CONSTITUTIONAL LAW: PAROLE STATUS AND THE PRIVILEGE CONCEPT

According to traditional notions, a parolee is not entitled to even the minimal safeguards of procedural due process. The Sixth Circuit echoed those sentiments in the recent case of Rose v. Haskins. *This note, however, maintains that the* Rose *rationale, when analyzed in light of contemporary Supreme Court decisions, is no longer viable.*

In *Rose v. Haskins*,[1] the Court of Appeals for the Sixth Circuit reiterated the orthodox view that since a prisoner parole system is not constitutionally compelled, parole status is merely a "privilege" regulated by statute and not circumscribed by either the specific constitutional guarantees applicable to a criminal proceeding nor the traditional safeguards of procedural due process. However, recent Supreme Court decisions have so undercut the basic assumptions surrounding the "privilege" concept that the analyses and conclusions of *Rose* and its predecessors have been rendered highly questionable.

In 1964, petitioner Rose was paroled from concurrent sentences for conviction of forgery and passage of valueless checks. However, the Ohio Paroles Commission summarily revoked its grant when petitioner's *ex-wife* accused him of the molestation of their minor daughter. Upon rejection of his request to be prosecuted on the molestation charge,[2] Rose instituted a habeas corpus action attacking the constitutional validity of his confinement based upon revocation of parole without a hearing, claiming violation of his rights under the fourth, sixth, eighth, thirteenth and fourteenth amendments. Denied relief first in Ohio and then by a United States district court, Rose filed his appeal with the Sixth Circuit. In affirming the decision below, the court concluded that parole status is merely a "privilege" granted by the grace of the state, and not a "right" protected by procedural due process.[3] It was further emphasized that the procedural safeguards

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[1] 388 F.2d 91 (6th Cir. 1968).

[2] Rose claimed that the prosecutor's reason for this rejection was that "he could not prosecute without a warrant from [Rose's] accuser." *Id.* at 92.

[3] *Id.* at 95.

claimed by Rose are only applicable in criminal cases prior to a conviction and that judicial review of state administrative procedures involving the post conviction disposition of criminals is a wholly unwarranted interference with an "exclusively state function."[4] Having thus disposed of the constitutional arguments, the court relegated Rose to his remedies under the Ohio parole statutes and, finding no provision for a hearing therein, dismissed the appeal.[5]

The privilege-right distinction, as delineated in *Rose*, has been used to dispose of numerous claims associated with conditional prison releases[6] and a variety of other forms of governmental largess.[7] But the supporting rationale, that a gratuitous grant can

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[4] *Id.* at 93, 96.

[5] Both the states and the federal government have provided enabling legislation creating parole commissions which are possessed with characteristically broad discretionary powers as to the selection of parole candidates, imposition of restrictions on their status, and revocation for violation of those conditions. *See Parole*, 13 CRIME & DELINQUENCY 209 (1967). However, state statutory provisions as to the procedural requirements necessary at parole revocation proceedings differ widely: nine explicitly deny any right to a hearing; sixteen (including Ohio) make no provision for a hearing; twenty-five explicitly require a hearing. In a small number of jurisdictions the legislatures have provided such further safeguards as confrontation, cross-examination, and presence of counsel. *See* Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964).

[6] Foremost among these decisions is Escoe v. Zerbst, 295 U.S. 490 (1935), in which Justice Cardozo, while construing the Federal Probation Act to require notice and hearing prior to probation revocation, stated that "we do not accept the petitioner's contention that the privilege [of hearing] has a basis in the Constitution, apart from any statute." *Id.* Likewise, a majority of jurisdictions still view parole and probation as being entirely regulated by statute, and invoke the privilege-right distinction to counter all claims to procedural due process. *E.g.*, Eason v. Dickson, 390 F.2d 585 (9th Cir. 1968); Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968). Curtis v. Bennett, 351 F.2d 931 (8th Cir. 1965); Richardson v. Markley, 339 F.2d 967 (7th Cir. 1965); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964); Washington v. Hagan, 287 F.2d 332 (3d Cir. 1960); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), *aff'd*, 340 U.S. 880 (1950). *But see* Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941). Current construction of Federal Probation and Parole Statutes allows for the parolee to present voluntary witnesses, *see, e.g.*, Reed v. Butterworth, 297 F.2d 776 (D.C. Cir. 1961), and have the assistanee of *retained* counsel. Moore v. Reid, 246 F.2d 654 (D.C. Cir. 1957). The Federal Board is not bound by the formal rules of evidence, Hyser v. Reed, 318 F.2d 225, *cert. denied*, 375 U.S. 957 (1963), and "most of the testimony presented by both sides is hearsay in the strict evidentiary sense." *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 716-17 (1968). *See also* Note, 40 U. COLO. L. REV. 617 (1968).

[7] *E.g.*, Jay v. Boyd, 351 U.S. 345 (1956) (deportation); Barsky v. Board of Regents, 347 U.S. 442 (1954) (teaching in public school); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (immigration); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (government employment), *aff'd*, 341 U.S. 918 (1951); Hornstein v. Illinois Liquor Control Comm'n, 412 Ill. 365, 106 N.E.2d 354 (1952) (licensing); Walker v. City of Clinton, 244

be withdrawn or revoked in any manner which the grantor may employ, has come under increasing attack,[8] and recent Supreme Court decisions indicate that the assumptions upon which it rests are demonstrably unsound.[9] The Court has recognized that status

Iowa 1099, 59 N.W.2d 785 (1953) (liquor licensing); Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772 (1954) (public school employment); Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952) (driver's license); Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954) (public school employment); Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963) (public school employment).

[8] For instance, in Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), the Court concluded that the question of whether summary dismissal of a short-order cook from a defense facility was a denial of due process "cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action." *Id.* at 894. See note 12 *infra*.

[9] The initial erosion of the privilege-right distinction appears to have been in those areas in which the grant of the benefit or status was conditioned upon the grantee's agreement, explicit or implied, to abstain from the exercise of some right protected by an *express* clause in the Constitution. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958). *See also* Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966). Lacking such a direct effect on an express right, the Court will attempt to balance competing public and private concerns to determine whether the regulation's "incidental" effect on constitutional rights (the so-called "chilling effect") is outweighed by a closely-connected important state interest in enforcing the particular statute or pursuing the particular custom. *See* Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Shelton v. Tucker, 364 U.S. 479 (1960).

A further method of circumventing the privilege-right distinction has been through the equal protection clause. That is, regulations limiting eligibility for a "privilege" to that class of persons willing to conform to "unreasonable" rules of conduct have been consistently struck down as arbitrary and discriminatory and therefore in violation of the fourteenth amendment. *See* Douglas v. California, 372 U.S. 353 (1963); Brown v. Board of Educ., 347 U.S. 483 (1954); Wieman v. Updegraff, 344 U.S. 183 (1952).

Finally, certain decisions indicate that the distinction may be circumvented by relying on an independent right to procedural due process which requires at least minimum procedural standards (such as a hearing) to help assure that a condition of the "privilege" had, in fact, been violated, *see* Greene v. McElroy, 360 U.S. 474 (1959); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (concurring opinion); Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961), or to insure that the action taken was not based upon an unconstitutional condition. *See* Thorpe v. Durham Housing Authority, 386 U.S. 670, 678-79 (1967) (per curiam) (Douglas, J., concurring), *reh. granted*, 36 U.S.L.W. 3345 (1968).

For an excellent discussion of the above, see Van Alstyne, *The Demise of the Privilege-Right Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

The argument proposed here in the context of parole revocations is that since the reasons for revocation cannot be arbitrary or capricious, (Burns v. United States, 287 U.S. 216 (1932). *See also* United States v. Ryser, 99 F.2d 816 (2d Cir. 1938); Swan v. State, 200 Md. 429, 90 A.2d 690 (1952)), there *at least* must be a hearing to insure that there is a non-arbitrary factual basis for the commission's decision. Moreover, since the right to be free from restraint is carefully safeguarded, it is necessary to balance this right against the state interest in denying procedural safeguards so as to determine whether such denial is "reasonable" or is "arbitrary" in terms of the goals and functions of a parole system.

interests, whether originally acquired as privileges or rights, are constitutionally protected and that

> [w]hether the Constitution requires that a particular right obtain in a specific proceeding depends upon . . . the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding . . . .[10]

Judicial reliance on the "privilege" concept has thus given way to a process of inquiry whereby courts undertake a thorough study of the objectives and procedures of the program in question as well as the nature of the status interest involved, in order ultimately to determine whether the alleged need to deny due process protections at a revocation or withdrawal proceeding is justified by state interests important enough to outweigh the resulting effect on the interests of the individual.[11] Indeed, recent decisions indicate that even where there is a substantial state interest involved, at least the minimum procedural safeguard of a hearing must be afforded as a built-in assurance that an administrative decision is not based on grounds that are arbitrary, capricious, or in derogation of a constitutional guarantee.[12] This expanded view of the scope of procedural due process thus mandates a re-evaluation and analysis of parole status and parole revocation procedure far different from the inquiry made by the Sixth Circuit in *Rose v. Haskins.*

Parole is the release of a criminal from a penal institution under supervision and prescribed conditions which, if violated, may necessitate reimprisonment.[13] The state's interest in granting parole,

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[10] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[11] Thus, summary dismissal of a short-order cook deemed to be a security risk was held justified when denial of her employment interest was balanced against the government's interest in the freedom of administration and the fullest security of key facilities. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961). On the other hand, due process was found to require a hearing prior to the dismissal of a student from a state university, for the student's interest in his education, both in terms of personal improvement and future opportunity, was viewed as "outbalancing" the university's interest in taking summary action to discipline "troublemakers." Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[12] *See* Thorpe v. Durham Housing Authority, 386 U.S. 670, 674 (1967) (Douglas, J., concurring), *reh. granted,* 36 U.S.L.W. 3345 (1968); Joint Anti-Fascism Refugee Committee v. McGrath, 341 U.S. 123 (1951); Welch v. Beto, 355 F.2d 1016, 1019 (5th Cir.), *cert. denied,* 385 U.S. 839 (1966); Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961); Holt v. Richmond Redevelopment and Housing Authority, 266 F. Supp. 397 (E.D. Va. 1966).

[13] *See* J. RUBIN, THE LAW OF CRIMINAL CORRECTION 546 (1963); *Parole,* 13 CRIME & DELINQUENCY 209 (1967). A basic difference among the three forms of conditional liberty—parole, probation, and conditional pardon—is that parole is an administrative

while partially economic,[14] is primarily the rehabilitation of the criminal so as both to protect society and to create a law-abiding citizen.[15] But to the extent that his actions are restrained by certain conditions, the parolee remains in the "custody" of the state authorities, who have a continuing interest in his observance of these conditions. Thus, upon reasonable cause to believe that a parolee has been guilty of a violation, parole commissions generally have both the statutory authority and the obligation to make full inquiry into the truth of accusations as well as to determine whether the alleged violative act was accompanied by any mitigating circumstances. The commissions then exercise their penological expertise in making a discretionary decision as to whether the state interest would best be served by reimprisonment, alteration of the parolee's conditions, or release upon the same

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function, probation a judicial function and conditional pardon an executive function. In substance, however, there is little difference between the three. *See* Comment, 12 WAYNE L. REV. 638 (1966). Probation is granted by the trial judge, usually prior to sentencing, but, as in the other two forms of conditional release, the probationer loses the right to vote, to hold public office, to hold or dispose of certain property, and to receive licenses. *See Adult Probation*, 13 CRIME & DELINQUENCY 159, 163-64 (1967). Conditional pardon, on the other hand, is granted by the governor, but, as a form of prisoner release, is "slowly becoming extinct," although it often serves as precedent to "form the basis in many jurisdictions for modern parole revocation decisions." Sklar, *supra* note 5, at 184. It is asserted, however, that for purposes of revocation proceedings the differences between the three forms lack legal significance, for in each case the essence of the proceeding is (1) the factual determination of a breach of conditions, (2) a weighing and evaluating of all factors involved, and (3) a disposition which serves the public interest in rehabilitation. *See* Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961); Comment, 12 WAYNE L. REV. 638 (1966). *But see* Comment, *The Rights of the Probationer: A Legal Limbo*, 28 U. PITT. L. REV. 643, 651 (1967). Moreover, it is arguable that those states which assign different rights to revocation proceedings involving different types of conditional liberty violate the equal protection clause of the fourteenth amendment. *See* Comment, 12 WAYNE L. REV., *supra*, at 652-53.

[14] *See* Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311 (1959); Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158 (1955). One commentator reaches the conclusion that factors such as overcrowded prisons and the cost of feeding and clothing the inmates renders economics "the primary consideration underlying parole." Comment, 12 WAYNE L. REV. 638, 640 (1966); *see* Hyser v. Reed, 318 F.2d 225, 234 (D.C. Cir. 1963); Kimball & Newman, *Judicial Intervention in Constitutional Decisions: Threat and Response*, 14 CRIME & DELINQUENCY 1, 5 (1968).

[15] Bates, *Probation and Parole as Elements in Crime Prevention*, 1 LAW & CONTEMP. PROB. 484 (1934); Note, *Fair Educational Practices Acts: A Solution to Discrimination?* 64 HARV. L. REV. 307, 309 (1951). *See also* Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

conditions as were originally imposed.[16]

This analysis of the parole revocation process reveals that a primary interest of the state is the proper penological disposition of a parolee, based upon an accurate factual determination of whether or not there was a violation, and a full consideration of possible mitigating circumstances. Thus, it would seem in the best interest of the state to insure the accuracy of the factual determination by imposing upon itself the slight burden of providing the parolee with the minimum protection of a hearing. The public purpose served by denying a hearing is, at best, remote;[17] while in terms of society's interest in the rehabilitation of criminals, it seems that a summary revocation creates the very antithesis of the mutual trust between the parolee and the law which parole is designed to engender.[18] Indeed, the only viable state objection, and one which appears throughout the *Rose* opinion, is that "legislation defining what conduct constitutes a crime and fixing the sentence to be imposed upon conviction therefor and the manner in which the sentence shall be served"[19] is exclusively a state function. But this fear of

[16] *E.g.*, OHIO REV. CODE ANN. § 2965.21 (Page 1963 Supp.); *see* Hyser v. Reed, 318 F.2d 225, 242 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 957 (1963); *Parole*, 13 CRIME & DELINQUENCY 209 (1967).

[17] The usual policy reasons supporting denial were presented by the Ohio Supreme Court in *In re* Varner, 2 Ohio Op. 2d 249, 166 Ohio St. 340, 142 N.E.2d 846 (1957), and were examined by Judge Celebreeze in his dissent to *Rose*. 388 F.2d at 101-02. Those reasons include, first, a fear that the public will be endangered by allowing a supposed violator to be at large until a hearing is arranged. The obvious reply to this is that within the criminal trial context this danger has been dealt with by the simple device of temporary detention without bail prior to a determination of guilt. Secondly, it is frequently contended that accusers, fearing reprisal, will not testify if they must confront the parolee. But this fear, however valid, should not serve to deny parolees a hearing. Denial of confrontation may be justified in certain contexts, see discussion of Williams v. New York, note 35 *infra*, but such denial is generally deemed to run counter to the whole notion of "fundamental fairness," while further increasing the danger that secret accusations may be based on faulty or biased information. *See* In re Gault, 387 U.S. 1 (1967); Beard v. Stahr, 370 U.S. 41, 43 (1962) (Douglas, J., dissenting). Indeed, this observation appears especially apt within the context of *Rose* in which the parolee's accuser was his *ex*-wife, who apparently was unwilling to swear out a warrant on the charge. Finally, objections have been raised to the increased burden on the parole commissions which would result from the imposition of procedural requirements. This fear, however, is not substantiated by evidence, *see* 388 F.2d at 102, and, nevertheless, must be deemed inconsequential when weighed against the conflicting interests of the parolee. See notes 25-27 *infra* and accompanying text.

[18] *See* Felming v. Tate, 156 F.2d 848, 850 (D.C. Cir. 1946); Stat v. Zolantakis, 70 Utah 296, 303, 259 P. 1044, 1046 (1927).

[19] 388 F.2d at 93. In support of the state-function contention, the court cited its own recent decision in Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967), *cert. granted*, 390 U.S. 943

judicial legislation and administration of a state's penal system appears wholly unwarranted. By imposing minimum protections at parole revocation proceedings the courts are merely concerning themselves with the constitutional validity of the methods of fact determination which the legislature has selected.[20] Certainly, the courts still must defer to the expertise of the appointed authorities in their application of nonarbitrary criteria, in their evaluation of facts fairly established, and in their discretion as to the final disposition of each case.

Moreover, while no substantial public interest is served by denying a hearing, such denial could result in considerable harm to the interests of a parolee. It is obvious that a parolee's liberty is being substantially curtailed by the revocation of parole and that he is entitled to some assurance that the factual basis for such deprivation is arrived at fairly and accurately.[21] Likewise, even if

(1968). However, at least one commentator has concluded that this decision is divorced from the current thought in the peno-correctional field and is overly conservative in the context of recent decisions. *See* Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 Duke L.J. 343. Certainly running counter to the absolute "hands off" attitude suggested by the 6th Circuit are such decisions as Lee v. Washington, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968), in which the court declared: "[I]t is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law." *Id.* at 331; *see, e.g.*, Cooper v. Pate, 378 U.S. 546 (1965). That is, while commitment to a penal institution following conviction necessarily results in the imposition of a number of restraints, these restraints must be reviewed to determine if they are justified as necessities of prison security and discipline, or as unavoidable consequences in the process of rehabilitation. *See, e.g.*, Lee v. Washington, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968). *See also* Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights—Obstacles to a Hearing On the Merits*, 20 RUTGERS L. REV. 528 (1966); Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967). Further, while a parolee conceptually may be deemed a "prisoner" by the fact that the conditions on his liberty constitute "custody," the requirements of security and discipline which support restrictions on a prisoner's substantive and procedural rights are substantially diminished once the parolee has left the confines of the prison. Thus, the mere assertion that "a state prisoner on parole is in custody," which was already made by the majority in *Rose*, is an insufficient basis for the conclusion that such a prisoner "does not have a constitutional right to a hearing on a state parole revocation." 388 F.2d at 95.

[20] *See In re* Gault, 387 U.S. 1, 71 (1967) (Harlan, J., concurring). *See also* Olsen v. Nebraska, 313 U.S. 236, 246-47 (1941); McLean v. Arkansas, 211 U.S. 539, 547 (1909).

[21] Recent Supreme Court decisions have greatly expanded the individual's due process rights in proceedings which threaten to restrain one's liberty. *See* Mempa v. Rhay, 389 U.S. 128 (1967); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

one of his parole conditions has been violated, the parolee retains an interest in the opportunity to present mitigating circumstances, such as evidence of his good character or of the involuntary nature of the breach,[22] so that the parole authority can make a more reasonable, and perhaps more lenient disposition of his case within the range of available alternatives. Beyond this interest in his basic freedoms, the parolee also has an interest in safeguarding any personal reputation he had retained or regained within his community, as well as any meaningful chance for future employment.

Denial of the minimum safeguard of a revocation hearing serves neither the state's interest in an effective and rehabilitative parole system nor the parolee's interest in retaining his liberty, for neither interest is validly served without procedural safeguards to help guarantee greater accuracy in the fact-determining process. Therefore, the *Rose* court should not have relied on the simplistic privilege-right analysis, but instead should have initiated a more detailed inquiry into petitioner's substantial due process claims. Such an inquiry would reveal that basic notions of fundamental fairness demanded that Rose be afforded an opportunity to be heard prior to the crucial determination made by the Commission.

Having concluded that due process requires a parole revocation hearing,[23] there still remains the important question of whether

[22] *E.g.*, Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); Combs v. LaVallee, 239 N.E.2d 743, 286 N.Y.S.2d 600 (1968); Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959); Hudson v. Youell, 178 Va. 525, 17 S.E.2d 403 (1941), *modified on other grounds*, 179 Va. 442, 19 S.E.2d 705, *cert. denied*, 317 U.S. 630 (1942).

[23] It should be noted that in addition to the privilege-right distinction, there are a number of other theories which are frequently relied upon to deny a parolee due process protections at revocation proceedings. While the theory of "constructive custody" has already been analyzed, note 22 *supra*, the "contract" and "parens patriae" theories merit brief discussion. The contract theory involves the assertion that a parolee accepts the condition of summary revocation of his status at the time of the parole grant and that he thereby waives all claim to his right to due process. *See* Fuller v. State, 122 Ala. 32, 26 So. 146 (1899); *In re* Lorette, 126 Vt. 286, 228 A.2d 790 (1967). This theory, while ironically recognizing that there is a *right* to due process which has been waived, has a fundamental weakness in that the waiver is obviously coercive and thus invalid. Furthermore, the Supreme Court in *Burns v. United States* specifically stated that a parole grant "is not a contract, but a favor." 287 U.S. at 220.

The most reeent argument, as expressed in Hyser v. Reed, 318 F.2d 125, 138 (D.C. Cir. 1963), is that the parole commission acts as *parens patriae* of the parolee and that therefore the protections of due process are unnecessary. However, any validity to this argument has now been completely undercut by the Supreme Court's analysis and conclusion in *In re* Gault, 387 U.S. 1, 26 (1967).

such a hearing should include any further procedural safeguards.[24] Fortunately, the Supreme Court has recently enunciated procedural guidelines for situations closely analogous to parole revocation. For instance, in *Mempa v. Rhay*[25] the Court held that a convicted criminal has a right to counsel at a proceeding for revocation of probation when that proceeding involves the imposition of a deferred sentence. The Court reasoned that because the degree of punishment is partially dependent upon a discretionary assessment of a probationer's character, prior conduct, and various other factors, there is a vital necessity "for the aid of counsel in marshalling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence."[26] The Court further emphasized that the necessity for counsel is even more compelling since imposition of sentence on the prior conviction "is based on the alleged commission of offenses for which the accused is never tried."[27]

The rationale in *Mempa* appears equally applicable to parole revocation proceedings. The similarity and inter-relationship between parole and sentencing processes has been recognized by the Supreme Court[28] and has led the President's Commission on Crime to observe that "parole legislation essentially involves a delegation of sentencing power to the parole board."[29] It is equally evident

[24] A person is entitled to a "quality of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat." Van Alstyne, *supra* note 9, at 1452.

[25] 389 U.S. 128 (1967).

[26] *Id.* at 135.

[27] *Id.* at 137. *See also* Perry v. Williard, Ore. , 427 P.2d 1020 (1967); State v. Edelblute, 91 Idaho 469, 424 P.2d 739 (1967).

[28] Williams v. New York, 337 U.S. 241 (1949). The Court indicated that while the sentencing judge fixes the early portion of the sentence, parole and probation commissions often fix the details of the latter portion, thereby implementing the policy of individualizing punishment to fit the changing needs of each case. The Court concluded that to effectively implement this policy a sentencing judge must possess the "fullest information possible concerning the defendant's life and characteristics" and that he "not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Id.* at 247. It therefore appears that if the parole and sentencing processes are deemed strictly analogous, *Mempa* would support a parolee's right to counsel, although *Williams* would be sufficient basis for denying him the right to confrontation and cross-examination. *But see* text accompanying notes 39-43 *infra*.

[29] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 86 (1967).

that the parolee's need and interest in having counsel's aid throughout the revocation process is just as great as that of the criminal upon whom initial sentence is being imposed,[30] since the same basic personal interest in freedom is involved.

But while it is useful to analogize the evaluative-dispositional phase of parole revocation and the sentencing phase of criminal prosecution,[31] there remains a vital distinction. At the time of sentencing, a criminal's guilt has already been established and all that remains is the discretionary assessment, based on a variety of sources, as to what should be the proper penological disposition for the individual. On the other hand, a parole board's initial and primary function is the factual determination of a violation of the parole conditions, and it is only after such a determination that the board's discretionary dispositional powers can be exercised. The importance of this fact-finding function in terms of due process considerations has recently been stressed by the Court in dealing with other proceedings traditionally characterized as "discretionary."[32] In *Gault*[33] the Court closely analyzed juvenile delinquency proceedings. While noting a valid state purpose in special treatment for youthful offenders[34] and recognizing the need for judicial deference to administrative expertise,[35] the Court nevertheless condemned the "unbridled discretion" of juvenile courts. Since an essential element of the proceeding was *fact-finding*[36] and since an individual's freedom was at stake,[37] due

[30] *Mempa* is not clear as to what role counsel is to assume in relation to the factual determination of whether or not a probation violation did occur. However, the thrust of the decision is not in this direction, but rather is toward the aid of counsel in presenting all evidence and implications favorable to the probationer, so that these factors, along with the trial judge's recommendations, can be considered by the commission prior to the exercise of its discretionary sentencing power. In the context of parole revocations, therefore, *Mempa* would primarily support the right to counsel at the evaluative or dispositional phase of the proceeding wherein the commission exercises its discretion *following* a finding of a breach of conditions.

[31] See note 30 *supra*.

[32] *E.g., In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Kent v. United States, 383 U.S. 541 (1966); Baxstrom v. Herold, 383 U.S. 107 (1966). *See also* note 13 *supra*.

[33] 387 U.S. 1 (1967).

[34] *Id.* at 27.

[35] *Id.* at 25-26.

[36] *Id.* at 21.

[37] *Id.* at 41.

process was found to require that the juvenile be afforded notice of the charges, representation by counsel, confrontation and cross-examination, privilege against self-incrimination, and sufficient specificity of findings to allow for meaningful appeal.[38] In a subsequent decision, *Specht v. Patterson*,[39] the Court reaffirmed its prior position in *Williams v. New York*,[40] but concluded that where the specific basis for imposition of a sentence is "a new finding of fact that was not an ingredient of the offense charged,"[41] the factual determination must be made at a hearing in which the defendant is afforded "the full panoply" of procedural rights.[42] Thus, although the situations in *Gault* and *Specht* are on the surface distinguishable from parole revocation,[43] each stands for the proposition that where there is a genuine factual dispute, the outcome of which may result in restraint of personal liberty, more formalized procedures, beyond a hearing, are required.

Applying this rationale to parole revocation, it seems clear that while a parolee needs aid of counsel at the evaluative phase of the proceeding,[44] that need is even more compelling when he is faced with a specific accusation of a designated offense, the alleged commission of which constitutes the very basis for placing his conditional freedom in jeopardy.[45] Likewise, the parolee and his counsel should be provided with notice of charges so that they have time to gather evidence and prepare defenses to the allegations

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[38] *Id.* at 31-58.

[39] 386 U.S. 605 (1967).

[40] 337 U.S. 241 (1949). See note 28 *supra*.

[41] Specht v. Patterson, 386 U.S. 605, 608 (1967).

[42] *Id.* at 609.

[43] The main distinction appears to be that in both the *Gault* and the *Specht* opinions the Court indicated that it was not dealing with the post-conviction dispositional aspects of the questions presented. *Mempa*, however, arose in the context of probation revocation, and the Supreme Court found the *Gault* situation analogous.

[44] See note 38 *supra* and accompanying text.

[45] The President's Commission on Law Enforcement recently reported its similar conclusion, stating in part: "The offender threatened with revocation should therefore be entitled to a hearing comparable to the nature and importance of the issue being decided. Where there is some dispute as to whether he violated the conditions of his release, the hearing should contain the basic elements of due process—those elements which are designed to ensure accurate fact finding . . . [—] such essential rights as reasonable notice of the charges, the right to present evidence and witnesses, the right to representation by counsel—including the right to appointed counsel—and the right to confront and cross-examine opposing witnesses." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 88 (1967).

involved. They should be allowed to present all relevant evidence in denial or mitigation of the charges, and should be provided with a transcript of the proceeding sufficient to delineate the grounds for the commissions' decision.

This analysis further suggests that the parolee should have the right to confront and cross-examine accusing witnesses either at the hearing or by interrogatories prior to the hearing. Since the factual determination is so vital to the interests of the parolee, it appears fundamentally unfair to deny him the right to question the very source of the accusations against him.[46] The importance of confrontation and cross-examination in a proceeding which involves the resolution of conflicting evidentiary implications was stressed in both *Gault* and *Specht* as well as in a number of decisions involving various analogous areas of administrative law.[47] Moreover, the burden and inconvenience to the state seems slight when weighed against the fact that the imposition of such additional administrative machinery will insure greater accuracy in the factual determination process and thereby serve the interests of both the public and the parolee.[48] Finally, it is contended that the imposition of the above safeguards still allows for flexibility in the administration of parole revocation proceedings. The commission can still maintain control over the fact-finding process by directing the scope of the inquiry and placing reasonable limitations upon counsel's questioning.[49] Moreover, once having ascertained that a violation occurred, the commission retains its great latitude in the exercise of its discretionary powers, for while *Mempa* would indicate that counsel is required at this evaluative-dispositional phase, *Williams* precludes any sound contention that the informational sources utilized therein must be at all restricted by the rules of admissible evidence.[50]

In summary, the consistent denial of minimal due process

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[46] *Id.* For a detailed analysis of these rights, see the majority opinion in *In re* Gault, 387 U.S. 1 (1967).

[47] *E.g.*, Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (dissenting opinion); Greene v. McElroy, 360 U.S. 474 (1959); Garrott v. United States, 340 F.2d 615 (Ct. Cl. 1965); *see* McKay, *The Right to Confrontation*, 1959 WASH. U.L.Q. 122 (1959).

[48] *See also* SKLAR, note 5, *supra*, at 195.

[49] *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16 (Supp. 1965).

[50] See note 28 *supra*.

protections to a parolee faced with an administrative proceeding in which the retention of his status is at stake, is based on assumptions which are demonstrably unsound. Further, analysis of parole status and revocation proceedings shows that both state and parolee purposes and interests are best served when the accuracy of the facts upon which the parole authorities act is guaranteed by the imposition of certain procedural safeguards. Finally, by drawing analogies from recent decisions it seems clear that due process requires that in the fact-determining phase a parolee must be afforded notice of charges, presence of counsel, confrontation and cross-examination of witnesses, and a transcript of the proceedings; while in the dispositional phase he should at least have aid of counsel and a chance to present evidence in mitigation of his guilt.