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1968 Act may be substantially different, the impact of the *Jones* case is still minimal in the field of open housing. The 1968 Act applies to practically everything the statute would cover, and more, as Justice Stewart indicated.[100] Furthermore, the burden of proof under section 1982 makes it almost useless as a remedy. In the *Jones* case, the defendants admitted that racial discrimination was the sole reason for not selling the property to the plaintiffs. In the future, to be realistic, such an admission would be very unlikely, and the discrimination could be disguised so as to make it almost impossible to prove by other evidentiary means. It would therefore be easier to use the 1968 Civil Rights Act because of such provisions as those that relate to advertising, services, facilities, and federal assistance to aggrieved parties.[101] Thus, it is reasonable to argue that the impact of the case is minimal in the area of open housing, and this fact combined with the other weaknesses of the majority decision could lead to the conclusion that certiorari should not have been granted.

Despite the weaknesses in the foundation of Justice Stewart's opinion, the *Jones* case stands as a possible landmark in the area of civil rights under the thirteenth amendment. The federal government is no longer restricted to combating racial discrimination only as it applies to state action or interstate commerce, although the fourteenth amendment and the commerce clause have both provided Congress with broad powers to legislate against racial discrimination. However, by use of the thirteenth amendment, Congress can legislate directly at the source of the evil of racial discrimination rather than incidentally, as it does when it employs the commerce clause; and it does not have to look for governmental involvement in discriminatory practices in order to legislate against racial discrimination as it does under the fourteenth amendment. Congress therefore does not have to disguise its legislation with the mantle of the commerce clause, or dilute it with the requirement of state action. Racial discrimination is an outgrowth of slavery in this country, and Congress can use the thirteenth amendment, which abolishes slavery, to try to eliminate such discrimination.

HOWARD E. FENTON

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—ALLEGED PAROLE VIOLATOR HAS RIGHT TO COUNSEL AT A PAROLE REVOCATION HEARING

Petitioner, an alleged parole violator, requested that retained counsel be allowed to represent him at a parole revocation hearing. The Board of Parole denied the request on the ground that the New York Correction Law provides that a parolee is not entitled to be represented by counsel at a revocation hear-

100. *See* text at *supra* notes 49-50.
101. *See supra* note 50.

ing.[1] After revocation of parole, petitioner instituted a habeas corpus proceeding, asserting that denial of counsel at the hearing violated his constitutional right to counsel. The trial court denied the application, holding that the procedure followed by the Board of Parole was not in contravention of the right to counsel clause of either the New York Constitution or the United States Constitution.[2] The Appellate Division reversed. *Held,* the refusal of the parole authorities to allow the parolee to be represented by counsel at a parole revocation proceeding contravenes the state constitutional provisions pertaining to the right to counsel and the right to be afforded due process. An order was entered requiring the Board of Parole to hold a new revocation hearing at which petitioner would be allowed representation by counsel. *People ex rel. Combs v. La Vallee,* 29 A.D. 2d 128, 286 N.Y.S.2d 600 (4th Dept. 1968), *appeal dismissed,* 22 N.Y.2d 857, 293 N.Y.S.2d 117 (1968).[3]

The right to be represented by retained counsel at criminal trials was one of the basic procedural rights recognized at common law.[4] That the presence of a lawyer is necessary in order to insure a fair hearing was pointed out by the Supreme Court of the United States in *Powell* v. *Alabama,*[5] where it said that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[6] In recent years several cases concerned with the role of the attorney have resulted in a guarantee of representation by counsel at all stages of a criminal proceeding which would substantially affect the rights of an accused.[7] In addition to ordinary criminal proceedings, the Supreme Court has required the assistance of an attorney in juvenile court proceedings[8] and in probation revocation hearings.[9] These cases indicate that the role of the attorney is of particular significance in proceedings which may contribute to or result in the deprivation of an individual's liberty.

Statutes in approximately one-half of the states provide for some form of

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1. Section 218 of the New York Correction Law provides that an alleged parole violator shall have "an opportunity to appear personally, but not through counsel or others. . . ." (McKinney 1968).
2. People *ex rel.* Combs v. LaVallee, 53 Misc. 2d 281, 278 N.Y.S.2d 287 (Sup. Ct. 1967).
3. As directed by the court, the Parole Board held a new revocation hearing at which the relator was represented by counsel. As a result of that hearing, the parole was reinstated. Brief for Respondent at 5, People *ex rel.* Combs v. LaVallee, 22 N.Y.2d 857. The Court of Appeals dismissed the appeal by the state," upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." People *ex rel.* Combs v. LaVallee, 22 N.Y.2d 857, 293 N.Y.S.2d 117 (1968).
4. Note, *An Historical Argument for the Right to Counsel During Police Interrogation,* 73 Yale L.J. 1000 (1964).
5. 287 U.S. 45 (1932).
6. *Id.* at 68-69.
7. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), guaranteed the right to the appointment of counsel for the indigent accused at a state trial for a substantial crime; *Douglas* v. *California,* 372 U.S. 353 (1963), guaranteed the right to appointment of counsel to a convicted indigent in perfecting the appeal of right granted by a state; Assistance by counsel at pre-trial interrogations was guaranteed by *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), which was reinforced by *Miranda* v. *Arizona,* 384 U.S. 436 (1966).
8. In re Gault, 387 U.S. 1 (1967).
9. Mempa v. Rhay, 389 U.S. 128 (1967).

hearing before parole will be revoked,[10] with some including a provision that a parolee may be assisted by retained counsel at a revocation hearing.[11] Where a statutory provision existed, some courts have held that the right to the assistance of counsel is inherent in the right to a hearing.[12] An early federal Court of Appeals decision recognized a right to a hearing on the ground that "[A] statute giving him [parolee] a right to a hearing would seem to carry with it the right to representation."[13] In a later decision in the same Circuit, it was held that the rights of a parolee at a revocation hearing also include the right to be informed of his right to be represented by counsel.[14] While recognizing the right to retained counsel, the same court in a more recent decision, held that an indigent parolee is not entitled to the appointment of counsel at a revocation hearing.[15]

The majority of federal and state courts have not recognized a right to representation by counsel at a parole revocation hearing. Some refuse to recognize a right to a parole revocation hearing.[16] One reason given for refusing to recognize a right to counsel or to a hearing is that a parole revocation hearing is not a criminal proceeding within the meaning of the Sixth Amendment.[17] This position is based on the contention that once a prisoner has been sentenced and imprisoned, the criminal case has terminated.[18] *Hyser* v. *Reed*,[19] while recognizing a right to retained counsel, denied the appointment of counsel to an indigent reasoning that since a parole revocation hearing is not a criminal prosecution, the parolee is not entitled to sixth amendment guarantees.[20] Another rationale for the denial of the right to representation by counsel is that parole is not a matter of right, but rather a matter of grace or clemency granted by

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10. Note, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. Rev. 702 (1963).

11. A Michigan statute provides that "Upon such [revocation] hearing such paroled prisoner shall be allowed to be heard by counsel of his own choice, at his own expense. . . ." (25 Ann. Code of Mich. 1954 § 28.2310); *See also* 24 Fla. Sta. Ann. § 947.23 (1969) and 9 Rev. Code Wash. Ann. § 9.95.120, (1961) for similar provisions.

12. Warden, Maryland Penitentiary v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957). In supporting its decision, the court said, ". . . a necessary ingredient of a fair hearing is the right to be represented by counsel . . ." 135 A.2d at 441. A Delaware court, while deciding a case on another issue pointed out that informing a parolee of his right to counsel would satisfy the requirements of a statute which provided for a hearing and an appearance. State v. Boggs, 49 Del. 277, 114 A.2d 663, 664 (1955).

13. Fleming v. Tate, 156 F.2d 848, 851 (D.C. Cir. 1946). Subsequently, the statute was revised to provide for the assistance of retained counsel. D.C. Code §§ 24-206 (1967).

14. Glenn v. Reed, 289 F.2d 462 (D.C. Cir. 1961).

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

16. *Rose* v. *Haskins*, 388 F.2d 374 (6th Cir. 1968), held that a state prisoner does not have a constitutional right to a hearing on a state parole revocation; *Whalen v. Gladden*, 377 P.2d 561 (Ore. 1968), held that where the legislature has not provided for a hearing, such a hearing is not compelled by due process.

17. Williams v. Patterson, 289 F.2d 374 (10th Cir. 1968); Mottram v. State, 232 A.2d 809 (Maine 1967).

18. Rose v. Haskins, 388 F.2d 91, 95 (6th Cir. 1968).

19. 318 F.2d 225 (D.C. Cir. 1963).

20. *Id.* at 237.

legislative enactment.[21] Consequently, parole can be revoked at the discretion of the board to which that power has been delegated.[22] In utilizing this argument, the courts have assumed that parole is a matter which should be left to the legislature.[23]

While the New York Court of Appeals has not made a determination of the issue of counsel at parole revocation hearings, it held in *In Re Hines* v. *Board of Parole*[24] that findings of the parole board are subject to judicial review to determine if a positive statutory requirement is violated.[25] The discretionary power of the parole board over parole violation has been recognized by New York courts.[26] A recent New York Supreme Court case held that a parolee was not entitled to constitutional due process when arrested as a delinquent parolee, because a parole violation is not a criminal prosecution to which sixth amendment guarantees apply.[27] Prior to the decision in the instant case, the courts of New York had not applied state or federal constitutional requirements to the determination of parole violation.[28]

In the instant case, the trial court found that since section 218 of the Correction Law provides that a parolee may not appear through counsel, the parole board was following the mandate of the legislature; and that such a procedure was not in contravention of the New York or the United States Constitution.[29] The trial court took the position that the right to counsel clauses, contained in the sixth amendment and section 6 of Article I of the New York Constitution, were not violated because a parole revocation hearing is not a criminal action to which those clauses apply.[30]

The Appellate Division reversed, holding that the refusal of the parole board to allow the parolee to be represented by counsel at the revocation hearing violated his state constitutional right to be represented by counsel and to be afforded due process.[31] At the outset of the decision, the court stated that the decision was reached "without regard to the Due Process clause of the Fourteenth Amendment of the Federal Constitution but upon this State's decisional

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21. *See* Gottesman, *supra* note 10; DiMarco v. Greene, 385 F.2d 556 (6th Cir. 1967); Malloroy v. State, 435 P.2d 254 (Idaho 1967).

22. Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968); Sorenson v. Young, 282 F. Supp. 1009 (D. Minn. 1968).

23. Whalen v. Gladden, 436 P.2d 560 (Ore. 1968).

24. 293 N.Y. 254, 56 N.E.2d 572 (1944).

25. *Id.* at 254. The same rationale was used to support a decision on the same issue in *Schwartzberg v. McHugh*, 8 A.D.2d 570, 184 N.Y.S.2d 582 (3d Dep't. Memorandum Opinion 1959).

26. Mummiami v. New York State Board of Parole, 5 App. Div. 2d 923, 172 N.Y.S.2d 1 (3d Dep't. Memorandum Opinion 1958).

27. People *ex rel.* Turner v. Deegan, 55 Misc. 2d 261, N.Y.S.2d 253 (Sup. Ct. 1967).

28. *Id.* at 262.

29. People *ex rel.* Combs v. LaVallee, 53 Misc. 2d 281, 283, 287 N.Y.S.2d 287, 289 (Sup. Ct. 1967).

30. *Id.* at 283; N.Y.S.2d at 289.

31. People *ex rel.* Combs v. LaVallee, 29 A. D. 2d 128, 286 N.Y.S.2d 600 (4th Dep't. 1968).

law and the constitutional provisions pertaining to the right to counsel and its guarantee of due process (N.Y. Const., art. I, § 6)."[32]

The "decisional law," purported to be a basis of the decision, is those state cases which have extended the right to counsel from the trial to pre-trial and post-trial proceedings.[33] The court pointed out that two Appellate Division cases which held that an individual is entitled to representation by counsel at probation revocation proceedings were affirmed by the Supreme Court in *Mempa* v. *Rhay*[34] and *In Re Gault*.[35] Having thus established the right to representation by counsel at probation revocation hearings, the court in the instant case contended that the difference between parole and probation revocation hearings was not "so vital that counsel should be mandated in the one and denied in the other."[36]

The right to counsel provision used as a basis for the decision in the instant case provides that a person may be represented by a lawyer "in any trial, in any court."[37] The court applied this provision to section 218 of the Correction Law which mandates that the Board of Parole "hold a parole *court*" at which the alleged violator is given an opportunity to appear.[38] In supporting its position that a parole revocation hearing is similar to an ordinary judicial proceeding, in relation to the role of counsel, the court referred to the contention in *Powell* v. *Alabama*[39] that the right to a hearing would be of little avail if it did not encompass the right to be represented by counsel.[40] In supporting the decision with the due process clause of the state constitution, the court said:

> When all the legal niceties are laid aside a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty just as much as did the original criminal action and, it is submitted, falls within the due process provision of section 6 of Article I of our State constitution.[41]

Shortly after (and apparently in response to) the decision in the instant case, the New York legislature revised section 218 of the Correction Law, and deleted the word "court" from the section and substituted more general ter-

32. *Id.* at 130; 286 N.Y.S.2d, 602.
33. *Id.* People v. Di Biasi, 7 N.Y.2d 544, 200 N.Y.S.2d 21, 166 N.E.2d 825 (1960); People v. Meyer, 11 N.Y.2d 162, 227 N.Y.S.2d 427, 182 N.E.2d 103 (1962); People v. Rodriguez, 11 N.Y.2d 279, 229 N.Y.S.2d 353, 183 N.E.2d 651 (1962); People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963).
34. 389 U.S. 128 (1967). A person accused of a violation of probation is entitled to appointment of counsel at the hearing.
35. 387 U.S. 1 (1967). A juvenile has a right to appointment of counsel at a juvenile court proceeding on violation of probation.
36. People *ex rel.* Combs v. LaVallee, 29 A. D. 2d 128, 131, 286 N.Y.S.2d 600, 603 (4th Dep't. 1968).
37. *Id.* at 131, 286 N.Y.S.2d, 603.
38. New York Correction Law 218 (McKinney 1967), (emphasis added).
39. 287 U.S. 45, 68 (1932).
40. People *ex rel.* Combs v. LaVallee, 29 A. D. 2d 128, 131, 286 N.Y.S.2d 600 (4th Dep't. 1968).
41. *Id.* at 131, 286 N.Y.S.2d, 603.

minology.[42] Since the decision in the instant case was based, in part, on the use of the word "court" in the statute and in the right to counsel clause of the state constitution, the revision raises the question of whether this court would have reached the same result in light of the change. Nevertheless, the similarity between parole and probation, along with the due process provision of the state constitution provides ample basis for the decision in the instant case regardless of the wording of the statute.

The significance of the instant case is that it was based, at least in part, upon constitutional rather than statutory grounds. Other decisions, which have found a right to counsel at parole revocation hearings have done so on the ground that the right to counsel is implied in a particular correction statute.[43] The court in the instant case contended that revocation of parole invokes the due process clause of the state constitution, since it "involves a deprivation of liberty just as much as did the original criminal action."[44] This contention recognizes that a parolee is entitled to the same right to due process as the ordinary citizen. Therefore, the conditional freedom of the parolee is raised to a level at which some degree of constitutional protection is required before that freedom can be revoked.

The court in the instant case failed to deal with the argument of the trial court, and other courts, that the constitutional guarantee of counsel applies only to criminal proceedings, and that a hearing on violation of parole is not a criminal proceeding.[45] The fact that the hearing is not characterized as a "criminal proceeding" is not dispositive of the right to counsel in light of *In Re Gault*,[46] where the Supreme Court found that there is a right to counsel at juvenile court proceedings, which have been traditionally labelled as "civil," rather than "criminal." The fact that the parolee has already been properly found guilty of a crime is not determinative, because the guarantee has been extended to a probation revocation hearing, where the guilt has been previously determined.[47] In *Mempa* v. *Rhay* and *In Re Gault*, the Supreme Court was concerned with the effect of a hearing, rather than what it was labelled. The effect of such a hearing could be the termination of the conditional freedom of

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42. Prior to the change the section read, in part:
"Thereupon, such board of parole, shall as soon as practicable, hold a *parole court* at such prison or institution and consider the case of such parole violator, who shall be given an opportunity to appear personally, but not through counsel or others, before such board of parole and explain the charges made against him."
After the revision, the same part read:
"The board of parole shall, as soon as practicable, give such parole violator an opportunity to appear personally, but not through counsel or others, before three members of such board of parole and explain the charges made against him." N.Y. Sess. Laws, Ch. 203, July 9, 1968 (emphasis added).

43. *See* notes 12, 13 *supra*.

44. People *ex rel.* Combs v. LaVallee, 29 A. D. 2d 128, 131, 286 N.Y.S.2d 600, 603 (4th Dep't. 1968).

45. *See* notes 17-20, *supra*.

46. 387 U.S. 1 (1967).

47. Mempa v. Rhay, 389 U.S. 128 (1967).

an individual. Since, an adverse determination of a parole revocation hearing would have a similar effect, the right to counsel should be recognized.

In a recent decision, the Supreme Court of Pennsylvania found that an accused parole violator had a right to counsel at a revocation hearing on the ground that the hearing was a part of the original criminal proceeding.[48] In basing the decision on *Mempa* v. *Rhay*, the Pennsylvania court contended that the parole revocation hearing was a "critical stage" of the criminal action. It was also pointed out that the lack of review of a determination by the parole board made the need for counsel all the more important.[49] One distinction between parole revocation and probation revocation is that a revocation of probation results in the initial imposition of the sentence; while a revocation of parole merely reinstates the sentence which was set at the original criminal action.[50] In much the same manner as the court in the instant case, the Pennsylvania court found that this distinction was not a sufficient basis for allowing counsel in one proceeding and not in the other.[51]

The decision in the instant case that retained counsel should be allowed at a revocation hearing, suggests the question of whether it is also necessary to require appointment of counsel for an indigent parolee. If the contention of the court that a parole revocation hearing is no different from an original criminal action is accepted, *Gideon* v. *Wainwright* would require appointment of counsel.[52] The Supreme Court held that appointment of counsel is required in juvenile court proceedings and in probation hearings.[53] These cases indicate that a necessary element of due process is appointment of counsel; and that due process is required in proceedings which substantially affect the freedom of an individual. If representation by retained counsel is a fundamental right based on either the state or federal constitution, the equal protection provision of the fourteenth amendment would seem to require appointment of counsel to the indigent parolee.

The instant decision also raises the question of whether the right to representation by counsel applies to a hearing to determine initial eligibility for parole. However, since conditional freedom does not exist until a prisoner has been awarded parole, there is no deprivation of freedom involved in that hearing. Moreover, the necessity of an attorney is not as great, since an eligibility hearing is concerned with general circumstances rather than specific violations as in a revocation hearing.[54] Thus, allowing counsel at revocation hearings would not necessarily require that counsel be allowed at an eligibility hearing.

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48. Commonwealth v. Tinson, 4 Criminal Law Reporter 2350 (Pa. Sup. Ct. 1969).
49. *Id.* at 2351.
50. New York Correction Law § 218 (McKinney's 1968); New York Code of Criminal Procedure § 935 (McKinney's 1968).
51. Commonwealth v. Tinson, 4 Criminal Law Reporter 2350, 2351 (Pa. Sup. Ct. 1969).
52. 372 U.S. 335 (1963).
53. In Re Gault, 387 U.S. 1 (1967); Mempa v. Rhay, 389 U.S. 128 (1967).
54. New York Correction Law § 213 (McKinney's 1968).

The value of a lawyer in a parole revocation hearing is clearly illustrated by the results of the instant case, because the parolee was released on parole after the new hearing at which he was represented by counsel.[55] Perhaps the most compelling reason for the assistance of counsel is that once a parolee is suspected of a violation, he is apprehended and incarcerated until the time of the hearing.[56] In such a position, the parolee is unable to prepare a defense to charges or to procure information to explain mitigating circumstances. Another reason which justifies the presence of an attorney is that a revocation hearing involves only persons who are part of the parole organization. As an outside party, an attorney could be essential in assuring a fair hearing. In offsetting the one-sided nature of the hearing, an attorney will lessen the possibility of a revocation without good cause.

The revision of the Correction Law is apparently an indication that the legislature did not consider the right to counsel a necessary part of the parole revocation procedure.[57] A possible justification for this position is that the presence of counsel at revocation hearings, may result in an undue burden upon the parole process, causing delays and additional expense.[58] The possible interference with the efficient administration of the parole program is another consideration that weighs against the desirability of allowing counsel at the hearings.[59]

Two New York Supreme Court decisions reached after the revision of the Correction Law indicate that the issue of counsel at parole revocation hearings remains unsettled. One case followed the decision in the instant case,[60] while the other came to the opposite conclusion.[61] In order to settle the question of the right to counsel, the courts must deal with the more basic issue of the constitutional status of the parolee. The rehabilitative purpose of parole might be better served, if the status of the parolee approached that of the ordinary citizen. The knowledge that his parole would not be revoked without some safeguards against an arbitrary determination could enhance the confidence of the parolee in his status, thereby aiding in rehabilitation. Finally, the granting of parole is a recognition that an individual is entitled to freedom; and although the freedom is only conditional, it should nevertheless be protected by some minimal guarantee of due process.

S. D. HESTER

55. See note 3, *supra*.
56. New York Correction Law § 216 (McKinney's 1968).
57. See note 42, *supra*.
58. Rose v. Haskins, 388 F.2d 91, 101, 102 (6th Cir. 1968), (dissenting opinion).
59. Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967).
60. Menechino v. Division of Parole, 57 Misc. 2d 865, 293 N.Y.S.2d 741 (Sup. Ct. 1968).
61. People *ex rel.* Johnson v. Follette, 58 Misc. 2d 474, 295 N.Y.S.2d 565 (Sup. Ct. 1968).