The Impossible Dream: Due Process Guarantees for California Parolees and Probationers

Victoria E. Armstrong

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THE IMPOSSIBLE DREAM?: DUE PROCESS GUARANTEES FOR CALIFORNIA PAROLEES AND PROBATIONERS

Traditionally the judiciary throughout the United States has preferred to maintain a "hands-off" approach in both parole and probation revocation proceedings. In the last decade, however, there has been a discernible trend toward a recognition of due process rights as constitutionally mandated for persons previously adjudged guilty by the courts. "It is obvious that while the basic notion of due process remains the same, the area encompassed by the concept has expanded considerably in the last few years." This expansion in parole and probation revocation has swept up both the federal and the state courts in its wake. In California the landmark case is People v. Vickers, which held that post-conviction rights included the right to counsel and which applied due process guarantees to parolees and probationers alike.

This note will discuss first the distinction between parole and probation. Second, it will examine the position of parolees and probationers in the federal court system, the rationales upon which the courts had previously based their refusal to extend due process rights into the post-conviction area, and the eventual rejection of these theories in favor of a set of federal due process guidelines. Third, the history of parole-probation due process rights in California will be traced, including the recent extensions of these rights in People v.

1. Judge Potter Stewart remarked, "It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every stage of the proceedings against him should have so neglected this most important dimension of fundamental justice [that of sentencing and corrections]." Quoted in Clark, Sentencing and Corrections, 5 U.S.F.L. Rev. 1 (1970). See also Dorado v. Kerr, 454 F.2d 892, 896-97 (9th Cir. 1972) (counsel denied for sentencing or parole revocation or eligibility hearings); F. Cohen, A Comment on Morrissey v. Brewer: Due Process and Parole Revocation, 8 Crim. L. Bull. 616, 619 (1972) [hereinafter cited as 8 CRIM. L. BULL.]; Jacob & Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 U. Kans. L. Rev. 493, 495 (1970); Comment, Right Versus Results: Quo Vadis Due Process for Parolees, 1 Pac. L.J. 321 (1970) [hereinafter cited as 1 PAC. L.J.]; Note, The California Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion, 5 U.C. Davis L. Rev. 360, 368 n.48 (1972).


Fourth, the still unresolved issues of the constitutional right to counsel and the application of due process rights to disciplinary proceedings and eligibility hearings will be discussed; possible arguments in favor of extending the due process guarantees to parolees, probationers, and perhaps prisoners themselves will be suggested and evaluated. Finally, an analysis of the trends in the present case law culminating in Gagnon v. Scarpelli and In re Law will be made in order to determine the direction in which future decisions will move.

Background in the Federal Courts

The Distinction Between Parole and Probation

The distinction between parole and probation is primarily one of procedure, rather than one of substance. Probation, which is granted by the trial judge, is a judicial function; parole, on the other hand, is at the discretion of the Adult Authority and is given only after the service of part of the sentence. This separation of powers, judicial from administrative, has been greatly overemphasized in the past, for the results of the two procedures are substantially the same. Both parole and probation are aimed at rehabilitation of the convict, at economy for the government, and thus at benefit for society. Both depend upon a determination that the convicted person can now safely rejoin the society whose rules he has broken with a good chance of assimilation. Both rely upon conditions of supervision for release.

4. Id.
5. 8 Cal. 3d 463, 503 P.2d 1322, 105 Cal. Rptr. 314 (1972).
9. For a discussion of the California viewpoint on the distinction between parole and probation, see text accompanying notes 102-111 infra.
13. See CALIFORNIA LEGISLATURE ASSEMBLY INTERIM COMMITTEE ON CRIMINAL
and upon possible revocation to assure the success of the programs. Even though the similarity of the two procedures is substantial, only recently has the specious distinction been abandoned, and then primarily in the state courts.14

Theoretical Bases for Denying Post-Conviction Due Process Rights

Until about five years ago the law presented a generally bleak picture to the parolee or probationer seeking to obtain procedural due process rights in revocation hearings. Confusion and differing theories for denying relief,15 as well as reluctance to extend constitutional guarantees, meant that many individuals were forgotten by the courts following conviction. While the protections afforded to the accused in a criminal proceeding were enlarged, the post-conviction area remained virtually untouched by direct judicial decision. This section will examine some of the principal rationales by which the courts justified their refusal to extend due process rights to post-conviction procedures.16

The Right-Privilege Theory

_Escoe v. Zerbst,_17 one of the early United States Supreme Court cases dealing with the limited liberty of the convict, voided a probation revocation because the procedure employed failed to comply with a federal statute requiring a hearing. However, the constitutional right to such a hearing was specifically denied.18 Rather, Justice

Procedural, Parole Revocation Procedures (1969) for sample parole conditions and a brief summary of the procedures used in revoking parole.

14. See text accompanying note 111 infra.
16. Not all commentators agree on the number or designation of these conflicting theories, although most of the writers agree in substance. Fred Cohen limits his theories to three and refers to them as "privilege, contract, and continuing custody." F. Cohen, supra note 15, at 31-34. Van Dyke, on the other hand, lists five reasons for refusing due process protections: the right-privilege distinction, _parens patriae_, constructive custody, the distinction between administrative and judicial tribunals, and waiver. Van Dyke, supra note 10, at 1243-54. A student author notes six such theories, adding "comity" to and substituting "contractual relationship" for "waiver" in those cited by Van Dyke. Note, Conditional Liberty and the Fourteenth Amendment, 33 U. Pitt. L. Rev. 638, 639-46 (1972) [hereinafter cited as 33 U. Pitt. L. Rev.]. William Cohen uses the right-privilege distinction, the constructive custody theory, the civil-criminal distinction, and the contract theory. W. Cohen, supra note 10, at 206-15. Other student writers discuss four theories: _parens patriae_, the right-privilege distinction, the theory of constructive custody, and contract. 1 Pac. L.J., supra note 1, at 330; Comment, Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata?, 10 Santa Clara Law. 319, 330-32 (1970).
18. Id. at 492.
Cardozo stated in dicta: "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." The well-recognized implication, and the thought emphasized by later courts, was that the probationer possessed a privilege, not a right, with regard to his liberty. Almost thirty years before Escoe, parole had been similarly described. The distinction between privilege and right was one of the theories used to defeat proponents of post-conviction due process guarantees; it was reasoned that parole and probation were conditional grants given through the kindness of the state, which could be forfeited at the state's discretion.

Although modern courts have been reluctant to rule that the right-privilege distinction was a mere fiction created by the judiciary of the past, the importance of the theory in due process questions was finally exploded by Hahn v. Burke. While the opinion noted that probation was a privilege, the court went on to say that "essential procedural due process no longer turns on the distinction between a privilege and a right." Both Goldberg v. Kelly and Cafeteria & Restaurant Workers Union v. McElroy also held that the constitutional challenge alleging a denial of due process protections could not be answered by repetition of the worn right-privilege distinction. As Professor Fred Cohen correctly observed,

A fundamental problem with this theory is that probation is now the most frequent penal disposition just as release on parole is the most frequent form of release from an institution. They bear little resemblance to episodic acts of mercy by a forgiving sovereign.

Thus, the right-privilege theory, based upon the idea of state benevo-

19. Id. at 492-93. Other dictum in Escoe suggested that a probation revocation hearing at which the accused could speak would improve the probation system and avoid unfair dealing. Id. at 493-94. This was not, however, constitutionally required, and, in fact, this part of the opinion was ignored in subsequent judicial rulings. As one commentator observed, "However much the Supreme Court might have felt that the proper administration of a rehabilitative program required due process, it could not extend due process rights in such cases, since only minimal due process was accorded to defendants in pre-conviction proceedings until the 1960's." 1 PAC. L.J., supra note 1, at 332-33 (emphasis added).


23. 430 F.2d 100 (7th Cir. 1970).

24. Id. at 103; see Note, California and Federal Administrative Due Process: Development, Interrelation and Direction, 5 U.C. DAVIS L. REV. 1, 33-35 (1972).


27. F. COHEN, supra note 15, at 32.
lence in granting probation or parole, is no longer accepted as a ra-
rationale for denying due process rights in post-conviction proceedings.

The Contract Theory

Emphasis upon the beneficence of the state also appeared in the contract theory of revocation. Since the granting of conditional release to the convict was a state’s prerogative, the state could and did demand that the individual consent to the conditions it imposed. The prisoner’s agreement was formalized by his signing of the document stipulating to those conditions. However, an acceptance was also theorized whenever the prisoner took advantage of the opportunity for freedom, with or without the formal signature. The contract was completed by this “acceptance,” and any breach by the former prisoner would be material enough to allow the state to rescind the contract and revoke the liberty.

The contractual theory died even faster than the right-privilege distinction. The unconscionability of a contract between parties with unequal bargaining power, such as the state and the convict, was recognized; and once the contract was no longer considered valid, it became impossible to justify rescission of the conditional freedom on breach of contract grounds.

The Parens Patriae Theory

Some opponents of post-conviction due process argued, again in the name of benevolence, that the parole board was merely acting as parens patriae to the released man. This theory rested on the assumption that the goals of both the parole board and the parolee or


30. See Van Dyke, supra note 10, at 1244. Although Van Dyke refers to “the waiver theory,” it is similar to the contract theory referred to in this note.

31. See Hahn v. Burke, 430 F.2d 100, 104 (7th Cir. 1970): “Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state.”

probationer were identical—the return of the convicted person to a rehabilitated life within society. Under this view, the revocation proceedings were not considered to be criminal in nature, nor was the state to be regarded as an adversary; these proceedings were merely administrative and were in the best interest of the accused. Thus, it was argued that the procedural safeguards which were slowly being introduced into criminal proceedings had no place in the revocation setting.

The theory of a nonadversarial revocation was closely akin to that used in juvenile hearings, in which the state had also proceeded in parens patriae. When In re Gault rejected this reasoning in the case of a juvenile, the United States Supreme Court removed one of the foundation stones for denial of due process to the parolee and probationer. Even before the discrediting of the theory by Gault, the Supreme Court had stated, "[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." In light of this admonition and the holding in Gault, it seems obvious that parens patriae is no longer a viable excuse for depriving an adult offender of his due process safeguards. Certainly the parens patriae theory, the idea of the helpful parental relationship, is less persuasive in the case of the adult offender than in the case of the juvenile, where it has already been laid to rest.

The Constructive Custody Theory

Just as the parens patriae theory viewed the parolee or probationer basically as a ward of the state, the constructive custody theory was based upon the premise that the released man was not really at

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35. Hyser v. Reed, 318 F.2d 225, 239-40 (D.C. Cir. 1963). The court also held that compulsory process was not constitutionally required.
36. 387 U.S. 1, 16 (1967): "The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."
37. "[T]he essence of Gault is that even in the most classic of the parens patriae relationships—that of state and child—certain procedural safeguards heretofore associated with strictly adversary proceedings are constitutionally required." Van Dyke, supra note 10, at 1247. In the area of juvenile justice, state protectiveness of the individual had been an accepted theory before the case of In re Gault was handed down.
liberty at all. He was merely serving his sentence within invisible prison walls which surrounded him even as he moved through free society.\textsuperscript{40} This theory presupposed that the parolee or probationer was actually under the custodial care of the state and that his imprisonment had merely taken a different form. Through this logic it was possible to argue that revocation involved a mere change in the type of incarceration,\textsuperscript{41} a procedure which would certainly not entitle the prisoner to constitutional guarantees equal to those before his conviction.\textsuperscript{42}

The idea that "custody" undermined due process rights was substantially destroyed in the late 1960's by \textit{Specht v. Patterson}\textsuperscript{43} and other lower federal court decisions.\textsuperscript{44} The goal of these cases was to provide safeguards following conviction for criminal offenses. The \textit{Specht} case\textsuperscript{45} granted the prisoner the right to counsel and to a hearing before imposing an additional sentence for an alleged violation of a different statute than the one under which the defendant had been convicted.\textsuperscript{46} Despite the fact that the convict was already within the \textit{physical} custody of the state, the Court forbade additional incarceration, based upon a different statute than that relied upon at trial, without prior procedural protections. In a First Circuit case,\textsuperscript{47} transfer of an inmate from a training center to a correctional center also was prohibited unless the prisoner had received a hearing with counsel present. Obviously, the notion that procedural due process can be denied on the basis of constructive custody finally was recognized as a fallacy.

Throughout the decades of the twentieth century the federal court system thus had built a series of legal fictions to support the denial of due process rights to parolees and probationers. Since the Supreme Court had not yet begun to grant extensive due process protections within the context of the \textit{criminal trial}, it is not surprising that the judiciary hesitated in providing those same protections to men who had \textit{already} been convicted. But slowly the courts struck down each

\textsuperscript{40} See Anderson v. Corall, 263 U.S. 193, 196 (1923). Although the Court noted that parole was a type of imprisonment, nevertheless, this case held that, once parole was revoked, the prisoner had to serve his entire sentence without credit for the time which he had spent on parole. Therefore, a parolee is actually serving his sentence only if his parole is \textit{not} revoked. \textit{Id.} This type of logic indicates the fallacious nature of the constructive custody theory.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} Hyser v. Reed, 318 F.2d 225, 235 (D.C. Cir. 1963).

\textsuperscript{43} 386 U.S. 605 (1967).

\textsuperscript{44} Van Dyke, \textit{supra} note 10, at 1248-49; see, \textit{e.g.}, Shone v. Maine, 406 F.2d 844 (1st Cir.), \textit{vacated as moot}, 396 U.S. 6 (1969).

\textsuperscript{45} 386 U.S. 605 (1967).

\textsuperscript{46} The Court also held that there was a right to confront witnesses, to cross examine, to give evidence, and to have findings made. \textit{Id.} at 610.

\textsuperscript{47} Shone v. Maine, 406 F.2d 844 (1st Cir. 1969).
of the blocks upon which post-conviction denials of rights had been
built. The 1960's brought a sudden increase in judicial recognition of
the constitutional rights of both the accused and the convict; the evolu-
tion from a very few rights to substantial due process guarantees had
begun.

The Granting of Due Process Rights Since the Late 1960's

Mempa v. Rhay and Expansions in the Civil Law

In Mempa v. Rhay the Supreme Court finally held that pro-
bation revocation, when it was combined with sentencing, was a part
of the criminal proceeding, thus making at least one type of revoca-
tion action subject to due process protections for the probationer. Justice Marshall wrote: "[A] lawyer must be afforded at this pro-
ceeding whether it be labeled a revocation of probation or a deferred
sentencing." But lower court response to the Mempa ruling was
confused and uncertain. Some federal jurisdictions applied the Mempa
holding broadly; they equated probation with parole and ex-
tended procedural safeguards to both types of revocation. Other
circuits chose to limit the decision to its facts and then only apply it when
the probationer was subject to a newly imposed sentence.

At the same time that Mempa was opening the door to due proc-
ess guarantees in the post-conviction area, the Supreme Court was
also beginning to take a more active role in extending procedural due
process to areas of the civil law. Sniadach v. Family Finance Corpo-
ration expanded the rights to which a defendant in a civil suit was
entitled before he could be deprived of his property. In that case, the
Supreme Court applied the Fourteenth Amendment to summary pre-
judgment remedies and held that a Wisconsin pre-judgment wage
garnishment statute denied the prior notice and hearing which the due
process clause required. Sniadach was followed by Goldberg v.

49. Id. at 133-37.
50. Id. at 137.
51. See Van Dyke, supra note 10, at 1228-34, for a listing of cases in each fed-

eral circuit with regard to Mempa.
52. Id. at 1228-31.
53. Id. at 1231.
55. Both Sniadach and Fuentes v. Shevin, 407 U.S. 67 (1972), made a point of

the constitutional issue involved in pre-judgment actions. Fuentes, which considered
replevin statutes from a due process viewpoint, stated that "it is clear that the ... posi-
sessory interests ... were within the protection of the Fourteenth Amendment." Id.
at 84. For a more extensive analysis of Fuentes, see 6 LOYOLA L. REV. (LOS AN-
GELES), supra note 10, at 172-73.
56. For a discussion of the application of due process to civil law, see Tobriner,
Kelly, in which the Court held that the Fourteenth Amendment required the right to a hearing and other procedural safeguards before welfare payments could be terminated. Finally, in Boddie v. Connecticut the restriction of procedural guarantees to particular and limited property interests was abandoned in favor of a more general application of the Fourteenth Amendment. Justice Harlan, writing for the Court, noted that merely because "the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest" when such a procedure does not conflict with "a countervailing state interest of overriding significance." These cases "dispelled any lingering remnants of the theory that procedural due process was only required when some 'vested right' was being impaired." It was an easy and rational step for the Supreme Court to shift the emphasis from the protection of general property interests to the security of liberty, particularly since the right-privilege theory supporting a denial of safeguards to probationers and parolees had now lost much of its importance in both criminal and civil law.

Morrissey v. Brewer

This transitional step took place in the decision of Morrissey v. Brewer, which came in the midst of the confusion caused by
Mempa and extended the rights granted in civil cases to those in criminal post-conviction proceedings. The United States Supreme Court was faced squarely with the constitutional issue of whether the due process clause of the Fourteenth Amendment required that an individual be provided with the opportunity to be heard prior to the revocation of his parole. However, the Court did not limit its inquiry strictly to the question of the right to a hearing, but went on to consider and establish specific minimum procedures which are necessary to fulfill the due process requirements in the corrections field. The framework for a full, if informal, hearing resulted.

Morrissey v. Brewer heralded a new era in the correctional field. Unlike the Mempa decision, which held that probation revocation and deferred sentencing when taken together were part of a criminal action, the Morrissey court concluded that parole revocation was not a part of the criminal proceedings envisaged by the Fourteenth Amendment; therefore, "the full panoply of rights due a defendant in such a proceeding [did] not apply to parole revocations." But Morrissey did consider and finally dismiss the four theories that had served as a basis for the denial of due process. Parole was not to be viewed as a privilege or a right, but as a freedom, "although indeterminate," which included "many of the core values of unqualified liberty" whose termination implied "grievous loss" for the individual. Even conditional liberty was held to be within the Fourteenth Amendment protections. The state's interest in revoking the parole of an offender had to be balanced with the individual's interest in his freedom. The Court concluded that an informal hearing would meet the needs of both interests without hardships on either one.

Due process requirements, as propounded by the majority in Morrissey, were to be fulfilled in two stages. The first stage was seen as a "preliminary" hearing to determine whether probable cause existed to believe that the accused was indeed a parole violator. A second hearing, to consider the actual revocation, was to be held within a reasonable time. Both of these proceedings were to be governed by six basic and "minimum" requirements of due process, to which the

66. See text accompanying notes 48-53 supra.
68. 408 U.S. at 480.
69. Id. at 480-84 (by implication); 86 Harv. L. Rev., supra note 65, at 96 & n.7. See text accompanying notes 15-47 supra.
70. 408 U.S. at 482.
71. Id. at 483-84.
72. Id. at 485.
73. Id. at 487-88.
states might add their own procedural ideas. The six requirements 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 (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.74

The emphasis of the Court was on flexibility and informality; reasonableness was to reign in future correctional actions.75

Due Process in California

Background

In the pre-Morrissey days, California state courts, like federal courts, employed the four theories which were used to justify a denial of due process rights.76 The holding in In re Martinez,77 a parole revocation case, was founded upon three of these arguments78 and proved that, as late as 1969, the California courts maintained the attitude that "[p]arole and rights related thereto are creatures of statute, not of constitutional directive."79 Past application of the four theories by California courts was not a rarity,80 nor was the resulting denial of

74. Id. at 489.
75. See 8 CRIM. L. BULL., supra note 1, at 619. The possible ramifications of this aspect of the Morrissey opinion are discussed critically in an article by California Supreme Court Justice Mathew O. Tobriner and Harold Cohen in volume 25, issue 4, of the Hastings Law Journal.
76. See text accompanying notes 17-47 supra. Although the application of the contract theory, per se, in California, has been questioned, certainly the existence of a contract has been inferred by the courts. Comment, Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata?; 10 SANTA CLARA LAW. 319, 330-31 & n.83 (1970).
78. 79 Cal. Rptr. at 688-92.
79. Id. at 688.
post-conviction due process protections founded upon these theories.\textsuperscript{81} In \textit{People v. Leach}\textsuperscript{82} the court defined probation in terms which clearly indicated a reliance upon the right-privilege distinction. Probation was seen as "an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted."\textsuperscript{83} Even in 1972 a California court found that it was relevant to discuss the right-privilege distinction.\textsuperscript{84} Thus, the California courts steadfastly maintained the viewpoint that there was no\textsuperscript{85} constitutional right to a hearing prior to parole or probation revocation.\textsuperscript{86}

In general, the more recent holdings of the California courts have coincided with their federal counterparts. In \textit{People v. Youngs},\textsuperscript{87} the state court complied with the ruling in \textit{Mempa v. Rhay}\textsuperscript{88} by holding that a probationer upon whom sentence had not been passed was entitled to the right to counsel, the right to present witnesses, and the right to a hearing before final sentence could be passed following the summary revocation of his probation. However, the \textit{Youngs} court extended itself beyond the federal position in one area by indicating that probation granted before sentencing and probation granted after a suspended sentence \textit{appeared} to be nearly identical.\textsuperscript{89} While this concept laid the foundation for the unprecedented holding in \textit{People v. Vickers},\textsuperscript{90} the dictum expressed by the \textit{Youngs} court was not bind-

\textsuperscript{82} 22 Cal. App. 2d 525, 71 P.2d 594 (1937).
\textsuperscript{83} \textit{Id.} at 527, 71 P.2d at 595, \textit{quoting} \textit{People v. Hainline}, 219 Cal. 532, 534, 28 P.2d 16, 17 (1933).
\textsuperscript{84} \textit{In re Thomas}, 27 Cal. App. 3d 31, 36, 103 Cal. Rptr. 567, 570 (1972). Thomas noted that the right-privilege distinction was effectively overruled by the United States Supreme Court in the \textit{Morrissey} case; however examination by the California court did indicate that the \textit{Morrissey} idea was not yet a firmly established one. \textit{Id., citing Morrissey v. Brewer}, 408 U.S. 471, 481 (1972).
\textsuperscript{85} It would also appear that the California courts did not effectively enforce the statutory right to a hearing prior to revocation either. According to California Penal Code section 3063 (West 1970) the Adult Authority must show "cause" in order to revoke or suspend parole, but, until recently, the Authority determined cause with little challenge from the judiciary or the parolee himself, except in cases of an abuse of discretion. \textit{See} 1 PAC. L.J., \textit{supra} note 1, at 328 n.26. Thus, the legislature of California granted a statutory safeguard which was one in name only; no real protection in terms of a \textit{guaranteed} hearing was effected by the statute itself. \textit{In re Levi}, 39 Cal. 2d 41, 44, 244 P.2d 403, 404 (1952).
\textsuperscript{86} E.g., \textit{In re Levi}, 39 Cal. 2d 41, 244 P.2d 403 (1952); \textit{In re Davis}, 37 Cal. 2d 872, 236 P.2d 579 (1951); \textit{see} 29 CAL. JUR. 2d Judges § 365 (1956) for a full discussion of California probation revocation procedure.
\textsuperscript{87} 23 Cal. App. 3d 180, 99 Cal. Rptr. 901 (1972).
\textsuperscript{88} 389 U.S. 128 (1967).
\textsuperscript{89} 23 Cal. App. 3d at 188, 99 Cal. Rptr. at 907.
\textsuperscript{90} 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).
ing in abolishing the distinction between the two; it was only a mere foreshadowing of what was to come. What is more, the majority in *In re Tucker* had previously specifically declined to apply the *Mempa* holding concerning probation to parole revocation proceedings.

California Law Since December 1972

On December 14, 1972, the California Supreme Court handed down three companion decisions which radically altered the previous state of California law, which drew California into line with recent federal decisions, and which broke new ground beyond that of the *Morrissey* holding in the area of post-conviction due process.

*People v. Vickers*

The first and most important of these three cases was *People v. Vickers*. In October of 1970 the defendant was convicted of possession of heroin, was sentenced following his guilty plea, and was granted probation upon condition that the defendant serve one year in the county jail. After he had been on probation for one month and was working on furlough outside the jail, the defendant allegedly violated his probation. On the day of the possible violation, the defendant reported ill, was treated at an emergency hospital, and was discharged. When he did not respond to a call from his probation officer, the officer obtained a bench warrant on the assumption that the defendant had “absconded.”

When the defendant returned to his job, he was taken into custody with a large amount of money in his possession. He claimed that the money came from the collection of rents for his grandfather. At the revocation hearing, counsel for the defendant attempted to explain the circumstances of the defendant’s alleged violation, but the court, without taking testimony from witnesses, revoked the defendant’s probation. On appeal to the California Supreme Court, the judgment was affirmed, on the ground that the *Morrissey* case was not to be applied retroactively.

The affirmation of the lower court decision is deceiving, how-

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91. 5 Cal. 3d 171, 177-78, 486 P.2d 657, 659-60, 95 Cal. Rptr. 761, 763-64 (1971).

92. California Penal Code section 3060 (West 1970), which allowed revocation of parole without notice or hearing, and California Penal Code sections 1203.2 (West Supp. 1973) and 1203.3 (West 1970), which were silent on the question, no longer apply. They have been superseded by the *Vickers* decision. As yet, the legislature has not brought these statutory provisions into line.

93. 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).

94. *Id.*
ever; *Vickers* was much more than a rubber stamp. The court specifically adopted the minimum due process safeguards established by *Morrissey*95 for both parole and probation revocation proceedings96 and then added the right to counsel.97 Chief Justice Wright stated in *Vickers*:

> Although we do not reach the issue whether representation by counsel is *constitutionally compelled* at probation revocation proceedings of the type involved in the instant case, we are of the view . . . that the efficient administration of justice requires that the defendant be assisted by retained or appointed counsel at all revocation proceedings other than at summary proceedings had while the probationer remains at liberty after absconding.98

The court reasoned that violations were often technical in nature and might have been committed without intent by the accused or without his knowledge. The “degree” and “quality” of the violation would undoubtedly affect the outcome of the proceedings, but the court recognized that an offender is usually unequipped to cope with the heavy responsibility of presenting his own case in a clear, concise, and persuasive manner. Trained counsel, the court observed, would aid in achieving “an orderly, just conclusion.”99 This new judicial rule of procedure, which replaced Penal Code section 1203.2,100 was to apply both to formal revocation hearings and to hearings which would fol-

95. In adopting the *Morrissey* decision, the *Vickers* court quoted with approval those parts of the *Morrissey* opinion which laid the four theories previously mentioned to rest. 8 Cal. 3d at 455-58, 503 P.2d at 1317-19, 105 Cal. Rptr. at 309-11.

96. *Morrissey* was concerned with parole only. See text accompanying notes 65-75 supra.

97. See Annot., 44 A.L.R.3d 306 (1972) for a listing of California cases on the right to counsel at probation revocation hearings.

98. 8 Cal. 3d at 461, 503 P.2d at 1321, 105 Cal. Rptr. at 313 (emphasis added). See text accompanying notes 135-163 infra.

99. 8 Cal. 3d at 461, 503 P.2d at 1321, 105 Cal. Rptr. at 313.

100. Section 1203.2 provided for the rearrest of a probationer following alleged violations of the conditions of his release and for the revocation or modification of probation “if the interests of justice so require,” following notice to the probationer and his probation officer. *Cal. Pen. Code* § 1203.2 (West Supp. 1973). The statute, however, did not afford the probationer the right to a preliminary hearing based upon probable cause, to written notice, to disclosure of the evidence against him, to the confrontation of adverse witnesses, to the presentation of supporting evidence and witnesses, and to an appearance in person before the court. In these areas the provisions of section 1203.2 failed “to meet several of the mandatory requirements of due process as set out in *Morrissey* . . .” (People v. Vickers, 8 Cal. 3d at 459, 503 P.2d at 1319, 105 Cal. Rptr. at 511), and, therefore, did not conform to the Fourteenth Amendment. Since California courts have broadened the rights of a probationer to include many of those omitted from the statute, the statute itself is now outdated and has been substantially replaced by this recent case law. See, e.g., People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972); *In re Thomas*; 27 Cal. App. 3d 31, 103 Cal. Rptr. 567 (1972); People v. Youngs, 23 Cal. App. 3d 180, 99 Cal. Rptr. 901 (1972).
low an *ex parte* revocation in the case of an absconding probationer who was later taken into custody.\textsuperscript{101}

Although the specific wording of the court applies the new right to counsel to *probationers* only, it can be argued that such a right also extends to parolees.\textsuperscript{102} The court, in holding that the due process guarantees which *Morrissey* granted to parolees\textsuperscript{103} also applied to probationers, noted that it could not "distinguish such proceedings in principle insofar as the demands of due process are concerned."\textsuperscript{104} The opinion continued:

*Morrissey* is thus equally applicable in the case of a revocation of probation insofar as it assures that revocation can be had only with due process protections. However, the precise nature of the proceedings for such revocation need not be identical if they assure equivalent due process safeguards.\textsuperscript{105}

Thus, it appears that parolees and probationers are entitled to equivalent protection in the eyes of the California Supreme Court. To provide "equivalent" protection without also providing counsel is most difficult; therefore, it would seem that a strong case can be made for the extension of the right to counsel to both groups of offenders.\textsuperscript{106}

The argument that the similarities between parole and probation require an equal right to counsel is even more persuasive in California.

\textsuperscript{101} The *Vickers* decision cleared up the seeming discrepancy between *Morrissey* and *Youngs* with regard to summary revocation. *Morrissey*, on the surface, appeared to prohibit *ex parte* revocations, but this, the *Vickers* court suggested, was due to the Court's assumption that the accused was already in custody. When the offender had made himself unavailable through escape, then the *Youngs* doctrine of allowing revocation without the defendant's presence would more logically apply. 8 Cal. 3d at 460, 503 P.2d at 1320, 105 Cal. Rptr. at 312.

\textsuperscript{102} In fact, the United States Supreme Court accepted this argument in Gagnon v. Scarpelli, 411 U.S. 778 (1973), and equated the right of the parolee to counsel to the similar right of the probationer. Having abolished this distinction, the Court held that the Constitution did mandate such a right in *some* revocation hearings. The decision, however, did not provide counsel to *every* parolee and probationer; instead, each petition for counsel was to be decided on a case-by-case basis. Therefore, in California an argument for the right to counsel for every parolee and probationer must be based upon the ruling of the *Vickers* case in combination with *Gagnon*. From the two cases it can be argued that both the California Supreme Court and the United States Supreme Court should enlarge the constitutional right to counsel. See text accompanying notes 135-163 infra.

\textsuperscript{103} See text accompanying note 74 supra.

\textsuperscript{104} 8 Cal. 3d at 458, 503 P.2d at 1318, 105 Cal. Rptr. at 310.

\textsuperscript{105} *Id.* at 458, 503 P.2d at 1319, 105 Cal. Rptr. at 311.

\textsuperscript{106} It might be contended that although the *Vickers* court guarantees the same due process rights to both parolees and probationers, the right to counsel was not granted as a constitutional one and therefore cannot be extended to both groups. Such an argument has already been settled by Gagnon v. Scarpelli, 411 U.S. 778 (1973), which equated the two groups with regard to the right to representation. See note 102 supra.
than in other state or federal courts. California's indeterminate sentencing law essentially eliminates the distinction between the two revocation procedures by removing all final dispositive powers from the judiciary and by placing control in an administrative body. The indeterminate sentencing process\textsuperscript{107} prohibits the judge from making a final disposition of a case with regard to the exact length of sentence. Rather, the judge remands the convict to confinement for the term prescribed by law; the sentence is set later by the Adult Authority, or more often, is not set until the prisoner is deemed ready for release.\textsuperscript{108} Discretion is removed from the hands of the court and given to an administrative body. Thus a probationer who violates the terms of his conditional freedom finds that the judge makes only the initial determination of the probationer's incarceration. Subsequently, his case is treated in the same manner as that of the parolee revokee; he has the same blot upon his record and is subject to the determinations of the same administrative groups. Just as the purposes, controls, and methods for granting probation and parole are similar,\textsuperscript{109} so are the considerations for revoking the two types of conditional release. As Judge Burger aptly pointed out, "[t]he legal proceeding most comparable to revocation of parole is revocation of probation."\textsuperscript{110}

Therefore, since the administrative procedures used in parole and probation are essentially the same for both sentencing and revocation, it would be most untenable to argue that the probationer should have the right to counsel while the parolee is denied that right. New York was the first to drop this specious distinction by applying similar due process rights to the two situations.\textsuperscript{111} Now, with the Vickers ruling as precedent, California will most probably do the same.

\textsuperscript{107} California Penal Code section 1168 (West 1970) provides in part that "[e]very person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment."

Indeterminate sentencing has been praised for removing the wide judicial disparity in sentencing. Bennett, \textit{Foreword to J. CANNON, F. DEVINE, J. PERAZICH, L. SCHWARTZ & P. TRUEBNER, LAW AND TACTICS IN SENTENCING} iii (1970). On the other hand, it has been criticized for extending month-for-month the length of sentence served by California prisoners, who are not sentenced to a specific term initially. Mitford, \textit{Kind and Usual Punishment in California}, 227 \textit{The Atlantic} 45, 47 (Mar. 1971). A prisoner was quoted as saying, "Don't give us steak and eggs; get rid of the Adult Authority! Don't put in a shiny modern hospital; free us from the tyranny of the indeterminate sentence!" \textit{Id.}

\textsuperscript{108} \textit{Id. at 49.}

\textsuperscript{109} See text accompanying notes 9-14 \textit{supra.}

\textsuperscript{110} Hyser v. Reed, 318 F.2d 225, 236 (D.C. Cir. 1963).

\textsuperscript{111} People \textit{ex rel.} Combs v. LaVallee, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (1968); see 6 \textit{LOYOLA L. REV. (LOS ANGELES)}, \textit{supra} note 10, at 169. See note 146 \textit{infra.}
The second case in the series, and the least important in terms of granting new procedural rights or clarifying old ones, was *People v. Nelson.* The defendant in *Nelson* pleaded guilty to a charge of carrying a concealed weapon, but at sentencing the criminal proceedings were suspended and the defendant was placed on probation. Within a month the defendant was charged with new violations of the Penal Code. The defendant, accompanied by counsel, claimed at the hearing that he had committed no violation, but probation was revoked. On appeal the accused contended that he had not been allowed to present evidence of his innocence at the hearing. The California Supreme Court was thus forced to decide the retroactive application of *Youngs* and *Morrissey,* for the defendant's hearing was prior to either of these decisions. The lower court ruling was affirmed.

With regard to *Morrissey,* the *Nelson* court took notice of the fact that the United States Supreme Court had specifically stipulated that its decision was prospective only. "It was not until *Morrissey* that the Supreme Court purported to hold for the first time that a parolee's conditional liberty was entitled to certain due process protections." Since the United States Supreme Court itself enunciated what it considered to be a new requirement, the California Supreme Court chose not to apply "the usual tests for determining the retroactivity of a novel rule as [the court] would in those instances where that question is not answered in the written court opinion giving birth to the rule." Thus, the *Nelson* court made it clear that the *Morrissey* decision spoke only prospectively.

Determination of the effective date of the *Youngs* case, however, required that the court balance three criteria in order to decide where substantial justice could be found. These factors had been set forth in *In re Tahl:*

117. Id. at 465-67, 503 P.2d 1323-25, 105 Cal. Rptr. at 315-17.
118. Id. at 466, 503 P.2d at 1324, 105 Cal. Rptr. at 316.
Penal Code section 1203.2(e), since the purpose of Youngs was to protect the probationer with a hearing following ex parte revocation; therefore, no retroactive application of Youngs would have assisted the defendant. Concerning the second criteria, the Nelson court noted that there had been substantial and extensive reliance on previous procedures, which weighed heavily against retroactivity. Thirdly, the opinion in Nelson suggested that an onerous burden would have been placed upon the state and upon the administration of justice by such a retroactive use of the Youngs decision. For these reasons it was decided that the scales of justice tipped in the direction of prospective effectiveness only, even though the Mempa case, which had been the basis for the decision in Youngs, had previously been applied retroactively. In fact, the Nelson court recognized the interrelation of Youngs and Morrissey in due process questions but laid the primary emphasis upon the latter. Therefore, the holding in Nelson inexplicably made the Youngs decision effective from the same date as that of Morrissey, although Youngs became final six months earlier.

In the course of the discussion of retroactivity, Chief Justice Wright, referring to Vickers, observed, “Morrissey is to be made applicable to probation as well as parole revocations and . . . proceedings for such revocations must be in compliance with the procedures mandated by Morrissey.” This statement lends credence to the idea that California has now abandoned the unwarranted distinction between parole and probation.

Thus, Nelson proves significant in two ways: it holds that Morrissey and Youngs are not retroactive, and it again suggests, albeit in dicta, that parole and probation revocations are to be given equal status in applying due process protections.

In Re Prewitt

Unlike Nelson and Vickers, the Prewitt case concerned the parole rights of a prisoner who had not yet left the confines of the prison. The defendant was sentenced to serve from six months to five years for possession of a machine gun. In 1970 the Adult Authority set the term at the maximum but transferred the defendant to

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119. 8 Cal. 3d at 467-68, 503 P.2d at 1325-26, 105 Cal. Rptr. at 317-18.
122. Similar conclusions regarding retroactivity were stated in Vickers. 8 Cal. 3d at 462, 503 P.2d at 1321-22, 105 Cal. Rptr. at 313-14.
123. 8 Cal. 3d at 465, 503 P.2d at 1323, 105 Cal. Rptr. at 315.
124. See text accompanying notes 2-6 & 105-110 supra.
a forestry camp in preparation for release on parole in five months. One month before his expected release, the defendant was notified that parole was denied, that the term remained at five years, and that he would be given no further parole consideration; these actions were taken on the basis of investigative reports into the defendant's case.

The court in Prewitt held that "with the exception of the preliminary hearing the requirements of Morrissey are applicable in parole rescission proceedings . . ."\(^{126}\) as well as in parole revocation cases. However, retroactive use of the Morrissey decision, for either revocation or rescission cases, was proscribed. Therefore, the Adult Authority's refusal to release the prisoner was allowed under the pre-Morrissey rule. The question of the Authority's denial of future parole hearings for the prisoner was answered when the Authority recognized its failure to follow the law handed down in In re Minnis;\(^ {127}\) this case required periodic reconsideration of parole and maximum sentencing orders.

Prewitt's major significance, however, was the extension of the protection of due process rights beyond parole revocation proceedings. The court held that there was no substantial difference between the deprivation of conditional liberty presently being enjoyed, and the deprivation of the fulfillment of a promise of that freedom once granted.\(^ {128}\) Although the logic of the ruling made it possible to argue that due process protections which applied to revocation and rescission proceedings might also be extended to eligibility hearings, where the possibility of that promise of freedom existed, Chief Justice Wright made it abundantly clear that the decision was not calling for the application of the Morrissey procedures to sentencing and eligibility hearings. Rather, the issue was left open by the Prewitt case,\(^ {129}\) which merely stated that in the future "the reviewing court must consider the objectives sought to be achieved by the challenged procedure, the possible unfairness to the prisoner, and the availability of alternative procedures which are less burdensome to the prisoner."\(^ {130}\) Thus, while general guidelines for a possible broadening of due process rights were laid down, the Prewitt court refused, for the moment, to mandate a complete extension into eligibility and sentencing proceedings.

In at least one area, however, the Prewitt decision did indicate a willingness to recognize further rights for the prisoner, whether he

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126. Id. at 476, 503 P.2d at 1331, 105 Cal. Rptr. at 323.
127. 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972).
128. 8 Cal. 3d at 474, 503 P.2d at 1330, 105 Cal. Rptr. at 322.
129. Id. at 475, 503 P.2d at 1330, 105 Cal. Rptr. at 322.
faced rescission of parole, possible granting of parole, or the setting of sentence. Morrissey had ensured an individual's right to question those witnesses who favored his possible parole revocation, except in cases in which such confrontation imposed a risk of harm for the informant.\footnote{Prewitt} Prewitt then held that "at a minimum, and subject to limitation only when an informant will be exposed to an undue risk of harm, an inmate [also] should be provided with a copy of any document\footnote{Prewitt} which pertained to his case in order to satisfy due process requirements. More importantly, in terms of predicting the future direction of this area of the law, the court stated, "It is clear that in cases of term-fixing and parole-granting the private interest of an inmate in his liberty outweighs the public interest in preserving confidentiality,"\footnote{Prewitt} indicating that a claim that information was revealed to the prosecution in confidence cannot be made when the duty to disclose was compelled by law.\footnote{Prewitt} Thus, the court in Prewitt was extending some due process rights with regard to notice of the charges and disclosure of statements by informants to those without even the conditional liberty of the parolee or probationer, such as the prison inmate awaiting the granting or denying of parole, or the prisoner anticipating sentencing.

Unanswered Questions

A Constitutional Right To Counsel

While the Morrissey decision and the three California cases\footnote{Prewitt} were landmarks in an area previously overlooked and still rather substantially neglected by the judiciary,\footnote{Prewitt} a number of significant questions remain undecided by the courts' pronouncements. Perhaps the most important and far-reaching of these is whether every parolee or probationer is constitutionally guaranteed a right to counsel at revocation hearings. As Justice Marshall noted in Mempa v. Rhay,\footnote{Mempa v. Rhay} the

\begin{itemize}
  \item \footnote{Prewitt} 408 U.S. at 487, 489.
  \item \footnote{Prewitt} 8 Cal. 3d at 476, 503 P.2d at 1331, 105 Cal. Rptr. at 323 (emphasis added). The Prewitt decision was preceded by In re Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972). Minnis held that California Penal Code section 1203.01 (West Supp. 1973) did not violate due process; therefore, an inmate had the right to receive copies of statements sent by court officials and investigators to the Adult Authority following pronouncement of judgment. Prewitt made it clear that the prisoner had the constitutional right to read and respond not only to official statements, but also to any documents produced by informants.
  \item \footnote{Prewitt} Id.
  \item \footnote{Prewitt} Id.
  \item People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972); People v. Nelson, 8 Cal. 3d 463, 503 P.2d 1322, 105 Cal. Rptr. 314 (1972); In re Prewitt, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972).
  \item \footnote{Mempa v. Rhay} See note 1 supra.
  \item 389 U.S. 128 (1967).
\end{itemize}
lawyer's expertise is of great value "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case . . . ."138

Until recently the general view had been that the right to counsel was not considered a constitutional right.139 Vickers has assured counsel to an alleged offender through judicial rules of court. But it did not decide that the federal or state constitutions mandate such a holding;140 thus, there is nothing in the Vickers case which would prevent the retraction of a judicially given right. Only a finding on constitutional grounds would prevent the possible future loss of this basic right. While a number of legislatures have been willing to grant post-conviction counsel rights,141 the majority of the courts have hesitated to declare that these rights are constitutionally protected.142

138. Id. at 135.
141. In Alabama, the District of Columbia, Florida, Michigan, Montana, Washington, and West Virginia, the parolee may be entitled to representation by counsel. For the probationer such a right has been legislatively mandated only in Florida, Georgia, Minnesota, and Tennessee. Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. CRIM. L.C. & P.S. 175, 181-82 (1964) (citing specific state statutes). Since the constitutional right to counsel has not been applied across the board in revocation hearings (Gagnon v. Scarpelli, 411 U.S. 778 (1973)), statutes, such as these states have, take on added significance for the practitioner in those states.

Federally, 18 U.S.C.A. section 3006A (1973 Supp.) clearly provides for the appointment of counsel in federal revocation proceedings for those parolees or probationers who are financially unable to obtain their own attorneys. The statute provides: "(a) Each United States district court . . . shall place in operation . . . a plan for furnishing representation for any person financially unable to obtain adequate representation . . . who is subject to revocation of parole . . . .

(b) . . . In every criminal case in which the defendant is charged . . . with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. . . .

(c) A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings." Id. § 3006A(a)-(c).

It is obvious that when the due process right to retain counsel is recognized, the equal protection clause can be cited to support the constitutionally-compelled companion right to appointed counsel in the case of financial need. However, such logic does not solve the basic issue of whether a right to counsel, either appointed or retained, is con-
The better reasoned rule views the right to counsel as constitutionally mandated.\textsuperscript{143} Justice Roberts, in Commonwealth v. Tinson,\textsuperscript{144} commented that the logical extension of the Mempa right to representation at a combined sentencing-probation hearing was the granting of the constitutional right to counsel at a full parole revocation hearing.\textsuperscript{145} Cases such as People ex rel. Combs v. LaVallee\textsuperscript{146} have held that the due process clauses of their own state constitutions require the assistance of counsel, accompanied by an advising of each accused man of his rights.\textsuperscript{147}

It has been argued that the silence of the majority in Morrissey in regard to this right to representation indicated approval of this, as well as other, limitations upon the rights of the convict.\textsuperscript{148} But s-

\begin{footnotes}
\textsuperscript{143} See, e.g., People ex rel. Menechino v. Warden, Green Haven State Prison, 27 N.Y.2d 376, 383, 267 N.E.2d 238, 240, 318 N.Y.S.2d 449, 454 (1971); People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 300 N.E.2d 397, 347 N.Y.S.2d 178 (1973). Calloway reconsidered Menechino's broad grant of the right to counsel as constitutionally mandated and retreated slightly and at least temporarily from the apparent trend toward expanded due process rights. However, as in Gagnon v. Scarpelli, 411 U.S. 778 (1973), the New York court did continue to recognize a limited right under both the federal and state constitutions. Additionally, the state constitution was viewed as guaranteeing counsel during final revocation hearings. Thus, although change lessened the broad due process protections which New York had once granted, the rationale for these guarantees remains sufficiently viable to be used in arguments for the recognition of constitutional rights in other states, such as California.

\textsuperscript{144} 433 Pa. 328, 249 A.2d 549 (1969).

\textsuperscript{145} Id. at 332-33, 249 A.2d at 551-52. The Tinson case also noted that there was a greater need for counsel in the case of a full hearing, such as a parole revocation proceeding, than in the case of a sentencing hearing, which might often be a mere formality. Since counsel was granted at the latter, it was obviously required at the former. Id. at 333, 249 A.2d at 552, citing Commonwealth v. Johnson, 428 Pa. 210, 215, 236 A.2d 805, 808 (1968).


\textsuperscript{147} 29 App. Div. 2d at 130, 286 N.Y.S.2d at 602. Again, the equal protection clause would mandate appointed counsel, where retained counsel is allowed or required.

\textsuperscript{148} 86 Harv. L. Rev., supra note 65, at 103 n.41.
\end{footnotes}
lence cannot be claimed to be synonymous with approval or disapproval, for courts usually hesitate to consider all but those specific issues which are brought before them. 149

The opinion by Justice Douglas, dissenting in part in *Morrissey*, concerned itself directly with the question of counsel and advocated a constitutional guarantee of that right. 150 Commentators have noted that Douglas' opinion was worded in the form of a majority opinion, and it is speculated that this was to have been the opinion of the Court. 151 Evidently the remaining justices preferred to take a more conservative approach to post-conviction rights and to delay decisions on such questions as freedom from pre-hearing detention and the right to appointed and retained counsel. However, the indication that the United States Supreme Court had even considered taking a stand in favor of providing counsel boded well for future decisions on the same point.

One such recent opinion was handed down by the Supreme Court in *Gagnon v. Scarpelli*, 152 which concerned a habeas corpus proceeding by an indigent state prisoner whose probation had been revoked without a hearing and without benefit of counsel. After holding that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under . . . *Morrissey* . . .," 153 the Court went on to consider the due process right of indigent probationers and parolees to appointed counsel at these hearings. While refusing to apply "a new inflexible constitutional rule" 154 requiring such counsel in *all* cases, the Court held that the right to counsel was mandated in at least some cases. In the words of Justice Powell:

>[T]he decision as to the need for counsel 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 touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees. 155

The particular circumstances in which appointed counsel might be in order were held to include cases in which the petitioner had

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149. *Vickers* is not silent upon the right to counsel but does fail to reach a decision as to whether or not the right is constitutionally compelled. See text accompanying notes 2-6 & 91-111 *supra*.
150. 408 U.S. 471, 491-500.
151. Young, *supra* note 65.
153. *Id.* at 782.
154. *Id.* at 790.
155. *Id.*
denied the alleged violation or, if such a violation were uncontested or already proven, the case in which complex but substantial reasons in justification or mitigation of the offense existed. Such a petition for counsel was to be viewed in light of the prisoner's ability to defend himself effectively, and in all cases in which the request for counsel was denied, reasons for the denial were to be stated in the court record. \textsuperscript{156} Thus, \textit{Gagnon} implied that a constitutional right to counsel for probationers and parolees existed, at least in some cases. \textsuperscript{157} When the \textit{Gagnon} decision, affirming the \textit{constitutional} right to counsel for some parolees and probationers, is compared to the broad \textit{Vickers} ruling, which found a judicial right for all, it is possible to argue that the California Supreme Court should recognize a constitutionally protected guarantee of counsel for both groups in \textit{all} post-conviction proceedings. \textsuperscript{158}

In the past the extension of the right to counsel in the post-conviction area was strenuously opposed by those who felt that counsel for the parolee or probationer would only delay the proper administration of justice and would be economically unsound. \textsuperscript{159} Joseph Spangler, Administrative Officer of the Adult Authority, espoused this viewpoint and noted:

Caution should be the password for our all-out "due-process" adherents since all too often legalistic, attorney centered technicalities, in general and overall, can be far more damaging to the public interest and the parolee client than a well administered, flexible, and dynamic parole service. \textsuperscript{160}

However, this is a poor argument, since the informal hearing envisioned by \textit{Vickers} and \textit{Morrissey} returns much of the control over the proceedings to the Adult Authority; \textsuperscript{161} attorneys would be expected to conform to the standards and rules established by the administrative body. More importantly, when due process rights are in question, courts have attempted to select those types of guarantees which will afford the greatest benefit to the individual with the least burden to the state; \textsuperscript{162} the process must be one of balancing the benefit and

\textsuperscript{156} \textit{Id.} at 790-91.
\textsuperscript{157} California Supreme Court Justice Mathew O. Tobriner and Harold Cohen discuss the effect of \textit{Gagnon} on the California Adult Authority in an article to be published in volume 25, issue 4, of the Hastings Law Journal.
\textsuperscript{158} See note 102 \textit{supra} & text accompanying notes 102-111 \textit{supra}.
\textsuperscript{161} \textit{In re} Law, 10 Cal. 3d 21, 26, 513 P.2d 621, 624, 109 Cal. Rptr. 573, 576 (1973).
the burden with an eye always on the constitution. When such a basic safeguard as the right to counsel is under consideration, it would seem that the constitutional right must win out, however complicated the problems of administration may be.

**Due Process Rights For Prisoners**

Opening the courthouse door to the parolee or the probationer through the *Morrissey* and *Vickers* decisions cannot, of course, be equated with the access of the incarcerated to this same courthouse. Although the parolee or probationer may have been rearrested for a subsequent offense or violation, he has not been deprived of his *right* to limited liberty until the final revocation; meanwhile, "his condition is very different from that of confinement in a prison" in the eyes of the judiciary. Therefore, the due process rights which have been afforded to parolees and probationers through recent court decisions do not necessarily apply to the incarcerated prison inmate. Just how far constitutional guarantees granted to those on probation and parole will be extended to convicts is yet another unanswered question.

**Disciplinary Proceedings**

While the United States Supreme Court has primarily limited its consideration to parolees and probationers, other courts have investigated the procedures used by prison officials during disciplinary proceedings. In *Clutchette v. Procunier*, a federal court in California held that due process and equal protection considerations applied to such Adult Authority actions which might result in solitary or segregated confinement or possible increase in sentence, simply by referral. Procedural safeguards to be granted included the cross exam-

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165. 86 HARV. L. REV., supra note 65, at 101.
ination of witnesses, an impartial fact finder, and the right to appeal. Those inmates whose alleged disciplinary infractions could be referred to the district attorney for future prosecution were also guaranteed the right to counsel. Still other courts, which have not extended prisoner rights to so great an extent, nevertheless have given the accused the right to notice and to respond, while maintaining a vestige of the former "hands-off" policy.

Thus, solitary confinement or loss of credit for good behavior may arguably be as "grievous" a loss to the prisoner as revocation of parole is to the parolee or revocation of probation is to the probationer, and all are equally worthy of judicial protection through an application of the Fifth and Fourteenth Amendments. An effort to expand the rights of incarcerated inmates might also rely on the Eighth Amendment, which prohibits cruel and unusual punishment and is applied to the states through the Fourteenth Amendment.

Parole Eligibility Hearings

The applicability of due process rights to eligibility hearings is also undecided. "[W]hile there has been a significant increase in the volume and variety of judicial challenges to correctional decision-making, the revocation process has undergone far more challenges than the granting process," which typically has remained beyond the judicial pale. It has been contended that revocation involves the depriva-


169. 328 F. Supp. at 783.

170. See, e.g., Braxton v. Carlson, 483 F.2d 933, 937, 940 (3rd Cir. 1973) (punitive segregation of five days required some due process guarantees); Sostre v. McGinnis, 442 F.2d 178, 196-98 (2d Cir. 1971) (prisoner entitled to due process before punishing for disciplinary infraction); Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970) (refusal to mail prisoner's letter to civil liberties union denied him access to court).


172. Not all observers agree that disciplinary proceedings are equally worthy of due process protection. These commentators do point out, however, that the recent court trend toward application of guarantees in the disciplinary area lends support to the argument favoring such application in the eligibility hearing setting, which is felt to be at least as important, if not more so. Parsons-Lewis, Due Process in Parole-Release Decisions, 60 CALIF. L. REV. 1518, 1540-41 & n.113 (1972). See text accompanying notes 174-79 infra.


tion of conditional liberty upon which the parolee or probationer has come to rely\textsuperscript{175} and that the courts attach greater importance "to a person's justifiable reliance in maintaining his conditional freedom [absent a violation] than to his mere anticipation or hope of freedom."\textsuperscript{176}

In fact, however, the eligibility hearing is more than a mere hope of freedom; it even may be contended that the hearing is a type of deferred sentencing. The decision to deny parole means that the prisoner will continue to serve his sentence until the next parole hearing, while the granting of parole sets a more concrete date, barring violations, for the prisoner's complete freedom. Since sentencing has been deemed to be a part of the criminal proceeding to which due process rights are applied,\textsuperscript{177} it is logical to extend these rights to an analogous procedure, the eligibility hearing.\textsuperscript{178} What is more, the \textit{Prewitt} case suggests that the application of constitutional guarantees to eligibility hearings will not be long in coming.\textsuperscript{179}

\section*{A Summary of the Trends in Post-Conviction Due Process Law}

Any prediction of the judicial receptivity to continued expansion of post-conviction due process rights perhaps can be evaluated best by reviewing the development of judicial thought in the field. This section will trace that evolution from its initial "hands-off" approach, through a period of expansion, to its present state.

\textsuperscript{175} 8 CRIM. L. BULL., supra note 1, at 621-22; see, e.g., Morrissey v. Brewer, 408 U.S. 471, 482 n.8 (1972); United States \textit{ex rel.} Bey \textit{v.} Connecticut Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir. 1971); \textit{In re Cleaver}, 266 Cal. App. 2d 143, 160, 72 Cal. Rptr. 20, 31 (1968) (question of constitutional guarantees to freedom left open).

\textsuperscript{176} United States \textit{ex rel.} Bey \textit{v.} Connecticut Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir. 1971).


\textsuperscript{178} See Van Dyke, supra note 10, at 1235 n.74, in which the author notes that such an argument has been rejected by the courts. However, those cases which so held, as well as Van Dyke's article itself, were written prior to the recent California case law extending the right to counsel to probation and parole revocation. It would seem that the argument is once again viable.

At present the California Supreme Court is considering the case of \textit{In re Sturm}, Crim. No. 16799, which is concerned with parole release. The petitioner contends that, at a minimum, due process requires that the Adult Authority furnish a statement of reasons for denial of his parole. Also at issue are the prisoner's right to counsel in preparation for and during the eligibility proceeding and the availability of his record for his scrutiny before such a hearing. The decision in this case may well indicate how far the California Supreme Court will extend \textit{Vickers, Nelson, Prewitt,} and \textit{Morrissey} and in which direction the court is moving. See text accompanying notes 218-224 infra.

\textsuperscript{179} See text accompanying notes 125-130 supra.
The Hands-Off Approach

Until five years ago the judiciary generally avoided deciding cases involving due process rights in the parole and probation areas, particularly with regard to revocation. Since the United States Supreme Court had not yet granted more than minimal guarantees in pre-conviction proceedings, post-conviction rights were beyond judicial consideration. In order to justify the denial of these latter rights, the courts relied upon four theories regarding parole and probation: the right-privilege theory, the contract theory, the parens patriae theory, and the constructive custody theory. Slowly, each of these theories was recognized as a fiction and was rejected. Thus, justifications for the hands-off approach are no longer readily available.

The Beginnings of Post-Conviction Rights

As each of the bases for the hands-off approach fell into disfavor, the refusal of the courts to grant post-conviction protection became more untenable. Expansions of rights in the civil law regarding property, and in the criminal law concerning pre-conviction procedures, indicated the beginning of an evolution from which substantial post-conviction due process guarantees emerged.

The first steps of the judiciary in this evolution were taken in Mempa v. Rhay, a case involving a combined sentencing-probation proceeding. Here the Court found that such a sentencing hearing was a part of the criminal action and that a lawyer for the defendant was therefore in order. Since the Mempa proceeding was characterized as a criminal one, the Court did not really deal with post-conviction rights directly. However, some lower federal courts took the Mempa holding as indicative of the new direction in the law and applied due process criteria to revocation hearings. While California courts were initially reluctant to extend the Mempa ruling beyond its facts, dictum in People v. Youngs did foreshadow California's later position regarding rights for those on probation or parole.

Meanwhile, in Morrissey v. Brewer, the United States Supreme Court made it clear that these due process safeguards did indeed ap-
ply in the correctional field.189 Although parole revocation was not held to be a part of the criminal proceeding, Fourteenth Amendment protections nevertheless were found to be appropriate. The holding mandated both a preliminary hearing and a revocation hearing, and at each hearing six minimum due process requirements had to be met.190 Following the Morrissey case, the trend toward a judiciary more involved in post-conviction rights was obvious.

The Expansion of Due Process in California Parole and Probation Revocation

The speed of the evolution of due process protections was greatly increased in California after the Morrissey case. Not only were the requirements of Morrissey adopted,191 but they were expanded to encompass new rights as well as new types of post-conviction proceedings.192

People v. Vickers193 extended the Morrissey guarantees to both parolees and probationers and, more importantly, held that probationers were to be represented by counsel at revocation proceedings. The wording of the opinion indicated that the right to counsel for parolees also might be successfully argued in the future.194

The distinction between parole and probation also was abandoned in dictum in People v. Nelson,195 which thus added support to the Vickers case. In addition, the Nelson decision clearly pointed out the effective date of the holdings in both Morrissey and Youngs.

More significant than Nelson was In re Prewitt,196 which extended the protections of due process to the parole rescission situation. This case represented the acknowledgement of limited civil rights for the prison inmate. Furthermore, the rights to notice of the charges and to disclosure of statements and documents by informants were recognized as further expansions of Morrissey. Left open by the Prewitt decision was the question of the possible extension of these safeguards to sentencing and eligibility hearings.

Following the three companion cases of Vickers, Nelson, and Prewitt, it appeared that the California Supreme Court had entered into a new period in the granting of post-conviction due process rights,

189. See text accompanying notes 65-75 supra.
190. See text accompanying notes 72-75 supra.
191. See text accompanying notes 95, 126 supra.
192. See text accompanying notes 95-134 supra.
194. See text accompanying notes 102-110 supra.
a period which would see the continued expansion of protected rights and the extension of these protections into other types of proceedings. Much had been left undecided by the court, but the trend was one of liberalization and of new-found interest in the treatment of parolees and probationers. It seemed that the burden on the state increasingly would be outweighed by the benefit to the individual.197

The Curtailment of Due Process Extension

Whether the extensions which might reasonably have been expected after Vickers, Nelson, and Prewitt will be forthcoming is now substantially in doubt. Two recent cases, one from the United States Supreme Court198 and the other from the California Supreme Court,199 seem to indicate reluctance on the part of these courts to continue what they have started. It appears that the courts are once again narrowing their definition of due process for those caught up in the post-conviction process.

In Gagnon v. Scarpelli,200 the United States Supreme Court dealt with the question of the constitutional right to counsel for parolees and probationers and held that such a right existed only in a limited type of revocation hearing. The decision to provide counsel was to be made on a case-by-case basis and at the discretion of the authority responsible for corrections. As Justice Powell stated, "[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."201 While the Gagnon decision does not affect the California judicial rule which provides for counsel,202 it seems to imply that on a federal level the future application of due process safeguards to post-conviction proceedings will not be made as readily. In addition, the lack of formal procedures and of rules of evidence at these hearings was cited by the Court without disapproval,203 thus indicating that more rigorous standards in these areas are not now contemplated.

197. See note 162 supra.
201. 411 U.S. at 789.
202. People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972). In fact, Gagnon strengthens the argument for a constitutional right to counsel in California. Previously, Vickers held that counsel was required by a judicial rule of the court and that due process requirements applied to parolees and probationers alike. Now Gagnon holds that in some cases the Constitution requires counsel. Therefore, Vickers and Gagnon together can be used to argue for a constitutional right to representation in California. See note 102 supra & text accompanying notes 152-158 supra.
203. 411 U.S. at 789.
On the state level *In re Law* is the most recent California Supreme Court decision to deal with the post-conviction due process question. The petitioner was a parolee who sought release on bail from a "parole hold" requested by the Adult Authority following an alleged criminal offense during parole. Although the petition became moot when parole was revoked, the court decided to consider the case because it raised "a question of broad public interest." Since *Morrissey* spoke of the "'arrested' parolee" and "'the parolee's continued detention'", the *Law* court held that detention of the parolee without bail was permissible and did not violate due process requirements. Furthermore, it was noted that neither the California Constitution nor any statute "contemplates bail from restraints imposed after the finality of a judgment of conviction." In retreating from an extension of rights through judicial determination, the court continued:

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 Authority in the parole area.

This is reminiscent of the old hands-off approach and constitutes a step back from the liberal attitudes of Vickers, Nelson, and Prewitt.

The *Law* court also retreated somewhat from the *Morrissey* criteria of two separate hearings for an accused violator. The case

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204. 10 Cal. 3d 21, 513 P.2d 621, 109 Cal. Rptr. 573 (1973).
205. Although the petitioners in both *Gagnon* and *Law* were parolees, it is impossible to argue that the tightening of due process rights will occur in the parole area alone because parole and probation are substantially the same. See text accompanying notes 9-14 supra.
206. For a definition of "parole hold" and an explanation of the way in which the process operates, see *In re Law*, 10 Cal. 3d 21, 24 n.2, 513 P.2d 621, 623 n.2, 109 Cal. Rptr. 573, 575 n.2 (1973).
207. Id. at 23, 513 P.2d at 622, 109 Cal. Rptr. at 574.
209. 408 U.S. at 487, *cited in* 10 Cal. 3d at 25, 513 P.2d at 624, 109 Cal. Rptr. at 576 (emphasis omitted).
210. 10 Cal. 3d at 25, 513 P.2d at 624, 109 Cal. Rptr. at 576.
211. Id. at 26, 513 P.2d at 624, 109 Cal. Rptr. at 576.
212. Id.
213. See text accompanying notes 180-182 supra.
214. In California, at the appellate level, there had been a great deal of conflict before the *Law* case regarding the necessity for a preliminary pre-revocation hearing when there had been a prior conviction for the same alleged "violation-offense." *In re Frias*, 34 Cal. App. 3d 88, 109 Cal. Rptr. 749 (1973); *In re Edge*, 33 Cal. App. 3d 149, 108 Cal. Rptr. 757 (1973); *In re La Croix*, 32 Cal. App. 3d 319, 108 Cal. Rptr. 93 (1973); *In re Scott*, 32 Cal. App. 3d 124, 108 Cal. Rptr. 49 (1973).
held that a preliminary hearing prior to trial for an alleged felony\textsuperscript{215} satisfied the due process requirement of a preliminary pre-revocation proceeding, if the \textit{Morrissey} precepts were followed and if the parolee had fair notice of the dual purpose of the hearing.\textsuperscript{216} Thus, the parolee was denied an opportunity to contend, in a local forum, that the finding of the preliminary hearing prior to the felony trial was in error or that further evidence had arisen since that first proceeding.\textsuperscript{217}

\textbf{Future Trends}

Many commentators have speculated on the extent to which the courts in the future will be willing to extend constitutional rights to those caught up in the correctional and penal processes.\textsuperscript{218} Some have seen \textit{Morrissey}, \textit{Vickers}, and the revocation due process question as the point at which the judiciary will cease to concern itself\textsuperscript{219} and, more importantly, will refuse to recognize further rights as being constitutionally required. There can be little doubt that the extension of due process rights beyond \textit{Morrissey} and \textit{Vickers} will depend in great part upon the composition of the courts themselves.\textsuperscript{220}

\textsuperscript{215} The court in Law also discussed the possibility of treating the \textit{misdemeanor} trial as a preliminary pre-revocation proceeding. Two difficulties with this substitution were recognized by the court and included (1) the delay of the trial following arraignment which might fail to conform to the \textit{Morrissey} requirement for a prompt hearing and (2) the generally inaccessible trial transcript which would deny an important record of the court's findings to both the parolee and the Authority. Therefore, the misdemeanor trial could only serve a dual purpose following "proper notice or . . . agreement between the parolee and [the] Authority" (10 Cal. 3d at 27, 513 P.2d at 625, 109 Cal. Rptr. at 577.) "in appropriate cases [which were] sufficiently inclusive of the probable cause hearing procedures mandated by \textit{Morrissey} . . . ." \textit{Id.}

\textsuperscript{216} 10 Cal. 3d at 27, 513 P.2d at 625, 109 Cal. Rptr. at 577.

\textsuperscript{217} \textit{In re} La Croix, 32 Cal. App. 3d 319, 326, 108 Cal. Rptr. 93, 98 (1973).

Although Law gives the Adult Authority the right to conduct a separate preliminary hearing to establish probable cause, the decision to grant such a hearing is at the Authority's discretion and is not the right of the parolee. 10 Cal. 3d at 27, 513 P.2d at 625, 109 Cal. Rptr. at 577.

\textsuperscript{218} It has been argued that upon conviction a defendant loses all of his constitutional rights. \textit{See} Jacob & Sharma, \textit{Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process}, 18 U. KANS. L. REV. 493, 495 n.12 (1970). But it is widely recognized now that the prisoner has not been completely cut off from the federal and state safeguards, but has merely suffered a limiting of those guarantees. \textit{Id.; see In re} Cleaver, 266 Cal. App. 2d 143, 160, 72 Cal. Rptr. 20, 31 (1968). \textit{See generally} S. Rubin, H. Weihofen, G. Edwards & S. Rosenzweig, \textit{The Law of Criminal Correction} (1963).

\textsuperscript{219} 8 CRIM. L. BULL., supra note 1, at 621-22.

From the holdings in *Gagnon* and *Law* it could be argued that the judiciary is moving more slowly in the post-conviction due process field. Rights that had previously been given, such as the right to counsel and the right to two revocation proceedings, are being more clearly defined, and in the process of definition are being somewhat curtailed. Other rights which might have been expected (e.g., the right to bail) have been flatly denied. The fact that courts have dealt with questions not directly before them and have limited extensions through these decisions\textsuperscript{221} indicates that further due process rights will not be granted in the massive proportions of *Morrissey*, *Vickers*, *Nelson*, and *Prewitt*. It is now highly unlikely that courts will replace the probable cause standard of proof with the reasonable doubt standard, will restrict search and seizure, or will limit the use of arguably inadmissible evidence. The judiciary seems to have stalled in its forward movement.

Whether that movement will begin to speed up again is conjectural, at least. Certainly, the present curtailment is not absolute. Even in *Gagnon* and *Law* some additional due process rights were recognized. In *Gagnon*, for example, there is the recognition, however slight, of a constitutional right to counsel,\textsuperscript{222} and in *Law* notice to the alleged violator of the dual purpose of hearings is required.\textsuperscript{223} It would seem that the highest courts are now approaching the entire post-conviction due process questions more slowly, but ability to move in either direction remains possible.\textsuperscript{224}

\textsuperscript{221.} *In re Law*, 10 Cal. 3d 21, 23, 26, 513 P.2d 621, 622, 625, 109 Cal. Rptr. 573, 574, 577 (1973).

\textsuperscript{222.} 411 U.S. at 790.

\textsuperscript{223.} 10 Cal. 3d at 27-28, 513 P.2d at 625, 109 Cal. Rptr. at 577.

Conclusion

For many years the federal courts based their refusal to extend due process rights to the probationer and the parolee on four theories: right-privilege, contract, parens patriae, and constructive custody. These fallacious theories were eventually discarded, and *Morrissey v. Brewer* set the tone for and the requirements of the coming reform. In California, the historical perspective was much the same as in the federal courts; the four theories met their demise and were replaced by *People v. Vickers*, *People v. Nelson*, and *In re Prewitt*. As revolutionary as these three cases were, even when considered in light of *Morrissey*, certain unanswered questions arose. Was there a constitutional right to counsel? Could due process rights be expanded to apply to disciplinary and eligibility hearings? These questions are the material for the future shaping of the law in the post-conviction area. But such shaping depends upon the evolution of judicial thought. At the present time the trend in the United States Supreme Court and the California Supreme Court, as reflected by *Gagnon v. Scarpelli* and *In re Law*, appears to be one of a more gradual definition of due process guarantees. While it is highly unlikely that a legal system which has given increasing protection to the individual would suddenly abandon this position entirely, it is more probable that the rights of the prisoner, parolee, and probationer will grow much more slowly than in the recent past.

*By Victoria E. Armstrong*