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CRIMINAL LAW COMMENTS AND CASE NOTES

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DISCRETIONARY POWER AND PROCEDURAL RIGHTS IN THE GRANTING AND REVOKING OF PROBATION

JOEL BASSETT

Current emphasis in the criminal law has shifted from its punitive purpose to the rehabilitative and preventive.¹ While the prevention of crime was once considered to serve a prophylactic effect,² today focus is on the treatment of offenders and the factors which bring about criminal behavior.³ Probation today stands as both an example and an instrument of this new emphasis.

Probation is designed to promote rehabilitation.⁴

¹ See generally, *THE PRISON—STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE* (D. Cressy ed. 1961).

² Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176 (1952).

³ See, e.g., PRESIDENT'S COMMISSION ON CIVIL DISORDERS (1968); ADVISORY COMMITTEE OF EXPERTS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, INTERNATIONAL ACTION IN THE FIELD OF SOCIAL DEFENCE (1966).

⁴ *Burns v. United States*, 287 U.S. 216, 220 (1932); *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945).

Probation and parole are two types of conditional liberty. Probation occurs when a convicted criminal is allowed to remain free in society after his conviction, subject only to the supervision of a trained officer and certain additional requirements. This is done by way of a suspended sentence wherein either the imposition or the execution of the sentence is postponed. Parole, on the other hand, occurs after the criminal has served part of his sentence. It is usually administered by an executive agency rather than the courts. Confusion begins when one of the conditions imposed on a probationer is that he serve a portion of his sentence before returning to society. See, e.g., *Mempa v. Rhay*, 389 U.S. 128 (1967); *Breeding v. Swenson*, 240 Minn. 93, 60 N.W.2d

Prolonged imprisonment may impede rather than aid the correction of an individual's criminal predispositions⁵ since many prisons lack the facilities necessary to treat individual prisoner's needs.⁶ Probation, on the other hand, provides the reward of conditional liberty to those who can demonstrate the ability and willingness to act in a lawful manner over a certain period of time (usually five years or less).⁷ The probationer need never serve a

4 (1953); *People v. Jennings*, 129 Cal. App.2d 120, 276 P.2d 124 (Dist. Ct. App. 1954). Although this is called "probation", it might be more consistent to treat these situations as judicial recommendations to the parole board. Such a distinction may be more academic than useful due to the common juxtaposition of probation and parole in legal theory. See Weihs, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L.C. & P.S. 531 (1942). But the rights of a probationer and a parolee are distinguished in *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721. (1945). RUBIN, *THE LAW OF CRIMINAL CORRECTION* (1963), provides a general discussion of the area.

⁵ *THE PRISON—STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE*, 23 (D. Cressy ed. 1961).

⁶ NATIONAL PROBATION AND PAROLE ASSOCIATION, *Forward to 1955 STANDARD PROBATION AND PAROLE ACT* at vi (1955).

⁷ E.g., 18 U.S.C. §3651 (1951) provides a maximum probation period of five years. In 1965, according to ADMIN. OFFICE OF THE UNITED STATES COURTS 1966 ANN. REP. 124, the median period imposed was 24.5 months and the median period served was 20.2 months, 17% being discharged prior to the original expiration date of their probation.

day in prison.⁸ The conditions imposed on his liberty and the guidance afforded by a trained officer provide the necessary control, direction, and encouragement for this rehabilitation process. With this help, the probationer is given the opportunity to correct his anti-social behavior within, rather than apart from, the social context and tensions which may foster problems. This process attempts to facilitate the criminal's re-entry into society as a productive member.⁹ In short, the strength of the probation system reflects emphasis on the *positive treatment* of the criminal *within* society rather than the *punitive separation* of him *from* society. In this way, probation benefits both the probationer and society.¹⁰

Congress and all of the state legislatures have recognized the soundness of this rehabilitative approach by enacting statutes creating probation.¹¹ Nonetheless, few statutes are specific as to when or how to grant or revoke probation;¹² instead, individual trial courts have exercised broad discretionary powers.¹³ As will be seen, this discretion has occasionally been abused and the time has come to make a fresh analysis of the function it serves and of the safeguards available against arbitrary judicial action.

GRANTING PROBATION

Procedure

Generally a criminal may be placed on probation or given a suspended sentence after trial,¹⁴

⁸ *Roberts v. United States*, 320 U.S. 264, 273 (1943) (dissenting opinion).

⁹ Society's commitment to the goals of probation is shown by the fact that 144,000 persons were placed on adult probation by state courts in 1965. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE (hereinafter referred to as PRESIDENT'S CRIME COMMISSION), TASK FORCE REPORT: CORRECTIONS 202 (1967).

¹⁰ In 1966, the cost of supervising a person on probation for one day was only 67¢; the cost of imprisonment for one day was \$7.54, disregarding the added benefits of probationer's income, family support, and avoidance of the prison stigma. ADMIN. OFFICE OF THE UNITED STATES COURTS 1966 ANN. REP. 128.

¹¹ The first probation law was enacted in 1878, MASS. ACTS ch. 198 (1878). Subsequently, Congress passed The Federal Probation Act of 1925, ch. 521, §725, 43 Stat. 1260. RUBIN, *THE LAW OF CRIMINAL CORRECTION* (1963), and *Roberts v. United States*, 320 U.S. 264 (1943), give accounts of the origin of probation in the United States.

¹² Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311 (1959); Brief for National Legal Aid and Defender Association as *Amicus Curiae*, Appendix A, *Mempa v. Rhay*, 389 U.S. 128 (1967).

¹³ *Burns v. United States*, 287 U.S. 216 (1932); *Kirsch v. United States*, 173 F.2d 652 (8th Cir. 1949); *People v. Oskroba*, 305 N.Y. 113, 111 N.E.2d 235 (1953).

¹⁴ A few countries have permitted imposition of

whereby either the *imposition*¹⁵ or the *execution*¹⁶ of the sentence is postponed. Under either type, if the probationer abides by the conditions placed on his liberty, he will be released.¹⁷ Nonetheless, the distinction between suspended imposition and suspended execution may be significant in determining procedural rights upon revocation of probation. The Supreme Court of the United States has held recently that a probationer has a right to counsel in probation revocation hearings at which a deferred sentence may be imposed.¹⁸ But several lower federal courts have distinguished this case and denied the right to counsel at such hearings when only the execution of the sentence had been deferred.¹⁹

The imposition of a sentence after probation revocation is unlike most sentencing situations in that the court has knowledge of defendant's post-conviction activities. This may influence the length of the sentence if he has proved to be unresponsive to correctional measures.²⁰ To avoid

probation before trial in instances where there is no doubt of the person's guilt. U.N. DEP'T OF SOC. AFFAIRS, DIVISION OF SOCIAL WELFARE, PRACTICAL RESULTS AND FINANCIAL ASPECTS OF ADULT PROBATION IN SELECTED COUNTRIES, 38, 56 (1953) (Norway, Denmark, and the Netherlands). Although the person is spared the stigma of a criminal conviction, he is discouraged from attempting to prove his innocence. Such a procedure may have constitutional problems and, if used at all, should be restricted to youthful offenders.

¹⁵ See, e.g., *In re Perez*, 65 Cal.2d 224, 418 P.2d 6, 53 Cal. Rptr. 414 (1966); *People v. Price*, 24 Ill. App.2d 364, 164 N.E.2d 528 (1960); *Gebhart v. Gladden*, 243 Ore. 145, 412 P.2d 29 (1966); *Smith v. State*, 33 Wis.2d 695, 148 N.W.2d 39 (1967).

¹⁶ See, e.g., *Williams v. Commonwealth*, 350 Mass. 732, 216 N.E.2d 779 (1966); *Blea v. Cox*, 75 N.M. 265, 403 P.2d 701 (1965); *People v. Hamilton*, 26 A.D.2d 134, 271 N.Y.S.2d 694 (1966); *Perry v. Williard*, 247 Ore. 145, 427 P.2d 1020 (1967).

¹⁷ If the prisoner does not obey the conditions, he may be imprisoned. Twenty-five years ago in *Korematsu v. United States*, 319 U.S. 432, 435 (1943), the Supreme Court indicated that the difference between release and imprisonment was one of "trifling degree." The suspended imposition of sentence is in reality another form of indeterminate sentence, allowing the length of a criminal's sentence to depend on the measure of his improvement.

¹⁸ *Mempa v. Rhay*, 389 U.S. 128 (1967).

¹⁹ E.g., *United States ex rel. Bishop v. Briery*, 288 F. Supp. 401 (E.D. Pa. 1968); *Holder v. United States*, 285 F. Supp. 380 (E.D. Tex. 1968); *People v. Jones*, — C. 1.2d —, — P.2d —, 70 Cal. Rptr. 13 (1968); *Petition of DuBois*, 445 P.2d 354 (Nev. 1968).

²⁰ Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 495-6 (1962); Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 322 (1959).

Where the criminal is placed on probation under a suspended imposition of sentence, it is practically

this result, state courts could impose sentence at trial and only suspend its execution. Even if the same procedural safeguards are subsequently required for revocation of both types of probation, the convicted criminal who chooses probation should have the opportunity of knowing the alternative prison sentence. Such information might aid his rehabilitation by making him more willing to fulfill the conditions of the court's probation order.²¹

Selection

Because funds and supervisory personnel are limited, it is particularly important to place on probation only those criminals with potential for reform. Many courts use presentence investigation reports as aids in determining who should be granted probation.²² Although the use of such reports is generally accepted, it is still difficult to determine factors in assessing a person's potential for rehabilitation through conditional liberty.²³ Four

impossible to prove that probationer received a greater sentence upon revocation than he would have received immediately after trial. However, in a few cases of probation under a suspended execution of sentence there have been attempts to raise the sentence which was originally imposed. One federal court in *Remer v. Regan*, 104 F.2d 704, 705 (9th Cir. 1939), stated that such was permissible. Another federal court agreed in *Roberts v. United States*, 131 F.2d 392, 393 (5th Cir. 1943), but on appeal the Supreme Court of the United States found that Congress did not intend such in the Federal Probation Act of 1925, thus reversing while reserving the question of double jeopardy under the Fifth Amendment. See *Roberts v. United States*, 320 U.S. 264, 265 (1943); U.S. DEP'T OF JUSTICE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, vol. 1 at 13 (1939).

²¹ Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 495 (1962).

²² ADMIN. OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT (1965); Rubin, *Probation and Due Process of the Law*, 11 CRIME & DELINQUENCY 30 (Jan. 1965).

²³ Statistics taken from numerous courts within a large jurisdiction may tend to mask variations which exist among individual courts. Even where federal and state statistics remain reasonably constant, the use of probation among individual judges may vary from 5% to 70% of the cases before them. Rubin, *Probation and Due Process of the Law*, 11 CRIME & DELIN. 30, 33 (Jan. 1965). For example in 1966, Hartford, Connecticut, granted 2,120 new probation cases while Denver, Colorado, granted only 133. Brief for National Legal Aid and Defender Association as Amicus Curiae, Appendix B, *Mempa v. Rhay*, 389 U.S. 128 (1967).

An even greater variance exists as to the proportionate number of probationers who have their probation revoked. In Los Angeles, for example, there were 5,653 new probation cases and 4,027 revocations in 1966. But during the same year Philadelphia, Pennsylvania, granted probation to 4,233 while revoking only 249. Moreover, these figures are recurrent rather than abnormal. *Id.*

factors are commonly used in selection: age, prior record, current offense, and psychological stability.²⁴ There are also indications that criminals with good family relationships, consistency of occupation, and at least an average education have a better rehabilitation record when placed on probation than those without those characteristics.²⁵ More needs to be known about the factors which establish a criminal's potential for rehabilitation.

Once these factors which influence rehabilitation are isolated and understood, a significant change in the selection criteria may occur. For example, the crime which the individual committed is presently considered a critical factor in selection.²⁶ But the crime is not necessarily a relevant factor; it may be the symptom of certain underlying causes. If the rehabilitation criteria are isolated and recognized, the criminal's propensity for treatment may replace the crime itself as the major factor in selection for probation. As knowledge of proper treatment expands, more individuals may be placed on probation and returned to society as productive members; the prisons can become, "instead of mass custody centers, specialized and professionalized rehabilitation services for the relatively small number of offenders requiring institutional treatment."²⁷

Conditions Imposed

Some of the more serious, but as yet unanswered, legal problems in the granting of probation center around the nature of the conditions imposed. Some limitations must be imposed on the broad powers of the granting authority to prevent abuses of discretion.

In *People v. Turner*,²⁸ an individual convicted of the attempted sale of narcotics had been granted probation on the condition that he "immediately go to Buffalo State Hospital and be under care of Dr. Burnett." Probationer obeyed this directive but subsequently left the hospital, reporting to probation supervision on the following day. Almost four months later, probationer was arrested upon order of the trial judge and charged with vio-

²⁴ FEDERAL PROBATION, SOME FINDINGS FROM CORRECTIONAL CASELOAD RESEARCH 53 (1967).

²⁵ U.N. DEP'T OF SOC. AFFAIRS, *supra* note 14, at 84; U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, vol. 2, *Probation*, 335ff. (1939).

²⁶ See note 24, *supra*.

²⁷ NATIONAL PROBATION AND PAROLE ASSOCIATION, Forward to 1955 STANDARD PROBATION AND PAROLE ACT, at vi (1955).

²⁸ 27 A.D.2d 141, 276 N.Y.S.2d 409 (1967).

lating a condition of his probation by leaving the hospital without the consent of his doctor. Probationer's case history and the reports of his probation officer during this time show that he was leading a normal life:

This youth continues to demonstrate a sincere, cooperative, and mature attitude regarding the conditions of his probation imposed and no reports of misconduct or the use of narcotics have been received.²⁹

At the probation revocation hearing some evidence indicated that probationer was arrested because he, a Negro, was seeing a white girl and the girl's parents swore that he was inducing her to use drugs. The original trial judge conducted the hearing, despite suggestions that he disqualify himself and found that there had been a breach of conditions which compelled probation revocation.

The appellate court reversed the probation revocation and held that the appellant had the right to a definitive statement of probation conditions and also the right to appeal:

Thus, in finality, although the probation officer conceded on cross-examination that perhaps both he and appellant had misunderstood the terms of probation, the trial judge either had a mental reservation that appellant should not leave the hospital without the consent of the named doctor or this unexpressed condition was formulated and implemented to end the association between appellant and a female not of his race.³⁰

Justice was done in this case, but the danger posed by vague probation conditions is evident. In more general terms, *Turner* exemplifies the problem raised when the authority that grants probation has the power to impose and interpret whatever conditions it may choose.

Since the first probation law in 1878,³¹ statutes authorizing conditional liberty have been consistently silent on the type of conditions that may be imposed. The first federal probation act in 1925 authorized courts of original jurisdiction, when satisfied

... that the ends of justice and the best interests of the public, as well as the defendant will be subserved ... to place the defendant upon probation for such period and upon such terms and conditions as they may deem best.³²

Nearly all state statutes have followed a similar approach.³³ Only very recently have a few states, such as Illinois,³⁴ attempted to list possible conditions in their statutes. Even the listed conditions are merely suggestive: the Illinois probationer may be required to "perform or refrain from performing such other acts as may be ordered by the court."³⁵ Only the term of his probation and the amount of the fine are limited.

As a result of the lack of guidelines, probation authorities have at times lost sight of the goals of conditional liberty and fairness to the probationer. A few trial courts have imposed rather harsh conditions on a probationer's liberty.³⁶ For example, the sterilization of a syphilitic rapist has been up-

²⁹ Federal Probation Act of 1925, ch. 521 §725, 43 Stat. 1259.

³⁰ See Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964), for a listing of the probation and parole statutes in this country.

³¹ ILL. STAT. ANN. ch. 38 §117-2 provides as follows:

(a) A person admitted to probation shall be subject to the following conditions:

- (1) Not violate any penal statute or ordinance of any jurisdiction,
- (2) Not leave the State without the consent of the court,
- (3) Make a report to such person or agency and at such times as the court may direct and shall appear in person before the court at such time as the court may direct.
- (4) Execute a recognizance in accordance with the provisions of Article 110 of this Code.

(b) A person admitted to probation may be subject to the following conditions:

- (1) Imprisoned in a place of confinement other than a penitentiary for a period not to exceed one year and in no event to exceed the maximum penalty for the offense.
- (2) Pay within a period set by the court a fine not to exceed the maximum provided for the offense.
- (3) Pay the cost of the proceedings as set by the court.
- (4) Make restitution or reparation within the period of probation in an amount not to exceed actual loss or damage to property or medical expense resulting from bodily injury to person.
- (5) Perform or refrain from performing such other acts as may be ordered by the court.

³² *Id.*

²⁹ *Id.* at 412.

³⁰ *Id.* at 412.

³¹ MASS. ACTS ch. 198 (1878). For a general history of probation in the United States see RUBIN, *THE LAW OF CRIMINAL CORRECTION* (1963) and *Roberts v. United States*, 320 U.S. 264 (1943).

³⁶ See *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945), where a condition requiring a gift of blood to the Red Cross was invalidated. See note 37, *infra*.

held as a valid condition for his probation.³⁷ Some courts have attempted to further their regional interests by exiling probationers.³⁸

In addition, a probationer may not be adequately informed of the conditions. A number of probation revocations have been overturned for vague conditions.³⁹ But revocations based on implied conditions⁴⁰ or on the requirements of the probation statute⁴¹ have been upheld despite the fact that a probationer was not explicitly informed of them.

These defects are particularly serious in an area of the law which is devoted to rehabilitation and treatment of offenders. It would seem difficult to engender the proper respect for the laws in an individual who is being treated unfairly by them. His acceptance of probation as an alternative to imprisonment gives no justification for conditions which do not promote his rehabilitation.

In order to prevent these defects from recurring, some attitudes toward probation must be altered, and the discretionary power of the courts must be limited. Probation must no longer be viewed as quasi-judicial or administrative in nature.⁴² It is part of the criminal law, and the types of conditions that may be imposed should be brought into keeping with it. This calls for action by the federal and state legislatures or at least by the courts through judge-made law. Although probation is a "favor, not a contract",⁴³ limitations might be stated most clearly in contract terminology: conditions should be explicit, reasonable, and for an expressed maximum term.

The probationer should receive adequate notice of what is demanded of him.⁴⁴ Where a statute such

³⁷ *People v. Blankenship*, 16 Cal. App.2d 606, 61 P.2d 352 (1936).

³⁸ *State ex rel. Halverson v. Young*, 278 Minn. 381, 154 N.W.2d 699 (1967); *In re Scarborough*, 76 Cal. App.2d 648, 173 P.2d 825 (1946); *People v. Baum*, 251 Mich. 187, 231 N.W. 95 (1930).

³⁹ *People v. Turner*, 276 N.Y.S.2d 409 (1967); *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952).

⁴⁰ *Buhler v. Pescor*, 63 F. Supp. 632 (W.D. Mo. 1945).
⁴¹ *State v. Shyrock*, 86 Ohio App. 210, 89 N.E.2d 90 (1949); *People v. Hunter*, 42 Cal. App.2d 87, 108 P.2d 472 (1940).

⁴² See *Mempa v. Rhay*, 68 Wash. 882, 416 P.2d 104 and the opinion of the Supreme Court at 389 U.S. 128 (1967).

⁴³ *Burns v. United States*, 287 U.S. 216, 220 (1932).

⁴⁴ *Hollandsworth v. United States*, 34 F.2d 423 (4th Cir. 1929); *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951); *City of Lima v. Beer*, 90 Ohio App. 527, 107 N.E.2d 253 (1950); *State v. White*, 218 S.C. 130, 61 S.E.2d 754 (1950); *State v. Gooding*, 194 N.C. 271, 139 S.E. 436 (1927). *But cf. Kaplan v. United States*, 234 F.2d 345, 349 (8th Cir. 1956) (directions of trial judge to make disclosures to a grand jury); *Buhler v. Pescor*, 63 F. Supp. 632, 638 (W.D. Mo. 1945) (implied

as the Illinois probation statute⁴⁵ imposes certain conditions on all those granted conditional liberty, probationers should nonetheless be directly informed of these statutory conditions. It can be argued that a condition not to break the law should be implied in every grant of probation.⁴⁶ But, at most, this implied condition should only extend to illegal conduct which displays a failure to accept rehabilitative treatment and poses a definite risk to society. For example, this implied condition might prohibit only the commission of felonies.⁴⁷ At any rate, probation revocation based on such an implied condition should only occur after a proper adjudication of guilt in the new crime.⁴⁸

As exemplified by *Turner*,⁴⁹ vague conditions carry a potential danger of abuse which may lead the probationer to believe that he has been tricked even when the granting authority honestly concludes that the conditions which he intended to impose have been breached. These possible results are inconsistent with the goal of rehabilitation. Vague conditions also cause the courts problems of interpretation. Some courts have narrowly interpreted them so as to preserve the effectiveness of the restrictions as to other conduct.⁵⁰ Unfortunately, this does not solve the problems raised by such a condition. A better approach, taken by at least one court,⁵¹ would be to invalidate the condition altogether. This would probably deter their further use and largely eliminate the problem.

condition to act in a way "that will lead to his rehabilitation").

⁴⁵ See note 34, *supra*.

⁴⁶ *Whitehead v. United States*, 155 F.2d 460 (6th Cir.), *cert. denied*, 329 U.S. 747 (1946) (implied condition not to commit a felony); *Buhler v. Pescor*, 63 F. Supp. 632 (W.D. Mo. 1945) (same).

⁴⁷ See cases cited in note 46.

⁴⁸ See notes 85-87 and accompanying text.

⁴⁹ See notes 28-30 and accompanying text.

Other examples of vague conditions are found in: *Swan v. State*, 200 Md. 420, 90 A.2d 690 (1952) (defendant "should conduct himself in a law-abiding manner"); *State v. McBride*, 240 N.C. 619, 83 S.E.2d 488 (1954) (condition that "defendant be of good behavior and violate none of the laws of this state"); *Williams v. Harris*, 106 Utah 387, 149 P.2d 640 (1944) (condition that defendant "straighten up").

⁵⁰ *Swan v. State*, 200 Md. 420, 90 A.2d 690 (1952) (condition that probationer "conduct himself in a law-abiding manner" not breached by violating a statute against placing posters on private property without the owner's consent); *State v. McBride*, 240 N.C. 619, 83 S.E.2d 488 (1954) (condition that probationer "be of good behavior and violate none of the laws of the state" not breached by the commission of a crime in another state).

⁵¹ *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952) (condition that probationer "maintain a correct life").

Conditions should also be reasonably related to the purposes of the probation statutes⁵² and should not be dependent on events beyond probationer's control.⁵³ Nor should they be so exceedingly harsh that they unnecessarily encourage a breach or alter the fundamental force of the program from one of positive reform to one of negative coercion.

Finally, the conditions should be imposed for a fixed term during which they should not be altered without cause. Some state statutes permit courts to extend the term⁵⁴ and alter the conditions⁵⁵ to any requirements that might have been originally imposed. Such should not be done solely on the suggestion of a supervisory officer,⁵⁶ but should take effect only after a thorough investigation and clear expression of the cause for the change.

These limitations on the discretionary powers of the granting authorities would provide a broad framework within which their discretion could operate and, at the same time, prevent many possible abuses. The probationer should not be made to feel that he is at the complete mercy of the supervisory officials or the granting authority. He should be helped to understand fully the conditions that have been imposed on him. But with the exception of these conditions, he should be made to feel that he is a full member of society who can rely on the protections and privileges of the law.

There is still great discretion as to the conditions that might be imposed to promote rehabilitation effectively. These restrictions should in some way be related to the individual and the crime

committed.⁵⁷ For example, if the individual used an automobile in committing the crime of which he was initially convicted, probation might be granted on the condition that his driver's license be withheld. If he needed a car in his occupation, however, limited use of the automobile might be appropriate. But care should be taken, at least in the early stages of probation, not to make the conditions so difficult to enforce (from the standpoint of the supervisory officer's ability to know whether they have been breached or not) that the individual is tempted to disobey them. Furthermore, if the conditions are breached, the granting authority might be well-advised to stiffen the conditions rather than revoke probation.

In addition to the above limitations, constitutional provisions may be invoked as further limitations on the discretionary powers of those who grant probation. In 1935 the Supreme Court of the United States stated that a probationer has no constitutional right to be granted or to retain his probation.⁵⁸ The Court characterized probation as merely legislative grace, a privilege but not a right. This opinion has been widely cited in subsequent cases⁵⁹ and has formed a further basis for the assertion that the legislatures had vested the courts with discretionary powers in this area.⁶⁰ At least five states have departed from this traditional view, however, and have found that their state constitutions did give certain rights (mostly procedural rights at a revocation proceeding) to those placed on conditional liberty.⁶¹ With the growth of this opposing authority, many of the conditions which were previously deemed permissible are now being questioned.

Conditions requiring sterilization⁶² or the "donation" of blood to the Red Cross⁶³ could be argued to violate the Eighth Amendment prohibition against the infliction of cruel and unusual punish-

⁵² *People v. Dominguez*, 256 Cal. App.2d 663, 64 Cal. Rptr. 290 (1967) (condition that robber not become pregnant while unward); *Hollandsworth v. United States*, 34 F.2d 423, 427 (4th Cir. 1929) (dictum); *Varela v. Merrill*, 51 Ariz. 64, 76, 74 P.2d 569, 574 (1937) (dictum); *Redewill v. Superior Court*, 43 Ariz. 68, 78, 29 P.2d 475, 479 (1934) (dictum); see CAL. PEN. CODE §1203.1 (1967). But see Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 488 (1962), where this limitation is challenged as meaningless.

⁵³ RUBIN, CRIME AND JUVENILE DELINQUENCY 178-79 (1958); *Hollandsworth v. United States*, 34 F.2d 423, 427 (4th Cir. 1929) (dictum); see *Fuller v. State*, 122 Ala. 32, 37, 26 So. 146, 147 (1899); *Pagano v. Beachy*, 211 Iowa 1294, 1298, 232 N.W. 798, 799 (1930).

⁵⁴ E.g., 18 U.S.C. §3651 (1952); IDAHO CODE ANN. §20-222 (1948); NEB. REV. STAT. §29-2219 (1956).

⁵⁵ E.g., ARIZ. REV. STAT. ANN. §13-1657 (1956); UTAH CODE ANN. §77-35-17 (1953). But cf. *In re Bine*, 47 Cal.2d 814, 306 P.2d 445 (1957).

⁵⁶ But see *Hollandsworth v. United States*, 34 F.2d 423 (4th Cir. 1929); *Excoe v. Zerbst*, 295 U.S. 490, 493 (1935).

⁵⁷ KEVE, PROBATION (1960).

⁵⁸ *Escoe v. Zerbst*, 295 U.S. 490 (1935).

⁵⁹ E.g., *Brown v. Warden*, 351 F.2d 564 (7th Cir. 1965), cert. denied, 382 U.S. 1028 (1966); *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964); *Shum v. Fogliani*, 82 Nev. 156, 413 P.2d 495 (1966).

⁶⁰ See cases cited in note 59.

⁶¹ *Brill v. State*, 159 Fla. 682, 32 So.2d 607 (1947) (dictum); *Ex parte Lucero*, 23 N.M. 433, 168 P. 713 (1917); *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967); *State v. Zolantakis*, 70 Utah 296, 259 P. 1044 (1927); *State v. O'Neal*, 174 Wash. 169, 265 P. 175 (1928).

⁶² *People v. Blankenship*, 16 Cal. App.2d 606, 61 P.2d 352 (1936).

⁶³ *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945).

ment.⁶⁴ A convicted criminal's acceptance of probation might not constitute waiver of this right when faced with the coercive alternative of a long prison term. Since the purpose of probation is not punitive, one might have difficulty establishing that such a condition is "punishment" within the meaning of the constitutional provision.⁶⁵ However, where the condition is extremely harsh and lacks significant rehabilitative value, it would seem that the defendant is put in the position of choosing between different forms of punishment. He then should be able to attack the condition as unconstitutional.

The condition that requires the criminal to refrain from committing any further crimes during his term of probation might also be questioned. This condition can be valid on its face and yet be used to accomplish results of questionable constitutionality. Because a lower standard of proof controls proceedings for the revocation of conditional liberty,⁶⁶ the probationer may be sent to prison by a revocation proceeding even though he is found innocent of the new crime in a subsequent criminal prosecution.⁶⁷ But, since the re-imprisonment may be interpreted as merely an enforcement of the original crime,⁶⁸ it is doubtful that this practice or the condition which permits it will be found unconstitutional. Furthermore, at least from the viewpoint of preventing abuses or errors, the new crime may be regarded as no different than any other breach of conditions. The possibility that an authority may conclude that an individual

breached his conditions even though he did not, in fact, do so is an ever-present and inescapable danger. This can be minimized only by affording greater procedural safeguards to a probationer at revocation proceedings.⁶⁹

REVOKING PROBATION

Whereas the grant of probation is designed to promote rehabilitation, the purpose of probation revocation is to protect society and to punish the probationer, when he has violated one of the conditions placed on his freedom.⁷⁰ In effect, the court reverses its earlier decision granting probation on the pragmatic grounds that the prophylactic need so outweighs the rehabilitative benefits that no mere alteration of the probation conditions would sufficiently control the probationer's anti-social tendencies.⁷¹ Prison then becomes the only solution.

There are at least three reasons why there should be less discretion in revoking probation than in denying it originally. First, where there is informal procedure and judicial discretion, there is also a greater chance for error and abuse. Improper denial of probation would seem to have a less detrimental effect on a criminal than improper revocation of probation. If a convicted criminal deserves probation and is denied it, then society has lost an opportunity for more effective rehabilitation of this person; if a probationer is imprisoned for an alleged violation of conditions which, in fact, never occurred, then society has also discouraged a reformer from rehabilitation, inducing frustration and resentment in him. Thus, the risk of thwarting the rehabilitative purpose of probation would be less if discretionary power were restricted in probation revocation proceedings.

Second, a program of rehabilitation suited to a particular criminal must depend on so many factors

⁶⁴ Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 319 (1959); Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 489 (1962). There are some jurisdictions in which a criminal must accept probation when "granted" it. *Cooper v. United States*, 91 F.2d 195 (5th Cir. 1937); *Ex parte Boyd*, 73 Okla. Crim. 441, 122 P.2d 162 (1942); *State v. Farmer*, 39 Wash.2d 675, 237 P.2d 734 (1951).

⁶⁵ Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 319 (1959).

⁶⁶ *Manning v. United States*, 161 F.2d 827 (5th Cir.), cert. denied, 332 U.S. 792 (1947); *Blaylock v. State*, 88 Ga. App. 880, 78 S.E.2d 537 (1953); *People v. Valle*, 7 Misc.2d 125, 164 N.Y.S.2d 67 (1957).

⁶⁷ *Riggs v. United States*, 14 F.2d 5 (4th Cir. 1926); cert. denied, 273 U.S. 719 (1926); *Jianole v. United States*, 58 F.2d 115 (8th Cir. 1932); see *People v. Kuduk*, 320 Ill. App. 610, 51 N.E.2d 997 (1945), appeal dismissed, 388 Ill. 248, 57 N.E.2d 755 (1944); *State v. Greer*, 173 N.C. 759, 92 S.E. 147 (1917). As indicated by these cases and *People v. White*, 98 Ill. App.2d 1, 239 N.E.2d 854 (1968), the criminal might never be tried for the new crime since he can be imprisoned, supposedly for his original crime, with less proof in a probation revocation proceeding.

⁶⁸ See cases cited in note 67, *supra*.

⁶⁹ A condition requiring the criminal to make restitution for the damage caused by his crime, even though there has been no claim and no adjudication of causation or damages, might also be violative of the individual's due process rights. *People v. Becker*, 349 Mich. 476, 84 N.W.2d 833 (1957); *State v. Barnett*, 110 Vt. 221, 3 A.2d 521 (1939). *Contra*, *Swanson v. State*, 38 Ga. App. 386, 144 S.E. 49 (1928); *State v. Teal*, 108 S.C. 455, 95 S.E. 69 (1918). One could also argue that it denies paupers equal protection. *But cf. Ex parte Banks*, 74 Okla. Crim. 1, 122 P.2d 181 (1942).

⁷⁰ See, e.g., *Manning v. United States*, 161 F.2d 827 (5th Cir.), cert. denied, 332 U.S. 792 (1947); *In re Maguth*, 103 Cal. App. 572, 284 P. 940 (1930); *State v. Bonza*, 106 Utah 553, 150 P.2d 970 (1944); PROBATION AND CRIMINAL JUSTICE 31 (Glueck ed. 1933).

⁷¹ See *United States v. Murray*, 275 U.S. 347 (1928); *People v. Cannon*, 162 Cal. App.2d 215, 328 P.2d 474 (1958).

for determining the proper post-trial disposition that the authority may require discretionary powers. But the violation of a probation condition is an objective fact which should be determined by a more standardized method. Only after a breach of conditions has been established does discretionary power once again become appropriate to decide how to rehabilitate the individual.

Third, if probation accomplishes its purpose of rehabilitation,⁷² then it is not so much a favor or grace to criminals as it is a benefit to the state itself. In seeking to gain this benefit, the state should have the corresponding duty not to treat probationers unfairly, particularly after the probationer, in reliance on his status, has actually reformed. The surest way to do this is to provide procedural protection to probationers at probation revocation proceedings.

The need for some procedural safeguards at probation revocation proceedings has been generally accepted. Although early probation statutes appear to have followed the loose discretionary approach,⁷³ recent survey indicate a trend toward greater procedural protection for probationers.⁷⁴ A majority of the states already recognize probationer's right to a hearing,⁷⁵ notice of the charges against

him,⁷⁶ retained counsel,⁷⁷ the presentation of evidence,⁷⁸ cross-examination of adverse witnesses,⁷⁹ and appeal.⁸⁰

in the annotations appearing in 54 A.L.R. 1471, 60 A.L.R. 1410, 132 A.L.R. 1248, and 29 A.L.R.2d 1074. Cf. Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311 (1959); Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638 (1966). *Contra*, cases cited in note 5, *supra*. See generally, Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964).

Three states have statutes expressly authorizing revocation without a hearing. IOWA CODE ANN. §247.26 (1949) permits revocation "without notice" to probationer; MO. ANN. STAT. §549.101 (1965) permits revocation "without hearing"; and OKLA. STATS. ANN. tit. 22, §992 (1958) provides that probationer shall be arrested and "delivered forthwith" to the place to which he was originally sentenced. Courts in these states have held that there is no constitutional right to a hearing either. *Pagano v. Bechley*, 211 Iowa 1294, 232 N.W. 798 (1930); *Lint v. Bennett*, 251 Iowa 1193, 104 N.W.2d 564 (1960); *State v. Small*, 386 S.W.2d 379, 382 (Mo. 1965) *Ex parte Boyd*, 73 Okla. Crim. 441, 122 P.2d 162, 170-71 (1942) (dictum).

Eight other jurisdictions, including California, have statutes which do not indicate whether a hearing is or is not required. As a result, some courts in these jurisdictions have held that there is no right to a probation revocation hearing. *In re Davis*, 37 Cal. 2d 872, 236 P.2d 579 (1951); *In re Dearo*, 96 Cal. App.2d 141, 214 P.2d 585 (1950); *Varela v. Merrill*, 51 Ariz. 64, 74 P.2d 569 (1937); *Ex parte Johnson*, 53 Ariz. 161, 87 P.2d 107 (1939); *Application of Jerrel*, 77 S.D. 487, 93 N.W.2d 614 (1958).

California and Iowa allow *ex parte* revocation, a proceeding which does not require the presence of the probationer. *People v. Scott*, 74 Cal. App.2d 782, 169 P.2d 970 (1946). Oklahoma and South Dakota also permit such if the breach of conditions is clearly established. *Ex parte Boyd*, 73 Okla. Crim. at 459, 122 P.2d at 170-71; *Application of Jerrel*, 77 S.D. at 492-93, 93 N.W.2d at 617; cf. *United States ex rel. Edelson v. Thompson*, 175 F.2d 140 (2d Cir. 1949).

The majority of jurisdictions require a hearing for probation revocation, although it may be summary in nature. One writer has argued that California should require a hearing. Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158 (1955). See generally Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964).

⁷⁶ *Dingler v. State*, 101 Ga. App. 312, 113 S.E.2d 496 (1960); *People v. Price*, 24 Ill. App.2d 364, 376-77, 164 N.E.2d 528, 533 (1960); *Crenshaw v. State*, 222 Md. 533, 161 A.2d 669 (1960); *People v. Oskroba*, 305 N.Y. 113, 111 N.E.2d 235 (1953). See Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 188 (1964). See generally Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 326-28 (1959).

Some have suggested that proper notice includes adequate time for counsel to inspect and investigate the probation officer's report prior to the hearing. Comment, *Reform in Probation Matters, Suggestions*, 12 S. BAR J. 257 (1937). But generally, notice requirements at revocation proceedings are less strict than at other judicial proceedings. *Jianole v. United States*, 58 F.2d 115 (8th Cir. 1932). Most courts tend to regard the

⁷² Statistics show that the number of revocations is less than 20% of the number of persons placed on probation. UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, vol. II, *Probation*, 335-42 (1939) (about 19%); 1966 ANN. REP. ADMIN. OFFICE OF THE UNITED STATES COURTS 127 (less than 18%). See notes 10 and 27.

⁷³ *Burns v. United States*, 287 U.S. 216 (1932); *People v. Dudley*, 173 Mich. 389, 138 N.W. 1044 (1912).

⁷⁴ Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964); Brief for National Legal Aid and Defender Association as *Amicus Curiae*, Appendix, *Mempa v. Rhay*, 389 U.S. 128 (1967). THE MODEL PENAL CODE §301.4 (Proposed Official Draft, 1962) provides as follows:

Section 301.4. Notice and Hearing on Revocation or Modification of Conditions or Suspension or Probation

The Court shall not revoke a suspension or probation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

⁷⁵ E.g., *People v. Enright*, 332 Ill. App. 655, 75 N.E.2d 777 (1947); *Blusinsky v. Commonwealth*, 384 Ky. 395, 144 S.W.2d 1038 (1940); *People v. Myers*, 306 Mich. 100, 10 N.W.2d 323 (1943); *People v. Hill*, 164 Misc. 370, 300 N.Y.S. 532 (1937); *State v. Burnette*, 173 N.C. 734, 91 S.E. 364 (1917); *State ex rel. Vadnais v. Stair*, 48 N.D. 472, 185 N.W. 301 (1921); *Howe v. State ex rel. Pyne*, 170 Tenn. 571, 98 S.W.2d 93 (1936); *In re Hall*, 100 Vt. 197, 136 A. 24 (1927). See cases cited

But the procedural rights afforded vary greatly among jurisdictions, and a few states still do not recognize any of the safeguards at probation revocation proceedings.⁸¹ In *In re Levi*,⁸² an individual convicted of assault had been granted probation on the condition that he not indulge in intoxicating liquor. A few days after his conditional release, the probationer was arrested and subsequently convicted of intoxication. His probation officer recommended that probation be revoked and that the individual be imprisoned as punishment for his original crime. The probationer was brought before the court for the following "hearing" on this matter:

The Court: *People v. Eddie D. Levi*

Mr. Levi, they tell me you have had some more trouble since you were out.

The Defendant: I went to Pedro to my brother's . . .

hearing and notice requirements as one issue because the hearing is inadequate if proper notice was not given. Such may mean reversible error. *People v. Hodges*, 231 Mich. 656, 204 N.W. 801 (1925); *Sellers v. State*, 105 Neb. 748, 181 N.W. 862 (1921); *Slayton v. Commonwealth*, 185 Va. 357, 38 S.E.2d 479 (1946).

⁷⁷ *In re Levi*, 39 Cal. App.2d 41, 244 P.2d 403 (1952); *People v. Price*, 24 Ill. App. 2d 364, 377, 164 N.E.2d 528, 534 (1960); *Edwardsen v. State*, 220 Md. 82, 89, 151 A.2d 132, 136 (1959); *Williams v. Commonwealth*, 350 Mass. 732, 216 N.E.2d 779 (1966); *People v. Wood*, 2 Mich. App. 342, 139 N.W.2d 895 (1966); *People v. Hamilton*, 26 App.Div.2d 134, 271 N.Y.S.2d 694 (1966); *Thomas v. Maxwell*, 175 Ohio St. 233, 235, 193 N.E.2d 150, 152 (1963); *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967) (*semble*). See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 150 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, 54 (1967). Sklar, *supra* note 76, at 189, states that no court has denied this right. *But cf. People v. Dudley*, 173 Mich. 389, 138 N.W. 1044 (1912). See generally Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 328-30 (1959).

⁷⁸ *Fiorella v. State*, 40 Ala. App. 587, 590, 121 So.2d 875, 878 (1960); *People v. Enright*, 332 Ill. App. 655, 75 N.E.2d 777 (1947); *Mason v. Cochran*, 209 Miss. 163, 46 So.2d 106 (1950); see Sklar, *supra* note 76, at 188. See generally Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 330-31 (1959).

⁷⁹ *Robinson v. State*, 62 Ga. App. 539, 8 S.E.2d 698 (1940); *People v. Oskroba*, 305 N.Y. 113, 111 N.E.2d 235 (1953); *City of Lima v. Beer*, 90 Ohio App. 524, 107 N.E.2d 253 (1950). See generally Note, *supra* note 78, at 330-31.

⁸⁰ *United States ex rel. Grossberg v. Mulligan*, 48 F.2d 93 (2d Cir. 1931); *Huff v. Diebold*, 313 Ky. 655, 233 S.W.2d 276 (1950); *People v. Turner*, 27 App.Div.2d 141, 276 N.Y.S.2d 409 (1967). *Contra, People v. Gregory*, 1 Crim. L. Rep. 2266 (Aug. 1967).

⁸¹ See note 75, *supra*.

⁸² 244 P.2d 403 (1952).

The Court: You got into some sort of a drunken brawl?

The Defendant: No. They say I was drunk.

The Court: Your wife has never come out here and your children are still back in Chicago, is that right?

The Defendant: Sure.

The Court: Well, because of the serious nature of your offense, and because the Court specifically admonished you that you were not under any circumstances to use intoxicating liquors and because you rewarded the consideration that was given you by going out and getting drunk within five days after your release, your probation is revoked.⁸³

In California there is neither a constitutional nor statutory right to notice and hearing preceding revocation of probation.⁸⁴ Probation can be revoked on the report of the probation officer alone.⁸⁵ Of course, when a hearing is held, it may be summary in nature,⁸⁶ the probationer having no right to present or cross-examine witnesses.⁸⁷ Proof beyond a reasonable doubt is not necessary.⁸⁸ The right to counsel is recognized where probation was granted before sentence was pronounced.⁸⁹ In other California cases, the right to retained counsel appears uncertain,⁹⁰ and the right to assigned counsel is not recognized in every court.⁹¹ Language in several

⁸³ *Id.* at 44, 244 P.2d at 405.

⁸⁴ *People v. Daugherty*, 233 Cal. App.2d 284, 43 Cal. Rptr. 446 (1965); *supra*, note 5; CAL. PENAL CODE §§1203.1-3.

⁸⁵ Cases cited note 21, *supra*.

⁸⁶ *In re Levi*, 39 Cal. App.2d 41, 244 P.2d 403 (1951); *People v. Johns*, 173 Cal. App.2d 38, 343 P.2d 92 (1959); *People v. Wimberly*, 215 Cal. App.2d 538, 30 Cal. Rptr. 421 (1963).

⁸⁷ *In re Nelson*, 185 Cal. 594, 197 P. 947 (1921); *People v. Hayden*, 99 Cal. App.2d 97, 221 P.2d 221 (1950); *People v. Slater*, 152 Cal. App.2d 814, 313 P.2d 111 (1957).

⁸⁸ *People v. Sanders*, 64 Cal. App. 1, 220 P. 24 (1923); *People v. Johns*, 173 Cal. App.2d 38, 343 P.2d 92 (1959).

⁸⁹ *In re Levi*, 39 Cal. App.2d 41, 244 P.2d 403 (1951). The theory underlying this rule is undoubtedly that the revocation proceeding is still part of the prosecution since sentence was never imposed. See *Mempa v. Rhay*, 389 U.S. 128 (1967); *People v. Dewaele*, 224 Cal. App.2d 512, 36 Cal. Rptr. 825 (1964).

⁹⁰ *Ex parte Levi*, 244 P.2d 403 (1952) (no right); *People v. Wimberly*, 215 Cal. App.2d 538, 30 Cal. Rptr. 421 (1963) (no right). *But see People v. Walker*, 215 Cal. App.2d 609, 30 Cal. Rptr. 440 (1963) (probationer may sometimes be represented by counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹¹ See *in re Davis*, 37 Cal.2d 872, 236 P.2d 579 (1951). *But see Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1967).

judicial opinions betrays a disdain for "formal criminal trials";⁹² many courts attempt by means of strict statutory or constitutional interpretation to limit procedural safeguards to the trial situation, regardless of subsequent proceedings which could have a prejudicial impact upon the defendant.⁹³

Thus, whether one who is accused of violating the conditions of his probation will be given an opportunity to refute the charges against him may depend upon the fortuitous circumstance of the location of the hearing. Even within a given state it is seldom clear which procedural rights he may claim. Few statutes explicitly enumerate which procedural safeguards are to be afforded and which are not.⁹⁴ Though variously worded,⁹⁵ the vast majority of these statutes require a hearing of some sort,⁹⁶ but some courts have interpreted them to afford no further rights.⁹⁷

⁹² *Ex parte Levi*, 244 P.2d at 404 (1952).

⁹³ See generally Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158 (1955).

⁹⁴ ALAS. STATS. §33.05.070(b) (1962) ("reasonable notice" and "right to be represented by counsel"); FLA. STAT. ANN. §948.06 (1944) (probationer advised of charges and given "opportunity to be fully heard on his behalf in person and by counsel"); GA. CODE ANN. §27-2713 (1967 Supp.) (right to counsel and to be "fully heard"); HAWAII REV. LAWS §§258-56, 253-5 (1955), as amended, Act 179 (1967) (implies right to present evidence and provides right to assigned counsel); ILL. REV. STAT. ch. 38, §117-3 (1967) (right to appeal); MICH. STAT. ANN. §28.1134 (1954) (right to "a written copy of the charges"); MINN. STAT. ANN. §§609.14(2), 611.14(c) (1964) (right to retained counsel and assigned counsel); N.C. GEN. STAT. §§15-200, 15-200.1 (1965) (notice of charges and "a reasonable time for the defendant to prepare his defense"); TENN. CODE §40-2907 (1956) (notice, right to counsel, "right to introduce testimony").

⁹⁵ A hearing is required by 18 U.S.C. §3653 (1964), which provides that the probationer shall be "taken before the court", and by N.Y. CRIM. PROC. §935 (McKinney 1968) which requires that the probationer shall have "An opportunity to be heard" by the revoking authority. *Escoe v. Zerbst*, 295 U.S. 490 (1935); *People v. Oskroba*, 305 N.Y. 113, 111 N.E.2d 235 (1953). CAL. PENAL CODE §1203.2 (1954), on the other hand, which provides that the authorities shall arrest a probationer and "bring him before the court", does not require a hearing. *In re Davis*, 37 Cal.2d 872, 236 P.2d 579 (1951).

⁹⁶ See note 75.

⁹⁷ *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964); *Shum v. Fogliani*, 82 Nev. 156, 413 P.2d 495 (1966); see *Ex parte Levi*, *supra* notes 82-83 and accompanying text.

Nine states have statutes which explicitly provide that the hearing may be summary or informal: IDAHO CODE §20-222 (1948); KAN. GEN. STATS. §62-2244 (1961); LA. REV. STATS. §15:534(c) (1963); MONT. REV. CODE §94-9831 (1967); N.H. REV. STATS. ANN. ch. 504:4 (1955); N.J. STATS. ANN. §2A:168-4 (1953);

Even if the legislature or courts of a jurisdiction were persuaded to afford all of the aforementioned procedural safeguards, probationers would still not be adequately protected. The standard of proof at a probation revocation hearing is often low, requiring only evidence which "reasonably satisfies" the court.⁹⁸ The probation officer's report may be conclusive of probationer's improper activity⁹⁹ even though clouded by prejudice and error.¹⁰⁰ Furthermore, the probationer is not warned of his constitutional or statutory rights, and his failure to exercise certain procedural rights at the probation revocation hearing may constitute a waiver of them.¹⁰¹ A majority of the jurisdictions do not afford probationers the right to subpoena witnesses or to obtain the appointment of counsel if indigent.¹⁰² If the individual cannot appeal his

ORE. REV. STATS. §137.550(2) (1961); VT. STATS. ANN. tit. 28, §1015 (1958); W. VA. CODE §62-12-19 (1966).

As stated by Sklar, *supra* note 76, at 188, "state and lower federal court decisions are legion which stress the informality of the hearing granted by their statutes". Whether the governing statute expressly provides for an informal hearing or not, cases which deny further procedural safeguards for probationers must advocate such as the only alternative. But one could argue that even a "summary hearing" must imply a meaningful opportunity for an effective appearance. *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967).

⁹⁸ *Manning v. United States*, 161 F.2d 827 (5th Cir.), cert. denied, 332 U.S. 792 (1947); *Blaylock v. State*, 88 Ga. App. 880, 78 S.E.2d 537 (1953); *Bernal-Zazueta v. United States*, 225 F.2d 64 (9th Cir. 1955); *People v. Valle*, 7 Misc. 2d 125, 164 N.Y.S.2d 67 (1957).

Problems may arise where probation is revoked because of probationer's connection with a new crime. Since probation revocation hearings require a lesser degree of proof and apply more relaxed standards of evidence, a new criminal charge may cause probation revocation even though probationer is acquitted of the charge. See *People v. Kuduk*, 320 Ill. App. 610, 51 N.E.2d 997 (1943), appeal dismissed, 388 Ill. 248, 57 N.E.2d 755 (1944); *State v. Greer*, 173 N.C. 759, 92 S.E. 147 (1917). See generally, Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 332-33 (1959).

⁹⁹ *Hollandsworth v. United States*, 34 F.2d 423 (4th Cir. 1929). *Contra*, *People v. Yarter*, 138 Cal. App.2d 803, 292 P.2d 649 (1956); *People v. Root*, 192 Cal. App.2d 158, 13 Cal. Rptr. 209 (1961); *People v. Walker*, 215 Cal. App.2d 609, 30 Cal. Rptr. 440 (1963).

¹⁰⁰ See *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935); *Burns v. United States*, 287 U.S. 216, 223 (1932); *Hyser v. Reed*, 318 F.2d 225, 253 (D.C. Cir. 1963) (concurring opinion); *Johnson v. Walls*, 185 Ga. 177, 194 S.E. 380 (1937).

¹⁰¹ *Varela v. Merrill*, 51 Ariz. 64, 74 P.2d 569 (1937) (right to hearing and to present evidence); *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953) (right to present evidence and cross-examine witnesses).

¹⁰² E.g., *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964); *Edwardsen v. State*, 220 Md. 82, 151 A.2d 132 (1959); *People v. Wood*, 2 Mich. App. 342, 139 N.W.2d 895 (1966); *State v. Small*, 386 S.W.2d 379 (Mo. 1965); *Shum v. Fogliani*, 82 Nev. 156, 413 P.2d

probation revocation, then he must seek a writ of habeas corpus and certain procedural irregularities reviewable on appeal cannot be raised at the ensuing proceeding.¹⁰³ If appeal is permitted, the state is only required to introduce *some* evidence in order to achieve an affirmance of the revocation,¹⁰⁴ whereas it is usually necessary for the probationer to establish that the trial court abused its wide discretion in order to obtain a reversal.¹⁰⁵ It is rare for an appellate court to make such a finding.¹⁰⁶

In short, the use of discretionary power unchecked by procedural protections can prevent probationers from presenting a valid defense at a probation revocation proceeding and statutes have not gone far enough to change this.

Constitutional Due Process Arguments

In many cases where liberty has been revoked, the limited nature of the statutory rights have led probationers to assert a denial of their constitutional right to due process of law. Many theories have been advanced to explain that the due process clause is inapplicable to probation revocation.¹⁰⁷ Probation is considered by some a legislative grace or privilege and not a constitutionally protected

right;¹⁰⁸ the probationer has entered into a contract with the state whereby his acceptance of probation constitutes a waiver of due process rights.¹⁰⁹ Other theories are that probation is not different from imprisonment because the probationer remains within the constructive custody of the court,¹¹⁰ and that probation revocation is not a "criminal prosecution"¹¹¹ giving probationer the constitutional rights which he had and exhausted at trial.¹¹² Such justifications are of questionable validity, as will be shown. It is beyond the scope of this article to establish *which* procedural protections should attach at probation revocation hearings. Hopefully, once courts realize the superficial quality of past theories they will engage in a more thoughtful analysis of this problem.

The theory most frequently used to deny the due process contentions of probationers is the right-privilege distinction adopted by the Supreme Court of the United States in *Escoe v. Zerbst*¹¹³ wherein the Court stated:

... [W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime and may be coupled with such conditions in respect of its duration as Congress may impose.¹¹⁴

Yet probation should not be characterized as only a mere privilege. Probation provides an alternative method for the state to deal with criminals. It is mutually beneficial and is only granted

495 (1966); *People v. St. Louis*, 3 App.Div.2d 883, 161 N.Y.S.2d 170 (1957); *Thomas v. Maxwell*, 175 Ohio St. 233, 193 N.E.2d 150 (1963). *Contra*, *State v. Hoffman*, 404 P.2d 644 (1967); *People v. Price*, 24 Ill. App.2d 364, 377, 164 N.E.2d 528, 534 (1960); *Williams v. Commonwealth*, 350 Mass. 732, 216 N.E.2d 779 (1966) (dictum); *People v. Hamilton*, 26 App.Div.2d 134, 271 N.Y.S.2d 694 (1966); *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967) (*semble*); *Commonwealth ex rel. Remeriez v. Maroney*, 415 Pa. 534, 204 A.2d 450 (1964).

¹⁰³ *E.g.*, *United States ex rel. Grossberg v. Mulligan*, 48 F.2d 93 (2d Cir. 1931) (abuse of discretion in manner of interpreting probation order); *Moye v. Futch*, 207 Ga. 52, 60 S.E.2d 137 (1950) (failure to allow probationer to present or cross-examine witnesses); *Ex parte Patterson*, 317 S.W.2d 536 (Tex. Ct. Crim. App. 1958) (errors or irregularities which are not jurisdictional).

¹⁰⁴ *Harrington v. State*, 97 Ga. App. 315, 103 S.E.2d 126 (1958); *State v. Miller*, 122 S.C. 468, 115 S.E. 742 (1923). *But cf.* *Cooper v. State*, 175 Miss. 718, 168 So. 53, 54 (1936) ("evidence sufficient to convince a reasonable person"). See generally Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 333 (1959).

¹⁰⁵ *Manning v. United States*, 161 F.2d 827 (5th Cir.), cert. denied, 332 U.S. 792 (1947); *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949); *Reinmuth v. State*, 163 Neb. 724, 80 N.W.2d 874 (1957); *People v. Koning*, 18 Ill. App.2d 119, 151 N.E.2d 103 (1958).

¹⁰⁶ Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158, 173 (1955). *But cf.* *People v. Turner*, 27 App.Div.2d 141, 276 N.Y.S.2d 409 (1967).

¹⁰⁷ See note 64.

¹⁰⁸ *E.g.*, *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Varela v. Merrill*, 51 Ariz. 64, 74 P.2d 569 (1937); *Pagano v. Bechly*, 211 Iowa 1294, 232 N.W. 798 (1930); *People v. Dudley*, 173 Mich. 389, 138 N.W. 1044 (1912); *State ex rel. Jenks v. Municipal Court of City of St. Paul*, 197 Minn. 141, 266 N.W. 433 (1936); *Shum v. Fogliani*, 82 Nev. 156, 413 P.2d 495 (1966); *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967); *In re Weber*, 75 Ohio App. 206, 61 N.E.2d 502 (1945).

¹⁰⁹ *Fuller v. State*, 122 Ala. 32, 26 So. 146 (1899); *Johnson v. Walls*, 155 Ga. 177, 194 S.E. 380 (1937). See *Weihsen, Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L.C. & P.S. 531 (1942).

¹¹⁰ See *Jones v. Cunningham*, 371 U.S. 236 (1962); *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721 (1945).

¹¹¹ *Brown v. Warden*, 351 F.2d 564 (7th Cir. 1965); *In re Dearo*, 96 Cal. App.2d 141, 214 P.2d 585 (1950); *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

¹¹² *Burns v. United States*, 287 U.S. 216 (1932); *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967); *cf.* *Jones v. Rivers*, 338 F.2d 862 (4th Cir. 1964).

¹¹³ 295 U.S. 490 (1935).

¹¹⁴ *Id.* at 492. This was merely dictum: the case was reversed and remanded for failure to give the hearing required by statute.

to those deserving it. The Illinois Appellate Court has stated:

Our courts have never taken the view that it is a mere matter of favor or grace to admit a defendant to probation. When an order to that effect is entered by a court, the court has satisfied itself that the defendant is not likely to again engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty provided by law. . . . The fact that a person has been adjudged guilty of a criminal offense and subsequently granted probation should not deprive him of a fair, orderly hearing *according to accepted judicial principles and recognized standards of procedure* when it is sought to terminate that order. When an order granting probation has been entered and the court has imposed the conditions upon which defendant may be at liberty, the defendant has a right to rely thereon and as long as he complies with those conditions his liberty of action or freedom should not be restricted.¹¹⁵ [emphasis added]

A probationer's status can only be revoked upon a breach of conditions;¹¹⁶ it cannot be revoked arbitrarily.¹¹⁷ Thus, the probationer does possess certain rights which the incarcerated non-probationer does not possess. The different procedural implications of seeking to gain and seeking to continue a status have, for example, been recognized in the economic "privileges" cases.¹¹⁸ Revocation of the right to practice law raises entirely different and more substantial problems than were involved

in determining whether the privilege should have been granted initially.¹¹⁹

Few explanations have been made of how such rights can attach to a privilege. The restriction against arbitrary action has its basis in the due process clause. But it has been suggested that a distinction should be drawn between substantive due process rights, which are granted probationers, and procedural due process rights, which are not.¹²⁰ This is incorrect. The issue in these cases concerns the probationer's procedural rights. Probationers do not claim that the law itself is arbitrary because then not only the revocation clause but also very likely the granting clause would be unconstitutional and void, in which case probationers would be returned to prison. Rather, the claim is that lack of procedural protection permits arbitrary factual determinations, thus detracting from the probationer's *procedural* due process rights.¹²¹ In *Burns v. United States*,¹²² the Court issued its directive against arbitrary action to the judge who exercises his discretion to make factual determinations without affording certain procedural protections to the appellant. The Court was not concerned with potential denials of substantive due process rights. However, since *Escoe* subsequently declared a hearing to be merely a "privilege" and not a constitutionally protected right, the basis of the restriction against arbitrary action is not clear. Nevertheless, the Supreme Court of the United States has recognized that probationers have some *right* and protection for their status.

This right of probationers as compared to prisoners without probation becomes particularly significant in jurisdictions where one who accepts probation waives certain due process rights.¹²³ It has been held in at least one state that one who accepts probation cannot appeal his trial decision.¹²⁴

¹¹⁵ *People v. Price*, 24 Ill. App.2d 364, 377, 164 N.E.2d 528, 534 (1960).

¹¹⁶ See note 70 *supra*.

¹¹⁷ *Burns v. United States*, 287 U.S. 216 (1932); *Escoe v. Zerbst*, 295 U.S. 490 (1935). See also *Ohio Bell Telephone Co. v. Commission*, 301 U.S. 292, 302 (1937), where Mr. Justice Cardozo characterizes the "protection of the individual against arbitrary action" as the very essence of the due process clause.

¹¹⁸ *Cramp v. Board of Public Education*, 368 U.S. 278, 288 (1961) (teaching without taking anti-communist oath); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 897-98 (1961) (revocation of security clearance permit); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956) (teaching despite exercising right against self-incrimination); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (state employment); cf. *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963) (unemployment compensation benefits); *Fleming v. Nestor*, 363 U.S. 603, 611 (1960) (Social Security benefits).

¹¹⁹ Compare *Massengale v. United States*, 278 F.2d 344 (6th Cir. 1960) with *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) and *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

¹²⁰ Comment, *Revocation of Conditional Liberty—California and the Federal System*, 28 S. CAL. L. REV. 158, 166 (1955); cf. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963).

¹²¹ See *United States v. Mazei*, 345 U.S. 206, 218-28 (1952) (dissenting opinion); 29 A.L.R.2d 1078 (1953).

¹²² 287 U.S. 216 (1932).

¹²³ *Pagano v. Bechly*, 211 Iowa 1294, 232 N.W. 798 (1930); *Couture v. Brown*, 82 N.H. 459, 135 A. 530 (1926); *Wilson v. State*, 156 Tex. Crim. 228, 240 S.W.2d 774 (1951).

¹²⁴ *Brooks v. State*, 51 Ariz. 544, 78 P.2d 489 (1938). See also *Cooper v. State*, 175 Miss. 718, 168 So. 53 (1936); *People ex rel. Palladino v. Warden*, 6 Misc.2d 691, 167 N.Y.S.2d 327 (1957).

Other courts have denied procedural protections to a criminal from the time that he accepts probation to the time that he is released, arguing that the probationer waives his constitutional claims at the time of probation by entering into a contract with the state whereby he agrees to perform certain conditions.¹²⁵ Although the contract theory has been approved in subsequent cases before state courts,¹²⁶ the Supreme Court rejected it in *Burns*, describing probation as a "favor not a contract."¹²⁷ Particularly in jurisdictions where a convicted criminal must consent to probation,¹²⁸ the alternative of imprisonment would seem to be a sufficient coercive force to invalidate any such idea of a contractual waiver.¹²⁹ But the right against arbitrary revocation provides additional protection to the probationer in jurisdictions that still espouse waiver theories.

For reasons of accuracy and policy, the terms "privilege," "grace," and "favor" should apply to the sentencing court's discretion in granting probation and not to the continuance of probationer's conditional liberty. At the very least the terms are without value in this context because probation cannot be characterized as a mere privilege.

Even if probation *can* be properly characterized as a privilege, such a characterization has little, if any, analytical significance. The right-privilege distinction merely restates legal conclusions previously made. It presumes the conclusion in its premises and adds no justification of its own. The theory gives no insight into either constitutional rights or legislative intention. Such a theory certainly should not be dispositive of the issue whether probationer shall have the opportunity to justify his continued conditional liberty.

Even granting the value of the right-privilege distinction at the time of *Escoe*, serious question may be raised as to its applicability today. The judiciary has recently recognized that substantive rights are of little value without procedural methods which enable their presentation.¹³⁰ Pro-

cedural rights have been extended to both pre-trial¹³¹ and post-conviction¹³² processes. Although the right-privilege distinction previously enjoyed great favor in the license and welfare benefit cases, the Supreme Court of the United States has required protection in those cases despite the distinction,¹³³ apparently recognizing that there is no absolute distinction between "rights" and "privileges," these being simply different degrees of protection.¹³⁴ In short, constitutional claims should not be denied on the basis of such a fictitious polarization of social concerns, designed to perpetuate the *status quo* and wholly lacking in analytical value.

Finally, even if the right-privilege distinction were applied most strongly to treat a probationer as merely a prisoner with conditional liberty, constitutional language would be less warped and policy would be better served if procedural protections were granted probationers. Since probation did not exist at common law¹³⁵ and since prisoners were never afforded any of the procedural advantages now sought by probationers, it could be argued that the creation of an opportunity for probation by the legislatures or the courts did not intend to afford the probationer any additional constitutional rights. But the similarities of probation and imprisonment do not justify this conclusion.¹³⁶ It is true that the probationer has no more constitutional rights than the prisoner at the moment of sentencing. However, having been granted a liberty which the prisoner does not have, the probationer is in a position to assert certain constitutional rights which the prisoner cannot. As one writer has observed:

... it is suggested that the freedom of action which a probationer enjoys prior to revocation is sufficiently extensive that it should be considered "liberty" within the meaning of a due process clause, either by viewing the granting of probation as a restoration of a part of the liberty of which the offender had duly been

¹²⁵ See cases cited in note 109, *supra*.

¹²⁶ *Johnson v. Walls*, 155 Ga. 177, 194 S.E. 380 (1937); *Wilson v. State*, 156 Tex. Crim. 228, 240 S.W.2d 774 (1951); *cf. State v. Bufford*, 231 Iowa 1000, 2 N.W.2d 635 (1942).

¹²⁷ 287 U.S. 216, 220 (1932).

¹²⁸ *Cooper v. United States*, 91 F.2d 195 (5th Cir. 1937); *Ex parte Boyd*, 73 Okla. Crim. 441, 122 P.2d 162 (1942); *State v. Farmer*, 39 Wash.2d 675, 237 P.2d 734 (1951).

¹²⁹ *Cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹³⁰ See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹³¹ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹³² *Mempa v. Rhay*, 389 U.S. 128 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948).

¹³³ See cases cited in notes 95 and 96, *supra*.

¹³⁴ O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443, 445-46 (1966).

¹³⁵ See note 11, *supra*.

¹³⁶ See Weber, *Explorations in the Similarities, Differences and Conflicts Between Probation, Parole and Institutions*, 48 J. CRIM. L.C. & P.S. 580 (1958).

deprived by his conviction and by then viewing the revocation of probation as a deprivation of the restored liberty, or by theorizing that the offender was deprived of only part of his liberty when his conviction resulted in his being put on probation and that incarceration upon revocation of probation represents a further deprivation of liberty.¹³⁷

Courts have advanced two arguments against this. Some have contended that the probationer is not actually at liberty but rather is under "constructive custody" by means of an "extension of the prison walls."¹³⁸ Such excess fictionalizing flouts the common sense. A probationer's liberty is incomparably closer to the "unconditional" liberty which law-abiding citizens enjoy than to imprisonment.

Other courts have distinguished probation revocation proceedings from "criminal prosecutions," thereby obviating the constitutional requirements of the latter.¹³⁹ Where the trial court suspended the imposition of sentence in placing a person on probation, the Supreme Court of the United States has rejected this argument and condemned the denial of the right to counsel as unconstitutional.¹⁴⁰ This protection should also be required when there has been a suspended execution of sentence. Despite subsequent cases to the contrary in state and lower federal courts,¹⁴¹ there is no valid distinction between the two types of sentencing because a probationer's liberty is at stake in either case. Furthermore, merely providing procedural protection at immediate post-conviction sentencing may be insufficient. Those granted probation normally would receive at least as short a sentence as others because of their capacity for rehabilitation. Yet they may receive a longer sentence from a judge who is aware that it will only be served upon the commission of a further offense in violation of the probation conditions he prescribes.¹⁴² No such formalistic distinction between imposition and execution of sentence should result in the imprisonment of a probationer for post-trial acts or omissions of which he was never convicted.

¹³⁷ Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 325-26 (1959).

¹³⁸ See cases cited in note 110, *supra*.

¹³⁹ See cases cited in note 111, *supra*.

¹⁴⁰ *Mempa v. Rhay*, 389 U.S. 128 (1967). The arguments, as reported at 2 CRIM. L. REP. 2036 (1967), indicate that the Court wished to proceed cautiously.

¹⁴¹ See note 19, *supra*.

¹⁴² See note 20, *supra*. No statistics were found on the length of sentences imposed on probationers at trial.

On the other hand, a few state courts have held that a probationer does have a constitutional right to certain procedural protections before his status can be revoked.¹⁴³ They have referred to probation as a "valuable right"¹⁴⁴ which probationer "should be able to rely upon"¹⁴⁵ so long as he obeys the conditions of his liberty. Several other state courts have referred to the probationer's possession of certain "rights" in regard to his status.¹⁴⁶ The policy arguments often weigh heavily in the probationer's favor and some courts have stated that procedural rights "may be desirable" even while denying probationer's claim.¹⁴⁷ Such concessions are significant when determining whether certain due process rights attach since this determination has often rested on rather pragmatic policy considerations.¹⁴⁸

Because of the pragmatic character of the due process clause, the conclusion that the clause applies to probation revocation proceedings does not dispose of the problem of which procedural rights are thereby guaranteed to the probationer. For example, except where there is an issue as to the identity of defendant and the person originally sentenced,¹⁴⁹ no court has stated that probationer has a right to trial by jury at his revocation proceeding.¹⁵⁰ The due process clause need not change this result: a jury is not necessarily required merely because other procedural rights are. Some courts have gone beyond this and stated that affording any additional procedural rights will cause endless

¹⁴³ *Brill v. State*, 159 Fla. 682, 32 So.2d 607 (1947) (dictum) (hearing and notice); *Ex parte Lucero*, 23 N.M. 433, 168 P. 713 (1917), followed in *State v. Peoples*, 69 N.M. 106, 364 P.2d 359 (1961) (hearing and notice); *Perry v. Willard*, 247 Ore. 145, 427 P.2d 1020 (1967) (right to appointment of counsel); *State v. Zolantakis*, 70 Utah 296, 259 P. 1044 (1927), limited somewhat by *Baine v. Beckstead*, 10 Utah 2d 4, 347 P.2d 554 (1959) (hearing and notice); *State v. O'Neal*, 174 Wash. 169, 265 P. 175 (1928), approved in *State v. Shannon*, 60 Wash.2d 883, 376 P.2d 646 (1962).

¹⁴⁴ *Ex parte Lucero*, 23 N.M. 433, 168 P. 713 (1917); *State v. Zolantakis*, 70 Utah 296, 259 P. 1044 (1927).

¹⁴⁵ *People v. Price*, 24 Ill. App.2d 364, 377, 164 N.E.2d 528, 534 (1960); *Baine v. Beckstead*, 10 Utah 2d 4, 9, 347 P.2d 554, 558 (1959).

¹⁴⁶ *E.g.*, *Hoffman v. State*, 404 P.2d 644 (Alaska 1965); *In re Dearo*, 96 Cal. App.2d 141, 214 P.2d 585 (1950).

¹⁴⁷ *Shum v. Fogliani*, 82 Nev. 156, 413 P.2d 495 (1966).

¹⁴⁸ See Joint-Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149 (1951) (concurring opinion).

¹⁴⁹ *State v. Peoples*, 69 N.M. 106, 364 P.2d 359 (1961).

¹⁵⁰ *E.g.*, *People v. Price*, 24 Ill. App.2d 364, 164 N.E.2d 528 (1960); *Wilson v. State*, 156 Tex. Crim. 228, 240 S.W.2d 774 (1951).

delay and will overburden the courts.¹⁵¹ But it is doubtful that any solution would be more burdensome than the present confusion, especially since the practical effect on the courts of requiring some further procedural rights as a matter of due process would probably not be great. In light of the fact that a majority of the states already recognize probationer's right to a hearing, notice of the charges against him, counsel, the presentation of evidence and witnesses, cross-examination of those witnesses testifying against him, and appeal,¹⁵² it would not appear that a constitutional recognition of these rights would cause substantial turmoil. Nor would it seem that an extension of similar rights to those who have no knowledge of them¹⁵³ or to those who have no means of obtaining them¹⁵⁴ would significantly overburden the probation system. The benefits, on the other hand, would be

to make the realities of probation more consistent with its goals and to eliminate much of the error, uncertainty, confusion, and geographic inequity which presently prevails.

CONCLUSION

Discretionary power performs a necessary function in the implementation of probation. The imposition of individualized conditions is probation's peculiar strength. At present, it is largely the experience of the personnel, rather than the framework of the system, that makes probation work. Hopefully the gathering of research and statistical data will enable probation to become a behavioral science, with improved techniques and guidelines for supervision. But at least for now the states and federal government should take a step in this direction by placing and enforcing limitations on the conditions that can be imposed on probationers. In this way some of the abuses and errors of the system can be eliminated.

No mere limitations, however, will justify the place of discretionary power in the factual determinations of a probation revocation proceeding. A fair and just disposition of individuals can only be achieved by eliminating discretionary power and affording appropriate procedural protections to probationers.

¹⁵¹ Cf. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963); *Jones v. Rivers*, 338 F.2d 862 (4th Cir. 1964).

¹⁵² Notes 75-80, *supra*.

¹⁵³ E.g., abolishment of the waiver rule in regard to procedural irregularities at revocation, warnings concerning constitutional or statutory rights, etc.

¹⁵⁴ E.g., the appointment of counsel to indigents, the right to subpoena witnesses, etc. The equal protection clause of the Fourteenth Amendment is particularly significant in gaining these rights. See *Hoffman v. State*, 404 P.2d 644 (Alaska 1965); *Perry v. Willard*, 427 P.2d 1020 (Ore. 1967).

THE SUPREME COURT AND THE FOURTH AMENDMENT OCTOBER, 1968, TERM

(Notes prepared by *Leonard Singer*, assisted by *Robert A. Filpi* and *Bradford J. Race*. The opinions expressed therein are not necessarily those of the Journal's Editors.)

"[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose. . . ."¹

Alderman v. United States: Standing and Disclosure

The Fourth Amendment to the United States Constitution provides that

[t]he right of the people to be secure in their

¹ *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Alderman v. United States*² dealt with electronic surveillance which is subject to the dictates of this Amendment whether or not there is an actual physical intrusion of the premises for the "Constitution protects people—and not simply 'areas' ".³ This provision is a bar to the "uninvited ear" and allows persons to assume that the words they speak in confidence "will not be broadcast to

² 394 U.S. 165 (1969).

³ *Katz v. United States*, 389 U.S. 347, 353 (1967).