THE LACK OF DUE PROCESS IN REVOCATIONS OF BENCH PAROLES IN IOWA, A DIALOGUE

HEAR YE, HEAR YE, the District Court of the 9th Judicial District of the State of Iowa, his Honorable John Doe, Judge of the District Court presiding, is now is session.

J: Bailiff before any other matter comes before this court would you please call in the Sheriff.

B: Yes, your honor.

J: Sheriff, you recall that about two months ago James Felon was convicted of larceny before this court, and I suspended his sentence on good behavior?

S: Yes, your honor.

J: Well, it has been reported to me that he was out past midnight the other night, that he has been associating with some shady characters, and that he has violated the terms of his bench parole. I want you to go out and arrest him, put him in jail, and, at your convenience, transport him to the penitentiary to serve the term of his sentence, his bench parole, as of now being revoked.

(Attorney sitting in back of court room steps forward.)

A: Your honor, I am an attorney and I am a member of the Civil Liberties Union. With the court's permission, I wish to be heard on Mr. Felon's behalf.

J: Granted! What do you have to say on his behalf?

A: It appears to me that the revocation of Mr. Felon's probation is summary and I wish to suggest that as a matter of due process this man ought to receive some type of hearing on the question of whether or not he has violated the terms of his suspension; or at the very least some notice of the revocation.

J: (To Attorney) Because, counsel, he has no right to notice or hearing; it is solely within my discretion whether or not his parole should be revoked! The Iowa statutes[1] make no provision for notice or hearing in cases of revocation, and the Iowa court has held repeatedly that one who has been granted his "conditional" liberty by reason of a parole[2], commutation of sentence and subsequent parole[3], or suspended sentence[4] has no right to

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* This article was suggested by a discussion that occured at the 1965 Judicial Conference of Iowa Judges held in Des Moines in June, 1965. The style of the article is not new. It is not intended to reflect upon the current practice of trial judges in Iowa; the subject matter is important, and the discussion hereafter, therefore justified. (Ed.'s Note).

1 IOWA CODE, § 247.26 (1962) provides:

A suspension of sentence by the court as herein provided may be revoked at at any time, without notice, by the court or judge, and the defendant committed in obedience to such judgment.

2 See, *e.g.*, State v. Boston, 234 Iowa 1047, 14 N.W. 2d 676 (1944); Bennett v. Bradley, 216 Iowa 1267, 249 N.W. 651 (1933); Pagano v. Bechly, 211 Iowa 1294, 232 N.W. 798 (1930).

3 State v. Bostwick, 244 Iowa 584, 57 N.W. 2d 217 (1953).

4 Pagano v. Bechly, 211 Iowa 1249, 232 N.W. 798 (1930); *cf.*, Lint v. Bennett, 251 Iowa 1194, 104 N.W. 2d 564 (1960). For a complete annotation and collection of recent cases in the field, see Anno., RIGHT TO NOTICE AND HEARING BEFORE REVOCATION OF SUSPENSION OF SENTENCE, PAROLE, CONDITIONAL PARDON OR PROBATION, 29 A.L.R. 2d (1951).

notice or hearing in the event that the court or other proper authority deems that he has violated the conditions of his conditional freedom.[5]

A: I know the position taken by the Iowa court, and I imagine that it is the court's position that the status of conditional freedom is granted only as a matter of grace and forbearance on the part of the sovereign.[6]

J: That is correct. The Iowa court, in *State v. Bufford*, held:

> . . . when the defendant in a criminal case accepts the grace and forbearance extended by . . . [the Iowa] Code, he takes it with the conditions and limitations that go with it.[7]

One of these conditions is that he has no right to notice or hearing when the proper authority deems he has violated the conditions of his probation.[8]

A: But when a man is given a suspended sentence, or when he is on probation he is free to function in society once again as a member of that society and . . .

J: That may be true, but still his freedom is only limited, it is only of a conditional nature.[9]

A: But, you will admit that he does have some type of freedom.[10]

J: Yes, you are right.

A: And that to deprive him of that freedom without affording him the chance to be heard would be a denial of the mode of judicial process Daniel Webster was speaking when he said:

> A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial . . .
> Judgment without such citation and opportunity wants all attributes of a judicial determination; its is judicial usurpation and oppression and can never be upheld where justice is fairly administered.[11]

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[5] The Iowa Court has characterized the power to suspend without hearing as follows: "I will suspend your sentence during good behavior, but reserve the power to revoke this suspension of sentence and parole at any time I may see fit, without notice to you." Lint v. Bennett, 251 Iowa 1194 at 1196, 104 N.W. 2d 564 at 565 (1960). It is not the position of the writer that the statute does not give the court the power to suspend wihtout a hearing. It is the wiseness of the practice and its constitutionality that are in doubt.

[6] Pagano v. Bechly, 211 Iowa 1249, 232 N.W. 798 (1930) ("When the defendant in a criminal case accepts the grace and forbearance extended by [IOWA CODE, § 247.20] he takes it with the conditions and limitations that go with it provided in section [247.26]."

[7] 231 Iowa 1000 at 1002, 2 N.W. 2d 634 and 635 (1942).

[8] See cases cited at note 4, *supra*. In addition to revocation or suspension without hearing or notice, IOWA CODE, § 247.28 provides that a parolee who has been paroled by the Board of Parole is guilty of a substantive crime for violating the terms of his parole. IOWA CODE § 745.3 (1962) also makes violation of Board parole an escape, which is a felony. The fact that a bench parole violator is not charged or convicted under either of these provisions does not protect him from a revocation the original suspension. See Lint v. Bennett, 251 Iowa 1194, 104 N.W. 2d 564 (1960).

[9] See notes 3, 4 and 5, *supra*. It is unclear whether or not, the Iowa court in referring to the conditional nature of a parolee's freedom is referring to the terms and conditions of his parole, which are ordinarily set forth in the order granting him the parole, or to his freedom which is conditional in the sense that it relates back to the court's exercise in descretion in granting the suspended sentence. See in this connection, Pagano v. Bechly, 211 Iowa 1249, 232 N.W. 651 (1933); Note, 57 N.W. L. REV. 737 (1963).

[10] See Note, 72 Yale L. J. 368 (1963); KELAR, LAW AND PRACTICE IN PROBATION AND PAROLE REVOCATION HEARINGS, 55 J. Crim L. 175 (1964).

[11] Dartmouth College v. Woodward, 4 Wheat 518 at 525 (1819).

J: But, you are overlooking the fact that in the case of suspended sentences or probation, the convicted defendant has already been afforded full constitutional protection of all his rights in his original trail;[12] and when the court revokes his probation, it is merely imposing the sentence that resulted from the original conviction.[13]

A: That may be true. But when you revoke his probation you are depriving him of his liberty no matter how limited that liberty may be.[14] And when I speak of liberty in this context, I am referring specifically to that right which is guaranteed to every citizen by the 14th Amendment.

J: But the Supreme Court of the United States in *Escoe v. Zerbst*,[15] a case in which the criminal defendant was convicted and his sentence suspended, and which sentence was subsequently revoked without hearing, said:

> . . . We do not accept the petitioner's contention that the privilege [of a hearing] has a basis in the Constitution. . .[16]

A: You are correct in your citation, but I hurry to point out that the court in *Escoe* reversed the lower court for their failure to give the defendant a hearing.[17] It was not necessary that they find a constitutional basis for their decision; for the right to a hearing in such cases is specifically afforded the defendant probationer by statute,[18] at least in the federal courts.

J: Are you implying that my quotation from Justice Cardozo's opinion in the *Escoe* is only dictum?[19]

L: It can be nothing else. The court in *Escoe* went on to point out because the probationer was entitled to be brought before the court; the probationer was entitled to a hearing.[20] Justice Cardozo in the opinion stated:

> . . . there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.[21]

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12 See, *e.g.*, In Re Anderson, 191 Ore. 409, 229 P.2d 633 (1951); In re Varner, 166 Ohio St. 340, 142 N.E. 2d 846 (1957). *Cf.*, Pagano v. Bechly, 211 Iowa 1249, 232 Iowa 798 (1930); State *ex rel* Davis v. Hunter, 124 Iowa 569, 100 N.W. 510 (1904); Arthur v. Craig, 48 Iowa 264 (1878).

13 *Id.* See also Pagano v. Bechly, *supra* note 12, where the court expressly indicates that this is the required procedure when a suspended sentence has been revoked.

14 See State v. Zolantakis, 70 Utah 296, 259 Pac. 1044 (1927) ("The right to personal liberty is one of the most sacred and valuable rights of a citizen and should not be regarded lightly. The right to personal liberty may be as valuable as to one convicted of crime as to one not so convicted, and so long as one complies with the conditions upon which such right is assured . . . he may not be deprived of the same.") See also Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941).

15 295 U.S. 490 (1935).

16 *Id.* at 492.

17 *Id.* at 494. Although *Escoe* dealt with the revocation of probation under the Federal Probation Act, it has been cited by other courts as authority for the proposition that there is no constitutional right to a parole revocation hearing. See *e.g.*, United States *ex rel* Harris v. Ragen, 177 F.2d 303, 304 (7th Cir. 1949); Bennett v. United States, 158 F.2d 412, 414 (8th Cir. 1946, *cert. denied*, 331 U.S. 822 (1947).

18 18 U.S.C. §§ 3651-56 (1964); see in this connection the excellent summary of the federal practice in 72 FED. PROB. 38-57 (1963).

19 *Cf.*, Hannah v. Larche, 363 U.S. 420 (1960) (". . . it is imperative that those agencies use the procedures which have traditionally been associated with the

20 295 U.S. 490 at 493 (1935)

Legal process . . .").

21 *Id.*

J: This language does seem to imply that once the probationer is given a hearing, he is entitled to more procedurally than merely to be present before the court.[22]

But, this does not overcome the position of the Iowa court in *Pagano v. Bechley*,[23] a case in which the Iowa court held that the power of the court to suspend a convicted criminal's sentence is purely statutory; and that there is no inherent power in the court to suspend a criminal's sentence. And, since the statute specifically provides that there is no requirement of notice and hearing on revocation cases,[24] the court's power in this regard would therefore seem limited.

A: But you admit that when the court or other proper authority revokes a man's probation it deprives him of his liberty, yet you maintain that such court or agency may take away his liberty without affording him due process, merely because the legislature has seen fit to insert such a provision into the probation statutes. It has always been my thought that the states could not infringe upon a man's rights which have been afforded him by the natural law and embodied in the fourteenth amendment.[25]

J: The courts of the United States have never stated that there is any constitutional basis for the right of notice or hearing in probation revocation proceedings.

A: Your honor I beg to disagree with you. The Circuit Court of Appeals for the sixth circuit in *Fleenor v. Hammond*[26] held that to deprive a probationer of his freedom without notice or hearing was a violation of the probationer's right to due process under the fourteenth amendment of the Constitution.

J: But that is a federal case, and wasn't the court applying the federal statute which requires that the probationer be brought before the court?

A: No, the matter came before the court by reason of an application for a writ of habeas corpus by a prisoner who was being detained in the Kentucky penitentiary as a result of revocation by the state of his conditional pardon. Judge Simons in writing the opinion of the court stated:

> The question before us, . . . (is) whether summary revocation of a pardon, without hearing upon the question whether its conditions had been broken, is an impairment of the rights of the petitioner reserved to him by the Fourteenth Amendment of the Constitution of the United States, . . .[27]

The court in *Fleenor* reversed both the Kentucky Court of Appeals and

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[22] See Note, 57 N.W. U.L. REV. 737 (1963). The author lists and discusses the following elements of a due process type hearings:
(a) The revoking authority must present evidence to support its charges and the parolee has the right to examine the evidence against him.
b. Notice.
c. The parolle must have the opportunity to present evidence in his own behalf and to have compulsory process available.
d. Counsel may be necessary.

[23] 211 Iowa 1249, 232 N.W. 651 (1930).

[24] IOWA CODE, § 247.26 (1962).

[25] Dent v. West Virginia, 129 U.S. 114 (1889); *cf.*, Rochin v. Calif., 342 U.S. 165 (1952).

[26] 116 F.2d 982 (6th Cir. 1941). Other federal cases on the same issue are collected in Sklar, LAW AND PRACTICE AND PAROLE REVOCATION HEARINGS, 55 J. Crim. L. 175 (1964).

[27] *Id.* at 986.

the Federal District Court in reaching the conclusion that:

> It does not follow however from the reservation of a right to revoke that it may be exercised arbitrarily or upon whim, caprice, or rumor.[28]

J: But is this analogous to the revocation of a suspended sentence, by the court that imposed the sentence.

A: The court in *Fleenor* held that the granting of a conditional pardon may be assimilated to probation or imposition of a suspended sentence, and that for a court or other agency to revoke a man's pardon, probation, or suspended sentence without notice and a chance to be heard in his own behalf would be a denial of the right of due process as guaranteed him by the fourteenth amendment of the Constitution.[29]

J: But this one case does not determine the law in Iowa and you must admit that a number of other states follow the same procedure as Iowa, either by statute or when their statutes are silent on the matter.[30]

A: That may be true but it is self-evident, that, merely because something is done or the same inequitable procedure is followed by a number of courts, this does not preclude rexamination of local practice.

J: But because it is the law in a number of jurisdictions, and the Supreme Court of the United States had not condemned it as violative of the constitution, this would seem to raise an inference that lack of notice and hearing in these cases is not a denial of due process; and that the procedure is highly acceptable.[31]

A: The fallacy in that statement, your honor, is exhibited by the fact that for many years the state prosecuting attorneys were allowed to comment on a criminal defendant's failure to take the stand, and that courts could instruct that such failure gave rise to an inference of the man's guilt; and it has taken the Supreme Court of the United States until 1965 to determine that this procedure was in violation of the defendant's constitutional right against self-incrimination.[32]

J: You are referring of course, to *Griffin v. California,*[33] which position has recently been adopted by the Iowa Supreme Court.[34] But I fail to see how the Griffin case is in any way determinative of the question before this court today.

A. I am indicating by this citation your honor, that the realization that the rights of the criminal defendant in state courts have a Federal Constitutional basis has been evolutionary in its process, and, that this evolutionary process has just begun to reach its culmination in the last few years. The Supreme Court has finally reached the realization that the rights guaranteed to all men under the federal constitution are of no weight or moment and completely meaningless if each state can either

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28 *Ibid.*

29 *Id.* at 988, *Cf.*, Sklar, *Supra* note 26, at pp. 193-198.

30 See Sklar, *supra* note 26, where the statutes and cases are collected. The statutes of 13 states have provisions which prohibit a hearing. *Id.* at 176.

31 There is no doubt that this last statement is correct. In fact, both by statute or by case decision, 34 states expressly prohibit or severly limit hearings. *Id.* See also Anno., RIGHT TO NOTICE AND HEARING BEFORE REVOCATION OF SUSPENDED SENTENCE, PAROLE, CONDITIONAL PARDON, OR PROBATION, 29 A.L.R.2d 1074 (1951).

32 Griffin v. Calif., 380 U.S. 609 (1965).

33 *Id.*

34 State v. Johnson, ... Iowa ....., 136 N.W. 2d 518 (1965).

directly or indirectly abridge these rights by legislation or court decision.[35]

J: But you have failed to show me that there is any constitutional basis for the holding that a probationer is entitled to notice or hearing when the proper authority revokes his probation. The Iowa court has consistently held that because probation is a matter of grace and forbearance, the probationer has no "vested right" in his liberty.[36]

A: By this statement are you referring to the old, time worn "rights and privileges" dichotomy?[37]

J: Yes, I am. It appears to me that the revocation of a probation is in the contemplation of the Iowa statute nothing more than an administrative process, even though in the suspended sentence cases the process is being administered by the judiciary.[38]

A: I will agree with you that at one point in the evolution of the law the "rights and privileges" dichotomy was a prime distinction on which courts justified the particular deprivation they were executing at any given point in time. But as the court has begun to realize the error in applying such a valueless distinction, they have gradually allowed this concept to find its natural resting place with many other time-worn cliches.[39]

J: But in *United States ex-rel Knauff v. Shaughnessy,*[40] a case where a hearing was denied to an alien's wife who had been denied entry into this country, the Supreme Court held that entry into the United States was a matter of privilege, and that the wife had no vested right to entry, and that therefore it could be denied without affording her a hearing.

A: It may be true that the government can deny to aliens the right to enter the country;[41] but this does not mean that once they have allowed them to enter the country they can thereafter remove them without first affording them the right to a hearing.[42] The result being that a state may in the first

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[35] Mapp v. Ohio, 367 U.S. 643 (1961).

[36] *Supra,* notes 2-4, and accompanying text.

[37] The principle that is almost automatically applied, at least in state decisions dealing with right to hearing, is to determine if the matter is a vested right, which entitles it to constitutional protection. If the matter is a "privilege" or a "matter of grace", no constitutional safeguards are applicable. See Anno., 29 A.L.R. 2d (1951).

[38] *Cf.,* State v. Bostwick, 244 Iowa 584, 57 N.W. 2d 217 (1953).

[39] DAVIS, ADMINISTRATIVE LAW, § 7.15 (1962). See also Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941), where the court observes:

"We may grant at once that the giving of a pardon is an act of grace. . . . It does not follow, however, from the reservation of a right to revoke that it may be exercised arbitrarily or upon whim, caprice or rumor . . . To hold that such for feiture may be imposed without giving the grantee an opportunity to be heard, does violence to what are said to be the immuntable principles of justice, which inhere in the very idea of free government . . ." *Id.* at 986.

The same idea has been expressed as follows:

"One who has a sufficient interest or right at stake in determination of governmental action is ordinarily entitled to opportunity for a trial type hearing on issues of . . . facts. But what is a sufficient interest or right? Many judicial opinions assert that a party is not entitled to a hearing when only a "privilege" is involved. Often the ide of privilege is nothing more than a label attached after the solution has been worked out on other grounds." DAVIS, ADMINISTRATIVE LAW, CASES, TEXT, PROBLEMS, at 147 (1965).

[40] 338 U.S. 537 (1950).

[41] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[42] *Id.*

instance deny a convict the liberty which he requests, but once they have granted him his liberty they can not thereafter revoke this liberty without affording him the right to notice and hearing.[43]

J: But the proceeding is essentially administrative. The probationer has already been afforded all of the safeguards of due process when he was convicted at his trial, and all the court is doing is administering the same sentence that it could have when the initial criminal proceeding had ended.[44]

A: But the court, at the end of the initial trial, did not see fit, and I am sure for good cause, to enforce the sentence that it rendered. Instead the court granted to the convicted criminal the right to be once gain a liberty in society, to live as a free man, even though it is conditional freedom.

J: But still you have established no basis for your statement that the "right-privilege" dichotomy is not still a prevalent theory to be applied in adjudications of this nature; nor have you supplied any basis for your conclusion that once granted it may not be withdrawn without notice and hearing.

A: Your Honor, I would direct you first to the dissent by Justice Jackson in *Knauff*[45] wherein he expresses and substantiates the concept that no man's liberty or fredom should be denied to him without a chance for him to hear the charges against him and also a chance to rebut them.

J: The dissent in *Knauff* is overshadowed by the majority opinion and also the holding of the Supreme Court in *Cafeteria & Restaurant Workers Union v. McElroy*.[46] In the *Cafeteria* case a woman had been denied the right to work any longer in a cafeteria on the premisis of a naval gun factory on the grounds that she was a security risk.

A: Yes, I know and the court held that her discharge without notice and an opportunity to be heard was not a denial of due process of law. But the court did not base their decision on the question of right or privilege but simply weighed the interests of the worker in working at this one particular place against the interest of national security.[47] In addition I would refer you to the decision of the U. S. Court of Appeals in *Gonzales v. Freeman*.[48] In the *Gonzales* the parties had been denied the right to participate in government contracts, and the appeals court held:

> ". . . use of such terms as 'right' or 'privilege' tends to confuse the issues presented by debarment action.[49]

The court went on to hold that in the contemplation of the word 'right' there may be no such thing, but that does not mean that the government can act arbitrarily, either substantively or procedurally.

J: Your whole point being that once the government has granted a particular opportunity to an individual, i.e., government employment, opportunity to bid on government contracts, entry into the country of an

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[43] See Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941).

[44] *But see* Hannah v. Larche, 363 U.S. 420 (1960) (". . . it is imperative that administrative agencies use the procedures which have been traditionally been associated with the judicial process.").

[45] 338 U.S. 537, 550 (1950).

[46] 367 U.S. 886 (1961).

[47] *Id.* at 894.

[48] 321 F. 2d 491 (3rd Cir. 1962).

[49] *Id.* at 495.

alien, or a probation, the government cannot thereafter rescind or revoke such opportunity without first affording the individual concerned with notice and an opportunity to be heard.[50]

A: Yes, that is correct, and though I am concerned only at this point with the right of a probationer to notice and hearing; I would contend further that to revoke a probation without notice and hearing is prima facia arbitrary and capricous action, and therefore a denial of the probationer's right to due process.[51]

J: On what authority, if any, do you base your contention that the revocation of probation without notice and hearing would be prima facia a violation of the fourteenth amendment? Would this not depend on the facts of each individual case?

A: The facts of each case would be of no consequence unless there was some type of hearing to determine what, if any, of the allegations regarding the probationer's violation of his probation conditions are substantiated by sufficient competent evidence to constitute a fact or factual basis on which to revoke a man's probation. The Supreme Court in *Escoe*[52] stated that without a hearing:

> The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender.[53]

J: The revocation of a man's suspensed sentence is purely within the discretion of the court, or the other authority charged with the duty of overseeing the criminal's probation; and, when the court or parole board is presented with statements from a probation officer or some other responsible citizen, it is for it to determine the credibility of the report and of the complaining witness. The court has such authority since it certainly has the intelligence and maturity and responsibility to be able to determine such things, without being arbitrary.

A: But how can such a determination be made, when the deciding authority does not know where the information or rumor originated; and when it has not heard both sides of the story? Isn't a hearing with the procedural rights of notice, confrontation and cross examination necessary to:

> . . . satisfy the conscience of the court that the suspended sentence was violated.[54]

J: But it appears to me that investigation into the question of whether or not an individual has violated his parole, and the final determination of that question can be conducted fairly and impartially, without such a hearing. The court and parole board certainly is able to conduct and make its determination in a fair and impartial manner, thereby eliminating

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[50] See Weiman v. Updegraff, 344 U.S. 183 (1952) in which the State of Oklahoma's discharge of teachers who did not subscribe to a loyalty oath was held as "irbitrary." "To draw . . . the facile generalization that there is no constitutionally protected right to public employment . . . is to obscure the issue . . . We need not pause to consider whether an abstract right to public employment exists." *Id.* at 191-192.

[51] See Note, 72 Yale L. Jr. 368 (1963); *cf.*, Lint v. Bennett, 251 Iowa 1193, 104 N.W. 2d 564 (1960) in which the court indicates that perhaps some relief might be afforded a prisoner who has had his suspended sentence revoked without a hearing, if the prisoner can establish that the court acted arbitralily.

[52] 295 U.S. 490 (1935).

[53] *Id.* at 494.

[54] Brill v. State, 159 Fla. 682, 32 So. 2d 607 (1947).

any need for notice or a subsequent hearing. And if the proceedings themselves are fair and impartial, doesn't this avoid the charge that the action was arbitrary and capricious?

A: Your Honor, the deprivation of a man's liberty is not the type of thing that we should leave to chance. The margin of error, in any proceeding wherein a man might be deprived of his liberty, should be reduced if possible to the most infinitesimal degree. This can only be accomplished by affording the individual notice, a chance to prepare his defense, and a hearing in which he is afforded the opportunity to present any evidence which he has to contradict the charges against him.[55]

J: Then you feel that to deprive a probationer of his liberty without notice and hearing would be to violate one of the fundamental concepts of our system of jurisprudence, and also a violation of that concept of fair play which the Constitution and the courts have entitled "due process?"

A: Yes, Your Honor, that is my position.

J: Though it is my feeling that you may be correct in this contention I would ask you if the probationer's interest in his freedom is sufficient to overcome these two objections. First, that your position disregards one of the most important considerations, that of the public safety and the public's right to be protected from further harm;[56] and secondly, the contention that such proceedings would be an extreme burden upon our already incumbered court dockets.[57]

A: I would first like to consider your allegation concerning the burden on the courts if and when we afford to each probationer the right to notice and hearing. In order to understand my argument in opposition to this contention it is first necessary to look at the reason for allowing convicted criminals their liberty to function in society.

J: You are referring of course, to the modern concept and theory underlying the entire system of probation and of rehabilitation.[58]

A: Yes, I am. Each year about 200,000 convicts enter penal institutions.[59] Each year the financial burden of the state and federal governments rise immensely for it costs the state up to three thousand dollars to maintain each individual in our penal institutions.[60] It, therefore, becomes necessary that the state and federal governments seek some feasible way to release as many men from thes institutions as is possibl each year; and that this system be commensurate with the interest of the public safety.

J. In other words what you are saying is that the court in the first instance felt that at the time of sentencing a term in the penitentiary would not aid the individual involved to render himself once again a fit subject to be at liberty in society.

A: And also that the court in the first instance exercised its discretion

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55 DAVIS, ADMINISTRATIVE LAW § 7.14 (1962); Note, 57 N.W. U.L. Rev. 737 (1963).
56 See 4 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 27-44 (1939).
57 See, e.g., In Re Varner, 116 Ohio St. 340, 142 N.E. 2d 846 (1957); cf., State ex rel McQueen v. Horton, 31 Ala. App. 71, 14 So. 2d 557 (1943).
58 Note, 72 Yale L. Jr. 368 (1963); NATIONAL CONFERENCE ON PAROLE, PAROLE IN PRINCIPLE AND PRACTICE 51-58 (1957).
59 NATIONAL CONFERENCE ON PAROLE, *supra* note 58, at p. 30.
60 *Supra* note 58.

subsequent to a trial, and probably after a hearing and pre-sentence investigation to determine the man's past record.[61] Therefore how can the court now impune its own descretion without first hearing all of the facts both from the complainant and the probationer. And though this would be somewhat of a burden on the court, it could be handled in such a manner that the court could control the time element. I contend that it could be both short in point of time, yet thorough with regards to presentation of evidence on both sides of the question of violation of conditions of probation.

J: I understand the reason and necessity that underlies the modern concept of penal rehabilitation; but no matter how much we may wish to rehabilitate convicted criminals both from a humanitarian or from a materialistic view point, this does not solve the problem of the safety of society from men who have shown themselves to have criminal propensities.

A: Your Honor, when a criminal is put on probation, whether it be by means of a parole or suspended sentence, the granting authority is basing its decision to release the individual on a thorough investigation of his background, his past criminal record, and hopefully some type of psychological examination.[62]

J: This may be true, but it is still a calculated risk anytime one individual, or group of individuals makes an attempt to gage the future conduct of another human being. And this is exactly the case in the probation of a convicted criminal.

A: That may be the case, but you must remember that when a man is out on probation this does not mean that the revoking authority loses all control over him and his activities.[63]

J: The probationer is usually under the jurisdiction of a parole officer. But this does not mean that he will not have the opportunity to commit a criminal act.

A: No, it doesn't. But the law in this area provides for the speedly detention of the probationer when it is suspected that he has committed a criminal act or in any manner violated the terms of parole.[64]

J: The proper authority may, when put on notice that a probationer is once again exhibiting criminal tendancies, or committing acts which are violations of his conditional release, have him arrested and detained almost immediately.

A: And I would point out that this ability to immediately detain the probationer is a practice which is consummate with the interest of the public to be protected from further harm.[65]

J: This theory would seem to be in line with protection of the public safety.

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[61] The practice of presentence investigation is followed in the federal courts in almost every case. There is no consistent state practice. 27 FED. PROB. 1 (1963).

[62] See NATIONAL CONFERENCE ON PAROLE, PAROLE IN PRINCIPLE AND PRACTICE 41-70 (1957); SKLAR, LAW AND PRACTICE IN PROBATION AND PAROLE REVOCATION HEARINGS, 55 J. Crim. L. 175 (1964).

[63] IOWA CODE, § 247.22 (1962). See also, NATIONAL CONFERENCE ON PAROLE, *supra* note 62, for a description of the usual supervision and control.

[64] See, *e.g.*, UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION, IOWA CODE § 247.10 (1962); Lint v. Bennett, 251 Iowa 1193, 104 N.W. 2d 564 (1960).

[65] Note, 72 Yale L. Jr. 368, 370-372 (1963).

A: But because they can detain the probationer in this manner does not thereafter give the detaining authority, whether it be the court or the board of parole, the right to commit the probationer to the penitentiary without affording him time to prepare his defense with knowledge of the charges against him and a subsequent hearing to determine truth of those charges.

J: Your contention being that once detained the public is protected, and that then the court or other authority should turn to the protection of the probationer's rights, *i.e.*, his liberty, from any further arbitrary encroachment.

A: That is correct, Your Honor. Once detained, the probationer is entitled to the protection guaranteed to all men by the fourteenth amendment of the Constitution.

J: What type of notice and hearing would you feel would be consummate with a protection of these contitutionally protected rights?

A: First, Your Honor, I would ask you whether you feel that you could revoke the man's probation without any cause whatsoever?

J: No, I could not revoke without cause.[66]

A: Well you are going to revoke Mr. Felon's probation on the grounds that he has been staying out past the prescribed hour, and also that he is associating with some shady characters. Now, if these charges are not factually true, would you not be revoking this man's probation without cause?

J: Yes, I guess I would.

A: Then I suggest that the probationer should have a hearing that is designed to bring before the revoking authority, in this case the court, all of the facts which would substantiate the charges against the probationer, or on the other hand, show that he is free from any transgression which would render his conditional release subject to revocation.[67]

J: It being that the revocation can only issue if there is a firm factual foundation for the charges that the probationer has violated the conditions of his probation, you would require a hearing designed to establish such a factual foundation. Would such a hearing have to incorporate trial-type procedures?

A: Yes, but only to the extent that it would be necessary to elicit all of the facts. I would suggest that the probationer should be entitled to be represented by counsel,[68] and have the right of confrontation and cross-examination.[69]

J: But if we allow him these procedural safeguards, are we not going to

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[66] *Cf.*, Lint v. Bennett, *supra* note 64.

[67] Whether the right to a hearing ought to be governed by the sixth amendment, the fifth amendment, or the fourteenth amendment is a subject not here to be debated. The most exhaustive discussion of the constitutional theories involved is found in Hink, APPLICATION OF CONSTITUTIONAL STANDARDS OF PROTECTION TO PROBATION, 29 U. of Chi. L. Rev. 483 (1962). *See also*, Note, 65 Harv. L. Rev. 309 (1951); Note 59 Colum. L. Rev. 311 (1959); Note 57 N.W. UL Rev. 737 (1963).

[68] Glenn v. Reed, 289 F. 2d 462 (D.C. Cir. 1961) (failure to advise indigent of his right to counsel in revocation proceedings invalidates the proceedings resulting in the release of the prisoner).

[69] Note, 57 N.W. U.L. Rev. 737 (1963).

impede the process to such an extent that it will become overly time consuming?

A: I do not think so. With relation to the probationer's representation by counsel, the court *Fleming v. Tate*[70] said:

> The presence of counsel does not mean that he may take over the control of the proceeding . . .[71]

The court went on to suggest that the receipt of testimony would not have to be any more extensive than is necessary to insure that the revoking authority was sufficiently informed of all the facts from the probationer's standpoint and from the state or federal government's standpoint.

J: But in line with that decision would it not be possible for the revoking authority to both inform the probationer of the nature of the proceeding, and also to elicit all the necessary facts without the aid and assistance of counsel?

A: This may be true, only I would suggest to you that a trained attorney would be able to aid the court or revoking authority by characterizing the nature of the testimony, and presenting the probationer's side of the story in a more satisfactory and succinct manner.[72]

J: You would suggest then that the probationer would be entitled to present testimony on his behalf.

A: Yes, for how else can the court become informed of all the facts necessary to determine whether or not the probationer has exhibited continued criminal tendancies as to negate the rehabilitative nature of his initial release.

J: The presence of counsel and the right of controntation would seem to be necessary safeguards to guarantee that the probationer was not deprived of his freedom without factually founded cause.

A: And such safeguards would be in line with affording the probationer due process of law in revocation hearings.

TIMOTHY J. WALKER (August 1965)

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[70] 156 F. 2d 848 (D.C. Cir. 1946).
[71] Id. at 849,850.
[72] See Glenn v. Reed, 289 F. 2d 462 (D.C. Cir. 1961) noted in 75 Harv. L. Rev. 1230 (1962).