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Criminal Law--Due Process, Equal Protection, and the New Mexico Parole System

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NOTES

DUE PROCESS, EQUAL PROTECTION AND THE NEW MEXICO PAROLE SYSTEM

Considerable attention has recently been focused on the American penal system. Its deficiencies have been exposed and excoriated by countless critics. Less scrutiny has been directed towards the operation of the equally important, but less visible, parole system.

Under traditional theories of parole, prisoners and parolees possess few rights. Rather, parole is viewed as the granting of quasi-clemancy to convicted criminals; and what the state has conditionally granted, it may summarily withdraw with little pretence of adherence to the principles of due process.

The courts have generally been reluctant to grant judicial review to the grievances of prisoners and parolees. Consequently, what law there is relating to the due process restraints imposed upon the parole systems of the various states is largely negative. That is, most courts have held that inmates and parolees are not protected by constitutional safeguards in their dealings with parole boards. Administrative discretion is generally viewed as transcending the requirements of due process in the area of parole. However, this traditional view is changing. Several recent decisions have held that rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution are applicable to situations involving the granting or revoking of parole.

THE PAROLE SYSTEM IN NEW MEXICO TODAY

"Parole," as defined by New Mexico statute, means "the release to the community of an inmate of an institution by decision of the parole board prior to the expiration of his term, subject to conditions imposed by the board and to its supervision."[1]

This practice of releasing prisoners from correctional institutions before they have completed serving their full sentence, is followed by all of the states and by the federal correctional system. The purposes of parole are to relieve the crowded conditions in prisons, and to promote the rehabilitation of prisoners by allowing them to live under supervision in the general community rather than in a penal institution. Since most inmates of correctional institutions have received their sentences as a result of anti-social behavior, the

1. N.M. Stat. Ann. § 41-17-14B (Repl. 1964).

benefits to be gained by releasing them on parole must be balanced against the possible harm to society that might result if such prisoners are released before the expiration of their sentences. If the possibility of social detriment exceeds the benefits to be gained by releasing the prisoner, he is denied parole. On the other hand, if only a minimal likelihood of harm to the community exists, and this is outweighed by the positive aspects of granting an early release, parole is usually granted.

However, each prisoner is an individual. Therefore it would be impossible to formulate a rule, applicable in every case, to provide for the mechanical review of each prisoner's record, and determine whether or not he should be paroled. In order to inject the human decision-making factor, which would consider and weigh the specific facts of each prisoner's case, and then fit these facts into the "community detriment-prisoner/prison system benefit" scale, boards of citizens have been created to make parole decisions in the case of each individual prisoner.

In New Mexico, the duty of screening prisoners who are eligible for parole, and determining which of them are to be paroled, is carried out by the Parole Hearing Board.[2] This board is made up of five private citizens appointed by the governor. Appointments to the Board are for staggered terms of five years or less, so that, commencing June 30, 1972, one member's term will end on June 30 of each year.[3]

It is the duty of the Board to administer the State Probation and Parole Act.[4] Under the act, the Board is empowered to release on parole any eligible[5] prisoner confined to a state-administered correctional facility.[6]

2. N.M. Stat. Ann. § 42-9-7 (Supp. 1971).
3. N.M. Stat. Ann. § 42-9-7A (Supp. 1971).
4. N.M. Stat. Ann. § 41-17-12, 13, 14, 18, 21, 21.1, 30, 31, 32, 33, 34 (Repl. 1964).
5. N.M. Stat. Ann. § 41-17-24 (Repl. 1964):

> ... 1. Prisoners may become eligible for parole hearing after they have completed one-third of their minimum sentence; however, they must have a clear conduct record for at least six (6) months prior to their appearance before the parole board.
>
> 2. Prisoners having minimum sentences of ten (10) years or more shall be required to serve one-third of ten years plus one month additional for every year beyond a ten-year sentence before becoming eligible to appear before the parole board.
>
> 3. Prisoners sentenced for thirty (30) years or more shall become eligible to appear beforethe parole board after they have served seven (7) years of their minimum sentence.
>
> 4. Prisoners sentenced to life imprisonment shall become eligible to appear before the parole board after they have served ten (10) years.

6. N.M. Stat. Ann. § 41-14-24 (Repl. 1964)

The Board meets the second Thursday and Friday of each month at the Penitentiary of New Mexico in Santa Fe.[7] At these monthly meetings the Board holds hearings on parole applications, parole revocations and pardon recommendations.[8] In addition to the Board members, these hearings are usually attended by the Director of the Adult Probation-Parole Division of the New Mexico Department of Corrections, and representatives of the Attorney General's office, the Department of Vocational Rehabilitation, the Penitentiary of New Mexico, Project New Gate, and an Institutional Probation-Parole Officer of the Adult Probation-Parole Division.[9] These additional personnel are present to furnish Board members with pertinent information regarding specific individuals who appear before the Board.[10] By statute,[11] the Board is not required to hear oral statements or arguments by an attorney or any other person. The usual procedure is that no one is permitted to appear on behalf of the prisoner.[12]

However, prior to the scheduled date of the hearing, attorneys representing prisoners and families of prisoners have access to Board members. The Chairman of the Parole Hearing Board stated that it was common for family members and attorneys to phone and visit Board members at home and at work.[13] In addition, any person desiring to make a statement on behalf of a prisoner or parolee scheduled to appear before the Board may visit the offices of the Adult Probation-Parole Division in Santa Fe during the work week and give his statement to the Director.[14] A summary of the statement is made by the Director and entered into the file of the prisoner or parolee for consideration by the Board.[15]

After each parole candidate has been interviewed by the Board, the candidate is discussed and the Board votes to either grant parole, deny parole, or deny parole but review the case in a few months.[16] Parole may be granted by a vote of a majority of the appointed board;[17] unanimity is not required.

7. New Mexico Parole Hearing Board, Procedures Manual, § 3(a), 4(a) (1971) [hereinafter cited as Procedures Manual].

8. Procedures Manual, *supra* note 7, at § 6(a).

9. Interview with Mr. Santos Quintana, Director, Adult Probation-Parole Division, Department of Corrections, in Santa Fe, New Mexico, Apr. 3, 1972 [hereinafter cited as Quintana Interview].

10. Procedures Manual, *supra* note 7, at § 12(b).

11. N.M. Stat. Ann. § 41-17-27 (Repl. 1964).

12. Interview with Mr. Victor Salazar, Chairman of the Parole Hearing Board, in Albuquerque, New Mexico, Nov. 16, 1971 [hereinafter cited as Salazar Interview].

13. *Id.*

14. State of New Mexico, Adult Probation and Parole Division, Department of Corrections, Operations Manual, 3-III-2 (1971) [hereinafter cited as Operations Manual].

15. *Id.*

16. Procedures Manual, *supra* note 7, at § 13(a).

17. *Id.* at § 10(b).

If the Board determines that parole should be granted to a prisoner, the district judge from the judicial district from which the inmate was sentenced must be notified.[18] In practice such notification is given by mailing each district judge in the state a copy of the docket of parole candidates to be considered at the upcoming monthly meeting.[19] The judge may express his opinion regarding the granting of parole to the prisoner, and his opinion is considered by the Board. The final decision, however, lies with the Board.[20]

On the other hand, if the decision of the Board is to deny parole, the reason for such denial is indicated in the minutes of the meeting, and is conveyed by a member of the prison staff to the prisoner in a counseling session.[21] Informing the prisoner of the reason that parole was denied him is a recent procedural innovation. Prior to January, 1972, prisoners were not told the reason for denial.[22]

Among the factors considered by the Board in determining whether parole is to be granted are:[23]

a. Presentence report;
b. Present offense for which committed;
c. Mitigating circumstances of present offense;
d. Sentence imposed;
e. Expiration date of sentence;
f. Time served to date;
g. Prior criminal record;
h. Time left to serve on present offense;
i. Conduct in prison;
j. Psychiatric history;
k. Current physical and psychiatric reports;
l. Pending detainers;
m. Time elapsed since present felony and prior felony convictions;
n. Participation in educational, vocational, recreational, and religious programs offered at the penitentiary;
o. Medical disabilities if any;
p. Military service and type of discharge;
q. If there is a drinking problem, participation in AA program in prison;
r. If narcotics offenses indicated, participation in NA program in prison;

18. N.M. Stat. Ann. § 41-17-24 (Repl. 1964).
19. Operations Manual, *supra* note 14, at 3-III-1.
20. N.M. Stat. Ann. § 41-17-24 (Repl. 1964).
21. Quintana Interview, *supra* note 9; Procedures Manual, *supra* note 7, at § 15(b).
22. Salazar Interview, *supra* note 12.
23. Procedures Manual, *supra* note 7, at § 12(c).

s. Participation in therapy programs available;
t. Desire to obtain parole;
u. Resentment or hostility;
v. Indications of sincere remorse for wrong doings;
w. Indications of favorable attitudinal changes;
x. Support and treatment of family;
y. Whether returning to family and if so, attitude of the family;
z. Number of job changes;
aa. Length of time in jobs;
bb. Job skills;
cc. Job offers;
dd. Compatability of job;
ee. Living conditions;
ff. Whether DVR plan, if any, is viable;
gg. If a New Gate student, likelihood of success.

If the Board makes a final determination that a prisoner should be paroled, the prisoner must agree to certain conditions of parole before he is actually released. Typical of the New Mexico parole conditions are the following:[24]

> Must abstain from alcoholic beverages and narcotics.
> May not possess firearms.
> May not associate with ex-convicts.
> Must have parole officer's written permission to:
> a. leave the county or the state
> b. change residence or employment
> c. get a driver's license
> d. get married
> e. get divorced
> Must comply with all laws, statutes and ordinances
> Must at all times act in an honorable manner as a good member of the community.
> May not correspond with inmates of any correctional institution.
> Must submit monthly written report to parole officer.
> May have parole revoked if, in the opinion of the parole board, it would be detrimental to the parolee or the community to have parole continued.

Before being released on parole, the prisoner must read, agree to and sign four copies[25] of a Certificate of Parole, which contains a list of the conditions of parole referred to above. One copy is retained by the parolee.[26] In effect the signed certificate constitutes an agree-

24. State of New Mexico, Adult Probation-Parole Division, Department of Corrections, Certificate of Parole.
25. Operations Manual, *supra* note 14, at 3-IV-6.
26. *Id.*

ment between the parolee and the state that the parolee is aware that his parole will be revoked if any condition is violated.

This leads to the subject of parole revocation. During the time that a released prisoner is on parole, he is subject to being returned to prison if he violates any of the conditions of his parole or commits an act in violation of any federal, state, or local statute or ordinance. The Chairman of the Parole Hearing Board said that a verbal directive has been given to all parole officers in the state that mere technical violations of local ordinances or parole conditions are not sufficient grounds for parole revocation.[27] Examples that were given of technical breaches were non-repetitious violation of minor traffic ordinances (e.g. parking tickets), and temperate consumption of alcohol in the parolee's own home.

Should the parolee be charged with a serious parole violation,[28] his parole officer may request that the local authorities arrest the parolee and hold him in custody.[29] The parole officer informs the Director of the Adult Probation-Parole Division of the violation, and conducts an investigation to determine the facts surrounding the alleged violation.[30]

If the parole officer's investigations lead him to believe that a serious violation of the conditions of parole did in fact occur, the parolee is returned to the Penitentiary of New Mexico to await a parole revocation hearing.[31]

This hearing is held at the next monthly meeting of the Parole Hearing Board, if that meeting is held at least five working days from the date of the parolee's arrest.[32] Board policy is to give the parolee at least five working days advance notice of the revocation hearing. If arrested less than five working days before the date of the Board meeting, the parolee's hearing is scheduled for the second monthly meeting following his arrest. The stated purpose of the notice period is to give the alleged violator time to prepare his defense, and to consult with counsel, if he chooses.[33] However, parolees are not

27. Salazar Interview, *supra* note 12.
28. Operations Manual, *supra* note 14, at 3-VI-1:
    (a). The following are considered serious parole violations . . . :
    (1) Conviction of felony.
    (2) Evidence of felony-type behavior without conviction.
    (3) Conviction of misdemeanors endangering public safety.
    (4) Absconding from supervision.
    (5) Evidence of client being a detriment to the community.
29. *Id.*
30. *Id.* at 3-VI-2.
31. *Id.* at 3-VII-5.
32. Quintana Interview, *supra* note 9.
33. *Id.*

permitted to be represented by counsel at the hearing itself.[34] If, as a result of the hearing, the Board finds that a violation did in fact occur, it has the option of either revoking the parole, continuing the parole, or entering any other order it may see fit.[35]

It should be pointed out that the parole revocation hearing is essentially a fact-finding proceeding. Its purpose is to ascertain whether the parolee is actually guilty of the violation with which he is charged, and if so, whether there were any mitigating circumstances. Notwithstanding its trial-like function, it is classified as an administrative hearing, and none of the rights guaranteed to defendants in criminal prosecutions by the Fifth and Sixth Amendments of the U.S. Constitution are granted to the parolee. This area of the law will be examined in depth below.

Before leaving this examination of the procedure followed by the parole board in New Mexico, it is worthwhile to comment on the amount of discretion conferred by statute on the Board in its parole-related duties. The Probation and Parole Act is replete with reference to the discretionary power of the Board, as can be seen from the following examples.

The Board may release any prisoner not under sentence of death when the prisoner gives evidence of ability to support himself and "the Board finds IN ITS OPINION the prisoner can be released without detriment to himself or to the community."[36] (Emphasis added.)

"The board, in the case of parole records . . . IN THEIR DISCRETION, whenever the best interest or welfare of a particular . . . prisoner makes such action desirable or helpful, may permit inspection . . . by . . . the prisoner or his attorney."[37] (Emphasis added.)

"An inmate should be placed on parole only when THE BOARD BELIEVES that he is able and willing to fulfill the obligations of a law abiding citizen."[38] (Emphasis added.)

In the case of a parole violation, the board may revoke parole, continue parole, or issue any other order, "AS IT SEES FIT."[39] (Emphasis added.)

DUE PROCESS AND THE PAROLE PROCESS

After viewing the operation of the process of granting, denying and revoking paroles, two important points are readily apparent.

34. N.M. Stat. Ann. § 41-17-27 (Repl. 1964).
35. N.M. Stat. Ann. § 41-17-28 (Repl. 1964).
36. N.M. Stat. Ann. § 41-17-24 (Repl. 1964).
37. N.M. Stat. Ann. § 41-17-18 (Repl. 1964).
38. N.M. Stat. Ann. § 41-17-24 (Repl. 1964).
39. N.M. Stat. Ann. § 41-17-28C (Repl. 1964).

First, the Parole Board exercises tremendous discretionary power over the lives of inmates and parolees, and there is no appeal from the decisions of the Board.

Second, any Fifth and Sixth Amendment protections for prisoners and parolees are completely absent from the entire parole process; this is especially obvious with respect to hearings.

In view of these observations, one wonders whether the constitutional rights of the inmates and parolees are simply being ignored, or whether due process requirements, in fact, are not applicable to parole hearings.

In order to answer this question, it is first necessary to understand the traditional view of parole and the status of parolees *vis à vis* the correctional system. This view is typified by the following theories:[40]

1. *The Right-Privilege Theory.* When an individual is convicted of a crime and sentenced to a period of imprisonment, he is obligated to serve out his full sentence. Parole is an act of clemency, a privilege granted by statute. It is not a constitutional right. Therefore, the state may establish whatever administrative procedures it sees fit to grant or withdraw parole. Due process is not violated, no matter how summary and arbitrary the procedures, since the prisoner/parolee has no right to parole.
2. *The Contract Theory.* Prisoners are paroled subject to the conditions of parole imposed by the correction system on the parolees. Agreement to abide by these conditions constitutes a contract whereby the parolee agrees to return to prison to serve the balance of his sentence if he should violate any of the conditions. By entering into such a contract, the parolee waives all rights that he might have to due process.
3. *The Constructive Custody Theory.* This view of parole is based on the theory that a parolee is still a prisoner. He is merely being permitted to serve his sentence outside the walls of the correctional institution. If his conduct in the community proves unsatisfactory, he would be transferred back into prison. This transfer is perceived to be the same as transferring a prisoner from one cell to another.
4. *The Exhaustion Theory.* The idea here is that the inmate or parolee had the benefit of procedural due process at his trial, where sentence was imposed. Therefore, as long as his sentence is not lengthened, his right to due process is not violated by the denial or revocation of parole.

With this rudimentary background in the ways in which courts and parole system administrators have traditionally viewed parole, the

40. Note, *Parole: Rights and Revocation,* 37 Brooklyn L. Rev. 550 (1971); Comment, *Parole Revocation Hearings–Pro Justicia or Pro Camera Stellata?,* 10 Santa Clara Lawyer 319 (1970).

holdings in the cases which will now be discussed may seem more understandable.

In New Mexico, as in most states, parole is a creation of statute, not of the Constitution. Therefore any rights that a prisoner has at a parole hearing, or that a parolee has at a parole revocation hearing must be conferred by statute. The courts have not been receptive to arguments that basic constitutional protections are also applicable.

The New Mexico Supreme Court, in the case of *Robinson v. Cox*,[41] held that a parolee has no consitutional right to a parole revocation hearing; any such right to a hearing would have to arise under statute. While there is a statutory requirement that an alleged violator be given a hearing to determine whether a parole condition has actually been violated,[42] there is no requirement that the parolee be allowed counsel. In fact, the court found that the Probation and Parole Act expressly provides that the board needn't permit counsel to appear before it at hearing.[43] In denying the petitioner's request for a writ of habeas corpus, the court in *Robinson* held that "neither due process nor applicable statutes required that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation hearing."[44]

Numerous cases from other jurisdictions have echoed the view of the New Mexico Court in *Robinson*, that the rights afforded defendants by the Fifth and Sixth Amendments in criminal trials are not applicable in parole hearings.

In *State v. Maxwell*[45] the Arizona Supreme Court reiterated that in a parole revocation hearing the rights of the alleged violator are conferred not by the constitution, but by statute, Courts also distinguish parole hearings from trial-type proceedings. The parole hearing and parole revocation hearing are classified as administrative proceedings.[46] The revocation hearing has been held not to be an adversary proceeding.[47] On that basis, it is differentiated from a trial with its constitutional protections. Furthermore, it is not judicially reviewable where a purely discretionary determination concerning the withdrawal of a privilege is made.

The case that has gone the farthest in denying due process to

41. 77 N.M. 55, 419 P.2d 253 (1966).
42. N.M. Stat. Ann. § 41-17-28C (Repl. 1964).
43. N.M. Stat. Ann. § 41-17-27 (Repl. 1964).
44. 77 N.M. 55, 59, 419 P.2d 253, 256 (1966).
45. 97 Ariz. 162, 398 P.2d 548 (1965).
46. Williams v. Field, 301 F. Supp. 902 (D.C. Cal. 1969), People *ex rel.* Ochs v. La Vallee, 303 N.Y.S.2d 774 (1969).
47. People *ex rel.* Smith v. Deegan, 303 N.Y.S.2d 789 (1969).

prisoners and parolees at parole board hearings is *Hyser v. Reed*.[48] There the Court of Appeals for the District of Columbia held that persons appearing at parole board hearings have absolutely no rights unless they are expressly provided by statute. In holding that the Sixth Amendment of the United States Constitution did not apply to proceedings before parole boards, the Court said that it applies only to criminal prosecutions, and that a parole revocation hearing is neither a criminal prosecution nor an adversary proceeding in the usual sense of the term. This decision expressly held that persons appearing at parole board hearings have no right to court-appointed counsel, are not allowed cross-examination, are not permitted to learn the contents of the board's files by means of discovery, and have no right to compel the presence of witnesses through compulsory service of process. It further held that a parole board is not bound by rules of evidence, but that it may admit testimony and evidence that would be inadmissible in a trial type proceeding.

While the Supreme Court has not yet ruled on the rights of a parolee at a parole revocation hearing, it is interesting to note that the majority opinion in *Hyser* was written by Circuit Judge, now Chief Justice, Warren E. Burger.

From the foregoing cases, it can be seen that the salient characteristics of the traditional view of a parole board hearing are:

a. it is an administrative, rather than a judicial proceeding;
b. it is not an adversary proceeding;
c. the determination reached therein is not judicially reviewable;
d. any rights possessed by the person appearing before the board are created by statute, not by the Constitution;
e. the determination reached therein is purely discretionary, relating to the granting or withdrawal of a privilege.

Although the great majority of decided cases have espoused the view that due process and the rights guaranteed by the Sixth Amendment have no place in hearings conducted by parole boards, there is a contrary line of cases. This line has developed slowly and is not widely followed. Nevertheless, recent decisions from around the country show that this minority view is gaining acceptance.

In 1946, the District of Columbia Court of Appeals (the same court that decided *Hyser* seventeen years later), in *Fleming v. Tate*,[49] held that parolees have the right to employ counsel to represent them in federal parole revocation hearings. This right is granted by federal statute.[50]

48. 318 F.2d 225 (D.C. Cir. 1963).
49. 156 F.2d 849 (D.C. Cir. 1946).
50. 18 U.S.C. § 4207 (1948); 28 C.F.R. § 2.41 (1971).

Then in 1969, the Tenth Circuit, in *Earnest v. Willingham,*[51] held that where parolees who were financially able to hire counsel were statutorily allowed to be represented at parole revocation hearings, indigent parolees should have court appointed attorneys. The court's opinion was based on a due process argument, but it was implicitly an equal protection argument. It will be remembered that Judge Burger, in *Hyser,* rejected the contention that indigent parolees had a right to court appointed attorneys.

The Supreme Court, in *Mempa v. Rhay,* stated that a defendant in a PROBATION revocation hearing must be provided with counsel. "Appointment of counsel for an indigent is required at every stage of the criminal proceeding where substantial rights of a criminal accused may be affected."[53] The facts of the case indicate that under the laws of the State of Washington, the sentencing judge at the probation hearing prepares a report to the State Board of Prison Terms and Paroles. The Board determines the length of sentence that the probation violation is to serve, but the evidence in the case showed that the Board's decision was usually influenced by the judge's recommendations.

It was the opinion of the Supreme Court that in order to present his statement of the facts and mitigating circumstances to the judge, the probation violator needed the services of counsel. In addition, the prisoner's right to appeal the probation revocation was waived if not exercised within a specified time period. The court felt that the danger of an uninformed prisoner inadvertently waiving his right to appeal was also strong reason why counsel should be required. The *Mempa* case is frequently distinguished in cases deciding the rights of prisoners in parole revocation hearing situations, on the ground that *Mempa* dealt with probation revocation rather than parole revocation. The former is done only after a judicial hearing, while a parole revocation hearing is an administrative process.

This distinction was rejected by the New York Court of Appeals last year, in *People ex rel. Menechino v. Warden, Green Haven State Prison.*[54] Judge Fuld, writing for the majority, said that the *Mempa* principle is broad enough to encompass parole as well as probation.

> A parole revocation hearing is an accusatory proceeding in which the outcome–liberty or imprisonment–is dependent upon the board's factual determination as to the truth of specific allegations of misconduct.
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> * * *

51. 406 F.2d 681 (10th Cir. 1969).
52. 389 U.S. 128 (1967).
53. *Id.* at 134.
54. 27 N.Y.2d 376, 318 N.Y.S.2d 449 (1971).

> [W]hen all the legal niceties are laid aside, a proceeding to revoke parole involves the right of an individual to continue at liberty or be imprisoned. It involves a deprivation of liberty just as much as did the original criminal action and . . . falls within the due process section 6 of Article I of our state constitution.
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> * * *
>
> . . . [T]he Supreme Court, rejecting all efforts to limit the right to counsel to the narrow confines of criminal prosecution under the Sixth Amendment, has treated such right as an essential element of due process, applicable to all proceedings, whether they be classified as civil, criminal or administrative, where individual liberty is at stake.
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> * * *
>
> No matter how the proceeding is characterized, the demands of due process under both the U.S. Constitution and the Constitution of New York State require that a parolee be represented by a lawyer, and entitled to introduce testimony if he so elects.
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> * * *
>
> We find completely unpersuasive the contention that, since parole is a mere "privilege," a matter of grace, and not a "right" various constitutional guarantees, including the right to counsel, may properly be denied in a revocation hearing.
>
> Even if a distinction exists between the components of the right-privilege dichotomy, . . . when a state undertakes to institute a proceeding for the disposition of those accused of crime it must do so consistently with constitutional privileges, even though the actual institution of the procedure was not constitutionally required.[55]

The *Menechino* approach has been followed in several jurisdictions,[56] albeit a minority. The importance of that decision and those that have adopted similar reasoning is that they signal the beginning of a judicial reassessment of the entire subject of parole and the rights of parolees. Once the courts have admitted that due process is an essential requirement of the parole system, then the logical next step would be the extension of Sixth Amendment rights. To deny these rights on the ground that a parole hearing, or parole revocation hearing is an administrative proceeding, not a judicial proceeding, is to say that the prisoners rights are determined by semantics. As Judge Fuld said in *Menechino*, when a man's liberty is at stake, it is of no comfort to that man to be told that the hearing at which his fate is to be determined is merely an administrative re-evaluation of the wisdom of extending the privilege (i.e. parole) of conditional

55. *Id.* at 453-55, 27 N.Y.2d at 382-84.

56. U.S. *ex rel.* Bey v. Conn. St. Board of Parole, 443 F.2d 1079 (2d Cir. 1971); Goolsby v. Gagnon, 322 F.Supp. 460 (E.D. Wisc. 1971); Commonwealth v. Tinson, 433 Pa. 328 249 A.2d 549 (1969).

freedom that had been granted to him. Where a parolee's liberty is at issue the stake is just too important to be left completely to the unchallenged discretion of the parole board.

The argument that parole is a privilege, and therefore its denial or revocation needn't conform to due process requirements may be attacked, using non-parole cases as precedent.

In the case of *Greene v. McElroy*,[57] which involved the government's withdrawal of the plaintiff's security clearance, the government denied that the plaintiff had the Sixth Amendment right to cross-examine adverse witnesses. It was the contention of the government that a security clearance is a privilege, not a right, and that it could be withdrawn without going through the formalities that would be required by due process. In rejecting this argument, the Supreme Court held that although one may not possess a certain right, once it is extended as a privilege it can be revoked only by means consistent with due process.

Several recently decided welfare cases upheld this point. The state's requirement that a person must be a resident for one year before being eligible for welfare benefits was challenged in *Shapiro v. Thompson.*[58] The state contended that welfare payments were a privilege and not a right, and that therefore the state could impose whatever reasonable eligibility requirements it saw fit. The Supreme Court disagreed, stating that "a constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a right."[59]

The following year, in *Goldberg v. Kelly*,[60] another welfare case, the Supreme Court said that welfare recipients' benefits could not be terminated without giving the recipient an evidentiary hearing at which he was entitled to be represented by counsel, offer evidence and cross-examine witnessess. The fact that welfare benefits might be characterized as a privilege rather than a right was irrelevant.

If the reasoning of this line of cases is applied by the courts to parole revocation situations, as it was in *Menechino*, then the right-privilege distinction, which is the main pillar of the due process denial argument, is knocked aside. When that happens, parolees rights will take a long stride forward.

A foundation for constructing a case for due process in parole revocation hearings in New Mexico was laid in 1917 in *Ex Parte Lucero.*[61] The issue there was whether a suspended sentence may be

57. 360 U.S. 474 (1959).
58. 394 U.S. 618 (1969).
59. *Id.* at 627.
60. 397 U.S. 254 (1970).
61. 23 N.M. 433, 168 P. 713 (1917).

revoked without a hearing. Regarding that question, the New Mexico Supreme Court said:

> Upon principle it would seem that due process of law would require notice and opportunity to be heard before a defendant can be committed under a suspended sentence. The suspension of the execution of the sentence gives to defendant a valuable right. It gives him the right of personal liberty, which is one of the highest rights of citizenship. This right cannot be taken away from him without notice AND OPPORTUNITY TO BE HEARD without invading his constitutional rights.[62] (Emphasis added.)

The court held that where a question of fact was involved and revocation depended on the determination of factual issues, a hearing must be granted.

This requirement of a hearing in all cases where personal liberty is involved, becomes a requirement that an individual be granted the right of counsel, when the mandate of *Lucero* is added to the statement of the United States Supreme Court in *Powell v. Alabama.*[63] The Supreme Court declared in that case that the right to be heard would be "of little avail if it did not comprehend the right to be heard by counsel."[64]

The result reached by a combination of the holdings of *Lucero* and *Powell* is the requirement that in any proceeding in which an individual stands to be deprived of his liberty and be committed to prison, he must first be given a hearing at which he has the benefit of representation by an attorney. Although opponents of this position might argue that the type of proceeding involved in *Lucero* was judicial, while a parole revocation hearing is merely administrative in nature and therefore not subject to the same constitutional demands as a hearing before a court, this contention was rejected as specious by the New York Court of Appeals in *Menechino.*

There seems to be a logical inconsistency in the New Mexico law concerning rights of the accused at parole revocation hearings as compared to his rights at probation hearings. As was pointed out earlier, the New Mexico Supreme Court, in *Robinson v. Cox,*[65] held that since a parole revocation hearing is not a judicial proceeding, and since a prisoner has no constitutional right to parole, parolees have no right to representation by counsel at a PAROLE revocation hearing.

Yet in *State v. Brusenhan,*[66] which was decided by the New

62. *Id.* at 438-39, 168 P. at 715.
63. 287 U.S. 45 (1932).
64. *Id.* at 68-69.
65. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966).
66. 78 N.M. 764, 438 P.2d 174 (1968).

Mexico Court of Appeals two years after *Robinson*, it was held that an individual does have a right to counsel at a PROBATION revocation hearing. This result was reached even though the court remarked that "[p]robation is conferred as a privilege and cannot be demanded as a right. It is a matter of favor not of contract. There is no requirement that it must be granted. . . ."[67]

The court then went on to cite the *Ex parte Lucero*[68] holding that liberty is one of the highest rights of citizenship and cannot be taken away in a revocation proceeding unless the defendant has the right to be heard. To do otherwise was held to be a violation of the defendant's constitutional rights.

While probation and parole might be technically distinguished on the ground that the former is granted and revoked by the court system, and the latter is granted and revoked by a non-judicial board, the fact remains that in reality there is little significant difference between the two. They both permit a convicted criminal defendant to avoid completing a sentence in a correctional institution. Instead, an individual released under either system is permitted to remain at liberty in the community subject to the periodic supervision of his probation or parole officer. Revocation of either probation or parole means that the violator looses his conditional liberty and is required to serve his sentence behind prison walls.

The doctrine of *Lucero* would seem to apply in both cases. Neither a parolee accused of having violated his parole, nor an individual charged with having violated his probation, should be deprived of his liberty without having a right to counsel. It seems irrational to permit one individual to be represented by an attorney at a probation revocation hearing, while denying another person access to an attorney in a hearing to determine whether parole should be revoked.

Since both of the accused are granted a statutory right to a hearing,[69] and since the *Powell*[70] doctrine states that the right to a hearing is meaningless unless the party to be heard has the right of counsel, then the present practice in New Mexico seems to be violative of due process and equal protection, guaranteed under the constitutions of both the United States[71] and New Mexico.[72]

The principal obstacle in New Mexico to judicial acceptance of the argument that parolees have a due process right to counsel at parole revocation hearings is the decision of the New Mexico Supreme

67. *Id.* at 765, 438 P.2d at 175.
68. Ex Parte Lucero, 23 N.M. 433, 168 P. 713 (1917).
69. N.M. Stat. Ann. § 41-17-28C, 28.1B (Repl. 1964).
70. Powell v. Alabama, 287 U.S. 45 (1932).
71. U.S. Const. amends. V, VI, XIV, § 1.
72. N.M. Const. art II, § 18.

Court in *Robinson v. Cox*. In that case the court cited several federal court decisions as authority for the proposition that due process does not require that parolees be provided with counsel at parole revocation hearings. The court specifically cited the decision of the United States Supreme Court in *Escoe v. Zerbst*[73] as setting the tenor for these holdings.

Further, the court rejected the contention that the New Mexico statute denying parolees counsel at appearances before the parole board is unconstitutional.

Lastly, the court abruptly distinguished *Ex parte Lucero* since that case dealt with probation revocation, and not parole revocation.

The *Robinson* decision was dealt a serious blow in 1970, when the Tenth Circuit, in *Murray v. Page*,[74] held that state parole revocation proceedings must comply with the due process requirements of the 14th Amendment of the United States Constitution. Specifically making reference to *Escoe v. Zerbst*, the court said:

> Subsequent determinations of minimal due process standards by the Supreme Court have not embraced the theory proposed in *Escoe*.[75]
>
> * * *
>
> Therefore, while a prisoner does not have a constitutional right to parole, once paroled he cannot be deprived of his freedom by means inconsistent with due process. The minimal right of the parolee . . . to appear AND TO BE HEARD at the revocation hearing is inviolate. Statutory deprivation of this right is manifestly inconsistent with due process and is unconstitutional.[76] (Emphasis added.)

If the holding of the United States Supreme Court in *Powell*, that it is meaningless to grant a hearing if the defendant is not afforded the right to counsel at the hearing, is read alongside *Murray*, then the *Robinson* rule faces an extremely uncertain future.

CONCLUSIONS

The present state of the law relating to the rights of prisoners and parolees appearing at hearings before parole boards may be summarized as follows:

With respect to hearings held to determine whether parole should be granted, all jurisdictions take the position that parole is a privilege and may be granted or denied at the discretion of the board. Prisoners have no Fifth or Sixth Amendment rights in such a situation.

73. 295 U.S. 490 (1934).
74. 429 F.2d 1359 (10th Cir. 1970).
75. *Id.* at 1360.
76. *Id.* at 1361-2.

Concerning revocation of parole, the states are unevenly divided into two factions. The majority adhere to the theory that parole revocation is the mere withdrawal of a privilege. Therefore the parolee has no constitutional rights in connection with such withdrawal. Whatever rights he may possess are created by statute, and such statutes are generally strictly construed.

The minority view is that depriving the parolee of his conditional status of freedom is so serious a step that it may only be carried out with due regard for his rights under the Fifth and Sixth Amendments of the Constitution. That is, the parolee is entitled at a minimum to a hearing at which he has the right to be represented by counsel.

Earlier discussion brought out the fact that the New Mexico courts have frequently asserted that this state is solidly entrenched in the majority camp.

No well-founded allegation has been made that the New Mexico Parole Hearing Board has been abusing its power or discretion by arbitrarily revoking parole for minor violations of the conditions of parole. This appears to be attributable to the conscientiousness shown by the members of the Board and the personnel of the Adult Probation-Parole Division in the performance of their duties in this area. However, parolees should be able to rely on something more concrete than scrupulousness to protect them from arbitrary or vindictive revocations.

The writer urges that the rules of *Robinson v. Cox* be reexamined in the light of the recent *Menechino*-type decisions, and that the New Mexico courts adopt the theory that parolees have a right to due process in parole revocation proceedings. This would include the right to counsel at the revocation hearing.

The disruptive effect of such a policy change on parole hearing procedure could be minimized by the application of the rule enunciated by the Tenth Circuit in *Earnest v. Moseley*[77] and *Cotner v. U.S.*[78] In those cases, the court held that due process is not violated by denying the parolee counsel at the revocation hearing, if the parolee has admitted the alleged parole violation or where the facts regarding the alleged violation are not contested.

Both the Chairman of the Parole Hearing Board and the Director of the Adult Probation-Parole Division have stated that in the vast majority of parole revocation situations, the parolee admits the violation with which he is charged and does not allege any mitigating circumstances to justify the violation.[79] In such cases, the present

77. 426 F.2d 466 (10th Cir. 1970).
78. 409 F.2d 853 (10th Cir. 1969).
79. Salazar Interview, *supra* note 12; Quintana Interview, *supra* note 9.

parole revocation procedure would continue unchanged. Only in those relatively infrequent instances where the facts relating to the alleged parole violation are in dispute would the parolee be entitled to appear before the Board with counsel.

The proposed change offers the advantage of giving parolees a greater degree of protection against arbitrary and capricious parole revocation than they have at present, while at the same time, imposing no unmanageable administrative burden on the Parole Hearing Board.[80]

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80. *In re* Tucker, 486 P.2d 660, 681 n. 67, 95 Cal. Rptr. 761, 785 n. 67 (1971). Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Louisiana, Pennsylvania, South Dakota, Utah, West Virginia, Michigan, Montana, Nevada, Washington and the District of Columbia presently permit retained counsel at parole revocation hearings.