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NON-TRIAL DISPOSITION OF CRIMINAL OFFENDERS: A CASE STUDY

In many cases effective law enforcement does not require punishment or attachment of criminal status, and community attitudes do not demand it. Not all offenders who are guilty of serious offenses as defined by the penal code are habitual and dangerous criminals. It is not in the interest of the community to treat all offenders as hardened criminals; nor does the law require that the courts do so. It is at the charge stage that the prosecutor should determine whether it is appropriate to refer the offender to noncriminal agencies for treatment or for some degree of supervision without criminal convictions.¹

The Citizens Probation Authority of Genesee County (CPA)² is a program of deferred prosecution and diversion from the criminal court process of selected criminal offenders. It was initiated on an informal basis in 1965 by Prosecuting Attorney Robert F. Leonard as a means of relieving the overcrowded conditions of the traditional criminal process and of freeing from the stigma of a criminal conviction those offenders who could benefit from a community treatment plan. In 1968, the informal CPA had expanded its operations to such an extent that it was established as an autonomous County department. This article examines the legal questions surrounding the operation of CPA, particularly with reference to its justification as a proper exercise of prosecutorial discretion (since there is no statutory authorization for the program) and to the safeguarding of the rights of those who participate in CPA.

A client’s participation in CPA takes place before he is actually charged with an offense, often even before formal arrest. Any offender who meets certain criteria, for example, that his suspected offense be a non-violent crime,³ is referred by the prosecutor’s office to CPA for an interview and investigation. If on the basis of these preliminary contacts CPA counselors determine

¹ This article was prepared in connection with an overall study of the Genesee County Citizens Probation Authority (CPA) which was financed by a grant from the Law Enforcement Assistance Administration (LEAA) of the United States Department of Justice.
³ Genesee County encompasses the metropolitan area of Flint, Michigan.
⁴ See note 22 and accompanying text infra.
that the program of probation and counseling, as opposed to traditional criminal prosecution, would be appropriate treatment, and if the suspect voluntarily agrees, the prosecutor will allow the offender to participate in a probationary treatment period of up to one year under the supervision of CPA. If the client satisfactorily completes his probation, which may include a requirement of restitution to the victims of his crime, prosecution is dismissed and any arrest or booking records are returned. If at the referral stage CPA decides that voluntary probation would not be appropriate treatment, the case is sent back to the prosecutor’s office for normal disposition. Anyone referred to CPA has the right to withdraw from the program at any time, with the understanding that his case then becomes subject to prosecution. Additionally, probation may be revoked and the case sent back to the prosecutor’s office if the client violates the terms of his probation.

A number of pre-trial diversion projects, similar to CPA, funded either by the Law Enforcement Assistance Administration4 or by the United States Department of Labor,5 have been set up in recent years in a number of cities around the country. Many are modeled after the Vera Institute’s Manhattan Court Employment Project in New York and Project Crossroads in Washington, D.C. While the programs are not entirely identical in operation, hopefully this discussion of some of the legal issues involved in non-trial disposition of criminal offenders will be of use outside the immediate confines of the CPA situation. Ultimately the continued success and expansion of this type of program depend on the sociological and penological effectiveness of such treatment concepts. However, these questions concerning the immediate and long-range effects on the individual and on the community, while deserving of study, are outside the scope of this article.6

I. PROSECUTORIAL DISCRETION

A. Separation of Powers

Although the duty of the public prosecutor is to represent the
state in all criminal proceedings, one fundamental premise of American criminal procedure is that a public prosecutor may act according to his own discretion in deciding whether to charge an individual with a particular offense. The precise limits of this discretion have never been clearly defined, in part because of the inherent difficulty, and, indeed, undesirability of doing so. While the commentaries have discussed the subject extensively, courts treat it with a broad brush. The available material suggests that the scope of the discretion is very broad and that judicial checks on the exercise of that discretion are few.

9 See Pugach v. Klein, 193 F. Supp. 630, 634–35 (S.D.N.Y. 1961), cert. denied, 374 U.S. 838 (1963), where the court discusses the myriad and complex factors which the prosecutor must consider in making his charge decision. The varying weight to be accorded each factor in individual decisions makes it impossible to define clear limits to these discretionary value judgments.
10 The very multitude of factors which makes precise limits hard to define is also an argument for not attempting such a definition. Since the purpose of discretion is to make possible a consideration of shifting factors of varying importance, strict mathematical formulae may only promote injustice. The counter-argument is that wide-ranging discretion, by allowing for individualized decisions at the expense of the rule of law, promotes injustice. See generally K. Davis, Discretionary Justice (1969).
13 The scope of the prosecutor's discretion is usually held to be limited only by the constitutional requirements of equal protection. The courts realize that the prosecutor cannot bring charges against every law violator, and they accept many justifications for selective enforcement of the laws. The prosecutor abuses his discretion only where there is an intentional purposeful discrimination. Thus, a criminal conviction will be reversed where "the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others." People v. Utica Daw's Drug Co., 225 N.Y.S.2d 128, 136 (App. Div. 1962). See also Two Guys From Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944 (E.D. Pa. 1959), aff'd, 366 U.S. 582 (1961), an action to enjoin selective enforcement of Sunday blue laws, citing Snowden v. Hughes, 321 U.S. 1 (1943).
14 In court it is difficult to challenge successfully the prosecutor's exercise of discretion. A person against whom prosecution is initiated has the heavy burden of showing purpose-
Nevertheless, the CPA program is a sufficiently basic alteration of the prosecutor's standard operating procedures to bring into question the proper scope of the discretion vested in his office. This program of large scale diversion of suspected offenders from the criminal process could be viewed as an executive encroachment upon what is properly legislative power. Specifically, according the probation opportunity to some and denying it to others pursuant to established referral criteria might be viewed as a usurpation of the legislature's function of defining classes of offenders and the appropriate treatment for each such class. To forestall such possible objections and to assure CPA's legality, legislative authorization for the program would be useful.

However, if the basic concept of prosecutorial discretion is above objection, legislative authorization, although useful, is not necessary. Systematic pre-judicial disposition of offenders through CPA is not, properly viewed, an expansion of traditional prosecutorial discretion; rather, CPA actually regulates that discretion within proper bounds. Every prosecutor's office engages in large-scale diversion of offenders through plea-bargaining, refusal to prosecute, or similar practices. If there are no controlling criteria, this diversion takes place on an ad hoc basis and may be influenced by illegal factors such as class or racial prejudice or political pressure. CPA standardizes the operation of prosecutorial discretion through the promulgation of rules and regu-
lations, to the end not of expanding the scope of discretion but of exercising that discretion more intelligently. The prosecutor still makes an individualized, case-by-case determination of whether to prosecute; CPA enables him to have more and better information about the suspect at the time the decision is made and offers the prosecutor a useful alternative to traditional criminal prosecution.

B. Delegation of the Charge Decisions

Even if the concept of prosecutorial discretion provides a sufficiently broad legal basis to support CPA as presently administered, a question remains as to whether the prosecutor's deference in almost all cases to CPA's conclusions with respect to the bringing of charges is a permissible delegation of his decision-making power. In a case in which the suspected offender has not been arrested, the prosecutor or his deputy first must decide whether a request for a warrant is appropriate. When lack of sufficient evidence or any other reason makes a request inappropriate, the prosecutor does not refer the suspect to CPA. Where a warrant request is appropriate or the suspected offender is already in custody, the prosecutor must refer him to the CPA for a pre-charge report unless the crime falls within a narrow and specific list of exceptions.

Referral, however, does not assure acceptance into the CPA probationary program and consequent suspension of criminal charges. The referred offender is immediately scheduled for an initial interview with a member of the CPA staff to determine his (1) willingness to accept moral responsibility for his unlawful acts; (2) consent to a further investigation that will enable the CPA to

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19 The prosecutor usually accepts a recommendation for referral made by the CPA. In 1968, 55 out of a total of 391 referrals requested by the CPA were rejected. In 1969, 143 out of 743 referrals were rejected, whereas in 1970 the proportion of rejections declined further to 144 out of 1,000. Citizens Probation Authority Statistical Comparison—Yearly Summary (on file with the University of Michigan Journal of Law Reform).


21 Prosecutor's Policy and Procedures for Referral to Citizens Probation Authority of Genesee County (mimeographed materials on file with the University of Michigan Journal of Law Reform) [hereinafter cited as Prosecutor's Policy and Procedures].

22 Cases in which referral will not be made are offenses involving criminal conspiracies not of an incidental or temporary nature and crimes involving physical assault or intimidation. Minor sex offenses which do not seriously threaten a person's well-being, such as indecent exposure and statutory rape between consenting parties, are referrable. Cases of carrying concealed weapons are referrable unless the behavior of the accused entailed necessarily injurious consequences. Cases of possession of soft narcotics, which until recently were referrable to CPA, are now referred to a separate agency, the Genesee County Regional Drug Abuse Commission. Prosecutor's Policy and Procedures.

23 Summary Description of the Citizens Probation Authority (mimeographed materials on file with the University of Michigan Journal of Law Reform) [hereinafter cited as Summary Description].
decide whether his social history prevents acceptance into a community treatment plan;\textsuperscript{24} and (3) willingness to fulfill the program's expectations of him.\textsuperscript{25} Once the CPA staff determines that an individual is amenable to community supervision during a period of probation, it develops a plan directed at short-term treatment of recent behavioral problems. Within three weeks it submits a "pre-sentence type" investigation and report to the prosecutor who then makes the final decision whether to press charges or suspend prosecution during the probationary period.\textsuperscript{26} The offender who is accepted is asked to sign a moral contract with the prosecutor wherein he agrees to abide by the terms of his probation.\textsuperscript{27}

Any de facto delegation of the charge decision by the prosecutor to CPA is nonetheless consistent with the traditional legal basis for prosecutorial discretion because impartiality of the charge decision is not impaired and ultimate control of the charge decision still resides in the prosecutor. One basis of prosecutorial discretion is the American belief that a public official is more capable of making impartial decisions concerning the advisability of bringing charges against an offender than is a private complainant—the person who in effect made the charge decision under the old English system of criminal justice.\textsuperscript{28} Permitting CPA participation in the charge decision does not vitiate the necessary impartiality of public prosecutions. To the contrary, the CPA staff is likely to be less partial than state prosecutors. Unlike

\textsuperscript{24} If the referred offender's personal history indicates that the instant offense was part of a continuing pattern of anti-social behavior, a recommendation that the referred offender not be admitted to CPA probation will be made to the prosecutor. Summary Description.

\textsuperscript{25} These expectations are generally of rehabilitation, such as reforming negative attitudes toward law and authority. Prosecutor's Policy and Procedures.

\textsuperscript{26} See note 19 supra.

\textsuperscript{27} The usual conditions of probation will include requirements that the client not leave the state without the written consent of the probation counselor, that he report periodically to his probation counselor, and that he not associate knowingly with law violators. In appropriate cases, the client may also be required to continue in school or to make restitution. Citizens Probation Authority Voluntary Probation Agreement (on file with the University of Michigan Journal of Law Reform).

the latter, the CPA worker is less susceptible to pressures from interested parties.\textsuperscript{29}

It might be argued that this very impartiality makes the CPA staff insensitive to public opinion regarding the types of persons who ought to participate. Judicial deference to the judgment of public prosecutors has often been justified by the belief that the prosecutor, especially an elected state prosecutor, makes charge decisions that accurately reflect community values.\textsuperscript{30} But this objection loses its force when one considers that although the CPA worker is protected from improper pressures concerning individual cases, the fact that the CPA program was established by the prosecutor and is always under his ultimate control assures sensitivity to community values.

Thus, CPA operates as a supplement to, and not a replacement of, the prosecutor's office. It impairs neither the legal justifications of prosecutorial discretion nor the prosecutor's final control over the charge/no charge decision. Rather, CPA enhances the knowledge and expertise necessary for a just decision-making process.

\textbf{C. Referral of Multiple and Adult Offenders}

In deciding whether to suspend criminal proceedings, the prosecutor must of course consider the public interest.\textsuperscript{31} Specifically, in the exercise of his discretion a prosecutor must not jeopardize the safety of the public.\textsuperscript{32} That most previous programs for the non-trial disposition of offenders who could have been convicted usually have involved first and juvenile offenders\textsuperscript{33} raises the question whether the prosecutor's practice of referring adult and multiple offenders to CPA is violative of public policy and, as such, an abuse of discretion.

The fact that CPA embraces pre-trial disposition of adult and multiple offenders does not necessarily lead to the conclusion that

\textsuperscript{29} Since its staff is not elected, there is little possibility that political expediency will influence CPA's decision to accept a given individual.

\textsuperscript{30} F. Miller, supra note 28, at 154–56.

\textsuperscript{31} The prosecutor must decide whether public policy would justify the prosecution of acts that fall within the terms of a criminal statute. See, e.g., Howell v. Brown, 85 F. Supp. 537, 540 (D. Neb. 1949), and Hassan v. Magistrates Court. 20 Misc. 2d 509, 514, 191 N.Y.S.2d 238, 243 (Sup. Ct. 1959). Although courts rarely state explicitly that the interest of the community is a major factor in the charge decision, it is clear that in practice it is. See, F. Miller, supra note 28, at 287–92. See also Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961).

\textsuperscript{32} Prosecutor's Policy and Procedures states that "[a]ll rehabilitative endeavors of this program are subordinate to the primary and over-riding concern for public security."

\textsuperscript{33} See the discussion of such programs in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 6 (1967).
the program is not in accord with public policy. The low rate of recidivism among individuals who have participated in the CPA program\textsuperscript{34} refutes, as a practical matter, any assertion that the program compromises the security of the community. Indeed, the generally higher rate of recidivism among juvenile offenders as compared to adult offenders\textsuperscript{35} indicates that CPA acceptance of adults endangers the community less, not more, than acceptance of juveniles.

\textbf{D. Advantages of Systematization}

The President’s Crime Commission saw prosecutorial discretion as a potentially useful tool in the administration of justice.\textsuperscript{36} Yet before that discretion could be fully utilized in a rational and intelligent manner, three deficiencies in the normal exercise of discretion had to be corrected. Currently, most prosecutors suffer from a lack of sufficient information on which to base decisions to prosecute or not to prosecute, a lack of clearly stated standards to guide their decision-making, and a lack of established procedures to implement their decision-making.\textsuperscript{37}

CPA serves to remedy these three deficiencies. By requiring that a preliminary interview with and an investigation of the suspect be conducted, and that a report be submitted to the prosecutor,\textsuperscript{38} CPA provides the prosecutor with information about the suspect before he makes the charge/no charge decision. Further, the prosecutor has set forth explicit, published criteria to guide the decision-makers.\textsuperscript{39} Finally, there is an established procedure for making the decision.\textsuperscript{40} Thus, the CPA program systematizes the discretion so as to make it more controllable.\textsuperscript{41} Realizing that

\textsuperscript{34} The rate of recidivism, that is the rate of arrest during probation, has consistently remained under 4 percent, with many of those being so-called “technical violators.” Summary Description.

\textsuperscript{35} \textsc{President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society} 55 (1967).

\textsuperscript{36} \textit{Id.} at 133.

\textsuperscript{37} \textit{Id.}.

\textsuperscript{38} See notes 24–26 and accompanying text \textit{supra}.

\textsuperscript{39} See notes 21–25 and accompanying text \textit{supra}.

\textsuperscript{40} See notes 20–27 and accompanying text \textit{supra}.

\textsuperscript{41} Controllable not only in the sense of managerial control by an executive (the prosecutor) over subordinate workers (the prosecutor’s staff), but also in the sense of making the prosecutor’s decision more amenable to judicial review. The creation of CPA and the promulgation of regulations have in effect, established a new administrative agency. Arguably, therefore, in a proceeding for judicial review of administrative action, a person who fits within the class of persons described in the CPA program’s published criteria for admission should be able to assert due process and equal protection rights if he is denied admission to the program on illegal grounds. The self-imposed rules of the program currently state that “[f]ailure to refer an offender who meets the referral criteria pre-empts the authority of the prosecuting attorney and denies that offender equal opportunity before the law.” Prosecutor’s Policy and Procedures.
not all offenders can or should be processed through the conventional criminal justice system, the CPA program provides a rational process for deciding which offenders become subject to full criminal sanctions and which to more informal disposition. The aim of this structuring is to make the exercise of discretion less haphazard and more likely to serve beneficial ends.

II. PROTECTING THE CONSTITUTIONAL RIGHTS OF PARTICIPANTS

This part of the article deals with the rights of participants in the CPA program and safeguards necessary to protect those rights. The primary concern will be to analyze the availability to participants in the CPA program of constitutional protections guaranteed to individuals formally charged with a crime. The following discussion will consider how best to preserve the CPA client’s fundamental rights without destroying the effectiveness of the CPA treatment plan.

A. Showing of Probable Cause

It is necessary first to examine the constitutionality of an unstated but fundamental premise on which the program is built: that an individual may consent to restrictions of his liberty imposed by governmental authority, without any independent showing by the government of its right to exert such control over the individual. The restrictions on liberty suffered by the CPA client are not insubstantial. Although the client voluntarily agrees to abide by these restrictions, the theory of our government is that the right to liberty is inalienable, the implication being that an individual cannot contract away his liberty.

The legal issue becomes whether as presently structured CPA bases participation on an unconstitutional condition—the forfeiture of due process rights to a determination of the sufficiency of the government’s grounds for asserting control over the individual. Since the CPA client has not been convicted of any crime, it is not proper to view his probation as punishment. Conceptually, the restrictions on his liberty are merely substitutes for arrest and pre-trial detention, restrictions to which any citizen suspected of a crime is subject. Although there is no constitutional right of freedom from arrest, the arrest must be carried

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42 See note 27 supra.
43 This, of course, is an idea basic to the American democracy, appearing, for example, in the Declaration of Independence.
out in accordance with due process.\textsuperscript{44} The essential difference between the typical arrest situation and the CPA situation is that in the former, in order to obtain a warrant to arrest a suspect the government must show probable cause to believe him guilty of a crime.\textsuperscript{45} Participation in CPA, on the other hand, usually takes place without the prosecutor's ever obtaining a formal warrant.\textsuperscript{46} The client spends as much as a year under the control of CPA without any procedural check on CPA's assertion of that control.\textsuperscript{47} 

This objection to the CPA structure, while constitutional in nature, can be obviated by means of relatively simple procedural changes. The existing policy of the prosecutor's office is that it will not refer a person to CPA when the evidence is insufficient to secure his prosecution.\textsuperscript{48} Presently this is a unilateral decision, in the uncontrolled discretion of the prosecutor's office. Although the demands of due process vary, depending on the situation,\textsuperscript{49} due process would seem to be met if the CPA program contained a procedure for independent determination of the sufficiency of the prosecutor's case. For example, the program might make it a matter of policy to obtain a formal arrest warrant for every client. The extent of the showing required would be probable cause to believe the suspect guilty.\textsuperscript{50}

\section*{B. Representation by Counsel at CPA Proceedings}

1. \textit{The Sixth Amendment and Fourteenth Amendment Due Process}—There are two possible stages in the CPA program at which the assistance of counsel would be particularly important.

\textsuperscript{44} In Beauregard \textit{v.} Wingard, 230 F. Supp. 167 (S.D. Cal. 1964), the court, in considering whether an arrest by state officers without due process of law gave rise to a cause of action under a federal civil rights statute, said at 185: "There is no question that freedom from arrest... except through due process [is a right] 'implicit in the concept of ordered liberty,' and guaranteed by the Fourteenth Amendment against invasion by the State."

\textsuperscript{45} This requirement of a showing of probable cause is based on the fourth amendment, which was held to apply to arrest as well as search warrants in Giordenello \textit{v.} United States: 357 U.S. 480 (1958). See also Brown \textit{v.} Faunleroy, 442 F.2d 838 (D.C. Cir. 1971), and Pugh \textit{v.} Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971).

\textsuperscript{46} For a description of the CPA procedure, see text accompanying notes 20-27 supra.

\textsuperscript{47} Arguably, this deficiency has no harmful practical effect. Anyone who is so free even of the appearance of guilt that the government could not show probable cause would probably refuse participation in CPA, thus bringing into play all the procedural safeguards of the normal criminal process. However, this hardly seems to be a valid argument against conforming CPA practice to the requirements of due process, especially if such conformity would be a rather simple matter.

\textsuperscript{48} See text accompanying note 21 supra.

\textsuperscript{49} "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction." Zemel \textit{v.} Rusk, 381 U.S. 1, 14 (1965) (footnote omitted).

\textsuperscript{50} See note 45 supra.
At the time of the initial referral an attorney's advice would enable a prospective client to make an informed decision as to whether to participate in the program. Also when a CPA client is threatened with revocation of his conditional probation, counsel could assist him in demonstrating that such action is unjustified.

The right to counsel in criminal proceedings involving felonies is guaranteed by the sixth amendment, as made applicable to the states by the due process clause of the fourteenth amendment. The sixth amendment entitles the accused to the assistance of counsel in "all criminal prosecutions," and the Supreme Court has interpreted this provision to mean that an accused is entitled to the guidance of counsel at every critical stage in the proceedings.

It has been held that the accused must be afforded the assistance of counsel in a state hearing revoking probation and imposing sentence. In Mempha v. Rhay the sixth amendment was deemed to require appointment of counsel at every stage where substantial rights were affected. Although Washington state procedure directed that the probationer who has violated the terms of his probation receive the maximum sentence prescribed for his original offense, the Court held that substantial rights were involved since the sentencing judge recommended the length of time the person should actually serve before becoming eligible for parole.

The decisions of courts considering whether Mempha compels

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51 Offenders who are charged with misdemeanors have not been considered to be constitutionally entitled to the assistance of counsel. In the past the Supreme Court has denied certiorari in cases raising the issue of whether the refusal to appoint counsel for indigent misdemeanants may be a denial of equal protection. (See the dissenting opinion of Mr. Justice Stewart in DeJoseph v. Connecticut, 385 U.S. 982 (1965), where the Court denied certiorari to consider this issue.) A Florida case holding that an indigent misdemeanor defendant is entitled to counsel only when the offense is punishable by a sentence of more than six months currently is before the court. Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970), cert. granted, 401 U.S. 908 (1971), restored for reargument, 404 U.S. 999 (1972). Under existing decisions, however, the following discussion applies only to those CPA participants who may be subsequently charged with felonies.

52 U.S. CONST. amend. VI.


Furthermore, Mich. Const. art. 1, § 20, as implemented by statute, Mich. Comp. Laws Ann. § 763.1 (1968), echoes this guarantee. See also id. § 768.7 providing for the appointment of counsel to represent prisoners accused of crimes.

54 The U.S. Supreme Court has yet to indicate definitely that stage of the proceedings at which the right to counsel attaches. It has, however, held that counsel must be furnished at any critical stage and that such a stage is "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226 (1967) (footnote omitted).


56 Id.

57 Id. at 134.

a state to provide counsel at parole revocation hearings predict the impact of Mempha on the right to counsel in CPA proceedings, for the analogies between parole and the CPA program are striking. Both parole and the CPA program have as one of their primary purposes rehabilitation of the participant. Moreover, although parole proceedings take place after sentence has been imposed while participation in the CPA program occurs prior to the initiation of formal criminal charges, neither involves an adjudication of the suspect’s guilt or innocence. A parole board determines whether a prisoner has been sufficiently rehabilitated to be eligible for conditional release. CPA evaluates an individual’s psychological and sociological history in order to determine his amenability to a treatment plan. Unlike a jury which must determine as a matter of fact whether a defendant is guilty of the behavior charged, a parole board, like the CPA staff, subjectively evaluates the character and prospects of the individuals appearing before it.

In view of the functional analogy between CPA and a parole board, it is significant that most federal courts hold that Mempha does not imply a sixth amendment requirement of assistance of counsel at parole, as opposed to probation, revocation hearings. Mempha is often said to stand only for the proposition that counsel is required at deferred sentencings. In Beardon v. South

59 The CPA staff decides whether the alleged offense is part of an established pattern of anti-social behavior or an isolated incident of unlawfulness. The individual’s willingness to accept responsibility for his previous unlawful behavior is an important factor in the CPA’s decision to treat an offender initially referred by the prosecutor. Summary Description.

60 See, e.g., Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); Rose v. Haskins, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968); Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971); Mead v. California Adult Authority, 415 F.2d 767 (9th Cir. 1969). The United States Courts of Appeals for the Third, Fourth and Tenth Circuits have also held the sixth amendment does not guarantee counsel at parole revocation hearings. The decisions recognize that in extraordinary cases due process may compel the state to provide for the appearance of counsel if the fairness of the proceedings would otherwise be impaired. See United States ex rel. Halprin v. Parker, 418 F.2d 313 (3d Cir. 1969) (the appointment of counsel was not necessary because appellant was arrested for an admitted violation of the terms of his parole and therefore could only attempt to persuade the board to overlook the violation); Beardon v. South Carolina, 443 F.2d 1090 (4th Cir. 1971) (counsel need be appointed only when the parolee denied the existence of a violation and when the fundamental fairness of the proceedings would be impaired by the absence of counsel); Alvarez v. Turner, 442 F.2d 214 (10th Cir. 1970), cert. denied sub nom., McDannell v. Turner, 339 U.S. 96 (1970) (the opportunity to appear with appointed or retained counsel must be available to every releasee whenever an issue of disputed fact is involved).

61 See Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968), where the court refused to overrule a case decided before Mempha which denied parolees the assistance of counsel at parole revocation hearings. In the court’s view, the United States Supreme Court held only that “the defendant was entitled to the assistance of counsel ‘at the time of sentencing where the sentencing has been deferred subject to probation.’ ” Id. at 375.
Carolina, the Fourth Circuit suggested that Mempha does not compel states to furnish counsel at parole revocation proceedings, because the burden of providing counsel is heavier than in the case of probation revocation. The court posited that a parole revocation proceedings, unlike probation revocation hearings, would probably not occur in the same district as that in which the individual was originally tried. Moreover, more time was likely to intervene between trial and parole revocation proceedings than between trial and probation revocation hearings. Therefore the attorney who represented the releasee at his original trial could also represent him at probation revocation proceedings with little additional effort, but this would not be possible in the case of a parolee. However, this rationale should not be dispositive of the issue whether the sixth amendment requires the presence of counsel at parole revocation. Moreover, the Beardon court's holding that counsel is not required at parole revocation hearings does not apply to CPA proceedings. The burden of providing counsel to assist the CPA participant either at the time of referral or at a limited hearing prior to revocation would not be as great as that of providing counsel at parole revocation hearings. CPA proceedings take place in the same city in which a subsequent trial would be held and would have to take place within a short time of the trial because the maximum probationary period is one year. The burden of providing counsel at an informal revocation hearing would be even less than that of providing counsel to all potential clients at the referral stage, because, should probation be revoked, the right to counsel in any event attaches shortly thereafter when the accused appears before a judge or magistrate.

There is a second and more frequently given reason for the inapplicability of Mempha to proceedings before parole boards. The danger of the loss of certain legal rights, such as the right to appeal and the right to withdraw a plea of guilty, which was a major factor motivating the Supreme Court's decision, does not

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62 443 F.2d 1090, 1092 (4th Cir. 1971).
63 See Judge Winter's dissenting opinion, id. at 1097. "I cannot read Mempha . . . to rest on the premise that the degree of the burden on the convenience of counsel is a determining factor of when the right to counsel attaches."
64 See part II E 2 infra.
65 The CPA could revoke probation if the client violated the terms of his probation. A violation of the law, leaving the state without the counselor's consent, failure to report to CPA regularly, association with known criminals, or refusal to make restitution payments could result in revocation. Summary Description.
66 Any person accused of a felony may request the state to provide counsel at the time he first appears before a justice of the peace or magistrate. Upon a proper showing of indigency, the state must then furnish counsel at public expense. Mich. Comp. Laws Ann. § 775.16 (1968).
67 398 U.S. at 135–36.
arise in parole revocation proceedings.\textsuperscript{68} Parole is said to be a privilege, and not a right; and in \textit{Hyser v. Reed} the D. C. Circuit decided that therefore the assistance of counsel is not secured by the Constitution.\textsuperscript{69} The unstated premise of this argument is that the parolee has no legal right to freedom from incarceration before the stated term of his sentence has expired. Since the CPA client likewise has no legal right to be referred for supervision in the community rather than formally charged with his alleged offense, the assistance of counsel would seem to be unnecessary insofar as the sixth amendment is concerned either at the referral stage when the probation privilege is at stake or when the probation privilege is withdrawn.

However, the viability of the right-privilege distinction has become questionable as a result of the decision of the Supreme Court in \textit{Goldberg v. Kelly}.\textsuperscript{70} In deciding that recipients of welfare benefits were entitled to notice and a hearing before payments could be terminated, the Court rejected the state's argument that the constitutional challenge to procedures preceding withdrawal of benefits could be answered by the assertion that public assistance benefits are a privilege and not a right.\textsuperscript{71}

In \textit{United States ex rel. Bey v. Connecticut Board of Parole}\textsuperscript{72} the Second Circuit recognized the implications of \textit{Goldberg} when it decided contrary to the majority of the federal circuit courts\textsuperscript{73} that due process required the assistance of counsel at all parole revocation proceedings. The court realized that to rely unanalytically on the act of grace theory as was done in \textit{Hyser} was no longer tenable. Rather it held that whether lack of counsel deprived parolees of due process involved a consideration of three factors: (1) the stake of the parolee in the proceedings; (2) the

\textsuperscript{69} 318 F.2d 225 (D.C. Cir. 1963), \textit{cert. denied sub nom.}, Thompson v. United States Parole Bd., 375 U.S. 957 (1963). Judge, now Chief Justice, Burger wrote for the court:
Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege.
\textit{Id.} at 237. \textit{But cf., In re Gault}, 387 U.S. 1 (1967), where the Supreme Court noted that the state's role as parens patriae did not prevent the right to counsel from attaching in delinquency hearings.
\textsuperscript{70} 397 U.S. 254 (1970).
\textsuperscript{71} \textit{Id.} at 262.
\textsuperscript{72} 443 F.2d 1079 (2d Cir. 1971). \textit{See also} the dissenting opinion of Judge Winter in Beardon v. South Carolina, 443 F.2d 1090, 1096 (4th Cir. 1971).
\textsuperscript{73} See note 60 \textit{supra}.
lawyer’s impact on the fairness of the proceedings; and (3) the foreseeable effects on state institutions recognizing that right.\textsuperscript{74}

If the \textit{Bey} analysis is adopted, the close analogy between the parolee and the CPA participant strongly suggests that although the assistance of counsel may not be required at the referral stage of CPA proceedings, due process may require providing counsel at the revocation stage of CPA proceedings. Whereas the three factors set forth in the \textit{Bey} case are present at the revocation stage of CPA proceedings, perhaps two of these factors are absent at the referral stage. First, in both cases the CPA client’s interest in the proceedings, conditional freedom from prosecution and possible incarceration, is similar to that of the parolee.\textsuperscript{75} Second, although neither forensic skill, legal training, nor the advocate’s role in a decision-making process qualifies a lawyer for participation in the referral phase of CPA proceedings,\textsuperscript{76} when revocation of the conditional probation is involved an attorney should be able to assist CPA in deciding the factual question of whether the client’s behavior constituted a violation of the conditions of his probation.\textsuperscript{77} The presence of a lawyer at this hearing would enhance the fairness of CPA revocation procedures. Finally, while at the referral stage counsel might interfere with the atmosphere of rehabilitation necessary, the participation of counsel in hearing to decide whether to continue the CPA client’s probation or initiate formal criminal charges would not unduly disrupt the CPA program.\textsuperscript{78} Counsel would not introduce friction between the client and his probation officer, since the right to counsel would not attach until revocation seemed imminent.\textsuperscript{79}

\textsuperscript{74} 443 F.2d at 1086.

\textsuperscript{75} Perhaps the interest of the CPA client deserves more protection than that of the parolee because, unlike the parolee, the CPA client has not been lawfully convicted. See Price v. Johnson, 334 U.S. 266, 285 (1948), for the proposition that conviction of a felony may permit restrictions of freedoms guaranteed other citizens so far as “justified by the considerations underlying the penal system.”

\textsuperscript{76} The purpose of referral proceedings is to obtain a subjective evaluation of an individual’s amenability to treatment. The lawyer’s persuasive powers would not contribute to this process.

\textsuperscript{77} United States ex \textit{rel.} Bey v. Connecticut Bd. of Parole, 443 F.2d 1079 (2d Cir. 1971). The court points out that the decision to revoke or grant parole calls for knowledge of psychology, sociology, and penology—fields in which the lawyer ordinarily has no expertise. It reasons that the initial parole release decision involves intangible subjective factors whereas a necessary precondition to reincarceration is a finding of a violation of the terms of parole. Legal training renders a lawyer able to analyze and organize evidentiary matter so as to aid the parole board in reaching a just conclusion. The same reasoning applies to the decisions involved in referral to and revocation of probation: See, \textit{e.g.}, Mempha v. Rhay, 389 U.S. 128, 135 (1967).

\textsuperscript{78} See text accompanying note 62 \textit{supra}.

\textsuperscript{79} The \textit{Bey} court applies the same analysis to the case of a parolee:

Nor does our decision threaten to introduce friction into the relationship
2. *Fourteenth Amendment Equal Protection*—Some state courts, including the Michigan Court of Appeals, hold that even though due process may not require the assistance of counsel at a limited parole revocation hearing, fourteenth amendment equal protection requires the state to furnish counsel at public expense to parolees threatened with revocation of probation. In *Warren v. Michigan Parole Board* the Michigan court overruled an earlier decision that held that neither due process nor the sixth amendment entitled an indigent parolee to representation by counsel. The *Warren* court decided that when a statute permits the parolee to be represented by counsel, the state's failure to appoint counsel to represent indigent parolees in cases where there is a factual dispute as to whether there was a violation of probation constitutes a denial of equal protection. While no statute applies to proceedings before CPA, CPA permits retained counsel to attempt to persuade it to continue probation, and the Michigan court's reasoning would seem to dictate that failure to appoint counsel at a probation revocation hearing, at least when there is a factual dispute, would deny indigent clients equal protection of between a parolee and his assigned parole officer. The right to counsel does not attach until the parole status might imminently be discontinued. Neither will counsel's participation in proceedings post-dating a parolee's arrest and incarceration pending his hearing add in any degree to the burden of the overworked parole officer, or require him to divert his energies from his rehabilitative to his "patrolman" functions.

443 F.2d at 1088–89 (2d Cir. 1971).


*MICH. COMP. LAWS ANN.* § 791.240a (1968). The Michigan court noted that the previous statutory provision had been repealed, that as reenacted the clause entitling the accused to appear with counsel "at his own expense" had been eliminated, and that the current statute merely provides that an accused may appear "personally or with counsel."

The Michigan court expressly reserved the question whether the state would be required to furnish counsel to indigents if there were no factual dispute as to the violation of the terms of parole:

Where . . . there is a factual dispute, counsel is of fundamental importance . . . and the refusal to appoint counsel for indigent parolees is, therefore, a denial of equal protection of the laws. We recognize that counsel might be of assistance even in a case where the parole violation is admitted. . . . To decide this case, it is not, however, necessary to express an opinion whether the denial of counsel denies equal protection in a case where his function might be limited to a plea to discretion.

23 Mich. App. at 771, 179 N.W.2d at 672.

Telephone interview with James B. Wright, Director of the Citizens Probation Authority, Jan. 5, 1972. If a participant in the program retains counsel, his attorney could attempt to persuade the CPA to recommend extension of his client's probation.
the law. Even in the absence of a factual dispute, the Warren holding suggests that it would be appropriate to appoint counsel.\footnote{See note 85 supra.}

However, it is unclear whether Warren necessitates that counsel be provided at the initial referral stage of the CPA program. At present, retained counsel can accompany potential clients to the initial interview but he is not allowed to answer questions or influence the probation decision.\footnote{Telephone interview with James B. Wright, Director of the Citizens Probation Authority, Jan. 5, 1972. The client is typically accompanied by a lawyer when he has been arrested and booked over the weekend and the prosecutor's absence prevents referral to the CPA. Mr. Wright insisted that attorneys do not influence the decision of the CPA staff to accept an individual; CPA strictly adheres to the criteria set forth in the Prosecutor's Policy and Procedures for Referral to Citizens Probation Authority.} The lawyer's role is limited to advising his client on whether to accept conditional probation or to contest the charge. The Warren court noted that an advocate could attempt to persuade a parole board to parole\footnote{23 Mich. App. at 771, 179 N.W.2d at 672.} and that failure to provide counsel to all indigents would deprive them of equal protection of the laws.\footnote{See part 11 B 2 infra for a discussion of equal protection standards for indigent offenders.} However, a lawyer cannot attempt to sway the CPA staff member's decision. The interests of the indigent CPA candidate would be adequately protected by providing counsel upon request.\footnote{Telephone interview with James B. Wright, Director of the Citizens Probation Authority, Jan. 5, 1972. Clients who question the legality of their arrest generally request a lawyer. The CPA usually calls the Genesse County Legal Services to advise them that a potential client has been referred and request that the case receive prompt attention.} In order to guarantee that all who ask to consult with a lawyer may do so, it would be advisable to draft a statute that would provide for counsel for indigent CPA clients at public expense.

\section*{C. Restitution Requirement}

The willingness and ability of an offender to make restitution is a most important factor in the prosecutor's decision whether to suspend prosecution in favor of voluntary probation in the CPA program.\footnote{Prosecutor's Policy and Procedures.} If possible, restitution should be made immediately so that the complainant is completely repaid prior to the time the prosecutor makes his final decision to accept or deny probation.\footnote{Id.} However, if money is still owed at the time the prosecutor must make a decision, he evaluates efforts made by the CPA candidate to date and the expectation of his making restitution within the
normal probationary period. In addition the CPA candidate is expected to pay a one hundred dollar probation fee before entering the CPA program, except that payment is not required in hardship cases.

The restitution requirement and probation fee conform to conditions permitted by statute in Michigan for court-imposed probation. However, the restitution requirement may result in exclusion of indigents from participation in the CPA program. This possibility raises the issue whether an otherwise referable indigent is denied equal protection of the laws by CPA procedures that permit a person with means in a similar position to “purchase” eligibility for probation.

In Griffin v. Illinois the Supreme Court rejected by implication the argument that the state is not required to equalize financial disparities and held that failure to furnish at public expense a trial transcript necessary for appeal denied the indigent defendant equal protection of the law. In Douglas v. California decided six years later, the Court held that an indigent could not be denied the assistance of counsel on appeal. Therefore, in the context of criminal proceedings, a statute both fair on its face and nondiscriminatorily administered by which leads to one result for the wealthy and another for the poor may violate the equal protection clause.

Two recent Supreme Court decisions, Williams v. Illinois and Tate v. Short, rely on the Griffin-Douglas analysis for the decision that imposition of a fine as a sentence and automatic conversion of it into a jail term solely because of inability of the defendant to pay the fine immediately in full denies an indigent

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94 This probationary period may be extended, however, if restitution is not completed within the given period, or probation may be terminated with the consent of the complainant. Id.

95 Telephone interview with James B. Wright, Director of the Citizens Probation Authority, Nov. 8, 1971. The $100 fee helps defray CPA costs. Inability to pay the $100 fee does not, however, preclude referral. The example of a mother on A.D.C. was given as representative of the type of case in which the probation fee requirement is waived.


98 Id. at 28.

99 Id. at 19. Mr. Justice Black asserted that “there can be no equal justice when the kind of trial a man gets depends on the amount of money he has.”


Non-Trial Disposition defendant equal protection. Since confinement was contingent upon ability to pay, the state imposed different consequences on two categories of persons without meeting its burden of showing a substantial and legitimate purpose justifying the discriminatory result. An important factor in both decisions was the state's lack of a penological interest in the incarceration of the indigent defendants involved. In both cases the Court also emphasized the available alternatives to which the state could resort to avoid imprisoning indigents for involuntary nonpayment of fines and implicitly approved procedures for installment payments of fines.

Although inability to make restitution does not result in automatic incarceration of a CPA candidate, the rationale for Williams and Tate nonetheless applies. If an otherwise eligible offender is automatically denied the rehabilitative advantages of participation in the CPA program solely because of his inability to make restitution, the state has established a procedure leading to one result for the indigent defendant and another for the wealthy. Such a result may deny equal protection unless the state can demonstrate that the requirement of restitution is rationally related to a substantial state interest.

Certain significant state interests are perhaps unique to the CPA restitution requirement. The requirement may remind the CPA client of his wrongdoing and so increase his awareness of an obligation to society. Therefore, restitution may be a necessary part of the CPA rehabilitative program. Furthermore, exclusion of indigents from the program is not automatic, since payment in installments is permitted. Permitting restitution payments to be

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103 Mr. Chief Justice Burger stated for the majority that once the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by the reason of their indigency.

399 U.S. at 241-42.

104 The Williams Court mentions installment payment plans as a means of avoiding imprisonment for involuntary nonpayment of fines, 399 U.S. at 244 n.21. After stating that the state is free to choose from a variety of solutions to the problem of imprisonment of indigents for nonpayment of fines, the Tate court noted existing procedures for payment of fines in installments. 401 U.S. at 395 n.5.

105 Mr. Wright estimates that five out of one thousand individuals referred in 1971 were denied acceptance into the CPA program solely because they were unable to make restitution. Telephone interview with James B. Wright, Director of the Citizens Probation Authority, Jan. 5, 1972.

106 399 U.S. at 238. The Williams Court rejected the state's contentions that its interest in the collection of fines justified the incarceration of indigents beyond the maximum term specified by statute. Also rejected was the argument that the Illinois "work off system" was a rational means of implementing that policy. Id.

107 For a more thorough presentation of the rehabilitative impact of restitution, see Best & Birzon, Conditions of Probation: An Analysis, 51 GEO. L. REV. 809, 819 (1963).

108 Summary Description.
made in installments should therefore preclude a finding that the restitution requirement deprives indigents of equal protection of the laws.\textsuperscript{109}

Nonetheless, providing for payment of restitution in installments does not insure that an unskilled and unemployable person will not be automatically excluded because of his prospective inability to make restitution.\textsuperscript{110} If the accused qualifies for referral to the CPA on all other grounds, to deny referral because his unemployable status makes the payment of restitution unlikely clearly discriminates against the poor and constitutes a denial of equal protection according to the \textit{Griffin} and \textit{Douglas} analyses. Although the issue is unlikely to be litigated given the difficulty a rejected individual would have in proving that he was otherwise eligible for probation, fairness would require that restitution as a condition of probation be waived or reduced in such cases.

\textbf{D. Speedy Appraisal of the Charge}

If the CPA client has a constitutional right to be speedily apprised of the charge against him being held in abeyance, it derives from the sixth amendment right to a speedy trial\textsuperscript{111} as made applicable to the states by the fourteenth amendment.\textsuperscript{112} In \textit{United States v. Marion}\textsuperscript{113} the United States Supreme Court indicated that there is no such sixth amendment right to be speedily charged until either a formal indictment or information is filed or the suspect is subjected to the actual restraints imposed by arrest and detention to answer a criminal charge.\textsuperscript{114} Nevertheless,

\begin{itemize}
  \item \textsuperscript{109} This procedure has been approved by the United States Supreme Court, albeit in dictum, as a means of maintaining equal protection for indigents in the context of imprisonment for nonpayment of fines. \textit{See} note 104 \textit{supra}.
  \item \textsuperscript{110} The Supreme Court left open the issue whether imprisonment of an indigent for nonpayment of a fine would violate equal protection when alternative methods of enforcement failed despite a reasonable effort to pay the fine. \textit{Tate v. Short}, 401 U.S. 395, 401 (1971).
  \item \textsuperscript{111} The sixth amendment provides that "the accused shall enjoy the right to a speedy and public trial."
  \item \textsuperscript{112} \textit{See} \textit{Klopfer v. North Carolina}, 386 U.S. 213 (1967), where the Court held that a procedure whereby the state could postpone prosecution indefinitely on an indictment after the accused had been discharged because of the jury's inability to reach a verdict denied the sixth amendment right to a speedy trial.
  \item \textsuperscript{113} 404 U.S. 307 (1971). The Court held that dismissal of an indictment for fraudulent business practices was not constitutionally required by reason of a three year delay between the occurrence of the alleged criminal acts and the filing of the indictment.
  \item \textsuperscript{114} \textit{Id.} at 320. The Court stated that until arrested "a citizen suffers no restraints on his liberty and is not the subject of public accusation." \textit{Id.} at 321. Whether the unique situation of an individual referred to the CPA and threatened with a potential charge would be the subject of a public accusation is unclear. Likewise, if an individual did enter into the CPA voluntary probation program it is not certain that the terms of probation would be considered to be a restraint on his liberty sufficient to justify application of the sixth amendment.
\end{itemize}
the Court did concede that if delay in charging a suspected offender were shown to have caused "substantial prejudice" to the accused's right to a fair trial and that the delay was a "purposeful device"\(^{115}\) to gain a tactical advantage over the accused, the due process clause of the fifth amendment\(^{116}\) would require dismissal. Although the Court stipulated that decision on whether delay had impaired the accused's rights to a fair trial would involve a delicate judgment based on the circumstances of the individual case,\(^{117}\) decisions of several lower federal courts suggest that certain factors are relevant to a finding of a violation of the fifth amendment: possible prejudice to the accused because of his inability to recall details relevant to a defense against the charge;\(^{118}\) the unavailability of witnesses necessary to an adequate defense;\(^{119}\) and purposeful aspects of the government's delay.\(^{120}\)

By way of analogy these considerations demonstrate the possible prejudicial effect of failing to inform the CPA participant of the specific offense with which he may be subsequently charged. If the CPA client is not notified at the very outset of the crime for which he was referred, when proceedings are later reinstituted he may be unable to recall details essential to an adequate defense.\(^{121}\) Although the problem of witnesses' becoming unavailable would still exist, at least the CPA client who was informed of the charge could soon thereafter discuss relevant details with potential witnesses and thereby increase the probability of their remembering details relevant to a possible defense.\(^{122}\) Moreover, full disclosure

\(^{115}\) Id. at 324.

\(^{116}\) The fifth amendment to the United States Constitution provides in part that no person shall "be deprived of life, liberty, or property, without due process of law." The Michigan constitution repeats this same guarantee verbatim. MICH. CONST. art. 1, § 17.

\(^{117}\) 404 U.S. at 325.

\(^{118}\) See Ross v. United States, 349 F.2d 210, 213–14 (D.C. Cir. 1965). The defendant, a man of limited education, was prejudiced by a delay of seven months, since he could not reconstruct the events of the day on which the alleged offense was committed.

\(^{119}\) United States v. Hauf, 395 F.2d 555, 556–57 (7th Cir. 1968). Although the court decided that the defendant had not demonstrated prejudice due to preindictment delay, it emphasized that if the defendant had demonstrated actual prejudice resulting from the death of a witness, a violation of fifth amendment due process would have been found.

\(^{120}\) See United States v. Parrott, 248 F. Supp. 196, 206 (D.D.C. 1965). Although the court was reluctant to find that the government purposefully gave priority to a civil rather than criminal action concerning violations of the Securities Exchange Act to strengthen its case through the use of civil discovery procedures, this circumstance was a significant factor in the court's decision to exercise its discretion under Federal Rule of Criminal Procedure 48(b) to dismiss the indictment.

\(^{121}\) Notice may be a factor in determining whether the accused has been prejudiced. See United States v. McCray, 433 F.2d 1173, 1175 (D.C. Cir. 1970). There, although ten months elapsed between the offense and arrest, the defendant knew the police were looking for him and "was on notice as to the charges made against him."

\(^{122}\) The inability of witnesses to recall details necessary to testify in behalf of the defendant has been a factor contributing to a finding of prejudice. See, e.g., Ross v. United
would discredit allegations of purposeful delay brought against the state by CPA clients who ultimately were prosecuted for an offense initially disposed of by referral to CPA.

Since participation in CPA precedes and usually obviates the need for initiation of formal proceedings involving the filing of an indictment or an information, the CPA client is never formally informed of the charges against him. Nevertheless, CPA does adequately safeguard any due process right to be speedily apprised which the client may arguably possess. The client is informally apprised of the offense giving rise to his referral during the initial intake interview with a CPA worker. After fully discussing his unlawful behavior with the CPA worker, the client is required to complete a "Constitutional Rights Questionnaire" which includes a question designed to determine whether he understands the nature of his purported crime. Therefore, the CPA client, though not given the opportunity to read a formal indictment or information at the time of referral, is notified with reasonable specificity of the offense so that it is unlikely that he will be deprived of due process by delays preceding the initiation of a formal criminal action.

E. Reinstatement of Criminal Proceedings

This article has so far dealt with the general legal basis for CPA—what in the law authorizes such a program, the rights of clients while participating in the program, and the safeguards necessary to preserve these rights. This part focuses on the ultimate sanction of the CPA: the reinstatement of criminal proceedings. Or perhaps for "reinstitution" one should read "institution;"

States, 349 F.2d 210, 214–15 (D.C. Cir. 1965). The court found that defendant was prejudiced when a witness who could have offered exculpatory testimony at trial refused to do so because she was doubtful of her ability to recall the events of the day of the crime. Defendant had been indicted seven months after the alleged crime was committed.

See note 120 supra.

Mich. Comp. Laws Ann. § 767.28 (1968). In order to obtain an indictment the prosecutor must present a prima facie case to the grand jury.

Id. § 767.2. An information may be obtained when the prosecutor presents evidence sufficient to convict a suspect in the absence of a valid defense.

Every person charged with any offense is entitled to a copy of the indictment or information. Id. § 767.28.

Summary Description.

Constitutional Rights Questionnaire (on file with the University of Michigan Journal of Law Reform). The accused client is asked whether he understands that he has been accused of violating the law by engaging in a specific activity. If he answers no or indicates that he does not consider his acts to have been criminal, the CPA interviewer discusses with the client the details of the accusation, including both the acts allegedly committed and the elements of the crime, until he understands the nature of the offense and the charge against him.
for recall that a client's participation in the CPA program, if he is accepted, begins even before he is formally charged with a criminal offense. If the client adheres to the terms of his probation, the entire matter is officially forgotten. If, however, a client violates the terms of his probation or voluntarily withdraws, the matter is referred to the county prosecutor, who may decide to press charges. The following discussion examines the constitutional questions implicit in such a decision in terms generally of (1) what warnings must initially be given the CPA participant in light of the possibility of subsequent prosecution; (2) whether there are limits on CPA's power to terminate a client's probation against his will; and (3) whether a client forfeits any constitutional rights by agreeing to cooperate with CPA.

1. Warning of Possible Revival of Criminal Charges — One issue is whether the CPA client has a right to be warned of the possibility of revival of criminal charges before consenting to participate in the program. Due process has been held to require that an accused have the right to prepare his defense when the evidence against him is fresh. Therefore, failure to warn the client of the possibility of reinstatement of criminal charges based on the offense that gave rise to his referral would deny him notice of the charge and thereby deny him due process. Furthermore, by participating in the CPA program the client has in effect waived his sixth amendment right to a speedy trial. Under the due process clause, an essential element of an effective waiver of a constitutional right is knowledge of the possible consequences. If the CPA client is ignorant of the possibility of ultimately being charged with his original offense, his decision to

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129 In 1968, 28 CPA candidates withdrew from the program voluntarily, 203 withdrew in 1969, and 173 withdrew in 1970. In 1968, 2 clients violated the terms of their probation, 20 did so in 1969, and 35 did so in 1970. All were subject to further prosecution. Citizens Probation Authority Statistical Comparison — Yearly Summary (on file with the University of Michigan Journal of Law Reform).

130 See text accompanying notes 116-22 supra.

131 See note 121 supra.

132 See text accompanying notes 158-61 infra.

133 Boykin v. Alabama, 395 U.S. 238 (1969). The Court, per Mr. Justice Douglas, held that a defendant who pleaded guilty to a charge could not be presumed to have voluntarily waived his fifth and sixth amendment rights when the record did not show that the trial judge ascertained whether the defendant was aware of his rights. See also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (for waiver to be valid under the due process clause, it must be "an intentional relinquishment or abandonment of a known right or privilege").

134 For example, if a defendant pleads guilty to a crime, he must know the maximum penalty that can be imposed. See Von Moltke v. Gillies, 332 U.S. 708 (1948). In that case, petitioner brought a habeas corpus action in the federal district court to vacate her plea of guilty to a charge of conspiring to violate the Espionage Act of 1917. The plea was tendered without the assistance of counsel. Her plea was vacated, in part because the record did not show that she was aware of the possible range of penalties. Id. at 724.
accept voluntary probation and waive his sixth amendment right to a speedy trial can scarcely be "intelligently" made.

CPA does effectively disclose the possibility of initiation of formal criminal proceedings if the client voluntarily withdraws or violates the terms of his probation. At the intake interview CPA provides potential clients with a "Constitutional Rights" booklet which sets forth this information in bold face type.\textsuperscript{135} The CPA interviewer discusses the booklet with the client in detail in order to be sure that he understands the information contained therein. However, the "Constitutional Rights Questionnaire" which the client is required to complete at the end of the discussion does not inquire as to whether the individual understands that non-prosecution is contingent upon successful completion of probation. Such a question should be included to be sure that the accused cannot subsequently attack his waiver on the ground that it was not intelligently made.

The same reasoning compels the conclusion that at the time of referral the candidate should be told of his alternative right to a jury trial. By agreeing to accept one year's voluntary probation, the CPA client temporarily waives his sixth amendment right to a jury trial. The jury trial he receives at a later date may not be of as high quality as a jury trial at the time of referral would have been when the evidence for and against him was fresher.\textsuperscript{136} The client therefore should be informed of the alternative of a jury trial in order for permanent waiver of fifth amendment rights to be effective.\textsuperscript{137}

The CPA "Constitutional Rights" booklet saliently lists the right of a trial by jury as one of the constitutionally guaranteed rights of a criminally accused person. In addition, the CPA questionnaire includes a question asking the potential client whether he understands that he has a right to answer any accusations made against him in a court of law.\textsuperscript{138} In order to protect the CPA client against unintelligent waiver of his right to a trial by jury,

\textsuperscript{135} Summary Description.
\textsuperscript{136} See text accompanying notes 116–22 supra.
\textsuperscript{137} Boykin v. Alabama, 395 U.S. 238 (1969). The case involved vacating the petitioner's plea of guilty. A guilty plea may result in either incarceration or probation, both of which restrict an individual's liberty. The analogy of entering a guilty plea to a decision to participate in the CPA program is particularly compelling since the consequences of pleading guilty and participating in the CPA program are so similar, that is, possible incarceration or probation as opposed to a judicial adjudication of guilt or innocence of the charge.
\textsuperscript{138} Your Rights as a Citizen When You Are Accused of an Offense, 1971–1972 (available at the Citizens Probation Authority of Genesee County, and also on file with the University of Michigan Journal of Law Reform).
this question could be altered slightly by adding the phrase “before a jury composed of your equals” to the question.

2. Prior Adversary Hearing—One aspect of participation in CPA is that the government does not relinquish its right to prosecute until after the client has satisfactorily completed his year’s probation. This immunity from prosecution is a matter of grace, given by the government in exchange for good behavior and participation in the program; it is therefore revocable during the probation period. While the threat of reinstatement of criminal proceedings is a reasonable sanction for the government to retain, constitutional fairness would seem to require safeguards against the arbitrary use of this power.

The United States Supreme Court in Escoe v. Zerbst, a 1934 opinion that has never been overruled, held that the Constitution did not require a probation-revocation hearing. The Court reasoned that because probation is an “act of grace,” it may be granted on whatever conditions the legislature chooses.

This is, of course, the classic right-privilege distinction since abandoned by the Court in other contexts.

Although some courts still follow the old precedent, the better-reasoned opinions, including decisions in at least two federal courts of appeals, hold that modern notions of due process require a hearing before probation or parole can be revoked. In Hahn v. Burke, for example, the United States Court of Appeals for the Seventh Circuit declined to follow Escoe, finding

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138 295 U.S. 490 (1935). Petitioner was entitled to a probation-revocation hearing because of a federal statute and not because there was any constitutional right to one.

140 Id. at 492–93.

141 See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits cannot be conditioned on an infringement of constitutionally guaranteed religious liberty); Shapiro v. Thompson, 394 U.S. 618 (1969) (public assistance benefits cannot be granted on conditions violative of equal protection). In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that due process required an evidentiary hearing before welfare benefits could be terminated. The Court said:

The constitutional challenge cannot be answered by an argument that public assistance benefits are “a privilege and not a right.” ... The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be “condemned to suffer grievous loss,” Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication.


143 See, e.g., Rose v. Haskins, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968) (due process does not require a hearing prior to parole revocation).

144 Murray v. Page, 429 F.2d 1359 (10th Cir. 1970) (parole revocation); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970), cert. denied, 402 U.S. 933 (1971) (probation revocation).
that the "holding" that probation is a privilege and can be granted on any conditions whatever was in reality only dicta, indeed dicta the basis for which "has all but been obliterated by recent Supreme Court opinions."\textsuperscript{145} Applying the balancing test of \textit{Goldberg v. Kelly},\textsuperscript{146} the court determined that due process required a hearing prior to probation revocation.\textsuperscript{147}

Arguably the \textit{Hahn} holding does not apply to the CPA situation, since the traditional probationer faces imprisonment should his probation be revoked, while the CPA probationer faces only a criminal prosecution and the possibility of incarceration. But immunity from possible loss of liberty is a substantial interest. Moreover, this interest is hardly outweighed by the slight governmental interest in "summary adjudication."\textsuperscript{148} True, the government need not grant immunity from prosecution; but if it does, it should not be able to revoke that immunity without meeting the requirements of due process, which in these circumstances would seem to entail a hearing at which the client could present his side of the case.

Michigan Compiled Laws Annotated section 771.4 guarantees a probationer a hearing before his probation can be revoked.\textsuperscript{149} It must be noted, however, that this statute applies by its terms only to court-imposed probation, not to a CPA-type program. The explanation for this is probably not that the legislature meant to exclude other forms of probation from the guarantee, but that in 1947 when the law was passed, programs like CPA did not exist. The legislature was thinking only in terms of traditional

\textsuperscript{145} 430 F.2d at 105.
\textsuperscript{146} See note 141 supra.
\textsuperscript{147} As the court states:
\begin{quote}
Weighing the "extent to which he [the petitioner] may be condemned to grievous loss" against "the governmental interest in summary adjudication" we find the petitioner's loss of freedom to outweigh the added state burden of providing a limited hearing to allow petitioner to be confronted with his probation violation and to be heard.

The state need not grant probation, but if it does so, it should not be able to arbitrarily revoke such probation without giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions upon which his probation was granted. . . . To allow the state to summarily revoke the petitioner's probation without a hearing to determine if the conditions upon which the probation was granted have been violated, is state action inconsistent with the due process guarantees of the fourteenth amendment.
\end{quote}
\textsuperscript{430 F.2d at 104.}
\textsuperscript{148} The most obvious governmental interest in allowing CPA to act unilaterally, without a prior hearing, in terminating a client's probation and referring his case back to the county prosecutor is the interest in avoiding the delay and expense inherent in any kind of hearing. In \textit{Hahn} the court found that these considerations were outweighed by the petitioner's loss of freedom. See 430 F.2d 104 n.3.
\textsuperscript{149} MICH. COMP. LAWS ANN. § 771.4 (1968) provides in pertinent part: "the probationer shall be entitled to a written copy of the charges against him which constitute the claim that he violated his probation, and shall be entitled to a hearing thereon."
court-imposed probation. In any event, the policy thrust of the statute clearly indicates that the legislature was concerned with guaranteeing rights to probationers and not with limiting that guarantee to a particular type of probation. Thus, though courts have never been asked to apply the hearing requirement of the statute to situations other than the revocation of the typical probation imposed by the sentencing court, it would not be difficult for them to construe the section to apply to the CPA context, using the legislative intent indicated above as the basis for its reasoning.

Michigan statutory law, then, would appear to require at least a limited hearing before CPA probation could be terminated without the client's consent. Even if the courts should find section 771.4 inapplicable to CPA probation, recent constitutional decisions indicate that modern notions of due process, quite independently of any statutory mandate, require a limited hearing before CPA probation can be revoked. Of course, if probation is being revoked because the client committed a crime while on probation, the trial which resulted in his conviction on that second offense would satisfy the hearing requirement.

3. Speedy Trial—A CPA client whose probation was terminated after, say, ten months might argue at a subsequent trial on his original offense that the government had intentionally delayed his trial, that his recollection of the events in question was no longer fresh, and that his ability to find witnesses had been hampered. The argument would conclude that the prosecution denied him his right to a speedy trial by encouraging and permitting his participation in the CPA program. If such an argument were

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150 In People v. Roberson, 22 Mich. App. 664, 177 N.W.2d 712 (1970), the court applied the protection of section 771.4 to revocation of a juvenile's status as a youthful trainee. The Youthful Trainee Act, MICH. COMP. LAWS ANN. § 762.11-.16 (1968) does not provide the same procedural guarantees as section 771.4. However, applying an equal protection concept and reasoning from In re Gault, 387 U.S. 1 (1967), the court gave juveniles under the Youthful Trainee Act the same rights as adult probationers. 177 N.W.2d at 714.

While the equal protection argument might be useful for extending these guarantees to CPA probationers, there are significant differences by which one can distinguish a CPA probationer from the typical situation. The main difference being the fact that the CPA probationer has not been convicted. The most promising method for extending the application of section 771.4 to the CPA probationer seems to involve the argument that the legislature's mention of post-conviction probation cannot be read as an intentional exclusion of other types of probation.

151 CPA should establish regulations governing the conduct of such hearings. The proceedings should be of an adversary nature, and the client should be represented by counsel. See part II B supra. Judicial interpretations of section 771.4 indicate that probation-revocation hearings need not be elaborate or formal, but the probationer must be given a reasonable opportunity to answer the charges against him, including the right to call witnesses in his behalf. See People v. Wood, 2 Mich. App. 342, 139 N.W.2d 895 (1966); People v. Hazen, 19 Mich. App. 576, 172 N.W.2d 860 (1969).
accepted, the government's retention of its right to press charges on the CPA client's original offense upon premature termination of probation would be of little use.

The right to a speedy trial is guaranteed by the sixth amendment, as made applicable to the states by the fourteenth amendment. In addition, the Michigan constitution, as implemented by statute, provides the same guarantee. However, it appears fairly certain that this right would not bar a trial after revocation of CPA probation, either because it never attached or because the defendant will be deemed to have waived the right.

Since a client's participation in CPA takes place entirely before he is formally charged, it seems doubtful that his right to a speedy trial ever attaches. The Supreme Court recently held that the constitutional right to a speedy trial does not vest until after prosecution is instituted. Rather, delays in arrest and indictment are controlled by the applicable statute of limitations.

Even if a court finds that the right to a speedy trial attaches at the point an individual is first referred to CPA, it could go on to find that the client-defendant effectively waived that right under all the circumstances. The right to a speedy trial is easily waived, especially in Michigan where the courts have adopted what might be termed a presumption of waiver. The right to a speedy trial never even attaches unless and until a defendant

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152 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.
156 United States v. Marion, 404 U.S. 307 (1971). The Court indicated that the right to a speedy trial might attach at the time of arrest, which could be well before the time of formal indictment. Id. at 320. Thus, Marion does not absolutely foreclose the CPA probationer from arguing that his sixth amendment rights have been violated. Nevertheless, his sixth amendment argument would probably be frustrated by the doctrine of waiver. See discussion in text accompanying notes 158-61 infra.
157 While the sixth amendment right to a speedy trial does not itself govern pre-indictment delays, the Court in Marion stated that in some cases the fifth amendment due process clause would offer relief. Significantly, though, the Court indicated that the fifth amendment might not require dismissal of the charges unless the defendant demonstrated both that the pre-indictment delay was a "purposeful device to gain tactical advantage over the accused." 404 U.S. at 324. In any event, the accused would have to demonstrate actual prejudice to his rights. Id. However, the prominent characteristics of the CPA situation, not the least of which are the lack of oppressive governmental purpose in causing the delay and the voluntariness of the defendant's participation, are strong arguments against dismissing a subsequent prosecution on due process grounds. Note also that one of the primary ways in which pre-indictment delay causes a defendant prejudice, i.e., lack of timely notice of the charges against him, is effectively blocked in the CPA situation, since the client is informed of his suspected offense immediately upon referral to CPA. See discussion in part II D supra.
158 See notes 156-57 supra.
demands it. In the CPA context, therefore, waiver would work to bar a client-defendant from asserting that his right to a speedy trial had been denied. The actions of the CPA client constitute more than mere failure to demand a speedy trial, which alone would be enough to waive the right. By agreeing to participate in the CPA program, the client affirmatively acquiesces in whatever delay occurs.

4. Self-Incrimination—The fifth amendment privilege against self-incrimination, made applicable to the states through the due process clause of the fourteenth amendment, is repeated verbatim in the Michigan constitution. Since the right is a personal one, it can be waived when a witness, with knowledge of the privilege, voluntarily gives testimony on matters as to which he could claim the privilege. There are several perceived dangers to this constitutionally guaranteed protection against self-incrimination where a defendant stands trial subsequent to the premature termination of his CPA probation.

First, CPA participants uniformly assume moral responsibility for their alleged offenses. A statement admitting guilt, made by the defendant to his CPA staff worker, might later be introduced at trial and used against him. The admission required of the

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160 See, e.g., People v. Foster, 261 Mich. 247, 246 N.W. 60 (1933) (no good cause was shown for the government's delay in bringing the case to trial, but defendants could not complain because they had made no demand in open court nor filed any motion requesting a speedy trial). In accord, People v. Duncan, 373 Mich. 650, 130 N.W.2d 385 (1964), and People v. Kennedy, 23 Mich. App. 6, 178 N.W.2d 144 (1970). This demand requirement in Michigan was found compatible with the United States Constitution in People v. Frazier, 16 Mich. App. 38, 167 N.W.2d 481 (1969).

161 It might even be argued that by agreeing to participate in CPA the client-defendant causes the delay. Where delays are caused by the defendant, the case for waiver is certainly stronger than where there is only failure to demand a speedy trial. See People v. Nawrocki, 6 Mich. App. 46, 150 N.W.2d 516 (1967), and People v. Wallace, 33 Mich. App. 182, 189 N.W.2d 861 (1971).

The CPA client is free to terminate his participation in the CPA program at any time, with the understanding that he then makes himself amenable to criminal prosecution at the discretion of the prosecutor. Presumably, if a CPA client's participation in the program were prematurely terminated, either by voluntary action on the part of the client or by revocation of probation, his right to a speedy trial would attach upon his demand for same after he is formally charged.

162 "No person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. CONST. amend. V.


164 MICH. CONST. art. 1, § 17.


166 See text accompanying note 25 supra. This generally occurs during the preliminary intake interview. Since the primary purpose of the program is rehabilitative, CPA views the client's assumption of responsibility for the alleged offense as essential to the "reality therapy" approach used for reforming anti-social conduct. Summary Description.

167 The term "required" is used advisedly. Since the entire thrust of the CPA program is
CPA participant is in no sense an admission of legal guilt. It is merely an assumption of personal responsibility for the physical actions which constitute the alleged offense, without regard to any justifications or legal defenses which might be available at an actual trial. Thus at no time is the CPA participant required to confess to a crime, in the legal sense of that phrase. In addition, all such statements are made only in oral conversation with the probation officer; written statements are not taken. Nevertheless, testimony of the probation officer concerning admissions made at the intake interview could be very damaging to the defendant at a later trial.

Second, a defendant's participation in the CPA program could itself imply guilt quite apart from any specific statements made by the defendant while a CPA client. If the jury were told of CPA's routine "assumption of responsibility" requirement, the fact of participation would be especially damning. Even without such detailed knowledge of the program, a jury might very well reason that an innocent man would have demanded a trial from the beginning, and that the defendant, having participated in CPA, must be guilty.

Because the Supreme Court's holding in *Miranda v. Arizona* would seem to make such self-incriminating evidence inadmissible at a subsequent trial as direct proof of the defendant's guilt, there is no constitutional requirement that CPA warn participants of their right not to incriminate themselves. Moreover, because advising the participant of his right to remain silent would be detrimental to the purposes of CPA, no such warnings are given. Nevertheless, there is still a possibility that such evidence would come before the jury for purposes of impeaching the defendant should he decide to testify on his own behalf. Moreover, recent cases challenging the scope of the *Miranda* holding foreshadow the possibility of a Supreme Court decision restricting *Miranda* rehabilitative and not punitive, it is a psychological necessity that the CPA client honestly acknowledge responsibility for his behavior. Yet it is seldom necessary to "require" this acknowledgment in any formal sense. Most CPA clients freely and without being asked admit to their participation in the alleged offense. Telephone interview with James B. Wright, Director of the Citizens Probation Authority, Oct. 27, 1971.

Those who insist on their innocence are free to decline participation in CPA, thereby forcing the prosecutor to prove their guilt in a court of law.


Obviously, the validity of such an assumption is open to question. An innocent person caught in suspicious circumstances might very well agree to participate in CPA in order to avoid the expense, dangers, and stigma of a criminal trial.

*See* text following note 174 *infra*.

*See* *Harris v. New York*, 401 U.S. 222 (1971).
and perhaps making the statements of CPA clients admissible at trial.\textsuperscript{173}

The one person who is in a position to make these potential dangers to CPA participants a reality is the prosecutor. However, it seems clear that if the prosecutor were to make a systematic effort to use CPA-obtained information as incriminating evidence at subsequent trials, the willingness of suspected offenders to participate in CPA would be significantly diminished. The prosecutor instituted CPA and is committed to the program's success. Thus it seems unlikely that he would risk destruction of his own program, a program that is of great benefit to his office,\textsuperscript{174} by exploiting it for the sake of criminal convictions.

Nevertheless, the possibilities for abuse are apparent. One way to protect CPA participants against such possibilities would be to advise them at the intake interview of their right not to incriminate themselves. It is obvious, though, that one result of adopting such a policy would be to inhibit communication between the CPA participant and his interviewer. It would change the atmosphere of the interview from cooperation to adversariness. Since CPA's primary purpose is rehabilitative, it is important to maintain a relationship of confidence and full disclosure between the client and the CPA worker. To give Miranda-type warnings would be counter-productive to the maintenance of such a relationship.

An alternative method for protecting the CPA participant, and one that would advance rather than inhibit the purpose of the program, would be the enactment of a state statute making all CPA matters, even the fact of participation itself, privileged material and inadmissible at trial. Not only would such a statute prevent the possibility of the prosecutor's taking unfair advantage of CPA participants who later become defendants,\textsuperscript{175} it would encourage full communication between participant and counselor, and further it would make the law's treatment of those on CPA probation consistent in this regard with its treatment of those serving traditional probation.\textsuperscript{176}


\textsuperscript{174}The program helps relieve crowded prosecutor and court dockets, with consequent savings of time and money. The low recidivism rate of CPA participants (under 4 percent) indicates that the program provides more than temporary relief. Summary Description.

\textsuperscript{175}See note 129 supra.

\textsuperscript{176}See MICH. COMP. LAWS ANN. § 791.229 (1968) giving privileged status to communications made while an offender is serving a court-imposed probation.
There are a number of legal problems, most of a constitutional nature, with CPA's current operating procedures. Though none of these problems is necessarily fatal to the program, especially since many are of such a nature that they are not likely to be challenged in court, still they ought to be corrected. Some needed changes, such as more elaborate information for the participant as to his constitutional rights and the institution of an adversary hearing before probation can be revoked, can be effected by CPA itself as an administrative matter. In other areas, CPA should seek the enactment of new state statutes, specifically to provide explicit authorization for the program and to make participation in CPA a privilege matter for evidentiary purposes.

These are all relatively minor changes. The basic thrust and goals of the program remain unobjectionable. As the facilities of the traditional criminal process, particularly the courts and the prisons, continue to become increasingly congested; and as the wisdom of the traditional disposition of criminal offenders (incarceration) is called into question, the value of alternative means of disposition becomes apparent. Programs like CPA fulfill not only the need for relief of crowded conditions but also the need for effective and workable programs for the treatment of criminal offenders for whom typical conviction and imprisonment are inappropriate.

—Nancy S. Warder
and
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