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1973 ILLINOIS DUE PROCESS IN PROCEEDINGS TO REVOKE PROBATION: THE NEED FOR EXPANSION OF RIGHTS

This note provides a brief discussion of the nature of probation in Illinois, comments on the contrast between pre- and post-conviction due process, an analysis of the arguments favoring and opposing the expansion of procedural due process in proceedings to revoke probation, and a survey of settled and unsettled Illinois law controlling the various stages of the revocation proceeding. Included also, are suggestions that various procedural protections be expanded. Not included, are questions of whether to grant probation originally or of matters peculiar to revocation of parole.

WHAT IS PROBATION?

The device of probation is one of many correctional treatment techniques. It is a post-conviction sentence of conditional and revocable release of the offender for a term of years under the supervision of a probation officer. If the offender violates the conditions of his probation, his conditional liberty may be revoked and he may be sentenced to whatever indeterminate confinement was prescribed by statute for his original offense. Probation must be distinguished from parole which is the conditional release of an offender who is already serving time in an institution. The parolee is under the supervision of a state administrative paroling authority. If his parole is revoked he is returned to confinement to serve the remainder of his original sentence or until subsequently paroled. Both parole and probation are

a. See text accompanying notes 1 through 25 infra.
b. See text following note 25 infra.
c. See text accompanying notes 45 through 59, and 89 through 98 infra.
d. See text following note 101 infra.
2. Id. at § 1005-6-4(e).
3. Id. at § 1005-1-16. See text accompanying note 78 infra, regarding the merits of the parole/probation distinction.
distinguishable from “conditional discharge,” a form of probation without supervision.  

The purpose of probation is to afford an unhardened person convicted of crime the opportunity to initiate and carry out his own rehabilitation under supervision without confinement. Probation affects many Americans. Slightly over one half of the offenders sentenced in 1965 were placed on probation. It is estimated that in 1975 over 1,800,000 convicted persons will be serving time in the United States. Of that number more than 1,070,000 (58%) will be on probation and only 770,000 (42%) will be on parole or in institutions. For the majority of offenders concerned, probation is a successful treatment. Success is defined in terms of not having one’s probation revoked. Success rates vary from 60% to 90%. Revocation or difficulties with the probationer occur generally during the first one or two years of supervision.

American probation began in Boston in 1841. By 1925, probation for juveniles was available in every state; for adults, complete coverage did not occur until 1956; but within the states, coverage continues to be spotty. Illinois enacted its first probation act in 1911. There are divergent views as to how probation originated. Some writers argue that it is derived from the practical extension of certain English common law practices. Others argue that it is America’s distinctive

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5. A sentence of conditional and revocable release without probationary supervision but under such conditions as may be imposed by the court. Corrections code, ILL. REV. STAT., ch. 38, § 1005-1-4. Conditional release is governed by the same statutory rules as revocation of probation. See Corrections code, ILL. REV. STAT. ch. 38, § 1005-6-4.


7. Includes adult and juvenile. All statistics are from The President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections, 27 (1967) [hereinafter cited as Task Force Report].

8. E.g., 75% in New York State and 72% in California. (old statistics) Task Force Report, supra note 7, at 28.


10. E.g., for juveniles, probation is available in every county in only 31 states. Task Force Report, supra note 7, at 27.


In England and in the United States of America, probation developed out of various methods for the conditional suspension of punishment. Generally speaking, the court practices in question were inaugurated, or adopted from previously existing practices, as attempts to avoid the mechanical application of the harsh and cruel precepts of a rigorous, repressive criminal law. Among these Anglo-American judicial expedients which have been mentioned as direct precursors of probation are the so-called benefit of clergy [ . . . a special plea of devious origin, by virtue of which certain cate-
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correction to progressive penology.\textsuperscript{18}

\section*{Advantages of Probation}

Probation has three basic advantages over incarceration as a correctional technique. The first was well presented by the President's Commission on Law Enforcement and Administration of Justice in 1967.\textsuperscript{14} Interaction of the probationer with his community and his dealing with problems in his social context furthers the "correctional strategy" which seems to hold the greatest promise: reintegration into the community. Probation avoids the isolation and labeling caused by incarceration or institutionalization. The Commission cites statistics to support "reintegration" as a correctional strategy.\textsuperscript{15}

The second advantage of probation is its relatively low cost. Per capita, probation costs one tenth of what it costs the state to keep a man in prison. In addition to the saved cash outlay otherwise required for institutional construction and maintenance and the revenue required for annual inmate support,\textsuperscript{18} the state avoids the expense of possible welfare payments to support the family of the incarcerated wage earner and takes in added revenue through income taxation.

\begin{enumerate}
\item The foremost utility of probation is that it avoids the contaminating influence of prison on the first offender who is very often young and impressionable. Almost all of the undesirable effects of incarceration which breed resentment and contempt are avoided as the probationer on good behavior is punished only to the extent that he has undergone embarrassment and the restrictions that accompany probation.
\item In 1965, prison construction cost $20,000 per bed and annually costs $3,613 per juvenile, $1,966 per adult felon and $1,046 per adult misdemeanant. Task Force Report, supra note 7, at 5, 28. Eight years of inflation may have doubled these figures by 1973.
\end{enumerate}
Other social benefits resulting from the productivity of the employed probationer should also be considered.

The third benefit of probation is its implementation of the legal doctrine of "differential treatment." Under the 1970 Illinois Constitution correctional treatment after conviction must represent a conclusion based on a full appraisal of the offender, his personal and social character, background, and the various types of programs which are best suited to those characteristics.17 Much has been written of the benefits of probation. The matter seems to have best been summarized by Sheldon Glueck in 1933:

rightly administered, it substitutes intelligence and humanity for ignorance and brutality in the treatment of offenders. These are values enough for any social institution, even though, judged by the incidence of success and failure in terms of subsequent criminality, probation may not today or ever give the absurdly high results frequently claimed.18

THE ILLINOIS PROBATION SYSTEM

The specific incidents of probation and the systems of administration vary greatly among the states.19 The Illinois system is regulated by a new four-part statute contained in the Unified Code of Corrections, effective January 1, 1973. Illinois Revised Statutes, Chapter 38, §§ 1005-6-1 through 1005-6-4 (1972).20 It differs from systems in other states in certain important respects.

Probation is now an actual sentence; it is not deferred sentencing or a suspended sentence.21 Supervision in Illinois is local. The circuit court maintains jurisdiction over the probationer throughout the probation term; he is not under the authority of the Department of

17. ILL. CONST. art. I, § 11 (1970): "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. . . ." See generally Corrections code, ILL. REV. STAT., ch. 38, § 1005-3-1 et. seq. (presentence procedure) and § 1005-4-1 et. seq. (sentencing procedure).
18. S. GLUECK, PROBATION AND CRIMINAL JUSTICE, 10 (1933).
21. Compare the Washington State system described in Mempa v. Rhay, 389 U.S. 128 (1967) and see text accompanying note 72 infra. In Illinois the court must impose a prison sentence unless the court is of the opinion that neither:

(1) the defendant's imprisonment is necessary for the protection of the public; nor
(2) the defendant is in need of correctional treatment most effectively provided by imprisonment; nor
(3) that probation would deprecate the "seriousness of the offender's conduct" or be inconsistent with the ends of justice. Corrections code, ILL. REV. STAT. ch. 38, § 1005-6-1.
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Corrections, a state administrative agency. Only two probation conditions are mandatory under the statute. He must not violate any criminal statute of any jurisdiction, and he must report and appear as directed by the court. All other conditions are discretionary as the court directs. The sentencing court must be the one to make any and all decisions to revoke, modify or extend the probation terms; no administrative determination is involved. Apparently anyone can report a violation of the conditions to the sentencing court. If revocation occurs, "street time" served on probation is credited against any subsequently imposed sentence arising out of the original conviction.

THE CONTRAST BETWEEN PRE-AND POST-CONVICTION DUE PROCESS

Although the new Unified Code of Corrections represents a complete revision of Illinois correctional law and administration, a conspicuous brevity of statutory language still exists dealing with procedural safeguards in matters of probation revocation. This brevity demonstrates that we are now only one step further along in the continuum of post-conviction legal lag. During the last 50 years, particularly the last ten, we have experienced a strengthening, some would say a revolutionary development, of the pre-conviction rights of the accused. But the following 1964 comments are ironically true today:

The critical observer of our culture is confronted with a strikingly different picture in our methods of dealing with convicted criminals. The old retributive penology was predicated on the view that the proven criminal was an "outlaw" without legal rights. Not only might he be subjected to the crudest penalties, but he lost his citizenship (if not his life), his identity of person and his property. Correctional treatment has been swayed by new and often conflicting ideologies of individualization, rehabilitation, social protection, and social reform. But the changes have occurred for the most part administratively, with little relation to conceptions of due process and the rule of law. We have sought abstract, loosely defined goals, with a minimum of direction or control by the law over the authorities charged with the treatment of the criminal.

22. Compare the administrative nature of the parole system set out at Corrections code, ILL. REV. STAT., ch. 38, §§ 1003-3-1 through 7, 1003-3-9 and 10, and §§ 1003-14-2 through 4. And compare the Wisconsin system described at 1966 WISC. L. REV. 430, 520 and 527.


24. The Corrections code, ILL. REV. STAT., ch. 38, § 1005-6-4(a) is silent on this point. An old ILL. REV. STAT., ch. 38, § 789.1 (1961) (repealed) provided that anyone could report a violation if verified by someone who knew the facts.

... [A]s we look to the legal rights of prisoners in the United States, we find—in vivid contrast to the substantive law of crimes and to the law of evidence and procedure—that there are broad penumbras of vague legal specifications and areas of deep shade where the law is wholly silent. Rights of citizenship and of person and property attaching to the criminal have not been clearly defined by constitution or statute. 26

Five years later Professor Sanford Kadish commented on the same problem:

Indeed, law enforcement people, restive under the heavy apparatus of restraints, often protest that the law has gone too far in weighing the scales in favor of the accused. But the mood abruptly changes once guilt is finally adjudicated and the pertinent questions turn on dispositions of the convicted defendant within the framework of the relatively modern, beneficent systems designed to allow for tailoring of punishment to the circumstances of the individual offender. The dominant theme then becomes the freedom of the official to exercise his discretion rather than the freedom of the individual from the exercise of unconfined power. 27

But the brutally contrasting attitude has not been confined to administrative officers. The courts have long denied convicted offenders rights comparable to those afforded to the accused. Professor Kadish cites a memorable statement by the Illinois Supreme Court in 1941:

[A]ny person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him... [A]fter a plea of guilty... instead of being clothed with a presumption of innocence they are naked criminals hoping for mercy but entitled only to justice. 28

In 1967, the President’s Commission reported the beginning of significant change. There were signs of a marked increase in judicial concern for fair procedure in the correctional process and in the volume and variety of issues being presented for decision. Attention was focusing upon revocation of conditional liberty such as probation, suspended sentences and parole. In 1967 a survey of reported decisions revealed about as many cases dealing with issues of revocation as with all other aspects of corrections. 29 A re-evaluation was taking place:

28. The drama of these words was occasioned by the court's subsequent affirmance of the defendant's sentence to death. People v. Riley, 376 Ill. 364, 368, 33 N.E.2d 872, 875 (1941), cert. denied, 313 U.S. 586 (1941).
are there any crucial differences between the criminal trial to determine guilt or innocence and the revocation proceedings to determine "the appropriate peno-correctional disposition of an offender whose guilt has already been determined." Many persons have argued the important similarities between the two types of proceedings. Others have sought to force us to re-evaluate the cultural and social basis for our sharply contrasting treatment of pre- as against post-conviction defendants.

The substance of this article is the legislative and judicial response to these questions, leading to the 1967 United States Supreme Court decision in Mempa v. Rhay, which granted a constitutional right to counsel in certain state probation revocation proceedings, and its 1972 decision in Morrissey v. Brewer, which extended and outlined constitutional due process in state parole revocation proceedings. The final section is an analysis of settled Illinois law controlling the various issues and stages of the probation revocation proceeding, with suggestions as to the merits of those issues not yet presented to the Illinois courts for decision.

WHY THE DICHOTOMY BETWEEN PRE-CONVICTION AND POST-CONVICTION PROCEDURE?

**Similarities Between the Revocation Hearing and a Criminal Trial**

It was not until 1967 in Mempa v. Rhay that the United States Supreme Court applied the concept of constitutionally based due process

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31. See text accompanying note 41 infra.
32. Morrissey v. Brewer, 443 F.2d 942, 953 (8th Cir. 1971) (Lay, J., dissenting), rev'd, 408 U.S. 471 (1972). The case is directly concerned with a parole revocation proceeding but Judge Lay's comments apply with greater force to probation:

The denial of due process in parole revocation simply mirrors society's overall attitude of degradation and defilement of a convicted felon. It is sad Twentieth Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually un-employable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime.

33. 389 U.S. 128 (1967). The Court reversed a denial of a writ of habeas corpus, holding that a probation revocation proceeding, where sentencing was deferred and now will be imposed, is a "critical stage."

34. 408 U.S. 471 (1972). The Court reversed and remanded for hearing a habeas corpus proceeding which was dismissed by the lower court following revocation of parole; it carries great significance for probation as well. See text accompanying note 78 infra for a comparison of probation and parole.
to the probation revocation proceeding.\textsuperscript{35} As we shall see, the basis for the significant turn-around was a realization that, in many respects, the proceeding resembles a criminal trial and, therefore, concerns the same policies which are manifested in the rules of modern criminal procedure. The prior rule centered in a statement by Justice Cardozo in the 1935 Supreme Court case of \textit{Escoe v. Zerbst}.\textsuperscript{36} He stated that, since probation comes as an act of grace to one duly convicted of crime, Congress is free to impose such conditions as it deems wise, including dispensing with notice and any sort of hearing when the act of grace is revoked. He concluded that neither due process nor the specific constitutional rights of the accused extend to a probation revocation proceeding.\textsuperscript{37} The impact of Cardozo's words was mitigated by the Court's grant of a writ of \textit{habeas corpus} to the probationer which had been denied by the lower court. The favorable holding was grounded not upon the Constitution, but rather in judicial construction of the federal probation statute requiring an “inquiry” as will “enable the accused probationer to explain away the accusation,” but not a “trial in any strict or formal sense.”\textsuperscript{38}

Most state courts took heed of Cardozo's words to consider probation an act of grace and revocation proceedings as not subject to the constitutional procedural guarantees applicable to criminal prosecutions.\textsuperscript{39} Very few states granted probationers even the basic rights to a hearing, to be represented by counsel or to confront their accusers. Some states, however, followed Cardozo’s lead to the letter by construing their own state statutes to require an informed inquiry, an opportunity for the offender to be heard and the right to counsel. Illinois was among the few to do so.\textsuperscript{40} The “grace” concept which eliminated constitutional due process has today been discredited by the Supreme Court;\textsuperscript{41} but ironically, our cultural attitudes lag behind.

Why do we consider the probation revocation proceeding different from a criminal trial? The revocation itself has several purposes.\textsuperscript{42} The first is an essential retribution for the violation of a state imposed

\begin{itemize}
  \item \textsuperscript{35} 389 U.S. 128 (1967).
  \item \textsuperscript{36} 295 U.S. 490 (1935). \textit{See also} United States ex rel. Harris v. Ragen, 177 F.2d 303 (7th Cir. 1949).
  \item \textsuperscript{37} 295 U.S. 490, 492 (1935).
  \item \textsuperscript{38} \textit{Id.} at 493.
  \item \textsuperscript{39} Discussed fully at Kadish, \textit{supra} note 27, at 816-19.
  \item \textsuperscript{40} In \textit{People v. Burrell}, 334 Ill. App. 253, 255, 79 N.E.2d 88, 89 (1st Dist. 1948) the court used a statutory provision requiring the probationer to be “brought before the court.”
  \item \textsuperscript{41} Specifically, \textit{see} Morrissey v. Brewer, 408 U.S. 471 (1972). Generally, \textit{see} text accompanying note 45, \textit{supra}.
  \item \textsuperscript{42} \textit{See} Note, \textit{Due Process and Revocation of Conditional Liberty}, 12 \textit{WAYNE L.}}
condition. If we don’t draw the line, the offender and others will rejoice in getting away with it. The second purpose is to protect society from criminals who have demonstrated that they are not yet ready for release from total custodial supervision. Hopefully as well, a probationer who is not succeeding with his reintegration will be once again stimulated by a new brush with the law into reconsidering his attitude and facing up to needed self-change. This final purpose is surely the essential yet least emphasized function which revocation can serve.

There are two distinct factual issues which arise in every revocation proceeding. The first is a factual question of whether a violation occurred. Once that is established, the court faces a question of discretionary judgment—should probation be revoked because of the facts established and what sentence is to be imposed? It is the first issue entirely and the second one partly which closely resemble a criminal prosecution. The American Bar Association Project on Standards for Criminal Justice sought to clarify the resemblance in 1970:

The probation revocation proceeding . . . involves exactly the same kind of problem as is involved in the criminal trial itself—the ascertainment of historical events about which there may be some dispute and the consideration of those events against a standard of conduct to which the probationer is expected to adhere. The inability of a lay probationer to adequately protect himself in such a context would seem just as pronounced as it is at the trial itself.43

Professor Kadish argued the same point in 1966. The central task of the proceeding is to determine whether the prisoner committed the acts alleged. “[M]easuring the acts proven against the standard to which he was obliged to conform is precisely the business of the criminal trial itself . . . .”44 A candid analysis of this similarity holds the most promise for the future expansion (or limitation) of probation revocation due process.

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44. Kadish, supra note 27, at 833. See also Kamisar and Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations, 48 Minn. L. Rev. 1, 98 (1963). The professors quote from interviews with various Minnesota state trial judges who disagreed almost evenly as to the desirability of providing counsel and due process protections in probation revocation proceedings. (Particularly at 100-01.)
COMMENTS ON THE OLD ARGUMENTS AGAINST THE APPLICATION OF DUE PROCESS TO POST-CONVICTION PROCEEDINGS

Traditional arguments denying both the right and the desirability of granting due process protection to revocation matters have been both legal and practical in nature. The legal arguments which have continually appeared in the decisions are (a) that probation is only a privilege and not a right, thereby not requiring the protection of due process; (b) that the probationer has entered into a contract and waived due process in the bargaining; (c) that the probationer is really in custody, legally no different from a prison inmate; and (d) that the defendant's constitutional rights are exhausted at his actual trial. All four arguments have been rejected by the courts.

The End of the Right/Privilege Distinction

The first response to the distinction between privilege and rights as objects for constitutional protection is to deny that the distinction exists:

[Probation is] not remotely charity, but an integral part of our system of criminal law . . . . and as such can hardly be viewed as being properly administered outside the framework of the legal order appropriate to other laws.45

The President's Commission argued in 1967 that parole and probation should not be considered any more a matter of grace than any sentence which is less than the statutory maximum authorized by the legislature.46

But even if probation should be called a mere privilege, what significance does the classification have? How does it advance the analysis of the issue of whether or not a particular procedural protection should apply to probation revocation?47 In various contexts during the 1960's the United States Supreme Court considered the right/privilege distinction, gradually recognizing its inherent worthlessness.48 Fi-

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45. Kadish, supra note 27, at 826-27. In People v. Price, 24 Ill. App. 2d 364, 377, 164 N.E.2d 528, 534 (2nd Dist. 1960), the court denied that Illinois courts have ever adopted the view that probation is a mere matter of grace.
46. Task Force Report, supra note 7, at 86.
47. Consider Bassett, supra note 42, at 491:
   The right/privilege distinction merely restates legal conclusions previously made . . . in its premises and adds no justification of its own. The theory gives no insight into either constitutional rights nor legislative intention. Such a theory certainly should not be dispositive of the issue whether the probationer shall have the opportunity to justify his continued conditional liberty.
nally in 1972 Chief Justice Burger definitively rejected the argument as it applies to the revocation context, concluding for the majority that it is "hardly useful any longer" to deal with the due process issue in terms of whether the particular conditional liberty is a right or a privilege. Constitutional rights no longer turn on that distinction. Rather, whether rights are due depends upon the extent to which the individual will be condemned, as a result of the proceeding, "to suffer grievous loss." Is the weight of the individual's interest substantial and is its nature "one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Once the answer is affirmative and due process is applied, the second issue is: just what process is due? Justice Burger reduced the determination to a balancing test, weighing the nature of the governmental function against the individual's interest.

*The merits of the Morrissey balancing decision* substantially favor the accused probationer. Briefly, Chief Justice Burger summarized the state's interests as being to punish and restrict persons convicted of crimes. As for parole revocation (the subject of the *Morrissey* decision) the state, he says, has an overwhelming interest in being able to *return* the individual to prison without the burden of a new adversary criminal trial. Is not this state interest less essential in our probation context where the offender never went to prison? Furthermore, the Chief Justice recognizes that the state has no interest in revoking parole without some procedural guarantees.

It is essential to point out, as did the majority in *Morrissey*, that the interests on the individual's side of the balance are likewise interests of the state because society has a stake in whatever may be the chance of restoring the individual to a normal and useful life within the law. Essentially, the probationer has an interest in not having his probation revoked because of erroneous information or evaluation of the need to revoke, given a proven breach of conditions. Treating him with basic fairness will enhance the chance of rehabilitation by avoiding negative reactions to arbitrariness. The conclusion and the significance of the

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53. *Id.* at 481-84 (Burger, C.J. majority) and at 499 (Douglas, J., dissenting in part):

The rule of law is important in the stability of society. Arbitrary actions
holding in \textit{Morrissey} is that both the interests of the state and the individual will be furthered by an effective but informal hearing. Just how informal that hearing should be is yet undecided. It is submitted that substantially more formality is desirable and it must be expanded issue by issue pursuant to a clearer overall policy plan.

\textbf{THE THEORIES OF CONTRACT, CONSTRUCTIVE CUSTODY AND EXHAUSTION OF RIGHTS AT TRIAL}

Many courts have denied a revocation hearing on the basis that probation is a contract relationship and that the offender bargained away his due process protections, including any right to a hearing. The argument was not discussed in the \textit{Morrissey} opinion. But in \textit{Hahn v. Burke}\textsuperscript{54} the Seventh Circuit disposed of it by holding that a probationer could not have waived his rights by agreement because he could not have done so knowingly and voluntarily at the time of the probation order and acceptance. Judge Lay, dissenting in the Eighth Circuit decision in \textit{Morrissey v. Brewer},\textsuperscript{55} dismissed the theory as unrealistic because of the inequality of bargaining power.

The \textit{constructive custody theory} was not treated by the Supreme Court in \textit{Morrissey}, but Judge Lay handled the argument in his Eighth Circuit \textit{Morrissey} dissent. He reasoned that even if the probationer were in actual custody, he continues to be protected by the due process and equal protection clauses which follow him through the prison gates.\textsuperscript{56}

The \textit{exhaustion of constitutional rights at trial theory} also was not treated by the Supreme Court in \textit{Morrissey}. The assertion that a defendant could “exhaust” his rights at the time of conviction goes to the very heart of the question of post-conviction due process. The soundest response has been the holding of the Fourth Circuit in \textit{Hewett v. State of North Carolina}\textsuperscript{57} that the revocation proceeding itself is a stage in the criminal proceedings.

\textsuperscript{54} 430 F.2d 100, 104 (7th Cir. 1970), cert. denied, 402 U.S. 933 (1971). Regarding waiver of rights in Illinois see text accompanying note 105 \textit{infra}.

\textsuperscript{55} 443 F.2d 942, 962 (8th Cir. 1971). See also \textit{Burns v. United States}, 287 U.S. 216 (1932).


\textsuperscript{57} 415 F.2d 1316, 1322 (4th Cir. 1969).
Practical and Social Policy Arguments Against Due Process

Beyond the legal sphere, a number of brief pragmatic points arise as a basis for denial of protection to the probationer. The foremost assertion is that an all-out grant of procedural safeguards or even of the most basic "core" rights will complicate and increase the burdens of administration on the courts. The feared result is that judges will be reluctant to place future offenders on probation at all. The assertion was discredited by Chief Justice Burger in Morrissey. Speaking again of the parole context (where the entirely administrative nature of the system would make parolees more susceptible to the danger than probationers are in the judicial process) Burger noted that "[s]erious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole."\(^{58}\)

Another assertion has been that requiring probation officers to appear at hundreds of probation hearings annually will tie them up and keep them from their supervision duties. But every state agency has a manpower problem. That is no excuse. The solution is to increase the staff, not to limit the rights of the defendants. Furthermore, when the revocation results from a subsequent criminal conviction the officer need not appear at all.\(^{59}\) Finally, the general statement is often heard that allowing such protections as the right to counsel will convert the hearing into a legal battle. But as discussed below, representation by counsel and the other safeguards are means to ensure that the court is accurately informed of the probationer's point of view before the court acts to revoke. These are measures of protection most often badly needed.

The Illinois Probationer's "Core" Rights

Out of the concept of "ordered liberty" which originated in Palko v. Connecticut\(^{60}\) there developed a consensus in later cases that certain "core" rights essentially form the foundation for our due process structure.\(^{61}\) Generally, these minimal protections in criminal cases amount to the right to some sort of hearing with evidence presented by the

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60. 302 U.S. 319 (1937).

state in open court, the right to confront and cross-examine witnesses and presumably representation by counsel. Authority for these core rights rests in three sources to which the Illinois probationer can resort: to a limited extent in the federal courts construing the United States Constitution, to a greater extent in the state courts construing the federal and state constitutions and to an increasing extent in the Illinois statutes.

Core Rights: Federal Authority

As noted above, the first application of constitutional law to probation revocation came in 1967 when the Supreme Court reversed and remanded the decision of the Washington State Supreme Court which denied Jerry Douglas Mempa's pro se petition for a writ of habeas corpus. Mempa pleaded guilty in 1959 to the offense of "joyriding," a felony. He was convicted and placed on two years probation. Imposition of the sentence under the Washington State system was deferred. Four months later Mempa's probation officer instituted revocation proceedings and testified "without cross examination that according to his information" Mempa had been involved in a burglary subsequent to his joyride conviction and had denied participating in it prior to the revocation hearing. "Without asking petitioner [Mempa] if he had anything to say or any evidence to supply, the court immediately entered an order revoking petitioner's probation," sentencing him to ten years in prison with recommended parole after one year.

In 1967 the Supreme Court held in Mempa v. Rhay that Mempa's constitutional rights were violated. Seventeen year old Mempa was accompanied to the revocation hearing by his stepfather. He was not represented by counsel and was not asked whether he wished to have counsel appointed for him. Nor was any inquiry made concerning the appointed counsel who represented him at his criminal trial. On the authority of Gideon v. Wainwright the Court held that the sixth amendment as applied through the fourteenth amendment due process clause requires that a felony defendant be afforded counsel in posttrial proceedings to revoke probation where deferred sentencing may be imposed. The basis of the holding is that this proceeding is a "stage of the criminal proceeding where substantial rights of the criminal accused may be affected" and that the aid of counsel is necessary

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63. Id. at 131. At the hearing, Mempa admitted being involved in the burglary.
64. 372 U.S. 335 (1963).
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"in marshalling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant. . . ."65

As might be expected, the limitations incorporated in the Mempa holding have been employed by the lower courts to limit the scope of the right to counsel. Two issues are significant. Does the right apply equally to misdemeanor defendants? Does it apply as well where sentencing was not deferred prior to probation? The first question is perhaps answered by the Supreme Court's own 1972 decision in Arger-singer v. Hamlin66 where the Court diminished the significance of the felony/misdemeanor and jury/non-jury distinctions with respect to limiting the right to counsel in criminal prosecutions. The Court held that no accused person may be "deprived of his liberty" by any criminal prosecution which denied him the assistance of counsel.67

Mempa's limitation to actual sentencing situations has been more significant. The majority of the courts have considered Mempa narrowly so as not to require counsel at probation revocation where sentencing was not deferred.68 Since Illinois probation is a sentence,69 this argument might otherwise have a limiting effect were it not for Illinois' long-founded acceptance of the right to counsel both by judicial construction and by statute.70 But the Supreme Court itself has not clarified the scope of the Mempa right to counsel. No comment on the issue was made when Mempa was held retroactive in 1968.71 The Fourth Circuit made it perfectly clear that the right to counsel applies to criminal proceedings and expressed "little doubt" in Hewett v. State of North Carolina72 that the revocation of probation is a stage of the criminal proceedings. "Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty."73 But the Seventh Circuit Court of Appeals does not agree. While holding in Gu-nosulus v. Gagnon74 that due process requires the assistance of counsel in a probation revocation hearing where sentence is imposed, as well as where its imposition is stayed, the court denied that Mempa held

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67. Id. at 37.
70. See text accompanying note 81 infra.
72. 415 F.2d 1316 (4th Cir. 1971).
73. Id. at 1322.
74. 454 F.2d 416, 421-22 (7th Cir. 1971).
every probation revocation proceeding or “the entire range of the correctional process after sentencing” to be part of the criminal proceeding. The United States Supreme Court has granted _certiorari_ and heard argument in _Gagnon v. Scarpelli_ to consider this and other issues.\(^7\)

But in the parole context, considered in _Morrissey v. Brewer_ in 1972, the court specifically did not consider whether there is a right to counsel. Chief Justice Burger for the majority decided and outlined the minimal requirements of due process,\(^6\) but did not reach the issue of counsel. What is the distinction between parole and probation? Do they differ substantially? For purposes of revocation, the essential contrast has been that probation is a judicially based system and parole is exclusively an administrative one. But today many states conduct and revoke probation in an entirely administrative setting. Moreover, the Seventh Circuit held in 1971 that, assuming the Wisconsin administrative department follows hearing procedures which otherwise meet due process standards:

> there is no reason to fault it because carried out by administrative personnel rather than by a judge, and we find no other constitutional provision which expressly or by implication requires that revocation of probation be accomplished within the judicial department.\(^7\)

Nevertheless, in the case quoted, the court found representation by counsel to be a basic requirement of due process. Does the parole/probation distinction stand? Or can we proceed to apply Chief Justice Burger’s _Morrissey_ minimal due process outline to the probation setting as well as to parole? Perhaps these questions will be answered by the Court in the 1973 term.

In the meantime, we should note that many authorities have rejected the distinction where revocation of conditional liberty is involved—they include the New York Court of Appeals and the Pennsylvania Supreme Court.\(^7\) The Appellate Court of Michigan has said so most articulately:


\(^7\) _Gunsolus v. Gagnon_, 454 F.2d 416, 420, argued and awaiting decision on appeal, 41 U.S.L.W. 3386 (1973) (companion case with _Scarpelli_).

We are mindful of the peculiar status of the paroled prisoner. Technically he occupies a different place than the probationer. Yet when the parolee and the probationer are accused of violations of their conditional status, the differences between them assume insignificant proportions.79

It is submitted that the Chief Justice, aware of the national increase in litigation concerning probation due process, may very well have intended that his relatively detailed outline for the informal parole hearing described in *Morrissey* be applied to probation as well as to parole. His comment that "not all situations calling for procedural safeguards call for the same kind of procedure" can be interpreted both ways in light of the conspicuous exception regarding the right to counsel in parole.80 By not reaching the issue of counsel in *Morrissey* Chief Justice Burger avoided an immediate conflict with *Mempa v. Rhay* which, as noted above, is yet being decided by the Court this term. That conflict would have stood in the way of applying the *Morrissey* standards on other procedural issues to the probation context.

**Core Rights: Illinois Judicial Authority**

The concept of due process in Illinois carries considerably more baggage than it does in the federal courts. The right to counsel in probation revocation has existed by statutory construction since *People v. Burrell* in 1948.81 The term due process first appeared in a court holding in *People v. Price* (1960),82 where the appellate court asserted the authority of the judiciary to control matters of due process:

While our Probation Act contains no such express requirement—notice to the defendant and opportunity to be heard—our courts have held that such rights are conferred.83

The significance of these words was realized in *People v. Coffman*,84 decided five months before *Mempa*. The Fourth District Appellate Court reversed a lower court's revocation of the probation of a seventeen year old defendant who pleaded guilty to the alleged violation. The court held that Kenneth Coffman's rights were violated when the trial court failed to apprise him of the procedural protections available to him, including the right to counsel. The court rejected the state's

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82. 24 Ill. App. 2d 364, 376, 164 N.E.2d 528, 533 (2nd Dist. 1960), although the concept is suggested in earlier cases cited therein.
83. Id. at 376.
contention that repeal of the old and passage of a new Criminal Code probation statute eliminated certain procedural safeguards which no longer appeared on the statute books. The court held that such an argument was foreclosed by the due process provisions of the state and United States Constitutions:

Due process may not be limited, delimited, circumscribed, modified or denied by legislative enactment.

Most recently, the 1972 Illinois Supreme Court decision in People v. Pier reiterated the probationer's rights in general yet firm terms:

The consequences of a determination that the probation order has been violated are so serious that the appellate courts have surrounded the defendant at a revocation hearing with many of the same due process safeguards that are accorded to a defendant at a trial to determine his guilt. . . . Since the result of a probation revocation may be a deprivation of liberty and, consequently, as serious as the original determination of guilt, we agree with the holdings of these cases that due process of law requires that a defendant charged with having violated his probation be entitled to a conscientious judicial determination of the charge according to accepted and well recognized procedural methods. . . . He is not, however, entitled to a jury trial.

Core Rights: Illinois Statutory Authority

The Illinois General Assembly responded by passing the 1972 Unified Code of Corrections only months after People v. Pier was decided. Chapter 38, § 1005-6-4 sets out procedural protections to be incorporated into the revocation proceedings. In summary, the statute provides that:

1) when a violation is charged by a petition filed, the court may order a summons for the offender to appear or, where danger of flight or harm exists, a warrant for his arrest. When issued, it tolls the sentence of probation until the charge is finally determined;

2) the court must conduct a hearing and may admit the offender to bail pending the hearing;

3) the evidence must be presented in open court with the right

85. Id. at 276. Newer statute: ILL. REV. STAT., ch. 38, § 117-1, 2, 3 (1965) (repealed), older statute: ILL. REV. STAT. ch. 38, § 789.1 (1963) (repealed). It required that the defendant be furnished with a copy of the charge, that a hearing date be set by the court allowing the probationer reasonable time to prepare his defense and granted the right to counsel coextensive with that in the original criminal prosecution.


of confrontation, cross-examination and representation by counsel;

4) if the court finds a violation, it may continue with or without modifying the probation conditions or may impose any sentence that was available at the time of the initial sentencing. If a prison sentence is imposed, the defendant is credited with time served on probation.

Official comments to the statute describe the changes and differences between the new Act and the repealed § 117-3 of Chapter 38 and declare that the source of the changes is the "evolving standards developed by the courts." 88

WHY MORE PROTECTIONS SHOULD BE AFFORDED POST-CONVICTIO N DEFENDANTS

Beyond the "core" of rights already discussed, it is submitted that the procedural safeguards granted the probationer and other post-conviction defendants should be substantially expanded. Persuasive legal and policy arguments favor such expansion. With respect to many of the specific procedural issues discussed below in the survey of Illinois probation law, there are many strong reasons why standard criminal trial rules—many of which are set out in the statutes—should apply as well to probation revocation proceedings. Furthermore, as discussed above, the old arguments which have until recently blocked the expansion no longer carry sufficient weight to deprive probationers of the rights of the accused.

The foundation upon which any expansion of probationers' procedural rights must rest is the essential principle that society itself is the winner whenever due process of law is adhered to by the state. Due process and the institutions of probation and pardons generally are gestures of enlightened government, not just favors made to undeserving, ungrateful felons. The position which the due process clause holds in our constitution reflects the level of our civilization. The constitution was written by men who understood the importance of the thoughts expressed by Jean Jacques Rousseau in 1762:

Again, every malefactor, by attacking social rights, becomes on forfeit a rebel and a traitor to his country; . . . he even makes war upon it. . . . [But] frequent punishments are always a sign of weakness or remissness on the part of the government. There is not a single ill-doer who could not be turned to some good. . . .

88. Corrections code, ILL. REV. STAT., ch. 38, § 1005-6-4 comments (West 1972) at 113.
In a well-governed State, there are few punishments . . . because criminals are rare; it is when a State is in decay that the multitude of crimes is a guarantee of impunity. [For example, u]nder the Roman Republic, neither the senate nor the consuls ever attempted to pardon; even the people never did so.  

A modern reflection of Rousseau's point is that "... the strength of a constitutional system lies in the protection it affords those who have trespassed." If the people think otherwise, is it not the duty of the government, especially the judiciary, to revitalize this principle?

Let us not forget that probation itself is a sentence of punishment. After a man has suffered the humiliation and cost of criminal conviction, with all its collateral consequences, now his activities are severely restricted. He must report to his probation officer, seek permission before planning his activities, and regularly expose every aspect of his personal life for the duration of his term. He is reminded daily of his conviction and his crime. But in being granted probation rather than prison, he acquired a favored status among offenders—he is deemed a proper subject for release under supervision.

Should he not be able to rely on the state's representation that so long as he substantially abides by the conditions of his release and measures up to his responsibilities he is entitled to retain his liberty? Surely he should. Chief Justice Burger would agree. He cited such reliance as "implicit in the system" of conditional release in his 1972 majority opinion in Morrissey. The purpose of probation is to rehabilitate as much as it is to punish. The revocation itself should be rehabilitative as well. Only fair, consistent and straightforward treatment of the offender will promote that goal. The probationer must understand the rules and be able to predict what the consequences of his actions will be. Only adequate standards of procedural protection can reasonably ensure predictability. Only uniform procedural safeguards can afford the probationer a chance to order his affairs, to plan his actions. Society has no interest in revoking probation without procedural protections and without a valid reason. At the very least, won't unfair treatment make any future rehabilitation more difficult?

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92. See Hink, supra note 90, at 485.
to the extent that it is understood by the probationer. Denial of due process by resort to unguided, uncontrolled judicial discretion prevents understanding. We must be "careful, not only to treat . . . [the probationer] fairly, but in such a manner that he will see the fairness of it."

As a practical matter, the state saved money by originally granting probation rather than sending the offender to prison. We should recognize this chance for continuing savings by keeping him out of jail. Likewise, the offender was spared the dehumanization and dangers of a prison term in what is very often a "college of crime." We should not forget that the social benefits of not sending the offender to prison will be lost when probation is revoked. Furthermore, besides its function as a protection against the chance that the supervising officer was overly hasty in concluding that the probationer should be imprisoned, a more complete revocation hearing itself can have specific correctional uses. Such uses will be implemented by expansion of procedural rights. If a revocation is ordered, a record of the hearing might help the correctional authorities get insights into the individual's mental or emotional make-up which may be useful in promoting his future rehabilitation before his next release. The clues may be revealed only in his detailed explanations or rationalizations to the court. Such explanations can rarely occur in an abbreviated hearing. Perhaps also, a detailed inquiry will help the probationer see how irrationally he acted in violating his probation—an important first step in rehabilitation.

Two constitutional principles also favor expansion of the limited rights now available in revocation proceedings. First, while a state is not constitutionally required to provide for probation as a part of its criminal process anymore than it is required to provide for appellate review, when the state nevertheless does provide probation and wishes to revoke it, due process and equal protection should be fully applicable. Furthermore, the revocation of a privilege raises different

   The charges may or may not be true. Words of explanation may be adequate to transform into trivia what looms large in the mind of the . . . [probation] officer. "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony. . . ."
96. See Sklar, supra note 91, at 197.
and more substantial issues than were involved in originally determining whether or not to grant the privilege.  

In summary, the reasons why more procedural safeguards should be afforded probationers facing revocation can be reduced to a few central points. First, due process and fair, predictable treatment are necessities in any modern government proceeding to maintain dignity in our social order. Second, the probationer has a right to rely on the representation that only valid, proven reasons will justify revocation; and this reliance deserves and demands protection. Orderly proceedings under a rule of law rather than unbridled discretion will guard against unjustified revocation and the waste which follows. Third, orderly proceedings can serve productive rehabilitative purposes themselves, whereas haphazard, nebulous treatment cannot.

In addition to understanding why procedural expansion is justified, it is important to note that the reasons against such expansion offered by critics of reform generally are lacking in merit when viewed as a whole and in a modern light. First, the revocation hearing is not a special hybrid proceeding justifying its own discretionary procedures. In a very real sense it closely resembles the criminal trial and, as discussed below, many of the criminal rules and techniques are both needed and compatible with it. Second, there is no merit to the distinction between pre- and post-conviction proceedings as a basis for the denial or even the substantial trimming of due process protections. If not in all post-conviction matters, certainly in probation revocation the distinction is a transparent one. It has traceable and understandable cultural roots, but now is the time for us to realize that cultural attitudes toward convicts must change. No longer does the distinction justify such a radical departure, in the case of probation revocation due process, from our most essential legal and social traditions of fair, orderly and dignified treatment of the individual accused of wrongdoing.

THE NEED FOR A FORMULA TO ANALYZE THE SPECIFIC ISSUES

Whereas the 1950's and 1960's saw a major upheaval in criminal conviction procedure, the 1970's will likely see a shift of official attention toward post-conviction issues. The developments in rights of the accused will be selectively extended into the post-conviction field. In Illinois the passage of the 1970 Constitution was one such step;  

98. See Bassett, supra note 42 at 490 citing bar licensing cases e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

99. See art. 1, § 11 quoted in note 17.
Due Process

sage of the Unified Code of Corrections is another. The code "follows
the mandate of the Illinois Constitution . . . . by seeking to account
for the dual goals of a responsible sanction for crime and a realistic
opportunity for rehabilitation of the criminal." Its three objectives
are to consolidate, update and expand existing law and structure, to
reduce recidivism, and to reduce expense in Illinois corrections.

These goals will be furthered by an effort on the part of the judi-
ciary to define yet more clearly a method for analysis of the real dic-
tates of due process. The assembly of rights of the accused generally
and of the probationer specifically, has been haphazard and informal.
Avoidance of a cohesive method has been perpetuated in the name of
peno-correctional expertise and parens patriae discretion. It is sub-
mitted that a more systematic pattern should be developed from exist-
ing and proposed law to give the lower courts, the bar, and most im-
portantly, the probationer a more firm conception of what is expected
and permitted.

The remaining portion of this article is a survey of Illinois proba-
tion revocation law. Many of the issues discussed have not yet been
presented to the Illinois courts for decision. Where Illinois law is not
settled, the following analysis is recommended: a consideration of the
nature and purpose of probation to see if it correlates with the gener-
ally intended application of the specific procedural protection (e.g., the
exclusionary rule) and its purposes (e.g., deterrence). One should
keep in mind the percentage of probation cases to which the protec-
tion would be applicable and the reasons for the recent gradual in-
crease in probationers' rights. There follows for convenience a list-
ing of the procedural issues to be discussed which have arisen or are
likely to arise in Illinois proceedings:

1. Limits on the decision to seek revocation.
2. Standards for the waiver of rights.
4. The preliminary hearing, generally.
   a. The determination of probable cause.
   b. Notice of the charges.
   c. The right to counsel and appointed counsel.
   d. The determination of sanity.
   e. The right to bail.

100. The code was drafted by the Council on the Diagnosis and Evaluation of
Criminal Defendants pursuant to its re-establishment by the General Assembly in
1969. For background see the forward to the West. Publ. ed. (1972) at vii-viii, 2.

5. The revocation hearing, generally.
   a. The right to a speedy trial.
   b. The right to a fair hearing.
   c. The right to a public hearing and to confront adverse witnesses.
   d. The right to a transcript and written decision.
   e. Evidentiary issues.
      1) The exclusionary rule.
      2) The burden of proof.
      3) Relevance.
      4) The need for a specific violation; attacks on the probation conditions.

6. The sentencing issue.

7. Appeal.

1. Limits on the Decision to Seek Revocation

   In Illinois there are no legal limits on the probation officer's decision to petition for probation revocation. The need for limits stems from the fact that, as between any two persons, friction may develop between the probationer and his supervising officer merely because of a clash of personalities. As an alternative to a legal limit, the new probation statute recognizes the probationer's right to request the court to modify his probation conditions.

   The American Bar Association Standards recommend that the probationer should have a remedy short of actual violation and the potential sanction of revocation arising out of a dispute over the meaning of a condition or the probation officer's authority to extend conditions. The remedy is in the nature of a cross check on the performance of the officer as well as of the probationer.

   Writing in 1966, the Chief Probation Officer for the United States District Court in Philadelphia argued that when revocation becomes

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102. Corrections code, ILL. REV. STAT., ch. 38, § 1005-6-4(f). The conditions may be modified only "after notice to the defendant and a hearing."
103. A.B.A. Standards, supra note 43, § 3.1(c) at 43. See § 5.1 at 57 for the recommendation that possible alternatives to revocation should be considered in every case:
   (i) a review of the conditions, followed by changes where necessary or desirable;
   (ii) a formal or informal conference with the probationer to emphasize the necessity of compliance with the conditions;
   (iii) a formal or informal warning that further violations could result in revocation.

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necessary, it should be done only as part of a plan to serve a constructive purpose, keeping in mind the interests of the probationer, his family and society. Little is gained where revocation is for the sake of punishment only.

Imprisonment should be imposed only as a last resort. . . . [But t]he argument that commitment for violation of probation serves as a deterrent is not without merit. . . . What has to be resolved . . . is the question: Does rigid compliance and swift justice make for better probation or a fuller appreciation of probation on the part of the public. 104

2. Standards for the Waiver of Rights

The rule in Illinois is settled that an adult probationer or one under eighteen years of age with advice of counsel may waive any of his rights if knowingly and voluntarily done. The Fourth District Appellate Court in People v. Coffman 105 held that the record must show either that the probationer knew of those rights or was advised of them and knowingly waived them. The court applied what is now Illinois Supreme Court Rule 403 106 to the probation context where a seventeen year old probationer was found to have confessed by admitting a violation without advice of counsel. The court reversed the revocation and applied the rule because

[h]is liberty and his freedom is as much at stake in the plea of guilty to a violation of probation as it was in his original plea to the criminal charge. 107

3. Standards for Arrest

Illinois has made no exception in the case of probationers to the protective standards for arrest which are enjoyed by the ordinary citizen. The matter is governed by the fourth amendment, by Article One, Section 6 of the Illinois Constitution and by Illinois statute. 108 But in

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A peace officer may arrest a person when: (a) He has a warrant commanding that such person be arrested; or (b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or (c) He has reasonable grounds to believe that the person is committing or has committed an offense.
Any person may arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed.
the case of parolees, where arrest initiates an administrative proceeding, the Illinois Supreme Court has permitted a warrant to issue without meeting constitutional standards for probable cause. The American Bar Association has counseled against relaxing the law of arrest; but an important distinction is cited in that probation arrests should be permitted for different kinds of conduct than could be a basis for arresting an ordinary citizen. The court-imposed probation conditions expand the “horizon of activity” for which arrest is permissible. But the expansion does not require any relaxation of legal protections against abuse:

It would seem both unnecessary and unwise to endanger the accomplishment of . . . [the goal of probation—to induce the offender to live a law-abiding life] by a relaxation of the standards which govern the informational base upon which an arrest is appropriate.

The warrant requirement with its probable cause standard and the warrantless arrest standard of “reasonable grounds” are, therefore, required as usual. The American Bar Association also recommends that probation officers not be armed with any stronger power to make formal arrests than is vested in the ordinary citizen. The officer can always petition for an arrest warrant. Existing role conflicts in the officer’s tasks as supervisor, counselor, and enforcer are complex enough without the added confusion which such additional powers would cause.

4. The Preliminary Inquiry, Generally

The Illinois probation statute contemplates a preliminary hearing by implication only. It specifically requires only one hearing in the revocation proceeding. The Illinois courts have not ruled on the matter of whether a preliminary hearing is required.


110. A.B.A. Standards, supra note 43, § 5.2 at 60.
111. Id. at 61.
114. Corrections code, Ill. Rev. Stat., ch. 38, § 1005-6-4 might be read as follows: (b) the court shall conduct a [revocation] hearing of the alleged violation. The court may admit the offender to bail [at the preliminary hearing] pending the [later revocation] hearing.
Chief Justice Burger suggested that due process requires a preliminary inquiry to be conducted at or reasonably near the place of the alleged violation or arrest. It is to be held as promptly as is convenient after arrest while information is fresh and sources are available. "Such inquiry should be seen in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable grounds to believe" that the arrested parolee has committed acts which would constitute a violation of conditions.\textsuperscript{116} If the \textit{Morrissey v. Brewer} standards apply to probation as well as parole, then a probable cause determination would be constitutionally required in Illinois. Such an interpretation would be in keeping with the spirit of the Illinois Supreme Court's language in \textit{People v. Pier}\textsuperscript{116} but has not been settled by the Illinois courts. The statute is silent on the issue as well.

\textit{4b. Notice of the Charges.} The Illinois standards for notice to the probationer were set out by the Fourth District Appellate Court in \textit{People v. Tempel}\textsuperscript{117} where the court affirmed revocation because of a subsequent burglary by the defendant. The notice must be in writing and sufficient to fully inform the probationer as to the nature of the conduct alleged to constitute the grounds for revocation but need not identify the alleged conduct with the same specificity as is required in a standard indictment or information.\textsuperscript{118} It must merely be sufficient to fully inform and permit the defendant and his counsel to prepare a defense. Chief Justice Burger suggested as well that the notice should state what violations have been alleged and indicate that the purpose of the hearing is to determine whether there is probable cause to believe he has committed the violation.\textsuperscript{119}

But a prominent probation officer has suggested that the violation report should recite more. It should present the facts surrounding the alleged violation, including a summary of the probationer's conduct while on probation and his general attitude and outlook. It should candidly indicate whether the violation is isolated or part of a general pattern.\textsuperscript{120}

\textit{4c. The Right to Counsel and Appointed Counsel.} Notwithstanding the controversy over the scope of the holding by the United States

\textsuperscript{116} 51 Ill. 2d 96, 100, 281 N.E.2d 289, 291 (1972).
\textsuperscript{118} \textit{See generally ILL. REV. STAT.}, ch. 38, §§ 111-3, 111-5, 111-6 (1971).
\textsuperscript{120} DiCerbo, \textit{supra} note 104, at 15.
Supreme Court in *Mempa v. Rhay*, 121 the right to counsel and appointed counsel if needed in probation revocation has been granted in Illinois since 1948.122 Representation by counsel is required by the new Illinois probation statute as well. In spite of common arguments to the contrary,123 Illinois has long understood the profound need for trained defense guidance in the revocation proceeding. Quite recently, the Seventh Circuit United States Court of Appeals most eloquently posed the issue:

Whether assistance of counsel at the revocation proceeding is essential to fundamental fairness turns on the function counsel may be expected to perform. Granting that the scope of the revocation hearing is limited and that the procedure need not be formal, the ability of counsel to direct, amplify, and promote the flow of information is nevertheless of real significance.

Violation of a condition of probation is prerequisite to revocation. Thus there is likely to be an issue of fact in the just determination of which counsel can afford help. Development of other information, bearing upon the exercise of discretion whether to revoke or merely to warn for proved misconduct, would usually be an important role for counsel.

Recognizing the potential issues of fact and the scope of facts in mitigation or otherwise influential in a favorable exercise of discretion, we think that in order for the hearing . . . to be meaningful, the assistance of counsel must be available . . . “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”124

The issue of ineffective assistance of counsel has been litigated in the probation revocation context as well. Most Illinois courts have considered the merits of the defendants’ allegations of the attorney’s in-

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121. See text accompanying notes 65-75 supra.
123. Summarized in ISRAEL AND LAFAVE, CRIMINAL PROCEDURE IN NUTSHELL, 365 (1971):
    . . . courts have argued that counsel serves a limited and sometimes disruptive function at probation revocation, and therefore appointment is not necessary in order to assure the proper function of the revocation hearing. The rehabilitative functioning of probation, they suggest, is dependent upon vesting strong disciplinary power in the probation authority, insuring inter alia, a speedy return to confinement following a breach of probation conditions; but the lawyer may force the probation proceeding into a more formal adversary mold that conflicts with this goal. They also contend that the issues posed in revocation proceedings, because of the broad nature of probation conditions, often are not limited to narrow factual determinations on which counsel is of greatest assistance, but may depend upon evaluation of the individual’s personal traits as exhibited, in part, by his conduct at the revocation proceeding itself.
competence, but the arguments have been entertained with the cus-

4d. Determination of Sanity; competence to take part in the revo-
cation hearing. Contrary to the rule in criminal trials, an Illinois court
need not impanel a jury to determine the probationer's competence to
participate in the revocation hearing.

4e. The Right to Bail. The Illinois probation statute does not
grant a right to bail. It grants discretion to the court to admit the
offender to bail pending the hearing. Chief Justice Burger did not in-
clude the right to bail in his outline of due process in Morrissey. How-
ever, Justice Douglas, dissenting in part, did not merely consider pre-
revocation bail essential, he argued that until final disposition of the
revocation proceeding, no detention or even arrest should be permit-
ted. The potential conflict between the discretionary Illinois bail
statute and the state and federal constitutional right to bail is yet
be litigated in the context of probation in the Illinois courts.

It is submitted that the need for bail is as pressing for probationers
as for any citizen. Pre-hearing detention can quickly result in loss of
employment, family chaos and disruption of the probationer's ties with
his community. It deprives him of the chance to offer valuable assist-
ance in preparing his defense and can severely prejudice the outcome
of the revocation hearing. Recent studies have shown that defend-
ants incarcerated before trial are more likely to be found guilty and
committed to prison than those released on bail before trial.

Dist. 1966), appeal dismissed, 37 Ill. 2d 267 (1967), affirmed the revocation saying:
[W]here the defendant is represented by counsel of his own choice, the
judgment of conviction will not be reversed merely because his counsel
failed to exercise the greatest of skill or for the reason that it might appear
in looking back over the trial that he made some tactical blunder. In order
to vitiate the trial, the whole of the representation must be of such low cal-
iber as to amount to no representation and reduce the trial to a farce.
See People v. Newberry, 1 Ill. App. 3d 251, 273 N.E.2d 205 (1971) (dicta) and
United States v. Lauchli, 427 F.2d 258, 260 (7th Cir. 1970), cert. denied 400 U.S.
868 (1970) (argument rejected as "unfair and ridiculous.")


127. Corrections code, ch. 38, § 1005-6-4(b). Compare ILL. REV. STAT., ch. 38,

part):
The parolee is entitled to the freedom granted a parolee until the results of
the hearing are known and the parole board or other authorized State
agency—acts.

129. ILL. REV. STAT., ch. 38, § 110 (1971).

130. See LaFave, Alternatives to the Present Bail System, 65 U. OF ILL. L. FORUM
8, 10-12 (1965).

131. See Preventive Detention: An Empirical Analysis, 6 HARV. CIV. RTS.—CIV.
LIB. L. REV. 291, 347 (1971). Obviously, such a conclusion requires cautious

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there any reason why the same will not be true with respect to proba-
tion revocation? The court has every opportunity to summon the pro-
bationer and compel his appearance if he fails to show. Full rights to
bail under the Illinois statute should be afforded probationers accused
of violation.

4f. Protection from Forced Self-incrimination; Pleas of Guilty; In-
custody Interrogation. Older federal cases denied fifth amendment
protection to federal probationers. Chief Justice Burger did not in-
clude self-incrimination protection in his outline in Morrissey. But the
Seventh Circuit indicated in 1970 that such protection may apply to
probation. Moreover, to the extent self-incrimination is at issue
in the plea of guilty, the protection clearly applies to probationers in
Illinois. In the 1972 case of People v. Bryan, the Fourth District
Appellate Court reversed a probation revocation where the defen-
ant's counsel “admitted” violation of probation and the trial court ac-
cepted the “guilty plea” without admonishing the defendant. Judge
Craven, speaking for the court, reversed and remanded for a rehearing,
quoting the words of the Illinois Supreme Court in People v. Pier that
probationers are “entitled to the protection of the same due process re-
quirements which pertain to pleas of guilty. . . .” Such language
would imply that Supreme Court Rule 402’s progressive listing of ad-
monishment procedures would apply to probation proceedings per se.
Judge Craven noted the appellate court's previous statement that ap-
plication of the entire Rule 402 to probation would be “much pre-
ferred.” But the Second District Appellate Court specifically held
in the 1972 decision in People v. Evans that Rule 402 does not apply
in probation revocation hearings.

Even if Rule 402 itself does not apply to revocation proceedings,
parts of the rule and its spirit may nevertheless be required in the pro-
bation context. One provision, for example, is its significant recogni-

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132. Discussed in Comment, The Rights of the Probationer: A Legal Limbo, 28
133. United States v. Lauchli, 427 F.2d 258 (7th Cir. 1970), cert. denied, 400
U.S. 868 (1970). Although holding no self-incriminating evidence was in fact
introduced, the court, by implication, indicated the fifth amendment may apply in this
context.
134. 5 Ill. App. 3d 1006, 284 N.E.2d 706 (1972).
135. Id. at 707 quoting from 51 Ill. 2d 96, 100, 281 N.E.2d 289 (1972).
1971).
tation of the device of plea bargaining and certain basic safeguards which due process would seem to require in connection therewith. The Illinois Supreme Court recognized the plea bargaining phenomenon as it applies to probation revocation in the 1972 case of People v. Pier.\(^{138}\)

Moreover, the court granted relief to the defendant who alleged that he was a victim of the state's breach of a plea bargain. On the facts stated in defense counsel's affidavit, the court granted a local circuit court post-conviction hearing to consider the allegation further.

A related issue is when the right to be free from forced self-incrimination and when the right to counsel attach in the revocation process. The general rule set forth in *Miranda v. Arizona*\(^ {139}\) that these rights attach as soon as the defendant is interrogated in "custody" has apparently not yet been applied by the Illinois courts to the probation process. There are compelling reasons why *Miranda* should apply at some point in the probation revocation proceeding.\(^ {140}\)

4g. Pre-hearing Discovery. The newly adopted rules of criminal discovery\(^ {141}\) manifest the Illinois Supreme Court's acceptance of complete and candid discovery as an essential component in the criminal justice process. Chief Justice Burger recognized the importance of discovery: in *Morrissey* he ordered that on request of the defendant "persons who have given adverse information on which parole revocation is to be based are to be made available in question in his presence" as part of the preliminary proceedings prior to the revocation hearing.\(^ {142}\) He also listed "disclosure to the parolee of evidence

\(^{138}\) 51 Ill. 2d 96, 281 N.E.2d 289 (1972).

\(^{139}\) 384 U.S. 436 (1966).

\(^{140}\) The issue was recently "not reached" by the Texas Court of Criminal Appeals in Campbell v. State, 456 S.W.2d 918 (Tex. Cr. App. 1970), commented upon in Comment, *Rights of Probationers*, 23 BAYLOR L. REV. 431, 444 (1971): There are both advantages and disadvantages to applying the rights of *Miranda* in the probation procedure—weighing the rights of the individual and the rights of the public. Whether the *Miranda* warning should be applied is of special importance in view of the possible consequences.

[If we required] the warning to be given at the usual interview in more than rare or abusive situations—the probation system would become much less effective. . . .

However, the probationer cannot be left to the mercy of questioning officers in all situations. . . . *Miranda* must be applicable at some point. . . .

A very fair and reasonable answer to both society and to the probationer as well is to apply *Miranda* at the time of actual arrest or other significant deprivation of liberty—as determined by the objective intent of the officer. . . . [P]robation procedure generally would be unchanged by such an application, and the effect . . . would be to guard the probationer against abuse of authority by the probation officer. This means that he cannot actually physically restrain the individual and thereby use inherently compelling pressures to coerce a confession. Here, the rights of the probationer, faced with concrete adversity, finally overcome the needs of society. (emphasis and brackets added).

\(^{141}\) ILL. REV. STAT., ch. 110A, §§ 412, 413, 415 and comments (1972).

against him” as a minimum requirement of due process.\textsuperscript{143} Whether the liberal Illinois discovery policy will reach the revocation proceeding has yet to be determined by the Illinois courts; but in view of the comments by the United States Supreme Court, the outlook for liberal discovery is favorable. There is no reason to believe that the Illinois courts will not permit pre-hearing discovery in the revocation proceeding. Old polarized views of the discovery device as a fishing expedition and contrary to the sporting theory of adversary justice are fading in light of the modern systems approach to criminal justice administration. The need for liberal discovery to promote frequent guilty pleas has obvious implications for the fundamental problem of congestion in the courts. In 1969 former Attorney General John Mitchell quite persuasively affirmed the need for broader criminal discovery.\textsuperscript{144} In 1970 the American Bar Association recommended “more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States.”\textsuperscript{145} Further authority for the expansion of discovery follows from the statutory recognition of probation as an actual sentence already discussed. A new provision of the Code of Corrections requires disclosure of the presentence report to the defendant prior to the sentencing hearing.\textsuperscript{146} Since probation is a sentence, the pre-revocation report filed by the probation officer is arguably a form of pre-sentence report and therefore disclosure of it to the defendant is required by the new statute as well.

4h. Double Jeopardy. Double jeopardy arguments in the probation revocation context have not found favor with the Illinois courts. Three important questions have arisen but all were decided in favor of the state. The most significant decision, \textit{People v. Kuduk},\textsuperscript{147} held that consideration of the defendant's conduct as a violation of probation after acquittal of criminal charges relating to such conduct is not a violation of the probationer's rights against double jeopardy because of the lesser burden of proof required in revocation hearings. A related rule set out in \textit{People v. Price}\textsuperscript{148} is that where probation is con-

\textsuperscript{143} Id. at 489. In 1965, access to the pre-revocation report was available to the probationer in only one third of the states. \textit{Task Force Report, supra} note 7, at 87.

\textsuperscript{144} See T. MacCarthy, \textit{Pre-Trial Discovery in Federal Courts,} 3b 5-6 (in Illinois Institute for Continuing Legal Education, \textit{ILLINOIS CRIMINAL PRACTICE} (1971)).


\textsuperscript{146} Corrections code, ILL. REV. STAT., ch. 38, § 1005-3-4 (1972).


\textsuperscript{148} 24 Ill. App. 2d 364, 164 N.E.2d 528 (1960).
ditional upon defendant's not violating the laws, revocation of probation need not await termination of any criminal case growing out of the same criminal conduct. The American Bar Association has criticized both of these rules.\textsuperscript{149}

Delicate and serious problems arise because the relative informality, the relaxed evidence rules, lack of jury and lesser burden of proof as compared with a criminal trial can lead to abuse where revocation precedes disposition of the criminal charge. Furthermore, revocation after criminal acquittal should not be permitted where the conduct in question involved no "incidental violation of the conditions of probation." Imposition of a more severe sentence following probation revocation has also caused difficulty.\textsuperscript{150}

5. The Revocation Hearing, Generally

In \textit{Morrissey}, Chief Justice Burger required a hearing, if desired by the defendant, prior to the final determination on revocation. The purpose is more than to determine probable cause:

it must lead to a final evaluation of any contested relevant facts as determined warrant revocation. [The probationer] . . . must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or if he did, that circumstances in mitigation suggest the violation does not warrant revocation. . . . We emphasize there is no thought to equate this revocation to a criminal prosecution in any sense; it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.\textsuperscript{151}

5a. The Right to a Speedy Trial. In 1958 the First District Appellate Court of Illinois held in \textit{People v. Kostaken}\textsuperscript{152} that a seventeen month lapse of time between the issuance of the warrant for violation and the actual revocation hearing did not deprive the probationer of his constitutional rights. But some time after 1958 the United States Supreme Court applied the sixth amendment right to a speedy trial even to prison inmates.\textsuperscript{153} Were the issue to arise again in Illinois, a change in the \textit{Kostaken} rule might, therefore, occur. The Supreme Court of Texas in 1971 issued a conditional writ of mandamus at the

\textsuperscript{149} A.B.A. Standards, \textit{supra} note 43, \S 5.3 at 63.
\textsuperscript{150} See \textit{Comment}, 11 U. Chi. L. Rev. 286 (1944); \textit{Manley v. United States}, 432 F.2d 1241, 1245 (2d Cir. 1970); \textit{Roberts v. United States}, 320 U.S. 264 (1943).
\textsuperscript{152} 16 Ill. App. 2d 395, 148 N.E.2d 615 (1st Dist. 1958).
request of a Virginia probationer to compel a Texas trial judge to hold a hearing on a pending revocation application. One year's delay occurred between the filing of that application by the state and the defendant's filing of his petition for mandamus. The court held that the right to a speedy trial secured by the federal [and state] constitutions, guarantees a probationer the swift disposition of a proceeding to revoke probation.\textsuperscript{154} Three difficulties generally arise with unusual delay. The defendant is prejudiced by the weakening of his capacity to defend against the pending charge, intense anxiety is created by the threat of prosecution and the possibility of any concurrent sentencing is eliminated.

Chief Justice Burger recognized these problems and dealt with them in \textit{Morrissey} with respect to both the preliminary inquiry and the revocation hearing proper. He commented that although there is typically a substantial time lag between the arrest and the eventual determination by the parole board whether revocation is in order, an inquiry "in the nature of a 'preliminary hearing'" should be held "as promptly as convenient after arrest while information is fresh and sources are available."\textsuperscript{155} The revocation hearing itself, he says, must be tendered within a reasonable time after the defendant is taken into custody. "A lapse of 2 months, as the State suggests occurs in some cases, would not appear to be unreasonable."\textsuperscript{156} Note, however, that quite recently the Fourth District Appellate Court held the Illinois 120-day Rule inapplicable to probation revocation proceedings.\textsuperscript{157}

5b. The Right to a Fair Hearing. Fairness is a substantive matter, not merely the conclusion of a list of procedural rules. The Illinois courts have long recognized the dangers of abuse where discretionary judgment is concerned. General statements are common in the cases to the effect that a defendant is entitled to "a conscientious judicial determination" of the merits alleged.\textsuperscript{158} In \textit{Morrissey} Chief Justice Burger added the valuable comment that the function of a fairness standard is to assure that the finding of a violation will be

based on verified facts and that the exercise of discretion will be informed by accurate knowledge of the . . . [probationer's] behavior.\textsuperscript{159}

\begin{thebibliography}{99}
\bibitem{154} Fariss v. Tipps, 463 S.W.2d 176 (Tex. 1971); \textit{See Note}, 49 Tex. L. Rev. 917 (1971).
\bibitem{156} \textit{Id.} at 488.
\bibitem{158} \textit{E.g.}, People v. Whitfield, 131 Ill. App. 2d 991, 268 N.E.2d 169 (1971).
\bibitem{159} \textit{Morrissey} v. Brewer, 408 U.S. 471, 484 (1972).
\end{thebibliography}
A problem of fairness arose in the 1972 case of United States v. Panzea. The probationer was serving two years under supervision and was ordered by the court to report for induction on a certain day in November, all as a result of conviction for submitting a false statement to his local draft board. He did report but was rejected by the induction officer because of the prior conviction. The government moved to revoke his probation on the grounds that he violated his probation conditions. The defendant was not present at the initial hearing. His attorney argued on his behalf that he had reported for induction as required. The government argued that the real condition was to enter the military. District Judge Hoffman revoked the probation, ordered a warrant for arrest and told the attorney to bring the defendant into court two days hence when the court would "hear you fully."

But at the subsequent hearing the trial judge refused to hear arguments as to the revocation issue. He limited the hearing to the matter of sentencing, listening to the defendant say in his own behalf that he had fulfilled the conditions. Sentence was pronounced at three years in prison; but the Seventh Circuit vacated and remanded the sentence, holding it a violation of due process to revoke in the probationer's absence. The court rejected the government's arguments and held that revocation really occurred at the initial hearing, not the second one. Although the appellate court did not describe it as a "fairness" issue, the opinion implies that basic decency was at stake. Due process carries with it a substantive component of reasonableness.

5c. The Right to a Public Hearing and to Confront Adverse Witnesses. The right to confrontation has been delicately limited in probation revocation proceedings. In People v. Nordstrom the Second District Appellate Court held that failure by the state to call an informer who accompanied a state agent to the site of an alleged narcotics sale and who was a competent witness with material testimony, did not amount to a denial of due process. Apparently the state agent's testimony in Nordstrom did not require corroboration. In Morrissey v. Brewer the precise limit was clarified. While ordering that, on request, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in

161. 463 F.2d at 1217.
162. 73 Ill. App. 2d 168, 219 N.E.2d 15 (1966), appeal dismissed, 37 Ill. 2d 270 (1967), citing and describing cases.
the defendant's presence, the Chief Justice limited the right of confrontation:

[If the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.]

It is not clear why the fear-of-reprisals argument carries any more weight in the probation revocation hearing than it does at the criminal trial. The need to protect witnesses does not prevent compelled appearance in a criminal prosecution. At least one writer has suggested that the danger of misinformation stemming from secrecy is much more severe than the danger of reprisals. No public policy is served by anonymous informers.

5d. The Right to a Transcript and Written Decision. The need for a record of the revocation proceeding is as great as it is in any other open court matter. It can serve a number of purposes. The facts revealed by a record are necessary for appellate review of either the merits or the procedure and, quite valuably, can cut short subsequent collateral inquiry or attack. Moreover, the incidental background information revealed by the probationer's words and responses could be valuable if forwarded to correctional authorities in the event of confinement after revocation.

Findings of fact by the court are a more delicate matter. They burden the trial judge but serve the same purposes as the transcript. Chief Justice Burger detailed the hearing officer's duty in *Morrissey* respecting both the preliminary inquiry and the final parole revocation hearing. The officer, he said, has a duty of making a summary or digest of what happens at the preliminary inquiry. It should be

in terms of responses of the parolee and the substance of the documents or evidence given in support of the parole revocation and the substance of the parolee's position. . . . "The decision-maker should state the reasons for his determination and indicate the evidence he relied on . . ." but it should be remembered that this is not a final determination calling for "formal findings of facts and conclusions of law."

Finally, after the revocation hearing itself, the defendant is entitled to

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164. *See Sklar, supra* note 91, at 195. *See generally Dutton v. Evans*, 400 U.S. 74 (1970), and *California v. Green*, 399 U.S. 149 (1970), for the proposition that the thrust of the confrontation clause is to improve the accuracy of the truth determining process by assuring that the court or jury has a firm basis for evaluating the truth of testimony.

165. A.B.A. Standards, *supra* note 43, § 5.4(c) at 70.

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a "written statement by the factfinders as to the evidence relied on and reasons for revoking parole." If these basic standards are applied to probation revocation proceedings, negative reactions to arbitrariness can be avoided and the risk of error can be reduced without the burdens and delay of formalism.

5e. Evidentiary Issues. The new Unified Code of Corrections continues to permit the sentencing court to hear a broad range of evidence in the aggravation/mitigation hearing. The statute requires the court to:

(1) consider the evidence, if any, received upon the trial;
(2) consider any presentence reports;
(3) consider [any] evidence and information offered by the parties in aggravation and mitigation;
(4) hear arguments as to sentencing alternatives; and
(5) afford the defendant the opportunity to make a statement in his own behalf.

It is submitted that the open rules of evidence are not appropriate with regard to the first factual issue at the probation revocation hearing: was there, in fact, a violation? Although probation is defined as a sentence, the revocation hearing differs substantially from an ordinary sentencing proceeding. Its resemblance to a determination of guilt requires some—although far from all—of the protective devices normally available to the accused. Once the facts are determined and a violation is either proved or disproved, the open rules of evidence required by statute will be reasonable and appropriate to decide whether probation should be revoked, modified or continued.

(1) The exclusionary rule. It is quite clear that the constitutional protection from unreasonable search and seizure applies to probationers. The probation officer's right of visitation probably does not include the right to search the probationer's residence without a search warrant. In 1950 the Fourth Circuit United States Court of Appeals said:

The fourth amendment protects all persons suspected or known to be offenders as well as the innocent, and it unquestionably ex-

167. Id. at 489.
168. Corrections code, ILL. REV. STAT., ch. 38, § 1005-4-1(a). The hearing is now mandatory regardless of the defendant's wishes. Compare ILL. REV. STAT., ch. 38, § 1-7(g) (repealed):
the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender.

tends not only to the persons but also to the houses of the peo-

But whether the exclusionary rule—considered by some as a means to
enforce the fourth amendment against trespassing state officers—ap-
plies to the proceeding is doubtful. For a number of reasons the rule
has been held not to apply in the context of parole. It has been
argued that the rule would obstruct the rehabilitative purpose of the
system, that double application of the rule (in the criminal trial and
again at the revocation hearing) is not needed to serve its deterrent
purpose, and that it protects only the guilty. Other courts have not
reached the issue of whether the rule applies to this type of proceed-
ing but instead have ruled the fruitful searches not unreasonable.
The basis for these rulings has been either that a lower standard of
reasonableness applies to a convict under supervision than to a free
man or that the probationer submitted himself to search at any time
or place as a formal condition of probation.

But the rule in Illinois may be more favorable to the probationer. In
People v. Nordstrom the Second District Appellate Court consid-
ered the probationer's assertion that the fourth amendment applies to
revocation proceedings and fully considered the merits of his motion
to suppress evidence unlawfully seized. Although affirming his pro-
bation revocation, the court implied that a motion to suppress pursuant
to the exclusionary rule may be proper in the revocation hearing.

(2) The burden of proof. Standards for both the quality and
quantity of evidence have evolved in the Illinois probation cases. The
new probation statute clarifies two important rules. It sets the burden
to go forward with the evidence and the burden of proof (by a pre-
ponderance) upon the state. Challenges to the quality of evidence
have often been integrated by the courts into a general examination
of the sufficiency of proof. Briefly, for example, the courts have re-
versed a revocation where the uncontradicted testimony of one other

170. Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950), cert. denied, 340
172. E.g., People v. Langella, 244 N.Y.S.2d 802 (1963); Martin v. United States,
183 F.2d 436, 439 (4th Cir. 1950), and People v. Denne, 297 P.2d 451 (Cal. App.
1956) (different standard of reasonableness) or People v. Mason, 488 P.2d 630,
See Note, Probation Conditions, 1 Am. J.Cr. L. 235 (1972).
173. 73 Ill. App. 2d 168, 219 N.E.2d 151 (1966), appeal dismissed, 37 Ill. 2d 270
(1967). At 179 the court fully discussed the concept of reasonableness in a search
incident to lawful arrest and procedure for the hearing on the motion to suppress,
noting that the burden of proof regarding lawfulness of a search is not on the state,
citing ILL. REV. STAT., ch. 38, § 114-11(d).
than the probationer himself showed no violation occurred, or where revocation was based almost entirely on the hearsay petition of the probation officer or state's attorney. Other cases have been reversed where the revocation was based solely upon criminal conviction during probation but where the criminal statute was found to be unconstitutional or the plea of guilty withdrawn and the charge left undecided, or where based upon inconsistent and suspicious testimony of a self-confessed burglary co-conspirator and therefore not sufficiently clear and convincing.

In a particularly revealing case, the Third District Appellate Court reversed because a key element of the state's case was proved by no more than "speculation and suspicion." The revocation was based on an alleged execution and delivery of a bad check but the court held that the state's reliance on speculative and suspicious evidence to prove an essential element did not square with generally accepted legal principles and concluded that the state offered no basis for the revocation. The case illustrates that discretion and informality do not obviate the need for qualitative scrutiny of the evidence not unlike that embodied in the modern rules of evidence in criminal trials.

(3) Relevance. A potentially significant development came in the 1971 case of People v. Holmes. As suggested above, contrary to the general rule that sentencing matters carry very relaxed evidence limits, the issue of whether a violation has occurred, like the issue of whether the defendant is guilty at his criminal trial, should carry a more protective shield of relevance in deciding what evidence is to be considered in the revocation hearing. The reason for the limitation is to ensure that the judge will not be prejudiced as a result of considering external, unrelated, discordant facts.

This argument seems to have been advanced in Holmes with apparent approval by the court. Justice Trapp of the Fourth District Appel-
late Court stated that a hearing upon the revocation of probation “is bounded by the violations charged.” Even where a condition of the probation was that Holmes was to remain employed, the appellate court recognized that evidence that Holmes was not employed was nevertheless not relevant because Holmes was charged only with violation by means of committing theft. Although the court affirmed the revocation, finding that the trial judge, at most, merely “could have” been prejudiced by the evidence, the dicta constitutes a potentially significant step toward development of informal protective rules of evidence in these probation cases.

(4) The need for a specific violation; attacks on the probation conditions. A number of federal cases have set forth the principle that the appellate courts will not interfere with a revocation order unless obvious abuse of discretion is shown on the record. A line of cases under the federal probation statute has indicated that no specific act in violation of the probation order need be proven to enable the trial judge to revoke the probation if he deems it wise to do so. In *Burns v. United States* the Supreme Court held that the only limit placed upon the exercise of discretion by the judge on the issue of revocation is that he must be satisfied that his action will serve the ends of justice and the best interests of both the public and the defendant. In 1956 the Eighth Circuit stated that “the determinative question is [merely] whether the conduct of the probationer was inconsistent with his duties as such;” and in the case of *Trueblood Longknife v. United States* the Ninth Circuit implied that revocation can be ordered even if the defendant committed no acts upon which revocation is based. These federal cases were based on statutory rather than constitutional grounds. Presumably, however, in state matters, the federal courts will be even more hesitant to tamper with the trial judge’s exercise of discretion.

In Illinois the rule is more protective of the defendant. The 1972 language of the Illinois Supreme Court in *People v. Pier* strongly implies that a specific charge of acts in violation of the conditions is required, concerning the truth of which the probationer is entitled to a “conscientious judicial determination.” The implied limit on discretion

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180. *Id.* at 30. See generally *People v. O'Laughlin, 122 Ill. App. 2d 218, 258 N.E.2d 154 (4th Dist. 1970); People v. Cahill, 300 Ill. 279, 133 N.E. 228 (1922).*
181. 287 U.S. 216, 220 (1932).
182. *Kaplan v. United States, 234 F.2d 345, 348 (8th Cir. 1956).*
183. 381 F.2d 17 (9th Cir. 1967).
184. 125 Ill. App. 2d 154, 259 N.E.2d 834 (1970). See also *People v. Young, 125 Ill. App. 2d 289, 291 (1972).* The conditions are listed at Corrections code, ILL. REV. STAT., ch. 38, § 1005-6-3.
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is strongly supported by the words of Chief Justice Burger in Morrissey (again speaking of the entirely administrative system of parole rather than judicial probation):

Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that [he] . . . did violate the condition does the second question arise.

Attacks on the constitutionality of particular probation conditions have been made. For example, a condition that the probationer submit himself to search by any law enforcement officer at any time, or that he refrain from political activity, protest demonstrations or the like have been upheld. But the revocation of probation for failure to pay a fine or provide for restitution is not permitted unless the failure is willful.\(^{186}\)

6. The Sentencing Issue

Once a violation is proved, the judge need not automatically revoke probation. The same options are available to him as he had for his original correctional judgment which first placed the defendant on probation.\(^{187}\) The same factors should be considered as well.\(^{188}\) The American Bar Association Project on Minimal Standards expressed a strong opinion on this matter:

[W]e reject the thesis that revocation should inevitable follow a violation because "the defendant has had his chance" or because of similar generalizations which may not fit the facts. As at the time of initial sentencing, the public interest is best served by as sympathetic and honest a judgment as is within the capacity of the trial judge to make, responsive to criteria such as are here set forth . . . . it is the submission here that the public is not served by precipitate and automatic imprisonment following what might be either a technical violation or a violation which though sub-

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186. People v. Mason, 488 P.2d 630, 97 Cal. Rptr. 302 (Cal. 1971), cert. denied, 405 U.S. 1016 (1972) (California search and seizure); Annot., Propriety of Conditioning Probation . . . on Defendant's Refraining from Political Activity, Protest, or the Like, 45 A.L.R.3d 1022; Corrections code, ch. 38, § 1005-6-4(d) (failure to pay fine). Regarding purposes intended to be served by the conditions see Zeitoun, Parole Supervision and Self Determination, 26 Fed. Prob. 44 (Sept. 1962), Note, Judicial Review of Probation Conditions, 67 Colum. L. Rev. 181 (1967).
188. Task Force Report, supra note 7, at 14 lists the five essential factors which a sentencing judge must consider.
It is important to note that while the court must properly consider the probationer's conduct during the probation period before deciding whether to revoke probation, once that decision is made, the scope of evidence is narrowed to include only pre-conviction conduct. The severity of the post-revocation sentence must be limited to the original offense. The probationer must not be punished for his conduct during probation as a component of the prison sentence. The revocation is the punishment. If a further criminal sanction is to flow from such conduct, appropriate proceedings should be initiated after the defendant is imprisoned or the entire revocation proceeding should be deferred until after trial and any sentence which may follow on that charge.

The Second District Appellate Court applied this rule in People v. Clyne\textsuperscript{190} where the record clearly indicated that the sentencing judge would have considered a less severe sentence for the original offense had the defendant not been convicted of a subsequent offense while on probation. The appellate court reduced the heavy sentence to eliminate the possibility that the defendant was being punished for the subsequent offense by means of a heavier sentence upon his first conviction.\textsuperscript{191}

7. Appeal.

The judgment revoking probation is a final appealable order.\textsuperscript{192} Direct appeal is to the appellate court. It is a "conviction" for purposes of relief under the Illinois Post-Conviction Hearing Act;\textsuperscript{193} and the probationer is a proper subject for \textit{habeas corpus} relief because the due process clause of the United States Constitution applies to the proceedings and the probationer is sufficiently "in custody" because of the limits of his supervision.\textsuperscript{194}

CONCLUSION

Illinois citizens can be proud of the relative position of "forerunner" which the state occupies with respect to corrections and probation law

\textsuperscript{189} A.B.A. Standards, \textit{supra} note 43, \$ 5.1 at 59.
\textsuperscript{190} 7 Ill. App. 3d 121, 287 N.E.2d 72 (1972).
\textsuperscript{191} \textit{Id.} at 123; People v. Livingston, 117 Ill. App. 2d 189, 254 N.E.2d 64 (1969).
\textsuperscript{192} Corrections code, ILL. REV. STAT., ch. 38, \$ 1005-6-4(g). \textit{See generally} People v. Gary, 27 Ill. 2d 362, 189 N.E.2d 286 (1963).
\textsuperscript{194} \textit{Cf.} Carafas v. LaVallee, 391 U.S. 234 (1968).
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among the several states. But consideration of the similarities between a criminal trial and the first factual issue at the revocation hearing will lead to needed improvement in the many gray areas remaining. Much more consideration should be given to the policy issues only briefly mentioned here. There are policies favoring greater protection for the probationer facing revocation without reaching the burdensome formality which we see at the criminal trial. There is a vast gap between the undefined position which the law now occupies and that tangle of complexity so often cited as a counterproductive by-product of due process. There is opportunity in all of corrections for experimentation and flexibility. The probation revocation proceeding is no exception merely because it is conducted in court rather than an administrative hearing. In 1967 the President's Commission stressed that:

This is an essentially uncharted area—little consideration has been given to the issues involved. But this does not justify deferring action . . . . Legislatures and, especially, correctional administra-
tors must begin now to explore the area—to define offenders' rights and to establish procedures which will protect those rights.195

The judiciary could well take heed of the Commission's words and continue to develop a plan and an analytical basis for due process.

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Author's note:

After this manuscript went to press the Supreme Court decided almost unanimously in Gagnon v. Scarpelli, — U.S. —, 41 U.S.L.W. 4647, (No. 71-1225, Decided May 14, 1973) that revocation of probation is constitutionally indistinguishable from parole revocation and that, although it is not a "stage of the criminal prosecution," it does result in a loss of liberty. Therefore, a probationer is entitled to both preliminary and final revocation hearings under the same conditions specified in Morrissey. The Court recognized two distinct revocation issues: (1) the fact of violation, and (2) the decision whether to revoke; but because the proceeding is "predictive and discretionary" as well as factfinding in nature, counsel will not always be required. Rather, the Court stated that, presumptively, fundamental fairness and due process require a state to provide counsel where, after being advised of his rights, the probationer or parolee requests help, based on a timely and colorable claim that (1) he has not violated the conditions, or (2) even if he did, substantial reasons make revocation inappropriate and/or the facts too complex or difficult to present. Affirming and reversing in part 454 F.2d 416 with remand, Douglas, J., dissenting as to appointment of counsel only. (Note that Scarpelli was sentenced to his 15 year prison term before being granted probation. Compare Mempa v. Rhay.)