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Endorsement of Due Process Reform in Parole Revocation: Morrissey v. Brewer

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AN ENDORSEMENT OF DUE PROCESS REFORM IN PAROLE REVOCATION:

MORRISSEY v. BREWER[1]

A grant of parole is not mandated by the Constitution, but is a franchise bestowed upon a prisoner by legislative grace.[2] Consequently, parole has been considered a privilege to which no prisoner is entitled as a matter of right.[3] It has been argued that since the parolee has been deprived of his liberty in accordance with due process of law and since a state has the uncontrolled discretion to require those convicted of a crime to serve their entire sentence, then by a premature release of the parolee, the state has acted *ex gratia* and has not conferred any legally protected right to remain at liberty.[4] The Supreme Court, however, has "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege,' "[5] holding rather that they depend upon whether an individual will be "condemned to suffer grievous loss."[6] In *Morrissey v. Brewer*,[7] the Supreme Court recognized that the revocation of a parolee's qualified liberty is a loss severe enough to warrant constitutional protection and, for the first time, defined the minimum requirements of due process in parole revocation proceedings. With the Court's refusal to decide the issue of right to counsel in such proceedings, however, the procedural protections mandated may be rendered inefficacious.

1. 408 U.S. 471 (1972).

2. Pinana v. State, 76 Nev. 274, 383, 352 P.2d 824, 829 (1960); Zink v. Lear, 28 N.J. Super. 515, 524, 101 A.2d 72, 77 (1953).

3. Silva v. People, 158 Colo. 326, 329, 407 P.2d 38, 39 (1965); Berry v. State Bd. of Parole, 148 Colo. 547, 548, 367 P.2d 338, 339 (1961), *cert. denied*, 370 U.S. 927 (1962).

4. Comment, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702, 704 (1963). This theory is commonly referred to as the "Grace Theory." *Id.* at 704. A similar conclusion has been reached by applying the "Contract-Consent Theory" (liberty restored through medium of bargain, with liberty being granted in consideration of the convicts consent to be bound by conditions) as well as the "Custody Theory" (parolees are not at liberty but are still in legal custody and thus subject to prison rules and regulations). *Id.* at 708, 711-12.

5. Graham v. Richardson, 403 U.S. 365, 374 (1971). See text accompanying notes 87-96 *infra*.

6. Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

7. 408 U.S. 471.

The consolidated cases[8] in *Morrissey* concerned state parole revocations based on alleged violations of technical conditions[9] under Iowa's statutory parole scheme.[10] Petitioner Morrissey was released on parole after serving one year of a maximum seven year sentence for false drawing of checks. Seven months after his release, he was arrested at the direction of his parole officer and incarcerated in a local jail. His parole officer recommended revocation in a written report which specified the parole violations: (1) purchase of a car under an assumed name and operating it without permission; (2) giving false statements to police and an insurance company concerning his address after a minor accident; (3) obtaining credit under an assumed name; and (4) failing to report his place of residence to his parole officer. Further, the report provided that Morrissey had admitted to these alleged violations in an interview with the parole officer.[11] After considering this report and without providing Morrissey with a hearing, the Iowa Board of Parole revoked his parole and directed his return to the state penitentiary located some 100 miles from the place of arrest.[12]

Similarly, petitioner Booher was granted parole after serving two years of a maximum ten year sentence for forgery. Approximately nine months later, his parole officer directed that he be arrested for violating the territorial restrictions of his parole, obtaining a driver's license under an assumed name, and failing to maintain gainful employ-

8. *Id.* See text accompanying notes 11-14 *infra.*

9. Parole conditions are classified as technical or criminal. Technical conditions are behavior requirements limiting freedoms normally enjoyed by the average citizen. Criminal conditions originate by statute. Comment, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702, 720-21 (1963). "[T]he majority of parole revocations are for technical violations." Note, *Parole Revocation in the Federal System*, 56 GEO. LAW J. 705, 708 n.33 (1968) (citation omitted).

10. IOWA CODE ANN. §§ 247.1-247.33 (1969). The Iowa Statute merely established a parole system and does not define any specific procedure for parole revocation. The board of parole was empowered to

> terminate or discharge a parole granted by it . . . at any time and at its sole discretion whenever it is satisfied that satisfactory evidence has been given that society will not suffer thereby. *Id.* § 247.5.

Further, the duration of the parole period was considered to be within the sole discretion of the board of parole and could be terminated at any time. OP. IOWA ATTY. GEN. [Bobzin], March 26, 1970.

Consequently, with this absence of specific statutory guidelines for parole revocation, summary revocation was allowable. The absence of procedures guaranteeing notice and a hearing was not previously considered to be a denial of due process. Curtis v. Bennett, 256 I. 1164, 1167, 131 N.W.2d 1, 3 (1964), *cert. denied*, 380 U.S. 958 (1965).

11. 408 U.S. at 473. Although admitting that he had failed to contact his parole officer, Morrissey attempted to excuse this on the basis that he had been sick. *Id.*

12. *Id.* at 472-73.

ment. While incarcerated in a jail located near the place of his arrest, Booher allegedly admitted to violating these parole conditions at an interview with his parole officer.[13] The parole officer recommended revocation of Booher's parole in a report to the Iowa Board of Parole which described the alleged violations and Booher's admissions. Without affording Booher an opportunity to explain or refute these allegations, the Board ordered revocation, causing Booher to be recommitted to the state penitentiary which was located some 250 miles from the place of arrest.[14]

After exhausting state remedies,[15] the petitioners filed separate federal habeas corpus petitions alleging that they had been denied due process of law because their paroles had been revoked without hearings.[16] The district court, however, held that the failure to accord a hearing prior to parole revocation did not violate the Fourteenth Amendment's Due Process Clause.[17] The cases were consolidated on appeal and, in a 4-3 decision, the Court of Appeals for the Eighth Circuit, while recognizing that the traditional view of parole as a privilege rather than a vested right was no longer dispositive,[18] nevertheless concluded that a balancing of the competing interests[19] involved indicated that no hearing was necessary.[20]

The Supreme Court, in an opinion by Chief Justice Burger,[21] reversed the decision of the court of appeals and held that, although a

13. *Id.* at 474. Booher attempted to excuse his failure to maintain employment and his violation of the territorial restrictions by claiming that

> he could not find work that would pay him what he wanted—he stated he would not work for $2.25 to $2.75 per hour—and that he had left the area to get work in another city. *Id.*

14. *Id.* at 473.

15. *Id.* at 474.

16. *Id.*

17. *Id.*

18. 443 F.2d 942, 946-47 (8th Cir. 1971).

19. The competing interests considered by the court were the need to protect the welfare and security of society, and the desirability of placing convicted persons on parole in order to promote rehabilitation. The court concluded that prison officials are vested with wide discretion in controlling persons committed to them and since prisoners have no statutory right to be granted parole nor to be allowed to remain on parole once granted, the importance which the individual parolee attaches to his conditional liberty is not sufficient to override the interest of the state and prison authorities in effectively managing internal disciplinary and custodial affairs. *Id.* at 948-50.

It should be noted, however, that the court specifically stated that while prison officials have broad discretion and a parolee has no constitutional right to a hearing, "the parolee cannot be made the subject of arbitrary action." *Id.* at 490.

20. *Id.* at 952.

21. Justices Stewart, White, Blackmun, Powell and Rehnquist joined with the Chief Justice in the majority opinion. 408 U.S. at 472.

parolee's liberty is indeterminate, it is valuable and is therefore within the protection of the Fourteenth Amendment Due Process Clause.[22] The majority recognized two distinct stages of the parole revocation process at which procedural protections are required.[23] Initially, a hearing is required after arrest to determine whether there is probable cause or reasonable grounds to believe that the parolee has violated his parole.[24] Once probable cause is established, a revocation hearing must be held prior to revocation and within a reasonable time after the parolee is taken into custody.[25] In addition, the Court defined what it considered to be the minimum requirements of due process at both hearings.[26]

The majority's refusal to decide whether the parolee is entitled to the assistance of retained or appointed counsel prompted Justice Brennan's concurring opinion, in which Justice Marshall joined.[27] Justice Brennan felt that precedent required that a parolee at least "be allowed to retain an attorney if he so desires"[28] and that the only question which should have been left unanswered was whether indigents should be furnished counsel.[29] Justice Douglas also disagreed with the majority's abstention on this issue and, in his dissenting opinion,[30] he concluded that both retained counsel and appointed counsel should be included as constitutional requirements.[31] Additionally, Justice Douglas expressed disagreement as to when the initial hearing should take place. He believed that a hearing should be afforded prior to and not subsequent to an arrest for a violation of a technical parole condition.[32]

The Court was initially confronted with the state's assertion that a sufficient hearing had in fact been provided since, as a general matter of practice, the Board of Parole had granted both Morrissey and Booher a hearing within two months after the respective revocations of parole,[33] had reviewed the parole officer's report concerning the alleged parole violations in the presence of the returned parolee, and had provided the

22. *Id.* at 482.
23. *Id.* at 485-88.
24. *Id.* at 485, *citing* Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).
25. 408 U.S. at 487-89.
26. See text accompanying notes 148-55 *infra.*
27. 408 U.S. at 490. See text accompanying notes 187-89 *infra.*
28. 408 U.S. at 491, *quoting* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).
29. 408 U.S. at 491.
30. *Id.*
31. *Id.* at 498. See text accompanying notes 220-29 *infra.*
32. 408 U.S. at 497-98. See text accompanying notes 156-59 *infra.*
33. *Id.* at 475-76.

parolee with an opportunity to orally contest or explain the allegations.[34] The state argued that neither Morrissey nor Booher had denied the allegations at the hearing.[35] The state further contended that, if either had denied the report, the Board would have conducted a further investigation before finalizing, modifying or reversing the original decision.[36]

The Court refused to consider the state's argument since it had not been raised and preserved in the courts below.[37] Nevertheless, the Court implicitly denounced the state's procedure by its continued insistence that due process requires a hearing prior to the effective decision to revoke parole.[38]

THE FUNCTION OF PAROLE

Examining the function of parole in the correctional process, the Court concluded that both the individual's interest in not having his liberty unjustifiably terminated and the state's interest in administering a parole system consistent with its rehabilitative goal demand some procedural safeguards upon revocation.[39]

The parole system in this country is a creation of both federal[40] and state[41] statutes. The language of such statutes, however, does not provide a definite indication as to the purpose parole is to serve in the penological system. Generally, the theories underlying penology have been labeled as deterrence, restraint, retribution, and rehabilitation.[42]

34. *Id.*

35. *Id.* at 476.

36. *Id.*

37. *Id.* at 476-77. *See* United States v. Vuitch, 402 U.S. 62, 72-73 (1971); Ladner v. United States, 358 U.S. 169, 172-73 (1958); Lawn v. United States, 355 U.S. 339, 362 n.16 (1958); *cf.* United Bhd. of Carpenters v. United States, 330 U.S. 395, 412 (1947).

38. *See* 408 U.S. at 476 n.1. Ostensibly, the Court conceded the state an opportunity to assert this claim upon remand of the case to the District Court:

> [The State] may make a showing in the District Court that petitioners in fact have admitted the violations charged before a *neutral officer.* *Id.* at 477 (emphasis added).

However, it is apparent in the requirement that a hearing be provided *before* revocation that the state's argument will fail. Further, the Court appeared to acquiesce in the petitioner's argument that a hearing provided after the parolee was returned to prison could not result in an objective evaluation. *Id.* at 476 n.1.

Moreover, even if the state asserts the parolee's admissions as a basis for summary revocation, these admissions were made in interviews with the parolee's supervising officer (*Id.* at 473-74) and not to the neutral officers required by the Court. *Id.* at 486.

39. *Id.* at 483-84.

40. 18 U.S.C. §§ 4201-10 (1970).

41. *E.g.*, IOWA CODE ANN. §§ 247.1-247.33 (1969).

42. *See* W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 22-24 (1972). The theories of prevention and education are also mentioned but their similarity to deterrence makes

Parole is not relevant to the first three theories because the granting of even a conditional liberty will neither deter future crimes, restrain parolees from committing further crimes, nor satiate a desire for revenge in the parolee's victims. The purpose of parole, therefore, if it is to be consistent with the penological system of which it is a part, must be rehabilitative.

In *Morrissey*, Chief Justice Burger recognized that the purpose of parole is to help the individual reintegrate into society as a constructive individual.[43] Justice Douglas also recognized the rehabilitory purpose of parole. He stated that, under the modern concept of penology, parole is part of the rehabilitative aim of the correctional philosophy directed at returning a prisoner to a full family and community life.[44]

The general rule is that parole may be granted upon such terms and conditions as the granting power may see fit.[45] Chief Justice Burger viewed such conditions as serving a dual purpose.[46] They prohibit the parolee from engaging in behavior antipathetic to his rehabilitation.[47] In addition, the condition requiring periodic meetings with the parole officer provides that officer with valuable information with which to advise and guide the parolee into constructive development.[48] The parole officer ostensibily serves in an advisory position to the

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mention of them of no significant importance. Prevention is a theory aimed at deterring the criminal himself rather than deterring others from committing further crimes. The validity of this theory has been questioned because of the high recidivism rates of those punished. *Id.* at 22. Education is a theory based on the idea that the publicity which attends the trial, conviction and punishment will educate the public as to the distinctions between good and bad conduct, which, "when known, most of society will observe." *Id.* at 23. Deterrence is based on the idea that "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same fate." *Id.* Since education is an important part of deterrence (the public must be educated of the criminal's fate if it is to deter) and since deterrence is an important aspect of prevention, combining the three seems appropriate.

43. 408 U.S. at 477-78.

44. *Id.* at 495. *See* Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705 (1968); Comment, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963); Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368 (1962).

45. 18 U.S.C. § 4203 (1970); CAL. PEN. CODE § 3053 (West 1970); IOWA CODE ANN. § 247.6 (1969). It has been suggested, however, that "[t]he rules must be reasonable, practical, and within the intent of the law, and they should not require behavior that is illegal, immoral, or impossible." Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 CRIME & DELINQ. 267, 268 (1969).

46. 408 U.S. at 478, *citing* Note, *Observations on the Administration of Parole*, 79 YALE L.J. 698, 699-700 (1970).

47. 408 U.S. at 478.

48. *Id.*

parolee and he ordinarily will not take steps to revoke parole unless he feels that serious and continuing violations indicate that the parolee is not adjusting properly.[49] Notwithstanding this supposed reluctance to initiate revocation proceedings, Chief Justice Burger noted that revocation is not unusual[50] since an estimated 36 to 45% of all parolees are subjected to revocation and are returned to prison.[51]

In general, parole conditions are exceedingly broad, so that most parolees are unable to avoid violating at least one of them during the parole period.[52] "If the appropriate officials had knowledge of all the parole violations that occur, virtually every parole could be revoked at one time or another."[53] However, many conditions are not intended to be enforced.[54] They are vague statements of behavior rather than specific rules to be followed and they are designed to demonstrate to the parolee what his ultimate personal goals should be.[55]

49. *Id.* at 479.

50. *Id.*

51. *Id., citing* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 62 (1967) (hereinafter cited as PRESIDENT'S COMMISSION).

52. R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 306 (1969) (hereinafter cited as DAWSON).

53. *Id.*

54. *Id.* at 306-07.

55. *Id.* at 307. Although parole conditions theoretically are designed to aid in rehabilitation, statutory concern with the protection of society seems to have resulted in vague and confusing conditions. For example, the federal statute provides for release of prisoners on parole only when such release is not "incompatible with the welfare of society." 18 U.S.C. § 4203(A). A proper release under the statute presupposes the imposition of any conditions necessary to ensure the safety and welfare of society. It would seem that the conditions ought to bear a reasonable relation not only to the community's protection but also to the success of the parolee's rehabilitation as well. Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 708 (1968); *see* Hyser v. Reed, 318 F.2d 225, 235 (D.C. Cir. 1963). Consequently, the conditions should be realistic and flexible with each case being judged separately, taking into account the needs, problems, and capacity of the individual offender. Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 CRIME & DELINQ. 267, 269 (1969).

Instead, a study of parole rules resulted in the general conclusion that in many states the conditions were too numerous to be of any real value, that some of the statements listed as conditions were actually interpretations of policy, that many of the regulations were unrealistic and unenforceable, and that the basic rules were not uniform throughout the states. *Id.* at 267.

Although some states have decreased the number of conditions, notably California, Colorado, Mississippi and Missouri (*Id.* at 268), many more have increased the number. *Id.* To be effective they must be simplified and standardized, and they should be regarded as aids to successful adjustment rather than as punitive restrictions. *Id.* at 268-69; *see* C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 344-49 (3d ed. 1970), for a listing of general parole conditions and the states in which they are imposed.

In his dissent, Justice Douglas was more critical of the conditions attached under the parole system than was the Chief Justice. He recognized that parole boards have had broad discretion in formulating conditions and that conditions have been drawn "to cover any contingency that might occur" in order to maximize "control over the parolee by his parole officer."[56] The result, he concluded, was "often vague and moralistic . . . parole conditions [which] may seem oppressive and unfair to the parolee."[57] Justice Douglas, while acknowledging that a parole officer's exercise of discretion often results in counseling rather than revocation, expressed concern that parole is commonly revoked on mere suspicion that the parolee may have committed a crime.[58] "Violations of conditions of parole may be technical, they may be done unknowingly, they may be fleeting and of no consequence,"[59] and thus if the purpose of parole is to be maximized the parolee should be given a chance to explain before he is subjected to further incarceration.[60]

Chief Justice Burger alluded to an incidental function of parole when he stated "[i]t also serves to alleviate the costs to society of keeping an individual in prison."[61] Instead of characterizing the financial benefit to society as an incidental purpose, however, the financial consideration should be viewed as a necessity. The volume of prison traffic alone makes it economically infeasible not to release convicts on parole.[62] This necessity would be advanced by establishing and utilizing

56. 408 U.S. at 496, *quoting* DAWSON, *supra* note 52, at 307.

57. 408 U.S. at 496, *quoting* DAWSON, *supra* note 52, at 306.

58. 408 U.S. at 496, *quoting* DAWSON, *supra* note 52, at 366-67. Although Dawson states: "No instances were observed in which a parolee was returned as a violator solely because of suspected criminal activities that could not be proved," *Id.* at 366, Justice Douglas' concern must be directed at Dawson's subsequent statement: "There were cases observed in which this, along with other factors, resulted in revocation without conviction of suspected offense." *Id.* The example of other factors mentioned was an alcoholic sex deviate who begins drinking again. *Id.* In such a case, however, if drinking is one of the conditions attached, parole could be revoked for that violation alone. Notwithstanding this argument, Dawson indicates that such revocations are not frequent. *Id.* at 366-67. Significantly, however, Dawson cites as his authority "high-ranking parole officials" and thus it is apparent that Justice Douglas views revocation on mere suspicion as a serious problem in spite of the parole officials' statements minimizing its severity.

59. 408 U.S. at 495.

60. *Id.*

61. *Id.* at 477; *see* ANNUAL REPORT, OHIO ADULT PAROLE AUTHORITY 1964/65; Warren, *Probation in the Federal System of Criminal Justice*, 19 FED. PROB. 3 (Sept. 1955); Comment, *Parole: A Critique of Its Legal Foundations & Conditions*, 38 N.Y.U. L. REV. 702, 705-07 (1963).

62. Comment, *Parole: A Critique of Its Legal Foundations & Conditions*, 38 N.Y.U.L. REV. 702, 705, 708 (1963). This conclusion is drawn in reference to the Grace Theory. *Id.* For a discussion of the Grace Theory see note 4 *supra.*

a more effective and workable parole system based on specific and simple conditions.

Chief Justice Burger insisted that an accurate determination of whether a parole violation has occurred is essential to the success of a parole system:

> Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as he substantially abides by the conditions of his parole.[63]

The bifurcated nature of this process should involve an inherent concession to the discretion of the administrative authority, for while

> the first step in a revocation decision . . . involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. . . [t]he second question [whether parole should be revoked] involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts.[64]

Notwithstanding the predictive and discretionary character of this second step, Chief Justice Burger concluded "it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were."[65] Thus, the Chief Justice asserted that some form of procedural safeguards is necessary to ensure that the discretion exercised is an informed discretion.[66]

THE DEMANDS OF DUE PROCESS IN CRIMINAL PROSECUTIONS

The demands of due process in criminal prosecutions are explicitly treated in the United States Constitution. The Fifth Amendment established that no one shall, "in any criminal case," be deprived of life, liberty or property without due process of law.[67] The Sixth Amendment defined the minimum requirements of due process in criminal prosecutions by providing that:

> [T]he accused shall enjoy the rights to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[68]

63. 408 U.S. at 479.
64. *Id.* at 479-80.
65. *Id.* at 480.
66. *Id.* at 484.
67. U.S. CONST. amend. V.
68. *Id.* amend. VI. Although the Sixth Amendment only applies to the federal government, the majority of the requirements mentioned have also been held ap-

These are the requirements which Chief Justice Burger wished to avoid by beginning his consideration of the demands of due process with "the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."[69]

The exclusion of parole revocation proceedings from criminal prosecutions should be based on the validity of the factual distinctions between them. In *Mempa v. Rhay*,[70] the Court held that the time of sentencing is a critical stage in a criminal case and thus the revocation of probation and the imposition of a deferred sentence require compliance with procedural due process.[71] The distinction drawn between a probationer who has been tried and convicted and a parolee who has been tried, convicted and sentenced, however, is difficult to justify.

Generally, it is argued that "probation relates to action taken before the prison door is closed . . . while parole relates to action taken after the door has been closed"[72] and with this symbolic shutting of the prison door the constitutional protections required in criminal cases are relinquished. However, "[p]robation, like parole, 'is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency.' "[73] The objective of probation, therefore, is educational and reconstructive rather than punitive or oppressive[74] and thus it is concerned with rehabilitation

plicable to the states by way of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v. North Carolina, 386 U.S 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel). The only two requirements mentioned in the Sixth Amendment which have not been held applicable to the states are the right to a public trial and to be informed of the nature and cause of the accusation; however, it might be noted that they have not been specifically excluded as no case has dealt with them directly.

It might also be noted that additional requirements which are mentioned in the Fifth Amendment have also been held applicable to the states. *See* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination). The right to a grand jury indictment, however, has been specifically denied applicability to the states. Hurtado v. California, 110 U.S. 516 (1884).

69. 408 U.S. at 480; *cf.* Mempa v. Rhay, 389 U.S. 128 (1967). See text accompanying notes 70-86, 227 *infra.*

70. 389 U.S. 128 (1967).

71. *Id.* at 133-37.

72. *Ex parte* Anderson, 191 Ore. 409, 424, 229 P.2d 633, 639-40 (1951), *quoting* Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029, 1033 (1941).

73. Korematsu v. United States, 319 U.S. 432, 435 (1943), *quoting* Zerbst v. Kidwell, 304 U.S. 359, 363 (1938).

74. Logan v. People, 138 Colo. 304, 307, 332 P.2d 897, 899 (1958).

rather than with the determination of guilt.[75] It is clear, therefore, that both probation and parole

> 'now share precisely the same goals and use precisely the same techniques'. . . . Both devices pursue the goals of rehabilitation, surveillance, and economy; both assist the agencies of law enforcement, prosecution, and institutional confinement; conditions are attached to the grant of either; the community serves as the correctional arena in both; and the individual is in each case under the supervision of someone who has access to coercive authority.[76]

In short, stripped of legal verbiage, the factual distinction[77] between a probationer and a parolee is negligible and the denomination of probation as part of the criminal prosecution while excluding parole from that designation appears inconsistent.

A major argument against comparable treatment of probation and parole is that the judicial power of a court which awards and revokes probation and pronounces sentence is clearly distinguishable from the power of an authorized administrative body to grant or revoke parole.[78] When a court suspends the pronouncement of sentence, the argument

75. Berman v. United States, 302 U.S. 211, 213 (1937).

76. Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings,* 42 U. COLO. L. REV. 197, 225 (1970); *see* note 236 *infra.*

77. "The only factual distinction between a parolee and a probationer is that the parolee has served part of his sentence in the penitentiary prior to receiving his conditional release, whereas the probationer obtains his conditional freedom without prior incarceration." *Id.* at 226.

This factual distinction is evident in both state and federal statutes. *See* 18 U.S.C. § 3651 (1970) (probation) and 18 U.S.C. § 4202 (1970) (parole); CAL. PEN. CODE § 1203 (West Supp. 1972) (probation) and CAL. PEN. CODE § 3041 (West Supp. 1972) (parole); IOWA CODE ANN. § 247.20 (1969) (probation) and IOWA CODE ANN. § 247.5 (1969) (parole).

It should be noted that both California and Iowa have indeterminant sentencing (CAL. PEN. CODE § 3020 (West Supp. 1972); IOWA CODE ANN. § 789.13 (1969)) which means that the judge does not set the sentence as a specified number of years but the limits are set by law, and the actual term is left to the Adult Authority (California) or the Director of Corrections (Iowa). *Id.* After sentence has been set, parole can be granted prior to the completion of the term set.

Under a system such as this, it can hardly be said that parole revocation does not affect sentencing because once parole is revoked the sentence can be reset at the maximum:

> Parole revocation hearings in California, particularly, cannot be differentiated from the probation revocation hearing considered in *Mempa v. Rhay,* because California's parole revocation hearings directly affect the parolee's sentence. When the Adult Authority revokes parole, the parolee's sentence is invariably reset at the maximum allowed by law, subject to a later redetermination. Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel,* 59 CAL. L. REV. 1215, 1243 (1971), *citing* Adult Authority Resolution 171, adopted March 6, 1951.

See Lincoln v. California Adult Authority, 435 F.2d 133, 134 (9th Cir. 1970).

78. *Ex parte* Anderson, 191 Ore. 409, 424, 229 P.2d 633, 640 (1951).

goes, the judicial process has not been completed, but remains in a state of suspension.[79] Not so, however, in the case of a prisoner who has been sentenced and imprisoned.[80] The infirmity in this argument stems from the use of the word "power." The power of the court is distinguishable from the power of an administrative agency only in that it is part of the judicial system.[81] The effect of each decision is the same in that both may result in the incarceration of the individual. A distinction based on pre-sentence and post-sentence action is untenable because it in no way affects the power of the decision-making body and is merely a characterization utilized to grant protections in one case and not in the other.

The argument that the powers are distinguishable is untenable in another sense. The jurisdiction of lower courts and the powers of administrative agencies such as parole boards depend upon statutory authorization.

> The power to grant paroles is not inherent in courts; Pennsylvania courts never had such power until it was given to them by [statute] . . . and then only with respect to prisoners in county jails and workhouses. What the legislature thus gave it can take away again in whole or in part and vest in some other agency of the government.[82]

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79. *Id.*

80. *Id.*

81. One kind of power of adjudication which clearly cannot be conferred upon an administrative agency is the power to determine guilt or innocence in criminal cases. The reason is that the criminal defendant is entitled to special procedural protection of the kind that is given neither in civil proceedings in court nor in administrative proceedings. . . . The problem is therefore to distinguish between criminal penalties and civil or remedial penalties, for the administrative imposition of penalties is commonplace . . . . 1 K. DAVIS, ADMINISTRATIVE LAW § 2.13, at 133-34 (1958).

The distinction expounded by Davis is the same as that used in reference to probation and parole in *Ex parte* Anderson, 191 Ore. 409, 229 P.2d 633 (1951). The argument is that probation is part of the judicial process of a criminal prosecution because it involves sentencing. As such, it is subject to special procedural protections through the Sixth Amendment and the Sixth Amendment as applied to the states by way of the Fourteenth Amendment. Parole, on the other hand, is not part of the judicial process subject to these special procedural protections because when parole is granted the judicial process has already been completed. Consequently, the power of the court to grant and revoke probation is a judicial power which cannot be delegated to an administrative agency, whereas the power of the parole board is merely an administrative power.

In actuality, neither procedure involves the guilt determination for an original offense, but both involve the guilt determination of a subsequent violation of a condition. Upon a determination of guilt in regard to such a violation, both the court and the board have the power to incarcerate the alleged violator.

82. *Ex parte* Anderson, 191 Ore. 409, 229 P.2d 633, 640 (1951), *quoting* Commonwealth *ex rel.* Banks v. Cain, 345 Pa. 581, 28 A.2d 897, 899 (1942).

It is thus clear that if the legislature so desired, as in Pennsylvania, the power to revoke and grant parole could be granted to the court system. By distinguishing between the powers of the court and the powers of administrative agencies, and by relying on this distinction as a criteria for what is included within a criminal prosecution, the judiciary has allowed the legislature to determine which status requires constitutional protection and which does not. If a mere statutory change would include parole within the realm of criminal prosecutions, such a distinction is tenuous. Constitutional protections are not creatures of statute but are inherent in the constitutional provisions themselves.

The state of New York has pioneered the rejection of the distinction between parole and probation. In *People ex rel. Combs v. LaVallee*[83] the petitioner challenged his parole revocation, alleging his right to due process under the state constitution and, more specifically, his right to be represented by counsel had been violated by the revocation procedure. The court recognized that certain distinctions between probation and parole do exist since the court imposed sentence of a parolee cannot be changed and since parole proceedings are arguably not part of the criminal process.[84] It stated, however, that it did not consider these differences to be so vital as to allow them to direct the application or denial of constitutional protections.[85] The court concluded that:

> When all the legal niceties are laid aside a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty just as much as did the original criminal action and . . . falls within the due process provision . . . of our State constitution.[86]

83. 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (1968).

84. *Id.* at 131, 286 N.Y.S.2d at 603.

85. *Id.*

86. *Id.* N.Y. CONST. art. 1, § 6 provides:

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, and *in any trial in any court* whatever the party accused shall be allowed to appear and defend in person and with counsel *as in civil actions* and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself . . . . *Id.* (emphasis added).

While the same guarantees defined in the Fifth and Sixth Amendments of the United States Constitution are present, it should be noted that no distinction is made between criminal prosecutions and civil cases as in the United States Constitution. The distinctions discounted in *LaVallee* (see text accompanying note 83 *supra*), therefore, were not concerned with the question whether parole was part of a criminal proceeding, but whether parole was a judicial proceeding. Within the meaning of this section guaranteeing safeguards "in any trial in any court," the parole board was not considered a

THE TEST FOR APPLICATION OF THE FOURTEENTH AMENDMENT

By denying application of the Sixth Amendment to parole revocation proceedings, the Court necessarily became dependent on the nebulous dictates of the Fourteenth Amendment Due Process Clause to inject procedural protections into the parole revocation process. Consequently, the Court was obligated to decide whether the denial of liberty inherent in parole revocation invokes the procedural protections of the Fourteenth Amendment.

Until recently, this question had been resolved by a determination of whether the "governmental benefit is characterized as a 'right or as a privilege'."[87] Commonly denominated the "right-privilege" distinction,[88] this doctrine has been utilized to deny application of constitutional protections to the termination of a governmental benefit where the individual's access to that benefit is characterized as a privilege rather than a right.[89] More specifically, the theory as applied to the relationship of the parolee to the state's grant of parole is that parole is conferred "not as a matter of right, but as a matter of grace and privilege to enable the prisoner to prove himself. . . ."[90] The government is not required to prematurely release any legally convicted prisoner. If a prisoner is in fact given the privilege of conditional liberty, that liberty may be terminated at any time under the terms and established practices of the granting authority.[91] Such an interpretation of the right-privilege dis-

court. People *ex. rel.* Johnson v. Follette, 58 Misc. 2d 474, 480, 295 N.Y.S.2d 565, 572 (1968). However, probation revocation was controlled by the courts and these constitutional safeguards were apposite. It was this difference which the *LaVallee* court found not so compelling as to deny constitutional protection to parole hearings.

87. 408 U.S. at 481, *quoting* Graham v. Richardson, 403 U.S. 365, 374 (1971).

88. The right-privilege distinction in constitutional law first appeared in the case of McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). In that case, a policeman challenged his dismissal for participating in political activities arguing that his right to participate was guaranteed by the United States Constitution. *Id.* at 220, 29 N.E. at 517-18. Justice Holmes, speaking for the Massachusetts Supreme Court, replied to this challenge by declaring, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" *Id.* at 220, 29 N.E. at 517.

89. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as Van Alstyne].

> This tough-minded distinction between constitutionally protected rights of private citizens and unprotected governmental privileges has been applied to defeat a great variety of claims associated with government employment or other forms of largess. *Id.* at 1440.

Van Alstyne's use of government "largess" refers to a particular status which is dependent upon government expenditures (*i.e.* the status of a welfare recipient or a parolee) and which does not have any constitutional basis. *Id.* at 1442 n.11.

90. Annot., 29 A.L.R.2d 1074, 1099 (1953).

91. *Id.*

tinction has consistently been applied to deny parolees the right to notice and hearing before revocation.[92]

Militating against the harsh consequences of this doctrine, judicial circumvention became so prevalent[93] that the Court finalized the demise of the doctrine in *Graham v. Richardson*.[94] In *Graham*, Justice Blackmun, writing for the Court, concluded "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "[95] Although concerned with an individual's access to welfare benefits, *Graham* was not expressly limited to its facts and has been applied to all constitutional challenges involving "governmental benefits."[96]

In *Morrissey*, both Chief Justice Burger and Justice Douglas relied on *Graham* to discount the right-privilege distinction.[97] Moreover, relying on *Joint Anti-Facist Refugee Committee v. McGrath*,[98] the Chief Justice asserted:

> Whether *any* procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss."[99]

In *McGrath*, the Court was confronted with the problem of whether due process required notice and hearing to be provided to suspect organizations before the Attorney General could designate them as "communist

92. *E.g., Ex parte* Tabor, 173 Kan. 686, 250 P.2d 793 (1952); *Ex parte* Damato, 11 N.J. Super. 576, 78 A.2d 734 (1951).

93. Van Alstyne, *supra* note 89, at 1445. For a discussion of these methods of circumvention and their limitations *see id.* at 1445-64.

94. 403 U.S. 365 (1971). In *Graham*, Arizona and Pennsylvania statutes which denied welfare benefits to resident aliens or to aliens who had not lived in the U.S. for a certain length of time were challenged as violating the Equal Protection Clause. The argument was advanced that there is a special public-interest doctrine by which states desire to preserve limited welfare benefits for its own citizens. This was discounted in *Graham* because the doctrine was heavily grounded on the theory that privileges, as opposed to rights, may be made dependent upon citizenship and the Court had rejected the right-privilege distinction. *Id.* at 374. *See also* Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

95. 403 U.S. at 374.

96. *See* Dougall v. Sugarman, 339 F. Supp. 906, 907 (S.D.N.Y. 1971) (holding unconstitutional a New York Civil Service Law restricting civil service employment to United States citizens); *cf.* Teitscheid v. Leopold, 342 F. Supp. 299, 302 (S.D. Vt. 1972) (denial of employment to aliens under Vermont statute denies them equal protection of the law); Younus v. Shabat, 336 F. Supp. 1137, 1139 (N.D. Ill. 1971) (eligibility for tenured status in state college system).

97. 408 U.S. at 481, 493.

98. 341 U.S. 124-26 (1951).

99. 408 U.S. at 481 (emphasis added).

organizations" in a list to be forwarded to the Loyalty Review Board.[100] Several members of the Court concluded that notice and hearing were required and, in his concurring opinion, Justice Frankfurter propounded:

> [T]he *right to be heard* before being condemned to suffer *grievous loss of any kind,* even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.[101]

Significantly, Frankfurter had assumed that the governmental action involved resulted in a deprivation of "liberty" within the meaning of the Fourteenth Amendment.[102] Therefore, his statement was not directed to the question of whether the Fourteenth Amendment applied, but was rather concerned with the procedure due under the circumstances. In *Goldberg v. Kelly*[103] the Court again directed the "grievous loss" standard solely to the issue of what procedure was due. In *Goldberg,* it was conceded by the government that the Fourteenth Amendment was applicable to the termination of welfare payments,[104] but the Court went on to state:

> 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". . . .[105]

In contrast, the *Morrissey* Court's concern with whether the individual would suffer a "grievous loss" was primarily directed to the preliminary issue of whether the Fourteenth Amendment safeguards applied at all, and not to the nature of the process required.[106] In considering whether the infringement of any given interest should require the application of the Fourteenth Amendment, the Court noted:

> The question is not merely the "weight" of the individual's interest, but whether *the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.*[107]

The Court based this reasoning on its recent decision in *Fuentes v. Shevin,*[108] wherein it had held state laws allowing prejudgment replevin without notice or hearing to be violative of the Fourteenth Amendment. The *Fuentes* Court had examined the nature of the individual's

100. 341 U.S. at 143, 173, 176, 186, 202.
101. *Id.* at 168 (emphasis added).
102. *Id.* at 162.
103. 397 U.S. 254 (1970).
104. *Id.* at 261-62.
105. *Id.* at 262-63 (emphasis added).
106. 408 U.S. at 481. The Court stated, "[w]hether *any* procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Id.* (emphasis added).
107. *Id.* (emphasis added).
108. 407 U.S. 67 (1972).

interest and concluded that it was encompassed within the "property" language of the Fourteenth Amendment:[109]

> The right to a prior hearing, of course, attaches only to the deprivation of an interest *encompassed* within the Fourteenth Amendment's protection. . . . [I]t is clear that the appellants were deprived of possessory interests in . . . chattels that were within the protection of the Fourteenth Amendment.[110]

Decisions prior to *Fuentes* in which the Court had condemned the taking of "significant" property interests without notice and hearing had given only cursory consideration to whether the interests involved were encompassed within the Fourteenth Amendment protection.[111] Perhaps *Fuentes* intended to stress that, where the asserted interests enjoy only an attenuated relationship to the "liberty or property" language of the amendment, the Court will not encroach into an area of legislative prerogative.[112] Significantly, the *Fuentes* Court recognized that it was not the *weight* but rather the *nature* of the interest that was the basis for application of the Due Process Clause.[113]

The *Morrissey* Court evidenced a similar circumspection:

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. *Its flexibility is in its scope* once it has been determined that some process is due.[114]

The Court proceeded with an examination of the nature of the parolee's interest in his conditional liberty, concluding:

> [T]he liberty of a parolee . . . includes many of the *core values of unqualified liberty* and its termination inflicts a "grievous loss" on the parolee . . . . [T]he liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.[115]

Morrissey reiterates the direction to lower courts to examine the interest advanced in order to determine whether it is entitled to Fourteenth

109. *Id.* at 86, 89, 90.

110. *Id.* at 84 (emphasis added).

111. Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970). *But cf.* Fuentes v. Shevin, 407 U.S. 67, 86-90 & n.21 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 340-42 (1969).

112. Boddie v. Connecticut, 401 U.S. 371, 390, 393-94 (1971) (Black, J., dissenting); Goldberg v. Kelly, 397 U.S. 254, 275-76 (1970) (Black, J., dissenting); Wheeler v. Montgomery, 397 U.S. 280, 282 (1970) (Burger, C.J., dissenting); Sniadach v. Family Finance Corp., 395 U.S. 337, 344 (1969) (Black, J., dissenting); *see* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* 1970 SUP. CT. L. REV. 161, 179-82.

113. 407 U.S. at 90 n.21.

114. 408 U.S. at 481 (emphasis added); *cf.* Fuentes v. Shevin, 407 U.S. at 86.

115. 408 U.S. at 482 (emphasis added).

Amendment protection. The Court particularly emphasized the necessity for such an analysis where the interest advanced relates to the "liberty" language of the amendment. Only after it has been determined that the nature of the interest is within the contemplation of the amendment does it become necessary to decide whether its importance or weight, as balanced against the government's interest, demands some procedural safeguards.[116]

Interestingly, Justice Douglas in his dissent concurred in the Court's insistence that the interest to be protected must be one encompassed by the Fourteenth Amendment.[117] Justice Douglas opined

> The Court [has] said . . . that a "pardon is a deed." The same can be said of a parole, which when conferred gives the parolee a degree of liberty which is often associated with *property interests.*[118]

THE NATURE OF THE PROCESS REQUIRED

Having found the parolee's interest in his conditional liberty to be within the ambit of the Fourteenth Amendment, the Court proceeded to assess the importance of the individual and governmental interests at issue. Perhaps this process was best characterized in Justice Douglas' reference to *Goldberg v. Kelly*,[119] wherein the Court reiterated that:

> 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' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in sum-

116. *Id.* at 481. The Court has clarified the *Fuentes* and *Morrissey* approach in Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth*, a non-tenured professor was not rehired after completing one academic year of a four year probationary period. He alleged, *inter alia*, that his right to procedural due process was violated by the University official's failure to give him notice of any reason for nonretention and an opportunity for a hearing. *Id.* at 569. The district court had decided that the Fourteenth Amendment was applicable by "assessing and balancing the weights of the particular interests involved," (*Id.* at 570) and granted summary judgment on the issue of procedural due process. In reversing, the Court stated:

> [T]o determine whether due process requirements apply in the first place, we must look *not to the "weight" but to the nature of the interest at stake.* We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. *Id.* at 570-71 (emphasis added and citations omitted).

The Court emphatically adduced: "[T]he words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning." *Id.* at 572. The Court concluded that the professor had not been deprived of an interest within the contemplation of the Due Process Clause. *Id.* at 579.

But cf. Perry v. Sindermann, 408 U.S. 593 (1972).

117. 408 U.S. at 495; *cf.* Boddie v. Connecticut, 401 U.S. 371, 384-85 (1971) (Douglas, J., concurring).

118. 408 U.S. at 493 (citations omitted and emphasis added).

119. 397 U.S. 254 (1970).

mary adjudication.[120]

While recognizing that a parolee's interest in his indeterminate liberty compels some "orderly process,"[121] the majority in *Morrissey* emphatically rejected the adoption of a rigid set of procedural rules as being antipathetic to the governmental interests involved. Obviously, a state's willingness to meliorate the position of a person who has been convicted of a crime against its people should not be taken as negating the state's awareness that a parolee continues to present a substantial threat to its citizenry.[122] Accordingly, Chief Justice Burger asserted:

> [A] State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.[123]

Yet of equal import, the Chief Justice concluded, is the state's interest in avoiding unjustified revocation of parole and elimination of any opportunity to integrate the individual into society:

> [T]he State has *no interest* in revoking parole without some informal procedural guarantees. . . . A simple factual hearing will not interfere with the exercise of discretion. . . .
>
> Society . . . has an interest in not having parole revoked because of erroneous information or *because of an erroneous evaluation of the need* to revoke parole, given the breach of parole conditions. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[124]

Such reasoning evidenced a predilection on the part of the majority to inject some "orderly process" into both the objective determination of whether a violation had occurred and into the discretionary evaluation of whether parole should be revoked.

Generally, the effect of due process is to inhibit a person from taking another's liberty or property by means "contrary to the settled usages and modes of procedure."[125] The guarantee does not require any particular form of procedure[126] as long as it is in accordance with natural, inherent, and fundamental principles of justice.[127] At the outset, it must be recog-

120. 408 U.S. at 494, *quoting* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (citation omitted).

121. 408 U.S. at 482.

122. *Id.* at 483.

123. *Id.*

124. *Id.* at 483-84 (citation and footnote omitted) (emphasis added).

125. Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913).

126. Ballard v. Hunter, 204 U.S. 241, 255 (1907).

127. Holden v. Hardy, 169 U.S. 366, 390-91 (1898).

nized that "[a] procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case."[128] With this broad definition as a basis, a perusal of the demands of due process as expounded in various cases will have a significant bearing on the demands required for parole revocation.

In *Bell v. Burson*[129] the Supreme Court considered the issue of whether the motor vehicle registration and driver's license of an uninsured motorist involved in an accident could be suspended unless he posted security for the damages.[130] In denying the validity of the state statute, the Court held "that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee."[131] Succinctly, the Court merely reaffirmed prior decisions indicating that a hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case.

Other cases declaring particular statutes unconstitutional on due process grounds have arisen in such areas as creditors' rights[132] and employment.[133] While holding, generally, that due process demanded notice and a prior hearing, these decisions did not delineate with any specificity the procedural requirements of due process. In contrast, the Court's recent decision in *Goldberg v. Kelly*[134] adopted a more definitive approach and explicated the precise procedure required by due process for the termination of welfare benefits.

In *Goldberg*, which was cited in all three opinions in *Morrissey*, welfare recipients challenged the termination of welfare payments, which

128. Bell v. Burson, 402 U.S. 535, 540 (1971).

129. 402 U.S. 535 (1971).

130. *Id.* at 540.

131. *Id.* (citations omitted), *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

132. *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). There, a Wisconsin statute permitted a prejudgment garnishment procedure whereby defendant's wages were frozen in the interim between the garnishment and the culmination of the main suit without defendant having a chance to be heard. The statute was held to violate the Due Process Clause of the Fourteenth Amendment because it provided for the taking of property without notice and prior hearing. *Id.* at 340-41.

133. *See, e.g.*, Slochower v. Board of Higher Education, 350 U.S. 551 (1956). There, a college teacher was summarily discharged without a notice or hearing, pursuant to a New York City Charter provision, because he relied on his privilege against self-incrimination in refusing to answer questions about his official conduct. The discharge without notice or prior hearing was held to violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 559.

134. 397 U.S. 254 (1970).

had occurred without prior notice or a hearing, as being violative of the Due Process Clause.[135] In allowing this challenge, Justice Brennan, writing for the majority, outlined the particular demands of due process for the termination of such benefits. Initially, a "pretermination evidentiary hearing" was required.[136] This "hearing need not take the form of a judicial or quasi-judicial trial," but the recipient must be given "timely and adequate notice" including an explanation of the reasons for the proposed termination.[137] He must also be given the opportunity to defend himself by confronting adverse witnesses and by presenting his own arguments and evidence before the decision maker.[138] While the Court did not require the appointment of counsel, the recipient must be allowed to retain an attorney if he so desires.[139] The decision maker must be impartial and, although he may have prior involvement in some aspects of the case, he should not be the one who made the determination under review.[140] Upon conclusion, the decision maker should state the reasons for his determination and indicate the evidence he relied on though this need not be a full opinion nor a formal finding of fact or conclusion of law.[141]

Goldberg, therefore, defined the minimum procedures consistent with due process in the case of a termination of welfare benefits. The parolee is no more or less a beneficiary of legislative grace than is a welfare recipient and thus the demands of due process should be similar in the two situations. The major distinction between the two is that the welfare recipient faces the loss of financial assistance and thus has a "property" interest at stake, while the parolee faces incarceration and has a "liberty" interest at stake.[142] Both interests, however, are protected by the language of the Fourteenth Amendment.

THE DEMANDS OF DUE PROCESS AT PAROLE REVOCATION PROCEEDINGS

In *Morrissey*, Chief Justice Burger began his discussion of the de-

135. *Id.* at 255-56.
136. *Id.* at 264.
137. *Id.* at 266-68.
138. *Id.* at 267-68.
139. *Id.* at 270. Query how a welfare recipient who, by the very qualification for such benefits, is indigent can afford retained counsel.
140. *Id.* at 271.
141. *Id.*
142. However, in the welfare area the distinction between "economics" (the "property" interest) and "life" (also an interest protected by the Fourteenth Amendment) may become "blurred when the money involved constitutes a subsistence-level income." Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215, 1254 n.187 (1971).

mands of due process with *Cafeteria and Restaurant Workers Union v. McElroy*.[143] In that case, the superintendent of a gun factory terminated the employment of a cook without a hearing because she failed to meet certain security requirements. The determination that security requirements were not met was made by a security officer. Although the Court upheld the termination without a hearing, it made it clear that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[144] The Court continued by declaring that:

> Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.[145]

Chief Justice Burger's approach in *Morrissey* contemplated two distinct stages in a parole revocation: "The first stage occurs when the parolee is arrested and detained. . . . The second occurs when parole is formally revoked."[146] The first step in the bifurcated process was obviously the result of an evidentiary concern. The locale of the arrest and incarceration is typically the place of violation and provides the earliest opportunity to examine the evidence "while information is fresh and sources are available." Chief Justice Burger concluded that:

> [D]ue process would seem to require that *some minimal inquiry* be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest. . . .[147]

While the "minimal inquiry" was perceived by the Chief Justice to be "in the nature of a 'preliminary hearing'," [148] it is certain that he did not intend to inject a comparable adversary quality into this preliminary inquiry.[149] The sole purpose of the inquiry should be to determine whether there was probable cause or reasonable grounds to believe that the parolee had in fact violated parole conditions.[150] To ensure an accurate evidentiary basis for such a determination, the majority con-

143. 367 U.S. 886 (1961).

144. *Id.* at 895 (citations omitted).

145. *Id.*

146. 408 U.S. at 485.

147. *Id.* (emphasis added).

148. *Id.*

149. A preliminary hearing serves an analogous purpose in that it is a hearing to determine whether probable cause exists to believe a crime has been committed. *See* Rideout v. Superior Ct., 67 Cal. 2d 471, 432 P.2d 197, 62 Cal. Rptr. 581 (1967). *See, e.g.*, Pointer v. Texas, 380 U.S. 400 (1965) (Court held the individual was entitled to retained counsel at the preliminary hearing).

150. 408 U.S. at 485.

cluded that due process required that the parolee be provided: (1) an impartial hearing officer; (2) notice of the alleged violations and impending hearing; (3) an opportunity to appear and speak in his own behalf; (4) an opportunity to present relevant documents and witness testimony; (5) the ability to request that persons who have given adverse information be made available for questioning in his presence; and (6) a written summarization by the hearing officer of the reasons for the determination and the evidence relied on.[151] The majority emphasized, however, that these requirements could be effectuated through informal procedures: "No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error."[152]

The second stage of the revocation process is the presentation of the case to the parole board for a final determination as to whether violations have occurred and, if so, whether revocation is warranted. Chief Justice Burger concluded that the minimum requirements of due process at this stage include: (1) written notice of the alleged violations; (2) disclosure to the parolee of adverse evidence; (3) an opportunity to be heard and present evidence within a reasonable time after the parolee's return to custody;[153] (4) the right to confront and cross examine adverse witnesses; (5) a neutral hearing body; and (6) a written statement by the hearing body as to the evidence relied on and the reasons for revocation.[154] The Chief Justice again cautioned that "there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense."[155]

The Chief Justice, in formulating the procedural requisites for the preliminary inquiry, presupposed that the parolee would already have been arrested pursuant to his parole officer's direction. Justice Douglas, in his dissent, objected to this notion that a parolee's conditional liberty should be terminated, even temporarily, without a prior hearing. Justice Douglas argued:

> If a violation of a condition of parole is involved, rather than the commission of a new offense, there *should not be an arrest* of the parolee. . . . Rather, notice of the alleged violations should be given to the

151. *Id.* at 486-87.

152. *Id.* at 487.

153. Although not approving of other aspects of Iowa's procedure, the Court indicated that a lapse of two months before a revocation hearing was held might not be unreasonable. *Id.* at 488. However, this was predicated on an assumption that the parolee had been returned to custody after a neutral hearing officer had concluded there existed reasonable grounds upon which to return him. See note 38 *supra.*

154. 408 U.S. at 489.

155. *Id.*

parolee and a time set for a hearing.[156]

Justice Douglas reasoned that no interest would be served by arresting the parolee for such violations. If serious violations of parole were committed, the parolee would be arrested by the proper authorities on charges related to such violations.[157]

The purpose of the initial hearing as envisioned by Justice Douglas would be to conclusively deduce whether or not a violation had occurred, not merely to ascertain whether reasonable grounds existed to believe such a violation had occurred.[158] Justice Douglas would have provided the parolee with this opportunity to prove his innocence or present matters of mitigation. The parolee's liberty would not be curtailed until the results of the hearing were known and the parole board ordered revocation.[159]

Justice Douglas also contemplated a bifurcated revocation proceeding. Whereas Chief Justice Burger described the two steps as a preliminary hearing to determine probable cause followed by the actual revocation hearing, Justice Douglas saw them as being, first, a factual hearing to determine if a violation had occurred and, second, a submission to the parole board for final action.[160] Ostensibly, Justice Douglas intended the sole issue before the parole board to be whether parole should be revoked on the basis of the factual conclusions established at the prior hearing. Justice Douglas did not state whether the parole board would be required to provide a hearing when deciding the

156. *Id.* at 497-98 (emphasis added).

157. *Id.* at 497 n.8. It should be noted that the reasoning Justice Douglas apparently used is drawn from a quote from Judge Skelly Wright in Hyser v. Reed, 318 F.2d 225, 262 (D.C. Cir. 1963) (concurring in part and dissenting in part). A study of *Hyser* gives no indication as to what constitutes a "serious violation." The reliance on such specious terminology could lend itself to an interpretation that "serious violation" could include such things as territorial violations for which no arrest would be made by local authorities. Such an interpretation, although logical on its face, is insubstantial because Justice Douglas clearly stated in *Morrissey* that the distinction is between the violation of conditions and the commission of new offenses. 408 U.S. at 497. A similar distinction has been registered in regard to probation violations whereby violations which involve convictions for a new felony or misdemeanor are distinguished from such violations as failure to submit monthly reports, traffic violations, purchasing an automobile without permission, marrying without permission, or quitting a job without permission, which are categorized as "minor violations." C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS, 133-34 (3d ed. 1970). Based on this interpretation, it is clear that Justice Douglas feels that if no arrest is made by the local authorities for a new offense, no independent arrest for violation of any parole condition should be made prior to a parole revocation hearing.

158. 408 U.S. at 499.

159. *Id.* at 500.

160. *Id.* at 499.

appropriate course of action. However, he intimated that after a revocation a returnee should be given an opportunity to comment as to extenuating circumstances and to persuade the board of the disutility of reimprisonment.[161]

Notwithstanding any disparity in the individual justices' perception of the parole process, all were in accord as to the basic issue of injecting equitable procedure into this process. Initially, it was agreed that the officer in charge of the hearing should not be the parole officer who recommended revocation.[162] Chief Justice Burger based this require-

161. *Id.* at 500 n.13. Justice Douglas was singularly ambiguous in his discussion concerning the procedural protections, if any, the parole board would have to provide in evaluating the appropriateness of revocation. Throughout his dissent he seemed to suggest that only one hearing was required by due process. Generally, Justice Douglas directed that the parolee be provided: (1) A hearing before a neutral hearing officer; (2) notice of the alleged violations; (3) advice of counsel; and (4) right to confrontation. *Id.* at 497-99. The purpose of these safeguards was to ensure the accuracy of the conclusive determination of whether or not a violation had occurred. Justice Douglas opined:

> The hearing is to *determine the fact of parole violation.* The results of the hearing would go to the parole board . . . *as would cases which involved voluntary admission* of violations. *Id.* at 499 (emphasis added).

The purview of this hearing was directed solely at the factual finding of a violation. Justice Douglas made no proviso for a parolee to explain his actions or comment as to extenuating circumstances. To do so would be to effectively admit such violations. Logically such explanation or commentary would not be relevant in a hearing designed only to deduce the fact of a violation, nor would it be necessary or even desirable for the hearing officer to consider such matters in his determination. The parole board is the body concerned with the appropriateness of revocation; and such commentary or explanation would only be relevant at this stage wherein the effective decision to revoke parole is made. Accordingly, one of two conclusions can be drawn. Justice Douglas either intended to preclude such considerations entirely from the parole revocation process, or he contemplated an opportunity should be provided the parolee to present these matters in a hearing wherein they would have some relevance. The latter conclusion is the most probable, for the former is patently inconsistent with the tenor of Justice Douglas' attempt to ensure that the decision to revoke be made pursuant to reasoned and informed judgment. *Id.* at 495. In many cases where a consideration of the objective facts would indicate the appropriateness of revocation, an explanation of the parolee's actions, commentary on extenuating circumstance, or personal assurances of guarded future conduct might dissuade the board from this conclusion. Moreover, where a parolee would voluntarily admit to violations, the only evidence conveyed to the board would be an acknowledgment of these admissions. Such a conclusion would certainly be at odds with Douglas' attempt to inject some "fairness" into the parole revocation process as well as his apparent approbation of the essence of the American Correctional Association's standards which mandate analogous procedures. *Id.* at 500 n.13.

Generally, in cases where the parolee voluntarily admits to violations some form of hearing is provided. Although no evidentiary hearing is required the board should provide the parolee with an "informal interview" wherein the parolee can present mitigating factors. Hyser v. Reed, 318 F.2d 225, 256-57 (D.C. Cir. 1963).

162. 408 U.S. at 485, 497-98.

ment on *Goldberg v. Kelly*.[163] In that case, it was held that procedural due process required an evidentiary hearing prior to the termination of welfare benefits.[164] Although the decision maker required by *Goldberg* is not disqualified despite some prior involvement with the case, he should not have participated in making the determination under review.[165] Chief Justice Burger observed in *Morrissey* that an "officer directly involved in making recommendations cannot always have complete objectivity in evaluating them."[166] Similarly, Justice Douglas in his dissent remarked that:

> The hearing should not be before the parole officer, as he is the one who is making the charge and "there is inherent danger in combining the functions of judge and advocate."[167]

Chief Justice Burger did not feel that the hearing officer need be a judicial officer for either hearing. Nor did he require that the officer at the preliminary hearing be the "traditional neutral and detached officer."[168] He did, however, include the requirement of a " 'neutral and detached' hearing body such as a traditional parole board" for revocation hearings.[169] The inclusion of this requirement for revocation hearings and the exclusion at preliminary hearings implies that, although at preliminary hearings it is sufficient that the hearing officer not be the one who made the charge of parole violation,[170] at revocation hearings the decision making body cannot include anyone who has been previously connected with the case.[171]

The second issue of general agreement was that of notice. The ma-

163. 397 U.S. 254 (1970).
164. *Id.* at 264, 266-71.
165. *Id.* at 271.
166. 408 U.S. at 486.
167. *Id.* at 497-98, *quoting* Jones v. Rivers, 338 F.2d 862, 877 (4th Cir. 1964) (Sobeloff, C. J., concurring). *Jones* was a habeas corpus proceeding wherein the court affirmed the district court's ruling that due process did not require that indigent parolees be provided with counsel when they appear before the parole board, a member thereof or an examiner appointed by the board. However, the court also directed that the parolee was entitled to be advised of his right to be represented by retained counsel. Chief Judge Sobeloff stated that parole boards and their agents have the duty of functioning in the interest of the parolee in an advisory capacity and thus must see to it that the hearing is conducted fairly and impartially. The Chief Judge opined that it was no reflection on those officials, however, to recognize that in our system of jurisprudence there is inherent danger in combining the functions of judge and advocate. *Id.* Note, however, that this argument is used in *Jones* as a reason for requiring retained counsel and not in the sense of a neutral or detached decision maker.
168. 408 U.S. at 486, *citing* Goldberg v. Kelly, 397 U.S. 254 (1970).
169. 408 U.S. at 489.
170. *Id.* at 486.
171. 408 U.S. at 489.

jority required notice of the preliminary hearing and of its purpose.[172] At the revocation hearing, "written notice of the claimed violations of parole" is required.[173] Justice Douglas also required notice, but the notice would be prior to any arrest.[174]

It is arguable that the objectives sought to be served by Justice Douglas' notice requirement differs from those intended by the majority. Although under the majority's mandate notice should be given prior to the actual hearings, the parolee is already incarcerated and thus his effectiveness in gathering evidence for his defense is severely limited. Unless he has friends or relatives who are unusually capable, or unless he is provided with the right to counsel, the speciousness of the Court's notice requirements is apparent.[175] It can be concluded that the sole objective of a notice requirement under such circumstances is clarification of the alleged violations in order to be consistent with some ethereal notion of due process. In contrast, notice in Justice Douglas' conceptualization of the revocation process is a functional procedure intended to notify the parolee of the alleged violation at a time when he is still able to actively prepare his defense.

The third area of general agreement concerned the opportunity for the parolee to be heard in person and to present witnesses and documentary evidence.[176] Justice Douglas additionally emphasized the value and necessity of counsel in the presentation of the parolee's case to the hearing officer.[177]

The fourth issue of agreement was that of cross-examination. The majority stated it as a definite requirement at both hearings unless the hearing officer specifically found good cause for not allowing it.[178] Justice Douglas, however, gave only cursory consideration to this procedural aspect. He stated that although such hearings do not require "the full panoply of rights applicable to a criminal trial . . . confrontation *may* . . . be necessary . . . ."[179] Ostensibly, such a conclusion

172. 408 U.S. at 486-87.

173. *Id.* at 489.

174. *Id.* at 497. The notice Justice Douglas required includes the time of the hearing and the alleged charges.

175. MODEL PENAL CODE § 305.16 (Proposed Official Draft, 1962), however, provides that the parole board staff should render reasonable aid to the parolee in preparation for the hearing. How effective would this be considering the massive workload of the staff?

176. 408 U.S. at 487, 489, 500.

177. *Id.* at 498.

178. *Id.* at 487, 489.

179. *Id.* at 499 (emphasis added), *citing* Roviaro v. United States, 353 U.S. 53, 77 (1957).

leaves undecided who is to determine the necessity of confrontation in a particular hearing. If the hearing officer is to evaluate the utility of confrontation, this would support the view that confrontation is not a definite requirement. Justice Douglas' reference to *Roviaro v. United States,*[180] however, might well indicate that he did not intend "may" to mean at the discretion of the officer, but at the discretion of the parolee.[181] Moreover, Justice Douglas' reference to the necessity of counsel to "see that . . . vague and insubstantial allegations [are] discounted"[182] supports the view that confrontation and cross-examination are requirements. However, both the majority and Justice Douglas allowed for the denial of confrontation and cross examination by the hearing officer when disclosure of a witness' identity would endanger him.[183]

The final area of agreement concerned the requirement that the hearing officer prepare a written summarization "of what occurs at the hearing in terms of the responses of the parolee and the [evidence for and against revocation]" and a statement of the " 'reasons for [the hearing officer's] determination and . . . the evidence he relied on.' "[184] The hearing officer at the preliminary hearing and the hearing body—usually the parole board—at the revocation hearing were each directed to prepare such a summary. While Justice Douglas did not expressly comment on this requirement, his reference to the Court's decision in *Kent v. United States,*[185] wherein the Court opined: "there is no place in our system of law for reaching a result of such tremendous consequences . . . without a statement of reasons,"[186] suggests that he would have imposed a similar requirement in the parole revocation process.

THE RIGHT TO COUNSEL

The issue of right to counsel was not raised before the Court,[187] and

180. 353 U.S. 53 (1957).

181. In *Roviaro,* the Court held that the trial court erred in denying the petitioner's request for disclosure of the informer's identity as well as denying, prior to trial, a motion for a bill of particulars requesting the informant's identity and address. *Id.* at 65 n.15.

182. 408 U.S. at 498.

183. *Id.* at 487, 499. The Government has a privilege to withhold disclosing the identity of informants. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. Such a rule encourages citizens to communicate their knowledge of the commission of crimes. Note, however, that where disclosure is essential to a fair determination of a cause, the privilege must give way. *Id.*

184. 408 U.S. at 487, *quoting* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

185. 383 U.S. 541 (1966).

186. 408 U.S. at 495-96, *quoting* Kent v. United States, 383 U.S. 541, 554 (1966).

187. Morrissey v. Brewer, 443 F.2d 942, 950 n.10 (8th Cir. 1971):

therefore it understandably declined to advise on this issue:

> We do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.[188]

Notwithstanding this refusal to consider whether a parolee is entitled to counsel at either hearing, the Court intimated that some assistance should be provided to the parolee.[189]

To study the implications and impact that *Morrissey* will have on the issue of right to counsel at parole revocation hearings, it is unnecessary to trace the historical development of the right to counsel. Instead, a considered observation of the law as it presently stands should give insight into the effect *Morrissey* will have, if indeed it will have any effect at all. Significant areas which may influence the ultimate conclusion in parole revocation proceedings are: the statutory requirement of counsel in federal and state parole proceedings; the extension of the right to counsel in criminal prosecutions to include probation; and the requirement of counsel in hearings of other administrative agencies.

Title 18 of the United States Code is silent as to whether a parolee is entitled to the right to counsel at federal parole revocation proceedings.[190] In *Fleming v. Tate*[191] the District of Columbia's parole statute, which required that a parolee "be given an opportunity to appear before [the] Board", was interpreted as meaning an effective appearance which necessarily included the presence of counsel if the parolee so elected.[192] In *Robbins v. Reed*,[193] the court recognized the similarity between the District of Columbia statute and the federal statute, and thus interpreted the federal statute as also affording the right to counsel.[194] Since this interpretation was based on the implications of the federal

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Appellants do not seek relief on the basis of denial of counsel but merely argue that the *Mempa* holding supports their contention of a right to a hearing as a requirement of due process.

188. 408 U.S. at 489 (footnote omitted).

189. In declining to decide the issue of whether counsel, either appointed or retained, was required in the present circumstances the court made reference (408 U.S. at 489 n.16) to MODEL PENAL CODE § 305.15(1) (Proposed Official Draft 1962) which provides:

> The institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel.

At the very least, this reference was intended to evidence the Court's approbation of such practices without making it an absolute requirement.

190. 18 U.S.C. §§ 4201-10 (1970).

191. 156 F.2d 848 (D.C. Cir. 1946).

192. *Id.* at 849.

193. 269 F.2d 242 (D.C. Cir. 1959).

194. *Id.* at 243-44.

statute rather than the requirements of due process,[195] an equal protection argument was avoided and the courts have not interpreted the statute to require appointment of counsel for indigents.[196]

State law concerning the right to counsel at parole proceedings has taken divergent directions. The most progressive trend is exemplified by New York's procedure. In *People v. Warden*,[197] the New York Court of Appeals held that the state constitution guaranteed the parolee's right to be accompanied by retained counsel at his parole revocation hearing.[198] Further, the court recognized that the parolee had a right to counsel at parole revocation hearings based not merely on the state constitution, but also on the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.[199] In contrast, the state of Utah exemplifies the line of authority which has consistently denied the right to counsel at parole revocation hearings. In *Beal v. Turner*,[200] the Supreme Court of Utah held that the failure to appoint counsel for the parolee at the revocation proceeding did not violate due process.[201] In so deciding, the court stated that it did not accept, as authority for the law of the state, the rulings of federal district courts which recognized the right to counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.[202] The laws of the various states range from the absolute right to counsel recognized in New York to the absolute denial of right to counsel[203] in Utah, and,

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195. Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 719 (1968).

196. *See* Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963), wherein they recognized the right to retain counsel but refused court-appointed counsel concluding that parole revocation was not a criminal proceeding within the meaning of the Sixth Amendment. The *Hyser* court relied on Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964), wherein the court held that parole revocation was not a criminal prosecution requiring appointed counsel and that the parole board was not a judicial body possessing the power, statutory or otherwise, to appoint an attorney. The court further referred to Martin v. United States Bd. of Parole, 199 F. Supp. 542 (D.C.D.C. 1961) which held that the constitutional right to counsel only applied to trials in court and not to parole hearings, and thus retained counsel was allowed only as a matter of statutory interpretation based on Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946).

197. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

198. *Id.* at 380, 267 N.E.2d at 240, 318 N.Y.S.2d at 452.

199. *Id.* at 380-83, 267 N.E.2d at 240-42, 318 N.Y.S.2d at 452-54.

200. 22 Utah 2d 418, 454 P.2d 624 (1969).

201. *Id.* at 419, 454 P.2d at 625.

202. *Id.*

203. In United States *ex rel.* Bey v. Connecticut Bd. of Parole, 443 F.2d 1079, 1084-85 n.11 (2d Cir. 1971), it was stated that Goldberg v. Kelly, 397 U.S. 254 (1970), undermined the rationale of cases which sustained a denial of right to counsel in parole revocation proceedings because parole was a matter of "grace." *See* Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970).

as such, do not provide a clear picture of state policy which the Court could consider when it is directly confronted with the issue of right to counsel.[204]

The right to counsel in criminal prosecutions is guaranteed by the Sixth Amendment of the Constitution. This was made applicable to the states by way of the Fourteenth Amendment in *Gideon v. Wainwright,*[205] which held, *inter alia,* that the appointment of counsel for an indigent was required at every stage of a criminal proceeding where substantial rights of the accused could be affected.[206] The area of criminal prosecution which is most analogous to parole revocation is the field of probation revocation.[207] The leading case in that area is *Mempa v. Rhay.*[208] In *Mempa,* the Court recognized that probation revocation proceedings are part of a criminal prosecution[209] and that counsel must be afforded at such proceedings.[210]

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204. It should also be noted that, while some states deny counsel at parole revocation hearings and others absolutely allow it, a middle ground appears to have emerged whereby counsel may be granted on a case by case determination. The Ninth Circuit has intimated at such an approach. Dennis v. California Adult Authority, 456 F.2d 1240 (9th Cir. 1972). In *Dennis,* the court upheld a denial of counsel where the parolee admitted operating a car with a suspended license; however, it stated:

> It remains to be determined in each case whether the procedures followed . . . were reasonably and fairly designed to enable it to ascertain whether issues existed concerning the asserted violation and to make an informed decision upon such issues. *Id.* at 1241.

See Wilburn v. Nelson, 458 F.2d 502 (9th Cir. 1972) (counsel was denied at parole hearing, but the court recognized that a contrary result might be more appropriate in other cases) *and* M'Clary v. California Adult Authority, 446 F.2d 1122 (9th Cir. 1972). In *M'Clary,* the parolee challenged revocation because he was not allowed right to counsel nor to confront witnesses. The court remanded the habeas corpus petition to the district court for consideration in light of *Dennis* and *Wilburn* and recognized that it is possible under the circumstances of a particular case that a parolee might be entitled to additional procedural safeguards.

205. 372 U.S. 335 (1962).

206. *Id.* at 344-45.

207. Another analogous area is that of juvenile proceedings. It had been argued that juvenile proceedings were nonadversary and that since the state was proceeding as *parens patriae,* juveniles could be excluded from constitutional protections. This argument, however, has not been recognized and the right to retained or appointed counsel has been applied to such proceedings. *In re* Gault, 387 U.S. 1 (1967); *see* Note, *Parole Revocation in the Federal System,* 56 GEO. L.J. 705, 722. *See also* Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 109-11 (1909).

208. 389 U.S. 128 (1967).

209. For a discussion of the critical nature of sentencing in a criminal case *see* Townsend v. Burke, 334 U.S. 736 (1948). *See also* Nunley v. United States, 283 F.2d 651 (10th Cir. 1960); McKinney v. United States, 208 F.2d 844 (D.C. Cir. 1953); Martin v. United States, 182 F.2d 225 (5th Cir. 1950).

210. 389 U.S. at 137. This includes the right to appointed counsel. The Court stated:

In the non-criminal field, *Goldberg v. Kelly*[211] is the leading case which defines broad procedural requirements based on the Due Process Clause. In speaking of the right to counsel at welfare benefit termination hearings, the Court stated, "[w]e do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires."[212] Consequently, retained counsel is a constitutional requirement, but appointed counsel at such hearings is not.

Obviously, the *Morrissey* Court's refusal to consider the right to retained or appointed counsel in parole revocation proceedings, when passing upon the procedural requirements in such proceedings, will be interpreted by some to mean that counsel is not required. Support for such an argument is evident in the Court's assertion, "[w]e emphasize there is no thought to equate . . . parole revocation to a criminal prosecution in any sense. . . ."[213] *Gideon v. Wainwright*[214] guaranteed the right to counsel only in state *criminal* proceedings. Since the Court did not intend parole revocation hearings to be part of the criminal prosecution, and since they expressly declined to include right to counsel as a procedural requirement at this point, it is arguable that the right to counsel is not one of the minimum requirements of due process.[215]

We assume counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding. *Id.*

211. 397 U.S. 254 (1970).

212. *Id.* at 270.

213. 408 U.S. at 489.

214. 372 U.S. 335 (1963). *Gideon* quotes the Sixth Amendment as providing that "[i]n all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.* at 339 (emphasis added). It stands for the precept that an indigent has an absolute right to appointment of counsel in felony cases. *Id.* at 336-48. Recently, in Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court extended the right to appointment of counsel to any situation where the defendant could be imprisoned as a result of conviction, regardless of whether the crime charged is classified as a felony or as a misdemeanor.

215. It should be noted here that in addition to the legal objections to the right to counsel at parole revocation hearings there are also two practical objections. The first, expressed in Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir. 1967), is that counsel might impede the parole process. This has largely been discounted. For example, Michigan has one of the highest rates of parole in the country and they have long recognized extensive due process rights, including the right to retained counsel. *See* MICH. STAT. ANN. § 28.2310(1) (Supp. 1968); Warren v. Michigan Parole Bd., 23 Mich. App. 754, 179 N.W.2d 664 (1970); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S., 175, 194 n.157 (1964). It seems contrary to common sense that the Supreme Court would allow the relatively small increase in administrative burden to influence its decision on such a vital issue. *See* United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1089

The majority's reluctance to include the right to counsel prompted Justice Brennan's concurring opinion. He based his opinion on *Goldberg v. Kelly*,[216] stating that *Goldberg* plainly dictated that the right to retained counsel was one of the minimum requirements of due process.[217] The only question Justice Brennan felt should have remained unanswered was whether counsel must be furnished to the parolee if he is indigent.[218] Justice Brennan's inclusion of the right to retained counsel as well as the majority's intimation that some assistance should be allowed could be relied on as predicates for the right to retained counsel. If the right to retained counsel were recognized, the Court would inevitably be confronted with an argument for appointed counsel based on the Equal Protection Clause.[219]

(2d Cir. 1971). The second objection is that allowing the right to counsel might overtax the resources of the bar. In Re Tucker, 5 Cal. 3d 171, 182, 486 P.2d 657, 663, 95 Cal. Rptr. 761, 767 (1971). In Argersinger v. Hamlin, 407 U.S. 25 (1972), it was suggested that the tremendous increase in admission to law schools and to the bar were more than enough to meet the demands, and law students may be an additional supply of manpower to provide legal assistance for the indigent. *Id.* at 40-41.

But cf. note 236 *infra.*

216. 397 U.S. 254 (1970).

217. 408 U.S. at 491, *citing* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

218. 408 U.S. at 491.

219. Since parole is a statutory creation, many jurisdictions have held that the right to counsel is statutory and not constitutional, and thus equal protection attacks have been avoided. Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946); Poole v. Stevens, 190 F. Supp. 938 (1960). Cases which have recognized constitutional protections included both the right to retained and appointed counsel thereby rendering unnecessary an equal protection argument. People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); People *ex rel.* Combs v. LaVallee, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (1968).

In Perry v. Williard, 247 Ore. 145, 427 P.2d 1020 (1967), however, an equal protection argument was applied to probation hearings. The court concluded that "if a probationer with money is entitled to retained counsel, an indigent is entitled to appointed counsel." *Id.* at 149, 427 P.2d at 1022. This may be a significant argument in conjunction with the *Goldberg* case because in *Perry* probation was not considered to be a part of a criminal prosecution, but the court asserted that "the distinction does not justify the denial of equal protection of the laws when liberty is concerned." *Id.*, 427 P.2d at 1023.

In criminal trials, it is clear that discrimination because of poverty is a denial of equal protection. In Griffin v. Illinois, 351 U.S. 12 (1956), indigent defendants challenged the denial of a request for transcript for appeal of their convictions. In holding the denial to be violative of the Equal Protection Clause, the Court stated:

> In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . .
>
> . . . .
>
> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. *Id.* at 17-19.

This rationale was applied to parole revocations in Earnest v. Willingham, 406

Significantly, Justice Douglas extended Justice Brennan's argument by stating simply that "the parolee should be entitled to counsel."[220] He did not belabor the subject but merely quoted from the Supreme Court of Oregon's decision in *Perry v. Williard*:[221]

> A hearing in which counsel is absent or is only present on behalf of one side is inherently unsatisfactory if not unfair. Counsel can see that relevant facts are brought out, vague and insubstantial allegations discounted, and irrelevancies eliminated.[222]

Justice Douglas cited three cases in support of his brief argument.[223] *Hewett v. North Carolina*[224] dealt with the revocation of probation. It stands for the precept that *Mempa v. Rhay*,[225] which required the right to counsel in probation revocation proceedings, should be read broadly and that the appointment of counsel at every stage of criminal proceedings where substantial rights may be affected is mandatory.[226] Revocation of probation is a stage of a criminal proceeding and "[e]ven if a new sentence is not imposed, it is the event which makes operative the loss of liberty" and thus it requires counsel.[227] This argument was taken a step further in *Perry v. Williard*.[228] In *Perry*, the court concluded:

> It would be somewhat surprising to hold now for the first time that a wealthy person brought before the court for revocation of probation could not have the assistance of retained counsel to dispute the alleged grounds for revocation. . . . We now hold that counsel is not only desirable but is so essential to a fair and trustworthy hearing that due process of law when liberty is at stake includes a right to counsel. Accordingly, if a probationer with money is entitled to retained counsel, an indigent is entitled to appointed counsel. . . . As observed in an-

F.2d 681 (10th Cir. 1969), wherein the petitioner on a mandatory early release which was revoked brought a habeas corpus proceeding based on a denial of right to counsel. Referring to *Griffin*, the court stated:

> To pose the question is to answer it, for Griffin and its progeny have made it clear beyond doubt that where liberty is at stake a State may not grant to one even a non-constitutional, statutory right such as here involved [right to appear before parole board under 18 U.S.C. § 4207 with counsel] and deny it to another because of poverty. *Id.* at 683-84.

For a discussion of the effect of the Equal Protection Clause in administrative proceedings *see* Comment, 18 U.C.L.A.L. REV. 758, 776-90 (1971).

220. 408 U.S. at 498.

221. 247 Ore. 145, 427 P.2d 1020 (1967).

222. 408 U.S. at 498, *quoting* Perry v. Williard, 247 Ore. 145, 148, 427 P.2d 1020, 1022 (1967).

223. 408 U.S. at 498.

224. 415 F.2d 1316 (4th Cir. 1969).

225. 389 U.S. 128 (1967).

226. 415 F.2d at 1322-25.

227. *Id.* at 1322.

228. 247 Ore. 145, 427 P.2d 1020 (1967).

> other context, discrimination "on account of poverty" is as unjustifiable as discrimination on account of religion, race or color.[229]

The *Perry* decision, therefore, recognized the right to retained counsel in probation revocation hearings, and by applying the Equal Protection Clause, it also required appointment of counsel for indigents. While the court in *Perry* did not consider probation revocation hearings to be criminal trials, they stated that such a "distinction does not justify the denial of equal protection of the laws when liberty is concerned."[230]

In *People ex rel. Combs v. LaVallee*,[231] the case law dealing with probation revocation was applied to parole revocations as well. The court held that the parolee's constitutional right to be represented by counsel and afforded due process was violated by the refusal of the parole authority to grant his request for counsel to be present at the "parole court."[232] It reached this decision by discussing probation and the two basic differences between probation and parole. Unlike probation, it concluded, under parole the court imposed sentence may not be changed.[233] Also unlike probation, revocation proceedings based on a violation of parole are not a part of a criminal proceeding.[234] The court discounted these differences, however, stating:

> We do not view these differences as so vital that counsel should be mandated in one and denied in the other. . . . When all the legal niceties are laid aside a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty just as much as did the original criminal action and . . . falls within the due process provision . . . of our State constitution.[235]

A factual question emerges from the *Morrissey* formula itself which lends further support to the argument for counsel. Without counsel, how is a parolee who is in jail awaiting the preliminary hearing or the revocation hearing supposed to find and interview witnesses, accumulate documents, prepare for cross-examination of witnesses against him, and, in general, prepare his case? The obvious answer is that he cannot. The problem has two solutions. The first is to accept Justice Douglas' argument that the parolee must be allowed to remain at freedom until after parole is revoked. If this is unacceptable, then the alternative is

229. *Id.* at 149, 427 P.2d at 1022.
230. *Id.* at 149, 427 P.2d at 1023.
231. 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (1968).
232. *Id.* at 130, 286 N.Y.S.2d at 602.
233. *Id.* at 131, 286 N.Y.S.2d at 603.
234. *Id.*
235. *Id.*; *cf.* Mempa v. Rhay, 389 U.S. 128 (1967). See note 86 *supra.*

that the parolee must be allowed the assistance of counsel to do the leg work and prepare his defense. Justice Douglas presented two significant points of dissent and, when the issue of right to counsel arises again, the Court will have to reconsider them or render *Morrissey* ineffective except for the formality of the hearing itself.[236]

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236. Since the scope of this Note is very broad, it has been unnecessary to discuss the effect of *Morrissey* upon any individual state. However, a brief perusal of California procedure and the effect that *Morrissey* will have on it should be illustrative of the substantial impact the *Morrissey* decision will have.

Justice Douglas described the California parole system in *Morrissey*:

> [P]arole revocation hearings in California are secretive affairs conducted behind closed doors and with no written record of the proceedings and in which the parolee is denied the assistance of counsel and the opportunity to present witnesses on his behalf. 408 U.S. at 498 n.10.

Such a system emerged in California because the California Adult Authority as a statutory creation (CAL. PEN. CODE §§ 2399-2403 (West 1972)) was given "full power to suspend, cancel or revoke any parole without notice . . . ." *Id.* § 3060. Consequently, the statute has been interpreted as not requiring notice or hearing. People v. Dorado, 62 Cal. 2d 338, 359, 398 P.2d 361, 375, 42 Cal. Rptr. 169, 183 (1965); In re McLain, 55 Cal. 2d 78, 84-85, 357 P.2d 1080, 1084-85, 9 Cal. Rptr. 824, 828-29 (1960).

Hearings called "Parole and Community Service Hearings," however, are held at which the Adult Authority, armed only with the parole agent's report and prior case history, decides if the parolee should be returned to prison. Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215, 1219-20 (1971). The hearings are closed to the public, no transcript is made, and seldom does the panel give the reasons for its decision. *Id.* at 1220. After the parolee's return to prison he is given another hearing at which he can present oral and written evidence. *Id.* at 1221. He is not, however, allowed to bring either retained or appointed counsel, present witnesses on his behalf, or cross-examine witnesses against him. *Id.* These hearings are also closed to the public and again the reasons for decisions are virtually never given. *Id.* At neither of these hearings does the parolee have the right to counsel. *See* Lincoln v. California Adult Authority, 435 F.2d 133, 134 (9th Cir. 1970); Mead v. California Adult Authority, 415 F.2d 767, 768 (9th Cir. 1969).

It is evident that California was one of the least progressive states in granting rights to parolees at parole revocation hearings. Although hearings were held, they were secretive and the parolee was denied many of the rights defined in *Morrissey*. *Morrissey* should have a noted effect on this procedure. Notice and hearing will be required, the parolee will have a right to cross-examine witnesses, and the Adult Authority will have to state the reasons and evidence relied on in their determination of revocation. It is questionable, however, whether *Morrissey* will require California to change its practice of denying counsel at the revocation proceeding.

The California Supreme Court in People v. Vickers, 8 Cal.3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972), applied the specific due process procedures enunciated in *Morrissey* to probation revocations. *Id.* at 458, 503 P.2d at 1318, 105 Cal. Rptr. at 310. The court, while recognizing that *Morrissey* expressly compelled such procedures only for parole revocation, concluded that "we cannot distinguish [parole and probation revocation] proceedings in principle insofar as the demands of due process are concerned." *Id.*

Significantly, the court also held that a probationer should be entitled to be represented by counsel. *Id.* at 461, 503 P.2d at 1321, 105 Cal. Rptr. at 313. While acknowledging that the *Morrissey* decision did not compel such a result in parole revocation

RETROACTIVITY

Chief Justice Burger stated that "[t]he few basic requirements set out above . . . are applicable to *future* revocations of parole. . . ."[237] His use of "future" is significant in that it suggests that the procedural requirements defined in *Morrissey* were intended to have prospective rather than retroactive effect.

The retroactivity of a rule is not automatically determined by the provision of the Constitution on which it is based.[238] Instead, as the Court stated in *Johnson v. New Jersey*:[239]

> Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.[240]

In *Linkletter v. Walker*,[241] the Court stated that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective."[242] Therefore, the Court functions to limit the retroactive application of judicially interpreted constitutional rules. In *Stovall v. Denno*,[243] the Court delineated the relevant considerations in exercising this limiting function:

(a) the purpose to be served by the new standards, (b) the extent of

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proceedings, the court asserted:

> [T]he efficient *administration of justice* requires that the defendant be assisted by retained or appointed counsel . . . . *Id.* (emphasis added).

Notwithstanding the *Vickers* court's reliance on *Morrissey* to inject equivalent procedure into probation revocations, the court denied relief to the petitioner holding that *Morrissey* was not intended to be applied retroactively:

> Defendant in the instant case is not entitled to the benefits provided by *Morrissey* for the reason that *Morrissey* itself states that such procedures "are applicable to future revocations . . . ." *Id.* at 462, 503 P.2d at 1321, 105 Cal. Rptr. at 313 citation omitted).

See People v. Nelson, 8 Cal.3d 463, 503 P.2d 1322, 105 Cal. Rptr. 314 (1972).

237. 408 U.S. at 490 (emphasis added). See note 236 *supra.*

238. *E.g.*, Stovall v. Denno, 388 U.S. 293, 297 (1967) (Court denied retroactivity to United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967)); Johnson v. New Jersey, 384 U.S. 719, 728 (1966) (Court denied retroactive application of its decisions in Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966)).

239. 384 U.S. 719 (1966).

240. *Id.* at 728.

241. 381 U.S. 618, 639-40 (1965) (Court denied retroactivity to Mapp v. Ohio, 367 U.S. 643 (1961)).

242. 381 U.S. at 628. For a critical discussion of *Linkletter, see* Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

243. 388 U.S. 293 (1967); *see* Linkletter v. Walker, 381 U.S. 618, 636-39 (1965); Comment, *Constitutional Rules of Criminal Procedure and the Application of Linkletter*, 16 J. PUB. L. 193 (1967).

> the reliance by the law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[244]

An attempt to systematically apply these limiting factors, however, requires a determination of whether or not each factor should be given equal weight in the balancing process.[245]

Generally, those rules of criminal procedure which are fashioned to correct serious flaws in the fact-finding process at trial have been given retroactive effect.[246] For example, in *McConnell v. Rhay*,[247] which held *Mempa v. Rhay*[248] to be retroactive, the petitioner had been convicted of grand larceny and placed on probation for five years upon condition that he serve one year in county jail.[249] After two hearings his probation was revoked. At neither hearing was he allowed counsel nor was he advised of his right to have counsel appointed.[250] The Washington Supreme Court found that his Sixth Amendment rights had been violated, but denied relief, holding that *Mempa* should not be applied to cases in which probation and deferral or suspension of sentences had been revoked prior to the date of that decision.[251] The Supreme Court reversed, reasoning that the right to counsel at sentencing was no different than other rights which had been applied retroactively (*e.g.*, right to counsel at trial, at certain arraignments and on appeal) and must be treated the same.[252] The Court said that " '[t]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.' "[253] In short, the right to counsel relates to "the very integrity of the fact finding process."[254]

The peculiar aspect of *McConnell* is that, once it was determined that the rule expounded in *Mempa* was fashioned to correct flaws in the

244. 388 U.S. at 297.

245. *See* Comment, *Constitutional Rules of Criminal Procedure and the Application of Linkletter*, 16 J. PUB. L. 193, 209-10 (1967). The author distinguishes three possibilities for applying the three factors: balancing, determination solely on the basis of purpose, and limited balancing. The latter two, however, are merely variations of balancing with emphasis placed on different factors. Consequently, such a distinction would serve no purpose in this discussion.

246. Stovall v. Denno, 388 U.S. 293, 298 (1967).

247. 393 U.S. 2 (1968).

248. 389 U.S. 128 (1967).

249. 393 U.S. 2 (1968).

250. *Id.* at 3.

251. *Id.*

252. *Id.* at 3-4.

253. *Id.* at 4, *quoting* Mempa v. Rhay, 389 U.S. 128, 135 (1967).

254. *Id.* at 3, *quoting* Linkletter v. Walker, 381 U.S. 618, 639 (1965).

fact-finding process, retroactive effect was granted without any further discussion of the other two limiting factors defined in *Stovall.* This indicates the possiblity that, once the purpose of the rule is established to be the protection of the fundamental fairness of the fact-determining process, retroactive effect can be granted without the necessity of considering the other two limiting factors.[255]

In cases where retroactive effect is denied, however, all three factors are considered.[256] For example, the question involved in *Linkletter*[257] was whether or not the decision in *Mapp v. Ohio*[258] applying the exclusionary rule to the states should receive retroactive effect. The Court concluded that "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights."[259] Consequently, deterrence of illegal police action and not the prevention of error at trial was its purpose. Since the governmental misconduct had already occurred in situations occurring prior to the decision, retrospective application would serve no purpose. Rather than immediately deny retroactive application as in *McConnell,* however, the Court proceeded to analyze the factors of reliance and impact on the administration of justice.[260] Only upon a determination that the states relied upon the pre-*Mapp* rule and that applying *Mapp* retrospectively "would tax the administration of justice to the utmost," did the Court restrict the *Mapp* decision to prospective application.[261]

The test which emerges is that if the purpose of the rule under consideration is to enhance the integrity of the fact-finding process, then the rule will be held retroactive.[262] If the purpose of the rule is otherwise, it can still be applied retroactively if it neither overburdens the administration of justice nor was relied upon to any great extent. If the rule is not intended to enhance the integrity of the fact-finding process, however, and if the prior law had been substantially relied upon

255. Comment, *Constitutional Rules of Criminal Procedure and the Application of Linkletter,* 16 J. PUB. L. 193, 209 (1967).

256. *See* Johnson v. New Jersey, 384 U.S. 719, 727, 731-32 (1966); Tehan v. Shott, 382 U.S. 406, 415-18 (1966); Linkletter v. Walker, 381 U.S. 618, 636-39 (1965).

257. 381 U.S. 618 (1965).

258. 367 U.S. 643 (1961) (Court required exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment in state criminal trials).

259. 381 U.S. 618, 636 (1965).

260. *Id.* at 637.

261. *Id.*

262. *See* Comment, *Constitutional Rules of Criminal Procedure and the Application of Linkletter,* 16 J. PUB. L. 193, 211-12 (1967).

and retroactive application of the rule would burden the administration of justice, then the rule should be applied prospectively only.

The application of this test to *Morrissey*, contrary to the implication of the Chief Justice, indicates that it should not be limited to prospective application. While parole revocation is not considered to be part of a criminal trial, the determination of whether a parolee is guilty of violating conditions of his parole is certainly a fact-finding or fact-determining procedure. Chief Justice Burger indicated that the rule expounded in *Morrissey* is primarily designed to enhance the reliability of the fact-finding process in revocation hearings and only incidentally to prevent administrative misconduct.[263] Error rather than abuse is its target, and thus, based on the "purpose test" defined in *Stovall* retroactive effect should be granted.[264]

An analogous situation can be found in the Supreme Court's treatment of *Mempa v. Rhay*[265] in *McConnell*. The effect and purpose of the holding in *Morrissey* is difficult to distinguish from the ruling in *Mem-*

263. 408 U.S. at 484. The argument for retroactivity suffers when the sole purpose is to *deter* administrative officers from intentionally acting arbitrarily and without substantial evidence. Chief Justice Burger stated:

> Society . . . has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole. . . . 408 U.S. at 484.

He does not imply that the purpose is to prevent intentional misuse of discretion. *See* Linkletter v. Walker, 381 U.S. 618 (1965), which denied retroactive effect to Mapp v. Ohio, 367 U.S. 643 (1961), because the purpose of the search and seizure exclusionary rule was to deter law officers from making unlawful searches and seizures and it obviously would not have deterred those who had already acted. *See also* L. HALL, Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 592 (3d ed. 1969) [hereinafter cited as HALL].

264. Although a determination that the *Morrissey* rule was designed to enhance the fact-finding process apparently negates the necessity of complying with the other two considerations, it might be noted that an examination of the reliance and impact factors would oppose retroactivity. It must be very clear that the reliance on the old standards was complete and as varied as the standards themselves. 408 U.S. at 488 n.15. If the reliance of those states which did not require hearings or otherwise did not adhere to the *Morrissey* dictates are to be a consideration, then retroactivity should not be granted. Further, the granting of retroactivity would allow many convicts to challenge their parole revocations which could create a burden on the court system. This would oppose retrospective application.

Chief Justice Burger stated that the *Morrissey* requirements "should not impose a great burden on any State's parole system." *Id.* at 490. This statement seems to contradict the argument against retroactivity in that it appears to indicate that no burden would be created. A distinction must be drawn, however, between a burden on the court system by retroactive application, which the *Stovall* test refers to, and a burden on the parole system by prospective application. The Chief Justice is not referring to the former, but is stating that no burden will be imposed on the parole system by a prospective application of *Morrissey*. *Id.* As such, there is no inconsistency.

265. 389 U.S. 128 (1967).

pa.[266] The factual pattern is even closer to *McConnell* which granted retroactive application to *Mempa.* The probationer in *McConnell* was released after serving a year in jail pursuant to a procedure classified as probation. The distinction between such a procedure and parole is *nominal* except for the tenuous argument that on revocation the petitioner faced further sentencing rather than merely returning for the remainder of a sentence already rendered.[267]

Regardless of the *McConnell* analogy and the test defined by *Linkletter,* the Chief Justice purports to have limited *Morrissey* to prospective application. Consistency requires that *McConnell* be distinguished, that the purpose of the *Morrissey* decision be interpreted as something other than ensuring fairness in the fact-finding process, or that the test previously advanced be discarded. Although the latter alternative is not inconceivable, the overruling of a previous case requires a compelling necessity which is not apparent in *Morrissey.*[268] *McConnell* could be distinguished from *Morrissey* on the basis that it involved probation and *Morrissey* does not go to the integrity of the fact-determining process in a criminal proceeding. This distinction, however, would stand or fall with the tenuous distinction between probation and parole discussed earlier.[269]

The most subtle and perhaps the most controversial approach would be a simple molding of the purpose of *Morrissey* such that the technique utilized in *Linkletter* could be applied. A clue to such a method is presented in *Stovall* itself. In that case, the Court applied all three of the factors outlined therein. It argued that the extent to which a condemned practice affects the integrity of the truth-determining process is a question of probabilities.[270] The Court recognized that, while

266. *Id.* Although *Mempa* dealt with probation rather than parole, it is analogous to *Morrissey.* Both involved the constitutional rights of a convicted felon. Although *Mempa* included the right to counsel and *Morrissey* did not, both had the effect and purpose of establishing the minimum requirements of due process in their respective revocation proceedings.

267. 408 U.S. at 480. In a state which provides for indeterminant sentencing, this distinction dissolves. A parolee, although already sentenced, usually has his sentence reset at the maximum while the probationer who has not been sentenced or whose sentence has been suspended is subject to further sentencing which could result in the maximum. See notes 70-82 *supra* and accompanying text.

268. *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963), which overruled Betts v. Brady, 316 U.S. 455 (1942), because a trial and conviction without the assistance of counsel is a violation of the Fourteenth Amendment and, consequently, the right of an indigent to have appointed counsel in a criminal trial is a fundamental right essential to a fair trial.

269. See notes 70-86 *supra* and accompanying text.

270. 388 U.S. 293, 298 (1966).

"the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present."[271] Further, it remained open to anyone to allege and prove that the confrontation (lineup) resulted in such unfairness that it infringed his right to due process of law.[272] Ostensibly, the *Stovall* Court concluded that the existence of this alternative remedy coupled with the possibility of challenge to many prior fair confrontations indicated that the dominant purpose of the *Wade* and *Gilbert* decisions was not directed at ensuring the integrity of the fact-finding process. Although it was not explicitly stated, the Court must have considered the deterrence of suggestive identification procedures to be the prevailing purpose. Accordingly, the Court proceeded to a consideration of reliance and impact and, based on its evaluation of those factors, determined that retroactive effect should be denied.[273]

The application to *Morrissey* would be similar. While the rule under consideration purports to enhance the truth-determination process, it would be argued that many fair parole revocations would also be affected. In addition, habeas corpus proceedings represent a means by which a subsequent incarceration could be challenged regardless of the limitations on *Morrissey*.[274] Consequently, while the protections advanced in *Morrissey* affect the fact-finding process, the dominant purpose must in fact be the deterrence of parole authorities from acting capriciously and arbitrarily. Having surmounted the first obstacle, the Court would then be at liberty to weigh the considerations of reliance and impact and, in light of the implication that they would not support retroactivity,[275] *Morrissey* could be limited to prospective application.

Even if retroactivity is not granted, the question still remains as to where the cut-off point will be. Not all decisions which are denied retroactive effect have been applied only to prosecutions brought after the date of the decision.[276] Thus, whether a denial of retroactivity would mean *Morrissey* only applies to revocation proceedings taking place after the decision, or whether it applies to cases pending review,

271. *Id.* at 299.
272. *Id.*
273. *Id.* at 299-301.
274. See note 242 *supra.*
275. See note 264 *supra.*
276. In Johnson v. New Jersey, 384 U.S. 719 (1966), both Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964), were held to affect only those cases in which the trial began after the date of the respective decisions. *See* HALL, *supra* note 263, at 593.

would have to be decided. A strict interpretation of "future" would render *Morrissey* applicable only to revocation proceedings taking place after the decision. If a number of justices favored retroactivity, however, the broader interpretation could be adopted as a compromise and it would also be applied to cases pending appeal at the time of the decision.

CONCLUSION

The decision in *Morrissey v. Brewer*[277] is a significant step in parole reform. It defines for the first time the minimum demands of due process required by the United States Constitution at parole revocation hearings, while maintaining the informality necessary to prevent a costly and timely revocation procedure. The failure to specifically include the right to counsel in the required procedure, however, may substantially reduce its effectiveness. This issue will arise again, however. Considering the precedent at hand, it seems likely that the right to counsel will eventually be added to the *Morrissey* formula. If it is, it will complete the formula for an effective revocation proceeding which could be the catalyst for parole reform on all levels.

Under the *Morrissey* formula, the function of parole as a means of rehabilitation could receive a complete reevaluation. Technical conditions of parole will receive an in-depth evaluation with each case. The desired result would be a change in such conditions with a goal of simplification and uniformity. This could create a viable behavorial code by which parolees could rehabilitate themselves under the guidance of their parole officers rather than become subject to commonplace revocation due to vague and unreasonable restrictions. It has been said that the failure of the parolee is the failure of the parole officer.[278] This can be extended one step further to include the failure of the parole system. With a more simplified and specific group of parole conditions parolees will be able to make the transition from prisoner to productive citizen because they will better understand their responsibilities to society and to themselves. There is much to be done in the way of parole reform and the judicial system cannot do it all. It can, however, insure that individual rights and liberties are protected in this area of the law. The parolee, the system and, most of all, the community will benefit by such a change.

Michael C. Denison

277. 408 U.S. 471 (1972).

278. 408 U.S. at 485-86, *citing* Note, *Observations on the Administration of Parole*, 79 YALE L.J. 698, 704-06 (1970).