Parole Revocation Hearings in California: The Right to Counsel

Jon Van Dyke*

Author's Note

On June 24, 1971, after this Article was completed, the California supreme court held by a 5-2 vote in the case of *In re Tucker*¹ that parolees have no right to counsel at parole revocation hearings.

Preston Tucker had been released on parole in January 1968 after having been convicted in 1949 of committing three first-degree robberies and an assault with intent to commit murder. On December 6, 1968, Tucker's parole was suspended, and he returned to prison. At the revocation hearing held on February 20, 1969, Tucker was accused of having left his home county without prior approval and of having possessed a firearm. Tucker admitted the first violation but refused to admit or deny the second, contending that the Adult Authority's only evidence that he possessed a firearm—a statement that Tucker had made to police officers—was exacted through duress, threats, and promises, and without the warnings required under *Miranda v. Arizona*.² The California supreme court appointed a referee, who determined that the confession was voluntary. The court then declared that it need not determine whether Tucker was given *Miranda* warnings, because the Adult Authority could consider such a confession whether or not Tucker had first been told of his constitutional right to remain silent.³

The remainder of Justice Burke's short majority opinion deals with Tucker's contention that he was denied due process of law because he was not allowed to appear with counsel at his

* Associate Professor of Law, Hastings College of the Law, University of California. B.A. 1964, Yale University; J.D. 1967, Harvard University.

1. 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971).

2. 384 U.S. 436 (1966).

3. 5 Cal. 3d at 175, 486 P.2d at 658, 95 Cal. Rptr. at 762, citing *In re Martinez*, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970).

revocation hearing. The court repeats most of the traditional arguments against permitting counsel to appear at revocation hearings (the procedures are administrative not judicial,⁴ no substantial legal rights are involved because the parolee is in legal custody while on parole,⁵ and parole is a matter of grace rather than a right⁶) and also argues that the administrative burdens caused by a change in the rule would be excessive⁷ and might make the Adult Authority more reluctant to grant parole.⁸ In a footnote the majority admits that "in most cases revocation of parole necessarily affects the length of the term which defendant must serve,"⁹ but the majority nonetheless purports to distinguish California's parole revocation hearings from the "deferred sentencing procedures"¹⁰ involved in *Mempa v. Rhay*¹¹ on the ground that the Adult Authority is not performing a judicial act when it revokes parole. Justice Burke makes no mention whatsoever of the other recent United States Supreme Court decisions that discuss the current obligations of due process.¹²

In a concurring opinion, Justice Mosk asserts that if parolees are granted the right to counsel at revocation hearings, they must also be granted this right at parole eligibility hearings and that such a rule would require counsel to appear at 32,000 hearings annually: 28,000 hearings for those seeking parole and 4,000 for those facing revocation. In addition, lawyers would have to be provided to represent the parole board at these hearings in order to present accusatory evidence. "This monumental requirement," Justice Mosk asserts, "would stagger the imagination."¹³

Justice Tobriner, in a long and careful dissenting opinion also signed by Justice Peters, argues forcefully that parolees must be provided with counsel at their revocation hearings. The court was provided with a copy of the Article that follows and Justice Tobriner refers to it at several points in his dissent.¹⁴

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4. See text accompanying notes 161-69 *infra*.

5. See text accompanying notes 156-60 *infra*.

6. See text accompanying notes 131-40 *infra*.

7. See text accompanying notes 171-79 *infra*.

8. See text accompanying notes 180-85 *infra*.

9. 5 Cal. 3d at 178 n.5, 486 P.2d at 660 n.5, 95 Cal. Rptr. at 764 n.5.

10. *Id.* at 177, 486 P.2d at 659, 95 Cal. Rptr. at 763.

11. 389 U.S. 128 (1967).

12. See text accompanying notes 133-38, 142-55 *infra*.

13. 5 Cal. 3d at 182, 486 P.2d at 663, 95 Cal. Rptr. at 767.

14. *Id.* at 184-208, 486 P.2d at 665-82, 95 Cal. Rptr. at 769-86 (Tobriner, J., concurring and dissenting).

The final act in the sequence of events that forced Eldridge Cleaver into exile was the revocation of his parole by the California Adult Authority through a procedure that denied him the opportunity to prove his innocence of the act that was the basis of the revocation.¹

In 1958, Cleaver was convicted of two counts of assault with intent to commit murder² and three counts of assault with a deadly weapon.³ In accordance with California's indeterminate-sentencing law,⁴ Cleaver's punishment was set at from one to 14 years, the actual term to be determined subsequently by the California Adult Authority.⁵ After Cleaver had spent eight years in prison, the Adult Authority set his term at 13 years, with the final four-and-a-half years to be served on parole. Accordingly, Cleaver was released from prison on December 12, 1966.

During the next year and a half, Cleaver became active in politics and a leader of the Black Panther Party. On April 6, 1968, during the turmoil that followed the assassination of Dr. Martin Luther King, Cleaver was involved in a gun battle in Oakland, the facts of which are still in dispute. A fellow Panther, Bobby Hutton, was killed during this gun battle, and Cleaver surrendered to the police who had surrounded the house where he had sought refuge. What Cleaver actually did during that gun battle is not important for purposes of this discussion. What is important is that he has never had an opportunity to explain what he did, or to challenge the police version of the conflict, before an impartial tribunal.

Immediately after the battle, Cleaver's parole was revoked. His parole agent charged Cleaver with violating three standard conditions of parole—associating with individuals of bad reputation, possessing and controlling a firearm, and failing to cooperate with his parole agent⁶—and with generally violating the law.⁷ The failure-to-cooperate charge was based on Cleaver's neglecting to report to his parole agent

1. *In re Cleaver*, 266 Cal. App. 2d 143, 72 Cal. Rptr. 20 (1st Dist. 1968).

2. CAL. PENAL CODE § 217 (West 1957).

3. CAL. PENAL CODE § 245 (West 1957).

4. CAL. PENAL CODE §§ 3020, 3023 (West 1957).

5. The California Adult Authority is a body created by statute that determines how long adult males sentenced to state prisons shall serve in prison and on parole. For the statutes that establish and guide the Adult Authority see CAL. GOV'T CODE §§ 11555, 11556(d), 18591, 20016, 21363.3 (West 1963, Supp. 1971); CAL. HEALTH AND SAFETY CODE § 11751 (West 1964); CAL. PENAL CODE §§ 1389.7, 2081.5, 2399-2403, 2690, 2903, 2920-26, 2940-43, 2946-47, 3000, 3020-25, 3042, 3054-55, 3103-04, 3113, 4812, 5001, 5003.5, 5055, 5074-82, 5089, 6025, 6025.5, 6403, 11193, 13020 (West 1970, Supp. 1971).

6. CALIFORNIA CDC FORM 1515, Standard Conditions of Parole, Nos. 7, 8, and 10, cited in Comment, *Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata?*, 10 SANTA CLARA LAWYER 319, 320 n.6 (1970).

7. See note 9 *infra*.

for a week after leaving the state (with permission) to appear on television in Chicago and New York. The charge of association with individuals of bad reputation arose out of regular contact with other Black Panthers, many of whom, having grown up in a ghetto like Cleaver himself, had a police record. These three violations of the standard conditions probably would not have led to a revocation of parole because of the general tendency to tolerate minor violations.⁸ In any event, Cleaver had no real chance to refute these charges or to present evidence of mitigating circumstances.

The final charge lodged against Cleaver was that he failed "to obey all municipal, county, state, and federal laws, ordinances, and orders; and failed to conduct himself as a good citizen,"⁹ a charge that relates to the gun battle itself and that accuses Cleaver of violating the law. Nonetheless, before his parole was revoked, Cleaver had no chance to present evidence responding to these charges, or to explain in an open hearing with the assistance of counsel the circumstances surrounding his alleged involvement in the Oakland shootout. Cleaver was subject to reimprisonment at the Adult Authority's discretion, without any of the constitutional procedural safeguards normally accorded to persons accused of crime and subject to possible imprisonment. He was denied the right to counsel, the right of confrontation and cross-examination, and the right to an impartial adjudication of the facts.

Each year, about 5,000 California parolees are similarly ordered back to prison without any impartial determination of whether they had violated their terms of parole.¹⁰ This Article discusses the parolee's right to counsel at parole revocation hearings and concludes that parolees must be provided with counsel at parole revocation hearings if their rights are to be protected. Part I outlines and evaluates present California parole revocation procedures and discusses what role the parolee's counsel can and should play at parole revocation hearings. Part II discusses the current state of the law regarding the right to counsel at parole revocation hearings, and part III argues that the right to counsel at such proceedings is constitutionally compelled.

I

PAROLE REVOCATION IN CALIFORNIA: AN EVALUATION

When a parole agent decides that a parolee should return to prison, he places the parolee in custody and recommends to the Adult Authority that parole be revoked. If, as in Cleaver's case, the parolee has al-

8. See, e.g., J. IRWIN, *THE FELON* 152-55 (1970).

9. 266 Cal. App. 2d at 150, 72 Cal. Rptr. at 24.

10. RESEARCH DIVISION, CALIFORNIA DEPARTMENT OF CORRECTIONS, *CALIFORNIA PRISONERS* 1968, at 96, 105 (1968).

ready been arrested, the parole agent simply places a "hold" on the parolee, which means that the parolee may not be released on bail.¹¹ The parole agent then writes a report, which he submits through his supervisors to the Adult Authority.

These reports are considered by Adult Authority panels at weekly meetings called Parole and Community Service Hearings.¹² Four panels, each consisting of one Adult Authority member¹³ and one hearing representative,¹⁴ meet for about four hours each Friday morning, two of the panels meeting in Los Angeles and the other two in San Francisco. Each panel considers a wide range of matters concerning parole conditions and possible parole suspensions. Some of these cases require little discussion because the parolee has been convicted of some new felony, making parole suspension and subsequent revocation virtually automatic.¹⁵ But about 40 other cases before each panel re-

11. See CAL. PENAL CODE § 3056 (West 1957).

12. Parole revocation hearings are not required by statute in California. See note 24 *infra*.

In 21 states the statute requiring parole revocation does not expressly require a hearing and in one of these states the statute precludes such a hearing. In 20 states, statutes authorize a hearing, but do not provide for representation by counsel; two other states specifically preclude representation by counsel. Seven states authorize representation by retained counsel at a statutory hearing: ALA. CODE tit. 42, § 12 (1958); FLA. STAT. ANN. § 947.23 (1965); LA. REV. STAT. ANN. § 15:574.9 (West 1951); MICH. COMP. LAWS ANN. § 791.240a (Supp. 1971); MONT. REV. CODES ANN. § 94-9835 (1969); N.J. STAT. ANN. § 2A: 168-4 (1953); W. VA. CODE ANN. § 62-12-19 (1961). See Warren v. Michigan Parole Bd., 23 Mich. App. 754, 179 N.W.2d 664, 667 n.9 (1970); Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197, 198 (1970); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964).

Among the states that have no parole revocation hearings whatsoever are Nebraska [See Comment, *Revocation of Probation and Parole in Nebraska—a Procedural Antithesis*, 48 NEB. L. REV. 220, 231 (1968)], Ohio [Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Rose v. Haskins, 21 Ohio St. 2d 94, 255 N.E.2d 260 (1970)], and Oregon [Whalen v. Gladden, 249 Ore. 12, 377 P.2d 561 (1968)]. The Oklahoma court of criminal appeals recently altered the situation in that state by ruling that a hearing is now required when parole is revoked. Chase v. Page, 456 P.2d 590 (Okla. Crim. App. 1969). Subsequently, the U.S. Court of Appeals for the Tenth Circuit, in approving the Oklahoma court's recent ruling, stated that a hearing at the time of parole revocation is constitutionally demanded. Murray v. Page, 429 F.2d 1359, 1361-62 (10th Cir. 1970).

13. According to statute there should be nine members of the Adult Authority [CAL. PENAL CODE § 5075 (West 1957)], but because of financial reasons one of these nine positions has never been filled. The eight members are appointed by the governor to four-year terms. At the present time, two members are attorneys, three come from law enforcement agencies, and three have previously worked in the Department of Corrections. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970.

14. There are eleven hearing representatives. These men are civil servants, and all have had lifetime careers in the parole and prison system. *Id.*

15. Telephone interview with Bernard Forman, Adult Authority representative, in Los Angeles, Oct. 21, 1970.

quire deliberation and a discretionary decision. A small percentage of this group carries the parole agent's recommendation that parole be revoked, and the Adult Authority panel concurs with virtually all of these recommendations.¹⁶ In the remaining cases, the agent reports a technical violation but requests that the parolee remain on parole. The panel disagrees with these recommendations of leniency from 25 to 40 percent of the time and suspends parole over the agent's contrary recommendation.¹⁷

The cases involving possible parole suspension are usually presented to the Adult Authority panel by the District Administrator, who, because of his responsibility for general supervision of many parole agents, is usually far removed from the specific case involved. The panel receives only the parole agent's report, with the comments of the agent's Unit Supervisor and the District Administrator, and the parolee's prior case history. The parole agent is only rarely present at this hearing, and the parolee is never there. Each matter is disposed of within half an hour at most, and a decision is made immediately.¹⁸ If the panel decides that the parolee should return to prison, he is sent to the Reception-Guidance Center at Vacaville.

The hearings are closed to the public, no transcript is made, and in the usual case the only written record consists of a short notation of the action taken; only rarely does the panel give reasons for its decision.¹⁹ Although the parolee has usually been informed by his parole agent of the general nature of his alleged violation, it is only in Vacaville that he is given formal notice of the charges that have been filed against him.²⁰

Within 60 days of his return to confinement, the parolee is given an opportunity to appear before an Adult Authority panel in a proceeding that is only slightly more formal than the Parole and Community Service Hearing. This second panel consists of two Adult Authority hearing representatives, but because one of the representatives questions the parolee while the other attempts to ease the Authority's heavy load and speed up the day's business by reading the papers involved in the next case,²¹ only one person devotes full attention to the parolee.²² The

16. *Id.*

17. *Id.*

18. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970.

19. *Id.*

20. CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, 1970 REPORT ON PAROLE REVOCATION PROCEDURES 3 (Feb. 19, 1970).

21. *Id.*

22. A survey report made by the California Youth and Adult Authority Correctional Agency in 1962 came to the following conclusion about this practice:

While we noted that some panel members were quite skilled in listening and reading at the same time, it is impossible for anyone to give full concen-

hearing representative first asks the parolee whether he understands the charges against him. He then asks the parolee for a plea, which, if guilty, ends the matter. If the plea is not guilty, the hearing representative reads to the parolee the facts on which the charge is based.²³ The parolee can support his not guilty plea by oral and written evidence, but he cannot bring either retained or appointed counsel to the hearing, nor present any witnesses in his own behalf.²⁴ Nor is he permitted to cross-examine any of the witnesses against him. The Adult Authority representative need not find beyond a reasonable doubt that the parolee violated his conditions of parole in order to support a decision to revoke parole; rather, he need only find by the preponderance of the evidence that there was a violation.²⁵

These hearings are short, lasting from 15 to 30 minutes, and are closed to the public because public attendance would tend "to inhibit the inmate or the hearing panel."²⁶ The parolee is given the decision of the panel in writing one to three days after the hearing, but, as in the Parole and Community Service hearings, reasons are virtually never given for the decision.²⁷ Since early 1969 a clerk has taken notes to preserve the substance of the hearing, but a verbatim transcript is not made. These rough notes can be subpoenaed by the parolee, but unless the parolee takes the matter to court, he and his lawyer are not normally allowed to examine them.²⁸ Ninety-eight percent of the parolees who appear

tration to both tasks. We feel that the danger is great that important facts can be missed by one or the other of the panel members and the quality of the decision could suffer according.

CALIFORNIA YOUTH AND ADULT CORRECTIONS AGENCY, THE PAROLING BOARDS OF THE AGENCY 94-95 (1962).

23. The names of the persons who supplied the information are not given to the parolee, however, if there is any fear that harm might thereby come to the informer. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970.

24. From 1931 to 1941, redetermination of a previously fixed sentence could not be made except after a hearing, at which the prisoner was entitled to be present and to produce evidence and witnesses in his behalf. CAL. PENAL CODE § 1168 (West 1957); see *In re Etie*, 27 Cal. 2d 753, 758, 167 P.2d 203, 206 (1946). This hearing requirement was deleted in 1941 and never reappeared. Ch. 106, § 13, [1941] Cal. Stat. 1083. See *Ellhamer v. Wilson*, 312 F. Supp. 1245, 1252 n.2 (N.D. Cal. 1969), *rev'd*, No. 25919 (9th Cir. July 7, 1971). The hearings now provided by the Adult Authority have no statutory basis, and according to the California supreme court are not constitutionally required. *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965).

25. *In re Anderson*, 107 Cal. App. 2d 670, 237 P.2d 720 (3rd Dist. 1951).

26. Letter from Henry W. Kerr, Chairman of the Adult Authority, to the author, May 14, 1970; see also Mitford, *Kind and Usual Punishment in California*, 227 ATLANTIC MONTHLY, Mar. 1971, at 45, 52.

27. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970.

28. Telephone interview with Bernard Forman, Adult Authority representative, in Los Angeles, Oct. 21, 1970.

before panels at Vacaville have their parole revoked.²⁹

Many revocations of parole occur, as in Eldridge Cleaver's case, after the parolee has allegedly committed some new crime. Because of his notoriety, Cleaver would undoubtedly have been prosecuted for his crime in addition to having his parole revoked. But in less celebrated cases, especially when some of the evidence against the parolee has been illegally obtained,³⁰ a district attorney may decide to avoid the burden of a new trial by attempting to return the accused parolee to prison by the simpler method of parole revocation. To accomplish this, the district attorney forwards to the Adult Authority a report establishing a *prima facie* case of the parolee's guilt.³¹ The parolee is given the right to deny the charges before an Adult Authority panel in Vacaville, but he is denied all the usual safeguards built into the Anglo-Saxon system of criminal justice.

The swift, secretive, and almost despotic nature of these proceedings is particularly disturbing because the legislature originally established the Adult Authority as a liberal reform to bring order into the previously chaotic sentencing field.³² The Authority was created because the legislature determined that trial judges could not, based on their limited knowledge of the defendant, pronounce a sentence that related to his specific needs and problems. The Adult Authority was designed to bring professional knowledge to this murky area and render decisions that would best enable convicted men to return speedily to productive lives.

The original legislation creating the Adult Authority stated that its members should be experts in the field of rehabilitation and gave them broad discretionary powers because these powers were thought necessary to promote rehabilitation.³³ The legislature desired to establish a system of individualized treatment through which each inmate would be provided with his own rehabilitative routine and released when the Adult Authority determined that he had been rehabilitated, or at least that his chances of staying out of trouble were at a maximum.³⁴

29. CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, *supra* note 20, at 3. For additional information on parole revocation see *Proceedings of the First Sentencing Institute for Superior Court Judges*, 45 Cal. Rptr. app. 103 (1965); A.F. GINGER, CALIFORNIA CRIMINAL LAW PRACTICE (II) 607-08 (1969); Wall St. J., Apr. 9, 1968, at 1, col. 1; Comment, *supra* note 6, at 319.

30. The use of illegally obtained evidence in parole revocation hearings was allowed in *In re Martinez*, 1 Cal. 3d 641, 650, 463 P.2d 734, 740, 83 Cal. Rptr. 382, 388 (1970).

31. Milligan, *Parole Revocation Hearings in California and the Federal System*, 4 CALIF. WESTERN L. REV. 18, 21 (1968).

32. J. IRWIN, *supra* note 8, at 54-55.

33. *Id.*

34. *Id.*

The legislature gave the Adult Authority the ultimate powers of setting sentence and granting and revoking parole so the Authority could respond to each convict's particular situation.³⁵

The goal of individualized evaluation and treatment must now be recognized as unrealistic and unattainable at the present level of expenditures.³⁶ The Adult Authority members and representatives do their best to evaluate each convict, but they cannot, in the short time they are able to spend on each man's file, bring significant individual attention to his case.

The convicts realize this and they resent it.³⁷ Criminologists have argued that effective rehabilitation of criminals must include creating respect for the rules and procedures of the legal system. Any such respect, however, is threatened by a process that ignores the protections laymen, including lawbreakers, associate with justice.

In spite of this indictment, the Supreme Courts of California and of the United States have refused to review the procedures and decisions of the California Adult Authority.³⁸ The California legislature has similarly refused to bring the Authority into line with modern notions of due process of law,³⁹ and the Adult Authority continues to

35. *Id.*

36. *Id.* at 54 n.23.

37. CALIFORNIA YOUTH AND ADULT CORRECTIONS AGENCY, PAROLE BOARDS: AN ADMINISTRATIVE ANALYSIS 93-94 (1962). When inmates at San Quentin drew up a list of grievances in February 1968, half of them focused directly on the mysterious and seemingly arbitrary practices of the Adult Authority. Berkeley Barb, February —, 1968, at 1, *quoted in* J. IRWIN, *supra* note 8, at 54 n.22. Several years later, a reporter asked a group of ex-convicts what their major grievance was and received this response: "Don't give us steak and eggs; get rid of the Adult Authority! Don't put in a shiny modern hospital; free us from the tyranny of the indeterminate sentence!" Mitford, *supra* note 26, at 47. For other examples of situations in which the convicts view the Adult Authority as an arbitrary and unjust institution, see J. IRWIN, *supra* note 8, at 55-60; Alexander v. California Court Dir. of Correction, 433 F.2d 360 (9th Cir. 1970); Carter v. California Adult Authority, 433 F.2d 978 (9th Cir. 1970).

38. For the California supreme court, see, e.g., *In re Evans*, Crim. No. 13792 (Cal. Dec. 10, 1969) (minute order); *In re Lujan*, Crim. 14134 (Cal. Feb. 25, 1970) (minute order). For the United States Supreme Court, see, e.g., *Conway v. California Adult Authority*, 396 U.S. 107 (1969); *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); *Eason v. Dickson*, 390 F.2d 585 (9th Cir.), *cert. denied*, 392 U.S. 914 (1968); *Johnson v. Stucker*, 203 Kan. 253, 453 P.2d 35, *cert. denied*, 396 U.S. 904 (1969).

39. The California Assembly Interim Committee on Criminal Procedure filed a report in February 1970, recommending, among other things, that parole revocation hearings be held locally, either in the parolee's county of residence or in the county where the alleged violation occurred, and that the parolee should be given the right to appointed counsel at all revocation hearings. See CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, *supra* note 20, at 9-10. No action has been taken on these recommendations. The California Assembly did pass, on June 10, 1970, and again on July 1, 1971, a bill that would have provided more definite guidelines for

act without providing definite guidelines for future conduct or written opinions justifying past action. Because of the responsible parties' failure to act, California now has a parole revocation procedure that is not only unconstitutional,⁴⁰ but also unwise in terms of promoting responsibility, respect for law, and self-reliance on the part of the parolees.⁴¹

Although there are many aspects of California's present parole revocation practices that raise serious constitutional questions,⁴² the most

Adult Authority decisions, reduced the statutory size of the Adult Authority from nine members to five, and required the release on parole of all prisoners when their minimum sentence was completed (except under certain specified circumstances). A.B. 1511, Cal. Reg. Sess. (1970); A.B. 483, Cal. Reg. Sess. (1971). The bill was not reported out of the Senate Judiciary Committee to the floor of the State Senate in 1970, and the Senate had not yet acted upon the bill by mid-July in 1971. Letter from W. Craig Biddle, then Majority Floor Leader in the California Assembly, to the author, Aug. 31, 1970; San Francisco Chronicle, July 2, 1971, at 9, col. 1. This legislation does not affect the procedural aspects of parole revocation hearings.

40. See part III *infra*.

41. As early as 1946, the United States Court of Appeals for the District of Columbia stated:

The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective, and thorough processes of the machinery of the law. And hardly any circumstance could with greater effect impede progress toward the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy, or impervious to facts.

Fleming v. Tate, 156 F.2d 848, 850 (D.C. Cir. 1946).

In 1967, the President's Commission on Law Enforcement and Administration of Justice came to a similar conclusion:

The offender threatened with revocation should therefore be entitled to a hearing comparable to the nature and importance of the issue being decided. Where there is some dispute as to whether he violated the conditions of his release, the hearing should contain the basic elements of due process—those elements which are designed to ensure accurate factfinding [It should include] such essential rights as reasonable notice of the charges, the right to present evidence and witnesses, the right to representation by counsel—including the right to appointed counsel—and the right to confront and cross-examine opposing witnesses.

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 88 (1967).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the United States Supreme Court acknowledged the importance of promoting individual self-respect and the extent to which procedural protections can foster such self-respect:

[I]mportant governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

397 U.S. at 264-65 (1970).

42. If the parolee is accused of committing a crime for which he has not been convicted in a court of law, he should have the right to confront his accusers and to subpoena witnesses. Judge Ferguson of the Central District of California recognized this right in the case of *Hester v. Craven*, Civ. No. 70-832-F (C.D. Cal., filed Feb. 18, 1971). See also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Greene v. McElroy*, 360

critical is the denial of the right to representation by counsel. Justice Marshall, in discussing probation revocation proceedings in *Mempa v. Rhay*,⁴³ notes that the lawyer's skill is invaluable "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case."⁴⁴

In the context of a criminal trial, it has long been recognized that defendants invariably suffer if they are not provided with counsel. In 1932, the United States Supreme Court said:

Even the intelligent and educated layman has small and some-

U.S. 474 (1959); *Hyser v. Reed*, 318 F.2d 225, 248-49 (D.C. Cir. 1963) (Bazelon, C.J., dissenting); *Sostre v. Rockefeller*, 312 F. Supp. 863, 872 (S.D.N.Y. 1970), *rev'd in part, modified in part, aff'd in part sub nom.* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971). If the parole agent recommends revocation not because a specific crime was committed, but rather because of a series of loosely connected events, the parolee's accuser is really his parole agent, even though the agent will have formed his recommendation on the basis of discussions with others. When this is so, the parole agent should at least be required to explain his reasons for recommending revocation and should be subject to cross-examination by the parolee's attorney.

Reform is urgently needed, too, with respect to secrecy of the records of the parole board. In California, parolees and their attorneys are not permitted to inspect the reports of the parole agents and the comments of the reviewing supervisors. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970. For counsel to refute effectively the allegations on which parole revocation is recommended, he must have access to the files that contain these allegations.

The Adult Authority must begin to give reasons for its revocation decisions. The United States Supreme Court said in *Specht v. Patterson*, 386 U.S. 605, 610 (1967), that whenever a hearing is required, the person conducting the hearing must make findings sufficiently adequate that any appeal allowed is meaningful. No meaningful judicial review is possible if a one-line order is all the reviewing court has to examine. The decisions of the California supreme court that parole can only be revoked for "cause" [*In re Schoengarth*, 66 Cal. 2d 295, 302, 425 P.2d 200, 204-05, 57 Cal. Rptr. 600, 604-05 (1967); *People v. Dorado*, 62 Cal. 2d 338, 359, 398 P.2d 361, 375, 42 Cal. Rptr. 169, 183 (1965); *In re McLain*, 55 Cal. 2d 78, 87, 357 P.2d 1080, 1086, 9 Cal. Rptr. 824, 830 (1960); *In re Smith*, 33 Cal. 2d 797, 803, 205 P.2d 662, 666 (1949)] cannot be enforced if the Adult Authority is not required to inform the parolee and the reviewing court what "cause" they found persuasive.

The Adult Authority insists on keeping its proceedings closed to the public, arguing that this policy assists the parolee by keeping secret damaging information about him. Letter from Henry W. Kerr, Chairman of the Adult Authority, to the author, May 14, 1970. The parolee would be far better served in the long run if the public were allowed to observe parole revocation hearings and to examine parole records, just as they are now allowed to attend criminal trials and inspect trial transcripts, because such public scrutiny would force the Adult Authority to take more care in reaching its decisions. There is no place for secret proceedings when the liberty of a citizen is at stake.

Finally, the parole revocation hearings should be held as soon as possible and in a location as close as possible to the site of the alleged violation or to the parolee's normal residence. See *Hyser v. Reed*, 318 F.2d 225, 243-44 (D.C. Cir. 1963); CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, *supra* note 20, at 8; Cohen, *supra* note 12, at 215-24.

43. 389 U.S. 128 (1967). See notes 50-55 *infra* and accompanying text.

44. *Id.* at 135.

times no skill in the science of law He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁴⁵

The Court has also recognized the assistance counsel can provide at a hearing to determine punishment:

It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge.⁴⁶

The Supreme Court of Pennsylvania felt that a lawyer was even more important in a parole revocation hearing than in a sentencing hearing because there are more factual questions to be resolved. In a sentencing hearing, "counsel [is] necessary because even if the sentencing [is] for the most part a formality, 'just a few words, if spoken effectively enough' by counsel might [aid] the appellant."⁴⁷ In a parole revocation hearing, the court continued, "there can be no doubt as to the value of counsel in developing and probing factual and legal situations which may determine on which side of the prison walls appellant will be residing."⁴⁸ Furthermore, because revocation hearings are held after the parolee has been returned to prison and hence is prevented

45. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

46. *Carter v. Illinois*, 329 U.S. 173, 178 (1946).

47. *Commonwealth v. Tinson*, 433 Pa. 328, 333, 249 A.2d 549, 552 (1969).

One former parole board member has expressed the problem as follows:

Prisoners are generally quite ineffectual in organizing the information they should put to a parole board, important as the hearing is to them, and they have little talent for arguing to the board. To put it simply, they lack those qualities that are important to their success: the qualities that are the peculiar strength of the effective advocate. For these reasons the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board.

Tappan, *The Role of Counsel in Parole Matters*, 3 PRACTICAL LAWYER, Feb. 1957, at 21, 26-27.

48. 433 Pa. at 333, 249 A.2d at 552. The Appellate Division of the Superior Court of New Jersey has similarly stressed the importance of counsel in presenting facts:

Moreover, in revocation proceedings—both as to probation and parole—there are usually specific factual allegations concerning the conduct of the probationer or parolee said to constitute a violation of probation or parole. An attorney could prove most useful, even essential, in defending against such allegations of misconduct—presenting contrary evidence or cross-examining adverse witnesses if necessary.

Puchalski v. New Jersey State Parole Bd., 104 N.J. Super. 294, 301, 250 A.2d 19, 22-23 (1969), *modified*, 55 N.J. 113, 259 A.2d 713 (1969), *cert. denied*, 398 U.S. 938 (1970). See also Note, *Constitutional Law: Parole Status and the Privilege Concept*, 1969 DUKE L.J. 139, 148-49 (1969).

from uncovering evidence on his own, an attorney can assist the Authority by seeking out evidence and information relevant to the inquiry.⁴⁹

II

THE CURRENT CASE LAW

A. *Mempa v. Rhay*

An examination of current constitutional law governing parole revocation hearings must begin with *Mempa v. Rhay*,⁵⁰ a case that considered the probation revocation procedures of the State of Washington. Jerry Douglas Mempa was convicted of joyriding and released on

49. The presence of an attorney at a parole revocation hearing may be even more necessary than that presence in a courtroom because of the close-knit, almost family-like, atmosphere that prevails at parole hearings. The recommendations of the parole agent and his supervisor that parole be revoked are only rarely rejected. The Adult Authority and the parole workers are working toward the same end and their various judgments on a given situation are likely to be identical. Interview with Robert R. Miller, Adult Authority hearing representative, in Los Angeles, Sept. 17, 1970; letter from Robert R. Miller to the author, Oct. 21, 1970.

The agent, in the process of coming to his conclusion, has generally considered and rejected all information favorable to the parolee. His effect as a filter may seriously color the Adult Authority's impression of the case. Because the Authority has a somewhat paternalistic view toward parolees, a parolee trying to reverse the decision of the parole agent and his associates is simply unlikely to be persuasive, even if he is listened to. As one former parole board member has expressed it:

[Many prisoners] are of less than normal intelligence. Most of them approach parole hearings partially paralyzed by fear and anxiety. Few are able to express themselves fully and effectively, sometimes because of language difficulties. Certainly there is little or no relationship between the offender's ability to make a favorable impression and his actual readiness for release For these reasons, the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board.

Tappan, *supra* note 47, at 26-27. Only if an outsider with the capacity to command the Authority's respect is allowed to enter this family-like proceeding will there be any hope that the parolee's position will be fairly heard.

Furthermore, the attorney could inhibit the introduction of political considerations into the deliberations of the Adult Authority. In cases such as Eldridge Cleaver's, the actions of the Adult Authority may appear to have political motives. In fact, political motives may not have played a part in their decision, but the summary procedures used by the Authority encourage those who would think the worst of this governing body. The requirement that the Adult Authority revoke parole only for "cause" [see note 42 *supra*] is meaningless as a protection against political controversy unless there is an open discussion with counsel of the reasons for revocation. See also Kadish, *The Advocate and the Expert—Counsel in the Penitentiary Process*, 45 MINN. L. REV. 803 (1961); Casenote, 18 BUFFALO L. REV. 607 (1969).

The National Legal Aid and Defender Association (in November 1965) and the House of Delegates of the American Bar Association (in February 1966) have both adopted standards for a Public Defender System that include legal representation for parolees at revocation proceedings. See *Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 400-01 (1969) (Amendments to the Criminal Justice Act of 1964).

50. 389 U.S. 128 (1967).

two years probation. Imposition of sentence was deferred pending his performance during probation, a common practice in Washington. Four months later, Mempa was accused of being involved in a burglary. A hearing was held before a trial judge, but Mempa was not provided with a lawyer. Mempa admitted that he participated in the burglary and his probation was revoked.⁵¹

The judge had no discretion in setting Mempa's deferred sentence; under Washington law it had to be the maximum term provided by law.⁵² The trial judge did have discretion, however, to suggest the length of time that should be served to the Board of Prison Terms and Paroles, which, by virtue of its power to grant parole, makes the ultimate decision as to how long a defendant will actually serve. In this instance the judge recommended that Mempa serve only one year.⁵³

The United States Supreme Court found this procedure constitutionally defective, ruling that counsel is required whether the proceeding is one to revoke probation or to determine sentence,⁵⁴ just as counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."⁵⁵

B. Lower Court Response

Lower court responses to *Mempa* have been anything but uniform. A number of courts have focused on the "substantial rights of a criminal accused may be affected" rationale and have applied *Mempa* to *parole*, as well as *probation*, revocation hearings. Thus, the Supreme Court of Pennsylvania, ruling that all indigent parolees must be provided with counsel at parole revocation hearings,⁵⁶ stated that "[w]e are helped not at all in determining appellant's constitutional rights by attaching artificial labels to describe the proceedings before us."⁵⁷ Once the substance of the proceeding was uncovered, it became clear that a significant event was taking place:

The recommitment hearing determined whether or not appellant would be returned to prison. There can be no question that a pro-

51. *Id.* at 130-31.

52. WASH. REV. CODE § 9.95.010 (1961), cited in 389 U.S. at 135.

53. 389 U.S. at 131.

54. *Id.* at 137.

55. *Id.* at 134.

56. *Commonwealth v. Tinson*, 433 Pa. 328, 249 A.2d 549 (1969). Tinson pleaded guilty in 1959 to voluntary manslaughter and was sentenced to 5-to-12 years in prison. He was paroled in 1964, but was recommitted in 1966 for alleged parole violations after a parole hearing at which he was not represented by counsel. In December 1968, Tinson's application for parole was denied. The Supreme Court of Pennsylvania held in January 1969 that Tinson was entitled to a new parole revocation hearing and to appointed counsel to represent him at such a hearing.

57. *Id.* at 332, 249 A.2d at 551.

ceeding at which a determination of that kind was made was a "critical stage."⁵⁸

The New York Court of Appeals has come to the same conclusion,⁵⁹ that the reasoning of *Mempa* applies to a parole revocation hearing at which the liberty of the parolee is at stake:

There are, of course, differences between Washington's deferred sentencing procedure, probation revocation and parole revocation but such differences cannot, and should not, militate against the need for a lawyer where revocation of parole results in the deprivation of liberty. As we read *Mempa v. Rhay* [citation omitted] we are persuaded—as other courts have been . . .—that it may not be limited to its narrow factual content. The principle which underlies the decision in *Mempa* is sufficiently broad to encompass the revocation of parole as well as of probation. In both, the decision to deprive an individual of his liberty turns on factual determinations, and we would say, as did the Supreme Court in the *Mempa* case (389 U.S. at p. 135), that "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case . . . is apparent."⁶⁰

A few months after the New York Court of Appeals' ruling, the U.S. Court of Appeals for the Second Circuit supported this decision, emphasizing the ability of a lawyer to uncover significant evidence that might assist the parolee.⁶¹ Two other federal circuits, the fourth⁶² and

58. *Id.* at 334, 249 A.2d at 552.

59. *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 318 N.Y.S.2d 449, 267 N.E.2d 238 (1971). Menechino was sentenced in 1947 to an indeterminate term of from 20 years to life after pleading guilty to second-degree murder. He was released on parole in 1963, but he was declared "delinquent" the following year and taken into custody in March 1965. A month later he appeared, without counsel, before a "parole court" to face charges of associating with individuals having a criminal record and giving false and misleading information to his parole supervisor. The giving-false-and-misleading-information charge resulted from Menechino's having denied to his parole agent that he was consorting with individuals having a criminal record. Menechino did not deny these charges before the parole court, but apparently tried to defend himself by arguing that these charges did not justify parole revocation because his only relationship with the ex-convicts was through his job where they were fellow construction workers. The board nonetheless revoked Menechino's parole and he remained in prison until this decision in 1971. The Court of Appeals ruled 4-3 that Menechino was entitled to a new revocation hearing at which he would be represented by counsel.

60. 27 N.Y.2d at 381, 318 N.Y.S.2d at 453, 267 N.E.2d at 241.

61. *U.S. ex rel. Bey v. State Bd. of Parole*, No. 35107 (2d Cir., filed May 17, 1971). Bey was convicted of second-degree murder after killing a constable in 1935. He was released on parole in June 1960, but was reimprisoned in November 1960 after his parole agent concluded that "difficulties" had developed at each of the three places Bey had been employed. One of the three places was the Porter School in Farmington, Connecticut, a girl's preparatory school, where Bey was accused of becoming too involved with one of the girls. He allegedly wrote upsetting letters to girls and faculty members. He subsequently threatened to leave Connecticut without informing his parole board

the seventh,⁶³ have held that *Mempa* applies to all probation revoca-

and a search of his room uncovered a hunting knife. The Connecticut parole board held a hearing in December 1960, without providing Bey with an attorney, and decided to revoke Bey's parole. The Second Circuit's opinion, written by Judge Kaufman, suggested that a review of Bey's letters by an attorney "might have revealed different hues of motivation than found their way into" the parole agent's report. *New York Times*, May 18, 1971, at 20, col. 3 (city ed.).

62. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969). In a state action Hewett was convicted in 1964 of store-breaking, larcency, escape from jail, and injury to a building. He was given concurrent sentences of five to seven years, but the sentences were suspended and Hewett was put on probation. Two years later, Hewett was accused of violating his conditions of probation and a hearing was held to consider the allegations. Hewett requested counsel but this request was denied, so Hewett attempted to conduct his own defense by cross-examining the state's witnesses and testifying in his own behalf. *Id.* at 1319. The trial judge ruled that Hewett had violated his conditions of parole and the North Carolina supreme court upheld the denial of counsel at the probation revocation hearing. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476, 479 (1967). The U.S. Court of Appeals for the Fourth Circuit held that Hewett did have such a right and ordered North Carolina to institute a new revocation proceeding at which Hewett would be represented by appointed counsel or (because Hewett had subsequently been released from prison) to void the previous hearing and expunge the revocation from Hewett's record. 415 F.2d at 1325. The court specifically stated that:

[*Mempa*] cannot be limited to its narrow factual context. The principle which undergirds that decision is broad indeed, "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." [citation omitted] While the right to counsel applies to "criminal proceedings," we have little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty.

Id. at 1322 (emphasis in original).

The Court concluded that whenever "liberty hangs in the balance" the right to counsel attaches. *Id.* at 1323. Because liberty hangs in the balance at a parole revocation hearing, the United States Court of Appeals for the Fourth Circuit will rule (if it follows its clear language in *Hewett*) that indigent parolees must be provided with counsel, when such a case comes before them.

63. *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970). Hahn pleaded guilty to a charge of burglary in 1964; he was given a five-year suspended sentence and placed on probation. Several months later his probation was revoked without a hearing on the charge that he violated his terms of probation by going from Wisconsin to California. The Seventh Circuit explicitly balanced the rights of the probationer against the Government's interests and concluded that the rights of the probationer must prevail and that he must be given a hearing at which he can be represented by counsel. *Id.* at 104. The court used broad language in reaching this decision, indicating that the judges will reach the same conclusion when they consider a parole revocation. In fact, at one point the court mistakenly used the word "parole" when it meant "probation." *Id.* at 102.

The opinion discusses the need for due process as enunciated by the United States Supreme Court in the welfare-termination case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), and then says that "[t]he immediacy of desperation is at the very least as strong in the case of a probationer who is literally being denied his freedom." 430 F.2d at 104. The court then balances the interests involved: "Weighing the 'extent to which [the petitioner] may be condemned to grievous loss' against 'the governmental interest in summary adjudication' we find the petitioner's loss of freedom to outweigh the added state burden of providing a limited hearing to allow petitioner to be confronted with his probation violation and to be heard." *Id.* The Attorney General of Wisconsin filed a petition for certiorari in this case. 39 U.S.L.W. 3392 (U.S. Dec. 18, 1970). Judge

tion hearings in broad opinions that indicate they will extend *Mempa* to parole revocation hearings when that issue comes before them.⁶⁴

Other jurisdictions have ignored the broad rationale of *Mempa* and limited it to its facts. A few courts have held, in fact, that *Mempa* does not apply even to probation revocation hearings unless a new sentence is imposed on the probationer.⁶⁵ A larger number of courts

Reynolds in the Eastern District of Wisconsin subsequently applied the *Hahn* test to parole revocations and has concluded that parolees have the right to a hearing and appointed counsel. *Goolsby v. Gagnon*, 322 F. Supp. 460 (E.D. Wis. 1971).

64. Other courts have held that parolees have a right to counsel at parole revocation hearings, or have rendered related decisions that indicate they will so rule when the question is presented to them:

United States Court of Appeals for the First Circuit: *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969), *vacated as moot*, 396 U.S. 66 (1969), held that counsel must be appointed to represent an inmate of the Boys Training Center at a hearing to decide whether he should be transferred to the Men's Correctional Center. *Id.* at 848 n.13. The court mentioned that marshaling of facts was essential to the hearing and that the petitioner was being moved to a facility with markedly different treatment and privileges; the parole revocation hearing is, therefore, a proceeding clearly encompassed in this decision.

Northern District of California: *Ellhamer v. Wilson*, 312 F. Supp. 1245 (N.D. Cal. 1969), *rev'd*, No. 25919 (9th Cir. July 7, 1971).

Southern District of New York: Judge Motley, in *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part, modified in part, aff'd in part sub nom.* *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), ruled that there is a right to a full-scale hearing with the right to present witnesses, to cross-examine accusers, and to bring in retained counsel before a prisoner can be put in solitary confinement for more than a few days. The decision does not deal with the question of appointed counsel, but provides greater procedural protections for prisoners than any previous decision.

District of Utah: *Workman v. Turner*, Civ. No. C-230-68 (D. Utah, filed Feb. 19, 1969). Without an opinion or discussion, appointed counsel was supplied to a parolee facing a revocation hearing.

New Jersey: The New Jersey supreme court has not passed directly on the question [see *Puchalski v. New Jersey State Parole Bd.*, 55 N.J. 113, 259 A.2d 713 (1969), *cert. denied*, 398 U.S. 938 (1970)], but the intermediate appellate court has indicated that the right to counsel extends to parole revocation hearings. See *Puchalski v. New Jersey State Parole Bd.*, 104 N.J. Super. 294, 250 A.2d 19, 22-23 (1969); *State v. Seymour*, 98 N.J. Super. 526, 237 A.2d 900 (1968).

65. *Shaw v. Henderson*, 430 F.2d 1116 (5th Cir. 1970), *affirming* *Shaw v. Henderson*, 303 F. Supp. 183 (E.D. La. 1969); *Perck v. Henderson*, 317 F. Supp. 29 (E.D. La. 1970); *Marquardt v. Gagnon*, 314 F. Supp. 709 (E.D. Wis. 1970); *Splawn v. Fitzharris*, 297 F. Supp. 44 (C.D. Cal. 1969); *United States ex rel. Bishop v. Brierly*, 288 F. Supp. 401 (E.D. Pa. 1968); *Holder v. United States*, 285 F. Supp. 380 (E.D. Texas 1968); *Sammons v. United States*, 285 F. Supp. 100 (S.D. Texas 1968); *United States v. Hartsell*, 277 F. Supp. 993 (E.D. Tenn. 1967); *Winchester v. State*, 45 Ala. App. 24, 221 So. 2d 700, 701 (Ala. Ct. App. 1969); *Stout v. State*, 45 Ala. App. 262, 229 So. 2d 37 (Ala. Crim. App. 1969); *Cole v. Holliday*, — Iowa —, 171 N.W.2d 603 (1969); *Wingo v. Lyon*, 432 S.W.2d 821, 822 (Ky. Ct. App. 1968); *Thonias v. Commonwealth*, 437 S.W.2d 512, 514 (Ky. Ct. App. 1968), *cert. denied*, 397 U.S. 956 (1970); *State ex rel. Thompson v. Henderson*, 256 La. 823, 239 So. 2d 347 (1970); *Skidgell v. State*, 264 A.2d 8 (Me. 1970); *State v. Russo*, 260 A.2d 140 (Me. 1969); *State v. Oliver*, 247 A.2d 122 (Me. 1968); *Knight v. State*, 7 Md. App. 313, 255 A.2d 441 (1969) (although *Warden v. Palumbo*, 214 Md. 407, 135 A.2d 439 (1957), had earlier concluded that

argue that *Mempa* applies to all probation revocation hearings, but not to any parole revocation proceedings, whether a new sentence is imposed or not.⁶⁶

parolees were entitled to bring retained counsel into their revocation hearings); *In re DuBois*, 84 Nev. 562, 571, 445 P.2d 354, 359-60 (1968).

In a related matter, the Supreme Court of Vermont ruled that there is no right to counsel at a hearing to consider revocation of a conditional pardon. *In re St. Amour*, 127 Vt. 576, 255 A.2d 667 (1969).

Most jurisdictions have, however, concluded that *Mempa* does apply to all probation revocation hearings, whether or not sentence is imposed. *Daugherty v. Craven*, 422 F.2d 6 (9th Cir. 1970) (concerns California state procedures); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969) [see note 62 *supra*]; *Ashworth v. United States*, 391 F.2d 245 (6th Cir. 1968) (*Mempa* applies to federal probation revocation proceedings); *Scarpelli v. Gagnon*, 317 F. Supp. 72 (E.D. Wis. 1970); *Fletcher v. Beto*, 302 F. Supp. 41 (N.D. Texas 1969); *State v. Walter*, 12 Ariz. App. 282, 469 P.2d 848 (1970); *In re Cleaver*, 266 Cal. App. 2d 143, 160, 72 Cal. Rptr. 20, 32 (1st Dist. 1968); *In re Koebrich*, 256 Cal. App. 2d 678, 679 n.1, 64 Cal. Rptr. 355, 356 n.1 (3d Dist. 1967); *State v. Saavedra*, 5 Conn. Cir. 367, 253 A.2d 677, 680 (1968); *Clark v. State*, 222 So. 2d 766, 767 (Fla. Dist. Ct. App. 1969); *Gargan v. State*, 217 So. 2d 578, 579 (Fla. Dist. Ct. App. 1969); *Herrington v. State*, 207 So. 2d 323 (Fla. Dist. Ct. App. 1968); *People v. Parks*, 110 Ill. App. 2d 455, 249 N.E.2d 720 (1969); *People v. Hazen*, 19 Mich. App. 576, 172 N.W.2d 860 (1969); *People v. Brown*, 17 Mich. App. 396, 169 N.W.2d 522 (1969); *People v. Marshall*, 16 Mich. App. 578, 168 N.W.2d 480 (1969); *Petition of Parrett*, 154 Mont. 257, 459 P.2d 268 (1969); *Petition of High Pine*, 153 Mont. 464, 457 P.2d 912 (1969); *Petition of Spurlock*, 153 Mont. 475, 458 P.2d 80 (1969); *State v. Holiday*, 182 Neb. 229, 153 N.W.2d 855 (1967), *modified*, 182 Neb. 410, 155 N.W.2d 378 (1967); *State v. Brusenhan*, 78 N.M. 764, 438 P.2d 174 (1968); *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970); *State v. Main*, 20 Ohio St. 2d 16, 251 N.E.2d 862 (1969); *State v. Miller*, 19 Ohio St. 2d 180, 249 N.E.2d 920 (1969); *Helton v. Tehan*, 15 Ohio Misc. 367, 241 N.E.2d 100, 101 (Ct. C.P. Hamilton County 1968); *Ex parte Bird*, 457 S.W.2d 559 (Tex. Crim. App. 1970); *Campbell v. State*, 456 S.W.2d 918, 920 n.2 (Tex. Crim. App. 1970); *Ex parte Allen*, 452 S.W.2d 472 (Tex. Crim. App. 1970); *Ex parte Fletcher*, 442 S.W.2d 705 (Tex. Crim. App. 1969); *Ex parte Buffington*, 439 S.W.2d 345, 346 (Tex. Crim. App. 1969); *Eiland v. State*, 437 S.W.2d 551 (Tex. Crim. App. 1969); *Ex parte Fuller*, 435 S.W.2d 515 (Tex. Crim. App. 1968); *Crawford v. State*, 435 S.W.2d 148 (Tex. Crim. App. 1968).

Two states have conflicting decisions. In West Virginia, *State ex rel. Strickland v. Melton*, 152 W. Va. 500, 165 S.E.2d 90, 95-96 (1968), says there is a right to counsel at probation revocation hearings, but *State ex rel. Riffle v. Thorn*, — W. Va. —, 168 S.E.2d 810 (1969), by a 3-2 vote distinguishes *Melton* and holds that there is no such right. In Missouri, *Woody v. State*, 445 S.W.2d 288 (Mo. 1969), says probationers have a right to counsel at revocation hearings, but *State v. Phillips*, 443 S.W.2d 139 (Mo. 1969), says there is no such right, and *McClain v. State*, 448 S.W.2d 599 (Mo. 1970), states that there is not even a right to counsel at a sentencing hearing if the judge is without power to reduce the sentence below a stated minimum.

66. *United States Court of Appeals for the Third Circuit*: *United States ex rel. Halprin v. Parker*, 418 F.2d 313 (3d Cir. 1969) holds that a parolee has no right to counsel at revocation hearings when the parolee is "patently in violation" of his parole conditions. On the other hand, a Third Circuit judge who did not sit on this panel (Judge Staley) gave *Mempa* a very broad interpretation when he was sitting with the First Circuit in the case of *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969), and the panel sitting on *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248 (3d Cir. 1970), indicated the issue may still be an open one.

United States Court of Appeals for the Sixth Circuit: Compare *Ashworth v. United*

The United States Court of Appeals for the Ninth Circuit, for example, has held that the California Adult Authority need not provide

States, 391 F.2d 245 (6th Cir. 1968) (the right to counsel in federal probation revocation proceedings is protected) *with* Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968) (*Mempa* does not apply to Ohio's parole revocation proceedings). Smartt v. Avery, 411 F.2d 408, 409 (6th Cir. 1969), confused the situation still further by indicating that the question of the right to counsel at parole revocation hearings may still be an open one.

United States Court of Appeals for the Eighth Circuit: Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971) (held 4-3 that there is no constitutional right to a parole revocation hearing).

United States Court of Appeals for the Ninth Circuit: Compare Daugherty v. Craven, 422 F.2d 6 (9th Cir. 1970) (right to counsel extends to probation revocation hearings) with the following cases that state that there is no right to counsel at parole revocation hearings: Lincolu v. California Adult Authority, 435 F.2d 133 (9th Cir. 1970); Worley v. California Dep't of Corrections, 432 F.2d 769 (9th Cir. 1970); Olson v. California Adult Authority, 428 F.2d 1228 (9th Cir. 1970); Allard v. Nelson, 423 F.2d 1216 (9th Cir. 1970); Mead v. California Adult Authority, 415 F.2d 767 (9th Cir. 1969); Head v. Chavez, 411 F.2d 1222 (9th Cir. 1969); Dunn v. California Dep't of Corrections, 401 F.2d 340, 342, (9th Cir. 1968); Eason v. Dickson, 390 F.2d 585, 588 (9th Cir.), *cert. denied*, 392 U.S. 914 (1968). Williams v. Dunbar, 377 F.2d 505 (9th Cir.), *cert. denied*, 389 U.S. 866 (1967), says there is no right to a parole revocation hearing.

United States Court of Appeals for the Tenth Circuit: In Firkins v. Colorado, 434 F.2d 1232 (10th Cir. 1970), Bongiorno v. Moseley, 431 F.2d 1175 (10th Cir. 1970), Martinez v. Patterson, 429 F.2d 844 (10th Cir. 1970), and Williams v. Patterson, 389 F.2d 374, 375 (10th Cir. 1968), the Tenth Circuit has ruled that parolees have no constitutional right to counsel at parole revocation hearings. In Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969), and Alvarez v. Turner, 422 F.2d 214 (10th Cir. 1970), this court ruled that if parolees are allowed to bring retained counsel into such hearings, the equal protection clause demands that counsel be supplied to indigents, but in Earnest v. Mosely, 426 F.2d 466 (10th Cir. 1970), Duennebeil v. Turner, 425 F.2d 1207 (10th Cir. 1970), and Cotner v. United States, 409 F.2d 853 (10th Cir. 1969), the court modified this position by saying that a parolee who admits his parole violation has no right to appointed counsel. One Tenth Circuit judge, Judge Lewis, said in a concurring opinion to *Earnest v. Mosely* [426 F.2d at 469] that he was unable to reconcile *Cotner* with *Willingham*.

Federal District Courts: Le Febre v. Cady, 322 F. Supp. 1160 (E.D. Wis. 1970); Mason v. Field, 308 F. Supp. 205 (C.D. Cal. 1970); United States *ex rel.* Bradshaw v. Parker, 307 F. Supp. 451 (M.D. Pa. 1969); Murray v. Page, 305 F. Supp. 1043 (W.D. Okla. 1969); Wilkerson v. Patterson, 303 F. Supp. 665 (D. Colo. 1969).

In the federal parole system this issue is now resolved—as of February 1971—by statute. See 18 U.S.C.A. § 3006A (1971), *amending* 18 U.S.C. § 3006A (1964) (all federal parolees subject to revocation of parole are entitled to appointed counsel if they cannot afford to retain an attorney).

Kansas: Johnson v. Stucker, 203 Kan. 253, 453 P.2d 35, *cert. denied*, 396 U.S. 904 (1969).

Kentucky: Snedeker v. Wingo, 453 S.W.2d 552 (Ky. 1970).

Minnesota: *In re* Lloyd, 287 Minn. 12, 177 N.W.2d 555 (1970) (facts involve a juvenile whose parole was revoked under the Youth Conservation Act).

Montana: Three cases hold that there is a right to counsel at probation revocation hearings, but not at parole revocation hearings: Petition of Parrett, 154 Mont. 257, 459, P.2d 268 (1969); Petition of Spurlock, 153 Mont. 475, 458 P.2d 80 (1969); Petition of High Pine, 153 Mont. 464, 457 P.2d 912 (1969). The Montana parole board nonetheless subsequently decided to allow parolees to appear at their revocation hearings with

parolees with procedural protections.⁶⁷ The decisions, to the extent that they have any reasoning whatsoever, argue that a prisoner released on parole is in a custodial status that differs only in degree from imprisonment, that the redetermination of sentence⁶⁸ is not significant because the prisoner has theoretically already been sentenced to the maximum term, and that any additional term is therefore not a penalty.⁶⁹

C. *The California Response*

The California supreme court has had ample opportunity to rule directly on the right to counsel at parole revocation hearings, but it has avoided this issue whenever it has been presented.⁷⁰ The only

counsel, and the Montana Defender Project now represents indigent parolees. *Petition of Finley*, 154 Mont. 262, 460 P.2d 267 (1969).

North Dakota: *John v. State*, 160 N.W.2d 37 (1968).

Ohio: Compare the following cases that state that there is a right to counsel at probation revocation hearings: *State v. Main*, 20 Ohio St. 2d 16, 251 N.E.2d 862 (1969); *State v. Miller*, 19 Ohio St. 2d 180, 249 N.E.2d 920 (1969); *Helton v. Tehan*, 15 Ohio Misc. 367, 241 N.E.2d 100, 101 (Ct. C.P. Hamilton County 1968), *with Rose v. Haskins*, 21 Ohio St. 2d 94, 255 N.E.2d 260 (1970), which holds that there is no right to a parole revocation hearing in Ohio, much less a right to counsel at such a hearing. See also *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968).

Oklahoma: *Okla. Stat. tit. 22, § 991b* (Supp. 1970-71) states that there is a right to counsel at probation revocation hearings, but *Brown v. Page*, 474 P.2d 137 (Okla. Crim. App. 1970), *Conn. v. Page*, 462 P.2d 346 (Okla. Crim. App. 1969), and *Chase v. Page*, 456 P.2d 590 (Okla. Crim. App. 1969) hold that there is no such right at parole revocation hearings.

Utah: *Beal v. Turner*, 22 Utah 2d 418, 454 P.2d 624, 625 (1969).

See also the California cases discussed in text accompanying notes 70-104 *infra*.

67. See, e.g., *Worley v. California Dep't of Corrections*, 432 F.2d 769 (9th Cir. 1970); *Olson v. California Adult Authority*, 428 F.2d 1228 (9th Cir. 1970); *Allard v. Nelson*, 423 F.2d 1216 (9th Cir. 1970); *Mead v. California Adult Authority*, 415 F.2d 767 (9th Cir. 1969); *Head v. Chavez*, 411 F.2d 1222 (9th Cir. 1969); *Dunn v. California Dep't of Corrections*, 401 F.2d 340, 342 (9th Cir. 1968); *Eason v. Dickson*, 390 F.2d 585 (9th Cir.), *cert. denied*, 392 U.S. 914 (1968).

68. The parolee's sentence is almost always reset at the maximum possible length when his parole is revoked, subject to later readjustment by the Adult Authority. See Adult Authority Resolution 171, adopted March 6, 1951, which provides that "when paroles are cancelled, suspended, and/or revoked, the previous action fixing term will be rescinded . . . and the prisoner shall be considered as serving the maximum term . . . subject to further order of the Adult Authority . . .," *cited in Lincoln v. California Adult Authority*, 435 F.2d 133, 134 (9th Cir. 1970).

69. In response to this stance, Federal District Judge Zirpoli argues:

This explanation partakes of the mystical. Certainly to the prisoner, an increase of a sentence . . . feels like a penalty, and for society's penal purposes, he is deemed to be undergoing punishment. If substance is to have any influence on legal conclusions, then the extension of a previously fixed sentence . . . must be deemed a penalty.

Ellhamer v. Wilson, 32 F. Supp. 1245, 1255 n.5 (N.D. Cal. 1969), *rev'd*, No. 25919 (9th Cir. July 7, 1971).

70. See, e.g., *In re Evans*, Crim. 13792 (Cal. Dec. 10, 1969) (minute order); *In re Lujan*, Crim. 14134 (Cal. Feb. 25, 1970) (minute order). Only Justice Peters formally indicated that an order to show cause should be issued in these cases.

case in which that court has explicitly commented on the right to counsel in parole revocation hearings is *People v. St. Martin*,⁷¹ a case involving a parole *eligibility* hearing. In such a hearing the Adult Authority considers each prisoner's eligibility for parole, asking him about his prison activities and future plans and explains what is expected of him before he may be paroled. The hearing is short and informal, before a panel usually consisting of one member and one representative.⁷² The prisoner himself attends the meeting, but is not permitted to bring a lawyer. The court in *St. Martin* held that prisoners have no right to counsel in such a proceeding, but added that the question whether they have such a right at parole revocation hearings is still open.⁷³ Although a lawyer would be a valuable addition to parole eligibility hearings,⁷⁴ the arguments are not as persuasive as those advanced in favor of granting a right to counsel at parole revocation proceedings.⁷⁵

The court's only other reference to the right to counsel in parole revocation proceedings was in *In re Marks*,⁷⁶ decided several months

71. 1 Cal. 3d 524, 463 P.2d 390, 83 Cal. Rptr. 166 (1970).

72. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970.

73. 1 Cal. 3d at 538, 463 P.2d at 398, 83 Cal. Rptr. at 174.

For other cases holding that prisoners have no right to counsel at parole eligibility hearings, see *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970); *Peinado v. Adult Authority of Dep't of Corrections*, 405 F.2d 1185 (9th Cir. 1969); *Schawartzberg v. United States Bd. of Parole*, 399 F.2d 297 (10th Cir. 1968); *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); *Lewis v. Rockefeller*, 305 F. Supp. 258 (S.D.N.Y. 1969); *Sorenson v. Young*, 282 F. Supp. 1009 (D. Minn. 1968); *State v. Le-Vier*, 203 Kan. 626, 455 P.2d 534 (1969); *Puchalski v. New Jersey State Parole Bd.*, 55 N.J. 113, 259 A.2d 713 (1969), *cert. denied*, 398 U.S. 938 (1970); *Briguglio v. New York State Bd. of Parole*, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969); *In re Reed*, 21 Ohio App. 2d 1, 254 N.E.2d 384 (1969).

74. Parole eligibility hearings are essentially sentencing hearings, because the Adult Authority fixes sentence at the same time that it determines whether parole should be granted. CAL. PENAL CODE § 3020 (West 1971). Therefore, counsel is arguably required, but the argument has invariably been rejected. See *Conway v. California Adult Authority*, 396 U.S. 107 (1969); *Padilla v. Lynch*, 398 F.2d 481 (9th Cir. 1969); *People v. St. Martin*, 1 Cal. 3d 524, 538, 463 P.2d 390, 398, 83 Cal. Rptr. 166, 174 (1970); and cases cited note 73 *supra*.

75. Only rarely are there factual disputes to be resolved at parole eligibility hearings, whereas revocation hearings involve complex factual disputes requiring a lawyer's skill in evaluating data and presenting arguments based on interpretations of facts. Moreover, only in parole revocation hearings are the parolees faced with a deprivation of their liberty, with a dramatic change in status. The rights involved in the revocation hearings are, therefore, more substantial than those involved in the eligibility hearings. In addition, the parole eligibility hearing is almost exclusively concerned with the general quality of the prisoner's conduct. The revocation hearing is also concerned with these general characteristics but usually concentrates on some event or series of events that precipitated the parole board's renewed interest in the parolee. The factual inquiry in the revocation hearing, therefore, tends to be more focused than in the eligibility hearing, although in both the complete picture is in issue. See Casenote, 18 BUFFALO L. REV. 607 (1969).

76. 71 Cal. 2d 31, 453 P.2d 441, 77 Cal. Rptr. 1 (1969).

prior to *St. Martin*. The court, considering termination of a drug addict's out-patient status, included in a footnote the suggestion that *Mempa* is "inapplicable to cases of termination of conditional release" that do not involve sentencing.⁷⁷ A fair implication of this sentence might be that *Mempa* is applicable to California's parole revocation proceedings, which almost invariably involve a resetting of sentence.⁷⁸ However, another sentence in that same footnote indicates that the court *was* thinking of parole revocation hearings: "It is well established, for example, that due process does not require notice of hearing for parole revocation."⁷⁹ The court thus seems to have been confused about what actually transpires at a parole revocation hearing, but in any event this footnote is only a dictum, because after Marks' outpatient status was suspended and he was returned to custody, he was given another hearing by the Narcotic Addict Evaluation Authority at which attorneys were permitted to argue on his behalf.⁸⁰ The California supreme court was not, therefore, considering a case in which due process had been denied, and the remarks made in the footnote are gratuitous.⁸¹

Although the California supreme court has successfully ducked the opportunities presented to it to provide parolees with counsel at parole revocation hearings, two panels of the California courts of appeal have commented more explicitly on the meaning of *Mempa*. The Court of Appeals for the Third District, in *In re Koebrich*,⁸² suggested, but did not unambiguously decide, that *Mempa* required that counsel be permitted at all of California's *probation* revocation hearings.⁸³ The Court of Appeals for the First District, in *In re Cleaver*,⁸⁴ seemed to agree with the proposition, but held that parolees have no right to counsel at *parole* revocation hearings:

Mempa v. Rhay [citation omitted], which extends to federal protection the California rule requiring the presence of counsel at the time of imposition of sentence after revocation of probation [citation omitted] does not affect the instant case. The petitioner has been

77. *Id.* at 47 n.11, 453 P.2d at 452 n.11, 77 Cal. Rptr. at 12 n.11.

78. Adult Authority Resolution 171, note 68 *supra*.

79. 71 Cal. 2d at 47 n.11, 453 P.2d at 452 n.11, 77 Cal. Rptr. at 12 n.11, *citing* *Williams v. Dunbar*, 377 F.2d 505 (9th Cir.), *cert. denied*, 389 U.S. 866 (1967).

80. 71 Cal. 2d at 50, 453 P.2d at 454, 77 Cal. Rptr. at 14.

81. In a related case, *In re Martinez*, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970), the court ruled that the fourth amendment's exclusionary rule does not apply to parole revocation hearings [1 Cal. 3d at 650, 463 P.2d at 741, 83 Cal. Rptr. at 388], thus allowing illegally seized evidence to be considered by the Adult Authority.

82. 256 Cal. App. 2d 678, 679, 64 Cal. Rptr. 355, 356 (3d Dist. 1967). *Koebrich* concerned a revocation of probation accompanied by imposition of sentence and held that in such a hearing, California law has been clear that probationers have a right to counsel. The court cited *In re Turrieta*, 54 Cal. 2d 816, 819, 356 P.2d 681, 8 Cal. Rptr. 737 (1960).

83. 256 Cal. App. 2d at 679 n.1, 64 Cal. Rptr. at 356 n.1.

84. 266 Cal. App. 2d 143, 72 Cal. Rptr. 20 (1st Dist. 1968).

sentenced, the question remaining is the *administrative* one of determining the period for which and the manner in which his sentence should be served.⁸⁵

A second panel from the First District subsequently came to the same conclusion. Three companion cases decided in July 1970⁸⁶ held that there should be virtually no review of Adult Authority actions and that parolees have no right to counsel, or to any other procedural safeguards, in parole revocation hearings. These cases are worthy of a full discussion because they present in dramatic form the issues involved in this inquiry.

The first case concerns Donald E. Mozingo,⁸⁷ who was convicted of second-degree robbery in 1965, paroled in 1968, convicted of a second crime, and then paroled again in 1969. Shortly after his second parole, Mozingo was involved in a bar-room brawl. At one of its weekly Parole and Community Service Hearings,⁸⁸ the Adult Authority decided to suspend Mozingo's parole again because of the brawl. While in Vacaville awaiting his revocation hearing, Mozingo petitioned the Solano County superior court for a writ of habeas corpus, asking that an evidentiary hearing be held so that he could present his side of the story.⁸⁹ That court ordered an evidentiary hearing and appointed the public defender to represent Mozingo. Before the evidentiary hearing could be held, however, the court of appeals intervened and directed the superior court to stop the proceeding:

The [Adult] Authority has "full power to suspend, cancel or revoke any parole without notice, and to order returned to prison any prisoner upon parole." This provision is valid and no due process requirement is violated by the absence of notice and hearing. Nor is the parolee entitled to be represented by counsel at the revocation hearing [citations omitted].⁹⁰

85. *Id.* at 160-61, 72 Cal. Rptr. at 32 (emphasis added). For a criticism of the administrative rationale, see notes 161-69 *infra* and accompanying text.

86. *Pope v. Superior Court (Mozingo)*, 9 Cal. App. 3d 636, 88 Cal. Rptr. 483 (1st Dist. 1970); *Pope v. Superior Court (Beasley)*, 9 Cal. App. 3d 644, 88 Cal. Rptr. 488 (1st Dist. 1970); *Pope v. Superior Court (Bush)*, 9 Cal. App. 3d 649, 88 Cal. Rptr. 491 (1st Dist. 1970).

87. *Pope v. Superior Court (Mozingo)*, 9 Cal. App. 3d 636, 88 Cal. Rptr. 483 (1st Dist. 1970).

88. See notes 12-18 *supra* and accompanying text.

89. The charge against Mozingo was that he had assaulted another person at the bar with a pool cue. Mozingo denied the charge, asserting that his brother was "set upon in a bar, by a belligerent person, and petitioner [Mozingo] tried to break it up." 9 Cal. App. 3d at 642, 88 Cal. Rptr. at 487. Mozingo was never charged with breaking a law or prosecuted in a court of law. The Adult Authority nonetheless charged him with committing an assault and made a factual determination that Mozingo committed the assault, without affording him the right to counsel or providing him with any other procedural safeguards. 9 Cal. App. 3d at 639, 88 Cal. Rptr. at 485.

90. 9 Cal. App. 3d at 640, 88 Cal. Rptr. at 486.

The court noted that "proceedings of the Adult Authority are wholly administrative in nature" and hence not subject to review.⁹¹ Only if the Adult Authority makes a ruling "without information, fraudulently or on mere personal caprice" will a court intervene.⁹²

The second case presents an even more dramatic example of the need for procedural protections.⁹³ Samuel B. Beasley was paroled in 1968 after serving three and a half years in prison on narcotics charges. A year later he was arrested and charged with an attempted murder in Riverside, but the charges had to be dropped when the alleged victim failed to appear at the preliminary examination. Nonetheless, Beasley's parole was suspended and he was returned to prison at Vacaville where he had the usual parole revocation hearing, without counsel or the right to confront and cross-examine the alleged victim who had originally made the accusation against Beasley. The Adult Authority concluded, solely on the basis of submitted documents, that Beasley was guilty of the attempted murder and revoked his parole, whereupon Beasley petitioned the Solano County superior court for an evidentiary hearing to take place in Riverside, some 450 miles to the south of Vacaville. The superior court's favorable action on this petition was again overturned by the court of appeals, which held that parolees have no right to counsel and no right to confrontation in revocation hearings.⁹⁴ The function of a court "is to review the record upon which the Adult Authority revoked parole. Only if that record is wholly inadequate to sustain the action can it be deemed based upon mere caprice or no reason."⁹⁵

The final case⁹⁶ provides further evidence of the dangers of denying procedural safeguards to parolees. Thomas Earl Bush was paroled in 1968 after serving five years for taking an automobile without the owner's consent and for selling marijuana. Six months after his release he was arrested in Los Angeles and charged with possession of a concealed firearm. The action was dismissed by the Los Angeles superior court because the search warrant on which the policeman based his seizure of the gun was illegal. Nonetheless, Bush's parole was revoked by the Adult Authority, which had previously been given per-

91. *Id.* at 640-41, 88 Cal. Rptr. at 486, *quoting In re Schoengarth*, 66 Cal. 2d 295, 304, 425 P.2d 200, 206, 57 Cal. Rptr. 600, 606 (1967).

92. 9 Cal. App. 3d at 641, 88 Cal. Rptr. at 486, *quoting Eason v. Dickson*, 390 F.2d 585, 589 n.4 (9th Cir. 1968).

93. *Pope v. Superior Court (Beasley)*, 9 Cal. App. 3d 644, 88 Cal. Rptr. 488 (1st Dist. 1970).

94. 9 Cal. App. 3d at 647, 88 Cal. Rptr. at 490.

95. *Id.*

96. *Pope v. Superior Court (Bush)*, 9 Cal. App. 3d 649, 88 Cal. Rptr. 491 (1st Dist. 1970).

mission to consider illegally seized evidence.⁹⁷ Again the Solano County superior court ordered an evidentiary hearing, this time in Los Angeles, and again the court of appeals reversed. "[M]ere dismissal of a criminal charge," the court ruled, "does not preclude reliance upon its underlying facts as ground for revocation of parole."⁹⁸ As in the two companion cases, Bush was denied the assistance of counsel.

Although these cases represent the latest word in California on the question of the right to counsel at parole revocation hearings, they cannot be accepted as the final word both because of the recent United States Supreme Court decisions with which the court did not deal⁹⁹ and because they are not even based on sound California precedent. *Mozingo* and *Beasley*, in support of their holding that parolees have no right to counsel at parole revocation hearings, cite a case¹⁰⁰ holding only that a prisoner has no right to appointed counsel at parole *eligibility* hearings.¹⁰¹ Furthermore, *Beasley* asserts that *Mempa* does not apply to parole revocation because parole revocation "involves no judicial act, such as pronouncement of judgment," citing *In re Marks*¹⁰² for that proposition, although the footnote in *Marks* to which *Beasley* refers is only a dictum.¹⁰³ *Bush* cites only the unsupported *Mozingo* decision for the proposition that "an Adult Authority hearing on revocation does not require the presence of counsel."¹⁰⁴ The three cases are, therefore, of dubious value as precedent for subsequent decisions by California courts.

III

THE CASE FOR A CONSTITUTIONAL RIGHT TO COUNSEL

A. Probation v. Parole

The courts that have refused to provide parolees with counsel at their parole revocation hearings have done so by refusing to acknowledge the full import of *Mempa v. Rhay*¹⁰⁵ and other recent United States Supreme Court decisions concerning due process.¹⁰⁶ *Mempa*

97. *In re Martinez*, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970).

98. 9 Cal. App. 3d at 652, 88 Cal. Rptr. at 492.

99. See part III *infra*.

100. *In re Schoengarth*, 66 Cal. 2d 295, 304, 425 P.2d 200, 206, 57 Cal. Rptr. 600, 606 (1967).

101. 9 Cal. App. 3d at 640, 647, 88 Cal. Rptr. at 486, 490.

102. 71 Cal. 2d 31, 47 n.11, 453 P.2d 441, 452 n.11, 77 Cal. Rptr. 1, 12 n.11 (1969).

103. See text accompanying notes 76-81 *supra*.

104. 9 Cal. App. 3d at 652, 88 Cal. Rptr. at 492.

105. 389 U.S. 128 (1967).

106. See notes 133-38, 142-55, 158-60 *infra* and accompanying text.

must be interpreted to require the appointment of counsel for indigent parolees facing revocation of parole because there is no important difference between a parole revocation hearing and the probation revocation hearing at issue in *Mempa*.¹⁰⁷

Probation differs from parole in that probation is ordered by a trial judge at the time of sentencing while parole is ordered by the parole board (in California, the Adult Authority) after a prisoner has served part of his sentence in jail. Although the granting of limited freedom to the convicted person is made by different decisionmakers, the effect is the same: the convict remains subject to the power of the state and can be ordered back to prison should he violate the conditions under which he has been released.

Some courts have said, nonetheless, that the procedural standards applicable to the revocation of parole are different from those that apply to the revocation of probation, solely because different bodies are involved in the revocations.¹⁰⁸ The U.S. Court of Appeals for the Sixth Circuit rejected the claim of a parolee that he was entitled to a hearing when his parole was revoked by saying:

The constitutional rights of Rose, which he claims were violated, apply *prior* to conviction. They are not applicable to a convicted felon whose convictions and sentences are valid and unassailable, and whose sentences have not been served.¹⁰⁹

The U.S. Court of Appeals for the Ninth Circuit has similarly stated:

The judicial power of a court which acts on notice and hearing to suspend the pronouncement of sentence and award probation or thereafter to revoke the probation and pronounce sentence is clearly distinguishable from the power of an authorized administrative body to grant or revoke a parole. When a court suspends the pronounce-

107. Jerry Mempa pleaded guilty to a charge of joyriding on June 17, 1959. He was placed on probation for two years and the imposition of sentence was deferred pursuant to Washington statute. About four months later, the prosecuting attorney moved to have Mempa's probation revoked on the ground that he had been involved in a burglary. A hearing was held in superior court; Mempa was not accompanied by counsel nor was he asked whether he wished to have counsel appointed for him. Mempa admitted that he had participated in the burglary. The probation officer testified without cross-examination that his information indicated that Mempa had participated in the burglary and that Mempa had previously denied participation. Without asking Mempa if he had anything to say or any evidence to offer, the trial judge revoked his probation and then imposed a ten-year sentence, the maximum provided for the offense, as required by statute [WASH. REV. CODE § 9.95.010 (1961)]. He then recommended to the parole board that Mempa be required to serve only a year. 389 U.S. 128, 130-31 (1967).

108. For cases that distinguish between the revocation of parole and the revocation of probation, see note 66 *supra*.

109. *Rose v. Haskins*, 388 F.2d 91, 95 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968), *quoted in* *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, —, 318 N.Y.S.2d 449, 461, 267 N.E.2d 238, 247 (1971) (Scileppi, J., dissenting).

ment of sentence, the judicial process has not been completed. It remains in a state of suspense; not so in the case of a prisoner who has been sentenced and imprisoned.¹¹⁰

Other appellate judges, instead of asserting that the "criminal process" or "judicial process" ends at the time of sentencing, try to find differences between trial courts and administrative agencies. Judge Scileppi, dissenting from the New York Court of Appeals' decision to grant parolees the right to counsel,¹¹¹ wrote:

Though it is true that both revocation of parole and revocation of probation involve factual determinations, the basis of the right to counsel at proceedings to revoke probation is, that the criminal trial, which includes sentencing has not ended.¹¹²

Similarly, the U.S. Court of Appeals for the Tenth Circuit has written:

The parole procedure is a statutory function delegated to the executive branch of state government by the legislative body. Unlike probation granted by the judicial branch of government, parole has been recognized as a grace given the executive branch by the legislative branch wherein clemency is awarded for humanitarian reasons.¹¹³

These technical differences should not receive constitutional importance. Procedural protections cannot be denied to parolees solely because different labels are used to describe what is done to them when they are forced to return to prison and because different bodies administer the revocation.¹¹⁴ The similarities between parole and probation revocations are much more impressive than their differences.

Both parole revocation and probation revocation take a person out of a state of conditional liberty and put him into prison.¹¹⁵ Both types of revocations involve factual determinations accompanied by the exer-

110. *Eason v. Dickson*, 390 F.2d 585, 588-89 n.3 (9th Cir.), *cert. denied*, 392 U.S. 914 (1968), *quoting* *Anderson v. Alexander*, 191 Ore. 409, 424, 229 P.2d 633, 640 (1951).

111. *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 318 N.Y.S.2d 449, 267 N.E.2d 238 (1971).

112. *Id.* at 390, 318 N.Y.S.2d at 461, 267 N.E.2d at 247.

113. *Murphy v. Turner*, 426 F.2d 422, 423 (10th Cir. 1970); *see also* *Brown v. Page*, 474 P.2d 137, 138 (Okla. Crim. App. 1970).

114. 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.

Baine v. Beckstead, 10 Utah 2d 4, 9, 347 P.2d 554, 558 (1959).

115. *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 382, 318 N.Y.S.2d 449, 453, 267 N.E.2d 238, 241 (1971); *Warren v. Michigan Parole Bd.*, 23 Mich. App. 754, 179 N.W.2d 664 (1970).

cise of discretion.¹¹⁶ Both types of revocation are designed to serve the same goals—protection of society and ultimate rehabilitation of the individual—and both are a necessary part of penal schemes designed to save money and to promote easy reintegration of the convict back into his community.¹¹⁷ If the loss to the individual is balanced against the interests of the government,¹¹⁸ the results again emphasize the similarity between parole and probation revocations: both the parolee and the probationer lose their liberty, and the government's interest in each case is identical—as stated above, to protect society and rehabilitate the individual.¹¹⁹ It is impossible to conclude that the probationer must be constitutionally protected but not the parolee. The argument that courts need to provide more procedural guarantees than administrative bodies¹²⁰ seems particularly bizarre in this context, because such a distinction can only be based on an assumption that courts are more likely to be arbitrary than parole boards.¹²¹

The argument is also occasionally made that the state is permitted to deal with the parolee (but not the probationer) without regard to constitutional guarantees because the parolee was at an earlier point determined to be a poorer risk than the probationer.¹²² Parole, however, is granted only if the parole board determines that a prisoner will

116. *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 381, 318 N.Y.S.2d 449, 453, 267 N.E.2d 238, 241 (1971); *Cohen, Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197, 225 (1970).

Chief Justice (then Judge) Burger pointed out in *Hyser v. Reed*, 318 F.2d 225, 236 (D.C. Cir. 1963), the similarities in this respect between parole revocation and probation revocation:

The legal proceeding most comparable to revocation of parole is revocation of probation. . . .

While there are distinguishing factors between probation and parole, the underlying purposes are closely allied. In each the entity which grants is the entity which is empowered to revoke. In each situation the revoking authority is being exercised pursuant to explicit statutory authority. Moreover that power is being exercised by a person or persons experienced in sifting and weighing evidence and evaluating the factors involved in the grant or revocation of conditional freedom. Congress, which is the source of both of these penological devices has given no indication that the revocation of parole should be more difficult or procedurally different than revocation of probation.

Chief Justice Burger was arguing that neither revocation-of-probation hearings nor revocation-of-parole hearings required appointed counsel, but his argument that there is no fundamental difference between the two hearings is nonetheless sound.

117. See *Cohen*, *supra* note 116, at 225.

118. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) [see notes 133-38, 170 *infra*]; *Hahn v. Burke*, 430 F.2d 100, 103 (7th Cir. 1970) [see note 63 *supra*].

119. See generally *Goolsby v. Gagnon*, 322 F. Supp. 460 (E.D. Wis. 1971).

120. See notes 108-13 *supra*.

121. *Baine v. Beckstead*, 10 Utah 2d 4, 9, 347 P.2d 554, 558 (1959).

122. *People v. Miller*, 317 Ill. 33, 147 N.E. 396 (1925); *Hollandsworth v. United States*, 34 F.2d 423 (4th Cir. 1929); *United States ex rel. Hancock v. Pate*, 223 F. Supp. 202 (N.D. Ill. 1963); *Barnhart v. Maxwell*, 2 Ohio St. 2d 308, 208 N.E.2d 752 (1965);

probably be able to adjust to the outside world and that he is no more dangerous than a person released on probation by a judge. The original determination of "poor risk" has, therefore, been superseded by a subsequent determination of "good risk." One judge has, in fact, suggested that procedural distinctions between treatment of probationers and parolees violate the equal protection clause of the fourteenth amendment because there is no rational basis for such a distinction.¹²³

Parole revocation hearings in California, particularly, cannot be differentiated from the probation revocation hearing considered in *Mempa v. Rhay*,¹²⁴ because California's parole revocation hearings directly affect the parolee's sentence. When the Adult Authority revokes parole, the parolee's sentence is invariably reset at the maximum allowed by law,¹²⁵ subject to later redetermination.¹²⁶ In *Mempa*, the trial judge imposed the maximum sentence when he revoked Mempa's probation. At the same time, the judge made a *recommendation* to the Board of Prison Terms and Paroles "as to the length of time that the person should serve, in addition to supplying it with various information about the circumstances of the crime and the character of the individual."¹²⁷ This recommendation has no binding effect. Nonetheless, the United States Supreme Court held that a lawyer should participate in assisting the judge to reach his conclusion: "Obviously to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."¹²⁸ If a trial judge cannot make an *advisory* decision unaided by counsel, logic dictates that a parole board, which renders a *binding* decision, must also have the assistance of counsel.¹²⁹

B. The Traditional Arguments Reexamined

Five reasons have been advanced by those courts that refuse to

see Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1 (1968).

123. *Rose v. Haskins*, 388 F.2d 91, 103 (6th Cir. 1968) (Celebrezze, J., dissenting); Comment, *Revocation of Probation and Parole in Nebraska—A Procedural Antithesis*, 48 NEB. L. REV. 220, 242-47 (1968); and Cohen, *supra* note 116, at 225-28.

124. 389 U.S. 128 (1967).

125. Adult Authority Resolution 171, note 68 *supra*.

126. See generally *Menechino v. Oswald*, 430 F.2d 403, 412-19 (2d Cir. 1970) (Feinberg, J., dissenting); Comment, *Revocation of Probation and Parole in Nebraska—A Procedural Antithesis*, 48 NEB. L. REV. 220 (1968).

127. 389 U.S. at 135. The sentencing judge was required by statute to furnish such information. WASH. REV. CODE § 9.95.030 (1961).

128. 389 U.S. at 135.

129. See Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 506-07 (1968).

grant parolees counsel at revocation hearings, some of which have already been alluded to in the preceding section. The explanations are all interrelated, but they can nonetheless be discussed and analyzed separately. They are: First, parole is a privilege, not a right, and hence the state can withdraw it at any time and in any manner it chooses; second, the state acts as *parens patriae* toward the parolee, and because the state's and parolee's ultimate goal (rehabilitation of the parolee) is the same, the proceeding is not, and should not become, adversary; third, the parolee is in constructive custody when on parole and there is no need for formal proceedings when a prisoner is transferred from one form of custody to another; fourth, the parole revocation hearing is conducted by an administrative rather than a judicial tribunal, hence the procedure may be summary and constitutional safeguards are unnecessary; fifth, the parolee waives his right to a formal revocation hearing when he accepts parole status.

The waiver theory is mentioned only infrequently now, because the waiver is so obviously coerced.¹³⁰ The other explanations are still in use, however, and must be analyzed in detail.

1. *The Right-Privilege Distinction*

Most of the possible arguments for refusing to extend the right to counsel to parole revocation hearings were used by Chief Justice (then Judge) Burger in 1963 when he wrote the majority opinion in *Hyser v. Reed*.¹³¹ With regard to the right-privilege distinction he argued that "[i]n a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a *privilege* from an errant child not as punishment but for misuse of the *privilege*,"¹³² and consequently that procedural protections are not required. But in *Goldberg v. Kelly*,¹³³ with the now Chief Justice Burger dissenting, the United States Supreme Court rejected this analytical approach by holding that procedural protections no longer turn on the distinction between a privilege and a right.¹³⁴

The Court confronted in *Goldberg* the question whether a state may terminate welfare payments without providing the affected recipient with an evidentiary hearing prior to the termination.¹³⁵ Justice

130. See Comment, *Parole Revocation Hearings—Pro Justitia or Pro Camera Stellata?*, 10 SANTA CLARA LAWYER 319, 330-31 (1970); see also Hahn v. Burke, 430 F.2d 100, 104-05 (7th Cir. 1970); Rose v. Haskins, 388 F.2d 91, 100 (6th Cir. 1968) (Celebrezze, J., dissenting).

131. 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963).

132. 318 F.2d at 237 (emphasis added).

133. 397 U.S. 254 (1970).

134. *Id.* at 262.

135. The New York statutes in question had established the following procedures:

Brennan, speaking for the Court, held that the due process clause of the fourteenth amendment required that the recipient be afforded an evidentiary hearing *before* the termination of benefits. Welfare benefits, the Court said, are "a matter of statutory *entitlement*,"¹³⁶ and any action taken by the state with regard to these benefits is state action.¹³⁷ Without deciding whether these statutory entitlements were rights or privileges, the Court said simply that "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'"¹³⁸

Even before *Goldberg*, the United States Court of Appeals for the Fourth Circuit recognized that the old right-privilege distinction has no governing effect on the right to counsel in probation revocation hearings:

We are not impressed by the argument that probation is a "mere" privilege, or a matter of grace, rather than a right and that, therefore, various constitutional mandates, including the right to counsel, should be held to be inapplicable. Even if a distinction exists between the components of the right-privilege dichotomy, when a state undertakes to institute proceedings for the disposition of those accused of crime it must do so consistently with constitutional privileges, even though the actual institution of the procedures was not constitutionally required.¹³⁹

After *Goldberg* the Seventh Circuit indicated that it, too, viewed the right-privilege distinction as not relevant:

While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court [citation omitted], essential procedural due process no longer turns on the distinction between a privilege and a right.¹⁴⁰

A welfare recipient could challenge a caseworker's decision that the recipient was no longer eligible for aid by asking the unit supervisor and the supervisor's superior to study the record, but if these welfare-agency officials agreed with the caseworker's decision, aid stopped immediately, and the recipient was informed of the action by letter. The recipient could then request a post-termination hearing at which he could appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevailed at this hearing, he regained all the back benefits that were owed him. 397 U.S. at 258-60.

136. *Id.* at 262. (emphasis added).

137. *Id.*

138. *Id.*

139. *Hewett v. North Carolina*, 415 F.2d 1316, 1322-23 (4th Cir. 1969).

140. *Hahn v. Burke*, 430 F.2d 100, 103 (7th Cir. 1970), *citing* *Goldberg v. Kelly*, 397 U.S. 254 (1970). *See also* *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Von Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

At least one judge in the United States Court of Appeals for the Ninth Circuit has recognized the irrelevance of the right-privilege distinction. Concurring in *Sturm v. California Adult Authority*, 395 F.2d 446 (9th Cir. 1967), Judge Browning said, "Ap-

2. *Parens Patriae*

Judge Burger in *Hyser* also presents the second reason for denying the parolees counsel at revocation hearing—that a non-adversary *parens patriae* relationship exists between state and parolee and that, therefore, procedural protections are unnecessary:

[T]here is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*.¹⁴¹

Since this statement was made in 1963, however, serious assaults have been launched against the doctrine of *parens patriae*, most notably in the juvenile field, and the ideas of Chief Justice Burger have been largely discredited. The most significant case is *In re Gault*,¹⁴² in which the Court ruled that in juvenile court proceedings that may result in the commitment of a juvenile to an institution, the juvenile and his parents or guardian must first be given notice sufficient to permit preparation of a defense.¹⁴³ Next, they must be notified of the juvenile's right to be represented by counsel appointed if the parents or guardian cannot afford one.¹⁴⁴ Finally, they must be informed that the juvenile has the privilege against self-incrimination and the rights of confrontation and cross-examination.¹⁴⁵

pellant may have no 'right' to be imprisoned for less than his whole life; but he is entitled to have the time he must serve determined in a manner consistent with the Constitution." *Id.* at 450.

141. *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). Professional parole officials have this same parental approach to their job. Adult Authority representative Robert R. Miller, for instance, says that counsel is not necessary at a revocation hearing because he cannot "add to our knowledge of the case, unless, of course, he had personal knowledge of the behavior under consideration. While I can appreciate the argument that the parolee is not without right to protection, I do strongly feel that through the creation of an adversary climate between the parolee and his agent, and to a certain extent, the entire correctional system, the correctional process will be to a great extent nullified. Realizing that much of criminality is spawned in the climate that, regrettably, often exists between the offender and the system of criminal justice, thoughtful correctionalists have attempted to move in a direction which will bring the individual and the State into a working partnership directed at the individual's succeeding in our social structure. I believe California's results, which show a reduced percentage of parole failures in both violations-technical, and, even more noteworthy, violations-new-commitment each year, for many years, is evidence of the success of these efforts." Letter to the author dated Oct. 21, 1970, on file with the California Law Review.

142. 387 U.S. 1 (1967).

143. *Id.* at 31-34.

144. *Id.* at 34-42.

145. *Id.* at 42-57.

State officials argued in *Gault* that their somewhat informal proceedings were justified because the state was acting as *parens patriae* and was not an adversary of the accused. In any event, the juvenile was not entitled to liberty but only to custody of one kind or another. The state argued that if the juvenile's parents "default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled."¹⁴⁶ The Court acknowledged that this argument was made in good faith and that the juvenile-court system was created for benevolent reasons, but it nonetheless rejected the argument because "unbridled discretion, however benevolently motivated, is . . . a poor substitute for principle and procedure."¹⁴⁷

The argument offered by Arizona in *Gault* is remarkably similar to that regularly offered by the states in parole revocation cases,¹⁴⁸ and the rejection of this argument by the Supreme Court in *Gault* must lead to the rejection of the argument in the parole revocation context.¹⁴⁹ *Gault* must extend to all *parens patriae* relationships where there is a possibility of incarceration, because the essence of *Gault* is that even in the most classic of the *parens patriae* relationships—that of state and child—certain procedural safeguards heretofore associated with strictly adversary proceedings are *constitutionally* required. Without question the state-parolee relationship is inherently more adversary than is that of state-child. Therefore, if the right to counsel is to be extended to the latter it is a fortiori required to be extended to the former.

If there was any doubt about the Supreme Court's intention in *Gault*, it was dispelled by *In re Winship*,¹⁵⁰ in which the Court ruled that juvenile courts are constitutionally required to use the criminal burden of proof "beyond a reasonable doubt" rather than the civil standard of "a preponderance of the evidence." *Winship*, building on *Gault*, is significant to this discussion because of the Court's comments on the inapplicability of civil standards in criminal proceedings.

The state again argued (and the New York Court of Appeals agreed) that the beyond-a-reasonable-doubt standard was not required, because the juvenile proceeding was not a criminal trial.¹⁵¹ The New

146. *Id.* at 17.

147. *Id.* at 18.

148. See, e.g., *Ellhamer v. Wilson*, 312 F. Supp. 1245 (N.D. Cal. 1969).

149. One federal district court judge in California noted that *Gault* logically extends to any *parens patriae* relationship and accordingly concluded that the right to counsel must be accorded a parolee at a parole revocation hearing. *Ellhamer v. Wilson*, 312 F. Supp. 1245, 1256 (N.D. Cal. 1969), *rev'd*, No. 25919 (9th Cir. July 7, 1971).

150. 397 U.S. 358 (1970).

151. *In re Winship*, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).

York Court of Appeals asserted that the preponderance-of-the-evidence burden of proof was justified because fewer collateral consequences flow from an adverse decision in a juvenile court than from a criminal conviction¹⁵² and because juvenile proceedings are designed "not to punish, but to save the child."¹⁵³ The Supreme Court rejected these arguments, as it had in *Gault*, stating again that "[c]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts"¹⁵⁴ because the consequences of a delinquency determination are "comparable in seriousness to a felony prosecution."¹⁵⁵ These words are equally compelling when applied to parole revocation, because the consequences of parole revocation hearings are "comparable in seriousness to a felony prosecution," for in both cases the individual is sent to prison. Criminal due process safeguards, including the right to counsel, must therefore be accorded to parolees facing revocation.

3. *Constructive Custody*

Then-Judge Burger further argued in *Hyser* that because a parolee is in constructive custody he need not be provided with the full panoply of procedural protections:

A paroled prisoner can hardly be regarded as a "free" man; he has already lost his freedom by due process of law and, while paroled, he is still a convicted prisoner whose tentatively assumed progress towards rehabilitation is in a sense being "field tested." Thus it is hardly helpful to compare his rights in that posture with his rights before he was duly convicted.¹⁵⁶

If this view of "custody" was not sufficiently discredited by the rejection in *Gault* of the state's argument that a mere shift from parental to state custody did not give rise to procedural rights under the Constitution, the *Hyser* rationale has been further undercut by other cases. The Supreme Court and many lower courts¹⁵⁷ have acknowledged that a person's right to the protections of the due process clause does not end

152. *Id.* at 200, 247 N.E.2d at 255-56, 299 N.Y.S.2d at 417-18.

153. *Id.* at 197, 247 N.E.2d at 254, 299 N.Y.S.2d at 415.

154. 397 U.S. at 365-66.

155. *In re Gault*, 387 U.S. 1, 36 (1967), *quoted in In re Winship*, 397 U.S. 358, 366 (1970).

156. *Hyser v. Reed*, 318 F.2d 225, 235 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). *See also Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968).

157. A number of lower courts have extended procedural protections to administrative actions taken within the prison system. *See, e.g., Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part, modified in part, aff'd in part sub nom. Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971).

Perhaps the most significant decision in this area is *Shone v. Maine*, 406 F.2d 844 (1st Cir.), *vacated as moot*, 396 U.S. 6 (1969), which held that counsel must be ap-

with a criminal conviction. In *Specht v. Patterson*,¹⁵⁸ the Supreme Court suggested that a formal hearing with counsel is required in any proceeding affecting the present or future liberty of any of its citizens. The *Specht* petitioner was convicted for taking indecent liberties, a crime in Colorado that carries a maximum sentence of ten years in jail. Then, without providing the petitioner assistance of counsel, or notice, or a right to appear before the court, the trial judge gave him an indeterminate sentence of from one day to life under the Colorado Sex Offenders Act.¹⁵⁹ The Supreme Court reversed the order with the admonition that due process requires that a hearing be held and that petitioner be provided with counsel. In essence, petitioner must have an opportunity to be heard, to confront and cross-examine the witnesses against him, and to offer evidence of his own with assistance of counsel. The trial judge must, furthermore, make findings adequate to make meaningful any appeal that is allowed.¹⁶⁰

In *Specht*, the judge imposed an additional punishment, based on the same facts that supported the original conviction. Although the defendant had already been convicted of the crime on which this extension was based, the sentence was held to violate due process because it was imposed without the procedural safeguards associated with sentencing. The procedures and powers of the California Adult Authority are in many ways similar to the judge's conduct in *Specht*: when it revokes parole and refixes a sentence at the maximum legal term, the Authority extends a sentence without granting the defendant the right to representation or any other procedural protections.

4. *The Distinction Between Administrative and Judicial Tribunals*

A variation on the right-privilege argument is that the right to counsel does not extend to parole revocation hearings because such proceedings are "administrative" rather than "judicial" in nature. Addressing himself to this issue, Judge Burger flatly stated in *Hyser* that "no case has yet held that an interested party in an administrative or regulatory proceeding is entitled to be furnished with counsel if he cannot afford one of his own choice."¹⁶¹

pointed to represent an inmate of the Boys Training Center at a hearing to decide whether he should be transferred to the Men's Correctional Center.

158. 386 U.S. 605 (1967).

159. *Id.* at 607-08.

160. *Id.* at 610.

161. 318 F.2d 225, 238 (1963).

Some California courts have similarly held that the "proceedings of the Adult Authority are wholly administrative in nature" and hence not subject to judicial review. *In re Schoengarth*, 66 Cal. 2d 295, 304, 425 P.2d 200, 206, 57 Cal. Rptr. 600, 606 (1967); *Pope v. Superior Court (Mozingo)*, 9 Cal. App. 3d 636, 640-41, 88 Cal. Rptr. 483,

There are at least three ways of responding to this assertion. First, as Chief Judge Bazelon points out in his dissent in *Hyser*,¹⁰² there are very few administrative or regulatory proceedings in which the poor are involved or in need of representation and in one of these areas, immigration proceedings, voluntary organizations provide free legal assistance. Judge Burger's statement, then, is not surprising in light of the fact that very few of such cases would ever be litigated. Second, since *Hyser* was decided in 1963, there has been an increased willingness to extend procedural protections beyond judicial tribunals to, for instance, congressional committees¹⁰³ and administrative bodies investigating teachers, lawyers, and policemen.¹⁰⁴ Third, it was not true when Judge Burger made the statement, and it is certainly not true today, that the right to counsel has never been extended to administrative proceedings.¹⁰⁵ For some time, courts have provided counsel to those facing commitment for mental deficiency or communicable disease, and this trend is expanding.¹⁰⁶ In 1969, the Federal Trade Commission

486 (1st Dist. 1970). See also *In re Cleaver*, 266 Cal. App. 2d 143, 160-61, 72 Cal. Rptr. 20,32 (1st Dist. 1968).

The Ninth Circuit has also hid behind the "administrative" shield when that has been useful [*Eason v. Dickson*, 390 F.2d 585, 588 n.3 (9th Cir. 1968)], even though the Ninth Circuit has also held that members of the California Adult Authority are immune from civil-rights suits because they perform "quasi-judicial functions." *Silver v. Dickson*, 403 F.2d 642, 643 (9th Cir. 1968).

162. 318 F.2d at 255.

163. *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

164. *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Garrity v. New Jersey*, 385 U.S. 493 (1967). See generally *Ellhamer v. Wilson*, 312 F. Supp. 1245 (N.D. Cal. 1969), *rev'd*, No. 25919 (9th Cir. July 7, 1971).

165. In *Hannah v. Larche*, 363 U.S. 420 (1960), the Supreme Court indicated that whenever a governmental agency takes "affirmative action which will affect an individual's legal rights" procedural protections must be given to that individual. 363 U.S. at 441. The Court continued: "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals it is imperative that those agencies use the procedures that have traditionally been associated with the judicial process." 363 U.S. at 442.

Other decisions have stated that procedural protections are needed—no matter what the tribunal is called—when questions of a factual nature are to be resolved [*e.g.*, *Kelly v. Wyman*, 294 F. Supp. 887 (S.D.N.Y. 1968), *aff'd sub. nom.* *Goldberg v. Kelly*, 397 U.S. 254 (1970)] or when the evidence "consists of testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, prejudice or jealousy" [*Greene v. McElroy*, 360 U.S. 474, 496 (1959)].

166. "[W]e think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability. . . . It is the likelihood of involuntary incarceration . . . which commands observance of the Constitutional safeguards of due process." *Hereyford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968). See also *Dooling v. Overholser*, 243 F.2d 825 (D.C. Cir. 1957); *Howard v. Overholser*, 130 F.2d 429 (D.C. Cir. 1942); *In re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968); *Mendoza v. Small Claims Court*, 49 Cal. 2d 668, 673, 321 P.2d 9 (1958); *Steen v. Board of Civil Serv.*

said that the officer of a corporation administratively charged before a hearing officer with violating section 5 of the Federal Trade Commission Act,¹⁶⁷ for "having made false, misleading and deceptive representations, written and oral, to prospective purchasers of chinchilla breeding stock . . ."¹⁶⁸ was "entitled" to have counsel appointed to defend him because he was indigent.¹⁶⁹

But the real problem is not that the procedure is labeled administrative rather than judicial. Rather, the problem is that the procedure is summary, and the question that must be answered is whether governmental interests in a summary disposition of parole revocation cases outweighs the harm to the individual parolee.¹⁷⁰ The answer must inevitably be in the negative.

Three interrelated governmental interests in continuing the process of summary disposition of parole revocation cases have been suggested: First, that a quick procedure is the only way an already overworked panel of Adult Authority members and representatives can deal with the number of cases that come before them;¹⁷¹ second, that the revocation proceedings would become overly formalized and cumbersome if constitutional guarantees applied, and "parole boards would

Comm'rs, 26 Cal. 2d 716, 160 P.2d 816 (1945); *Richey v. Superior Court*, 59 Wash. 2d 872, 371 P.2d 51 (1962); Comment, *Civil Commitment of the Mentally Ill in California: 1969 Style*, 10 SANTA CLARA LAWYER 74, 82-86 (1969); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966); Comment, *supra* note 6, at 327; Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 503 (1968).

167. 15 U.S.C. § 45 (1964).

168. American Chinchilla Corp., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,059, at 21,320 (FTC 1969); see Note, 84 HARV. L. REV. 1026 (1971).

169. 3 TRADE REG. REP. at 21,322. The Commission's opinion states that it is not "conducive to fairness and due process in administrative procedures . . . to pit the power of the state, armed with all the panoply of the legal machinery . . . against a single individual and then to deny that individual the right to counsel when he denies the allegations and specifically asserts that he cannot afford counsel." *Id.*

170. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), Justice Brennan summarized this doctrine as follows:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 . . . (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah v. Larche*, 363 U.S. 420, 440, 442 . . . (1960).

397 U.S. at 262-63.

171. Interview with Robert R. Miller, Adult Authority representative, and Donald M. Kelly, Adult Authority special investigator, in Los Angeles, Sept. 17, 1970.

become hopelessly mired in needless procedure;"¹⁷² and third, that the "increase in cost would make the program prohibitive."¹⁷³ In short, there is an "apprehension that lawyers would bog down the system,"¹⁷⁴ a fear that stems "from the layman's traditional distrust of lawyers as masters of the art of frustration, sworn to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion."¹⁷⁵

None of these arguments is worthy of serious attention, because the goal of administrative efficiency cannot justify abandonment of basic constitutional rights.¹⁷⁶ Mr. Justice Blackmun, when he was sitting on the bench in the Court of Appeals for the Eighth Circuit said that "humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . ."¹⁷⁷ Inevitably, however, judges do consider economic factors, so it is important to point out that these factors are not particularly significant with respect to the parolee's right to counsel.

The staff of the Adult Authority would undoubtedly have to be expanded if lawyers were allowed to participate, because parole revocation hearings would last longer and the hearing representatives would have to devote more time to studying each case and to writing an opinion about their decision. Requiring the state to appoint lawyers for indigent parolees would not, however, place an undue burden on the financial resources of the state, or on the time of California lawyers, because the relative increase in appointed counsel would be quite small. In 1968, 4,404 parolees had their parole suspended or revoked after a hearing before the Adult Authority.¹⁷⁸ Although this figure may seem large standing alone, it is much less imposing when compared with the number of indigent persons arrested for crimes who require appointed counsel at trial—something on the order of 500,000.¹⁷⁹ The financial burden

172. *Rose v. Hawkins*, 388 F.2d 91, 101-02 (6th Cir. 1968) (Celebrezze, J., dissenting).

173. *Id.* at 102. See also *Fleming v. Tate*, 156 F.2d 848, 849 (D.C. Cir. 1946); *Hahn v. Burke*, 430 F.2d 100, 104 n.3 (7th Cir. 1970).

174. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 838 (1961).

175. *Id.*

176. *United States ex rel. Marcial v. Fay*, 247 F.2d 662, 669 (2d Cir. 1957).

177. *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

178. There were 4,826 revocations in 1967 and 4,807 in 1966. The parole population in California was 12,856 on January 1, 1966, 12,461 on January 1, 1967, and 12,002 on January 1, 1968. These figures are from RESEARCH DIVISION, CAL. DEP'T OF CORRECTIONS, CALIFORNIA PRISONERS 1967, at 75, and the 1968 edition of the same publication at 96. The number of parole revocation hearings must be slightly higher than 4,404, because the Adult Authority occasionally decides not to revoke parole at these hearings.

179. Each year 800,000 persons are booked into California jails, accused of violat-

caused by adding the expense of appointed counsel for some 4,500 parole revocation hearings is, therefore, quite insignificant. The parole revocation hearing is not an elaborate proceeding that will demand heavily of the appointed lawyer's time. The bar of California has responded without difficulty when the right to counsel has been extended to other types of criminal proceedings, and there is absolutely no reason to believe that California lawyers would have any difficulty in adapting to an extension of the right to parole revocation hearings.

The extension of the right to counsel to parole revocation hearings will not, as is sometimes argued,¹⁸⁰ cause parole to be granted with greater caution. The United States Board of Parole favored the appointment of counsel for indigent parolees facing revocation¹⁸¹ before this idea was enacted into federal law,¹⁸² and a number of representatives and members of the California Adult Authority are sympathetic to the idea.¹⁸³ Their support for the reform is some indication that they would not be inclined to view safeguards at revocation as a threat to standing policies on granting parole. Those jurisdictions permitting retained counsel to appear at revocation hearings have not been

ing a law more serious than the usual traffic and parking offenses. See Bureau of Criminal Statistics, *Adult Criminal Detention* (Oct. 1967), and Report of the Judicial Council of California (Jan. 6, 1969). Every one of these persons has the right to appointed counsel if he cannot afford a lawyer. See, e.g., *In re Johnson*, 62 Cal. 2d 325, 329, 398 P.2d 420, 422, 42 Cal. Rptr. 288, 290 (1965); *In re Smiley*, 66 Cal. 2d 606, 614-15, 427 P.2d 179, 184, 58 Cal. Rptr. 579, 584 (1967).

Although there are no figures on exactly how many indigents ask for appointed counsel each year, general estimates can be made. About 60 percent of the criminal appeals that are brought before the courts of appeal and the California supreme court are argued by appointed counsel. If this percentage is true at lower levels, then some 500,000 cases would require appointed counsel each year.

A different mode of computation confirms this figure. The San Francisco County Public Defender's office reports that it handled 34,920 different cases during fiscal year 1968-69. Edward T. Mancuso, Annual Report 17 (July 1, 1968 to June 30, 1969). The Alameda County Public Defender's office, which uses more restrictive eligibility standards, represented 16,511 different clients in calendar year 1969. Report of the Alameda County Public Defender's Office (1969). These two counties contain about one-tenth of the state's population, so if the practices of their public defender's offices are representative it means that about 500,000 Californians are represented by public defenders each year.

180. Note, 40 U. COLO. L. REV. 617, 621 (1968); this argument was made by the State of Wisconsin in *Goolsby v. Gagnon*, 322 F. Supp. 460, 463 (E.D. Wis. 1971) but was rejected by the court in that case.

181. *Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 233 (1969) (Amendments to the Criminal Justice Act of 1964).

182. 18 U.S.C.A. § 3006A (1971), amending 18 U.S.C. § 3006A (1964).

183. An Adult Authority and Department of Corrections task force chaired by representative Bernard Forman submitted a recommendation in 1966 that advocated increased procedural protections for parolees, including the right to counsel. Telephone interview with Bernard Forman, in Los Angeles, Nov. 25, 1970.

more reluctant to grant parole.¹⁸⁴ Granting parole is to a large extent demanded by the economics of running a prison system; the government saves vast sums of money when it releases a prisoner on parole.¹⁸⁵ This will continue to be true, with the result that the granting of parole is not likely to fall below its present rate.

C. *The Right to Counsel and the Equal Protection Clause*

A number of jurisdictions now allow retained counsel to appear at the revocation hearings, but do not provide appointed counsel for indigent parolees.¹⁸⁶ At those hearings involving questions of economics rather than questions of life or liberty, such as zoning hearings, tax interviews, eminent domain proceedings, and rate reviews, it is appropriate to allow retained counsel to appear but not to provide counsel for those unable to retain one.¹⁸⁷ The parole revocation proceeding, however, clearly falls on the other side of the line because liberty is at stake. In this hearing, therefore, appointed counsel must be provided if retained counsel is permitted. *Griffin v. Illinois*¹⁸⁸ and *Gideon v. Wainwright*¹⁸⁹ command no less.

184. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 n.157 (1964).

185. Nationally, the average parolee costs \$231.20 per year, and the average man in prison costs the state \$1,912.60. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 194 (1967). In California, during 1966-67, the average parolee cost the state \$572, and the average adult prisoner cost the state \$2,628. CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS 38 (1968).

186. Among these jurisdictions are *Alabama*: ALA. CODE tit. 42, § 12 (1959); *Florida*: FLA. STAT. § 947.23(1) (1967); *Shiplett v. Wainwright*, 198 So. 2d 647 (Fla. Dist. Ct. App. 1967); *Montana*: MONT. REV. CODES ANN. §§ 94-9838, 94-9835 (Supp. 1967); *Nevada*: Smith v. Warden, 85 Nev. 83, 450 P.2d 356 (1969); *Washington*: WASH. REV. CODE ANN. § 9.95.120 (1961); *Riggins v. Rhay*, 75 Wash. 2d 271, 450 P.2d 806 (1969); *West Virginia*: W. VA. CODE ANN. § 62-12-19 (1966); *Lawson v. Coiner*, 291 F. Supp. 79, 82-83 (N.D.W. Va. 1968).

In Michigan, the statutory scheme allowing retained counsel to appear at revocation hearings, but not appointing counsel for indigent parolees [MICH. STAT. ANN. § 28.2310(1) (Supp. 1968); *Saunders v. Michigau Parole Bd.*, 15 Mich. App. 183, 166 N.W.2d 278 (1968)], has recently been said to violate the equal protection clause by one division of the Michigan court of appeals (*Warren v. Michigan Parole Bd.*, 23 Mich. App. 754, 179 N.W.2d 664 (1970)).

187. The welfare termination hearing falls within this broad category, although the distinction between "economics" and "life" becomes blurred when the money involved constitutes a subsistence-level income.

188. 351 U.S. 12 (1956). See in particular the following language:

In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . .

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

351 U.S. at 17-19.

189. 372 U.S. 335 (1963).

The Tenth Circuit in *Earnest v. Willingham*¹⁹⁰ applied *Griffin* to the federal parole procedures, in which retained counsel was allowed, but appointed counsel was not provided, and concluded that:

[W]here liberty is at stake a State may not grant to one even a non-constitutional, statutory right such as here involved and deny it to another because of poverty

A hearing where witnesses may be heard is contemplated and revocation may very well turn on the resolution of disputed facts or the emphasis to be placed on admitted facts. Ameliorating circumstances may tip the scales against revocation. In these circumstances a revocation hearing is no "perfunctory formality." Nor can it be said that the assistance of counsel at such a revocation hearing is an empty ritual. It may very well spell the difference between revocation and forgiveness.¹⁹¹

A growing number of courts have agreed with the Tenth Circuit's conclusion that the equal protection clause requires the appointment of counsel for an indigent, if retained counsel may appear at the hearing.¹⁹² Moreover, *Willingham* and *Mempa* prompted Congress to amend the Criminal Justice Act of 1964 to provide for appointed counsel at federal parole revocation hearings.¹⁹³

In *Cotner v. United States*,¹⁹⁴ however, the Tenth Circuit sharply circumscribed its broad grant in *Willingham*. Although reaffirming that the equal protection clause requires the government to provide counsel to indigents at a parole revocation hearing if it is to permit retained counsel, the court limited the grant to those cases in which the parolee challenges the factual basis for the revocation.¹⁹⁵ The court concluded that because Cotner challenged the interpretation and discretion of the parole officials and did not raise a factual dispute, the equal protection clause did not require Cotner to be provided with counsel.¹⁹⁶

190. 406 F.2d 681 (10th Cir. 1969).

191. *Id.* at 683-84 (emphasis added).

192. See, e.g., *Alvarez v. Turner*, 422 F.2d 214 (10th Cir. 1970); *Hoffman v. State*, 404 P.2d 644 (Alas. 1965); *Warren v. Michigan Parole Bd.*, 23 Mich. App. 754, 179 N.W.2d 664 (1970); *Perry v. Williard*, 247 Ore. 145, 427 P.2d 1020 (1967). The Third Circuit, in *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1250 (3d Cir. 1970), hints that it may agree. See also Comment, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 725 (1968).

193. 18 U.S.C.A. § 3006A (1971), amending 18 U.S.C. § 3006A (1964). See *Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (Amendments to the Criminal Justice Act of 1964).

194. 409 F.2d 853 (10th Cir. 1969).

195. *Id.* at 856.

196. Although the result of *Cotner* as applied to the federal system was reversed by statute [see note 193 *supra* and accompanying text], the Tenth Circuit has applied the same rule to the state parole systems it supervises. *Duennebeil v. Turner*, 425 F.2d 1207 (10th Cir. 1970); *Earnest v. Moseley*, 426 F.2d 466 (10th Cir. 1970). In

Chief Judge Bazelon came to a similar conclusion in his dissent in *Hyser v. Reed*,¹⁹⁷ contending that if a parolee does not deny a violation, the board need only hold an informal interview allowing the parolee to make a statement and to submit documents that may persuade the board toward leniency.¹⁹⁸ In such a hearing, according to Bazelon, the government would not be required to introduce evidence or to provide the parolee with counsel.¹⁹⁹ Moreover, Bazelon continued, even a parolee who denies his guilt needs to be represented by counsel only during part of his revocation hearing, because two different determinations are to be made by the parole board:

The first is whether the arrested or retaken parolee has violated a specifically charged condition of his parole. If he has not, he must be permitted to remain at liberty, regardless of any predictive judgment regarding his dangerousness. The second determination is whether, if a violation is found, it warrants modification or revocation of parole.²⁰⁰

Bazelon argued that only with regard to the first determination is a hearing to be held and in that hearing the government would be obliged to produce its evidence of violation and to provide the parolee with counsel if he cannot afford to retain his own. With regard to the second determination, however, no hearing whatsoever need be held because this is a matter that can be decided by the parole board alone "in the exercise of its expert discretion."²⁰¹

These facile distinctions between parolees who plead guilty and those who contest their violations and between the two aspects of the parole board's duties obviously have an appeal to judges who desire to extend due process protection but want to avoid placing additional administrative burdens on the government. The distinctions are inappropriate, however, and might lead to evils greater than those they purport to cure. One problem is that parolees who are faced with termination of their parole status are almost invariably charged with more than one violation and in virtually every case they have, in fact, violated some condition of parole. In California the conditions of parole are broad and vague: For example, the parolee cannot drive without his agent's permission;²⁰² he must not consume alcohol to excess (or per-

addition, one branch of the Michigan court of appeals has accepted the reasoning of the court in *Cotner* and has held that appointed counsel is required at a parole revocation hearing only when there is a factual dispute. *Warren v. Michigan Parole Bd.*, 23 Mich. App. 754, 179 N.W.2d 664 (1970).

197. 318 F.2d 225, 248-57 (D.C. Cir. 1963).

198. *Id.* at 256-57.

199. *Id.* at 249.

200. *Id.* at 248-49.

201. *Id.* at 250.

202. California CDC Form 1515, reprinted in Comment, *Parole Revocation Hear-*

haps not at all);²⁰³ he must conduct himself "as a good citizen at all times;"²⁰⁴ he must refrain from associating with other persons who have been in prison;²⁰⁵ he must "cooperate with the Parole Agent at all times;"²⁰⁶ he must file monthly reports,²⁰⁷ and so on. Parole agents invariably discover trivial violations,²⁰⁸ but they refrain from recommending revocation of parole until they detect an extended course of conduct that they view as dangerous.²⁰⁹ At that point, the agent may find some technical violation and report it. The parolee cannot deny that he committed the technical parole violation, but he can, if he is provided with an effective advocate arguing persuasively on his behalf, attack the major premise of the parole agent, that is, that the parolee is moving in a dangerous direction.

Mempa v. Rhay,²¹⁰ on its facts, refutes the distinction between factual disputes and discretionary decisions made in *Willingham* and in Chief Judge Bazelon's dissent in *Hyser*, because in *Mempa* the Court ruled that counsel was required even though the trial judge was making only a discretionary recommendation and even though there was no factual dispute. *Mempa* did not deny that he had committed the violation (a burglary) of which he was accused. A lawyer was deemed necessary, nonetheless, because of a lawyer's ability to persuade the judge with regard to his exercise of discretion through facts. The attorney is a trained, articulate advocate; the parolee is not.

The Court of Appeals for the Fourth Circuit came to the same conclusion in *Hewett v. North Carolina*,²¹¹ noting that the Supreme Court in *Gideon v. Wainwright*²¹² did not distinguish between accused felons who pleaded guilty and those who pleaded not guilty. In fact, *Gideon* specifically rejected the "special circumstances" test of *Betts v. Brady*,²¹³ which is essentially what the Tenth Circuit and Chief Judge Bazelon advocate for parole revocation hearings. The Fourth Circuit decided that at a probation revocation hearing no definite line between those who need counsel and those who do not could be articulated, and

ings—*Pro Justitia or Pro Camera Stellata?*, 10 SANTA CLARA LAWYER 319, 320 n.6 (1970) (Standard Condition No. 9).

203. *Id.* (Standard Condition No. 5).

204. *Id.* (Standard Condition No. 12).

205. *Id.* (Standard Condition No. 8).

206. *Id.* (Standard Condition No. 10).

207. *Id.* (Standard Condition No. 4).

208. See Note, *Observations on the Administration of Parole*, 79 YALE L.J. 698, 699 (1970).

209. Letter from Robert R. Miller, Adult Authority representative, to the author, Oct. 21, 1970.

210. 389 U.S. 128 (1967).

211. 415 F.2d 1316 (4th Cir. 1969).

212. 372 U.S. 335 (1963).

213. 316 U.S. 455 (1942).

furthermore that "[e]ven the most superficially frivolous proceeding may reveal to competent counsel procedural or substantive irregularities which require correction in order to safeguard the interests of a probationer."²¹⁴ Even when there are no errors to correct, no mitigating circumstances to present, and no mysterious conduct to explain, an attorney can still assist the Adult Authority by placing the parolee's situation in the best possible light, and by explaining the parolee's relationships with his family and his community and his attitude toward his own future.²¹⁵

CONCLUSION

Many courts have been slow to recognize the full implications of *Mempa v. Rhay*²¹⁶ and *In re Gault*²¹⁷ because doing so requires reviewing some areas of the criminal justice system that courts have left alone for many years. The reasoning that led the Supreme Court to make those sweeping decisions must, however, lead that Court and other courts who understand those motivations to render a similarly sweeping decision when a case involving parole revocation hearings comes before them. Parolees must now be permitted to attend revocation hearings with counsel, and indigent parolees facing revocation must be provided with appointed counsel.

The use of parole has become firmly entrenched into our system of criminal justice. It can no longer be viewed as a magnanimous

214. 415 F.2d at 1325. See also Tappan, *The Role of Counsel in Parole Matters*, 3 PRAC. LAW. 21, 27 (1957), in which the following comments were made in the context of parole eligibility hearings:

For example, the writer, as a parole board member, has had brought more effectively to his attention by counsel than by most parole candidates details relating to the prisoner's family and his relationships in the home, the quality of community feeling toward the offender, the victim's attitude and other matters.

215. There is one final argument in favor of extending the right to counsel to parole revocation hearings that is applicable in California. The California supreme court has said in numerous cases [see, e.g., *In re Johnson*, 62 Cal. 2d 325, 329, 398 P.2d 420, 422, 42 Cal. Rptr. 228, 230 (1965); *In re Smiley*, 66 Cal. 2d 606, 614-15, 427 P.2d 179, 184, 58 Cal. Rptr. 579, 584 (1967)] that the right to counsel extends to persons charged with misdemeanors as well as persons charged with felonies. This goes beyond any holding of the United States Supreme Court, and, in fact, the United States Supreme Court has hinted in two recent cases [*Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *In re Gault*, 387 U.S. 1, 36 (1967)] that it now reads the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as applying only to those persons accused of a felony.

The conclusion of the California supreme court that the right to counsel extends to misdemeanants may therefore indicate that the right to counsel found in the California Constitution (art. I, § 13) is broader than the right granted by the sixth amendment of the federal constitution. Even if the United States Constitution does not require that parolees be given appointed counsel at revocation hearings, the California Constitution may so require.

216. 389 U.S. 128 (1967).

217. 387 U.S. 1 (1967).

gesture bestowed by the sovereign for humanitarian reasons and hence a mere privilege for the convict. It is a penal device used by the state for sound sociological and financial reasons, and when the state uses the device it must use it in conformity with the requirements of the Constitution.

After *Gault*, the state can no longer argue that no important event is occurring when it revokes parole, that it is merely transferring the parolee from one form of custody to another. A "substantial right"²¹⁸ was being affected when the state transferred a juvenile from the custody of his parents to the custody of the state penal system. A "substantial right" similarly is affected when the state transfers a parolee from the loose custody of the parole system to the much tighter custody of the state prison. Parole agents and parole boards undoubtedly try to make the best possible decision, both for the parolee and the public, when they consider parole revocation, but that does not justify denying the parolee representation by counsel. As the Court said in *Gault*, "[U]nbridled discretion, however benevolently motivated, is . . . a poor substitute for principle and procedure."²¹⁹

The test to be used is not whether parole is a "privilege" or a "right" but whether the loss to the individual of his liberty is more significant than the government's interests in a short, informal hearing conducted without giving the parolee the benefit of legal representation.²²⁰ No governmental interest has been cited that in any way looms as large as the loss of liberty to the individual,²²¹ and so the inevitable conclusion must be that parolees have a right to counsel at their revocation hearings.

218. 389 U.S. at 134.

219. 387 U.S. at 18.

220. See note 170 *supra* and accompanying text.

221. See notes 171-85 *supra* and accompanying text.

California Law Review

VOL. 59

SEPTEMBER 1971

No. 5

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