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Revocation of Probation and Parole in Nebraska: A Procedural Antithesis

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REVOCATION OF PROBATION AND PAROLE IN NEBRASKA—A PROCEDURAL ANTITHESIS

I. INTRODUCTION

Although rehabilitation, in the sense of integrating or reintegrating the offender into community life, is generally considered the primary objective of corrections today,[1] the convicted offender will still face notions of retribution, deterrence and control from the moment of his sentencing until he is finally discharged.[2] While these various aims[3] have often led to conflict and confusion in the past, it has become increasingly apparent that the reconciliation of "humanitarian and rehabilitative activities to the requirements of control is the first order of business in any kind of correctional planning."[4] For instance, the reformation of an offender may require that he be confined in order to provide him with intensive treatment away from the undesirable influences of his outside life; at the same time, his confinement also serves to restore social normalcy.[5] Although a reasonable balance between rehabilitation and control presently exists only in the most progressive institutions, the concept of social restoration in a manner consistent with public safety has been widely implemented through programs of proba-

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1 The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 7 (1967) [hereinafter cited as Task Force on Corrections].

2 Following his discharge, in addition to suffering the unofficial stigma of being an ex-convict, the offender may also be deprived of numerous civil rights, such as voting, jury service, or holding public office. *See generally* Task Force on Corrections, *supra* note 1, at 88-92. However, Nebraska has made provision for the restoration of the civil rights of prisoners upon their discharge by the Board of Pardons. NEB. REV. STAT. § 29-2634 (Reissue 1964), *construed in* Bosteder v. Duling, 115 Neb. 557, 213 N.W. 809 (1927).

3 For a most enlightening discussion of the aims of corrections see Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58, 65-83 (1966).

4 J. CONRAD, CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES 62-63 (1965). The purposes and apparatus of corrections in Europe likewise rest on a "precarious balance of reason and unreason." For a comparison of the correctional patterns in the United Kingdom, the Netherlands, Scandinavia, France, Germany, and the Soviet Union, *see id.* at 58-171.

5 Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58, 64 (1966).

tion,[6] parole,[7] and most recently, work release.[8] Yet, even in such enlightened programs the goal of resocialization has generally been subordinated to considerations of control whenever an offender's probation or parole has been subject to revocation because of an alleged breach of the conditions of his release.

Except in the minority of states which statutorily provide for revocation proceedings with procedural safeguards,[9] the liberty enjoyed by the probationer or parolee has commonly been considered a matter of grace[10] and consequently subject to revocation without due process trial-type safeguards or even a hearing in many states.[11] The point has been well made that offenders who are not afforded what they consider to be a fair hearing on the revocation issue will very likely be difficult subjects for future reformation endeavors because it is probable that their confidence in the correctional system as a whole will have been undermined.[12] The judiciary's refusal to review these procedures by which a man's liberty can be taken from him, effectually relegating the probationer or parolee to the status of a non-citizen or worse,[13] has

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6 "Probation shall mean a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court, without imprisonment, subject to conditions imposed by the court and subject to the supervision of the probation service." NEB. REV. STAT. § 29-2224(1) (Reissue 1964).

7 "Parole shall mean the release of a prisoner to the community by the Board of Pardons prior to the expiration of his term, subject to conditions imposed by the board and to its supervision." NEB. REV. STAT. § 29-2224(2) (Reissue 1964).

8 "Work release allows an individual to participate in unsupervised employment in the community while residing in the institution during his leisure hours." Carpenter, *The Federal Work Release Program*, 45 NEB. L. REV. 690, 690 n.2 (1966). *See* NEB. REV. STAT. § 83-440.01 (Supp. 1967).

9 A state-by-state statutory breakdown, which is in general still up-to-date, is presented in Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964) [hereinafter cited as Sklar].

10 *E.g.*, Escoe v. Zerbst, 295 U.S. 490 (1935).

11 *E.g.*, Anderson v. Alexander, 191 Ore. 409, 229 P.2d 633 (1951) (revocation of parole); *contra*, People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909) (revocation of parole); *Ex parte* Lucero, 23 N.M. 433, 168 P. 713 (1917) (revocation of probation); People *ex rel.* Combs v. LaVallee, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (1968) (revocation of parole).

12 Task Force on Corrections, *supra* note 1, at 83; Sklar, *supra* note 9, at 196; Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. Rev. 702, 734 (1963).

13 Aliens who have gained admission to the United States, even though illegally, must be afforded a hearing conforming to traditional stan-

been uneasily based on the doctrine of privilege. While this judicial crutch has been weakened substantially[14] by recent bar admission[15] and disbarment cases[16] and in decisions concerning public employees,[17] the first significant step toward procedural due process in probation revocation proceedings did not come until the United States Supreme Court's holding in *Mempa v. Rhay*.[18]

Mempa v. Rhay held generally that counsel must be appointed for an indigent "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[19] More spe-

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dards of fairness encompassed in due process of law before they can be deported. Yamataya v. Fisher, 189 U.S. 86 (1903); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). However, an alien on the threshold of initial entry into this country, but who has not yet become a member of the American community, is not denied due process when he is excluded without a judicial hearing. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

14 "The greatest circumvention of the [right-privilege] distinction has been achieved via the equal protection clause. Under that clause, it seemingly makes no difference that the threatened interest is a privilege rather than a right. Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1454 (1968).

15 Spevack v. Klein, 385 U.S. 511, 516 (1967); Cohen v. Hurley, 366 U.S. 117, 146-47 (1961) (Black, J., dissenting opinion).

16 Hallinan v. Committee of Bar Examiners of State Bar, 65 Cal. 2d 447, 452, 421 P.2d 76, 80, 55 Cal. Rptr. 228, 232 (1966); Application of Levine, 97 Ariz. 88, 90, 397 P.2d 205, 206-07 (1964). *See generally* Note, *Admision to Bar—Hallinan v. Committee of Bar Examiners of State Bar*, 47 NEB. L. REV. 128, 141-43 (1968).

17 *See* Greene v. McElroy, 360 U.S. 474 (1959).

18 389 U.S. 128 (1967). Jerry Mempa was convicted in Spokane County Superior Court of the offense of joyriding based on his guilty plea entered with the advice of court-appointed counsel. The imposition of sentence was deferred and Mempa was placed on probation after spending thirty days in the county jail as a condition of probation. Four months later a proceeding was brought to revoke Mempa's probation on the grounds that he was involved in a burglary while on probation. Mempa, who was seventeen at the time, was not represented by counsel and the court made no inquiry as to whether he desired the assistance of his previously appointed counsel. Mempa's probation was revoked when he affirmatively answered the court's question as to his involvement in the alleged burglary. Mempa was then sentenced to ten years' imprisonment with the recommendation that he be required to serve only one year. Mempa's petition for a writ of habeas corpus, based on the ground that he was denied the right to counsel at the revocation hearing, was denied by the Washington Supreme Court. Mempa v. Rhay, 68 Wash. 2d 882, 416 P.2d 104 (1966). The Supreme Court of the United States granted certiorari, Mempa v. Rhay, 386 U.S. 907 (1967).

19 389 U.S. 128, 134 (1967).

cifically, the high court ruled that "a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing."[20] While *Mempa* did not expressly state that the probationer's due process right to appointed counsel also encompasses the right to a meaningful hearing, the right to a revocation hearing is patent for "[w]ithout a hearing, even of an informal kind, in which antagonistic facts can be rebutted and favorable ones presented, the role of counsel is inevitably marginal."[21]

The procedural due process questions which permeate revocations of probation and parole will be discussed in this Comment primarily in light of *Mempa v. Rhay* and *In re Gault*.[22] Attention will then shift to the disparity in the procedural elements presently guaranteed probationers and parolees in revocation proceedings under Nebraska law and whether the denial of a hearing to the parolee is violative of equal protection of laws. The Comment will conclude by suggesting legislation providing procedural safeguards in the revocation hearing which not only will ensure the offender a fair hearing but also will further the rehabilitative goals of the concept of conditional release.

II. WHAT EFFECT *MEMPA v. RHAY*?

A. Due Process and the Probation Revocation Hearing

Despite some seemingly straight-forward language in *Mempa*, concern has been justly expressed that *Mempa* may not extend the *Gideon* doctrine[23] flatly to all probation revocation hearings.[24] The unanimous *Mempa* opinion written by Justice Marshall falls short of the mark in that its rationale appears to acknowledge Jerry Mempa only as a person awaiting sentence, rather than as a probationer whose conditional liberty is about to be revoked. Due

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[20] *Id.* at 137. It has been suggested, and was argued by the State, that the term "deferred" may be misleading "since several states do have the concept of 'deferred conviction,' under which a conviction is 'deferred' (not entered) while the defendant consents to supervision. If the supervision succeeds, the conviction is never entered and a criminal record is avoided." Rubin & Glen, *Developments in Correctional Law*, 14 Crime & Delin. 155, 162-63 (1968).

[21] Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 828 (1961) [hereinafter cited as Kadish]. "Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel." Kent v. United States, 383 U.S. 541, 561 (1966).

[22] 387 U.S. 1 (1967).

[23] Gideon v. Wainwright, 372 U.S. 335 (1963).

[24] *See* Rubin & Glen, *Developments in Correctional Law*, 14 Crime & Delin. 155, 162 (1968).

to this undeveloped aspect of the opinion, *Mempa* has been construed by some courts as a "sentencing decision"[25] only applicable to those probation revocations in which the imposition of sentence has been suspended during the probationary period.[26]

Indeed, a federal district court in *United States v. Hartsell*[27] has construed *Mempa* to apply only when it is possible for the probationer to lose some legal rights in the revocation-sentencing process in addition to the possible loss of his liberty. The basis for this stringent interpretation of *Mempa* is Justice Marshall's exhibited concern that certain legal rights, including the right to appeal the conviction, might be lost if not exercised at this stage of the criminal proceeding.[28] Under Washington law a defendant can appeal a case involving a guilty plea followed by probation only after probation has been revoked and sentence has been imposed,[29] which was precisely the position in which Jerry Mempa found himself.

While clearly representation by counsel is needed to protect the probationer's right to appeal in Washington following revocation of his probation,[30] it is inconceivable that the only rights of the probationer which due process will protect by an attorney's assistance are those which come into play *after* his probation has been revoked by the court at a proceeding in which the probationer may

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[25] *E.g.*, Commonwealth v. Johnson, 428 Pa. 210, 236 A.2d 805 (1968); Petition of Croteau, — Mass. —, 234 N.E.2d 737 (1968); Holder v. United States, 285 F. Supp. 380 (E.D. Tex. 1968).

[26] Washington statutes provide that the court in granting probation may suspend either the imposing or the execution of the sentence. WASH. REV. CODE ANN. § 9.95.210 (1961). When imposition of sentence is suspended and one is placed on probation, sentence will only be imposed should the probationer violate the conditions of his probation. Nebraska permits the court to suspend only the imposition of sentence during probation. NEB. REV. STAT. § 29-2218 (Reissue 1964).

[27] 277 F. Supp. 993 (E.D. Tenn. 1967).

[28] Washington law also permits defendants convicted by their guilty pleas to withdraw their pleas at any time prior to the imposition of sentence should the trial judge find that the ends of justice will be served by the withdrawal. Wash. Rev. Code Ann. § 10.40.175 (1961), *construed in* State v. Shannon, 60 Wash. 2d 883, 376 P.2d 646 (1962).

[29] State v. Farmer, 39 Wash. 2d 675, 237 P.2d 734 (1951). *But see* State v. Longmore, 178 Neb. 509, 134 N.W.2d 66 (1965), which held that the placing of a defendant on probation is a final appealable order even though imposition of sentence has been suspended. The Nebraska Supreme Court rejected the argument that acceptance of probation is a voluntary waiver of the right of appeal and recognized that probation is a judicial abridgement of the liberty of an individual in the public interest to account for his commission of an offense. *Id.* at 511-14, 134 N.W.2d at 69-70.

[30] The Mempa Court is cognizant of the reality that guilty pleas are frequently secured by offers of probation. *See* Enker, *Perspectives on Plea Bargaining*, in The President's Commission on Law Enforce-

be denied counsel. It seems manifest that appointment of counsel to assist the probationer when the court is about the task of ascertaining whether he has violated his probation is a necessary prerequisite to representation of the probationer in matters which will not even arise should it be determined that the probationer has not violated the conditions of his probation. However, if we discard the cautiously phrased legal niceties of the *Mempa* opinion, we discover the basic issue in *Mempa* and in all revocation proceedings —the simple proposition that a man's liberty is at stake with no real procedural safeguards. Although the dearth of case law may indicate a contrary conclusion, it is not inconceivable that the Court deemed appointment of counsel at the fact-finding stage of the revocation hearing so elementary in view of the substantial rights involved that articulation of a rationale was thought superfluous. Regardless of such supposition, it is clear that due process demands appointment of counsel at this stage of the probation revocation hearing as well as when the court is in the process of making its final disposition of the case.[31]

B. Due Process and Parole Revocation

Due to the uncertainty concerning the *ratio decidendi* of *Mempa*, it is difficult to assess whether *Mempa* will affect parole revocation procedures. If *Mempa v. Rhay* extends the right of appointed counsel to the indigent probationer as a probationer rather than as one about to be sentenced, the argument can be made that an indigent parolee should likewise be accorded this right at his revocation proceeding as a matter of equal protection.[32] However, the Sixth,[33] Ninth,[34] and Tenth Circuits[35] have distinguished the status of the parolee from that of the probationer in *Mempa* on the grounds that the parole board is not concerned with sentencing since the criminal case has ended, that sentence has already been imposed, and that the parolee has been serving the sentence imposed.

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ment and Administration of Justice, Task Force Report: The Courts 108-19 (1967) [hereinafter cited as Task Force on The Courts]. If the defendant were not represented by counsel at his probation revocation hearing, under Washington law he might easily lose his right to appeal and end up with sentence being imposed on his prior guilty plea based on alleged offenses for which he was never tried. Mempa v. Rhay, 389 U.S. 128, 136-37 (1967).

31 *Accord*, Rubin & Glen, *Developments in Correctional Law*, 14 Crime & Delin. 155, 170 (1968). *See also* Kadish, *supra* note 21, at 828.

32 Sklar, *supra* note 9, at 198 n.182; Comment, *Due Process and Revocation of Conditional Liberty*, 12 Wayne L. Rev. 638, 653 (1966). For discussion of the equal protection issue see text accompanying footnotes 120-51.

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

34 Eason v. Dickson, 390 F.2d 585 (9th Cir. 1968).

35 Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968).

Notwithstanding these courts' view that *Mempa* is applicable only when the judicial sentencing power is involved, it is arguable that the Tenth Circuit erred in refusing to appoint counsel for the indigent parolee in *Williams v. Patterson*[36] due to the workings of the Colorado statutory procedure providing that a parolee who has violated the terms of his parole cannot have his parole time credited on his sentence.[37] Revocation of parole in Colorado will automatically mean an increase in the total time during which the parolee will be subject to correctional authority.[38] Therefore, it seems evident that the Colorado parole board's decision to revoke is a sentencing decision[39] under the ruling of *Mempa v. Rhay*. If *Mempa* does require appointment of counsel for an indigent parolee released under a statute which does not give credit for street time when the paroling authority seeks to revoke his parole,[40] it would logically follow that the Ninth Circuit likewise erred in *Eason v. Dickson*[41] when it denied the parolee a right to appointed counsel, because the California Penal Code[42] requires forfeiture of the parolee's good time credits due to a parole violation.[43]

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[36] 389 F.2d 374 (10th Cir. 1968).

[37] COLO. REV. STAT. § 39-18-5 (1963), *construed in* Furlow v. Tinsley, 151 Colo. 280, 377 P.2d 132 (1962).

[38] Task Force on Corrections, *supra* note 1, at 87. It has been argued that such an extension of one's sentence beyond that set in the initial judicial proceeding is a deprivation of liberty without due process. The contract theory, that a parolee by accepting as a condition of his parole that his street time may be discounted has thereby consented to this condition, has served as the basic rationale for rejection of the due process argument. Smith v. Blackwell, 367 F.2d 539 (5th Cir. 1966); Van Horn v. Maguire, 328 F.2d 585 (5th Cir. 1964); Doherty v. United States, 280 F.2d 35 (9th Cir. 1960). The fallacy of the so-called contract theory is easily penetrated. *See* text accompanying footnotes 86-87.

[39] *See* Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 377 n.54 (1962).

[40] *E.g.*, 18 U.S.C. § 4205 (1964). NEB. REV. STAT. § 29-2628 (Reissue 1964) provides that the parolee shall not be allowed to count the time from the date of his declared delinquency to the date of his arrest as time served. This statutory language leaves the inference that the street time prior to the violation does count toward the parolee's sentence.

[41] 390 F.2d 585 (9th Cir. 1968).

[42] CAL. PENAL CODE § 3053 (West 1956). *See also* NEB. REV. STAT. § 29-2628 (Reissue 1964), which provides for forfeiture of good time upon violation of parole. According to the 8th Circuit Court of Appeals in Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967), the right to good time is contingent until the time arrives when its authorized allowance will end the prisoner's term of imprisonment. Pre-crediting of good time amounts to no more than a bookkeeping entry in the opinion of the court; the good time must be fully earned before it becomes vested. *Id.* at 687.

[43] *Contra*, McKinney v. Taylor, 358 F.2d 689 (10th Cir. 1966).

The various theories for denying that due process requires a hearing and certain minimal procedural safeguards for the revocation of parole have been discussed extensively and need not be restated here.[44] However, the foundation of these theories rests basically on the concept of grace and considerations of administrative convenience.

1. *Erosion of the Doctrine of Privilege*

It has been stated that a parole board in revoking a parole "occupies the role of a parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege."[45] In a very well reasoned dissent to *Rose v. Haskins*,[46] Judge Celebrezze objects to summarily granting this act-of-grace assumption.[47] Judge Celebrezze suggests that the parole granting decision may be considered an act of grace due to the distinctly discretionary nature of the parole board's decision[48]—whether the prisoner is a fit candidate for rehabilitation in the community. In contrast, however, revocation of parole does not involve a wholly discretionary determination, but rather is based upon a finding that the parolee has violated one of the specified conditions of his parole. Consequently, although the liberty granted the parolee may be considered a privilege, it is posited that due process does not permit arbitrary revocation under the guise of the privilege doctrine.

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[44] Sklar, *supra* note 9, at 193-98; Kadish, *supra* note 21, at 817-25; Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 733-35 (1963); Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158, 162-69 (1955).

[45] Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 957 (1963).

[46] 388 F.2d 91 (6th Cir. 1968).

[47] *Id.* at 99-100 (dissenting opinion).

[48] *Id.* at 99 (dissenting opinion). Professor Kadish has very ably made this distinction, too: "The sentencing determination, whether it be performed by the judge after conviction or by a parole board in deciding when and whether to release, entails a primary focus on the intangibles of the rehabilitative potential of the offender coupled with the needs of society for protection and for vindication. Here, one would suppose, the range of the relevant reaches its apogee and the grounds of judgment rest maximally on the expertise of the professional clinical judgment. By contrast, however, commitment redeterminations, whether by a court to revoke probation or by an agency to revoke parole, involve an inquiry of narrower ambit, whatever the overlayer of discretion, of whether the releasee has complied with standards of behavior which the judge or board expressly made the condition of continued liberty." Kadish, *supra* note 21, at 828.

The United States Supreme Court in *In re Gault*[49] instructively pointed out that while the commitment of juveniles may be principally for the purpose of their rehabilitation, the commitment is nevertheless a deprivation of liberty which requires certain due process safeguards. Despite the ostensible non-adversary nature of the juvenile proceeding and the state's role as *parens patriae*, *Gault* recognized that there are very real adversary interests in the determination of delinquency. Therefore, the Court ruled that the factual determination of whether the individual committed the delinquent act must necessarily precede any plan of rehabilitation. Implementation of the essentials of due process into the juvenile court proceeding, the Court noted, does not require subordination of rehabilitation considerations, for the introduction of some elements of the adversary system would enhance the appearance as well as the actuality of fairness. It was felt that an atmosphere of fair play would do more to encourage a therapeutic attitude on the part of the child than would an informal commitment proceeding.[50]

It has been suggested that a parole revocation presents an analogous situation to the juvenile proceeding.[51] Continuation of the parolee's liberty depends on the board of parole's determination of whether the parolee has breached the conditions of his parole, an adjudicatory fact.[52] Legal controls have often been considered inappropriate in parole revocation proceedings because the decisions involved were depicted as professional and diagnostic in nature, but there is a growing awareness that the objectives of rehabilitation will not be hindered by conceding that parolees have certain legal rights.[53] The *Gault* holding intimates that a trial procedure is not the only fair procedure for finding facts and, therefore, that due process does not require that the juvenile court proceeding be encumbered by all the legal controls which safeguard one's rights in a trial.[54] However, *Gault* did find that due process requires that

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[49] 387 U.S. 1 (1967).

[50] *Id.* at 26.

[51] Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 722-23 (1968). *See also* Address by Sol Rubin before the Congress of Correction, August 22, 1967.

[52] Sklar, *supra* note 9, at 197-98; Kadish, *supra* note 21, at 829; Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 734 (1963).

[53] Task Force on Corrections, *supra* note 1, at 83.

[54] For a discussion of the constitutional implications of Gault in terms of the need for other procedural safeguards, *see* Comment, *In re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts*, 47 NEB. L. REV. 558 (1968).

juveniles be given the right to appointed counsel, the right to confront and cross-examine adverse witnesses, and the privilege against self-incrimination. It has been suggested that procedural due process requires similar safeguards when a court or a parole board is making a violation determination.[55] Quite clearly the right to a fair hearing and to appointed counsel is fundamental.

2. *The Lessening Significance of Administrative Convenience*

Many courts have not extended procedural safeguards to parole revocations because of the traditional fear that such an award would cause both the courts and the parole boards to be swamped by frivolous claims, particularly so since prisoners "have little better to do with their time." While the denial and the limitations of many privileges and rights is necessary for imprisonment, there are indications that the Supreme Court is evolving a theory that prisoners should be deprived of only those rights "which would be detrimental to the administration and discipline of the institution."[56] *United States v. Muniz*[57] provides an outstanding example of the Court's unwillingness to approve the repression of a prisoner's rights unless the argument can be justified. *Muniz* held that a federal prisoner could maintain a suit against the government under the Federal Tort Claims Act to recover for personal injuries sustained during his confinement in prison by reason of the negligence of prison guards in failing to halt an assault upon him by other prisoners. While recognizing that this grant of a negligence cause of action to a federal prisoner might bring a flood of tort claims to the federal courts, the Court considered this to be but "an inescapable concomitant of any form of liability."[58] The Court also rejected the government's assertion that prison discipline might be upset by the extension of legal rights to prisoners in that they might spend their time fighting legal battles rather than accepting the correctional regimen.[59]

Likewise, considerations of administrative convenience did not carry the day when the Court required police to give persons under

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[55] For more extensive documentation of the due process arguments that a parolee at his revocation hearing should be afforded a right to appointed counsel, a right to confront and cross-examine adverse witnesses, and a right to assert the privilege against self-incrimination without being penalized for doing so, *see* Note, *Parole Revocacation in the Federal System*, 56 GEO. L.J. 705, 719-31 (1968).

[56] Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 673 (1966).

[57] 374 U.S. 150 (1963).

[58] *Id.* at 162.

[59] *Id.* at 163.

interrogation warnings of their rights in *Miranda v. Arizona.*[60] The *Miranda* doctrine appears to have been significantly expanded by the Court in *Mathis v. United States*[61] which held inadmissible self-incriminating evidence obtained by a federal tax investigator from a prisoner in the Florida State Penitentiary without warning him of his right to be silent and right to counsel. The five-to-three majority[62] ruled that governmental employees conducting civil investigations which *may* lead to criminal prosecutions must give the *Miranda* warning to an individual taken into custody "or otherwise deprived of his freedom by the authorities in any significant way"[63] and then subjected to questioning. The fact that Mathis was in custody by reason of his conviction for another crime was held to be no grounds for depriving him of his right to invoke his privilege against self-incrimination.[64]

At the very least, it can be said that *Mathis* and *Muniz* substantiate the proposition that the need for legal controls at parole revocation proceedings cannot be disregarded because of expediency. While the *Mathis* Court's failure to better amplify the rationale for its sweeping decision is "deeply troubling,"[65] it is submitted that a parolee at his revocation hearing qualifies as one who has been deprived of his freedom by governmental authorities in a significant way. The conclusion of this syllogism requires that parolees be extended the right to counsel (including appointed counsel for indigents)[66] and the right to remain silent.

The Supreme Court appears to be on the threshold of extending certain of the elements of procedural due process to parole revocation hearings. Some anxiety has been expressed that when judicial supervision does come it may not only limit improper practices but also control otherwise fair and necessary discretionary decisions.[67] The possibility of such mistakes can be minimized if correctional officials will assume creative roles and implement needed safeguards through administrative or legislative action.

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[60] 384 U.S. 436 (1966).

[61] 391 U.S. 1 (1968).

[62] Justice Marshall did not take part in the decision.

[63] Mathis v. United States, 391 U.S. 1, 3 (1968), *quoting* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[64] Mathis v. United States, 391 U.S. 1, 3 (1968).

[65] *Id.* at 4 (White, J., dissenting opinion).

[66] *See* In re Menechino, 3 B.N.A. CR. L. REP. 2486 (N.Y. Sup. Ct., N.Y. Co. August 28, 1968), holding that a statute providing for a hearing before parole can be revoked is meaningless if the parolee is not afforded representation by counsel.

[67] *See generally* Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELIN. 1 (1968); Task Force on Corrections, *supra* note 1, at 83.

III. PROBATION AND PAROLE REVOCATION PROCEDURES IN NEBRASKA

An intelligent effort to draft constructive legislation demands an understanding of the failures of the present statutory scheme. While Nebraska statutes do not indicate whether a hearing is or is not required for revocation of either probation[68] or parole,[69] the Nebraska courts have consistently afforded the probationer an informal hearing when he has pleaded not guilty to the probation violation allegation.[70] The parolee in Nebraska has not been so fortunate. While the Board of Pardons does require the Chief State Parole Officer to make a written report of the parole violation before parole will be revoked, the parolee has no right to a hearing and in practice is not given a hearing.[71]

A. Revocation of Probation in Nebraska

Although the Nebraska Supreme Court has considered probation to be a matter of legislative grace, the court nonetheless made certain long before *Mempa v. Rhay* that probationers were provided many procedural safeguards when their conditional liberty was in jeopardy due to a violation charge. Each probationer in Nebraska is guaranteed notice of all charges and a fair and impartial hear-

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68 Neb. Rev. Stat. § 29-2219(3) (Reissue 1964).

69 Neb. Rev. Stat. § 29-2623 (Reissue 1964).

70 State v. Holiday, 182 Neb. 229, 153 N.W.2d 855 (1967), *modified*, 182 Neb. 410, 155 N.W.2d 378 (1967); Reinmuth v. State, 163 Neb. 724, 80 N.W.2d 874 (1957); Phoenix v. State, 162 Neb. 669, 77 N.W.2d 237 (1956); Young v. State, 155 Neb. 261, 51 N.W.2d 326 (1952); Carr v. State, 152 Neb. 248, 40 N.W.2d 677 (1950); Moyer v. State, 144 Neb. 673, 14 N.W.2d 220 (1944); Moore v. State, 125 Neb. 565, 251 N.W. 117 (1933); Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921).

71 Interview with Clarence A. H. Meyer, Attorney General of Nebraska, in Lincoln, June 24, 1968. The attorney general is a member of the Board of Pardons, the paroling authority in Nebraska, Neb. Rev. Stat. § 29-2604 (Reissue 1964). There is only one parole revocation hearing on record, and that proceeding was actually a reconsideration of the board's ex parte revocation order. The petition for reconstruction was brought by the mother of the parolee's child, who was born out of wedlock. The petition asked that the father be continued on parole in order that he might return to his job and thereby enable him to pay her medical expenses and child support. The only record of the reconsideration proceeding is the board's denial of the petition, but apparently the parolee was represented by counsel retained by the mother at the hearing. Interview with Eugene E. Neal, Chief State Parole Officer of Nebraska, in Lincoln, June 10, 1968.

ing.[72] Preciseness of charges is not vital to sustaining the revocation hearing,[73] but a proper charge is necessary.[74] Before revocation can be upheld a violation of conditions must be established by clear and satisfactory evidence,[75] but neither a jury trial nor proof beyond a reasonable doubt is required.[76]

While one's probation can only be revoked upon a finding of a violation of conditions,[77] a second question arises if a violation is found—whether to set aside the probation and impose the penalty which the court might have imposed before placing the offender on probation or to continue the probation.[78] In making this latter decision Nebraska courts are "not limited to a consideration of probative evidence of matters arising subsequent to the order of probation,"[79] but can exercise broad powers of inquiry in their attempts to more fully understand the individual offender.

Representation by retained counsel was also permitted by the high court of Nebraska prior to *Mempa*,[80] but due process was not deemed to make available to the indigent a corresponding right to appointed counsel.[81] But immediately following the *Mempa* decision, in a supplemental opinion reversing and remanding *State v.*

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[72] State v. Holiday, 182 Neb. 229, 231-32, 153 N.W.2d 855, 858 (1967), *modified*, 182 Neb. 410, 155 N.W.2d 378 (1967); Phoenix v. State, 162 Neb. 669, 673, 77 N.W.2d 237, 240 (1956).

[73] Phoenix v. State, 162 Neb. 669, 673, 77 N.W.2d 237, 240 (1956); Carr v. State, 152 Neb. 248, 250, 40 N.W.2d 677, 680 (1950).

[74] State v. Holiday, 182 Neb. 229, 232, 153 N.W.2d 855, 858 (1967), *modified*, 182 Neb. 410, 155 N.W.2d 378 (1967); Moyer v. State, 144 Neb. 673, 676, 14 N.W.2d 220, 222 (1944).

[75] In Moyer v. State, 144 Neb. 673, 14 N.W.2d 220 (1944), a probation revocation was reversed because there was no probative evidence of violation. The court held that the probationer's move of some 34 blocks from one Omaha address to another was not a violation of the statutory condition that the probationer "shall remain or reside within a specified place or locality." Likewise, the court held that the probationer did not violate the statutory prohibition against association with "persons of disreputable or harmful character" by being seen out on the street with her husband, from whom she was apparently separated, at 1:30 A.M.

[76] State v. Holiday, 182 Neb. 229, 232, 153 N.W.2d 855, 858 (1967), *modified*, 182 Neb. 410, 155 N.W.2d 378 (1967); Phoenix v. State, 162 Neb. 669, 673, 77 N.W.2d 237, 240 (1956).

[77] State v. Holiday, 182 Neb. 229, 153 N.W.2d 855 (1967), *modified*, 182 Neb. 410, 155 N.W.2d 378 (1967); Young v. State, 155 Neb. 261, 51 N.W.2d 326 (1952); Moyer v. State, 144 Neb. 673, 14 N.W.2d 220 (1944).

[78] Young v. State, 155 Neb. 261, 268, 51 N.W.2d 326, 330-31 (1952).

[79] *Id.* at 269, 51 N.W.2d at 331.

[80] Phoenix v. State, 162 Neb. 669, 77 N.W.2d 237 (1956); Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921).

[81] State v. Holiday, 182 Neb. 229, 153 N.W.2d 855 (1967).

Holiday[82] which had denied court-appointed counsel to an indigent probationer at his revocation hearing, the Supreme Court of Nebraska without reservation extended the right to appointed counsel to probation revocation hearings. Since no sentence is imposed on probationers in Nebraska until after revocation,[83] *Holiday* fell squarely under the *Mempa* holding regardless of whether *Mempa* is applicable to probation revocations in general or only to those in which sentence has not yet been imposed.

The safeguards afforded the Nebraska probationer in the revocation process stand in stark contrast to the dearth of protection extended the Nebraska parolee. The Nebraska courts have never really tried to reconcile this gross disparity, but it probably can best be explained in that probation revocations are conducted by the courts while parole revocations are conducted by an administrative agency.

B. Revocation of Parole in Nebraska

1. *Nebraska's Parole Act Makes No Provision for a Hearing*

In those jurisdictions which have hearing safeguards for parole revocations, there has normally been a statute providing for an opportunity to be heard, with the judiciary frequently interpreting

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[82] 182 Neb. 229, 153 N.W.2d 855 (1967), *modified,* 182 Neb. 410, 155 N.W.2d 378 (1967).

[83] Neb. Rev. Stat. § 29-2218 (Reissue 1964). Moore v. State, 125 Neb. 565, 251 N.W. 117 (1933), construed what are the present § 29-2218 and § 29-2219 to empower the district courts to place defendants on probation only *before* pronouncing sentence. Suspension of the imposition of the sentence in this way permits the court to maintain a substantial degree of leverage over the probationer, for upon violation of a probation condition the court can impose any sentence the law would have permitted in the first instance. The Nebraska Supreme Court noted that should courts be required to pass sentence initially, they might give the defendant a light or minimum sentence for which they would later regret should the probationer indicate serious criminal tendencies during his probation. *Id.* at 568, 251 N.W. at 118.

Phoenix v. State, 162 Neb. 669, 77 N.W.2d 237 (1956), clearly denotes why one might hesitate to accept probation in Nebraska. The probationer had completed all but two weeks of his 3-year probation term when an information was filed against him charging him with a violation of probation on the grounds that he failed to report to his probation officer one month, that he left the state without the officer's permission, and that he did not notify the officer of his change of address. Two months after the expiration of the probation period an amended information was filed withdrawing the charge that the probationer left the state without permission but adding the charge that the probationer failed to report to his officer the last 7 months of his probation term. The probation was revoked and the defendant was thereupon sentenced to 3 years imprisonment. The Supreme

this provision to necessarily require other procedural elements.[84] Nebraska parole statutes, however, neither make provision for a hearing in revocation proceedings nor require that revocation must be for cause:

> The Board of Pardons shall have power to establish rules and regulations under which prisoners within the Nebraska Penal and Correctional Complex may be allowed to go upon parole outside the building and enclosure, but to remain while on parole in the legal custody and under the control of the board.... The board shall have full power... to retake and reimprison any inmate so upon parole at any time, with or without cause.[85]

The leading Nebraska case concerning the parolee's rights at his revocation proceeding is the early case of *Owen v. Smith*,[86] which construed virtually the same parole statute as set out above. The Nebraska Supreme Court upheld the revocation by the governor, although made without notice or hearing, on the ground that the parolee had entered a parole agreement with the governor when granted his conditional release and the governor was only exercising one of his prerogatives under this contract. The court sought to ease the harshness of the decision by positing that should the court require notice and full hearings to revoke paroles, the governor would be much less inclined to grant paroles.

Court of Nebraska upheld the revocation finding that "a violation occurring on the last day of probation could still properly result in the revocation of probation after the probationary term" if the revocation procedure was instituted within the probationary period or within a reasonable time thereafter. *Id.* at 675, 77 N.W.2d at 241.

In addition to the argument that imposition of a prison term in excess of the probationer's remaining probation term is a denial of liberty without due process, *see* discussion *supra* note 38, the argument has been raised that the great uncertainty which is inherent in any suspension of the imposition of sentence raises serious questions of procedural fairness. The feeling is expressed that the penalty for the crime ought to be determined by circumstances known at the time of the sentence—that probation should not be a test of what punishment should be, particularly so since violations of probation are not determined by a trial. Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 495-96 (1962).

[84] *E.g.*, D.C. CODE ANN. § 24-206 (1940) providing that the parolee be given "an opportunity to appear" before the parole board was construed by the District of Columbia Court of Appeals to mean that the parolee had the right to appear through retained counsel and to present evidence, Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946).

[85] NEB. REV. STAT. § 29-2623 (Reissue 1964).

[86] 89 Neb. 596, 131 N.W. 914 (1911). While it is unclear from the Owen opinion whether the court was considering a conditional pardon or a parole, the rationale has subsequently been applied to both forms of conditional release. Losieau v. Sigler, Civil No. 718L (D. Neb., filed Sept. 25, 1964).

The court's reasoning is fallacious on both counts. Conditions of parole are not agreed upon by the parties but are instead prescribed by the board of parole. Such a "contract" is adhesive in nature, for a person whose only alternative is imprisonment is likely to accept whatever conditions are imposed. Because of the inherent inequality in the parolee's bargaining position with the board, the argument that the parolee has waived his constitutional right of due process is patently spurious.[87]

As to the hypothesis that there is an inverse relationship between the expansion of procedural safeguards to parole revocation hearings and the number of paroles a parole board will grant, there is substantial evidence pointing to the contrary. Michigan and Washington both provide parolees with a revocation hearing and an opportunity to appear with retained counsel at the hearing,[88] yet Michigan's parole rate is well over eighty percent and Washington's parole rate is one hundred percent.[89] The parole rate represents the number of inmates released on parole as a percentage of all persons released from prison in the state during the year. In contrast, Nebraska provides no procedural safeguards at all and maintains the meager parole rate of twenty percent.

Customary parole revocation procedure in Nebraska is as follows:[90]

(1) on the basis of the information he has at hand, the Chief State Parole Officer determines whether the parolee has violated a condition of his parole;

(2) if the Chief State Parole Officer feels a significant violation has occurred, he issues a warrant for the parolee's arrest;

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[87] Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 645-46 (1966); Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 324 (1959); Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 710-11 (1963).

[88] MICH. STAT. ANN. § 28.2310(1) (1968 Supp.); WASH. REV. CODE ANN. § 9.95.120 (1961). However, it must be conceded that very few parolees can afford counsel, which makes somewhat arguable the proposition that the revocation safeguards provided by Michigan and Washington are too inconsequential to truly judge the effect that a guarantee of a fair revocation hearing with assigned counsel would have on parole release practices.

[89] U.S. Dep't of Justice, Fed. Bureau of Prisons, *National Prisoner Statistics: Prisoners in State and Federal Institutions for Adult Felons, 1964*, 38 Nat. Prisoner Statistics Bull. 11 (1965). The table is reprinted in Task Force on Corrections, *supra* note 1, at 61.

[90] Interview with Eugene E. Neal, Chief State Parole Officer of Nebraska, in Lincoln, June 10, 1968.

(3) upon arrest the parolee is returned to the penitentiary; and

(4) a written report of the parole violation is presented by the Chief State Parole Officer to the Board of Pardons at its next monthly meeting, at which time the board makes its revocation decision solely on the basis of the report.

This system effectively places the revocation decision in the hands of the Chief State Parole Officer, thereby combining the conflicting functions of prosecutor and judge in one man. The primary aim of the present Nebraska parole system is control, not rehabilitation.[91] Although control is necessary for a successful parole plan, both in terms of protecting society and in attaining public confidence and cooperation,[92] it should be recognized as the basis from which the ultimate objective of resocialization can be pursued rather than as the millennium itself. The Nebraska system's seeming disorientation can be somewhat explained by the practical reality that three parole officers with some assistance from ten already overburdened district probation officers can do little more than keep track of the more than four hundred parolees scattered throughout the state.[93] Regardless of the reasons for this misapplication of the parole concept, the Nebraska parolee not only does not share the procedural safeguards possessed by the Nebraska probationer, but the interests of the official making the violation determination are diametrically opposed to the parolee's interest in retaining his conditional freedom.[94]

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[91] *Id.*

[92] Considerations of control responsibility weighed heavily in a recent decision of the Court of Claims of New York awarding a claimant $110,000 because of the negligent supervision of a paroled juvenile delinquent. Wasserstein v. State, 56 Misc. 2d 225, 288 N.Y.S.2d 274 (1968). The state was ruled negligent for failing to expeditiously pick up the juvenile when it was learned that he had violated the conditions of his parole by being truant from home and school for several days. The parole officer ordered the juvenile reincarcerated as a parole violator, but no arrest warrant was issued until 2 days later, during which time the parolee shot the claimant causing his blindness.

[93] NEB. REV. STAT. § 29-2215 (Reissue 1964) provides that probation officers may act as parole officers upon request. Presently, in accordance with an unwritten agreement between the Chief State Parole Officer and the District Court Judges Association which supervises the probation system, probation officers outside of Lincoln and Omaha do serve as deputy parole officers. Interview with W. Paul Beave, Lancaster County Adult Probation Officer, in Lincoln, June 28, 1968.

[94] "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." 4 ATTORNEY GENERAL'S SURVEY ON RELEASE PROCEDURE 246-47 (1939).

Unchecked power has always been considered incompatible with our system of government. There seems to be no reason to abandon this principle with regard to persons convicted of crime, for a conviction does not mean that the offender "has forfeited all rights to demand that he be fairly treated by officials."[95] The present parole revocation procedure which delegates virtually uncontrolled discretion to the Chief State Parole Officer over the liberty of the parolee has no constitutional justification. While a prisoner may have no constitutional right to parole, it is submitted that once paroled he cannot be deprived of his liberty by means inconsistent with due process.[96]

2. *Are Parole Revocations "Contested Cases" Under the Nebraska Administrative Procedures Act?*

Although the issue apparently has never been raised, parole revocation proceedings may be governed by the procedural guarantees of the Nebraska Administrative Procedures Act (hereinafter cited as "NAPA").[97] Administrative boards which are authorized by statute to make rules and regulations qualify as "agencies" under the Act.[98] Despite the fact that the legislative history of NAPA provides negligible help in determining whether the Board of Pardons is governed by the Act,[99] the board is authorized by statute to make rules[100] and the board did file a copy of its rules with the secretary of state in apparent compliance with the Act.[101] For those adherents of the rule of contemporaneous construction

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[95] Task Force on Corrections, *supra* note 1, at 83.

[96] *Cf.* Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941).

[97] NEB. REV. STAT. § § 84-901 to 916 (Reissue 1966).

[98] NEB. REV. STAT. § 84-901(1) (Reissue 1966).

[99] Record of debate on the floor of the Unicameral has been kept only since 1961. The records of the hearings on the act by the Committee on the Judiciary are likewise very sketchy. It appears that the only state agencies which have formally opposed inclusion under NAPA are the Railway Commission and the Highway Department, *Hearing on L.B. 362 Before the Comm. on Judiciary*, 69th Neb. Leg. Sess. at 5-6 (1959).

[100] *E.g.*, NEB. REV. STAT. § 29-2611, § 29-2618, and § 29-2622 (Reissue 1964).

[101] The General Rules of the Board of Pardons were filed June 21, 1945, with the secretary of state as required by what is presently NEB. REV. STAT. § 84-902 (Reissue 1966), requiring that agencies governed by the act shall file certified copies of the rules in force in those agencies on August 10, 1945. These rules, as revised, provide that "in the event of parole violation, the facts shall be presented to the board, at either a regular or special meeting and the board shall determine whether or not a parole shall be revoked." Rule VII, General Rules of the Nebraska Board of Pardons.

of statutes,[102] the board's acknowledgement that it is covered by the act would normally be entitled to substantial weight in any subsequent interpretation of the statute by the courts. Inclusion of the Board of Pardons under NAPA does not conflict with the Pardon and Paroles Act, although the latter expressly states that no person shall be released under any other procedures except those specifically prescribed by the parole act,[103] because the subsequently enacted Administrative Procedures Act was "intended to constitute an independent act establishing minimum administrative procedure for all agencies."[104] This statement of legislative intent certifies that NAPA was not intended to supersede the rules of the various agencies, but rather was meant to complement their rules and to ensure that the essentials of fair play are being followed in all proceedings which are included within the act's definition of "contested case."[105]

While the Board of Pardons appears to qualify as an agency under NAPA, there is some question as to whether a parole revocation proceeding is a contested case under the act. Contested case is defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are *required by law or constitutional right* to be determined after an agency hearing."[106] While Nebraska law clearly does not make such provision, it is arguable that the Federal Constitution does.[107]

Assuming *arguendo* that a parole revocation is a contested case, the procedure required by NAPA is "essentially that which is normally used in adversary proceedings."[108] However, the Nebraska Supreme Court has recently held that in applying NAPA to the administrative process "some consideration must be given to the particular nature of the state board including its purpose and function."[109] Therefore, *County of Blaine v. State Bd. of Equalization and Assessment*[110] ruled that state boards need not afford parties

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[102] *E.g.*, Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).

[103] NEB. REV. STAT. § 29-2605 (Reissue 1964).

[104] NEB. REV. STAT. § 84-916 (Reissue 1966).

[105] NEB. REV. STAT. § 84-901(3) (Reissue 1966).

[106] *Id.* (emphasis added).

[107] *See* text accompanying footnotes 32-66. Since the statute makes no allusion to the Nebraska Constitution this writer feels his assumption that the statute is referring to the Federal Constitution is warranted.

[108] County of Blaine v. State Bd. of Equalization and Assessment, 180 Neb. 471, 474, 143 N.W.2d 880, 883 (1966).

[109] *Id.* at 474, 143 N.W.2d at 883.

[110] 180 Neb. 471, 143 N.W.2d 880 (1966).

all the procedural elements set out by the act where the parties are numerous and the issues complex, but each board must adopt a reasonable method of procedure.[111]

There is scarcely any doubt that like considerations of administrative practicality, because of the present ex-officio composition of the Board of Pardons, would prevent full application of all procedural safeguards in NAPA[112] to parole revocation proceedings. Because of the many other demands upon the governor, secretary of state, and the attorney general, who comprise the board,[113] a substantial and probably impractical burden would be placed upon the board to require anything beyond a very informal hearing.

The solution to this organizational dilemma appears obvious—change to a professional parole board which not only will have time to make proper deliberations, but will also bring correctional

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[111] *Id.* at 474-75, 143 N.W.2d at 883. In County of Blaine v. State Bd. of Equalization and Assessment, the order and notice requiring the representatives of Blaine County to appear before the state board failed to state the issues that were to be considered at the hearing. The court found that the primary duty of the Board of Equalization was the establishment of uniformity in taxation between the counties and that the purpose of the hearing was to provide an opportunity for the county's representatives to appear and show cause why the valuation of the county should or should not be changed. Therefore, the Nebraska high court held that NAPA requires the notice of hearing in contested cases to state the issues involved and, as applied to the facts of the case, to state the percentage adjustment which the board proposes to make in that county. But County of Blaine does not compel the board to afford parties the other procedural elements set out by the act.

[112] Full application of NAPA to parole revocation proceedings would provide the parolee with: (1) a hearing, after reasonable notice, at which he would have the opportunity to present evidence and argument, NEB. REV. STAT. § 84-913 (Reissue 1966); (2) the right to have the board issue subpoenas to compel both the attendance of witnesses and the production of papers, NEB. REV. STAT. § 84-914(2) (Reissue 1966); (3) the right to cross-examine witnesses and to submit rebuttal evidence, NEB. REV. STAT. § 84-914(4) (Reissue 1966); (4) the right to judicial review of the final decision of the board, NEB. REV. STAT. § 84-917(1) (Reissue 1966). Rules of legal evidence are not required by the act, enabling the board to admit evidence "which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." NEB. REV. STAT. § 84-914(1) (Reissue 1966). Final decisions by the board must be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law, NEB. REV. STAT. § 84-915 (Reissue 1966), and are entitled to de novo review by the district court without a jury, NEB. REV. STAT. § 84-917(5) (Reissue 1966).

[113] NEB. REV. STAT. § 29-2602 (Reissue 1964); NEB. CONST. art. 4, § 13 (1920).

expertise into the decision.[114] Such a professional parole board, however, has been an impossibility because of Article 4, section 13 of the Nebraska Constitution,[115] which made mandatory the ex-officio board. But on November 5, 1968, the Nebraska electorate resoundingly ratified an amendment to the constitution[116] which enables the legislature to establish a Board of Parole and to prescribe the qualifications for board members.[117] It should be noted that the amendment is merely permissive, it does not of itself alter the present composition of the board due to the codification of the ex-officio board in section 29-2602 of the Nebraska Revised Statutes.[118] But it does seem probable that legislation providing for a professional parole board will be forthcoming since the present officials manning the board recognize that they lack both the time and expertise to properly perform this function and are encouraging legislative change.[119] The feasibility of any realistic extension of

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114 While there are three states which combine ex-officio members and citizen representation on their parole boards, only Nebraska and Wyoming have completely ex-officio parole boards. It is worthy of note that Nebraska ranks 47th and Wyoming ranks 49th among the states with regard to parole rates (percentage of those released on parole/all persons released). Nebraska's parole rate of 20.1% falls far short of the national average of 60.1%. U.S. Dep't of Justice, Fed. Bureau of Prisons, *National Prisoner Statistics: Prisoners in State and Federal Institutions for Adult Felons, 1964*, 38 NAT. PRISONER STATISTICS BULL. 11 (1965). The table has been reprinted in Task Force on Corrections, *supra* note 1, at 61. The Task Force Report forthrightly concludes that "ex-officio parole board members have neither the time nor the kind of training needed to participate effectively in correctional decision-making." Task Force on Corrections, *supra* note 1, at 66.

Conrad notes that the net effect of laymen making the release decision is frequently a reduction in the credibility of the correctional system's rehabilitation objectives. When an inmate does achieve substantial progress through institutional treatment, but is not released, the confidence of both inmates and clinicians suffer. J. CONRAD, CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES 53 (1965).

115 NEB. CONST. art. 4, § 13 (1920).

116 L.B. 561, 77th NEB. LEG. SESS. (1967).

117 The amendment does not affect the composition of the Board of Pardons or its pardoning power, but it does shift the parole power from the Board of Pardons to a separate Board of Parole to be established by the legislature.

118 NEB. REV. STAT. § 29-2602 and § 29-2604 (Reissue 1964).

119 The Governor's Commission on Law Enforcement and Criminal Justice has approved a legislative proposal for a professional Board of Parole, consisting of a full-time chairman and 2 part-time members. Lincoln Star, December 14, 1968, at 24, col. 3. *See also* Inaugural Address by Governor Norbert T. Tiemann, Jan. 5, 1967; Omaha World Herald, August 7, 1966, at 6-B, col. 1; Lincoln Evening Journal & Nebraska

procedural safeguards to parolees at their revocation proceedings, whether by judicial construction of NAPA or by future parole legislation, is dependent upon the establishment of a professional board of parole.

Unless there is some rational ground for distinguishing the status of the probationer from that of the parolee, it would seem that the marked discrepancy in the procedural safeguards granted in revocations of probation as compared with those provided in revocations of parole constitutes invidious discrimination violative of equal protection of laws.[120] Certainly the fact that the probation revocation decision is made by a different authority, a court rather than a parole board, does not provide a reasonable basis for dissimilar classification.[121] The argument most frequently advanced as justification for providing better procedural protection for the probationer is that he is generally a safer risk than the parolee. The premise of this proposition is that a parolee by definition has been refused probation by the sentencing judge on one of two grounds—"[e]ither his crime was one of those regarded as so heinous that the judge was prohibited by statute from granting probation, or the judge, when weighing the question of risk to the public versus rehabilitative potential, decided that this defendant was too dangerous to place on probation."[122]

State Journal, January 19, 1967, at 6, col. 1, March 30, 1967, at 5, col. 1, April 3, 1967, at 6, col. 1.

120 To a lesser degree this charge would appear valid against the Model Penal Code. The Code provides the probationer at his revocation hearing with the right to be represented by counsel, the right to hear and controvert the evidence against him, and the right to offer evidence in his defense. MODEL PENAL CODE § 301.4 (Proposed Official Draft, 1962). The Code, in contrast, only permits the parolee to "advise with his own legal counsel" at the parole revocation hearing. MODEL PENAL CODE § 305.15 (Proposed Official Draft, 1962). No rationale is stated to explain the disparity in the procedural safeguards authorized for the two proceedings, but there are indications that the decision was based on administrative convenience. *See* 33 ALI PROCEEDINGS 259 (1956).

121 In Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959), the Utah Supreme Court held that a hearing is necessary for revocation of probation, as well as for revocation of parole. "Whether the defendant be placed on probation or parole, and by whatever method this is effected, the fundamental and controlling consideration is the status of the defendant in relation to the court and its authority. The rights and duties depend upon the nature of that relationship. This is determined by what is done and the purpose thereof, rather than upon the technical aspects of the ritual by which it is accomplished." *Id.* at 9, 347 P.2d at 558.

122 Comment, *The Rights of the Probationer: A Legal Limbo*, 28 U. PITT. L. REV. 643, 650-51 (1967) (footnotes omitted).

C. Equal Protection for the Nebraska Parolee

1. *The Essential Identity of Probationer and Parolee*

Before examining the merits of the proposition that a parolee is not as safe a risk as a probationer, we must first determine whether such a distinction, if valid, has "some relevance to the purpose for which the classification is made."[123] For if the rationale underlying the preferential treatment afforded probationers as compared to parolees is deemed arbitrary, the state of Nebraska's discrimination against the parolee is a denial of equal protection of laws.[124]

The relevance of the risk theory to a decision on what procedural safeguards are needed in making the factual determination of whether a parolee has violated the conditions of his parole appears hard put for justification in light of the United States Supreme Court's recent decision in *Baxstrom v. Herold*.[125] In *Baxstrom*, a prisoner in a New York Department of Correction hospital for mentally ill prisoners was recommitted civilly as he neared the end of his criminal sentence without the jury review of the determination as to his sanity which is granted all others civilly committed under the New York Mental Hygiene Law. The Court found that the hospital's classification of the prisoner as criminally insane "may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*."[126] Therefore, the denial of judicial review before a jury of the factual question of the prisoner's mental illness on the grounds that he was dangerous and had "proven criminal tendencies" was found to be capricious and violative of the equal protection clause.

Where fundamental rights and liberties are at stake, classifications which might invade, restrain, or deprive one of his liberty must be closely scrutinized and carefully confined.[127] Probation and parole are in substance identical, providing for the conditional

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[123] Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

[124] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Perhaps the most meaningful analysis of the equal protection test of "arbitrary classification" can be achieved by recognizing that it is almost indistinguishable from the substantive due process test of "unreasonable regulation." *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1456 (1968).

[125] 383 U.S. 107 (1966).

[126] *Id.* at 111.

[127] Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966).

release of convicted criminals to society subject to revocation should they fail to conform to the required conditions.[128] The essential identity of the probationer and parolee was elucidated by Judge Celebrezze in his dissent to *Rose v. Haskins*:

> Each has been found guilty of a crime; each has been deemed worthy of rehabilitation; and each has been given a status that is considerably more desirable than that of a prisoner. When revocation is threatened, they all have the same interest in maintaining that status.[129]

The equal protection clause, like the due process clause, is not static[130] and extension of its protection to the parolee in the context of Nebraska parole revocation procedure seems clearly warranted.

2. *Can Parolees Be Rationally Classified as More Dangerous than Probationers?*

Even assuming that the proposed classification based upon the risk theory might be a rational basis for differentiating the procedural safeguards afforded in probation and parole revocations, a recent study indicates that conclusions drawn as to the danger an offender presents to society on the basis of whether he was placed on probation or in an institution are of very uncertain validity because sentencing patterns vary radically among jurisdictions and even among judges.[131] These disparities are explained in part by the differences in quality of available correctional programs from jurisdiction to jurisdiction, but differences in judges' philosophies are also a contributing factor.[132] Yet, should a parolee

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128 Task Force on Corrections, *supra* note 1, at 86-88; Sklar, *supra* note 9, at 198 n.182; Kadish, *supra* note 21, at 814; Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 638-39 (1966); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16 at 176-77 (Supp. 1965).

129 Rose v. Haskins, 388 F.2d 91, 103 (6th Cir. 1968) (dissenting opinion) (footnotes omitted).

130 Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966).

131 CALIFORNIA DEP'T OF THE YOUTH AUTHORITY, ANNUAL STATISTICAL REPORT, 1965 (1966). For a synopsis of the report and its implications see Task Force on Corrections, *supra* note 1, at 18.

132 Task Force on Corrections, *supra* note 1, at 18. Efforts are being made within the judiciary to eliminate unjustified sentencing disparity. Sentencing councils are being introduced in multijudge courts to enable each court's judges to meet regularly to consider what sentences should be imposed on offenders whose cases are pending before the court. Levin, *Toward A More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966). Both federal and state judges are now participating in institutes devoted entirely to sentencing. *See* Youngdahl, *Developments and Accomplishments of Sentencing Institutes in the Federal Judicial System*, 45 NEB. L. REV. 513 (1966).

sentenced in the Scotts Bluff County District Court have lesser rights than a probationer from one of the Douglas County district courts merely because the Scotts Bluff judge felt that his probation officer was so heavily burdened that he could not adequately supervise another offender[133] or because the judge was not "sold" on probation?

As to the argument that the individual whose offense carried a legislatively mandated sentence prohibiting the availability of probation is not as safe a risk on parole as is the probationer on probation, correctional authorities are cognizant of the fact that the type of offense is not determinative of whether the offender is or is not a safe risk.[134] Hence, the *Task Force on Corrections* advocates reducing the various outright prohibitions on the probation of certain types of offenders because such restrictions prevent the differential treatment needed to "take into account all possible extenuating circumstances surrounding the commission of an offense or the circumstances of particular offenders."[135]

To grant the hypothesis that a parolee is not as safe a risk as a probationer almost compels one to accept the view that the correctional programs in our penal institutions are failures,[136]

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[133] Probation District 10, which includes Scotts Bluff, Banner, Kimball, Morrill, Cheyenne, Garden, and Deuel Counties, has but one probation officer. During 1967 the tenth district had a caseload which never declined below 230 probationers. STATE OF NEBRASKA—COMPOSITE REPORT OF TEN PROBATION DISTRICTS, 1967 (1968). This figure does not include parolees, with whom probation officers outside the Lincoln and Omaha areas are also charged with supervising. In addition, 113 presentence investigations were conducted by the District 10 officer in 1967.

While the Task Force on Corrections stresses that caseloads must vary to enable differentiation in supervision for offenders with different needs, it recommends that caseloads average 35 per officer. Task Force on Corrections, *supra* note 1, at 70. While District 10 may be the most heavily overburdened among Nebraska's probation districts, caseloads in the other districts are likewise significantly larger than the optimum. It should be noted that a part-time officer is being sought to assist in District 10. *See* STATE OF NEBRASKA—COMPOSITE REPORT OF TEN PROBATION DISTRICTS, 1967 (1968).

[134] *See* Task Force on Corrections, *supra* note 1, at 34.

[135] *Id.*

[136] An empirical study comparing the recidivism rates of 110 inmates who were released from the Florida prison system at the moment their convictions were overturned by the Gideon decision with the recidivism rates of 110 Florida inmates who were released at the expiration of their terms found that the Gideon motion release group recidivated less than its counterpart expiration release group. Eichman, *Impact of the Gideon Decision upon Crime and Sentencing in Florida: A Study of Recidivism and Socio-Cultural Change*, Florida

because the parolee has been exposed to such treatment while the probationer has not. While most correctional authorities would concede that any rehabilitation accomplished in prison has often been in spite of the prison environment, not because of it,[137] this shortcoming does not necessarily increase the risk factor of parolees. Regardless of the institutions' present potential for rehabilitating prisoners, Dr. Glaser's studies indicate that incarceration may deter inmates from future crime.[138] In sharp contrast to popularly held notions that recidivism rates may easily exceed fifty per cent, Glaser's initial research leads him to postulate that perhaps two-thirds of the men released from prison via parole and ultimate discharge do *not* return.[139] In measuring the risk potential of inmates, Glaser's conclusion that "[a]t least ninety per cent of American prison releasees seek legitimate careers for a month or more after they leave prison"[140] is of substantial significance. For if ninety per cent of all prisoners seek to go straight upon discharge, it seems reasonable to surmise that very few parolees will immediately return to criminal ways upon their release for supervision in the community.[141] Despite the incompleteness of Glaser's work, it provides solid support for those who advocate intensive supervi-

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Division of Corrections, Research and Statistics Section, Research Monograph No. 2, pp. 71-73 (1966).

"If taken to its logical conclusion, the proposition which Mr. Eichman's research supports is shocking indeed. Boldly stated it is that if we, today, turned loose all of the inmates of our prisons without regard to the length of their sentences and, with only some exceptions, without regard to their previous offenses, we might *reduce* the recidivism rate over what it would be if we kept each prisoner incarcerated until his sentence expired. While of course this much cannot be claimed for the Florida study, and is not even suggested by its author, at the very least it underscores the need for reexamination of the purposes and consequences of present sentencing practices." ADVISORY COMMITTEE ON SENTENCING AND REVIEW, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 59 (Tent. Draft, 1967).

137 Leopold, *What Is Wrong With the Prison System?*, 45 NEB. L. REV. 33, 42 (1966).

138 *See* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

139 *Id.* at 24.

140 *Id.* at 475.

141 Where a state has a mandatory release statute requiring all prisoners to experience some supervision in the community under parole rather than outright discharge upon the expiration of their sentences, the proportion of parolees returned to prison tends to increase. But it should be recalled that revocation of parole is often on a technical violation of conditions, rather than upon the conviction or accusation that the parolee has committed a new felony. *Id.* at 27-31.

sion of the parolee during his first months of freedom,[142] and it should caution those asserting that the risk posed by parolees is sufficiently greater than that presented by probationers as to rationally justify the state's provision of a hearing and counsel for probation revocations with its denial of these safeguards in revocations of parole. In light of Dr. Glaser's studies indicating that the experience of imprisonment does deter men from future crime[143] and our assumption that parole boards only parole those they consider reasonable risks, the premise that parolees are significantly worse risks than probationers appears on shaky ground.

Indeed, it has been suggested that parole boards' release decisions are better considered than those of most sentencing judges due to the boards' correctional expertise and its advantage in having before it not only the pre-sentence report, which was available to the judge as a decisional aid, but also the individual's institutional record showing his adaptation to institutional life,[144] and hopefully an examination report by a psychiatrist or psychologist. This informational advantage of parole boards is most apparent in the many cases in which the offender's conviction is based on a guilty plea resulting from a plea bargain.[145] Negotiated guilty pleas, whether for the purpose of reducing the potential maximum sentence or for a specific promise of probation,[146] complicate the release decisions of courts and parole boards alike in that the result is usually a misleading conviction label. Since courts exercise little or no control over charge reduction,[147] judges often have scanty information about the crime or the defendant, leaving them with a

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[142] *See* Task Force on Corrections, *supra* note 1, at 68.

[143] Following this theory, many courts do impose a short jail term as a "condition" to probation prior to the start of the probationary period. *See* fact sketch of Mempa v. Rhay, supra note 18. The propriety of such commitments has been questioned, however, due to the incomplete research on the deterrent effects of imprisonment and particularly in those instances where a jail term may cause the offender to lose his job. Task Force on Corrections, *supra* note 1, at 34-35.

[144] Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 640 (1966). It is not contended that the parole decision should be made upon the prisoner's adjustment to the controlled atmosphere of the prison, but it is submitted that the inmate's institutional record will often reflect his prospects for adjusting and integrating into the community.

[145] It has been estimated recently that nearly 90% of all convictions are the result of guilty pleas and, although precise data is not available, it is known that a substantial number of guilty pleas are the product of negotiation. Task Force on The Courts, *supra* note 30, at 9.

[146] *See generally* Enker, *Perspectives on Plea Bargaining* in Task Force on The Courts, *supra* note 30, 108-19.

[147] *Id.* at 109. For a discussion of the judiciary's role in plea bargaining see *id.* at 117-18 and Task Force on The Courts, *supra* note 30, at 12-13.

meager basis from which to make their sentencing dispositions.[148] When one who has struck a plea bargain subsequently is considered for parole, this same lack of information concerning the offense makes the parole decision more difficult,[149] but correctional theory today recognizes that it is the offender's potential for making a successful adjustment to society which determines his readiness for parole rather than the nature of the offense which he committed.[150] Since the primary focus in granting a conditional release, whether probation or parole, is on the offender instead of his offense, the conclusion is compelling that the professional parole board with its experience and training and its informational advantage in the form of an institutional record and psychiatric tests will generally make a wiser release decision in granting paroles than will most judges in granting probations.

Since there is no realistic rationale for differentiating the revocation safeguards granted probationers from those granted parolees, the establishment of such a dichotomy by judicial construction of the Nebraska probation statutes is arbitrary and violative of equal protection.[151] However, until courts expressly discontinue their almost uniform denial that a parolee has any constitutional rights, it would appear prudent to discuss the inclusion or exclusion of particular trial-type procedures in terms of possible legislation. Legislative proponents of such procedural safeguards should strive to ensure that the procedural elements enacted do not conflict with the purposes of the revocation hearing. Any discussion of these purposes necessitates an examination of the aims of parole for theoretically "a decision to revoke must be regarded as a decision that desired goals would no longer be served by continuing parole in a particular case."[152] Therefore, in contemplating legislative implementation of parole revocation safeguards, lawmakers should seek to enact only those procedural elements which further the dominant aims of parole. More specifically, it is submitted that trial-type procedures "should be incorporated only to the extent that they do not interfere with . . . the establishment of a basis for deciding what is appropriate rehabilitative treatment."[153]

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148 Enker, *Perspectives on Plea Bargaining* in Task Force on The Courts, *supra* note 30, 109-10.

149 *Id.* at 110.

150 Article 4, section 13 of the Nebraska Constitution prohibits the parole of offenders convicted of treason or impeachment, however.

151 *See* Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 653 (1966).

152 Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 370 (1962).

153 *Id.* at 373.

IV. LEGISLATING PROCEDURAL FAIRNESS WITHOUT HINDERING REHABILITATION

The two revocation functions of a board of parole consist of a factual determination to ascertain whether there has been a violation and of an evaluation of the violator's rehabilitation potential to discover whether he is such a bad risk that his parole should be revoked.[154] The board must not only determine what has happened but also must construct "a total image of an individual's situation" in order to predict what is likely to happen.[155] While proof of a parole violation is relevant to the revocation decision primarily in that it establishes cause for revocation, it also sheds light upon "the ultimate issue of what the parolee is likely to do after the hearing."[156] Consequently, the need for accurate fact-finding cannot be discounted for such predictions depend in large part upon the thorough gathering of past and present facts. It is generally agreed that when a genuine factual dispute arises as to whether a parole violation has occurred, a hearing which embodies the following minimal procedural elements is needed to ensure accurate fact-finding:[157] (1) the right to reasonable notice of the precise charges; (2) the right to present evidence and witnesses;[158] and (3) the right to counsel,[159] including counsel appointed by the parole board when necessary. It should be recalled that the probationer in Nebraska presently has these safeguards at his revocation hearing.[160]

The necessity of providing notice and counsel has been well documented earlier. However, there is a practical problem in allowing parolees to present witnesses which arises whenever the pa-

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154 Note, *Rights of the Federal Parolee Threatened with Parole Revocation*, 1964 WASH. U. L.Q. 335, 351 (1964).

155 Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 372 (1962).

156 *Id.*

157 *Id.* at 373-75; Task Force on Corrections, *supra* note 1, at 88; Sklar, *supra* note 9, at 197-98; Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158, 175 (1955); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16 at 178-79 (1965 Supp.).

158 E.g., ALA. CODE tit. 42, § 12 (1959); FLA. REV. STAT. § 947.23(1) (1967); MICH. STAT. ANN. § 28-2310(1) (1968 Supp.); WASH. REV. CODE ANN. § 9.95.120 (1961).

159 There are no statutes expressly providing indigent parolees with a right to appointed counsel. And only a few revocation statutes are clear that a parolee can be represented by retained counsel. D.C. CODE ANN. § 24-206 (1961); MONT. REV. CODE ANN. § § 94-9838, 94-9835 (1967 Supp.); W. VA. CODE ANN. § 62-12-19 (1966); and the statutes of Alabama, Florida, Michigan, and Washington, cited *supra* note 158.

160 *See* text accompanying footnotes 72-83.

rolee's locale is a substantial distance from the place where the board holds its hearings. This problem would be even more acute should parolees be allowed to confront and cross-examine adverse witnesses. Of course, the difficulty can be alleviated by use of compulsory subpoenas, but this is costly and works an inconvenience on those citizens, police officers, and parole officers called upon to appear. It has been suggested that the board in such cases should move the revocation hearing to the parole locale in the interest of increasing its fact-finding efficiency.[161] Instead of burdening the board with such costly and time-consuming trips, some states have employed professional examiners to conduct distant hearings for the board.[162] The examiners oversee the construction of the record and recommend whether to revoke or not, but the ultimate decision-making power remains with the board of parole.

A more difficult determination is whether the parolee should be allowed to confront and cross-examine adverse witnesses. It has been advanced that because this right would require the board to disclose its sources of information, valuable witnesses may be discouraged from presenting their evidence and the board may be deprived of information pertinent to judging the parolee's rehabilitation potential.[163] While it is most desirable that all sources of information be developed, a revocation procedure which permits a faceless informer to give information against an accused and then shields that witness from cross-examination would be contrary to the fundamental precepts of our system of justice, which makes no exceptions even when there exists a possibility of reprisal against that witness.[164] The possible loss of information which might follow from requiring the parole board to disclose its sources of information

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161 Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 376-77 (1962); Sklar, *supra* note 9, at 195. *E.g.*, 28 C.F.R. § 2.40 (1968).

162 It is recognized that usage of examiners by parole boards suffers from the defect inherent in all institutional decision-making—the inability of the parolee to confront the ultimate authority directly. In some instances this problem might be alleviated by delegating the examiner's role to one of the parole board members. Such a proposal would not be infeasible in Nebraska due to the relatively small parole population and the heavy population concentration in the eastern third of the state near the penal complex in Lincoln. It has been suggested that in the large California parole system such local hearings might be conducted by the district parole supervisor, with the final revocation decision reserved for the paroling authority. Milligan, *Parole Revocation Hearings in California and the Federal System*, 4 CALIF. WEST. L. REV. 18, 33 (1968).

163 Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 375 (1962).

164 "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously

and the probable complication of the revocation proceeding by allowing cross-examination of the state's witnesses would appear to be outweighed by the need to maintain a system of justice which is open to public scrutiny.[165] Clearly, the right to cross-examine is imperative if the parolee is to be guaranteed a fair hearing. Furthermore, since the information which it is feared will be lost by allowing cross-examination is most likely to be information relevant to the parolee's rehabilitation potential, rather than factual information concerning the alleged violation,[166]it is possible that a workable compromise can be effected through the medium of a bifurcated revocation hearing.[167]

The initial, more formal stage of such a hearing would determine whether a violation has been committed, while the second stage of the hearing would seek to evaluate the parolee as a parole risk.[168] The parolee would be afforded the right to confront and cross-examine adverse witnesses only in the first stage of the hearing. In those cases in which there is no factual dispute, as when the parolee has admitted the violation or has been convicted of another crime while on parole, this first stage would be omitted. There is some evidence which indicates that the actual number of parole revocations involving factual disputes is small,[169] so authorization of cross-examination in the first stage of the hearing should not unduly hamper the board's disposition of revocation cases. However, should the number of parolees contesting violation allegations rise significantly upon being awarded counsel and the other recommended safeguards, the parolee's unqualified right to cross-examine might of necessity require some modification, such as limiting it to the extent the parole board deems desirable to bring out the facts.[170]

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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 on the individual so that he has an opportunity to show that it is untrue.... This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases... but also in all types of cases where administrative and regulatory actions were under scrutiny." Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

165 Sklar, *supra* note 9, at 195.

166 Most parole officers, in the opinion of the author, will realize that the determination of a parole violation is analogous to the adjudication of original guilt and will be hesitant to make a violation charge unless they feel the evidence and witnesses will stand up in a hearing.

167 Note, *Rights of the Federal Parolee Threatened with Parole Revocation*, 1964 WASH. U. L.Q. 335, 354 (1964).

168 *Id.* at 351-54.

169 *See* Sklar, *supra* note 9, at 192 n.138, 193 n.143, 197 n.176.

170 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16, at 179 (1965 Supp.). Michigan may be moving toward this position as it recently repealed

The second step in the hearing will only be reached should a violation be proved or admitted in the first stage.[171] It would embrace a subjective policy determination very similar to the original parole granting decision—whether despite the violation the parolee's generally good behavior and progress or the extenuating circumstances of the breach merit continuance of his parole. While it has been suggested that the parolee only be afforded a chance to explain his conduct,[172] a better approach would permit the parolee's witnesses to also present the positive aspects of his behavior.[173] This would enable full presentation to the board and would somewhat counterbalance the practicality that due to the limitations on parole officers' time their reports as to the parolee's behavior will concentrate on its negative aspects.[174]

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its statute providing parolees with the right to cross-examine adverse witnesses at their parole revocation hearings. Pub. Acts 1968, No. 192. It seems probable that administrative convenience weighed heavily in bringing about this procedural change, but as this article goes to press the author has been unable to obtain either the legislative history concerning this procedural modification or any new rules which may have been prescribed by the director of corrections under the replacement statute's express delegation of rule-making authority.

The current statute affords the parolee a hearing in accordance with the rules and regulations adopted by the director of corrections at which the parolee "shall be given an opportunity to appear personally or with counsel and answer to the charges placed against him." MICH. STAT. ANN. § 28.2310(1) (1968 Supp.). Although cross-examination has been removed as a statutory right, it appears that the director of corrections can implement and/or qualify the right through his rule-making power.

171 If rehabilitation were the sole purpose of parole, it might follow that parolees should be recommitted, even though they have not violated any condition of their paroles, when there has been a change in their circumstances which seriously diminishes the possibility of help in the outside world. Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 378 (1962).

However, such a view is not too likely to prevail because of the not unfounded fear that the state's rehabilitative aims when not harnessed by minimal legal controls can lead to a malevolent tyranny perpetrated in the name of humanitarianism, C. S. Lewis, *The Humanitarian Theory of Punishment*, reprinted in DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW: PROBLEMS FOR DECISION IN THE PROMULGATION, INVOCATION AND ADMINISTRATION OF A LAW OF CRIMES 499 (1962). The Nebraska Supreme Court's recent decision in State v. Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968), cannot help but swell the numbers of those adhering to Lewis' theory. *See generally* Note, *The Sterilization of the Mentally Deficient— A Reasonable Exercise of the Police Power?*, 47 NEB. L. REV. 784 (1968).

172 Sklar, *supra* note 9, at 197.

173 Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 375-76 (1962).

174 *Id.*

Provision of the suggested safeguards will not turn parole revocation hearings into legal battlegrounds. There are no voices urging that there be jury trials or that determinations of violations require proof beyond a reasonable doubt. The experiences of Washington and Michigan, which provide a hearing and the opportunity to appear with retained counsel, indicate that provision of procedural safeguards at parole revocation proceedings does not discourage parole boards from granting paroles.[175] Instead, the proposed procedure implemented through a bifurcated hearing will guarantee the parolee a fair opportunity to meet the charges against him and will both expand and authenticate the information available to the parole board, thereby improving the accuracy of the revocation decision.[176]

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[175] *See* text accompanying footnotes 88-89.

[176] It is submitted that the following statute embodies the needed safeguards to ensure the parolee a fair hearing and affords the parole board sufficient flexibility to make a meaningful evaluation of the parolee's rehabilitation potential:

(1) Whenever a paroled prisoner is accused of a violation of his parole, he shall be entitled to a prompt hearing of such charges before the Board of Parole, and in no case shall such hearing be held more than 30 days after the arrest of the parolee. The revocation hearing shall consist of two stages. Stage 1 of the hearing shall be a factual determination by the board of whether the parolee did in fact violate the conditions of his parole. If no violation of parole is found in Stage 1, as determined by a preponderance of evidence, the parolee shall be reparoled and the hearing shall be concluded. When the parolee has admitted the parole violation or has been convicted of another crime which would be a felony or misdemeanor under the laws of this state while on parole, the hearing will omit Stage 1 and begin with Stage 2. Stage 2 of the hearing shall consist of a policy determination by the board of whether the parolee represents such a bad risk that his parole should be revoked due to the violation. The board may order revocation of parole if it is satisfied that the parolee has failed, without a satisfactory excuse, to comply with a substantial requirement imposed as a condition of his parole and that the parolee's violation of condition involves conduct indicating a substantial risk that the parolee will commit another crime. Parole revocation shall be by majority vote of the board.

(2) During Stage 1 of the parole revocation hearing, the parolee shall have the following rights:

(a) reasonable notice of the precise charges, which will state the time, place, and issues involved;

(b) representation by counsel, including counsel appointed by the Board of Parole should the parolee be unable to otherwise procure such legal assistance;

(c) presentation of evidence and witnesses in his favor;

(d) confrontation and cross-examination of witnesses who are produced against him [as the Board of Parole deems it desirable to bring out the facts]; and

(e) if it shall appear to the satisfaction of the board that there is a material witness in his favor without whose testimony he cannot

V. CONCLUSION

While *Mempa v. Rhay* demands that probationers be granted a hearing and an attorney at their revocation proceedings, it must be conceded that the Court's weak articulation of its rationale prevents truly persuasive application of the *Mempa* holding to parole revocations. Nonetheless, the Court's rationale in cases such as *Gault* and *Mathis* hints that such a decision may not be long in forthcoming. While it is more conjectural whether additional procedural safeguards are required, the right of cross-examination and the privilege against self-incrimination seem so fundamental as to also be within the purview of due process.

The possibility of the judiciary imposing inflexible and unrealistic requirements on revocation proceedings is a real one, but its probability will diminish significantly should correctional officials initiate adequate procedural reforms on their own. With legislative or administrative implementation of such internal controls,[177] it is quite possible that maximum legitimate discretion can be retained in the hands of correctional experts for it will be less necessary for courts "to intervene to define necessary procedures or to review the merits of correctional decisions."[178] Such action should not be taken begrudgingly for a revocation hearing conducted with the proposed safeguards will further the correctional goal of rehabilitation by ensuring that the parolee is given a fair hearing and should also prove economical in that it will make certain that those parolees who have not committed parole violations are continued on parole.

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safely proceed to hearing, and that such paroled prisoner is without funds and cannot obtain the means to procure the attendance of such witness at the place of hearing, the board shall have power to issue a subpoena to compel the attendance of such witness, or any other witness.

(3) During Stage 2 of the parole revocation hearing, the parolee shall have the following rights:

(a) to be informed of the evidence against him;

(b) to advise with counsel;

(c) to present evidence and witnesses in his favor; and

(d) to explain or offer rebuttal evidence.

177 While the Omnibus Treatment and Corrections Bill approved in principle by the Governor's Commission on Law Enforcement and Criminal Justice is an enlightened piece of correctional legislation in its entirety, it makes no effective change in the present Nebraska parole revocation procedure. While the proposed statute requires that the board of parole find a parole violation before it can revoke parole, the board can make this determination ex parte as a revocation hearing is left to the discretion of the board. Omnibus Treatment and Corrections Act § § 46-47 (Proposed Draft 6, 1968), L.B. —, 80th NEB. LEG. SESS. (1969).

178 Task Force on Corrections, *supra* note 1, at 83.

In addition to improving decision-making, fair hearings will increase the parolee's confidence that correctional officials are interested in his success. A fair hearing will benefit the parolee even in terms of treatment, for by directly involving him in a decision vital to his interests, his self-reliance and problem-solving abilities will be strengthened.[179] One of the practical realities encouraging the expanded use of parole has been the great cost saving achieved by the state when it supervises a man on parole rather than maintaining him in prison. Recent estimates point toward a cost figure for the state in supervising a parolee that is but one-tenth the cost of keeping a convict imprisoned.[180] And these figures neither include the reduction in welfare costs when a man released on parole begins to support his family again nor the added tax revenues to the state as a result of the parolee's earnings. Therefore, economic considerations likewise demand that great care be taken to prevent arbitrary re-incarceration of an individual whom the parole board has previously found to represent a reasonable risk to society.

But the foremost reason for extending procedural safeguards to the revocation proceeding is that parole should represent a guarantee to the parolee that he will not be reimprisoned unless he violates certain defined conditions. The board of parole in granting his conditional release exhibited its confidence in the parolee's rehabilitative potential. Revocation without affording the parolee the opportunity to truly meet the violation charges is totally alien to the parole concept for it prevents any re-evaluation of the individual's rehabilitative potential. It is perhaps a greater injustice to reimprison one who has not committed an alleged parole violation or who having committed the violation does not represent an unacceptable risk to society than it is to deny parole to the inmate who represents a minimal risk. It should not therefore be forgotten that although parole is a privilege, there is no justification either in terms of due process or correctional objectives to revoke a man's parole arbitrarily.[181]

Russell E. Lovell II, '69

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[179] *Id.* at 64.

[180] *Id.* at 28; Comment, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 705-06 (1963).

[181] " 'One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.' " Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 894 (1961).