1984

The Due Process Need for Postponement or Use Immnuity in Probation Revocation Hearings Based on Criminal Charges

Joseph Doyle

The Due Process Need for Postponement or Use Immunity in Probation Revocation Hearings Based on Criminal Charges

INTRODUCTION

A probationer faced with a revocation hearing prior to a criminal trial arising out of the same conduct is presented with a Hobson's choice: testify at the revocation hearing and waive the privilege against self-incrimination, allowing any self-incriminatory statements to be used at the subsequent trial, or preserve the privilege against self-incrimination at the criminal trial by waiving the right to be heard at the revocation hearing.[1] Neither option is appealing to the probationer, whose "choice" consists of the selection between three potentially damaging courses of action: self-incrimination, perjury, or injurious silence.

Sympathetic to this "cruel trilemma,"[2] some courts have adopted a postponement/use immunity rule. These courts require that the revocation hearing be postponed until after the disposition of the underlying criminal charges or that the probationer be granted use immunity for testifying at the revocation hearing.[3] The majority of courts, however, have declined to afford probationers such relief.[4] Most recently, the Court of

1. The Supreme Court explicitly recognized a probationer's due process right to be heard at a revocation hearing in Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); *see infra* notes 6 and 88.

2. People v. Coleman, 13 Cal. 3d 867, 878, 533 P.2d 1024, 1034, 120 Cal. Rptr. 384, 394 (1975); *cf.* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) ("cruel trilemma of self-accusation, perjury or contempt").

3. *See, e.g.,* Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968) (per curiam) (parole revocation); McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980) (parole revocation); State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981); People v. Coleman, 13 Cal. 3d 867, 889, 533 P.2d 1024, 1042, 120 Cal. Rptr. 384, 402 (1975); People v. Rocha, 86 Mich. App. 497, 512-13, 272 N.W.2d 699, 706-07 (1978); State v. DeLomba, 117 R.I. 673, 679-80, 370 A.2d 1273, 1276 (1977); State v. Evans, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664, 668-69 (1977).

4. *See, e.g.,* Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978), *cert. denied,* 440 U.S. 977 (1979); United States v. Brugger, 549 F.2d 2, 5 (7th Cir.), *cert. denied,* 431 U.S. 919 (1977); Flint v. Mullen, 499 F.2d 100, 105 (1st Cir.), *cert. denied,* 419 U.S. 1026 (1974); People v. Lee, 88 Ill. App. 3d 396, 399-400, 410 N.E.2d 646, 648-49 (1980); State v. Kartman, 192 Neb. 803, 807, 224 N.W.2d 753, 755 (1975); *see generally* United States v. Markovich, 348 F.2d 238, 241 (2d Cir. 1965).

Appeals for the Third Circuit, following the majority rule, held that a postponement/use immunity rule is not constitutionally required; the court also refused to adopt such a rule under its supervisory powers.[5]

This Note argues that a postponement/use immunity rule is constitutionally required to protect a probationer's due process right to be heard at a revocation hearing. Part I considers the scope of the fifth amendment privilege against self-incrimination in revocation proceedings. Part II discusses the development of the choice-of-rights test that courts have applied to this issue. Part III examines the analyses that courts have generally employed under the choice-of-rights test in revocation proceedings. Part IV analyzes the scope of a probationer's due process right to be heard at the revocation hearing. Under the due process analysis employed, this Note concludes that holding a revocation hearing prior to a related criminal trial appreciably impairs the policies underlying a probationer's right to be heard at a revocation hearing, and that a postponement/use immunity rule is therefore constitutionally required.[6]

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[7] This privilege may "be asserted in any proceeding, civil

5. United States v. Bazzano, 712 F.2d 826, 840 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1439 (1984).

6. Similar problems arise in other situations in which the possibility of dual proceedings exists. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (prison disciplinary hearings); United States v. Kahan, 415 U.S. 239 (1974) (indigency hearings); De Vita v. Sills, 422 F.2d 1172 (3d Cir. 1970) (criminal prosecution concurrent with civil litigation); Hamilton v. United States, 309 F. Supp. 468 (S.D.N.Y. 1969) (tax investigation), *aff'd*, 429 F.2d 427 (2d Cir. 1970), *cert. denied*, 401 U.S. 913 (1971). Because the precise nature of due process requirements varies in each of these situations, a thorough treatment of these related situations is beyond the scope of this Note. For a survey of such cases, see Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674, 694-707 (1976).

Probation and parole revocations differ procedurally in that probation revocations generally are held before a court whereas parole revocations generally are held before an administrative board. Both types of proceedings, however, involve the termination of the conditional liberty of an individual previously convicted of a crime. The Supreme Court has held that the due process requirements for probation and parole revocation are identical. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). Therefore, the analysis suggested in this Note is applicable to both types of proceedings. For consistency, all references will be to probation revocation.

7. U.S. CONST. amend V. The privilege against self-incrimination was

or criminal, administrative or judicial, investigatory or adjudicatory."[8] The privilege applies to any evidence that is "personal,"[9] "testimonial,"[10] and potentially incriminating.[11] The Supreme Court has held that the privilege entails two interrelated substantive guarantees: (1) the state cannot use compulsion to elicit any self-incriminatory statements and (2) any such compelled testimony is inadmissible at trial.[12] The prohibition against compulsion includes not only physical coercion, or the threat of imprisonment or fine, but also "any sanction which makes assertion of the . . . privilege 'costly.' "[13]

---

made binding on the states by virtue of the due process clause of the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1, 3 (1964).

8. Kastigar v. United States, 406 U.S. 441, 444 (1972) (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring)).

9. United States v. Nobles, 422 U.S. 225, 233 (1975).

10. Schmerber v. California, 384 U.S. 757, 761 (1966).

11. Hoffman v. United States, 341 U.S. 479, 486-87 (1951). For a more extensive treatment of these requirements in the context of probation revocation proceedings, see Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations,* 74 MICH. L. REV. 525, 547-50 (1976).

12. Murphy v. Waterfront Comm'n, 378 U.S. 52, 57 n.6 (1964). The Court has also held that no adverse inferences may be drawn from the invocation of the privilege, at least in a criminal proceeding. Griffin v. California, 380 U.S. 609, 615 (1965). *But see* Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (permissible to draw adverse inferences from a prisoner's refusal to testify at a prison disciplinary hearing); *infra* notes 14-26 and accompanying text.

The state cannot compel an individual to waive the privilege against self-incrimination without a grant of immunity that is coextensive with the scope of the privilege. Kastigar v. United States, 406 U.S. 441, 453 (1972). In an early opinion, the Supreme Court suggested that the immunity must provide absolute protection from prosecution concerning the "transaction" to which the testimony relates in order to supplant the privilege. *See* Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892). In *Kastigar*, however, the Court rejected the transactional immunity requirement and held that use immunity sufficed to supplant the fifth amendment privilege against self-incrimination. 406 U.S. at 462. Use immunity does not prohibit the state from prosecuting the person who provided the immunized testimony; rather, it prohibits the state from using the immunized testimony, or any evidence derived from it, in any subsequent criminal proceeding against the witness. In order to ensure this protection, the state is required to prove an independent basis for all its evidence in any subsequent prosecution. *Id.* at 460.

13. Spevack v. Klein, 385 U.S. 511, 515 (1967) (citing Griffin v. California, 380 U.S. 609, 614 (1965)). The Supreme Court has consistently held that if the privilege against self-incrimination applies, any direct sanction for the refusal to waive the privilege creates an impermissible burden on the exercise of the right. In Garrity v. New Jersey, 385 U.S. 493 (1967), police officers under investigation for ticket-fixing were required to either waive the privilege at an investigatory hearing or forfeit their jobs and pension benefits. The Supreme Court held that the officers' subsequent testimony was compelled and therefore was inadmissible in any subsequent proceedings against them. *Id.* at 500. Similarly, in *Spevack*, a companion case to *Garrity*, the Court, in setting aside the disbarment of an attorney who refused to waive the privilege, held that disbar-

Although the Supreme Court has not defined the extent to which the privilege against self-incrimination applies in a revocation hearing, it has taken a restrictive view of the privilege in an analogous context. In *Baxter v. Palmigiano*,[14] the Court held that the privilege does not apply to the same extent in a prison disciplinary hearing as it does in a criminal trial.[15] The Court concluded that an adverse inference may be drawn from a prisoner's refusal to testify in response to allegations of misconduct because prison disciplinary hearings are not criminal proceedings.[16] Further, the Court emphasized that the trier of fact considered the prisoner's refusal to testify only as evidence, not as the equivalent of an admission of guilt.[17] Therefore, the Court concluded that allowing the trier of fact to draw adverse inferences from the prisoner's refusal to testify did not violate his fifth amendment privilege against self-incrimination.[18]

At least one court of appeals has noted that, in light of *Baxter*, the fifth amendment privilege might not apply in its full rigor in probation revocation hearings. In *United States v. Se-*

---

ment constituted an impermissible penalty for the exercise of the right. 385 U.S. at 515-16.

Although the Court has reaffirmed this line of reasoning in several subsequent cases, *see, e.g.,* Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 284-85 (1968); Gardner v. Broderick, 392 U.S. 273, 279 (1968), it remains unclear exactly what constitutes an impermissible penalty, *compare* Brooks v. Tennessee, 406 U.S. 605, 610-12 (1972) (state statute which required defendant to choose between testifying before introducing any other evidence on his behalf and not testifying at all impermissibly burdened defendant's fifth amendment privilege) *with* Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (allowing prison disciplinary board to draw adverse inferences from prisoner's refusal to testify does not impermissibly burden the prisoner's fifth amendment privilege) *and* McGautha v. California, 402 U.S. 183, 220 (1971) (procedure that required defendant in a capital case to waive right to address court on issue of punishment in order to exercise privilege against self-incrimination does not impermissibly burden the fifth amendment privilege).

In *Cunningham*, the Court suggested that an impermissible burden arises only if an individual is punished "automatically and without more" for the refusal to waive the privilege. 431 U.S. at 808 n.5. This language seems to indicate that an impermissible burden arises only when an individual is directly punished for refusing to testify. The distinction between direct and indirect penalties for the refusal to waive the privilege has been criticized by courts, *see, e.g.,* People v. Rocha, 86 Mich. App. 497, 511-12, 272 N.W.2d 699, 705-06 (1978), and commentators, *see, e.g.,* Note, *supra* note 6, at 688-90.

14. 425 U.S. 308 (1976).

15. *Id.* at 318-19.

16. *Id.*

17. *Id.* at 317-18.

18. *Id.* at 320.

gal,[19] the Ninth Circuit rejected a probationer's argument that the standards for accepting an admission of a violation at a probation revocation hearing should be the same as the standards for accepting a plea of guilty in a criminal trial.[20] Although the court did not decide the fifth amendment issue directly, it stated that *Baxter* "at least leaves open the question of whether the privilege should also have lesser force" in revocation hearings.[21] The court noted that, like a prison disciplinary hearing, a probation revocation hearing is not a criminal proceeding;[22] such a hearing involves "important [state] interests besides conviction for crime."[23]

Even assuming the Ninth Circuit's reasoning in *Segal* is correct,[24] the court's analysis would not extend to a probation revocation hearing held prior to a related criminal trial. In *Baxter*, the Supreme Court specifically noted that "if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered 'whatever immunity is required to supplant the privilege' and may not be required to 'waive such immunity.' "[25] The Court emphasized that because no criminal proceedings were pending against the prisoner his testimony would not be used against him in any such proceedings.[26] A probationer's testimony at a revocation hearing held prior to a related criminal trial, however, very likely will be used at the trial. Therefore, although *Baxter*'s ultimate impact on probation revocation proceedings has yet to be determined, the Court's reasoning suggests that the fifth amendment privilege extends at least to revocation hearings dealing with matters that might result in criminal proceedings.

II. THE CHOICE-OF-RIGHTS TEST

In addition to directly penalizing an individual for refusing

19. 549 F.2d 1293 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977).

20. *Id.* at 1299. In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that in a criminal trial there must be an affirmative showing that a guilty plea was voluntary and intelligent before the plea can be accepted.

21. 549 F.2d at 1299.

22. *Id.* at 1297.

23. *Id.* at 1299; see also Ryan v. Montana, 580 F.2d 988, 991 n.2 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979).

24. Most courts have assumed that a probationer cannot be penalized for invoking the fifth amendment privilege. *See, e.g.*, State v. Evans, 77 Wis. 2d 225, 234, 252 N.W.2d 664, 668 (1977) ("it is clear a probationer cannot be penalized for invoking his privilege against self-incrimination").

25. 425 U.S. at 316 (quoting Lefkowitz v. Turley, 414 U.S. 70, 85 (1973)).

26. *Id.* at 317.

to waive the privilege against self-incrimination,[27] the state may impermissibly burden the exercise of the privilege by requiring an individual to waive the benefit of the privilege in order to assert another constitutional right. The Supreme Court first employed this "choice-of-rights" analysis in *Simmons v. United States*,[28] in which the Court held that a defendant must be granted use immunity for testimony at a pretrial fourth amendment suppression hearing.[29] In *Simmons*, the defendant moved to suppress certain evidence as the "fruits" of an unlawful search.[30] To establish standing to raise the motion, the defendant was required to state his connection to this highly incriminating evidence.[31] The motion to suppress was denied and the defendant's testimony from the suppression hearing was subsequently introduced at his trial. The Supreme Court held that the defendant's statements at the suppression hearing should not have been admitted at the subsequent trial on the issue of guilt.[32] Justice Harlan, writing for the majority, focused on the tension between the defendant's fourth amendment right to be free from unreasonable searches and seizures and his fifth amendment privilege against self-incrimination and found it "intolerable that one constitutional right should have to be surrendered in order to assert another."[33]

In language and tone, the *Simmons* Court appeared to create a per se rule against forcing an individual to choose between two constitutional rights.[34] In *Melson v. Sard*,[35] the Court of Appeals for the District of Columbia Circuit adopted this interpretation. The court held that a parolee must be granted use immunity for testimony at a revocation hearing held prior to a criminal trial arising out of the same conduct[36] in order to prevent the parolee from being forced to choose be-

27. *See supra* note 13.
28. 390 U.S. 377 (1968).
29. *Id.* at 394.
30. *Id.* at 385.
31. *Id.* at 389-90; *see generally* Rakas v. Illinois, 439 U.S. 128 (1978). The petitioner in *Simmons* was on trial for bank robbery. Police had entered the house of the mother of one of the other defendants and seized two suitcases which contained a number of incriminating items, including various items of clothing. To establish standing to challenge the introduction of these items, the petitioner was required to testify that he owned two suitcases identical to those seized and that he was the owner of the clothing found inside the suitcases. 390 U.S. at 381.
32. 390 U.S. at 394.
33. *Id.*
34. *See* Note, *supra* note 6, at 678-87.
35. 402 F.2d 653 (D.C. Cir. 1968) (per curiam).
36. *Id.* at 655.

tween the right to be heard at the revocation hearing[37] and the privilege against self-incrimination concerning the criminal charges.[38] The court reasoned that without such a rule the parolee would likely be deterred from exercising the right to be heard at the revocation hearing in order to retain the privilege against self-incrimination for the pending criminal trial, thereby rendering the revocation hearing "meaningless."[39]

In *McGautha v. California*,[40] however, the Supreme Court retreated from its broad language in *Simmons*. In *McGautha*, the petitioner argued that Ohio's use of a unitary trial[41] for capital cases created an intolerable tension prohibited by *Simmons* because it required a defendant to choose between remaining silent on the issue of guilt and addressing the court on the issue of punishment.[42] Justice Harlan, again writing for the Court, rejected this argument and significantly limited the holding of *Simmons*. Harlan stated that the impermissible burden in *Simmons* was not the burden on the defendant's fifth amendment privilege.[43] Instead, he explained, the result in *Simmons* was based on the "unacceptable risk" that permitting the use of the defendant's testimony from the suppression hearing at the subsequent trial might deter a defendant from "the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior."[44] Harlan rejected as "insubstantial" the argument that *Simmons* was based solely on the burden that a forced election may have placed on the defendant's fifth amendment privilege.[45] Harlan concluded that the result

37. *Melson* was decided prior to Morrissey v. Brewer, 408 U.S. 471 (1972), in which the Supreme Court held that a parolee has a constitutional right to be heard prior to the revocation of parole. *See infra* notes 87-88 and accompanying text. A District of Columbia statute, however, guaranteed a parolee the right to a hearing and an opportunity to be heard prior to the revocation of parole. 402 F.2d at 655 n.9.

38. 402 F.2d at 655.

39. *Id.*

40. 402 U.S. 183 (1971).

41. In a unitary trial, the issues of guilt and punishment are decided in a single proceeding. *See id.* at 191-92.

42. Justice Harlan "[a]ssum[ed], without deciding, that the Constitution does require such an opportunity" to address the court on the issue of punishment. *Id.* at 218-19. At common law, this right was known as the right of allocution. *See, e.g.,* Specht v. Patterson, 386 U.S. 605, 610-11 (1967); Townsend v. Burke, 334 U.S. 736, 740-41 (1948); Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 HARV. L. REV. 821, 832-33 (1968).

43. 402 U.S. at 212.

44. *Id.* at 211.

45. *Id.* at 212.

in *Simmons* was justified on fourth amendment grounds[46] but declared that the discussion in *Simmons* that indicated that the result was based on a broader rationale of the tension between rights was "open to question."[47]

In place of the per se rule suggested by *Simmons*, Harlan proposed a new standard under which a compelled election between rights is unconstitutional only if it "impairs to an appreciable extent any of the policies behind the rights involved."[48] Harlan reviewed the history of, and the policies underlying, the privilege against self-incrimination and the right of allocution[49] and determined that a unitary trial did not appreciably impair those policies.[50] He reasoned that a defendant in a unitary trial faced essentially the same choice as a defendant in a bifurcated trial: to testify and risk self-incrimination, or to remain silent and risk waiving a valuable defense.[51] In each case, the defendant's decision would depend on the force of the state's case, and "the mere force of evidence is [not] compulsion of the type forbidden by the privilege."[52] Rather than the intolerable tension present in a case such as *Simmons*, a defendant in a unitary trial merely faced a "difficult judgment" similar to many others encountered throughout the trial.[53] Harlan concluded that "although the defendant may have a right, *even of constitutional dimensions*, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring

46. *Id.* at 211-12.
47. *Id.* at 212-13.
48. *Id.* at 213.
49. *See supra* note 42.
50. Concerning the fifth amendment privilege against self-incrimination, Harlan noted that the policies underlying the privilege are varied and not all of these policies are implicated in any given application of the privilege. 402 U.S. at 214.

In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), the Court noted the following policies underlying the fifth amendment privilege against self-incrimination: (1) to protect the defendant from "the cruel trilemma of self-accusation, perjury or contempt;" (2) to maintain an accusatorial rather than inquisatorial system of justice; (3) to prevent the elicitation of confessions by inhumane treatment; (4) to maintain a fair state-individual balance by "requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" (5) respect for privacy; and (6) distrust of self-deprecatory statements. *Id.* at 55.

Harlan concluded that the only policy affected by a unitary trial is that of the "cruel trilemma," 402 U.S. at 214, and this policy is not impaired when a defendant "yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt." *Id.* at 217.
51. 402 U.S. at 213.
52. *Id.*
53. *Id.*

him to choose."[54]

III. CHOICE-OF-RIGHTS ANALYSIS IN PROBATION REVOCATION PROCEEDINGS

A. RELIANCE ON *MCGAUTHA*

Several courts have relied on *McGautha* to hold that a postponement/use immunity rule is not constitutionally required for probation revocation proceedings.[55] Most recently, the Court of Appeals for the Third Circuit considered this issue in *United States v. Bazzano*.[56] Only Chief Judge Seitz's concurring opinion addressed the constitutional issue, concluding that the case was indistinguishable from *McGautha*.[57] He argued that the forced election did not appreciably impair the policies underlying the probationer's privilege against self-incrimination.[58] He reasoned that the pressure on the probationer to waive the fifth amendment privilege was indistinguishable from the pressure on a defendant in a unitary trial to waive the privilege, which the Supreme Court found constitutionally permissible in *McGautha*.[59] Accordingly, Seitz concluded that there was no impermissible coercion on the probationer's privilege against self-incrimination.[60]

Similarly, Seitz relied on *McGautha* to conclude that the forced election did not appreciably impair any of the policies underlying the probationer's right to be heard at the revocation hearing.[61] Seitz reasoned that the same individual interests that underlie the right to be heard at the revocation hearing "also underlie [the] due process right to be heard at sentencing . . . [and such interests are] not undermined by requiring [a] defendant to risk that statements made regarding punishment will be damaging with regard to guilt."[62]

---

54. *Id.* (emphasis added).

55. *See, e.g.,* Ryan v. Montana, 580 F.2d 988, 992 (9th Cir. 1978), *cert. denied,* 440 U.S. 977 (1979); Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied,* 419 U.S. 1026 (1974); People v. Lee, 88 Ill. App. 3d 396, 398, 410 N.E.2d 646, 648 (1980).

56. 712 F.2d 826 (3d Cir. 1983), *cert. denied,* 104 S. Ct. 1439 (1984).

57. *Id.* at 842.

58. *Id.*

59. *Id.*

60. *Id.* In a footnote, Chief Judge Seitz distinguished Brooks v. Tennessee, 406 U.S. 605 (1971), on the ground that *Brooks* involved a trial on the issue of guilt rather than the revocation of conditional liberty and therefore was more coercive. 712 F.2d at 842 n.1.

61. 712 F.2d at 843.

62. *Id.* at 843 (citing McGautha v. California, 402 U.S. 183, 220 (1971)). Seitz concluded that the "individual interests protected by the due process right to

Despite the near unanimity among lower courts in interpreting *McGautha* as controlling on whether the Constitution requires a postponement/use immunity rule for probation revocation proceedings,[63] reliance on *McGautha* is inappropiate for several reasons. First, there is greater pressure on a probationer to testify at a revocation hearing than on a defendant to testify at a criminal trial. Unlike a criminal trial, silence at a revocation hearing is not a viable strategic alternative. The state's burden of proof is lower at a revocation hearing.[64] Moreover, many of the procedural safeguards of a criminal trial are relaxed at a revocation hearing: illegally seized evidence may be admitted,[65] the probationer is not guaranteed the assistance of counsel,[66] and hearsay evidence may be admitted.[67] These differences allow the state to prove its case with comparative ease. Without a probationer's testimony to rebut or mitigate the charges, the possibility of a judgment adverse to the probationer is substantial.[68] Because the probationer is not pro-

---

be heard in person at a probation revocation hearing include personal participation in the revocation process, and bringing to the court's attention evidence peculiarly within the probationer's own knowledge." *Id.*

63. *See supra* note 55.

64. Generally, the state need only prove that it is "reasonable to believe" that a violation occurred, or some other significantly lower standard. *See, e.g.,* United States v. Rice, 671 F.2d 455, 458 (11th Cir. 1982) ("reasonably satisf[ies] the judge"); United States v. Torrez-Flores, 624 F.2d 776, 782 (7th Cir. 1980) (court need only be "reasonably satisfied" that a violation has occurred); United States v. Reed, 573 F.2d 1020, 1023 (8th Cir. 1978) ("adequate proof"). *But see* COLO. REV. STAT. § 16-11-206(3) (1973 & Supp. 1983) (state must prove violation beyond reasonable doubt if violation is also a criminal offense). At a criminal trial, the state must prove the defendant's guilt beyond a reasonable doubt. *E.g., In re* Winship, 397 U.S. 358, 364 (1970).

65. *See, e.g.,* United States v. Bazzano, 712 F.2d 826, 830 (3d Cir. 1983) (citing cases), *cert. denied,* 104 S. Ct. 1439 (1984). *But see* United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978) (fourth amendment exclusionary rule applies to probation revocation proceedings).

66. *See, e.g.,* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); *cf.* Mempa v. Rhay, 389 U.S. 128, 137 (1967) (probationer has right to counsel at deferred sentencing hearing).

67. *See, e.g.,* United States v. Torrez-Flores, 624 F.2d 776, 780 (7th Cir. 1980). Indeed, with the exception of the privilege rule, the Federal Rules of Evidence are inapplicable in a probation revocation proceeding. FED. R. EVID. 1101(c),(d)(3). Moreover, the right to confront and cross-examine witnesses may be denied for "good cause," *e.g.,* Morrissey v. Brewer, 408 U.S. 471, 489 (1972), discovery may be denied or otherwise limited, *e.g.,* People v. DeWitt, 78 Ill. 2d 82, 85, 397 N.E.2d 1385, 1386 (1979), and there is no right to a jury trial, *e.g.,* Morgan v. State, 352 So.2d 161, 162 (Fla. Dist. Ct. App. 1977).

68. Further, if the Ninth Circuit's suggestion in United States v. Segal, 549 F.2d 1293 (9th Cir.), *cert. denied,* 431 U.S. 919 (1977), that it may be permissible to draw adverse inferences from a probationer's refusal to testify prevails, *see supra* notes 19-23 and accompanying text, there would be an even greater pressure on the probationer to testify.

tected by the "full panoply of rights"[69] accorded a defendant at a criminal trial, reliance on *McGautha* in the context of probation revocation is inappropriate.

Second, a probationer, unlike a criminal defendant, faces the possibility of a subsequent criminal proceeding. A defendant who testifies at a criminal trial risks that the testimony may prove harmful in that trial. In contrast, a probationer who testifies at a revocation hearing prior to a related criminal trial not only risks that such testimony may be harmful in the revocation hearing but also that it may be harmful in the subsequent criminal trial. Therefore, a forced election is likely to have a greater chilling effect on a probationer's right to testify at a revocation hearing than it has on a defendant's right to testify at a criminal trial.[70]

Finally, reliance on *McGautha* is inappropriate in the probation revocation context because the unitary trial at issue in *McGautha* was prescribed by statute whereas the scheduling of a revocation hearing is generally within the discretion of the state.[71] Allowing the state to decide whether to schedule a probation revocation hearing prior to a related criminal trial may infringe on one of the fundamental policies underlying the fifth amendment privilege against self-incrimination—the maintenance of a fair balance between the state and those individuals it prosecutes.[72] Because of the lower burden of proof and relaxed procedural safeguards at a revocation hearing,[73] the state, when faced with a weak criminal case, may be tempted to schedule the revocation hearing prior to the criminal trial. If the probationer refuses to testify at the hearing, the probation will very likely be revoked, thereby lessening the need for a conviction.[74] On the other hand, if the probationer does testify

69. Morrissey v. Brewer, 408 U.S. 471, 480 (1972); *see infra* note 88.

70. A probationer is subject both to greater pressure to testify and greater pressure not to testify than a defendant in a criminal trial, *see supra* notes 64-69 and accompanying text. The explanation for this apparent paradox is that the probationer's decision is substantially different from that of a defendant in a criminal trial because the consequences of the probationer's decision are more severe.

71. *See* United States v. Bazzano, 712 F.2d 826, 837 (3d Cir. 1983) (citing cases), *cert. denied,* 104 S. Ct. 1439 (1984); *infra* note 85.

72. *See* People v. Coleman, 13 Cal. 3d 867, 875, 533 P.2d 1024, 1032, 120 Cal. Rptr. 384, 392 (1975); *see also* McCracken v. Corey, 612 P.2d 990, 996 (Alaska 1980); People v. Rocha, 86 Mich. App. 497, 503, 272 N.W.2d 699, 703 (1978); *see generally* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

73. *See supra* notes 64-69 and accompanying text.

74. Although the state still has the option of prosecuting even if the defendant's probation has been revoked, in many cases the state's goal is simply

at the hearing, the state may be able to obtain incriminating evidence to bolster its case at the criminal trial.[75] Thus, the state may be able to parlay a weak case into a "no-lose" situation in which it relies primarily on the probationer, rather than its own investigation, to make its case.[76] A fair balance between state and individual is best maintained when the state is required to meet its high burden of proof with evidence obtained through its own efforts before the accused must decide whether or not to testify. Such a requirement is central to the fifth amendment, and, indeed, to the whole criminal justice system.[77] The possibility that this requirement might be bypassed simply by scheduling a revocation hearing prior to a related criminal trial threatens the state-individual balance and distinguishes the probation revocation situation from the situation in *McGautha*.

B. Judicial Adoption of a Postponement/Use Immunity Rule

Because the issue of whether a postponement/use immunity rule is constitutionally required is close, and the Supreme Court decisions under the choice-of-rights analysis somewhat inconsistent,[78] some courts have declined to address the constitutional issue and have instead adopted a postponement/use immunity rule under their supervisory powers.[79] Judicial adoption of a postponement/use immunity rule is consistent with the Supreme Court's latest pronouncement on the purposes of supervisory rules in federal courts: (1) to implement remedies for violations of recognized rights; (2) to preserve judicial integrity by ensuring that decisions rest on appropriate considerations validly before the fact-finder; and (3) to deter illegal

---

incarceration and revocation serves as an effective substitute for a conviction. *See* Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

75. *See* People v. Coleman, 13 Cal. 3d 867, 877, 533 P.2d 1024, 1032-33, 120 Cal. Rptr. 384, 393 (1975).

76. *See* Flint v. Mullen, 499 F.2d 100, 105 (1st Cir.) (Coffin, C.J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 460 (1966)), *cert. denied,* 419 U.S. 1026 (1974); *see also* McCracken v. Corey, 612 P.2d 990, 996 (Alaska 1980); People v. Coleman, 13 Cal. 3d 867, 877, 533 P.2d 1024, 1032, 120 Cal. Rptr. 384, 392 (1975); People v. Rocha, 86 Mich. App. 497, 513, 272 N.W.2d 699, 707 (1978).

77. *Cf. In re* Winship, 397 U.S. 358, 361-64 (1970) (role of proof beyond a reasonable doubt in criminal justice system).

78. *See supra* notes 28-60 and accompanying text.

79. *See, e.g.,* McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980); People v. Coleman, 13 Cal. 3d 867, 888-89, 533 P.2d 1024, 1041-42, 120 Cal. Rptr. 384, 401-02 (1975); People v. Rocha, 86 Mich. App. 497, 512-13, 272 N.W.2d 699, 706 (1978); State v. DeLomba, 117 R.I. 673, 676-77, 370 A.2d 1273, 1275-76 (1977); State v. Evans, 77 Wis. 2d 225, 234-36, 252 N.W.2d 664, 668 (1977).

conduct.[80] All three of these purposes apply in the context of probation revocations. A postponement/use immunity rule would implement the fifth amendment privilege against self-incrimination and the right to be heard at the revocation hearing.[81] Such a rule would also ensure that all relevant evidence is made available to the court at the revocation hearing, thus allowing the court to base its decision on appropriate considerations.[82] Moreover, a postponement/use immunity rule would deter reliance by the state on the revocation hearing as an investigative tool[83] and would deny the state the opportunity to present the probationer with the Hobson's choice referred to above.[84] Thus, adoption of a postponement/use immunity rule under the supervisory powers of the courts constitutes an entirely acceptable alternative to implementing the rule based on the due process analysis suggested below.[85]

IV. PROBATIONERS' DUE PROCESS RIGHT TO BE HEARD

Originally, courts considered probation an "act of grace" provided by the legislature.[86] Under this view, the rights of a probationer were largely a matter of legislative discretion. Accordingly, revocation proceedings were not subject to constitu-

80. United States v. Hastings, 103 S. Ct. 1974, 1978-79 (1983).

81. *See infra* notes 140-43 and accompanying text.

82. *See infra* text accompanying notes 100-06.

83. *See supra* notes 73-77 and accompanying text.

84. *See supra* text accompanying note 1.

85. In United States v. Bazzano, 712 F.2d 826 (3d Cir. 1983), *cert. denied,* 104 S. Ct. 1439 (1984), Chief Judge Seitz suggested that a postponement/use immunity rule is unnecessary because, as a matter of policy, the United States Probation Office delays the initiation of revocation proceedings until after the disposition of state criminal charges. This policy, however, is not enforceable by the probationer and does not protect against the possibility of bad faith on the part of the Probation Office. Therefore, the policy does not obviate the need for a postponement/use immunity rule.

Seitz's reference to United States v. Tonnelli, 577 F.2d 194 (3d Cir. 1978), does not support his position. In *Tonnelli*, the Third Circuit held that a supervisory rule requiring that putative defendants be advised of their fifth and sixth amendment rights prior to testifying in grand jury proceedings was unnecessary because the Justice Department had already adopted this practice. The Justice Department's procedure, however, was to be followed in every case. As a result, the problem of bad faith was eliminated. In contrast, the Probation Office policy referred to by Seitz is discretionary. Thus, the problem of bad faith remains a possibility.

86. Escoe v. Zerbst, 295 U.S. 490, 492 (1935) (dictum). For a review of other theories that courts have relied on in declining to extend the application of the due process clause to probation revocation, see Crowe, *The Exclusionary Rule in Probation Revocation Proceedings,* 13 LOY. U. CHI. L.J. 373 (1982).

tional due process requirements. In *Morrissey v. Brewer*,[87] however, the Supreme Court held that a parolee's conditional liberty is a liberty interest within the meaning of the fourteenth amendment, which cannot be revoked without due process. The process due a parolee includes the right to a revocation hearing and the right to be heard in person at that hearing.[88]

Courts that employ the choice-of-rights test in the probation revocation context have generally focused on the probationer's fifth amendment privilege against self-incrimination and have given rather cursory treatment to the probationer's due process right to be heard at the revocation hearing.[89] These courts have generally presumed that the policies that underlie a probationer's right to be heard at the revocation hearing are the same as the policies that underlie a defendant's right to testify at a criminal trial.[90] The right to be heard at a revocation proceeding and the right to be heard at a criminal trial, however, are predicated on different constitutional provisions[91] and therefore may be based on different policies. Under the test adopted in *McGautha v. California*,[92] compelling an in-

87. 408 U.S. 471 (1972).

88. In *Morrissey*, the Court held that in the context of a parole revocation hearing the due process clause requires at least a reasonably prompt, informal inquiry by an impartial tribunal to determine if there is reasonable ground to believe that there was a violation of the terms of parole and a subsequent hearing at which the revocation decision is made. *Id.* at 484-89. At the second hearing, the parolee is entitled to: (1) written notice of the claimed violations; (2) disclosure of adverse evidence; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses, unless denied "for good cause"; (5) a neutral and detached hearing body; and (6) a written statement by the fact-finder setting forth the evidence relied on and the reasons for revoking parole. *Id.* at 489; *see* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (extending due process requirements to probation revocation).

The early 1970s witnessed a "due process explosion," which extended procedural due process requirements to several areas that previously had been unprotected. *See, e.g.,* Goss v. Lopez, 419 U.S. 565, 574 (1975) (public school suspension); Fuentes v. Shevin, 407 U.S. 67, 80-83 (1972) (repossession actions); Bell v. Burson, 402 U.S. 535, 540-41 (1971) (driver's license suspension); Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (welfare benefits termination); *see generally* Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

89. *See, e.g.,* Ryan v. Montana, 580 F.2d 988, 992-93 (9th Cir., 1978), *cert. denied,* 440 U.S. 977 (1979); United States v. Brugger, 549 F.2d 2, 4-5 (7th Cir.), *cert. denied,* 431 U.S. 919 (1977); Flint v. Mullen, 499 F.2d 100, 104-05 (1st Cir.), *cert. denied,* 419 U.S. 1026 (1974); State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981).

90. *See, e.g.,* United States v. Bazzano, 712 F.2d 826, 843 (3d Cir. 1983) (Seitz, C.J., concurring), *cert. denied,* 104 S. Ct. 1439 (1984).

91. *See supra* notes 64-69, 88, and accompanying text.

92. 402 U.S. 183 (1971); *see supra* notes 40-54 and accompanying text.

dividual to choose between the exercise of two constitutional rights is unconstitutional if it "impairs to an appreciable extent any of the policies behind *the rights involved*."[93] The analysis employed by the majority of courts is inadequate because it fails to consider the specific policies that underlie a probationer's right to be heard at the revocation hearing. A proper analysis of the constitutionality of holding a revocation hearing prior to a related criminal trial must consider whether a procedure that encourages a petitioner to waive the right to be heard at the revocation hearing in order to later assert the privilege against self-incrimination at the criminal trial appreciably impairs the specific policies underlying the probationer's right to be heard at the revocation hearing. Such an analysis necessarily requires an explication of the policies underlying the probationer's right to be heard as well as a determination of the effect that holding a revocation hearing prior to a related criminal trial has on these policies.

A. Policies Underlying a Probationer's Right to be Heard

A probationer has a strong interest in being afforded an opportunity to be heard at the revocation hearing. The opportunity to be heard may be psychologically important to the probationer: "to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential."[94] Such an opportunity is particularly significant when the decision affects such a vital interest as one's liberty.[95]

More important, the opportunity to be heard at the revocation hearing may be essential to avoid the revocation of proba-

93. 402 U.S. at 213 (emphasis added).

94. Michelman, *Formal and Associational Aims in Procedural Due Process,* 18 Y.B. of the Am. Soc'y for Pol. & Legal Phil., Due Process 127-28 (J. Pennock & J. Chapman eds. 1977).

95. Revocation of probation is "the harshest action the state can take against the individual through the administrative process." Friendly, *supra* note 88, at 1296. The Supreme Court has recognized the unique severity of imprisonment in the context of the sixth amendment right to counsel. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial"). The Court has also noted that even conditional liberty "enables [a person] to do a wide range of things open to persons who have never been convicted of any crime." Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

tion. Unlike a criminal trial, a revocation decision entails two distinct questions: (1) whether a violation of the conditions of probation occurred; and (2) whether this violation justifies the revocation of probation.[96] The second question provides courts with broad discretion as to whether probationers should be committed to prison, or whether "other steps [should] be taken to protect society and improve chances of rehabilitation."[97] Thus, the ultimate decision entails both factual and subjective judgments. The subjective nature of the decision makes the opportunity to present mitigating evidence vital: "Even where a violation is proven or admitted, a probationer has a due process right to explain any mitigating circumstances and argue that the ends of justice do not warrant revocation."[98] Often, a probationer alone will have knowledge of such mitigating circumstances. Without the opportunity to be heard at the revocation hearing, a probationer may be unable to present an adequate defense.[99]

The state also has a strong interest in providing a probationer an opportunity to be heard. It has a strong interest in accurate fact-finding at revocation hearings in order to ensure informed, intelligent, and just revocation decisions.[100] The state's interest in a successful probation program is dependent on its ability to make rational revocation decisions. The "primary purpose of probation . . . is to promote the rehabilitation of the criminal by allowing him to integrate into society as a constructive individual."[101] The state needs as much information as possible to "make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community."[102] The complexity and implications of this decision make it "extremely important that *all reliable* evidence shedding light on the probationer's conduct be available during the probation revocation proceedings."[103] Consequently, courts have generally declined to extend the constitutional and common law limi-

96. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

97. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

98. People v. Coleman, 13 Cal. 3d 867, 873, 533 P.2d 1024, 1031, 120 Cal. Rptr. 389, 391 (1975).

99. Moreover, the relaxed procedural safeguards at a revocation hearing, *see supra* notes 64-69 and accompanying text, make it more likely that a probationer without an opportunity to be heard will suffer an adverse judgment.

100. Morrissey v. Brewer, 408 U.S. 471, 483-84 (1972).

101. United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975).

102. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973).

103. United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975) (emphasis added).

tations on the admissibility of evidence applicable in criminal trials to revocation proceedings.[104] Instead, the due process rights afforded a probationer are granted to ensure the full disclosure of evidence.[105] Similarly, courts have emphasized that revocation proceedings should be as nonadversarial as possible in order to encourage the full disclosure of relevant evidence.[106]

Moreover, providing probationers with an opportunity to be heard increases the likelihood that they will perceive that they were treated fairly[107] and therefore enhances the rehabilitative prospects of probation programs.[108] Thus, the state has an interest in the full disclosure of evidence, which includes testimony from the probationer, in order to promote rational revocation decisions.[109]

The state also has a strong, two-fold interest in law enforcement. First, the state has an interest in developing law enforcement procedures that are fiscally and administratively efficient. In the context of probation, this would include the administrative cost of the probation program and the revocation hearing as well as the cost of any subsequent trial. Second, the state has an interest in effective law enforcement. Primary to this concern is the state's interest in promoting public safety by removing from society those persons whose behavior does not conform to society's laws. Somewhat related is the more abstract concept of promoting respect for the law in general by publicly punishing those who break the law. In the context of probation revocation, both of these interests are magnified be-

104. *See supra* notes 64-69 and accompanying text.

105. *See supra* note 88.

106. Gagnon v. Scarpelli, 411 U.S. 778, 787-88 (1973); *see also* Note, *supra* note 11, at 528.

107. *See supra* notes 94-95 and accompanying text. Revoking a probationer's liberty without providing an opportunity to be heard prior to the decision may leave the probationer bitter and "generate negative reactions and attitudes at odds with the rehabilitative goals of the penal system." People v. Coleman, 13 Cal. 3d 867, 874, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975).

108. *See* People v. Coleman, 13 Cal. 3d 867, 874, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975) (citing Morrissey v. Brewer, 408 U.S. 471, 484 (1972)); *see also* Greenholz v. Nebraska Penal Inmates, 442 U.S. 1, 34 n.16 (1979) (Marshall, J., dissenting in part) (emphasizing the importance, for purposes of rehabilitation, of fair treatment in parole release procedures); *cf.* Dixon v. Alabama State Bd. of Higher Educ., 294 F.2d 150, 157 (5th Cir.) (failure of school to exercise "fundamental principles of fairness" in school disciplinary hearings may set an example "if not corrected by the courts, . . . [that] can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education"), *cert. denied,* 368 U.S. 930 (1961).

109. Moreover, the state has a practical incentive to avoid unnecessary revocations: prison is substantially more expensive than probation. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

cause the probationer has already been convicted of a crime.[110]

B. The Effect of Holding a Revocation Hearing Prior to a Related Criminal Trial on the Policies Underlying the Probationer's Due Process Right to be Heard

Both the probationer and the state have strong interests in the full disclosure of all relevant evidence at the revocation hearing.[111] Although mitigating evidence possesses special significance in revocation proceedings,[112] it often consists of damaging factual admissions coupled with more or less compelling moral excuses. It is exactly this type of evidence that is most likely to be withheld because of the fear of self-incrimination concerning the pending criminal trial.[113] Therefore, holding a revocation hearing prior to a related criminal trial is contrary to both the probationer's and the state's interests in the full disclosure of all the relevant evidence at the revocation hearing.

Holding a revocation hearing prior to a related criminal trial may be essential to efficient and effective law enforcement. In his concurring opinion in *United States v. Bazzano*,[114] Chief Judge Seitz argued that a postponement/use immunity rule was not constitutionally required because the burdens imposed on the state by such a rule outweighed the benefits.[115] Seitz concluded that because the burdens would vary from case to case, the issue was best left to the discretion of the trial judge,[116] but noted that "inconvenience . . . may result from an untimely motion for postponement."[117] For example, in *Bazzano*, the probationer did not raise his request for postponement until after the revocation hearing had begun. At that point, postponement would have caused serious hardship to

110. *See* Morrissey v. Brewer, 408 U.S. 471, 483 (1972).
111. *See supra* notes 94-109 and accompanying text.
112. *See supra* notes 96-99 and accompanying text.
113. The ultimate issue at a criminal trial is simply whether or not a violation of the law occurred. Consequently, moral excuses offered as mitigating evidence at a revocation hearing may prove very damaging at a criminal trial. Further, because probationers are by definition law-breakers, their credibility is likely to be low, especially if the state's charges are denied. A probationer's testimony is more likely to be accepted, and hence more valuable to the court, if it adds to rather than detracts from the state's version of the facts. *See* People v. Coleman, 13 Cal. 3d 867, 874, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975).
114. 712 F.2d 826 (3d Cir. 1983), *cert. denied,* 104 S. Ct. 1439 (1984).
115. *Id.* at 842-43.
116. *Id.* at 843.
117. *Id.* at 844.

the probation officials because several of their witnesses were from out-of-town.[118] In addition, Seitz argued that postponement would not be a viable alternative when no criminal charges are pending, "the disposition of which could mark the time at which the probation revocation hearing would be recommenced."[119] Finally, Seitz was concerned that a delay might "result in the loss of evidence, the disappearance or death of witnesses, or other forms of prejudice to the government."[120] Turning to the question of use immunity, Seitz argued that such a requirement would "impose on the government the substantial burden in a subsequent criminal prosecution of proving that its evidence was derived from a source wholly independent of the probationer's previously immunized testimony."[121]

Chief Judge Seitz treats postponement and use immunity as separate, rigid rules that are to be mechanically applied. As a result, he greatly exaggerates the potential burdens that these rules would impose on the state. Postponement and use immunity are more properly characterized as alternative remedies. If the circumstances are such that either postponement or use immunity would greatly inconvenience the state, the other remedy should be employed.[122] When the two remedies are considered as alternatives, the practical reasons against adopting a postponement/use immunity rule are considerably less persuasive. The inconvenience caused by an untimely motion will not result because the rule involves alternative procedures, both of which will protect a probationer's right to be heard. The state can choose whichever procedure is more appropriate for the specific case and each side can plan accordingly. The problem of losing evidence and witnesses, of course, affects both sides;[123] if the state has a special reason to avoid postponement, it can grant the probationer use immunity and hold the hearing quickly. Finally, if no criminal charges are pending against the probationer the need for a postponement/use immunity rule is even greater because, in such a situation, the state would be more tempted to use the revocation

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 843.
122. *But see infra* notes 144-53 and accompanying text (suggesting that postponement is the preferable procedure).
123. Because silence is not a viable alternative at a revocation hearing, *see supra* notes 64-74 and accompanying text, loss of evidence is likely to be more harmful to a probationer than to a defendant in a criminal trial.

hearing as a means to bolster a weak case.[124]

Postponement would not impair the state's interest in public safety; if necessary and appropriate, a probationer accused of violating the criminal law could be taken into custody pending the outcome of the criminal trial.[125] Moreover, postponement might encourage more thorough police work and thus promote public safety by reducing the state's incentive to use the revocation hearing as an investigative tool.[126]

If the state's goal is merely incarceration of a probationer, revocation is often preferred to a criminal conviction because revocation hearings are generally less expensive than criminal trials.[127] If the state does not intend to prosecute a probationer, it is in no way burdened by a grant of use immunity. On the other hand, if the state intends to prosecute, postponement of the revocation hearing would not increase the cost of either proceeding and, indeed, might even save money. By relieving a probationer of the difficult decision between remaining silent and testifying, and by encouraging the full disclosure of evidence, the revocation hearing will be less adversarial and, presumably, less expensive.[128] In any event, the fiscal burden imposed on the state by postponement would seem to be bearable; it is even standard policy in some jurisdictions to delay the initiation of revocation proceedings until after the disposition of the underlying criminal charges.[129]

Similarly, a grant of use immunity to a probationer when the revocation hearing is held prior to a related criminal trial would not impose substantial burdens on the state. Use immunity is employed in several other contexts without significant

---

124. *See supra* notes 71-77 and accompanying text.

125. In *Bazzano*, the petitioner argued that, "if necessary and appropriate, a probationer who is accused of violating the terms of his probation can be taken into custody pending the outcome of the revocation hearing." 712 F.2d at 836. Because the majority declined to adopt a postponement/use immunity rule, this issue was expressly left open. *Id.* The ABA STANDARDS RELATING TO PROBATION § 5.3 (Approved Draft 1970) provide that "upon a showing of probable cause that another crime has been committed by the probationer, the probation court should have discretionary authority to detain the probationer *without bail* pending a determination of the new criminal charges." (Emphasis added).

126. *See supra* notes 71-77 and accompanying text.

127. *See* Morrissey v. Brewer, 408 U.S. 471, 483 (1972).

128. For example, counsel is appointed in probation revocation proceedings on a case-by-case basis, depending on the probationer's need. *See* Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973). A probationer who does not have to make the difficult choice between testifying and remaining silent will have less need for counsel.

129. *See supra* note 85 and accompanying text.

impairment of law enforcement functions.[130] Indeed, a grant of use immunity does not penalize the state. Rather, use immunity merely prevents the state from gaining a windfall by putting it in the same position it would have been in had the probationer not testified.[131] Although requiring the state to prove an independent basis for its evidence at a subsequent trial might involve some administrative burdens,[132] such a requirement would not adversely affect the state's ability to obtain evidence. In the event of an ongoing investigation, the state can limit the possibility that it will be unable to establish an independent basis by carefully recording the evidence obtained prior to immunization and by limiting the number of people who have access to the immunized testimony.[133]

The state also has an interest in preventing perjury,[134] and, under due process analysis, both the the state and the probationer have an interest in presenting all the relevant evidence in order to allow the trier of fact to make a rational decision.[135] Because only truthful evidence is relevent, an exception to the use immunity rule should be made in situations where the probationer's revocation hearing testimony is materially inconsistent with the probationer's testimony at the subsequent criminal trial. In such cases, the revocation hearing testimony should be admitted for purposes of impeachment.[136] An impeachment exception is a rational accomodation of the individ-

130. *See, e.g.,* Kastigar v. United States, 406 U.S. 441 (1972) (grand jury testimony); Simmons v. United States, 390 U.S. 377 (1968) (pretrial fourth amendment suppression hearing); Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980) (defense witness immunity).

131. Indeed, the state may even be in a better position. *See infra* note 142.

132. *See* United States v. Bazzano, 712 F.2d 826, 845 (3d Cir. 1983) (Seitz, C.J., concurring), *cert. denied,* 104 S. Ct. 1439 (1984).

133. In ongoing investigations, the need for a grant of use immunity is even greater because there is a greater incentive for the state to use the revocation hearing as an investigative tool. *See supra* notes 71-77 and accompanying text.

134. In Simmons v. United States, 390 U.S. 377 (1968), Justice Black expressed concern that a grant of use immunity for a defendant's testimony at a pretrial suppression hearing would bar the state "from offering a truthful statement made by a defendant . . . in order to prevent the defendant from winning an acquittal on the false premise that" what was sworn to in the earlier proceeding is not true. *Id.* at 396 (Black, J., concurring in part and dissenting in part).

135. *See supra* notes 94-109 and accompanying text.

136. Many courts that have adopted a postponement/use immunity rule under their supervisory powers, *see supra* notes 78-84 and accompanying text, have allowed an impeachment exception. *See, e.g.,* State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981) (postponement/use immunity rule required by state rules of criminal procedure); People v. Coleman, 13 Cal. 3d 867, 892-93, 533 P.2d 1024, 1044, 120 Cal. Rptr. 384, 404 (1975); State v. Evans, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664, 668-69 (1977).

ual's interest in testifying and the state's interests in promoting full disclosure of evidence and preventing perjury.[137]

C. Results of the Due Process Analysis

Holding a revocation hearing prior to a related criminal trial without a grant of use immunity appreciably impairs the specific policies underlying a probationer's right to be heard at the revocation hearing. In such a situation, there is a significant risk that the probationer will be deterred from testifying. As a result, potentially relevant evidence is suppressed.[138] Moreover, holding a revocation hearing prior to the disposition of the underlying criminal charges may be contrary to the state's interest in efficiency if it makes the revocation hearing more adversarial.[139]

The adoption of a postponement/use immunity rule would protect the state's interest in the full disclosure of evidence without impairing the state's law enforcement interests. If revocation hearings were postponed until after the disposition of related criminal charges, the fear of self-incrimination would no longer exist.[140] On the other hand, if revocation hearings held

137. Although the Supreme Court has not explicitly upheld the use of immunized testimony for impeachment purposes, it has implied that such use would be permissible. In United States v. Salvucci, 448 U.S. 83 (1980), the Court overruled the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), which allowed a criminal defendant charged with a crime of possession to challenge the legality of a search without regard to whether the defendant had an expectation of privacy in the premises searched. Justice Rehnquist, writing for the majority, reasoned that the *Simmons* use immunity rule obviated the need for the automatic standing doctrine. 448 U.S. at 88-90. Rehnquist noted that the "Court has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial." *Id.* at 93-94. He noted further that "the protective shield of *Simmons* is not to be converted into a license for false representations." *Id.* at 94 n.9 (quoting United States v. Kahan, 415 U.S. 239, 243 (1974)). Thus, *Simmons* does not preclude the use of the petitioner's testimony for impeachment. *Cf.* United States v. Kahan, 415 U.S. 239, 243 (1974) (allowing the admission of a defendant's prior inconsistent statements made at an indigency hearing); Brown v. United States, 411 U.S. 223, 228 (1971) (holding that *Simmons* prohibits only direct admission of testimony from a suppression hearing); Harris v. New York, 401 U.S. 222, 225-26 (1971) (statements obtained by police in violation of *Miranda* may be used to impeach the credibility of a defendant who takes the stand to testify in his or her own defense). *But cf.* New Jersey v. Portash, 440 U.S. 450 (1979) (immunized testimony made before grand jury is inadmissible in a subsequent criminal trial for impeachment purposes). *Portash*, however, involved directly compelled testimony. In contrast, use immunity in the probation context would be granted to *allow* the probationer to testify.

138. *See supra* notes 112-13 and accompanying text.

139. *See supra* note 128.

140. Because the state's burden of proof is higher at a criminal trial, there

prior to the criminal trials were accompanied by a grant of use immunity, most, if not all,[141] of the probationer's concern about self-incrimination would be removed.[142] In either case, a probationer's decision would no longer be controlled by the fear of self-incrimination. Further, if a postponement/use immunity rule were adopted, the state's interest in effective and efficient law enforcement would not be impaired.[143]

Judge Garth's opinion in *United States v. Bazzano*[144] suggests that postponement should be the preferred procedure and use immunity should be the exception.[145] Although he did not explain this preference,[146] his suggestion is sound for a number of reasons. First, postponement will usually cause the state less inconvenience.[147] Second, probationers are protected from the possibility that the state may work backwards from the immunized testimony, either in bad faith or unintentionally, to establish an independent basis. Third, probationers will not have to disclose their defense strategy prior to the criminal trial.[148] Fourth, if the immunized testimony is admissible for impeachment,[149] defendants in subsequent criminal trials

---

will be no "chilling" of the defendant's right to be heard if the criminal trial precedes the revocation hearing.

141. Some courts and commentators have argued that use immunity may provide inadequate protection because it requires the probationer to disclose his or her defense strategy prior to the criminal trial. *See, e.g.,* McCracken v. Corey, 612 P.2d 990, 997 (Alaska 1980); Note, *"Catch-22": A Probationer's and Parolee's Choice Between the Right to be Heard and the Privilege Against Self-Incrimination,* 9 PAC. L.J. 949 (1978). Such protestations, however, are inconsistent with the Supreme Court's determination that use immunity supplants the fifth amendment privilege against self-incrimination. *See* Kastigar v. United States, 406 U.S. 441 (1972). Similarly, the Court has upheld certain pretrial discovery procedures in criminal cases that require a defendant to disclose his or her defense strategy. *See* Williams v. Flordia, 399 U.S. 78 (1970); *see also* De Vita v. Sills, 422 F.2d 1172 (3d Cir. 1970) (rejecting the claim that a judge facing a disbarment hearing prior to a related criminal trial is entitled to postponement rather than use immunity because use immunity would require him to disclose his defense strategy prior to trial). Thus, although postponement may be advantageous in most situations, *see infra* text accompanying notes 144-53, it is clear that use immunity is constitutionally adequate to prevent the chilling of a probationer's right to be heard.

142. Even courts that have refused to adopt a postponement/use immunity rule have recognized the desirability of such a procedure. *See, e.g.,* Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978), *cert. denied,* 440 U.S. 977 (1979); Flint v. Mullen, 499 F.2d 100, 104-05 (1st Cir.), *cert. denied,* 419 U.S. 1026 (1974).

143. *See supra* notes 125-33 and accompanying text.

144. 712 F.2d 826 (3d Cir. 1983), *cert. denied,* 104 S. Ct. 1439 (1984).

145. *Id.* at 838.

146. *Id.* at 850-51 (Adams, J., dissenting).

147. *Cf. supra* text accompanying notes 132-33 (possible problems in granting use immunity).

148. *See supra* note 141.

149. *See supra* notes 134-37 and accompanying text.

might be required to remain silent in order to prevent the introduction of the previous testimony.[150] This may deter defendants from presenting at trial relevant, nonincriminating evidence that is arguably inconsistent with prior statements. Some courts that have adopted a postponement/use immunity rule have also recommended postponement as the preferable procedure,[151] and this view is adopted in both the ABA Standards Relating to Probation[152] and the Model Penal Code.[153]

CONCLUSION

The dilemma of a probationer faced with a revocation hearing prior to a criminal trial arising out of the same conduct can be effectively solved by the adoption of a postponement/use immunity rule. Under the analysis suggested in this Note, a postponement/use immunity rule is constitutionally required in order to protect a probationer's due process right to be heard at a revocation hearing. Without a postponement/use immunity rule, a probationer must waive the right to be heard at the revocation hearing in order to protect the privilege against self-incrimination at a subsequent criminal trial. Requiring a probationer to choose between the exercise of these rights appreciably impairs the policies underlying the right to be heard. Specifically, it impairs the interest of both the probationer and the state in the full disclosure of evidence. The adoption of a postponement/use immunity rule would adequately protect a probationer's due process right to be heard without imposing any significant burdens on the state. Accordingly, such a rule is required under the due process clause of the fourteenth amendment.

Joseph Doyle

150. People v. Coleman, 13 Cal. 3d 867, 894, 533 P.2d 1024, 1045, 120 Cal. Rptr. 384, 405 (1975).

151. McCracken v. Corey, 612 P.2d 990, 997 (Alaska 1980); People v. Coleman, 13 Cal. 3d 867, 896, 533 P.2d 1024, 1046-47, 120 Cal. Rptr. 384, 406-07 (1975); State v. Evans, 77 Wis. 2d 225, 240-41, 252 N.W.2d 664, 671 (1977) (Abrahamson, J., concurring).

152. STANDARDS RELATING TO PROBATION § 5.3 (Approved Draft 1970); *see supra* note 125.

153. MODEL PENAL CODE § 301.3 (Proposed Official Draft 1962). The Model Penal Code requires the disposition of the related criminal charges prior to the initiation of revocation proceedings.