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LAW AND PRACTICE IN PROBATION AND PAROLE REVOCATION HEARINGS*

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In the following article, Mr. Sklar documents the federal and state law applicable to procedures for the revocation of probation and parole, as developed in both legislation and judicial decisions. In addition, he presents the results of a survey which he conducted to ascertain federal and state practice with regard to probation and parole revocation. Against this background, Mr. Sklar analyses the various constitutional and policy considerations which must be weighed in order to evaluate current law and practice and presents his own appraisal of the shortcomings of present revocation procedures.—EDITOR.

The Advisory Committee on Criminal Rules recently proposed a new subdivision (f) to Rule 32 of the Federal Rules of Criminal Procedure:

> "Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed."

This new provision, as the Committee observes in its Note to Rule 32, is intended to replace that portion of 18 U.S.C. §3653 which provides that upon arrest for a suspected violation of probation, a probationer "shall be taken before the court" and his probation revoked, or, as the case may be, modified or continued. The net result of the new amendment, again as observed by the Committee, would be to codify the decision of *Escoe v. Zerbst*,[1] in which the United States Supreme Court construed the statute's direction that the probationer "shall be taken before the court" to require that an informal hearing be held with the probationer present before probation is revoked.[2]

Although the Committee's proposal, therefore, would add nothing new to the present state of the law regarding the revocation of probation in federal courts, it represents an improvement over state legislation in specifying that a "hearing" must be held. In many states the statutes contain no indication as to whether a hearing is or is not required. Such legislative passivity concerning this important phase of the probation and parole process would be censurable under any circumstances; it is all the more extraordinary today when one considers the emphasis of recent years on the punishment and rehabilitation stage of the criminal law.

It is not a little discouraging to note that in the parole revocation field the number of states lacking legislation concerning the presence or absence of a hearing, as a group, outnumbers all other categories into which the states may be placed. More specifically, 16 jurisdictions have no pertinent legislation,[3] as compared, for instance, with nine jurisdictions which specify that no hearing is required and 14 jurisdictions which specify, without further elaboration, that a "hearing" is required before parole may be formally revoked.

* This article is adapted from the author's master's thesis entitled "The Revocation of Parole and Adult Probation," May 1962 (Northwestern University Law Library).

[1] 295 U.S. 490 (1935).

[2] The hearing, said the Court, is to be "so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper." *Id.* at 493. In the earlier case of Burns v. United States, 287 U.S. 216, 222, 223 (1932), the Court had said that the question in the case of the revocation of probation "is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges," but that the probationer is nevertheless "entitled to fair treatment."

[3] Note that in each of these jurisdictions there are statutes which govern the revocation procedure, but they are silent on the hearing question.

Eight jurisdictions in the probation revocation field are guilty of this kind of legislative oversight.

In those jurisdictions, and there are many, where the pertinent statute compels the revoking authority—usually a court in the case of probation, an administrative body in the case of parole—to hold some kind of hearing on the violation charges, the statute may simply require a "hearing," or may direct that the hearing be "summary" or "informal" in nature, or may, instead, specify in more or less detail the nature of the hearing to be held. For the most part, however, the statutes in the area do not elaborate on the scope and depth—the "quality"—of the hearing, but deal instead with the broader question of whether or not hearings are required. Judicial opinions ordinarily concern themselves with the same basic problem, leaving to the revoking authority the task of formulating the procedures before it.

State and federal cases do exist where the court, in working with a statute which simply directs that a hearing be held, has strived to set some ground rules for the hearing, struggling in this endeavor with basic constitutional and policy issues, more often with the former.

When statutes or court decisions make some kind of hearing mandatory, it remains basically within the province of the revoking authority to prescribe the type of hearing to be held. This is particularly the case where the law in the jurisdiction has not proceeded beyond the bare direction that a hearing be held. Moreover, even where the applicable statute or decisional law authorizes revocation without a hearing, it is, of course, still within the power of a trial court or parole board to grant, as a matter of practice, some kind of hearing before taking action on the charges.

THE STATUTES

The statutes throughout the country in the probation and parole revocation field may be grouped, generally speaking, into one of six categories. These will be presented in chart form.

I

STATUTES EXPRESSLY AUTHORIZING REVOCATION WITHOUT A HEARING

PROBATION

State	Statutes	Comments
Delaware	DEL. CODE ANN. tit. 11, §4321 (1953).	Process issued for probationer's arrest "and thereupon, without any further proceeding" sentence is imposed. Separate statute for Wilmington Municipal Court, having misdemeanor and city ordinance jurisdiction, categorized below.
Iowa	IOWA CODE ANN. §247.26 (1949).	Probation may be revoked "without notice" to probationer.
Missouri	MO. ANN. STATS. §549.101 (1963 Supp.).	Court "may in its discretion with or without a hearing" revoke probation. This statute, enacted in 1963, seemingly repeals §549.254 which required an "informal" hearing. See Revisor's Notes to §549.254.
Oklahoma	OKLA. STATS. ANN. tit. 22, §992 (1958).	Probationer arrested and "delivered forthwith" to the place to which originally sentenced.

PAROLE[4]

State	Statutes	Comments
California	CAL. PENAL CODE §3060 (1956).	Revoking authority may "revoke any parole without notice, and . . . order returned to prison" any parolee.

[4] In four of the states listed in this category—Colorado, North Carolina, Oregon, and South Dakota—the statute, while not expressly negating a hearing, sets up an ex parte revocation and commitment procedure. That is, the parolee is taken into custody pursuant to order of the revoking authority and reimprisoned in the institution from which he was paroled, without any appearance before the authority. No provision is made for a hearing after commitment. Since a hearing is not expressly denied, these statutes might have been included among those which are silent on the hearing question. The line of demarcation is uncertain. However, their ex parte language has impelled the writer to include them in the present category. The statute of a fifth state in this group, North Dakota, interestingly enough, provides for a "full hearing" on any parole violation charge. However, following the hearing the board *then* orders the parolee taken into "actual custody," which order is to be executed by a peace officer and the parolee upon apprehension delivered to the warden of the penitentiary for recommitment. It is clear, therefore, that the "hearing" contemplated by the statute is ex parte which, for purposes of this paper, is no hearing at all.

I—*Continued*

PAROLE—*Continued*

State	Statutes	Comments
Colorado	COLO. REV. STATS. ANN. §39-17-6 (1961 Supp.).	See footnote 4.
New Jersey[5]	N.J. STATS. ANN. §§30:4-123.22, 30:4-123.23 (1963 Supp.).	Prior to revoking parole, the board "*may*, in accordance with its rules, permit [the parolee] an opportunity to appear before the board and show cause why his parole should not be revoked" (emphasis added).
North Carolina	N.C. GEN. STATS. §148-61.1 (1958).	See footnote 4.
North Dakota	N.D. CENT. CODE §12-59-15 (1963 Supp.).	See footnote 4.
Oklahoma	OKLA. STATS. ANN. tit. 57, §346 (1950).	Parolee may be "rearrested and recommitted without any further proceedings."
Oregon	ORE. REV. STATS. §§144.340-144.370 (1961).	See footnote 4.
Rhode Island	R.I. GEN. LAWS §13-8-18 (1956).	Board "may . . . revoke with or without a hearing."
South Dakota	S.D. CODE §13.5307 (1960).	See footnote 4 (revocation by Governor).

II

STATUTES WHICH DO NOT INDICATE WHETHER A HEARING IS OR IS NOT REQUIRED

PROBATION

State	Statutes	Comments
Arizona	ARIZ. REV. STATS. §13-1657 (B) (1957).[6]	
Arkansas	ARK. STATS. ANN. §43-2324 (1963 Supp.).	
California	CAL. PENAL CODE §§1203.2, 1203.3 (1963 Supp.).	
District of Columbia	D.C. CODE §24-104 (1961).	
Massachusetts	MASS. ANN. LAWS ch. 279, §3 (1956).	
Nebraska	NEB. REV. STATS. §29-2219(3) (1956).	
South Dakota	S.D. CODE §34.3708-2 (1960).	
Utah	UTAH CODE ANN. §77-62-37 (1953).	

PAROLE[7]

State	Statutes	Comments
Arkansas	ARK. STATS. ANN. §§43-2802, 43-2808 (1947).	

[5] As indicated in the "comment" column, the board in New Jersey "may" but is not required to hold a hearing. If a hearing is held, however, N.J. STAT. ANN. §30:4-123.25 provides that the parolee "shall have the right to consult legal counsel of his own selection" and, if the board consents, may submit a "brief or other legal argument on his behalf to the parole board."

[6] Arizona's statute is typical. It reads, in part: "The court may, in its discretion, issue a warrant for the rearrest of any probationer and may thereupon revoke and terminate the probation."

[7] Several of the statutes in this category, it must be admitted, have an ex parte revocation "flavor." As observed in note 4 *supra*, the line dividing this category from the preceding one is not certain. The statutes considered here, however, are not as detailed as the statutes discussed in note 4, with some few exceptions. The Iowa statute is more or less typical: "All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of [the] board, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled." The phrase "subject at any time to be returned to the institution" appears, in substance, in the statutes of Illinois, Minnesota, Nevada, South Carolina, Wisconsin, and Wyoming. The statutes of Connecticut and Nebraska, although not referring to a hearing one way or the other, specify that the parolee may be reimprisoned "for any reason that seems sufficient to said board" (Connecticut) or "with or without cause" (Nebraska).

II—*Continued*

PAROLE—*Continued*

State	Statutes	Comments
Connecticut	CONN. GEN. STATS. §54-126 (1960).	See footnote 7.
Idaho	IDAHO CODE §§20-216, 20-228, 20-231 (1947).	*Cf.* §20-229.
Illinois	ILL. ANN. STATS. ch. 38, §§123-3 (eff. Jan. 1, 1964), 807 (1962 Supp.).	See footnote 7.
Iowa	IOWA CODE ANN. §247.9 (1949).	See footnote 7.
Massachusetts	MASS. ANN. LAWS ch. 127, §149 (1957).	
Minnesota	MINN. STATS. ANN. §243.05 (1963 Supp.).	See footnote 7.
Nebraska	NEB. REV. STATS. §§29-2628, 29-2623 (1956).	See footnote 7.
Nevada	NEV. REV. STATS. §§213.150, 213.110(1) (1960).	See footnote 7.
Ohio	OHIO REV. CODE ANN. §2965. 21 (1963 Supp.).	
South Carolina	S.C. CODE §§55-614, 55-616 (1963 Supp.).	See footnote 7.
Utah	UTAH CODE ANN. §77-62-38 (1953).	
Vermont	VT. STATS. ANN. tit. 28, §904 (1958).	
Virginia	VA. CODE §53-258-53-262 (1958).	
Wisconsin	WIS. STATS. ANN. §57.06(3) (1963 Supp.).	See footnote 7.
Wyoming	WYO. STATS. §7-326 (1957).	See footnote 7.

III

STATUTES WHICH IMPLY THAT A HEARING IS TO BE HELD PROBATION[8]

State	Statutes	Comments
United States	18 U.S.C. §3653 (1951).	
Alaska	ALASKA STATS. §33.05.070(b) (1962).	
Delaware	DEL. CODE ANN. tit. 11, §4346 (1953).	Wilmington Municipal Court only. See category I above.
Kentucky	KY. REV. STATS. §439.300(1) (1963).	§439.300(3) provides that probation may be revoked "without a hearing" if the probationer has been convicted of a subsequent crime.
Mississippi	MISS. CODE ANN. §4004-25 (1956).	
Nevada	NEV. REV. STATS. §176.330 (1960).	
Pennsylvania	PA. STATS. ANN. tit. 19, §1084 (1930).	
Rhode Island	R.I. GEN. LAWS §§12-19-9, 12-19-14 (1956).	
Virginia	VA. CODE §53-275 (1958).	

[8] These statutes require for the most part that the probationer be "brought before the court" and his probation revoked. The leading case construing such a phrase as a direction that some kind of hearing be held is Escoe v. Zerbst, 295 U.S. 490 (1935).

III—*Continued*

PROBATION—*Continued*

State	Statutes	Comments
Washington	WASH. REV. CODE §9.95.220 (1961).	
Wisconsin	WIS. STATS. ANN. §§57.03, 57.04(2) (1957).	
Wyoming	WYO. STATS. §7-321 (1959).	

PAROLE

None

IV

STATUTES WHICH EXPRESSLY REQUIRE A HEARING[9]

PROBATION

State	Statutes	Comments
Alabama	ALA. CODE tit. 42, §24 (1958).	
Colorado	COLO. REV. STATS. ANN. §39-16-9 (1953).	
Connecticut	CONN. GEN. STATS. ANN. §54-114 (1960).	
Illinois	ILL. ANN. STATS. ch. 38, §117-3 (eff. Jan. 1, 1964).	
Indiana	IND. STATS. ANN. §9-2211 (1956).	
Maryland	Charter & Public Local Laws of Baltimore City §279 (Flack 1947).	The revocation of probation in Maryland is primarily handled on a local level. Only Baltimore is listed here, although hearings are generally required in other cities and counties in Maryland.
Maine	ME. REV. STATS. ch. 27-A, §8 (1963 Supp.).	
New York	N.Y. CODE CRIM. PROC. §935 (1958).	
North Dakota	N.D. CENT. CODE §§12-53-11, 12-53-15 (1963 Supp.).	
Ohio	OHIO REV. CODE ANN. §§2951.08, 2951.09 (1958).	
South Carolina	S.C. CODE §§55-595, 55-596 (1962).	
Texas	TEXAS CODE CRIM. PROC. art. 781d, §8 (1962 Supp.).	

PAROLE

State	Statutes	Comments
United States	18 U.S.C. §4207 (1951).	
Alaska	ALASKA STATS. §33.15.220 (1962).	Hearing "without unreasonable delay" and under rules adopted by board.
Arizona	ARIZ. REV. STATS. ANN. §31-417 (1956).	
Hawaii	HAWAII REV. LAWS §83-65 (1961 Supp.).	No hearing required, however, when parole violation charged is conviction of a new crime while out on parole.
Indiana	IND. STATS. ANN. §13-1611 (1963 Supp.).	Hearing is held under rules and regulations adopted by board.

[9] Included within this category are statutes which provide that the alleged violator shall have "An opportunity to appear" before or "an opportunity to be heard" by the revoking authority, or which direct the revoking authority to "inquire into" the charges. Such provisions are more prevalent in the parole revocation field.

IV—*Continued*

PAROLE—*Continued*

State	Statutes	Comments
Kansas	KAN. GEN. STATS. §62-2250 (1961).	Hearing is held under rules and regulations adopted by board.
Kentucky	KY. REV. STATS. ANN. §§439. 330(1)(e), 439.430(1), 439. 440 (1963).	
Louisiana	LA. REV. STATS. §15:574.9 (1963 Supp.).	Hearing shall be held "at the request of the parolee."
Maine	ME. REV. STATS. ch. 27-A, §15 (1963 Supp.).	
Maryland	MD. ANN. CODE art. 41, §115 (1957).	
Mississippi	MISS. CODE ANN. §4004-13 (1956).	
Missouri	MO. ANN. STATS. §549.265 (1963 Supp.).	Hearing is held under rules and regulations adopted by board.
New Hampshire	N.H. REV. STATS. ANN. §607: 46 (1955).	
Pennsylvania	PA. STATS. ANN. tit. 61, §331. 21a(b) (1963 Supp.).	Hearing only required for "technical" violations. No hearing necessary when violation charged is conviction of a new crime while out on parole.
Texas	TEXAS CODE CRIM. PROC. art. 781d, §22 (1962 Supp.).	Hearing is held under rules and regulations adopted by board.

V

STATUTES WHICH EXPRESSLY PROVIDE THAT HEARING MAY BE "SUMMARY" OR "INFORMAL" PROBATION

State	Statutes	Comments
Idaho	IDAHO CODE §20-222 (1947).	
Kansas	KAN. GEN. STATS. §62-2244 (1961).	
Louisiana	LA. REV. STATS. §15:534(c) (1963 Supp.).	
Montana	MONT. REV. CODE §94-9831 (1963 Supp.).	
New Hampshire	N.H. REV. STATS. ANN. §504:4 (1955).	
New Jersey	N.J. STATS. ANN. §2A:168-4 (1953).	
Oregon	ORE. REV. STATS. §137.550(2) (1961).	
Vermont	VT. STATS. ANN. tit. 28, §1015 (1958).	
West Virginia	W. VA. Code §6291(17) (1961).	

PAROLE

None

VI

STATUTES WHICH EXPRESSLY GUARANTEE OR DISPENSE WITH[10] CERTAIN TRADITIONAL ELEMENTS OF A FAIR HEARING

PROBATION

State	Statutes	Comments
Florida	FLA. STATS. ANN. §948.06 (1944).	Probationer entitled to counsel and to be "fully heard." Probationer advised of charges and allowed, in effect, to plead to them, after which probation may be revoked (if charge admitted) or charge may be dismissed or probationer may be held for a hearing.
Georgia	GA. CODE ANN. §27-2713 (1963 Supp.).	Probationer entitled to counsel and to be "fully heard."
Hawaii	HAWAII REV. LAWS §258-56 (1955).	Probationer is to "appear... and show cause" why probation should not be revoked, implying, at least, a right to produce evidence.
Michigan	MICH. STATS. ANN. §28.1134 (1954).	"Summary and informal" hearing, with "a written copy of the charges" given to the probationer prior to the hearing.
Minnesota	MINN. STATS. ANN. §609.14 (1963 Supp.).	"Summary hearing" at which probationer "entitled to be heard and to be represented by counsel."
New Mexico	N.M. STATS. ANN. §40A-29-20 (1963 Supp.).	Alleged violation read to probationer who may admit or deny charges; if he denies them, he is to be "furnished a copy of the petition" to revoke and a hearing is set down no sooner than 5 days or more than 10 days later.
North Carolina	N.C. GEN. STATS. §§15-200, 15-200.1 (1963 Supp.).	Probationer to be informed of the grounds of the intended revocation and, at his request, the court "shall grant a reasonable time for the defendant to prepare his defense."
Tennessee	TENN. CODE §40-2907 (1963 Supp.).	Probationer entitled to counsel and "the right to introduce testimony."

PAROLE

State	Statutes	Comments
Alabama	ALA. CODE tit. 42, §12 (1958).	Parolee entitled to counsel and may "produce witnesses and explain charges made against him."
Delaware	DEL. CODE ANN. tit. 11, §7714 (1953).	No specific elements guaranteed but extent of hearing indicated by unique provision "in case the Board finds there is reasonable boubt of a violation of parole,... the prisoner shall be continued on parole...."
District of Columbia	D.C. CODE §24-206 (1961).	Parolee entitled to counsel.
Florida	FLA. STATS. ANN. §947.23(1) (1963 Supp.).	Parolee entitled to counsel "and a hearing shall be had at which the state and the parolee may introduce such evidence as they may deem necessary and pertinent to the charge of parole violation."
Georgia	GA. CODE ANN. §77-519 (1963 Supp.).	Parolee entitled to introduce evidence; parole "may be revoked without a hearing" if parolee has been convicted of "any crime" while on parole.

[10] Elements of a fair hearing are expressly denied to the alleged violator in the parole revocation field only.

VI—*Continued*

PAROLE—*Continued*

State	Statutes	Comments
Michigan	MICH. STATS. ANN. §28.2310 (1954).	Very detailed provision: parolee entitled to counsel "of his own choice"; "may defend himself, and he shall have the right to produce witnesses and proofs in his favor and to meet the witnesses who are produced against him"; board may subpoena witness for parolee "without whose testimony he cannot safely proceed to hearing." Statute not applicable where parolee has been convicted of a new crime while on parole.
Montana	MONT. REV. CODE §§94-9838, 94-9835 (1963 Supp.).	Parolee entitled to counsel.
New Mexico	N.M. STATS. ANN. §41-17-28 (1963 Supp.).	Parolee not entitled to counsel.
New York	N.Y. CORRECTION LAW §218 (1963 Supp.).	Parolee may "appear personally, but not through counsel or others, . . . and explain the charges made against him."
Tennessee	TENN. CODE §40-3619 (1955).	Parolee may "appear personally, but not through counsel or others, . . . and explain the charges made against him."
Washington	WASH. REV. CODE §9.95.120 (1961).	Parolee entitled to counsel and may present evidence and witnesses in his own behalf; hearing to be "fair and impartial." No hearing required if parolee convicted of new crime while on parole.
West Virginia	W. VA. CODE §6291(26) (1961).	Parolee entitled to counsel at a "prompt summary hearing."

CASES DECIDED UNDER STATUTES WHICH DO NOT REQUIRE A HEARING (CATEGORIES I AND II OF CHARTS)

No Right to Hearing: Probation

The approach utilized by the courts of jurisdictions in which statutes, expressly or by silence, do not require hearings to be held before probation is revoked is typified by the 1942 Oklahoma case of *Ex Parte Boyd*.[11]

Although it was at one time a matter of dispute whether courts possessed the inherent power to suspend the imposition or execution of sentence for a definite period and place the defendant on probation "upon considerations extraneous to the legality of the conviction,"[12] the matter of probation is now completely regulated by statutes. Accordingly, in the *Boyd* case, emphasis was first placed on the Oklahoma statute and the controlling role it plays "in determining the procedure to be followed" in revoking probation.[13] It necessarily followed from this emphasis that cases interpreting statutes containing language different from that of the forum had to be set to one side.[14] The next step, naturally, was to examine the Oklahoma statute to determine just what powers it conferred upon the revoking court. The court, in deciding that a hearing was not required by the statute, noted the absence of any express provision in the statute for notice or a hearing and the presence of a provision authorizing imprisonment "forthwith" upon a finding of probation violation.[15] Having construed the statute to authorize revocation without a hearing, the court was then compelled to grapple with the due process question, that is, whether the revocation of probation without a hearing is consonant with procedural fairness.

As might be expected, the courts throughout the country divide on this question. The *Boyd* court held that revocation of probation without a hearing accords with due process, reasoning:

> " 'While under a suspended sentence, a duly convicted person is not freed from the legal consequences of his guilt. He is merely enjoying a conditional favor, postponing his punishment, which may be withdrawn. When the suspension is revoked the convict is punished for the crime of which he was convicted, and not for violating the terms of his [probation]. The suspension of

[11] 73 Okla. Crim. 441, 122 P.2d 162 (1942).
[12] See *Ex parte* United States, 242 U.S. 27 (1916).
[13] 73 Okla. Crim. at 448, 122 P.2d at 166.
[14] *Ibid.*
[15] *Id.* at 459, 122 P.2d at 170.

> sentence can never be demanded as a matter of legal right. It is granted at the mere will of the court. When granted, it is not held as a vested right, but as a matter of favor or grace.... In exercising [their revocation powers]... courts must necessarily have a large discretion.... They are not dealing with specific legal rights and are not bound by the standards of legal procedure which usually control judicial proceedings. [Therefore], an order suspending sentence may be revoked without granting the defendant a trial upon the facts.' "[16]

This line of reasoning supporting the revocation of probation without a hearing—that probation is a matter of grace conferring only a privilege upon the probationer and not a legal right—is commonly referred to as the "act of grace" or "privilege" theory.

A caveat is often attached to the decisions approving revocation without a hearing, namely that an order revoking probation will be set aside "if it can be shown that the court's action was arbitrary or governed solely by whim or caprice of the judge, without a legal foundation."[17]

The case law in Arizona,[18] California,[19] District of Columbia,[20] Iowa,[21] Missouri,[22] North Dakota,[23] and South Dakota[24] is basically in accordance with the view taken in *Boyd*.[25]

The cases in California and Iowa not only permit revocation without a hearing, but condone ex parte revocation—revocation ordered in the absence of the probationer. At least two of the other jurisdictions listed, Oklahoma and South Dakota, will permit ex parte revocation only if the ex parte demonstration to the trial court clearly establishes a breach of one or more conditions of release.[26] South Dakota goes further, in fact, and requires a "hearing" if the ex parte demonstration is not "sufficient to justify the exercise of the court's discretion."[27]

The Arizona courts will not review the record on appeal to determine whether there has been an abuse of discretion on the part of the trial judge. This, as noted, is contrary to the ordinary practice.[28] If it appears that the probationer in Arizona was allowed an opportunity to make some kind of statement to the court prior to the order revoking probation, which statement was not sufficient to convince the trial court that he had lived up to the conditions of his probation, then it will be "conclusively presumed" that the trial court had sufficient cause to revoke.[29]

The case law in California is worth further attention. As already observed, California permits ex parte revocation. The case establishing this rule, *In Re Davis*,[30] advanced the "act of grace"

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[16] *Id.* at 452–53, 454, 122 P.2d at 168, quoting from the dissenting opinion in State v. Zolantakis, 70 Utah 296, 259 Pac. 1044 (1927).

[17] 73 Okla. Crim. at 462–63, 122 P.2d at 172. The *Boyd* decision has been consistently followed in Oklahoma. See Valentine v. State, 365 P.2d 166 (Okla. Crim. 1961); *In re* Luckens, 372 P.2d 635 (Okla. Crim. 1962) ("better practice" is that application by authorities to revoke probation "apprise the accused of the specific grounds" of the violation charged, but failure so to do is not violative of due process; only question for review is whether revocation was "arbitrary and capricious").

[18] Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937); *Ex parte* Johnson, 53 Ariz. 161, 87 P.2d 107 (1939). Compare McGee v. Arizona Bd. of Pardons and Paroles, 92 Ariz. 317, 376 P.2d 779 (1962) (due process requires notice to the prisoner and an opportunity to be heard on application for commutation of a death sentence).

[19] *In re* Davis, 37 Cal. 2d 872, 236 P.2d 579 (1951); *In re* Levi, 39 Cal. 2d 41, 244 P.2d 403 (1952); *In re* Dearo, 96 Cal. App. 2d 141, 214 P.2d 585 (1950).

[20] Stevens v. District of Columbia, 127 A.2d 147 (D.C. Mun. Ct. App. 1956) (dictum). Cases indicate, however, that the practice in the District of Columbia is to hold a hearing at which counsel is present and evidence is taken. Cooper v. United States, 48 A.2d 771 (D.C. Mun. Ct. App. 1946); Stevens v. District of Columbia, *supra*; United States v. Freeman, 160 F. Supp. 532 (D.D.C. 1957), *aff'd*, 254 F.2d 352 (D.C. Cir. 1958).

[21] Pagano v. Bechley, 211 Iowa 1294, 232 N.W. 798 (1930); Lint v. Bennett, 251 Iowa 1193, 104 N.W.2d 564 (1960).

[22] State v. Brantley, 353 S.W.2d 793 (Mo. 1962), decided under former statute which provided for an "informal" hearing. Court, in dicta, but after careful consideration, adopted the view that notice or a hearing is not required by the constitution.

[23] State v. Uttke, 60 N.D. 377, 234 N.W. 79 (1931); State v. Cowdrey, 73 N.D. 630, 17 N.W.2d 900 (1945) (by implication in both cases; hearings in fact held).

[24] Application of Jerrel, 77 S.D. 487, 93 N.W.2d 614 (1958); State v. Elder, 77 S.D. 540, 95 N.W.2d 592 (1959).

[25] Note that, prior to the enactment of its present hearing statute in 1963, the law in Minnesota was also in line with the *Boyd* case. State v. Chandler, 158 Minn. 447, 197 N.W. 847 (1924); State *ex rel.* Jenks v. Municipal Court, 197 Minn. 141, 266 N.W. 433 (1936); Breeding v. Swenson, 240 Minn. 93, 60 N.W.2d 4 (1953). The same was true in Kansas and Michigan under their earlier statutes. *In re* Patterson, 94 Kan. 439, 146 Pac. 1009 (1915); People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912).

[26] *Ex parte* Boyd, 73 Okla. Crim. at 459, 122 P.2d at 170–71; Application of Jerrel, 77 S.D. at 492–93, 93 N.W.2d at 617.

[27] Application of Jerrel, *supra* note 26.

[28] *Supra* note 17, and accompanying text.

[29] Varela v. Merrill and *Ex parte* Johnson, *supra* note 18.

[30] *Supra* note 19.

or "privilege" theory to support its position. A later case, *In re Levi*,[31] added as a ground for denying a hearing that a proceeding to revoke probation is not a criminal prosecution.

Nevertheless, the practice in California, as indicated by the case law, is to hold hearings before probation is revoked. The imprint of *Davis* and *Levi* is seen, however, in the nature of the hearing granted. The "informality" of the proceedings is continually stressed in the cases.[32] The court may revoke probation solely on the basis of the probation officer's report.[33] There is no right to present witnesses,[34] even those who are present in the courtroom during the hearing.[35] The probationer may even be denied the right to testify.[36] There is no right to counsel,[37] although the defendant may sometimes be represented by counsel.[38]

There is one curious twist to California law. *In re Davis* and the other cases noted involved instances where sentence was imposed and execution thereof suspended—the ordinary case in California. Where, however, the imposition of sentence is suspended, a hearing must be held before probation may be revoked,[39] at which the probationer is entitled to counsel.[40] These rules apply because when judgment is not pronounced and further proceedings are suspended, no judgment is outstanding against the probationer. Upon revocation, the probationer is entitled to a hearing at which judgment is pronounced. This situation is, according to the California courts, unlike the case where sentence is imposed and its execution suspended, since in the latter case revocation simply brings the sentence which was already imposed into effect.[41]

[31] *Supra* note 19.

[32] *In re* Levi, *supra* note 19; *In re* Young, 121 Cal. App. 711, 10 P.2d 154 (1932); *In re* Cook, 67 Cal. App. 2d 20, 153 P.2d 578 (1944); People v. Johns, 173 Cal. App. 2d 38, 343 P.2d 92 (1959); People v. Wimberly, 30 Cal. Rptr. 421 (Dist. Ct. App. 1963).

[33] People v. Root, 192 Cal. App. 2d 158, 13 Cal. Rptr. 209 (1961); People v. Walker, 30 Cal. Rptr. 440 (Dist. Ct. App. 1963).

[34] People v. Hayden, 99 Cal. App. 2d 141, 221 P.2d 221 (1950).

[35] People v. Slater, 152 Cal. App. 2d 814, 313 P.2d 111 (1957).

[36] People v. Natividad, 29 Cal. Rptr. 468 (Dist. Ct. App. 1963).

[37] *In re* Levi, *supra* note 19; People v. Wimberly, *supra* note 32.

[38] People v. Walker, *supra* note 33.

[39] Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182 (1959); *In re* Klein, 197 Cal. App. 2d 58, 17 Cal. Rptr. 71 (1962).

[40] *In re* Levi, *supra* note 19.

[41] Stephens v. Toomey, 51 Cal. 2d at 874, 338 P.2d at 187.

Note, however, that the hearing required in California where the imposition of sentence has been suspended is not the hearing ordinarily contemplated in a probation revocation case. That is, the fact of a violation of probation is not before the court. The probationer is in the same position as he would be if probation had not been granted and he were to be sentenced immediately following conviction. He may show that there is legal cause why judgment shall not be pronounced against him or that he is now insane, or he may show good cause to order a new trial or to grant a motion in arrest of judgment.[42] None of these arguments involves the question whether he violated the terms and conditions of his probation, although, of course, the sentencing court would have discretion to hear and consider argument on this question.

No Right to Hearing: Parole

Parole, it should be noted at the outset, is not the sole form of conditional release from imprisonment. The governor may grant what is called a "conditional pardon." Conditional pardons were more prevalent around the turn of the twentieth century than they are now for the simple reason that parole, as a method of conditional release, was then only in the formative stages.[43] The "conditional pardon" was the only means by which a prisoner could be released subject to a threat of reimprisonment if he failed to conform his conduct to the requirements of society. Full pardon was inapposite. It operated as a remission of guilt, completely freeing the offender from the control of the state.[44] It was an act of mercy,[45] whereas a conditional pardon is rehabilatory in nature,[46] similar in that respect to present-day parole systems. While the conditional pardon is slowly becoming extinct, early cases dealing with its revocation, because of its similarity in purpose to parole, form the basis in many jurisdictions for modern parole revocation decisions and are included in the discussion to follow.

A leading decision in the parole revocation field is the Oregon case of *In re Anderson*.[47] The revoca-

[42] *In re* Levi, *supra* note 19, at 46, 244 P.2d at 405.

[43] See generally 4 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 2–27 (1939).

[44] *Id.* at 2.

[45] See, *e.g.*, *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925); Biddle v. Perovich, 274 U.S. 480 (1927).

[46] See, *e.g.*, Fuller v. State, 122 Ala. 32, 37, 26 So. 146, 147 (1899); *In re* Patterson, 94 Kan. 439, 442, 146 Pac. 1009, 1011 (1915); 4 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 2 (1939).

[47] 191 Ore. 409, 229 P.2d 633 (1951).

tion there was ex parte. After construing its statutes "in their context" and deciding that the board was empowered to revoke the prisoner's parole without notice or hearing, the court turned to the constitutional issue. Its decision thereon followed upon a particularly exhaustive analysis of the relevant case law. The court held the ex parte procedure constitutional, relying primarily, through quotations from other cases, on the "act of grace" theory. A special concurring opinion rested squarely on this theory.[48]

The opinion of the court alludes to the familiar doctrine that the parolee, while not entitled to a hearing in the first instance, may challenge the revocation on habeas corpus and is entitled to his release if he can establish that the board acted arbitrarily, capriciously, or in abuse of its statutory powers.[49]

The Ohio case of *In re Varner*,[50] reaching the same conclusion as the *Anderson* case, observed, first, that a legislative intent to grant a hearing should not be recognized "unless it is clearly expressed" in the statutes and not left to conjecture;[51] it then proposed certain "policy reasons" for upholding revocation without notice or hearing. The policy reasons advanced were (1) "potential witnesses justifiably are fearful of testifying publicly against a paroled convict" and, therefore, in order to determine whether the parolee should be returned to prison as a violator "it may be necessary for the commission to rely upon secret investigations";[52] and (2) if parole could not be revoked except after a hearing, "the resulting burdens of administration of the commission and its desire to protect the public would undoubtedly discourage the commission from granting many paroles that it otherwise would grant," thus defeating the purpose of parole.[53] The court concluded on the more familiar note that the parolee had no right to a parole, so "it would seem that he should have no right to contest what may be in substance a revocation of his parole."[54]

In Oklahoma[55] and Minnesota,[56] also, the revocation of parole without a hearing is supported by the "act of grace" theory.[57]

Revocation of conditional pardon without a hearing has been held permissible on the ground that the pardon was accepted subject to the condition that it might be summarily revoked without notice or hearing, and that, therefore, the parolee is bound by this condition—denominated the "contract" theory—[58] in Iowa,[59] Minnesota,[60] Massachusetts,[61] Nebraska,[62] Oklahoma,[63] and Vermont.[64]

In Utah, the Supreme Court approved revocation of the prisoner's parole without a hearing on the principal ground that the parolee "is legally in custody the same as the prisoner allowed the liberty of the prison yard, or of working on the prison farm. The realm in which he serves has been extended."[65]

There is dicta in four California cases that

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[48] *Id.* at 451–52, 229 P.2d at 651.

[49] *Id.* at 430–31, 447, 229 P.2d at 642, 649.

[50] 166 Ohio St. 340, 142 N.E.2d 846 (1957).

[51] *Id.* at 345, 142 N.E.2d at 849.

[52] *Ibid. Accord*, State *ex rel.* McQueen v. Horton, 31 Ala. App. 71, 76, 14 So. 2d 557, 560, *aff'd*, 244 Ala. 594, 14 So. 2d 561 (1943).

[53] 166 Ohio St. at 345, 142 N.E.2d at 849.

[54] *Id.* at 347, 142 N.E.2d at 851. The order revoking parole, it seems, is non-reviewable in Ohio. *Ibid*; Bussey v. Sacks, 172 Ohio St. 392, 176 N.E.2d 220 (1961).

[55] *Ex parte* Ridley, 3 Okla. Crim. 350, 106 Pac. 549 (1910); Application of Cooley, 295 P.2d 816 (Okla. Crim. App. 1956).

[56] State *ex rel.* Jaffa v. Crepeau, 150 Minn. 80, 184 N.W. 567 (1921); State *ex rel.* Bush v. Whittier, 226 Minn. 356, 32 N.W.2d 856 (1948).

[57] In Rhode Island, the statute expressly authorizes revocation of parole "with or without a hearing." While no case has dealt with the hearing question, a recent case, considering another phase of the parole process, has emphasized its privilege aspects and the power of the legislature "to attach conditions to the grant of parole and to provide for the administration thereof," an indication that when the hearing question is raised the statute will be upheld. State v. Fazzano, 194 A.2d 680, 684 (R.I. 1963).

[58] See Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L. & C. 531 (1942).

[59] Arthur v. Craig, 48 Iowa 264 (1878); State *ex rel.* Davis v. Hunter, 124 Iowa 569, 100 N.W. 510 (1904).

[60] Guy v. Utecht, 216 Minn. 255, 12 N.W.2d 753 (1943); Washburn v. Utecht, 236 Minn. 31, 51 N.W.2d 657 (1952). The court in Guy v. Utecht was careful to point out, however, that revocation without a hearing is permissible only where the conditional pardon contains a reservation that it may be revoked summarily without a hearing or, as is the case with parole (see note 56 *supra*), where statutes authorize revocation without a hearing. Otherwise, the prisoner is entitled to a "judicial inquiry into the alleged breach" of the terms of his conditional pardon. 216 Minn. at 267, 12 N.W.2d at 759, approving the early case of State *ex rel.* O'Conner v. Wolfer, 53 Minn. 135, 54 N.W. 1065 (1893).

[61] Kennedy's Case, 135 Mass. 48 (1883).

[62] Owen v. Smith, 89 Neb. 596, 131 N.W. 914 (1911).

[63] *Ex parte* Rigley, *supra* note 55 (called a "parole" but granted by the Governor).

[64] *In re* Saucier, 122 Vt. 168, 167 A.2d 368 (1961).

[65] McCoy v. Harris, 108 Utah 407, 410, 160 P.2d 721, 722 (1945). The authority of this case was seriously weakened by dicta in Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959), a probation revocation case considered *infra* notes 69 to 72.

"parole may be validly revoked without notice or hearing."[66]

Right to Hearing: Probation

Of those jurisdictions where the statutes presently do not require that a hearing be held before probation is revoked, the courts of three states have decided that a hearing is mandatory.

In Utah, the requirement of a hearing is postulated on both constitutional and policy grounds. The conditional liberty of probation, rather than a matter of grace, is viewed in the leading case of *State v. Zolantakis*[67] as a "valuable right" not to be "regarded lightly" and not to be taken from the probationer except after a hearing "according to some well recognized and established rules of judicial procedure." From a policy viewpoint, the court added that reformation—the sole purpose of probation—"can best be accomplished by fair, consistent and straightforward treatment of the person sought to be reformed."[68] At the hearing, the court instructed, the defendant should have the opportunity to plead to or answer "a written pleading setting forth the facts relied upon for . . . revocation", and he should be given the right to be heard and to cross-examine witnesses who testify against him.

The later Utah case of *Baine v. Beckstead*[69] reaffirmed the *Zolantakis* case, but pointed out that the hearing procedures outlined in *Zolantakis* should be limited to cases where a factual dispute exists, where "the circumstances in fairness and justice warrant the granting of a hearing to the defendant."[70] In dicta, the court said that there should be no difference between probation and parole, since both have as their purpose reformation of the individual. Both probationer and parolee "should be able to rely upon the representation that if he measures up to his responsibilities, he will not have his liberty taken from him capriciously nor arbitrarily."[71] The parole revocation case of *McCoy v. Harris*,[72] which sanctioned revocation of parole without a hearing, was distinguished on the ground that no factual dispute existed which required resolution at a hearing.

Revocation of probation without "notice and an opportunity to be heard" was held violative of due process of law by the New Mexico Supreme Court in *Ex parte Lucero*,[73] the court stressing that suspension of sentence "gives to the defendant a valuable right," that of "personal liberty," and by the Washington Supreme Court in *State v. O'Neal*,[74] the court quoting extensively from the *Lucero* case. Both cases were decided under statutes which did not require a hearing. The Washington statute presently requires that the probationer be "brought before the court." A 1963 amendment to the New Mexico statute requires that a hearing be held.

In Arkansas, without reliance upon the constitution, it has been held error to deny the probationer the right to testify and call witnesses at the hearing to revoke his probation.[75] Similarly, in Nebraska, without resort to the constitution, the

[66] *In re* McLain, 55 Cal. 2d 78, 85, 357 P.2d 1080, 1084–85 (1960), *cert. denied*, 368 U.S. 10 (1961) (term of imprisonment increased and parole, which was to go into effect at a future date, revoked, without affording prisoner a hearing); *In re* Dearo, 96 Cal. App. 2d 141, 144, 214 P.2d 585, 587 (1950) (probation revocation case); *In re* Etie, 27 Cal. 2d 753, 758, 167 P.2d 203, 206 (1946); *In re* Tobin, 130 Cal. App. 371, 375, 20 P.2d 91, 92 (1933). In the last two cases hearings were in fact held to determine whether "good-behavior" credits, which were earned prior to the alleged parole violation, were to be forfeited. This question turned on whether or not parole had been violated. Hearings are customarily held in California when parole is revoked since the forfeiture of "good-behavior" credits is a normal consequence of violating parole and, by statute (CAL. PENAL CODE §2924 (1963 Supp.)), a hearing, at which the prisoner "shall be present and entitled to be heard and may present evidence and witnesses in his behalf," must be held before "good-behavior" credits may be forfeited. See *In re* Etie and *In re* Tobin, *supra*; *In re* Taylor, 216 Cal. 113, 13 P.2d 906 (1932); *In re* Payton, 28 Cal. 2d 194, 169 P.2d 361 (1946); *In re* Borgfeldt, 75 Cal. App. 2d 83, 170 P.2d 94 (1946). Further complicating California law is the decision that the parole authority may redetermine and increase the sentence of a person out on parole from eight to ten years without affording him notice or a hearing. *In re* Smith, 33 Cal. 2d 797, 205 P.2d 662 (1949). Although such action does not result in reimprisonment and is clearly distinguishable from parole revocation for that reason, the *Smith* case has been cited in California as authority for revoking parole without a hearing. *In re* McLain, *supra*; *In re* Dearo, *supra*.

[67] 70 Utah 296, 259 Pac. 1044 (1927).

[68] *Id.* at 303, 259 Pac. at 1046, 1047.

[69] 10 Utah 2d 4, 347 P.2d 554 (1959).

[70] *Id.* at 8, 10-11, 347 P.2d at 557, 559. And see McPhie v. Turner, 10 Utah 2d 237, 351 P.2d 91 (1960), holding that revocation of probation without a hearing on the facts there presented "was a denial of due process of law."

[71] 10 Utah 2d at 9, 347 P.2d at 558.

[72] *Supra* note 65.

[73] 23 N.M. 433, 168 Pac. 713 (1917), followed in State v. Peoples, 69 N.M. 106, 364 P.2d 359 (1961). Both cases apply the universal rule that a defendant is not entitled to a jury trial on the question of revocation, unless he pleads "want of identity of himself and the person originally sentenced."

[74] 147 Wash. 169, 265 Pac. 175 (1928), approved in State v. Shannon, 60 Wash. 2d 883, 376 P.2d 646 (1962).

[75] Gerard v. State 363 S.W.2d 916 (Ark. 1963).

courts have consistently held that the revocation process be instituted either by a "verified information stating specifically the conduct constituting a violation of probationary conditions" or by a motion to revoke probation and order to show cause. The information, however, need not be as precise as is necessary when instituting a formal criminal proceeding.[76] If the probationer pleads not guilty to the information or motion to revoke probation, a hearing is held.[77]

Right to Hearing: Parole

A case of importance is *Fleenor v. Hammond*,[78] decided by the United States Court of Appeals for the Sixth Circuit. A conditional pardon granted by the governor of Kentucky was revoked in that case without notice or hearing on the ground that a power to revoke in such a manner had been reserved by the governor in the pardon.[79] The federal court, bound by the construction placed on the pardon by the state court, framed the question for decision as whether summary revocation of a pardon, without a hearing, impaired petitioner's rights under the Fourteenth Amendment. The court held that it did, and, in a significant passage, took direct issue with the "act of grace" theory:

> "We may grant at once that the *giving* of a pardon is an act of grace; that to it the Governor may attach conditions; that if any condition is broken the Governor may revoke and that his judgment as to the breach is final and conclusive upon the courts. It does not follow, however, from the reservation of a right to revoke, that it may be exercised arbitrarily or upon whim, caprice, or rumor. . . . It is our conclusion that the petitioner's right to his freedom under the terms of the pardon could not be revoked without such hearing as is the generally accepted prerequisite of due process. . . .[80]

In three states having statutes that do not require a hearing, it can fairly be said that case law exacts a hearing before parole can be revoked. In one of these states, Utah, the requirement of a hearing is to be found in a dictum in *Baine v. Beckstead*, considered in the preceding section. The Illinois Supreme Court, viewing the due process clause as applicable to every proceeding which may deprive a person of his liberty, "whether the process be judicial or administrative or executive in its nature," refused to regard parole as "a mere act of grace and favor by the board of pardons or the warden." Construing the statute then on the books to require that a hearing be held, the court wrote: "As we hold that the relator is entitled to a hearing . . . , the act does not deprive him of his liberty without due process of law . . . ."[81] The present Illinois statute does not contain the clause relied on by the court for its construction of the earlier statute. It would have to follow, however, under the authority of this case, that revocation of parole without a hearing would be declared unconstitutional in Illinois.

The Virginia court in *Hudson v. Youell*,[82] observing that its statute failed to specify the procedure for revoking a conditional pardon, decided that a hearing should be held because it was "the established practice at common law and in the American States" to hold such hearings, at least in the absence of any statute or reservation in the pardon authorizing revocation without a hearing.

Cases Decided Under Statutes Which Expressly or Impliedly Require a Hearing (Categories III to VI of Charts)

Probation

It would be expected that decisions in jurisdictions where hearings are expressly or impliedly required by statute would recognize the right of a probationer to a hearing on the revocation of probation. Such is indeed the case; however, the nature and type of hearing required vary with the jurisdiction and, to some extent, the language of the statute.

Two influential decisions are out of the United States Supreme Court, construing the federal statute which requires that the probationer be

[76] See Sellers v. State, 105 Neb. 748, 750, 181 N.W. 862, 863 (1921); Moore v. State, 125 Neb. 565, 251 N.W. 117 (1933); Carr v. State, 152 Neb. 248, 40 N.W.2d 677 (1950); Young v. State, 155 Neb. 261, 51 N.W.2d 326 (1952); Phoenix v. State, 162 Neb. 669, 77 N.W.2d 237 (1956).

[77] Moyer v. State, 144 Neb. 673, 14 N.W.2d 220 (1944); Reinmuth v. State, 163 Neb. 724, 80 N.W.2d 874 (1957); Carr v. State, Young v. State, Phoenix v. State, *supra* note 76.

[78] 116 F.2d 982 (6th Cir. 1941).

[79] Commonwealth *ex rel.* Meredith v. Hall, 277 Ky. 612, 126 S.W.2d 1056 (1939).

[80] 116 F.2d at 986. (Emphasis added.) *Accord*, State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1950), holding that revocation of a conditional pardon without a hearing amounts to deprivation of a valuable right through "arbitrary action."

[81] People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 366, 367–68, 90 N.E. 118, 120, 121 (1909).

[82] 178 Va. 525, 17 S.E.2d 403 (1941), *modified on other grounds*, 179 Va. 442, 19 S.E.2d 705 (1942).

"taken before the court." In *Burns v. United States*,[83] a unanimous Court, noting that probation is a "privilege and cannot be demanded as a right," formulated certain "principles":

> "The question, . . . in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. . . . While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim and caprice."[84]

In *Escoe v. Zerbst*,[85] the Court expanded on what it said in *Burns*, explaining that the hearing, while it need not be formal in nature, must be "so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper." The probationer must be given the opportunity "to explain away" charges which "may have been inspired by rumor or mistake or downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing."[86]

Then, in a celebrated dictum, the *Escoe* Court rejected the probationer's contention that a hearing is mandated by the federal Constitution. The lawmakers, the Court observed, could, if they wished, "dispense with notice or a hearing." "Probation or suspension of sentence comes as an act of grace to one convicted of a crime," the Court wrote tersely, "and may be coupled with such conditions in respect of its duration as Congress may impose."[87]

Following the lead thus set by the Supreme Court, state and lower federal court decisions are legion which stress the informality of the hearing granted by their statutes, occasionally adding that the test is one of the exercise of sound judicial discretion, whether the probationer was accorded "fair treatment."[88]

The courts do not agree, however, as to just how "informal" the hearing is to be. Certain traditional elements of a fair hearing are accorded the probationer by the courts of some jurisdictions,[89] and denied to him by others. A close majority of the cases require that the probationer receive notice prior to the hearing of the particular grounds upon which revocation is sought;[90] it is sufficient, according to other cases, if the notice informs the probationer that he is charged with a violation of his probation, as by an order to show cause—that is, if it simply brings him before the court.[91] A clear majority of the cases hold that the probationer is entitled to introduce evidence and produce witnesses on his own behalf;[92] some few deny him that

[83] 287 U.S. 216 (1932).
[84] *Id.* at 222–23.
[85] 295 U.S. 490 (1935).
[86] *Id.* at 493.
[87] *Id.* at 492–93. State and lower federal courts tend to give this dictum the weight of a holding. See, *e.g.*, Hyser v. Reed, 318 F.2d 225, 238 (D.C. Cir. 1963); United States v. Freeman, 160 F. Supp. 532 (D.D.C. 1957), *aff'd*, 254 F.2d 352 (D.C. Cir. 1958); *In re* Davis, 37 Cal. 2d 872, 236 P.2d 579 (1951), discussed *supra* notes 19, 30; *In re* Anderson, 191 Ore. 409, 434, 438, 447, 229 P.2d 633, 644, 646, 649 (1951), discussed *supra* notes 47–49.

[88] See, *e.g.*, Bennett v. United States, 158 F.2d 412 (8th Cir. 1946); Brown v. United States, 236 F.2d 253 (9th Cir. 1956); United States v. Feller, 17 Alaska 417, 156 F. Supp. 107 (1957); Brill v. State, 159 Fla. 682, 32 So. 2d 607 (1947); *Ex parte* Medley, 73 Idaho 474, 253 P.2d 794 (1953); Ridley v. Commonwealth, 287 S.W.2d 156 (Ky. Ct. App. 1956); Edwardsen v. State, 220 Md. 82, 151 A.2d 132 (1959); Murphy v. Lawhon, 213 Miss. 513, 57 So. 2d 154 (1952); State v. Zachowski, 53 N.J. Super. 431, 147 A.2d 584 (1959); People v. Oskroba, 305 N.Y. 113, 111 N.E.2d 235 (1953); State v. Theisen, 167 Ohio St. 119, 146 N.E.2d 865 (1957); Arney v. State, 195 Tenn. 57, 256 S.W.2d 706 (1953); Stratmon v. State, 333 S.W.2d 135 (Tex. Crim. 1960); Berry v. Commonwealth, 200 Va. 495, 106 S.E.2d 590 (1959); State v. Shannon, 60 Wash. 2d 883, 376 P.2d 646 (1962).

[89] Note that some statutes confer specific rights on the probationer. See category VI of charts. Decisions which merely echo such legislative fiat are not considered here.

[90] Dingler v. State, 101 Ga. App. 312, 113 S.E.2d 496 (1960); People v. Price, 24 Ill. App. 2d 364, 376–77, 164 N.E.2d 528, 533 (1960); Crenshaw v. State, 222 Md. 533, 161 A.2d 669 (1960); State v. Zachowski, *supra* note 88, at 441, 147 A.2d at 590; People v. Oskroba, *supra* note 88; State v. Gooding, 194 N.C. 271, 139 S.E. 436 (1927). See generally Note, 59 COLUM. L. REV. 311, 326–28 (1959).

[91] Manning v. United States, 161 F.2d 827 (5th Cir. 1947); Ridley v. Commonwealth, *supra* note 88; State v. Thiesen, *supra* note 88; State v. Maes, 127 S.C. 397, 120 S.E. 576 (1923); Berry v. Commonwealth, *supra* note 88 (no advance notice given of any kind). As to the federal rule, however, see Holtzoff, *Duties and Rights of Probationers*, 21 Fed. Prob. 3, 8 (Dec. 1957).

[92] Fiorella v. State, 40 Ala. App. 587, 590, 121 So. 2d 875, 878 (1960); Zerobnick v. City and County of Denver, 139 Colo. 139, 337 P.2d 11 (1959) (must be the "taking of evidence"); Moye v. Futch, 207 Ga. 52, 60 S.E.2d 137 (1950); People v. Enright, 332 Ill. App. 655, 75 N.E.2d 777 (1947); *In re* Bobowski, 313 Mich. 521, 21 N.W.2d 838 (1946); Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106 (1950); State v. Haber,

right.[93] The courts of Michigan require the authorities to produce witnesses if the charges are denied.[94] Revocation based only on a probation report has been reversed in Illinois.[95] The courts in three states explicitly recognize the probationer's right to cross-examine adverse witnesses.[96]

No court has expressly denied the probationer the right to be represented at the hearing by counsel of his own choosing.[97] However, a split exists on whether there is a right to have counsel appointed by the court. The federal courts hold that no such right exists.[98] New York seems to agree,[99] as does Washington.[100] Illinois, on the other hand, requires assignment of counsel for the indigent probationer.[101] The Maryland Court of Appeals has informed trial courts that they "may" assign counsel to represent the probationer,[102] but it does not appear that a "right" exists in that jurisdiction to have counsel assigned, at least in the absence of extraordinary circumstances.[103]

Parole

Here, again, we deal with cases decided by courts of jurisdictions in which hearings are guaranteed by statute.[104]

The most active court in the country in this area is the District of Columbia Court of Appeals. Under the provisions of the Federal Administrative Procedure Act, the parolee whose parole has been revoked and who has suffered reimprisonment may seek his release by habeas corpus or a declaratory judgment action either from the federal district court sitting in the district in which he is confined *or* from the District of Columbia district court.[105] Since, as will soon become apparent, the construction of the federal parole revocation statute, which directs that the retaken parolee "shall be given an opportunity to appear before the Board," is notably more liberal in the Court of Appeals for the District of Columbia than in other federal circuits, reimprisoned parolees have sought relief from the courts of the District.

The starting point for our discussion is *Fleming v. Tate*,[106] in which the District of Columbia Court of Appeals construed the statute governing the revocation of parole in the District of Columbia, which is separate and apart from the federal parole revocation statute.[107] The court held in *Fleming* that the parolee was entitled to be represented by counsel of his own choice at the parole revocation hearing.[108] This decision was extended in *Moore*

132 N.J.L. 507, 512, 41 A.2d 326, 329 (1945); People v. Oskroba, *supra* note 88 ("opportunity to attack or deny the charge").

[93] Brozosky v. State, 197 Wis. 446, 222 N.W. 311 (1928); *cf.* Pritchett v. United States, 67 F.2d 244 (4th Cir. 1933) (whether to hear probationer's character witnesses is discretionary with court).

[94] People v. Myers, 306 Mich. 100, 10 N.W.2d 323 (1943); *In re* Bobowski, *supra* note 92; People v. Rudnik, 333 Mich. 216, 52 N.W.2d 671 (1952).

[95] People v. Warren, 314 Ill. App. 198, 40 N.E.2d 845 (1942); People v. Enright, *supra* note 92.

[96] Robinson v. State, 62 Ga. App. 539, 8 S.E.2d 698 (1940); Moye v. Futch, *supra* note 92; People v. Price, *supra* note 90, at 377–79, 164 N.E.2d at 534–35; State v. Zachowski, *supra* note 88, at 441, 147 A.2d at 590.

[97] The federal courts permit representation by retained counsel. See Holtzoff, *supra* note 91. In Maryland, however, the Court of Appeals has observed that the revoking court "may, but is not obliged to, advise the defendant of his right to obtain counsel . . . ." Crenshaw v. State, 222 Md. 533, 535, 161 A.2d 669, 671 (1960).

[98] Bennett v. United States, 158 F.2d 412 (8th Cir. 1946); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Kelley v. United States, 235 F.2d 44 (4th Cir. 1956); Cupp v. Byington, 179 F. Supp. 669 (S.D. Ind. 1960). *But see* Mason v. United States, 303 F.2d 775 (9th Cir. 1962) ("safe practice" is to see that probationer "is furnished with counsel, if he does not have it, and to give an opportunity for allocution").

[99] People v. Valle, 7 Misc. 2d 125, 127, 164 N.Y.S.2d 67, 70–71 (Ct. Spec. Sess. App. Pt. 1957) (dictum); *cf.* People *ex rel.* Ambrose v. Combs, 33 Misc. 2d 360, 224 N.Y.S.2d 874 (Sup. Ct. 1962).

[100] Jaime v. Rhay, 59 Wash. 2d 58, 365 P.2d 772 (1961).

[101] People v. Burrell, 334 Ill. App. 253, 79 N.E.2d 88 (1948); People v. Price, *supra* note 90, at 373, 164 N.E.2d at 534.

[102] Crenshaw v. State, *supra* note 97, at 535, 161 A.2d at 671.

[103] Edwardsen v. State, 220 Md. 82, 89–90, 151 A.2d 132, 136–37 (1959). One commentator refers to an unreported case in Maryland in which counsel was appointed for a probationer who claimed a mental defect, which claim had some support in the evidence. Mutter, *Probation in the Criminal Court of Baltimore City*, 17 MD. L. REV. 309, 321 n.61 (1957).

[104] There are many cases from these jurisdictions, however, which approve revocation of a conditional pardon without a hearing if such a power was expressly or impliedly reserved in the pardon. See Fuller v. State, 122 Ala. 32, 26 So. 146 (1899); Muckle v. Clark, 191 Ga. 202, 12 S.E.2d 339 (1940); Woodward v. Murdock, 124 Ind. 439, 24 N.E. 1047 (1890); Boaz v. Amrine, 153 Kan. 614, 113 P.2d 80 (1941); Silvey v. Kaiser, 173 S.W.2d 63 (Mo. 1943); Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954); *In re* Davenport, 110 Tex. Crim. 326, 7 S.W.2d 589 (1927); Scott v. Callahan, 39 Wash. 2d 801, 239 P.2d 333 (1951).

Note also that in two jurisdictions, under earlier statutes which did not require a hearing, revocation of a parole without a hearing had been upheld against a claim of unconstitutionality. Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937); *In re* Tabor, 173 Kan. 686, 250 P.2d 793 (1952).

[105] Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961).

[106] 156 F.2d 848 (D.C. Cir. 1946).

[107] *Cf.* Cooper v. United States, 48 A.2d 771, 773 (D.C. Mun. Ct. App. 1946).

[108] The District of Columbia statute was amended after *Fleming* to provide for representation of counsel.

v. Reid[109] to impose upon the board the duty to advise the parolee of his right to retain counsel.

In *Robbins v. Reed*[110] and, later, *Glenn v. Reed*,[111] the holdings in *Fleming* and *Moore* on the right to counsel were explicitly extended to revocations ordered pursuant to the federal parole revocation statute. In *Reed v. Butterworth*,[112] the federal parole board was ordered to allow the parolee to testify in his own behalf, if he elects, and to present voluntary witnesses.

The rights of the parolee, as recognized and enforced by the District of Columbia Court of Appeals, apparently end at this point. For in *Hyser v. Reed*[113] the court, sitting *en banc*, held, over a strong dissent, in a carefully structured opinion that the parolee is not entitled (1) to appointment of counsel, (2) to confront and cross-examine persons who have imparted information against him, (3) to examine reports made by the parole officer and other members of the board's staff, and (4) to the right to compulsory process to secure witnesses.

Notwithstanding the decision in *Hyser*, the federal parolee is better advised to seek his release from the courts of the District of Columbia than from federal courts outside the District. The latter have construed the federal parole revocation statute in a far more niggardly fashion. There is no right to representation by retained counsel.[114] There is no right to produce voluntary witnesses,[115] although on this point the Court of Appeals for the Second Circuit seems in disagreement.[116] And, of course, there is no right to confrontation and cross-examination.[117]

[109] 246 F.2d 654 (D.C. Cir. 1957).
[110] 269 F.2d 242 (D.C. Cir. 1959).
[111] 289 F.2d 462 (D.C. Cir. 1961).
[112] 297 F.2d 776 (D.C. Cir. 1961).
[113] 318 F.2d 225 (D.C. Cir. 1963).
[114] Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), *aff'd by equally divided court*, 340 U.S. 880 (1950); Washington v. Hagan, 287 F.2d 332 (3d Cir. 1960); Lopez v. Madigan, 174 F. Supp. 919 (N.D. Cal. 1959); Poole v. Stevens, 190 F. Supp. 938 (E.D. Mich. 1960); Hock v. Hagan, 190 F. Supp. 749 (M.D. Pa. 1960); Gibson v. Markley, 205 F. Supp. 742 (S.D. Ind. 1962). However, as to current practice, see notes 128–130 *infra*.
[115] Poole v. Stevens, *supra* note 114; United States *ex rel.* McCreary v. Kenton, 190 F. Supp. 689 (D. Conn. 1960) (but board enjoined "to give fair consideration to what the prisoner [has] to say" and to make "further investigation of sources of information where warranted"); Gibson v. Markley, *supra* note 114. However, as to current practice, see note 131 *infra*.
[116] United States *ex rel.* Frederick v. Kenton, 308 F.2d 258 (2d Cir. 1962).
[117] Gibson v. Markley, *supra* note 114.

The courts of Delaware and Maryland have held that the hearings guaranteed by their statutes include the right to representation by counsel of one's own choice,[118] but not the right to have counsel appointed by the board. In New Jersey, where the statute makes the granting of a hearing discretionary with the board, but guarantees counsel of one's own "selection" if a hearing is, in fact, held,[119] it has been decided that there is no right to be advised of one's right to retain counsel, at least where it is not shown "that counsel, if present, could have done more than present to the board the substantive point argued. . . ."[120]

In Delaware, the courts have further held that the parolee must be given the opportunity to call witnesses in his own behalf.[121] The Supreme Court of Florida has ruled that the parolee is entitled to be confronted by and meet the evidence against him. "The Commission," the court wrote, "[has] no right to treat as evidence material not introduced as such or to consider any information outside the record in its disposition of the case."[122] The Supreme Court of Pennsylvania has reached a different conclusion, holding that a hearing at which the parolee was informed that the board had evidence establishing the violation of six different rules of his parole agreement. which evidence was never produced, was adequate within the terms of their statute. "[T]he only person whom the Board is actually required to hear is the parolee," the court explained. "All other information and evidence may be brought to the attention of the Board as a result of a report prepared by its agents or employees."[123]

[118] State v. Boggs, 10 Terry (49 Del.) 277, 114 A.2d 663 (Super. Ct. 1955); Warden v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957). Note that several statutes confer on the parolee the right to retain counsel, while some expressly deny him such a right. See category VI of charts. Cases which are simply declarative of statutes granting one or more rights to the parolee (see, *e.g.*, Petition of Vaughan, 124 N.W.2d 251 (Mich. 1963), holding that the parolee was not confronted by adverse witnesses as required by the statute) are not considered in this section.
[119] See note 5 to the charts, *supra*.
[120] Jerabek v. State, 69 N.J. Super. 264, 174 A.2d 248 (1961).
[121] State v. Boggs, *supra* note 118; Lockwood v. Rhodes, 11 Terry (50 Del.) 287, 129 A.2d 549 (Super. Ct. 1957).
[122] Jackson v. Mayo, 73 So. 2d 881, 882 (Fla. Sup. Ct. 1954), relying in part, however, on the language of the Florida statute. And *cf.* Senk v. Cochran, 116 So. 2d 245 (Fla. Sup. Ct. 1959).
[123] Hendrickson v. Pennsylvania State Bd. of Parole, 409 Pa. 204, 209, 185 A.2d 581, 585 (1962). Note that the Pennsylvania statutes specifically authorize the Board when revoking parole to act on reports "sub-

The hearing which is held to revoke parole is "informal" and is not governed by judicial rules of procedure, "any more than the application of these rules is necessary in many informal administrative hearings."[124]

THE CURRENT PRACTICE

Hearings, as was observed early in this paper, may be granted in practice although the right to a hearing is denied by statute and case law. In at least two jurisdictions in which the statutes do not require a hearing on the revocation of parole—Colorado and Connecticut—rules and regulations promulgated by the board fill the gap. In Colorado,[125] the parolee upon his return to the institution "shall be informed of the reason for the suspension and of any grounds which have been asserted for revocation of his parole and shall be given an opportunity to be heard in regard thereto." In Connecticut,[126] the rules provide that upon his return to prison the parolee shall be given "reasonable notice of the charges against him . . . [and] an opportunity to appear before the Board at its next regular meeting at the State Prison to admit, deny, or explain the violation charged." These rules and regulations point up the practice, generally prevailing, to hold parole revocation hearings *after* the return of the parolee to the institution from which he was paroled.[127]

The United States Board of Parole, influenced perhaps by the trend of decisions in the District of Columbia[128] or by the fear that its present policy would not be favorably received by the United States Supreme Court,[129] recently issued two memorandums to all federal prisons.[130] The first, dated April 24, 1961, allows the parolee, not less than 30 days prior to the date of the scheduled hearing, to elect on a suitable form to retain counsel to represent him at the hearing. If counsel makes an unscheduled appearance at the hearing, and the parolee has no objections, counsel will be permitted to attend the proceedings. The board will not furnish counsel for the prisoner unable to retain his own.

Under a memorandum dated November 30, 1961, the parolee may present voluntary witnesses at the hearing. He signifies his desire to exercise this right on a form provided by the prison. If unscheduled witnesses appear at the hearing, and the parolee elects, they will be permitted to appear before the board and testify.[131]

The United States Parole Board has not changed its policy of non-confrontation. In responding to two questionnaires,[132] James C. Neagles, Staff Director, United States Board of Parole, indicated that neither the parole officer nor persons who may have given information against the parolee appear at the hearing, and this is the case even if the facts of the alleged violation are disputed by the parolee. A written report is submitted to the board by the parole authorities, which report is

mitted to them by their agents and employees . . . ." PA. STATS. ANN. tit. 61, §331.22 (1962 Supp.).

[124] Fleming v. Tate, *supra* note 106, at 849; and see Hiatt v. Compagna, *supra* note 114; State v. Boggs, *supra* note 118; Jackson v. Mayo, *supra* note 122; Hendrickson v. Pennsylvania State Bd. of Parole, *supra* note 123.

[125] Rules and Regulations of the State Board of Parole, adopted December 11, 1958, at page 4 (supplied to the writer by Edward W. Grout, Director of Parole).

[126] Rules and Regulations of the Board of Parole for the State Prison, effective November 5, 1958, at page 11 (supplied to the writer by James J. M'Ilduff, Executive Secretary to the Board).

[127] See parole statutes cited in categories IV and VI of charts; *cf.* Martin v. Warden, 182 F. Supp. 391 (D. Md. 1960), holding that reimprisonment prior to receiving the hearing guaranteed by the Maryland statutes is not violative of the Fourteenth Amendment.

[128] See discussion *supra* notes 105–113. In Reed v. Butterworth, 297 F.2d 776, 778 (D.C. Cir. 1961), the District of Columbia Court of Appeals criticized the parole board's apparent "notion . . . that revocation hearings are mere formalities, and the result a foregone conclusion," which philosophy, the court believed, the board evidenced by denying parolees "fundamental procedural safeguards."

[129] See Note, 57 NW. U.L. REV. 737, 743–44 (1963).

[130] Both memorandums were furnished to the writer by James C. Neagles, Staff Director, United States Board of Parole, under letter dated January 10, 1962.

[131] The claim has been made that the board has virtually nullified the right to present "voluntary witnesses" by choosing inappropriate places for the hearing and refusing to pay the expenses of witnesses who are willing to appear voluntarily. Note, *supra* note 129, at 745.

[132] Two questionnaires were prepared by the writer in December, 1961, and January, 1962, and were sent to parole boards and probation departments throughout the country. Fifty-two questionnaires were sent to parole boards. Thirty-six, or 69%, were returned. Second questionnaires were sent to 26 of the parole boards which had responded to the first. These were returned by 24, or 92%. Sixty-one questionnaires were sent to probation departments. In 19 states which have no centralized probation department, questionnaires were sent to departments in the counties having the greatest population. Fifty-five, or 90%, were returned. Second questionnaires were sent to 49 probation departments, and 44, or 90%, were returned. The questionnaires are reproduced and the replies from each jurisdiction are individually charted in the writer's unpublished thesis, The Revocation of Parole and Adult Probation, May 1962 (Northwestern University Law Library), at pages 12–18, 155–223.

not shown to the parolee or his counsel. Mr. Neagles offered this reason for the board's present policy of non-confrontation:

> "To present an entire communication from the parole officer to the parolee would tend to damage the public informants who might have contacted the parole officer to give information regarding parole violations. It might cause ultimate repercussions to such persons as wives, other family members and neighbors."[133]

State parole boards, responding to the writer's two questionnaires,[134] indicated that hearings are usually limited to an appearance by the parolee before the board at which time he may explain, admit, or deny the charges.[135] Witnesses against the parolee rarely appear before the board, even if the facts are disputed by the parolee.[136] Instead, the board relies on reports submitted by the parole authorities. The reports generally are kept confidential. The parolee rarely presents evidence or witnesses, although most jurisdictions report that such a right exists.[137] The failure to exercise this right is perhaps explained by the fact that in most cases, according to some of the parole boards responding, the parolee has been convicted of a new crime while on parole or has admitted the charges against him.[138] About half of the jurisdictions reporting indicated that the parolee may retain counsel if he wishes. Significantly, however, several jurisdictions pointed out that counsel, if retained, may present arguments on behalf of the parolee at the board's offices and not at the hearing.[139] Three jurisdictions indicated that the parolee "seldom" retains counsel.[140] No jurisdiction indicated that it would assign counsel for the parolee. Notice of the charges is ordinarily given to the parolee at some time before the hearing, either upon arrest or in an interview by a parole official at the prison. However, in a few jurisdictions, the charges are not made known to the parolee until the actual hearing.[141]

Probation revocation hearings, being held in court, tend to be more judicial or formal in nature than parole revocation hearings.[142] This is not the case in every jurisdiction, however. Louis B. Sharp, Chief, Probation Division, Administrative Office of the United States Courts, commenting on the hearing procedures in the federal courts, reported that the probation officer ordinarily testifies at the hearing and a written report is submitted to the court. The report is not shown to the probationer. Witnesses against the probationer usually do not appear in court, even if the facts are disputed. If witnesses are produced by the probation authorities, the probationer may not cross-examine them as of right, but "may with permission of the court." He may not present evidence or witnesses "as a general rule." Retained counsel is not permitted at the hearing. Counsel will not be assigned. Notice of the charges is "generally" given "at the time of arrest" and "prior to the hearing."

According to responses received from state and

[133] Letter to the writer dated January 10, 1962. The same point was made in a letter to the writer dated December 21, 1961, from the Director of Probation and Parole in Maine, John J. Shea. Mr. Shea observed:

> "[W]hile a parole violator has certain rights and while the State Board has certain obligations to the violator in terms of substantiating the return to the institution, the State Board also has a concurrent responsibility to outside citizens in the community whose safety and welfare might be jeopardized at a later date through any vengeful act by the violator after his release from the institution. . . . Therefore, the State Board may discuss with the parole violator at time of parole violation hearing only a sufficient number of items to substantiate the fact that the man is in violation of parole."

And see *In re* Varner, 166 Ohio St. 340, 142 N.E.2d 846 (1957), discussed *supra* note 52.

[134] See note 132 *supra*.

[135] Responses from Iowa, Nevada, South Dakota, and Vermont indicated that hearings are not ordinarily held in these states.

[136] Ohio and Pennsylvania, amplifying answers on the questionnaires, reported that no outsiders are permitted at the hearing, Pennsylvania adding that "We use a format similar to that used in Military Court Martial procedures . . . ." South Carolina and Hawaii indicated, however, that the parole officer will attend the hearing. This is probably the case in other jurisdictions as well.

[137] Louisiana, Maryland, and Virginia reported, however, that the parolee's witnesses will be heard at the board's offices, out of the parolee's presence. Georgia and Utah noted that whether the parolee's witnesses will testify in his presence will depend upon the "nature" or "circumstances" of the case. The writer believes that such may be the rule in many other jurisdictions which signified, without amplification, that the parolee may present his own witnesses.

[138] Louisiana, Ohio, Pennsylvania, Utah, Vermont, and Washington specially reported that cases are rare where the violation charged is not supported by a conviction or admitted by the parolee.

[139] Louisiana, Minnesota, Pennsylvania, and Virginia noted this by way of amplifying their responses to the questionnaires.

[140] Minnesota, Missouri, and Wisconsin.

[141] This appears to be the case in Maryland and Ohio. Notice of the charges in the District of Columbia is given to the parolee prior to the hearing "if represented by counsel." Otherwise, the "specifications are read to [the parolee] at the opening of the hearing."

[142] Note that the statutes in Florida and New Mexico set up a "pleading" procedure somewhat similar to procedure in criminal trials. See category VI of charts.

county probation departments, the probation officer is often the sole witness against the probationer. Witnesses against the probationer generally are produced if the facts are disputed by the probationer. Factual disputes, however, are not the rule, since in most cases the probationer has admitted the essential charges or the violation is supported by a judgment of conviction.[143] Several jurisdictions emphasized the trial court's power to order witnesses produced if he believes the case demands it.[144] When witnesses do appear, the probationer or his counsel, as a general rule, may cross-examine them.[145] Written reports are submitted to the court in the vast majority of jurisdictions. Roughly one-third of the jurisdictions responding indicated that the report is shown to the probationer or his counsel "on request." Retained counsel may represent the probationer at the hearing, and evidence and witnesses may be produced on his behalf, in almost all of the jurisdictions reporting on their procedures.[146] Again, however, the frequency of cases in which the charges are either admitted or substantiated by a judgment of conviction may, as a practical matter, obviate the need for presenting evidence and witnesses. Slightly better than half the jurisdictions reporting indicated that the court will assign counsel for the indigent probationer who desires counsel. Notice of the charges against him is generally given to the probationer on or soon after his arrest and is repeated at the hearing.

[143] This point was specially noted in the responses received from the statewide probation departments of Massachusetts, Utah, and Washington and those of Los Angeles and San Diego counties in California. It also appears to be the case in New York. See Note, 59 COLUM. L. REV. 311, 322 (1959). The probation department in Marion County (Indianapolis), Indiana indicated that probation is normally revoked for failure to pay fines or costs, or failure to report to the probation officer, in which case the judge will "rely on the officer's word."

[144] The statewide probation departments in North Carolina and Vermont so indicated, as well as the probation departments of Baltimore City, Maryland, Hennepin (Minneapolis) and Ramsey (St. Paul) counties in Minnesota, Essex County (Newark) in New Jersey, Philadelphia County, Pennsylvania, and Milwaukee County, Wisconsin.

[145] Here, again, the trial court has discretion to determine whether or not cross-examination should be permitted and to what extent. The statewide probation departments of Missouri, Vermont, and Washington and the federal probation department made this point.

[146] A notable exception appears to be the federal courts, as already pointed out.

CONSTITUTIONAL AND POLICY CONSIDERATIONS

The Constitutional Issues

The constitutional issues imbedded in the area have been thoroughly canvassed elsewhere. The pros and cons of whether due process requires a fair hearing before probation or parole may be revoked have been explored in the law reviews,[147] in a recent multi-opinioned decision of the Courts of Appeals for the District of Columbia, sitting *en banc* for the occasion,[148] and by this writer in his unpublished thesis,[149] and need not be further explored here. Suffice it to say that the hardiest of the arguments against the due process claim—perhaps because it twice has been articulated by the United States Supreme Court[150]—is that probation and parole are "privileges" and not "legal rights" and, hence, may be withdrawn in any manner the granting authority chooses. This has been undercut by recent decisions of the Supreme Court in the field of public employment. These decisions stress *harm*—whether the "governmental action seriously injures an individual"[151]—and refuse to allow the frozen terms "privilege" and "right" to be decisive on the issue of procedural fairness.[152] They also point out that sub-

[147] Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L. & C. 531 (1942); Hink, *Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483 (1962); Note, 65 HARV. L. REV. 309 (1951); Note, 59 COLUM. L. REV. 311 (1959); Note 57 NW. U.L. REV. 737 (1963).

[148] Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).

[149] Sklar, The Revocation of Parole and Adult Probation, 226-45, May 1962 (unpublished thesis in Northwestern University Law Library).

[150] Burns v. United States, 287 U.S. 216 (1932); Escoe v. Zerbst, 295 U.S. 490 (1935).

[151] "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Greene v. McElroy, 360 U.S. 474, 496-97 (1959). See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895-96 (1961); *cf.* Hannah v. Larche, 363 U.S. 420, 440-44 (1960); Silver v. New York Stock Exchange, 373 U.S. 341, 364-65 nn. 17 & 18 (1963).

[152] Cases *supra* note 151. In Green v. McElroy, the security clearance of an aeronautical engineer was revoked after a hearing at which he was denied access to much of the evidence against him and had no opportunity to confront or cross-examine adverse witnesses. As a result of the revocation he lost his job with a private manufacturer doing classified government work and was unable afterwards to secure similar employment. The revocation order was reversed by the Court, but on non-constitutional grounds. 360

stantial interests, even if denominated "privileges," cannot be taken from an individual through arbitrary governmental action.[153] This, it will be recalled, was the position taken by the United States Court of Appeals for the Sixth Circuit in regard to revocation of a conditional pardon without a hearing.[154]

Policy Considerations Against Granting a Full Hearing

Constitutional issues, especially weighty Fourteenth Amendment problems, while demanding and being entitled to careful attention, often retard mature deliberation on policy considerations of great practical import. The question whether hearings should be granted before probation or parole is revoked involves such policy considerations.

Absolute denial of a hearing has been justified on the policy ground that hearings would result in increased burdens of administration on the courts and parole boards and undoubtedly would discourage them from granting probations or paroles they otherwise would grant.[155] The same argument has been offered as a basis for severely limiting the scope and extent of a hearing required by statute.[156] There is no evidence that such expectations have materialized in jurisdictions where fuller hearings are mandated.[157] Indeed, knowledge that a hearing is needed before conditional release can be revoked may have the beneficial effect of compelling the granting authority to exercise greater care in selecting worthy candidates for rehabilitation.

A forceful answer to this policy argument is found in an opinion of the Utah Supreme Court:

> "It has been suggested that [the necessity of a hearing] may cause the trial courts to deny any stay of execution because of the complications involved even in cases where the public interest requires probation. We see no merit to this contention. It suggests that courts, in order to exercise arbitrary and capricious power, will violate their oath of office and their duty to the public. Why should any honest judge adopt such a policy? The very suggestion shows a lack of con-

U.S. at 508. In Cafeteria & Restaurant Workers Union v. McElroy, the Court held that the revocation of a security clearance permit without notice or a hearing, resulting in the discharge of a short-order cook from a military installation, was not violative of due process. *Restaurant Workers*, it has been said, underscores "the relatively narrow thrust of the Greene holding." Hyser v. Reed, *supra* note 148, at 239. On the contrary, however, the *Restaurant Workers* case underscores and strengthens the true thrust of the holding in Greene v. McElroy, for, as compared to the employment loss suffered by Greene, the employee in *Restaurant Workers* lost only the opportunity to work as a short-order cook "at one isolated and specific military installation." 367 U.S. at 896. See Willner v. Committee on Character & Fitness, 373 U.S. 96, 103 n.2 (1963); Williams v. Zuckert, 371 U.S. 531, 534 (1963) (dissenting opinion of Justice Douglas). Such a loss does not come within the sweep of the phrase "serious injury."

Unfortunately, however, the concept of "privileges" and "rights" lingers on in the opinions. See Jay v. Boyd, 351 U.S. 345 (1956), suspension of deportation being an "act of grace," an application for same may be denied on "confidential information"; note the analogy to probation in the majority opinion (at p. 354) and the treatment of the majority's analogy in Justice Black's dissenting opinion (at pp. 366–67); Willner v. Committee on Character & Fitness, *supra*, at 102, person cannot be excluded from the practice of law without an opportunity to confront and cross-examine those who give information against him—practice of law "is not 'a matter of grace and favor.'" And *cf.* the use of the term "legal rights" in Hannah v. Larche, *supra* note 151, at 441–42.

[153] Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Cafeteria & Restaurant Workers Union v. McElroy, *supra* note 151, at 894, 897–98; Cramp v. Board of Public Education, 368 U.S. 278, 288 (1961); *cf.* Fleming v. Nestor, 363 U.S. 603, 611 (1960); Sherbert v. Verner, 374 U.S. 398, 404–05 (1963).

[154] Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941), discussed *supra* notes 78–80. *Accord*, State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1950), discussed *supra* note 80. The United States Supreme Court has said in this connection: "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." Burns v. United States, *supra* note 150, at 223. However, aside from the question whether or not the *Burns* Court was only referring to the probationer's rights under the federal statute (see Escoe v. Zerbst, *supra* note 150, at 492–93), it is probable that when the Court spoke of protecting the probationer against "whim and caprice" it had in mind revocation on patently inadequate grounds and not revocation without a hearing. 287 U.S. at 223–24. Moreover, it seems equally probable that the "public employment" cases, cited *supra* note 153, when they admonish that "privileges" may not be taken away "arbitrarily," are referring more to non-existent or irrational grounds than non-existent procedure. See Cafereria & Restaurant Workers Union v. McElroy, *supra* note 151, at 897–98. This is not to say, of course, that the position taken in Fleenor v. Hammond, *supra*, has been discredited. Logic, as well as language in the opinions, support it, at least in a case where probation or parole is revoked without an adequate hearing for conduct which is neither admitted nor substantiated by uncontrovertable proof. See notes 173–181 *infra*, and accompanying text.

[155] *In re* Varner, 166 Ohio St. 340, 345, 142 N.E.2d 846, 849 (1957).

[156] Burns v. United States, 287 U.S. 216, 222 (1932).

[157] In fact, it has been observed that Michigan, where the statute grants an unusually full and complete hearing before parole is revoked (see chart VI), "has one of the highest proportions of parole grants." Davies & Hess, *Criminal Law—Insane Persons—Influence of Mental Illness on the Parole Return Process*, 59 MICH. L. REV. 1101, 1110 n.47 (1961).

fidence in the integrity of our courts, which we do not share."[158]

The next two policy considerations relate to the question of confrontation by adverse witnesses. The United States Parole Board has maintained that "to require [parole officers] to appear at hundreds of revocation hearings annually, convened in many instances at places distant from areas under their supervision, would render it impossible for them to carry on their normal duties."[159] However, it is probable that the board has exaggerated the burden to the parole officer. Parole officers would be required witnesses only if they had personal knowledge of the facts of the violation charged. They would generally have such knowledge, in turn, only where the charges constitute technical or non-criminal violations of the terms of the parole agreement. Where the charges amount to criminal offenses, and this is frequently the case, the logical witnesses would be police officers and private citizens. Furthermore, the board could alleviate this problem by scheduling the hearings at the place of the parolee's initial confinement rather than at the federal penitentiary to which he was returned.[160] Finally, even if this policy consideration is not without some merit,[161] the problem posed by the board is one faced by all law enforcement agencies, which are thus forced to "provide enough skilled men to allow for the presence of some of their number in court."[162]

The third policy consideration, and one that was verbalized in letters received by the writer from the federal parole board and the Maine board,[163] relates to the danger of reprisal. Requiring adverse witnesses to confront the probationer or parolee or turning the violation report over to him for perusal, it is maintained, may endanger the safety of the informants. Witnesses fearing reprisal may be reluctant to come forward and give information against the violator if they know this information will not remain secret.[164] Such a "danger," of course, exists as well in the trial of a criminal case, but it has never been seriously advanced there. It is clearly outbalanced by greater and more compelling considerations. The question is whether the balance in a revocation hearing should be struck in favor of secrecy. Into this balance must be thrown the danger of misguided, faulty, or biased information. The "faceless informer," who may peddle his rumors, but escape the ordeal of confrontation and cross-examination, is abhorrent to the Anglo-American sense of justice. True, some witnesses, fearing reprisal, may be unwilling to impart information if they know their identity will not be kept secret. However, the reason for this unwillingness, it seems to this writer, is just as, if not more likely to be, attributable to fear that the information they have will not withstand the test of cross-examination, as to fear of reprisal. No public policy is served by encouraging persons to come forward with information of this nature.[165]

A fourth policy argument is waged against allowing retained counsel to attend the informal hearings before the parole board. Counsel, it is argued, "would convert the hearing into a legal battle."

[158] McPhie v. Turner, 10 Utah 2d 237, 240, 351 P.2d 91, 93 (1960). A requirement that a violation charged be proved by a degree of proof approaching that demanded in criminal cases justifiably might make courts and parole boards reluctant to grant probation and parole even in deserving cases. Campbell v. Aderhold, 36 F.2d 366, 367 (N.D. Ga. 1929). This, clearly, is a different matter. It is avoided by recognizing in the revoking authority a broad discretion to revoke whenever it is reasonably satisfied that the best interests of the public and the offender are no longer being served by his conditional liberty. Evidence that a new crime has been committed is unnecessary. *E.g.*, Campbell v. Aderhold, *supra*; Hyser v. Reed, 318 F.2d 225, 242 (D.C. Cir. 1963); Swan v. State, 200 Md. 420, 90 A.2d 690 (1952); Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921). See generally Note, 59 COLUM. L. REV. 311, 332–33 (1959).

[159] Brief for Appellees, p. 47, Neiswenter v. Chappell, 318 F.2d 225 (D.C. Cir. 1963), quoted in Note, 57 NW. U.L. REV. 737, 754 (1963). The readier accessibility of courts makes this argument less persuasive in the area of probation revocation.

[160] The latter is the current practice of the board. See Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).

[161] See Note, *supra* note 158, at 754.

[162] *Ibid.*

[163] See note 133 *supra*.

[164] This point is also made in the cases. See *In re* Varner, *supra* note 155; State *ex rel.* McQueen v. Horton, 31 Ala. App. 71, 76, 14 So. 2d 557, 560, *aff'd*, 244 Ala. 594, 14 So. 2d 561 (1943).

[165] "Faceless informers," it has properly been written, "are often effective if they need not take the stand." Justice Douglas, dissenting in Beard v. Stahr, 370 U.S. 41, 43 (1962). Moreover, if the informer justly needs protection, his identity should be kept secret. At the same time, however, his information should not be used as a means of depriving another of his liberty. If secrecy and revocation cannot be accomplished at the same time, revocation should not be ordered. The revoking authority must make a choice; either reveal its information and allow it to be tested fairly, or justify its order of revocation without resort in any way to the information suppressed. To put it another way, the revoking authority must support its disposition of the case on the basis of facts developed at the hearing. Jackson v. Mayo, 73 So. 2d 881 (Fla. Sup. Ct. 1954); *cf.* Jencks v. United States, 353 U.S. 657, 671–72 (1957).

The issues at a revocation hearing—whether the parolee's conduct demonstrates that he is no longer a good parole risk—are not issues for which counsel is necessary or desirable. "It is difficult for us," one state parole board communicated to the writer, "to visualize how counsel can make a worthwhile contribution . . . at a parole violation hearing."[166] The answer to these contentions was supplied by the Court of Appeals for the District of Columbia:

> "The presence of counsel does not mean that he may take over control of the proceeding. The receipt of testimony offered by the prisoner need not be governed by the strict rules of evidence, any more than the application of those rules is necessary in many informal administrative hearings. . . . The participation by counsel in a proceeding such as this need be not greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose. . . . The presence of counsel is meant as a measure of protection to the prisoner; it should not be permitted to become a measure of embarrassment to the tribunal."[167]

Policy Considerations for Granting a Full Hearing

Policy considerations are not lacking on the side of granting a full and fair hearing. Probation and parole have as their sole purpose rehabilitation of the offender. The conditionally released offender, simply from the fact of release, has been deemed by the granting authority a proper subject for rehabilitation and has been given his liberty on condition that he follow a course of good behavior. He has thereby attained "a favored status." "He should be able to rely upon the representation that if he measures up to his responsibilities, he will not have his liberty taken from him capriciously nor arbitrarily."[168]

Furthermore, the purpose of the revocation hearing itself, one court has observed, "is as much to form a part of the rehabilitation process as to provide a check on the administrative decision, already tentatively made, that the conditions of release were violated."[169] Reformation, in turn, can "certainly best be accomplished by fair, consistent and straightforward treatment of the person sought to be reformed."[170] Although it would be to some extent engaging in speculation to maintain that the process of rehabilitating conditionally released prisoners is aided by their knowledge that they will receive a hearing should they be charged with violating the conditions of their release, the effect of revocation without a hearing upon *future* attempts at rehabilitation seems clear. A person who feels that he did not receive fair treatment at the hands of the revoking authority more than likely would become a difficult subject for any future reformation. Having made what he might consider an honest attempt to perform the conditions of his release, and having been imprisoned without an opportunity to answer his accusers and fairly to present his version of the facts of the alleged violation to the authorities, it is quite conceivable that he might develop "a feeling that he is [being] picked on or abused by society."[171]

Such considerations "rather argue the advisability of being careful, not only to treat him fairly, but in such manner that he will see the fairness of it."[172]

Several other policy grounds for granting a full hearing were suggested in the Attorney General's 1939 *Survey of Release Procedures*. Written in connection with parole, they apply equally to probation.

> "[T]he possibility exists that the parole agent was over-hasty in his action in returning the parolee as a violator. Parole agents are human, and it is possible that friction between the agent and parolee may have influenced the agent's judgment. In fairness to the violator, this is a possibility which should be investigated by some higher authority. . . .
>
> "Another reason for holding a hearing is that often the true psychology of the parolee precedent to the commission of the violation is revealed. The trend of the parolee's thought in trying to rationalize his behavior may afford

[166] Letter dated December 21, 1961, from John J. Shea, Director of Probation and Parole in Maine.

[167] Fleming v. Tate, 156 F.2d 848, 849–50 (D.C. Cir. 1946).

[168] Baine v. Bechstead, 10 Utah 2d 4, 9, 347 P.2d 554, 558 (1959).

[169] Hendrickson v. Pennsylvania State Bd. of Parole, 409 Pa. 204, 207, 185 A.2d 581, 584 (1962).

[170] State v. Zolantakis, 70 Utah 296, 303, 259 Pac. 1044, 1046 (1927). See, also, Escoe v. Zerbst, 295 U.S. 490, 493–94 (1935).

[171] Baine v. Beckstead, *supra* note 167, at 9, 347 P.2d at 559.

[172] *Ibid.*

clues to his mental and emotional make-up which will be useful in effecting his future adjustment in society.

"Third, the hearing is an opportunity for the violator to discuss his behavior and to have it analyzed by men who, by virtue of the position they occupy, necessarily have an interest in his future behavior. If, through his own statements, a parole violator can be made to see how irrationally he has acted, . . . a long step toward his ultimate rehabilitation may have been taken."[173]

Necessity of a Hearing When "Factual Dispute" Exists

When the reasonableness of governmental action which seriously injures an individual "depends on fact findings," the United States Supreme Court has said, the individual is entitled to a hearing at which he may test the truthfulness of the evidence against him and offer his own proof in rebuttal.[174] The presence of a genuine factual dispute when the revocation of probation or parole is sought mandates such a hearing—one that includes reasonable notice of the precise charges, the right to present evidence and witnesses, the right to retain one's own counsel, and the vital elements of confrontation and cross-examination.[175] Such hearings would not unduly hamper the administration of probation and parole. The number of cases in which a dispute as to material facts exists is relatively small.[176]

If the probationer or parolee has admitted the truth of the allegations against him, or if the violation has been proved by a judgment of conviction, there is no genuine or material issue of fact, and a hearing with a full panoply of rights is unnecessary. This point has been recognized time and again in the decisions[177] and is recognized in the statutes of several states.[178] The only question for determination by the revoking authority in such a case is whether the admitted or proved conduct requires the severe sanction of revocation or whether the violator's conditional liberty should nevertheless be continued with or without modification. This is a policy determination. It may be decided without hearing evidence. The hearing granted need extend no further than affording the violator a chance to explain his conduct.[179] Such a hearing, although limited, would be "appropriate to the nature of the case."[180]

Denial of a procedurally fair hearing in the few cases where genuine factual issues exist is "arbitrary governmental action."[181] None of the policy

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[173] 4 Attorney General's Survey of Release Procedures 246-47 (1939).

[174] Greene v. McElroy, 360 U.S. 474, 496–97 (1959); *cf.* Williams v. New York, 337 U.S. 241, 247, 249–50 (1949). See generally 1 Davis, Administrative Law §§ 7.01, 7.02, 7.04, 7.05 (1958).

[175] The Model Penal Code, §301.4, recommends that probation not be revoked except after a hearing embracing each of these elements. These elements are traditionally associated with a procedurally fair hearing under due process. *E.g.*, Powell v. Alabama, 287 U.S. 45, 68–70 (1932); Morgan v. United States, 304 U.S. 1, 18 (1938); *In re* Oliver, 333 U.S. 257, 273 (1948). On the question of the right to assigned counsel, see Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); Note, 57 Nw. U.L. Rev. 737, 758–60 (1963), both relating to the right to assigned counsel at the parole revocation proceeding. Neither probation nor parole revocation hearings can properly be termed "criminal prosecutions." *E.g.* Burns v. United States, 287 U.S. 216 (1932); *In re* Levi, 39 Cal. 2d 41, 244 P.2d 403 (1952); People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912); Jaime v. Rhay, 59 Wash. 2d 58, 365 P.2d 772 (1961). It would seem to follow that a right to assigned counsel cannot be based either on the Sixth Amendment or the due process clause of the Fourteenth Amendment. However, the United States Supreme Court recently held in Douglas v. California, 372 U.S. 353 (1963), that counsel must be appointed on appeal from a criminal conviction, otherwise the indigent defendant is discriminated against because of his indigency. Thus, in jurisdictions where paid-for counsel is allowed to appear at the revocation hearing, either under statute or case law, a strong argument under the equal protection clause of the Fourteenth Amendment can be made for extending the right to probationers or parolees who are unable to provide their own legal assistance. Hyser v. Reed, *supra*, at 255 (dissenting opinion of Bazelon and Edgerton, JJ.); Note, *supra*, at 758–59.

[176] See notes 138 and 143 *supra*, and accompanying text.

[177] Hearings have been denied or severely restricted in such cases. See Hyser v. Reed, *supra* note 174 (dissenting opinion of Bazelon and Edgerton, JJ.); Whitehead v. United States, 155 F.2d 460 (6th Cir. 1946); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946); Buhler v. Pescor, 63 F. Supp. 632, 639 (W.D. Mo. 1945); Hulse v. Pescor, 17 Alaska 353, 359–60 (1957); People v. Burrell, 334 Ill. App. 253, 79 N.E.2d 88 (1948); *In re* Carpenter, 348 Mich. 408, 83 N.W.2d 326 (1957); State v. Zachowski, 53 N.J. Super. 431, 440, 441, 147 A.2d 584, 589, 590 (1959) (a particularly illuminating opinion); Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959).

[178] In the probation revocation field: Kentucky, see chart III, Florida and New Mexico, see chart VI; in the parole revocation field: Hawaii and Pennsylvania, see chart IV, Georgia, Michigan, and Washington, see chart VI.

[179] Hyser v. Reed, *supra* note 174, at 247; Bayken v. United States Bd. of Parole, 322 F.2d 430 (D.C. Cir. 1963); Note, 59 Colum. L. Rev. 311, 322–23 (1959).

[180] See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Hannah v. Larche, 363 U.S. 420, 440–42 (1960).

[181] Greene v. McElroy, *supra* note 173, at 496–99, 508. "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is

considerations inveighing against a hearing can justify depriving the probationer or parolee of his conditional liberty on the basis of untested fact findings arguably open to dispute. Only a hearing at which the proof against the alleged violator is introduced in his presence and, in the case of witnesses, subjected to the antiseptic test of cross-examination, and at which countervailing proof may be produced, can fairly be said to satisfy the needs of the situation.[182] Aside from the demands of justice and fairness framed in the Fourteenth Amendment, the orderly and proper administration of our penological system demands no less.

procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Justice Douglas, concurring, in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951).

[182] Contrary to expressions in some of the opinions (*e.g.*, *In re* Anderson, 191 Ore. 409, 424, 229 P.2d 633, 640 (1951); McCoy v. Harris, 108 Utah 407, 413, 160 P.2d 721, 723 (1945)), there should not be any distinction drawn between probation and parole insofar as hearing procedures are concerned because one is judicial in nature and the other is an administrative determination. Both have the same purpose—rehabilitation of the offender—and both involve the same factual questions and determinations. See Baine v. Beckstead, 10 Utah 2d 4, 9, 347 P.2d 554, 558 (1959). When an administrative agency makes a binding factual adjudication directly affecting substantial interests of an individual—as does the parole board in revocation matters—"it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Hannah v. Larche, 363 U.S. 420, 442 (1960). These procedures embrace "not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." Morgan v. United States, 304 U.S. 1, 14–15, 18 (1938); Londoner v. Denver, 210 U.S. 373, 385–86 (1908); Greene v. McElroy, *supra* note 173, at 496–97. The administrative hearing, of course, may be less formal than a judicial proceeding. Londoner v. Denver, *supra*. For example, the atmosphere may be more relaxed. 1 DAVIS, ADMINISTRATIVE LAW §8.13 (1958). Technical rules of evidence are more or less inapplicable. 2 *id.* §§ 14.01, 14.06.