court held that a juvenile is entitled to counsel in a juvenile court proceeding. The nature of the sanction that could be imposed was emphasized in the court's rationale. The interest of the individual is highest with respect to his own freedom.

\(^{11}\) \textit{Morrissey} at 485-87.

\(^{12}\) \textit{Id.} at 487-89.

\(^{13}\) The lower courts are also hesitant to reach the issue. In Marchand v. Director, United States Probation Office, 421 F.2d 331 (1st Cir., 1970), the court held that a habeas corpus challenge to the denial of bail prior to a parole revocation hearing was foreclosed by the mootness doctrine. The petitioner, having served his sentence, had been unconditionally released from custody while his appeal on the habeas petition was pending. The court therefore held that the problem was not within the recurring controversy doctrine, notwithstanding the fact that the appellant had diligently acted in seeking judicial review of his denial for bail. This result is questionable, in light of \textit{Roe v. Wade}, 410 U.S. 113 (1973), where the court ruled on a similar mootness challenge. The Supreme Court in \textit{Sibron v. New York}, 392 U.S. 40, 50-58 (1969), recognized the importance of providing open avenues for judicial review when constitutional rights are violated at levels of low visibility in the criminal process. \textit{See also} \textit{Fiswick v. United States}, 329 U.S. 211 (1946). Further, although the merits were not reached in \textit{Mar-
UNRESOLVED ISSUES

Lower courts have not yet satisfactorily answered to what extent this discretionary and conditional liberty will limit constitutional standards and review of revocation of the releasee’s freedom. The revocation arrest with its subsequent incarceration until the revocation hearing brings into conflict the interests of the state and the individual. What has not been decided is if the grant of conditional liberty, in itself, is sufficient to vest in the releasee a right to insure that any arrest and incarceration prior to the revocation hearing is not more of a hardship to the individual than the state interest warrants.

THE FEDERAL COURTS

The applicable federal statutes are silent on whether bail can be granted prior to the revocation hearing. The federal courts have split on this issue, with a strong majority denying any release. The leading federal case for the majority view is In re Whitney where the court stated:

Probation revocation is an entirely different stage of the criminal-correctional process. The probationer has been convicted of a crime, subjected to the sanctions prescribed by law, and has been granted conditional release in order to serve the interests of society. The interests which the government may protect at this stage of the process are properly much broader than before trial. Since a conviction has been obtained, for example, it is hardly unreasonable to use incarceration pending the revocation hearing to protect society against the possible commission of additional crimes by the probationer. There is no presumption of innocence in the probation revocation process, at least not in the sense in which the phrase is used with reference to the criminal process. Hence, when

16. 421 F.2d 337 (1st Cir. 1970).
a probationer is incarcerated pending a hearing, the balance of interests is not the same as that involved in confining the accused who has not been found guilty. This is a fundamental distinction from the pre-trial stage which in our view, renders the Eighth Amendment inapplicable.\textsuperscript{17}

The majority of the federal courts have concluded that the interest of the government when a revocation arrest is made precludes a challenge either under a constitutional due process claim or under a consideration of personal hardship.\textsuperscript{18} It appears that once the proper person\textsuperscript{19} has found cause to believe a violation has occurred, the interest of the government will cut off any interest in freedom of the releasee until the revocation hearing. The courts have not elaborated on what interest of the state they are protecting when release is denied after a revocation arrest. If that interest is a possible danger to society, as \textit{In re Whitney} implied,\textsuperscript{20} then that argument is non sequitur when the releasee is not dangerous.

The federal courts have also denied the releasee’s bail application under a theory that once convicted, the constitutional rights due a defendant in a post-conviction proceeding change.\textsuperscript{21} Apparently, there is a change in the balance of interest between the state and the individual, a change so great that an unimpeachable presumption of valid government action occurs between the revocation arrest and the revocation hearing.

\textit{United States v. Schrieber}\textsuperscript{22} is the minority solution to the problems when the revocation arrest interferes with individual interests which should be protected.

\begin{itemize}
\item \textsuperscript{17} Id. at 338.
\item \textsuperscript{18} See note 15 supra.
\item \textsuperscript{19} Morrissey at 486:

This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers.

That fact that an administrative officer alone has the power to incarcerate an individual reinforces the proposition that some sort of judicial review and relief should be available.

\item \textsuperscript{20} \textit{In re Whitney}, 421 F.2d 337, 338 (1st Cir. 1970), spoke of the possible commission of additional crimes by the probationer. \textit{See also In re Law}, 10 Cal. 3d 21, 513 P.2d 621, 109 Cal. Rptr. 573 (1973).

\item \textsuperscript{21} See note 15 supra. The majority of courts hold that while there is no absolute right to bail pending trial, there is no absolute right to bail after conviction, the grant of bail on appeal is discretionary. Similarly, there is no absolute right to bail pending trial, though there is usually judicial discretion in granting or denying it. \textit{United States ex rel. Fink v. Heyd}, 287 F. Supp. 716 (E.D. La. 1968), aff’d, 406 F.2d 7 (5th Cir. 1969), cert. denied, 396 U.S. 895 (1969).

\item \textsuperscript{22} 367 F. Supp. 791 (E.D.N.Y. 1973) [hereinafter cited as \textit{Schrieber}].
Schrieber was released on parole from the Federal Correctional Facility at Danbury, Connecticut. Approximately five months later he was indicted for possession of stolen property and the felonious possession of a weapon in New York state court. In November of 1973, in satisfaction of all outstanding state criminal charges, Schrieber pleaded guilty to criminal possession of stolen property in the third degree. New York admitted Schrieber to bail until his sentence day.

Prior to the state sentence day, the United States Parole Board issued a warrant for Schrieber's arrest as a parole violator. The parole violation was commission of the crimes to which he had pleaded guilty in the New York state court. After his parole violation arrest, Schrieber made application for bail, this time in federal district court. Schrieber did not contest his state conviction, but stressed that parole revocation is dependent on many considerations and is not always automatic.

The federal district court held that admission to reasonable bail pending the decision of the parole revocation hearing was neither expressly authorized nor forbidden by 18 U.S.C. §§ 4205-07\(^{23}\) and 18 U.S.C. §§ 3141-52.\(^{24}\) The court noted that Schrieber's family circumstances were "peculiarly difficult" and concluded that he was a proper candidate for bail. All parties were in agreement that flight was not anticipated.

In *Schrieber* the court dismissed the government's claim that bail should be denied since there is no right to bail after the revocation arrest. The court recognized that the Supreme Court had discarded the right-privilege analysis for parole and probation proceedings in *Morrissey*. The government's response that there

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A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced.

A prisoner retaken upon a warrant is issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.

The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

24. These sections of the U.S.C. provide the standards for admission to bail. Cf. 18 U.S.C. § 3148 (1970) which allows release after conviction as long as the petitioner will not pose a danger to the community or flight is not anticipated. Since parole and probation revocation proceedings occur after conviction, it would seem that Section 3148 should be persuasive.
was no absolute right to bail simply did not answer the question of whether bail could be allowed under certain circumstances.\(^{25}\)

Despite the majority view that pre-hearing bail is unavailable, bail and release are available on revocation collateral challenges. Once the peculiar revocation hearing has passed, the courts will allow relief pendente lite.\(^{26}\) When there is an unlawful revocation or when the revocation hearing is delayed too long,\(^{28}\) habeas corpus is available. The cases have not distinguished why release is available after the full revocation hearing when the procedure is challenged but denied when release is sought before the revocation hearing, but the basis for the relief in these cases, like the rationale in Schrieber, is the hardship of the releasee.

In Baker v. Sard,\(^{29}\) the appellant sought release pending his appeal of a parole revocation. Though the appellate court denied the motion without prejudice and remanded it to the proper court, it stated a policy and power inherent in the court:

> When an action pending in United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action includes an inherent power to grant relief pendente lite, to grant bail or release, pending determination of the merits.\(^{30}\)

Thus, post-conviction remedies are available, though the courts will not exercise them except in exceptional situations. In Baker v. Sard the hardship was created by the parole board's delay of four years in arresting the petitioner who lived, apparently without incident, in California. Appellant violated the conditions of his parole by not reporting to his parole counselor. He alleged this failure to be due to his own ignorance and the parole board's not bringing the duty to his attention.\(^{31}\)

The irony of this situation is that the majority of federal courts will consider the defendant's hardship following the revocation hearing but refuse to provide a remedy for this hardship at the time when it actually occurs.\(^{32}\)

\(^{25}\) Schrieber at 792; Morrissey at 482.
\(^{28}\) See note 2 supra.
\(^{29}\) 420 F.2d 1342 (D.C. Cir. 1969).
\(^{30}\) Id. at 1343.
\(^{31}\) Id.
\(^{32}\) See text at notes 54-59 infra, which discuss the releasee's contacts with society and the respective interests of the state and the individual.
There are four general classes of statutes in the state system. These classes are (1) bail available as in a normal arrest (2) bail available for either the parolee or probationer but not for both (3) statutes which provide for an option for notice or arrest, often with a possibility of bail, and (4) states which have no bail or release provisions. Despite these four basic classes, the overwhelming majority of states do not provide statutorily for bail; only ten states have statutes within the first three classes. A statute may be categorized in more than one class because it combines different approaches to the bail problem. Few states fall clearly into one class to the exclusion of the other schemes.

**Pre-Conviction Bail Standard for Probation Revocation**

The first class allows the statutory or common law provisions of bail applicable to one arrested under a parole or probation violation warrant. These states may apply this pre-conviction bail to either probationers, parolees, or both.

The Connecticut General Statutes Section 539-32 states that provisions of law regarding release on bail of persons charged with a crime shall be applicable to any defendant arrested under the provisions of the section.
Implicit in this standard is a legislative decision that the state interest will not justify an arrest and incarceration without an opportunity for bail. Even though the freedom is conditional and granted with discretion, the state interest is not so great as to destroy the balance between the state and the individual by presuming a revocation arrest is without challenge.

Although these statutes prescribe a pre-conviction standard, such a standard is impossible when revocation is based on alleged violation of conditions of release. These conditions almost always forbid non-criminal activity. Thus, a violation of such conditions never appears in pre-conviction bail consideration.

**Bail Not Available for Both Parolee and Probationer**

The second group of statutes grant bail to either the parolee or the probationer but not to both.\(^8\) These statutes are the most arbitrary and inconsistent. As noted, the due process standards of parole and probation revocation are the same.\(^9\) There is no important reason for bail in one situation and not the other. The legislative distinction stems from the notion that the parolee, either by statute or common law, remains under the custody of the warden or his board of parole even though conditionally free. The probationer is often under some sort of judicial administration, though this function may also be delegated to an administrative agency.\(^40\)

For example, Illinois Revised Statutes, Chapter 38, Section 1005-6-4(b)\(^41\) allows that a probationer, when accused of a viola-
tion, may be admitted to bail. When the accused party is a parolee, the applicable statute\textsuperscript{42} is silent.

The Illinois procedures were strongly challenged in \textit{United States ex rel. Dereczynski v. Longo}.\textsuperscript{43} The U.S. District Court construed the two statutes as providing for bail in both situations using an equal protection argument.\textsuperscript{44} The court said:

Therefore, although neither the probationer nor the parolee has an Eighth Amendment right to bail pending the revocation hearings, we find that if one group may be so privileged, then so must the other, and that the pertinent Illinois Statutes so read.\textsuperscript{45}

This holding is consistent with the Supreme Court's ruling in \textit{Gagnon}, for there is no reason to treat parole and probation differently.\textsuperscript{46}

\textbf{The Notice Statutes}

The third group of statutes creates an option for summons or a notice to appear with an arrest provision, often with a possibility for bail.\textsuperscript{47} The violation of a condition or a minor infraction of the law can be treated by a summons or notice to appear. Where the violation is more serious, the releasee is arrested. He may then either demonstrate his need for bail or his unlikelihood for flight, or he may deny the charge.

The Delaware statute provides a flexible pattern:

(a) The court may issue a warrant for the arrest of a probationer for violation of any of the conditions of probation or suspension of sentence, or a notice to appear to answer to a charge of violation. Such notice shall be personally served upon the probationer.
(b) ... Provisions regarding release on bail of persons

\begin{itemize}
\item \textsuperscript{42} ILL. ANN. STAT. ch. 38, § 1103-3-9 (Smith-Hurd 1973).
\item \textsuperscript{43} 368 F. Supp. 682 (N.D. Ill. 1973).
\item \textsuperscript{44} Id. at 688-89.
\item \textsuperscript{45} Id. at 689.
\item \textsuperscript{46} 411 U.S. 778 (1973).
\item \textsuperscript{47} CONN. GEN. STAT. ANN. § 53a-32(g) (1972); DEL. CODE ANN. tit. 11, § 4335(b) (Supp. 1970); ILL. ANN. STAT. ch. 38, § 1005-6-4 (Smith-Hurd 1973); NEB. REV. STAT. § 29-2266 (Cum. Supp. 1974). The Nebraska statute creates an alternative procedure in the event that there is no danger to the community nor is flight anticipated. More serious violations cause arrest, with power in the county attorney to detain the probationer. Nebraska Revised Statutes Sections 83-1,119-1,120 (Cum. Supp. 1974) provide a similar informal provision for the parolee; more serious charges are treated with an arrest with the possibility of release pending the final decision of his revocation. The revocation hearing must be within 30 days. N.Y. CODE CRIM. PROC. § 410.40 (Supp. 1971); VT. STAT. ANN. tit. 28, § 301(1) (Supp. 1974).}
\end{itemize}
charged with crime shall be applicable to the probationers arrested under these provisions.\textsuperscript{48}

This type of statute allows the administrative action to be tempered with the force required by the violation. The personal situation can be considered with the method matching the gravity of the violation.

\textbf{No Bail or Release States}

The majority of state jurisdictions do not statutorily provide for bail release prior to the revocation hearing. Absent statutory law, the states, like the majority of federal courts, will not assume a post-conviction bail procedure prior to the revocation hearing. The California Supreme Court's treatment of this problem is illustrative:

Thus, to allow bail on the new offense to be grounds for release of a parolee would constitute an infringement upon a proper exercise of the statutorily declared exclusive jurisdiction of the [Adult] Authority in the parole area. The Authority has a continuing interest in maintaining controls over a parolee, including his return to prison, because of the "real risk that he may not be able to live without committing additional antisocial acts" and may not "adjust to the demands of society."\textsuperscript{49}

The states which deny bail appear to follow the same theory as the federal courts, that is, the interest of society must be protected. The courts which have decided the question have also recognized apparent legislative intent.\textsuperscript{50} The legislature has implemented acts of great scope defining the works of a parole and probation administrative agency. Legislative silence regarding bail signals the court to exercise judicial restraint in these post-conviction proceedings.

\textbf{NO RIGHT TO BAIL?}

The incorrect analysis of the state and federal courts which

\textsuperscript{48} Del. Code Ann. tit. 11, § 4335 (Supp. 1970). However, the Delaware statute is not applicable to a parole revocation proceeding. See text at notes 5-9 supra for discussion of the differences between parole and probation.

\textsuperscript{49} \textit{In re Law}, 10 Cal. 3d, 21, 26, 513 P.2d 621, 624, 109 Cal. Rptr. 573, 576 (1973).

\textsuperscript{50} This is recognized, implicitly, at least, when the court notes the legislative activity and regulation. For example, the California Supreme Court recognized this apparent legislative intent when it stated that granting bail to parolee is an "infringement upon a proper exercise of statutorily declared exclusive jurisdiction." \textit{In re Law}, 10 Cal. 3d 21, 26, 513 P.2d 621, 624, 109 Cal. Rptr. 573, 576 (1973). Cohen, \textit{Due Process, Equal Protection, and State Parole Revocation Proceedings}, 42 U. Colo. L. Rev. (1970).
deny bail rests in their insistence that there is no eighth amend-
ment "right" to bail. Saying there is no right does not answer
the question of the courts' power. As noted in Schrieber, when a
court concludes that there is no right to bail, it

neither decides that there is no power to admit to bail
nor excludes the conclusion that due process certainly
commends if it does not require consideration of the ques-
tion whether this defendant should not be admitted to
bail if the individual circumstances of the defendant's
case make postponement of recommitment until the Board
of Parole acts the course which a careful weighing of the
values involved dictates.

To deny review of government action by resorting to a right
or a privilege analysis is highly suspect. A more reasonable ap-
proach would be to weigh carefully the conflicting interests of the
state and the releasee in post-conviction proceedings.

THE INTEREST OF THE GOVERNMENT

Once the revocation arrest has occurred, the interest of society
is threefold after the parolee or probationer makes application for
bail or release. Society must protect itself from dangerous mem-
bers, it must maintain the integrity of the legal and correctional
process, and it must rehabilitate those under its custodial powers
in a fair way.

The new crime, if actually committed, indicates a non-rehabi-
litative state of mind. A strong presumption in favor of arrest
and confinement exists to protect society from the criminal who
has apparently broken the laws again. But even if probable cause
for a new crime exists, it does not answer whether confinement
should be absolute until the revocation hearing. If there exists a
meritorious defense or a valid alibi, should not the parolee or pro-
bationer be entitled to have this considered for his release until
the revocation hearing?

Furthermore, revocation often depends on other consider-
ations. Conditional release is commonly revoked on mere suspi-

51. See note 15 supra.
52. Schrieber at 792.
53. The termination of important rights by state action cannot be justi-
fied under a right-privilege thesis. Graham v. Richardson, 403 U.S. 365
(1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Pickering v. Board of
generally, Van Alstyne, The Demise of the Right-Privilege Distinction in
cision of criminal activity. Prosecutors will seek a parole or probation revocation rather than a new criminal conviction, since the standard of proof is significantly lower. When the revocation hearing approaches this quasi-criminal nature some restrictive admissions to bail should be granted. The interests of the government, though large, are not so compelling as to always preclude bail or release prior to the revocation hearing, in violation of the interests of the releasee.

THE INTEREST OF THE RELEASEE

Freedom, no matter how conditional, is the most precious personal right. It is for this reason that the law affords liberty its highest protection from governmental abuse in the area of due process.

The partial dissent of Justice Douglas in Morrissey recognized the importance of freedom, albeit conditional, and the destructive effect of summary incarceration upon the prisoner and his family. Justice Douglas was of the opinion that when renewed imprisonment is involved, safeguards must exist.

The releasee relies upon the government for fair treatment and rehabilitation while conditionally free. Revoking this conditional liberty destroys many family, occupational, and social contacts which the state seeks to develop in the parolee or probationer. Even if the release is not subsequently revoked, the government has effectively destroyed much of the parolee's or probationer's rehabilitation by pre-hearing detainment.

The test is not that a convicted felon's liberty is conditional. The determination of how far due process extends, and how arbitrary state action may be, depends on the circumstances, the precise nature of the governmental function, and what personal interests are invaded.

54. Morrissey at 496 (Douglas, J., dissenting in part).
55. Morrissey at 479; Rose v. Haskins, 399 F.2d 91, 104 (6th Cir. 1968) (Celebreeze, J., dissenting).
THE NATURE OF THE VIOLATION

One possible method for balancing the interests of the state and the releasee is consideration of the nature of the violation. Justice Douglas, in his partial dissent in *Morrissey*, raised this problem of summary detention. Douglas distinguished between a violation of a condition and a new criminal offense. He saw no need for incarceration when there was a mere violation of parole condition; a notice to appear would ordinarily be sufficient when there was a violation of a condition. On the contrary, when a new crime had been committed, a stronger need to protect society's interests exists. Justice Douglas quoted with approval Judge J. Skelly Wright's concurring and dissenting opinion in *Hyser v. Reed*:

> 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.

The distinction is sound. There is no overt threat to society when there is a violation of a condition, the condition being in the nature of a contract between the state and the person. Often the person might be unaware of the violation, especially if he considers his action insignificant. Such a distinction appears to provide a rational starting point for weighing these conflicting interests.

In addition, this system would be more consistent with the aim of bail which is to assure the appearance of the defendant, and not to punish him. Allowing bail eliminates the punitive aspect of summary detention and creates an atmosphere of fair treatment. If the allegations which seek to revoke parole are insufficient, the prison time is patently unjust. The parolee or probationer is imprisoned because of his status as a convicted man, with no consideration of the seriousness of the charges or his situation. For these reasons judicial discretion to grant bail when the violation and the personal condition of the releasee warrant can both balance

60. 318 F.2d 225, 262 (D.C. Cir. 1963) (Wright, J., concurring in part and dissenting in part).
conflicting interests of state and releasee and avoid penalizing a person for status alone.

THE STANDARD

Even where post-conviction bail is allowed, jurisdictions do not agree on the proper standard for determining when such bail should be granted.

Some states apply a pre-conviction standard for post-conviction admission to bail. This standard is questionable in light of the state’s higher interest in a post-conviction proceeding. When there is probable cause to accuse the releasee of a new crime committed while conditionally free, the system has made an apparent error endangering society. Worse yet, future public acceptance of the release program is in jeopardy, especially when the alleged crime is violent.

The accused parolee or probationer must necessarily stand in different shoes than the person newly indicted. Either the statute or case law should recognize the distinction.

A second group of statutes grant bail to either the parolee or probationer, but not both. An equal protection challenge under Gagnon and Dereczynski should force a modification of such procedures.

A third group of statutes provides for a notice to appear when the violation is minor. This standard is limited when a more serious violation is suspected. Certain situations will exist where the releasee must be brought into custody. As pointed out by Justice Douglas, a standard which considers the nature of the violation appears to be the most reasonable solution.

CONCLUSION

Thirty-five to forty-five percent of all parolees are subject to revocation at some time. There is a substantial time lag between the revocation arrest and the eventual determination whether parole or probation should continue. Since no two men are alike in their violations, wise law would provide for different options.

63. See note 35 supra.
64. See note 38 supra.
65. See text at notes 4-7 and 43-46 supra.
66. See note 47 supra.
68. Morrissey at 496. See note 2 supra.
To always deny bail is punitive. If the conditional release is not revoked, the jail time is administrative punishment.

It would appear reasonable, as many states have concluded, to allow judicial discretion to grant bail in order to relieve personal hardship and review administrative fiat.

A court granting bail or release in the absence of statutory authority is in a difficult situation because of wide powers of revocation granted by the legislature to various courts and agencies. This problem underscores the need for model legislation spelling out judicial discretion and appropriate standards.

The ideal statute would give the administrator a wide variety of options equally applicable to both the parolee and probationer. The statute should contain at least three options. A notice to appear at the revocation hearing could be used when there is a minor violation and flight is not anticipated. Arrest and incarceration would be the second option for more serious violations. A bail provision would be available when special circumstances are present. Any bail granted would be under a stricter standard than in the pre-conviction proceedings, and would consider the nature of the violation and the releasee's hardship if incarcerated. At this point, a hypothetical may be helpful to illustrate application of such a statute.

The conditions of John Parolee's release require him, among other things, to support his family, avoid taverns, and implicitly, avoid the appearance of criminal impropriety. After working and supporting his family for one year, John is given a raise and promotion. His co-workers celebrate by taking him to a local bar. After the celebration, John is involved in a traffic accident with property damage and minor injuries to the occupants of the other car. John is ticketed and arrested for drunk driving. John's parole office recognizes a violation of parole conditions and the commission of a new crime and initiates parole revocation proceedings.

John's family has only a small amount saved; within a few weeks his family must apply for welfare. In addition, John's warehouse boss was initially hesitant about hiring an ex-convict, nor can he afford having any men miss work for an indeterminate period of time. John will have to be replaced if his absence continues.

Under the proposed legislative model, it would be within the administrator's discretion to admit John to bail or to continue his incarceration. John's transgression would not always result in
parole revocation, nor is John dangerous to society. The administrator, noting John's success on release and the great hardship he would endure if jailed, would probably grant bail or release him with an order to appear at his revocation hearing.

The solution then is not summary denial of freedom prior to the revocation hearing. There must be balancing of society's interest and that of the convicted felon. This is not to say that all revocation arrests will be bailable. The integrity of a release program may sometimes require that arrest without bail should exist. However, options consistent with the nature of the violation should be available, as well as proper guidelines for the exercise of this discretion.

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