Due Process and Parole Revocation

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Criminal Procedure Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol77/iss1/10

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Due Process and Parole Revocation

I. INTRODUCTION

Daryl Standlee was convicted of rape in 1959 and sentenced to a maximum of sixty years' imprisonment. He was paroled on September 29, 1970. Less than a year later, Standlee was arrested on charges which included kidnapping, assault, and attempted rape. A parole-revocation hearing was convened. At the request of his counsel, however, the hearing was continued pending the completion of Standlee's criminal trial on the same charges.

At that trial, the complainants identified Standlee as their assailant. He countered with the testimony of two alibi witnesses. Standlee's girl friend and a Mrs. Merrill testified that he had been in Portland on the night of the offense, which had been committed in Seattle. The trial court found that Mrs. Merrill's testimony created a reasonable doubt as to Standlee's guilt.

[T]he testimony of Mrs. Merrill impressed me, not only her testimony but her appearance and demeanor upon the witness stand. . . . [T]o me her testimony is the one that weighed the scales of balance, whichever way they would fall . . . . [S]he left a reasonable doubt in my mind as to whether or not this defendant was the man who committed the offense. Accordingly, the court acquitted Standlee of all charges.

Thereafter, the state reconvened the parole-revocation hearing and presented the same evidence which at trial had not sustained a criminal conviction. But since Standlee was unable to pay Mrs. Merrill's travel expenses, her testimony was read into the record from the trial transcript. Her appearance and demeanor, which the trial court had found decisive, could not be considered. The Parole Board found that the preponderance of the evidence indicated that Standlee had committed the crimes charged. Accordingly, it revoked his parole and ordered him recommitted for a fifteen-year term beginning June 21, 1971.

Standlee's quest for habeas corpus relief in state court was

---

1. Washington law requires the sentencing judge to impose the maximum statutory sentence. The actual time served is determined by the state's parole board. See Mempa v. Rhay, 389 U.S. 128, 131 n.2 (1967).
2. Standlee v. Rhay, 557 F.2d 1303, 1305 (9th Cir. 1977) (quoting trial judge).
He then petitioned the federal district court for a writ of habeas corpus, arguing that the doctrine of collateral estoppel as embodied in the fifth and fourteenth amendments barred the revocation of his parole. Specifically, he urged that his acquittal at trial had established that he had not perpetrated the crimes charged and that the state was estopped to relitigate that issue.

The district court held that revocation of parole is a punitive sanction and that the case was therefore controlled by the rule the Supreme Court propounded in *Coffey v. United States*: when a defendant has been acquitted of criminal charges, the acquittal bars, on principles of res judicata, relitigation by the state of the issue of guilt in any subsequent civil suit to impose a punitive sanction. The *Coffey* rule applied, the district court concluded, even though the preponderance-of-the-evidence standard of proof used at the revocation hearing required a lesser showing of guilt than did the reasonable-doubt standard used at trial. The district court therefore issued the writ of habeas corpus.

The court of appeals reversed. It described parole revocation as a remedial rather than punitive sanction and accordingly held the *Coffey* rule inapplicable. Because of the different standards of proof in criminal and revocation proceedings, a difference which it felt had been approved by the Supreme Court, the

8. 116 U.S. at 443.
9. 116 U.S. at 443.
12. Revocation of parole is remedial rather than punitive, since it seeks to protect the welfare of parolees and the safety of society. The termination of parole results in a deprivation of liberty and thus is a grievous loss to the parolee. But the harshness of parole revocation does not alter its remedial nature.
13. "This lesser standard has been recognized by the Supreme Court as one of the crucial factors distinguishing parole revocation from criminal proceedings. See *Morrissey v. Brewer*. . . . It also is the reason why appellee had his parole revoked even though he was acquitted of the criminal charges." *Standlee v. Rhay*, 557 F.2d 1303, 1307 (9th Cir. 1977).

In fact, the Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), recognized that a lower standard of proof is used in parole-revocation hearings, but the Court neither approved nor disapproved of that difference: "Sometimes revocation occurs when the parolee is accused of another crime: it is often preferred to a new prosecution because of the proce-
court of appeals held that the state was not collaterally estopped from relitigating the identity issue in the revocation hearing. Therefore, it reversed the grant of the writ of habeas corpus.

Standlee may or may not have been guilty of the crimes charged. The trial court was not convinced by the state’s evidence. But because the state’s initial failure of proof was not conclusive, Standlee could be returned to prison to serve an additional fifteen years. This Note submits that that result is unconscionable.

The possibility of a criminal acquittal followed by revocation of parole on the same charges is symptomatic of the disparity between the due process rights of criminal defendants and those of parolees facing revocation. Parole is revoked in civil proceedings conducted before an administrative agency, the Parole Commission. The Supreme Court has said that such a hearing is not part of a criminal prosecution and, accordingly, that the full panoply of criminal-procedure safeguards does not apply to it.

Indeed, before the 1972 decision in *Morrissey v. Brewer*, it was commonly felt that a parolee need have no procedural protections. Justifications for this view derived from the idea that the
dural ease of recommitting the individual on the basis of a lesser showing by the State.”

408 U.S. at 479.

14. The difference in the burdens of proof in criminal and civil proceedings usually precludes application of collateral estoppel. . . . Because of this difference in the burdens of proof an adjudication of the issues in a criminal case “does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings.”

15. Standlee v. Rhay, 557 F.2d 1303, 1305 (9th Cir. 1977).

16. See text at note 2 supra.


20. The theories, all of which were implicitly rejected by the Court in *Morrissey* as a basis for denying due process to parolees, have been variously classified by the courts and commentators. Essentially, there are four major justifications for denying due process protection in parole-revocation proceedings:

a) The Right-Privilege Distinction: Since parole is an act of grace conferred at the discretion of the state, and since the parolee has no right to his conditional liberty, no due process protection need be afforded him if the state decides to terminate the liberty.

b) Contract Theory: Since the state grants parole at its option, it may contractually
grant of parole is an "act of grace" by the state, that having magnanimously conferred parole, the state may freely terminate it. On that reasoning, due process is not implicated.

The Court has now recognized that "the [parolee's] liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." But due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, it is flexible and calls for such procedural protections as the particular situation demands.

In Morrissey, the Court set the level of due process needed in parole revocations. Specifically, it held that the parolee facing revocation has a right (a) to receive written notice of the claimed parole violations; (b) to hear the evidence against him; (c) to be heard in person and to present witnesses and documentary evidence; (d) to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing the confrontation); (e) to have a neutral and detached hearing body, members of which need not be judicial officers or lawyers; and (f) to be given a written statement by the fact-finders of the evidence relied on and the reasons for revoking parole.

A subsequent case added the right to appointed counsel if the hearing body finds that the parolee asserts a "colorable claim" of innocence.

impose any conditions it desires, including the condition that parole may be revoked summarily at the discretion of the state.

c) Constructive Custody: Parole merely extends the prison walls, and since the parolee is still in the custody of the Attorney General, he has no true liberty to lose. He is therefore entitled to no due process protection.

d) The Civil-Criminal Distinction: Since the parolee was validly convicted at the original criminal proceeding, and since punishment was properly imposed, the decision to revoke parole is merely an administrative determination by the state to substitute one form of punishment for another, a civil proceeding to which no due process rights attach.


21. Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935): "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."


25. 408 U.S. at 489.

This Note argues that these protections are inadequate and that additional protections are constitutionally required. Specifically, the procedural rights guaranteed in juvenile-delinquency hearings should be extended to parole revocations so that parolees have (a) the privilege against self-incrimination; (b) an unconditional right to counsel; and (c) the protection of the reasonable-doubt standard of proof.

Part II explores the origins of the parolee's due process rights. It first discusses Goldberg v. Kelly,27 a welfare-termination case in which the Court recognized the concept of statutory entitlement—the concept that governmental largesse is a form of property which cannot be taken without due process. This Note then argues that in Morrissey v. Brewer,28 the Court implicitly equated the interests at stake in parole-revocation and welfare-termination proceedings and that it therefore applied Goldberg's welfare model of procedures to parole revocation.

The Note next compares the parolee's interest with the welfare recipient's and discovers two important differences. First, the parolee's liberty does not depend on statutory entitlement but upon his continued observance of parole conditions—while conditional, his liberty is akin to that of the ordinary citizen, rather than to governmental largesse. Second, the potential consequences of parole revocation are far more onerous than those of welfare termination. These differences, it is argued, make the parolee's interest in an accurate decision more important than the welfare recipient's and require greater protection than the Goldberg procedures afford. Part II recognizes that the state's interests preclude allowing parolees full-scale criminal rights and therefore proposes a model of due process intermediate between Morrissey and the criminal model.

Part III finds such a model in the procedures of juvenile-delinquency hearings. That Part traces the development of procedural protections for juveniles from the early days, when due process was thought not to apply; through the creation of minimum due process rights in In re Gault;29 to the recognition in In re Winship30 that the transcendent value of the liberty at stake makes the juvenile proceeding sufficiently similar to a criminal prosecution that the protection of the reasonable-doubt standard is necessary. Part III details the procedures mandated in the juve-

nile cases and argues that the difference between those procedures and parole-revocation procedures stem from the Court's implicit belief that while the juvenile's liberty is like that of the ordinary citizen, the parolee's is governmental largesse and so less deserving of protection.

Part IV examines that implicit belief by analyzing the interests at stake in the two proceedings. The Part first compares the parolee's and the juvenile's interests and finds them constitutionally indistinguishable. The parolee's interest, like the juvenile's, is liberty. Neither the greater restrictions on nor the conditional nature of the parolee's liberty distinguishes it from the juvenile's, and the effect of an erroneous decision to revoke parole is as great as that of an erroneous adjudication of delinquency. The Note next examines the remaining justification for the different levels of due process protection in parole and juvenile proceedings—that because the state need not grant parole, the parolee's liberty is a "privilege" entitled to less protection than the liberty of the juvenile—and finds it merely a tautology. In short, Part IV contends that the kinds of interests which necessitate the additional rights afforded to juveniles are equally present in parole revocation.

Part IV concludes by examining the government's interests and showing that extending juvenile rights to parolees comports with those interests. Such extension would promote the state's interest in accurate decisions by assuring that confessions are trustworthy, that defenses are adequately developed and presented, and that the possibility of an erroneous decision is reduced to an acceptable level. Furthermore, the state's interests in saving money and keeping proceedings simple are not affected by the privilege against self-incrimination or the reasonable-doubt standard and are only slightly more compromised by an absolute right to counsel than by the "colorable claim" procedure now used. In sum, the Note concludes, due process requires the same level of protection for the parolee as for the juvenile.

II. THE DEVELOPMENT OF DUE PROCESS RIGHTS FOR PAROLEES

A. Due Process and the Deprivation of Property

This subpart argues that the Court in *Morrissey* drew from its earlier decision in *Goldberg* both a rationale for applying due process to parole revocation and a model of specific rights. The *Goldberg* Court recognized that due process is required to protect the welfare recipient's statutory property and constructed a
model of rights appropriate to the interest at stake. In doing so, the Court relied on the concept of statutory entitlement, a concept born of Charles Reich's 1964 article, The New Property. Although some of the Court's recent decisions may have discredited Professor Reich's notion of largesse as property, it is central to an understanding of the property basis for the Goldberg rights, which ultimately became the Morrissey rights.

1. The Welfare Model of Procedural Safeguards

In his article, Charles Reich urged the re-evaluation of the theories according to which governmental largesse is regulated. Society, said Reich, developed the idea of "property" to provide individuals the means to act independently. Property creates a zone of private power within which the majority's preferences must yield to those of the owner. Upon this power political rights and civil liberties depend. But in the public-interest state, governmental largesse has begun to supplement traditional private property as an important form of wealth. Such largesse originates with the state and can be denied or taken away to serve some legitimate public policy. The potential for arbitrary deprivation, Reich argued, raises the spectre of increasing governmental intrusion into the affairs of the individual, who is decreasingly protected by private property. Therefore, said Reich, we need a new zone of privacy around governmental largesse so that it can do the work of property. Those forms of largesse closely linked to individual well-being and status must be held as of right. In short, they must become a new form of property which cannot be taken away without due process of law.

In Goldberg v. Kelly the Supreme Court, citing Professor Reich, recognized that welfare benefits are such a new form of property, that they are statutory entitlements of qualified recip-

33. Reich, supra note 31, at 771-72.
34. Id. at 771.
35. See id. at 766-71.
36. See id. at 738-39.
37. Id. at 774.
38. Id. at 784.
39. See id. at 785-86.
40. Id. at 785.
41. See id. at 783-85.
43. "It may be realistic today to regard welfare entitlements as more like 'property'"
In Goldberg, the Court at the outset rejected the argument that because welfare benefits are a privilege, due process is not implicated. Whether due process is required depends on the equities of the case rather than on the label applied to the interest of the individual.

Second, the Court balanced the competing interests of the recipient and the state to gauge whether the recipient is constitutionally entitled to procedural safeguards when the state decides to terminate welfare. On one hand is the recipient’s interest in continuing to receive welfare. Without benefits, truly eligible recipients—those lacking independent resources—would need to concentrate upon securing their daily subsistence and would have neither the time nor money to seek redress from the welfare bureaucracy. Furthermore, the state is interested in preventing an erroneous termination of benefits—public assistance promotes the general welfare by fostering the dignity and well-being of all persons, and these purposes are best served by the uninterrupted provision of benefits to eligible recipients.

On the other hand, the state is interested in the funds saved by summary terminations. Under the state’s pre-Goldberg system, payments could be stopped promptly if the state had reasonable grounds to believe the recipient ineligible; few recipients requested the post-termination hearing authorized by statute.

than a ‘gratuity.’ Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.” 397 U.S. at 262 n.8. That footnote goes on to quote Reich’s 1965 article, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965), to the effect that entitlements “are no longer regarded as luxuries or gratuities; to the recipients, they are essentials, fully deserved, and in no sense a form of charity.” The footnote concludes by citing Reich’s earlier article, The New Property, supra note 31.

44. 397 U.S. at 262.
47. 397 U.S. at 266.
48. 397 U.S. at 264.
49. 397 U.S. at 264-65.
50. 397 U.S. at 265.
Pre-termination hearings, the state argued, would be burdensome and expensive.\footnote{51}

The Court found the interests favoring due process protection weightier:

As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."\footnote{52}

Third, the Court specified the procedures required. Balancing the need for a preliminary determination of eligibility against the costs of one to the state, the Court concluded that a pre-termination evidentiary hearing is necessary.\footnote{53} The Court held that the recipient must receive advance notification of the state’s case for termination and that he must have an opportunity to appear at the evidentiary hearing, to be represented by retained counsel,\footnote{54} and to confront and cross-examine adverse witnesses. If benefits are terminated, the recipient must receive a written explanation of that decision.\footnote{55}

\textit{Goldberg} is significant in three respects. First, its rejection of the right-privilege shibboleth means that whether procedural safeguards are required depends upon a decision's impact on private interests rather than on a characterization of those interests as rights or privileges. Second, and equally important, the Court recognized a limited property interest in important governmental benefits: If the state elects by statute to grant a benefit, it becomes a statutory entitlement of qualified recipients\footnote{56} which cannot be taken away without due process of law. Third, the pattern of due process protection established in \textit{Goldberg} was adapted for parolees in \textit{Morrissey}.

2. \textit{The Welfare Model Applied to Parole Revocation}

\textit{Morrissey v. Brewer}\footnote{57} applied due process to parole revoca-

\begin{footnotes}
\item[51] 397 U.S. at 265.
\item[52] 397 U.S. at 266 (quoting Kelly v. Wyman, 294 F. Supp. 893, 904-05 (S.D.N.Y. 1968)).
\item[53] 397 U.S. at 264.
\item[54] The Court made no provision for appointed counsel. 397 U.S. at 270-71. Compare Gagnon v. Scarpelli, 411 U.S. 778 (1973), where the Court recognized the need for appointed counsel where a parolee or probationer asserts a colorable claim of innocence.
\item[55] 397 U.S. at 266-71.
\item[56] 397 U.S. at 262.
\item[57] 408 U.S. 471 (1972).
\end{footnotes}
tion. Morrissey and his co-petitioner, Booher, were Iowa parolees who had been summarily reincarcerated on the recommendations of their parole officers. Each unsuccessfully sought a writ of habeas corpus in the district court, arguing by analogy to Goldberg that the state's failure to hold a pre-incarceration hearing had denied him due process in violation of the fourteenth amendment. The dismissals of the writs were affirmed by the court of appeals, which found the due process clause inapplicable to the decision to revoke parole. The Supreme Court reversed. Due process, said the Court, requires a preincarceration hearing at which evidence can be presented and charges can be substantiated or rebutted.

First, the Court rejected the argument that because parole is a "privilege," revocation is wholly discretionary. Chief Justice Burger quoted from Graham v. Richardson: "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Instead, "[w]hether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" In short: "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the

58. Morrissey pleaded guilty in 1967 to a charge of passing bad checks and was sentenced to not more than seven years' imprisonment. He was paroled in June 1968. Seven months later, he was arrested at the direction of his parole officer and incarcerated in the county jail. A week later, the Iowa Board of Parole revoked his parole on the strength of the parole officer's written report, which charged him with: purchasing a car under an assumed name and operating it without permission; giving false statements to police concerning his address and insurance company after a minor accident; obtaining credit under an assumed name; and failing to report his place of residence to the parole officer.

Booher pleaded guilty in 1966 to charges of forgery and was sentenced to not more than 10 years in prison. He was paroled in November 1968. In August 1969, he was arrested as a parole violator, and in September of that year, his parole was, on the written report of his parole officer, summarily revoked. The charges were that he had violated the territorial restrictions of his parole without authorization, obtained a driver's license under an assumed name, operated a motor vehicle without permission, and failed to keep himself gainfully employed. 408 U.S. at 472-74.

59. The court denied the writ on April 15, 1970, in Morrissey's case and on June 16, 1970, in Booher's case. Neither decision was reported. See Morrissey v. Brewer, 443 F.2d 942, 944 (8th Cir. 1971).

60. Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971). The cases were consolidated for appeal.


62. 403 U.S. at 374 (1971).


64. 408 U.S. at 481 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
'liberty or property' language of the Fourteenth Amendment."

Second, in deciding whether the parolee's interest is within the contemplation of that language, the Court evaluated the potential loss to the parolee facing revocation. The interest at stake, the Court reasoned, is the parolee's conditional liberty, which enables him to hold a job, to be with his family, and to lead a relatively normal life. Although that liberty is indeterminate and restricted, it is valuable, and terminating it inflicts a grievous loss. Although conditional, it is sufficiently akin to unqualified liberty that it falls within the "liberty or property" language of the fourteenth amendment. The state thus may not abridge it without due process of law.

Third, in deciding which procedures are necessary, the Court balanced the competing interests of the parolee and the state. On one hand is the parolee's interest in continuing his conditional liberty. Reincarceration not only disrupts his family and employment, it also interferes with his ability to show he did not violate his parole. Further, the parolee relies on the state's implicit promise that it will not revoke parole in the absence of a violation. Finally, the state itself has an interest in not revoking parole if parole is adequately serving its corrective function and an interest in not embittering parolees by treating them arbitrarily.

On the other hand, the state must prevent antisocial conduct. The Court recognized that, since parolees have been previously convicted and since some cannot live in society without committing additional crimes, the state has an "overwhelming" interest in being able to imprison actual parole violators without the burden of a new criminal trial.

The Court found the interests favoring a pre-incarceration hearing controlling: because incarceration so completely disrupts his life, the parolee cannot be locked up solely on the recommendation of his parole officer. Yet logistical problems may preclude a full-scale evidentiary hearing at the time and place of the alleged violation, and the state cannot permit suspected parole violators to remain at large until such a hearing can be conducted. The Court's solution was dual hearings.

66. 408 U.S. at 481.
67. 408 U.S. at 482.
68. 408 U.S. at 483-84.
69. 408 U.S. at 482.
70. 408 U.S. at 484.
71. 408 U.S. at 483.
72. 408 U.S. at 483.
The first hearing simply determines whether there is probable cause to believe that the individual has violated parole. The hearing must be conducted by a parole officer not directly involved in the case; it must be at or reasonably near the place of the alleged violation and as soon as possible after the arrest. The parolee must be notified before the hearing of the charges against him, permitted to appear at the hearing and to present evidence in his behalf, and allowed to confront and cross-examine adverse witnesses (unless the fact-finder determines that this would jeopardize their safety). If probable cause is found, the parolee must be given a written summary of the evidence which led to that decision.

These procedures reflect the influence of Goldberg, which the Court cited several times. The pre-incarceration hearing is a direct extension of Goldberg's pre-termination hearing. The requirements of a neutral trier of fact; of advance notice; of an opportunity to appear, to present evidence, and to confront and cross-examine adverse witnesses; and of a written explanation of the decision were transplanted from the welfare-termination hearing. The only difference is that the Morrissey Court did not say whether a parolee has a right to retain counsel to represent him at the parole hearing—the Court found it unnecessary to decide that question.

73. 408 U.S. at 485.
74. Arrest sometimes involves incarceration in an institution distant from the place of the alleged violation. It will be difficult for the parolee to rebut even spurious allegations if so confined. Furthermore, since there is often a substantial time lag between arrest of the parolee and revocation of parole, 408 U.S. at 485, exculpatory evidence can disappear in the intervening period. And even if ultimately exonerated, the parolee can lose employment and thus suffer financial hardship by the mere fact of incarceration:

Because a new period of incarceration, even if only 24 hours in length, may cost a parolee his employment, and further jeopardize his chances for rehabilitation, the detention of an alleged violator is a serious matter and must be dealt with in a manner which clearly recognizes the degree of loss to be suffered.

75. 408 U.S. at 485-87.
76. 408 U.S. at 485-87.
77. 408 U.S. at 489. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court extended to probation-revocation proceedings the due process rights established in Morrissey. Gagnon imposed the additional requirement that the indigent parolee or probationer who asserts a colorable claim of innocence have appointed counsel. The applicability of the right was to be determined by the Parole Commission case by case. The Court was not presented with the question whether a parolee with independent resources was entitled to retained counsel.

Congress felt that the right to retained counsel should be recognized as well. In the Parole Commission and Reorganization Act, 18 U.S.C. § 4214(a)(2)(B) (1976), it provided that in hearings held pursuant to that section there shall be "opportunity for the parolee
Yet the Court recognized that a hearing which simply finds probable cause to believe a parolee violated his parole is not due process. Such a hearing answers only the first of three separate questions: whether there is enough evidence to justify incarcerating the parolee pending a full-scale evidentiary hearing; if so, whether the evidence presented at the revocation hearing justifies the conclusion that the individual violated his parole; and finally, whether parole should be revoked. \(^{78}\) The discretionary decision to revoke parole can be made only after a finding of a violation \(^{79}\) and only by the federal Parole Commission \(^{80}\) or the equivalent state authority. Thus, a preliminary hearing alone would not provide due process. \(^{81}\)

The Court therefore mandated an opportunity for the parolee to have, upon request, a second hearing before the final decision to revoke parole. \(^{82}\) This must be a full-scale hearing at which contested facts are finally resolved and at which the Parole Commission decides what sanctions are appropriate. Its procedures again reflect the *Goldberg* model: the parolee is entitled to written notice of the alleged violations; he must be informed prior to the hearing of the evidence against him; and he must be permitted to appear, to present evidence and witnesses in his defense, and to confront and cross-examine adverse witnesses (subject to limitations to protect their safety). Finally, he must be told in writing the reasons for an adverse decision. \(^{83}\)

The *Morrissey* decision is important for two reasons. First, the Court established that, despite its conditional nature, the parolee's liberty interest is within the protection of the "liberty or property" language of the fourteenth amendment. The Court evidently reasoned that, like the property interest of the welfare recipient, the parolee's liberty, once granted, is a statutory enti-

---

78. 408 U.S. at 479-80.
79. 408 U.S. at 479-80, 483-84.
81. In *Goldberg*, New York had provided by statute that the welfare recipient could request a post-termination hearing at which his eligibility would be finally determined. *Goldberg* v. Kelly, 397 U.S. 254, 265 (1970). Consequently, the Court was not confronted with the question whether due process required a post-termination hearing. But given the Court's emphasis on welfare as an entitlement, 397 U.S. at 262, it seems clear that, in the absence of the statutory hearing, the Court would have mandated a post-termination hearing, just as it did in *Morrissey*.
82. 408 U.S. at 489.
83. 408 U.S. at 489.
tirement. A decision to terminate either welfare or parole directly affects an important private interest, and it is immaterial that that interest could be characterized as a privilege. *Goldberg* had established that, however characterized, the property interest of the welfare recipient is entitled to due process protection. Since *Morrissey* in effect analogized the liberty interest of the parolee to the property interest of the welfare recipient, the application of due process to parole revocation followed logically.

Second, the extent to which the *Morrissey* Court drew upon *Goldberg* in formulating procedural safeguards for parole revocation indicates that the Court thought the parolee's interest nearly identical to that of the welfare recipient. *Goldberg* recognized that the recipient has a property interest in welfare benefits. *Morrissey* recognized that the parolee has a liberty interest in parole. By adopting the *Goldberg* model of procedure, the *Morrissey* Court in effect equated the two kinds of interests.

There are undeniably similarities between welfare terminations and parole revocations. In each case, the state seeks to terminate what may be viewed as a governmental benefit it was never required to confer. The individual in each proceeding has an interest in retaining that benefit if he is entitled to do so. The purpose of due process in each situation is to ensure that the question of entitlement is accurately resolved.

Because the Court accepted these similarities and did not investigate the dissimilarities between the proceedings, the Court saw no reason to go beyond the *Goldberg* procedures. Thus, saying that its imposition of a due process requirement was not intended to equate a revocation hearing to a criminal prosecution, the Court made no provision for appointed counsel or for invoking the privilege against self-incrimination. Further, the

---

84. 408 U.S. at 493, 495 (Douglas, J., dissenting in part). Although the majority opinion does not explicitly cite *Goldberg* as precedent for the requirement of due process, the opinion as a whole supports the analogy. E.g., 408 U.S. at 481 (*Goldberg* recognized that application of due process turns on whether the governmental action inflicts a "grievous loss"); 408 U.S. at 482 (termination of parole inflicts a "grievous loss"). See also Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974), where the Court likened the prisoner's liberty interest in retaining his "good time" credits to a property interest: "This analysis as to liberty parallels the accepted due process analysis as to property.... We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."

85. See text at notes 90-96 infra.

86. See, e.g., 408 U.S. at 486 (since *Goldberg* did not require a judicial pre-termination hearing to protect the welfare recipient's interest, none is required to protect the parolee's interest).

87. "We emphasize that there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." 408 U.S. at 489.
Court said that rules of evidence should be relaxed to permit consideration of material not admissible in a criminal trial.\textsuperscript{88} Finally, the Court noted that proof beyond a reasonable doubt has not been required.\textsuperscript{89} In sum, the Court transplanted the model of procedural safeguards developed for welfare terminations into the parole-revocation context, but it did not give complete attention to whether the situations of the welfare recipient and the parolee are substantially similar.

B. Due Process and the Deprivation of Liberty: Problems with the Goldberg Analogy

This subpart argues that, while Morrissey correctly recognized that the liberty interest of the parolee is entitled to due process protection, the Court erred in equating the interests of the parolee and the welfare recipient. The Note here points out two distinctions: first, the parolee's interest—liberty—is different in nature from the welfare recipient's property interest and thus is more than a statutory entitlement; second, because the consequences of parole revocation are more severe, that proceeding jeopardizes the individual's interest to a greater extent than does a welfare-termination proceeding. These differences make the parolee's liberty interest, quite simply, more important than the welfare recipient's property interest and demand a level of protection not afforded by the Goldberg procedures.

The initial problem with the Goldberg analogy is that the interests of the parolee and welfare recipient are different in nature. The welfare recipient's "property" depends entirely upon statutory entitlement.\textsuperscript{90} To assure a minimum standard of living, the state provides welfare benefits to qualified recipients who, in turn, depend upon those benefits for support. If the state may terminate benefits arbitrarily, it will have gained a source of power over recipients.\textsuperscript{91} Consequently, the Goldberg Court found it necessary to provide mechanisms for deciding whether a termination of benefits is justified.\textsuperscript{92} The result was the concept of statutory entitlement: so long as the state continues to make the benefit available, an individual who meets the statutory criteria is entitled to continue to receive it.

\textsuperscript{88} 408 U.S. at 489.
\textsuperscript{89} 408 U.S. at 479. See also Gagnon v. Scarpelli, 411 U.S. 778, 789 n.12 (1973).
\textsuperscript{90} "Such benefits are a matter of statutory entitlement for persons qualified to receive them." Goldberg v. Kelly, 397 U.S. 254, 263 (1970).
\textsuperscript{91} See Reich, supra note 31, at 749-51.
\textsuperscript{92} See text at note 52 supra.
But statutory entitlement implies the ongoing provision of consumable benefits. A recipient's "property" consists only of the right to demand that his eligibility be determined according to objective statutory criteria. If the state elected to cease providing welfare entirely, the recipient would have no property interest in welfare benefits.

By contrast, the liberty of the parolee does not depend upon the concept of statutory entitlement. While parole certainly benefits the parolee, it is a nonconsumable benefit which is granted once and then either retained or revoked. This stems from the fact that release on parole removes restrictions formerly imposed through confinement. Furthermore, once he is paroled, an individual's rights cannot be affected by the state's decision to cease granting parole, for by paroling him, the state has implicitly promised the parolee that, as long as he abides by the conditions of his release, he will not be reincarcerated. Thus, the parolee's liberty interest depends neither upon his continued eligibility for a benefit—he has already received it—nor upon the state's continued provision of similar benefits, but only upon his compliance with conditions established at the time of his release. This is entitlement only in its negative sense: if he ceases to qualify by violating parole, the previously conferred benefit may be taken away. But entitlement in this negative sense also describes the right of the ordinary citizen to retain his liberty as long as he observes the law. The parolee's liberty is thus very different from the "property" of the welfare recipient.

A second important difference between the welfare-termination and parole-revocation hearings lies in the decision's effect on the personal interests at stake. The welfare-termination hearing resolves the question of the current entitlement of the individual to receive benefits, and a determination of ineligibility implies nothing as to future eligibility. The consequences of an erroneous decision, therefore, may be only temporary. By contrast, the central issue in a parole-revocation proceeding is whether the parolee has violated his parole. The consequences of the decision may be far-reaching: an erroneous revocation can cause the incarceration of the parolee for many years. Such a

---

93. If benefits were not consumable, the recipient would have no need for additional benefits in the future.

94. "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." Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

potential result makes the proceeding comparable in seriousness to a felony prosecution. The parole-revocation hearing thus not only deals with a more significant personal interest than a welfare-termination proceeding, it threatens that interest more profoundly.

Nevertheless, the Court held in *Morrissey* that the parolee is not entitled to all the criminal-procedure protections. The Court noted that parole-revocation proceedings are conducted by an administrative agency which finds facts and exercises discretion and that the state’s interest in avoiding overly formal procedures makes some criminal-procedure safeguards inappropriate. Jury trials, for example, would be burdensome and expensive. Strict rules of evidence might impair the Parole Commission’s ability to evaluate all the circumstances of the parolee’s conduct in predicting the likelihood of future violations. While the

---

96. Cf. *In re Gault*, 387 U.S. 1, 36 (1967) (“a proceeding where the issue is whether a child will be found to be delinquent and subjected to the loss of his liberty for many years is comparable in seriousness to a felony prosecution”).


99. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972).

But that reasoning begs the question. The purpose of due process is to assure fair and objective decisions. If it could be known in advance that the parolee had ignored the conditions of his parole, the only remaining question would be whether to revoke parole, a decision wholly within the parole authority’s discretion. See text at notes 76-80, supra. Due process would require only that the parolee be allowed to explain any mitigating circumstances. See *Morrissey v. Brewer*, 408 U.S. at 495 (Douglas, J., dissenting in part). But the hearing must first determine whether a violation was committed. 408 U.S. at 479. Procedural safeguards are designed to insure that that determination is correct. To begin with the assumption that a violation has occurred is to assume the answer that due process is designed to facilitate.

It is not, however, the purpose of this Note to advocate that the full range of criminal-procedure safeguards be applied to parole-revocation proceedings. Although there is no logical reason such safeguards should not be made available to parolees, so radical a departure from current practice must, practically speaking, await a corresponding change in juvenile justice; and although procedural safeguards for juveniles are more palatable than they would be for parolees, the Court has so far refused to apply the criminal model to juvenile-delinquency hearings. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 540 (1971), discussed in note 134 infra.

100. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (disposition requires application of expertise in predicting the ability of the parolee to live in society without committing future antisocial acts); 408 U.S. at 489 (“process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial”).
parolee’s liberty interest requires that the state compromise to some extent its interest in fiscal savings and administrative convenience, it does not, the Court decided, justify full-scale criminal proceedings.

This Note argues that the Court improperly struck the balance between the parolee’s interests and the state’s. Greater procedural safeguards are required because liberty is at stake and because of the serious consequences of revoking parole. What is needed, then, are procedures intermediate between *Morrissey* and the criminal-trial model. Such a model would retain the flexibility to allow thorough review by the decision-maker of all pertinent evidence. It would allow the individual to remain silent without risking adverse inferences. It would assure the parolee adequate assistance in preparing and presenting a defense. And most important, it would recognize an adverse decision’s devastating impact on the parolee by requiring that the trier of fact be convinced beyond a reasonable doubt of the parolee’s guilt. Such a model is provided by the procedures of juvenile-delinquency hearings.

III. THE JUVENILE-DELINQUENCY MODEL OF PROCEDURAL SAFEGUARDS

The situations of the juvenile and the parolee in their respective hearings are sufficiently analogous that the juvenile and the parolee should receive the same degree of procedural protection. Some of the features of the analogy are readily apparent. Both the juvenile-delinquency hearing and the parole-revocation proceeding historically were regarded as exercises of administrative discretion to which due process did not apply.¹⁰¹ Even today, neither proceeding is considered a criminal prosecution, and some criminal-procedure safeguards are inapplicable.¹⁰² Yet despite these similarities, the Court guaranteed juveniles rights parolees do not have: the privilege against self-incrimination, the right to counsel, and the protection of the reasonable-doubt standard.

As the groundwork for a criticism of the Court’s failure to employ the analogy, this Part details the development of juvenile procedures. The Part argues that the Court granted greater rights to juveniles than to parolees because it thought the delinquency hearing more closely resembles a criminal trial than a welfare

---

¹⁰¹ See *In re Gault*, 387 U.S. 1, 15 (1967).
termination. That distinction arose from the Court's assumption that the parolee's interest is different from and less important than the juvenile's.

In re Gault\(^{103}\) established that due process is constitutionally required in juvenile-delinquency proceedings. Gault was accused of making an obscene telephone call to a neighbor, an offense that was a misdemeanor when committed by an adult.\(^{104}\) Two hearings were conducted within a week of the arrest. Although Gault and his parents were permitted to attend, no other procedural safeguards were provided.\(^{105}\) Gault, then fifteen, was adjudged a delinquent child and committed to a juvenile training school until the age of twenty-one. Arizona law permitted no appeal from that decision,\(^{106}\) and the state courts denied his petition for a writ of habeas corpus.\(^{107}\) Upon appeal, the Supreme Court reversed, holding that the hearing's procedural safeguards had been inadequate to secure fourteenth amendment due process.\(^{108}\)

The Court first reviewed the development of the delinquency proceeding as an alternative to punishing juveniles in appalling adult corrections systems.\(^{109}\) Arizona had made the traditional argument that juvenile proceedings are essentially administrative hearings in which the state acts as parenthood and is inter-

\(^{103}\) 387 U.S. 1 (1967).
\(^{104}\) Under the former Arizona Juvenile Code, 1941 Ariz. Sess. Laws ch. 80, § 2 (repealed 1970), a delinquent child was defined as a child who had committed an act which constituted an offense against any law of the state or an ordinance or regulation of a political subdivision thereof.
\(^{105}\) No sworn testimony was taken at either proceeding, and the evidence of Gault's delinquency came entirely from statements of the arresting officer. The delinquency petition was not made available to Gault or his family until the habeas corpus proceeding over two months later. At neither proceeding was the complainant present, and in fact she was interviewed only once, by telephone, when the complaint was received. No transcript was made of either proceeding, and the events of the hearings emerged only from testimony at the habeas corpus proceeding. 387 U.S. at 4-8.
\(^{106}\) 387 U.S. at 8.
\(^{107}\) In re Gault, 99 Ariz. 181, 407 P.2d 760 (1965). The initial denial of the writ was unreported.
\(^{108}\) In re Gault, 387 U.S. 1 (1967).
\(^{109}\) 387 U.S. at 15.
\(^{110}\) The Latin phrase \[has\] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child.

In re Gault, 387 U.S. 1, 16 (1967). As applied to the juvenile proceeding, the phrase was apparently intended to mean that when the state sought an adjudication of delinquency and appropriate "remedial" sanctions, it acted in the interest of the child rather than as its adversary. Since the hearing was not an adversary proceeding, due process was thought unnecessary.
ested in treatment and rehabilitation rather than punishment.\textsuperscript{111} But since the state’s interest, however great, does not justify a total denial of due process if the individual’s interest is within the “liberty or property” language of the due process clause, the Court rejected the \textit{parens patriae} argument as a rational basis for denial of due process protection.\textsuperscript{112}

The Court then analyzed the differences between criminal and juvenile proceedings involving the same conduct.\textsuperscript{113} It noted that Gault’s offense, if committed by an adult, would have been a misdemeanor punishable by no more than two months’ confinement. Gault’s sentence was six years. An adult faced with a potential sentence of that length would have had the full range of criminal-procedure safeguards. Gault had not even been permitted counsel. Said the Court, “So wide a gulf between the State’s treatment of the adult and of the child requires a bridge sturdier

\textsuperscript{111} The state’s role in parole-revocation proceedings has also been characterized as that of \textit{parens patriae}: “In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege.” Hyser v. Reed, 318 F.2d 225, 227 (D.C. Cir.), \textit{cert. denied}, 357 U.S. 957 (1958).

\textsuperscript{112} 387 U.S. at 30.

\textsuperscript{113} Whether any procedural protections are due depends on the extent to which an individual will be “condemned to suffer grievous loss.” . . . The question is not merely the “weight” of the individual’s interest, but whether it is one within the contemplation of the “liberty or property” language of the Fourteenth Amendment. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). If the individual’s interest meets these tests, due process applies. The state’s interest is relevant only in determining what procedures are required. 408 U.S. at 481.

387 U.S. at 29.
than mere verbiage, and reasons more persuasive than mere cliché can provide.\footnote{114}

The Court therefore held that when the state seeks an adjudication of delinquency, it must provide these procedural safeguards: notice of charges; the right to counsel, either retained or appointed; the privilege against self-incrimination; and the right to confront and cross-examine adverse witnesses.\footnote{115}

Three years later, in \textit{In re Winship},\footnote{116} the Court required proof of guilt beyond a reasonable doubt in juvenile-delinquency proceedings. Winship had been accused of theft.\footnote{117} He had had the procedural safeguards mandated by \textit{Gault} but was found guilty because state law required proof by only a preponderance of the evidence.\footnote{118} The juvenile judge said that the evidence had not persuaded him beyond a reasonable doubt of Winship's guilt but that the state had satisfied the lesser burden of proof. Winship was therefore adjudged a juvenile delinquent.\footnote{119} The New York Court of Appeals rejected his argument that the preponderance-of-the-evidence standard denied him due process,\footnote{120} but, on appeal, the Supreme Court reversed.

The New York courts had held that, because the juvenile proceeding was civil rather than criminal\footnote{121} and was designed to save the child rather than to punish him,\footnote{122} the reasonable-doubt standard was inappropriate.\footnote{123} Quoting \textit{Gault}, the Court contorted that reasoning:

\begin{quote}
We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."\footnote{124}
\end{quote}

\begin{footnotes}
\item[114] 387 U.S. at 29-30.
\item[115] 387 U.S. at 31-57.
\item[117] N.Y. FAM. CT. ACT § 712 (McKinney 1954) defined a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." Winship, then 12, was found guilty of having entered a locker and taken $112 from a woman's purse. His initial sentence of 18 months in the juvenile detention center was subject to annual renewal until he reached the age of 18. 397 U.S. at 360.
\item[118] N.Y. FAM. CT. ACT. § 744(b) (McKinney 1954).
\item[119] 397 U.S. at 360.
\item[121] 24 N.Y.2d at 197, 247 N.E.2d at 254, 299 N.Y.S.2d at 415.
\item[122] 24 N.Y.2d at 203, 247 N.E.2d at 257, 299 N.Y.S.2d at 420.
\item[123] 24 N.Y.2d at 203, 247 N.E.2d at 257, 299 N.Y.S.2d at 420.
\item[124] 397 U.S. at 365-66 (quoting \textit{In re Gault}, 387 U.S. 1, 36 (1967)).
\end{footnotes}
The Court also rejected the state's argument that requiring proof beyond a reasonable doubt might destroy many of the beneficial aspects of the juvenile proceeding: 125

Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the fact finding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing. 126

The Court then evaluated the reasonable-doubt standard in terms of the possibility of an erroneous finding of guilt. The Court's concern was with those cases such as Winship in which there was some doubt as to the guilt of the accused. As Justice Harlan's concurring opinion stated, the outcome of those marginal cases, in which there is a manifest potential for error, must reflect society's decision whether to err in favor of freeing the guilty or of convicting the innocent:

[T]he trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each. 127

The policy reflected by requiring the reasonable-doubt stan-

---

125. For example, under New York law, an adjudication of delinquency does not constitute conviction of a crime and therefore does not deprive the juvenile of his civil rights. In re Winship, 397 U.S. 358, 365 (1970).
127. 397 U.S. at 370-71.
standard in juvenile proceedings grew out of the analogy with criminal proceedings.

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.\textsuperscript{128}

The Court implicitly recognized that the disutility of convicting an innocent juvenile, of depriving him of liberty and stigmatizing him, is greater than the disutility of freeing a guilty youth.\textsuperscript{129} Therefore, it held that the reasonable-doubt standard is constitutionally required.\textsuperscript{130}

Thus, in \textit{Winship} the Court implicitly recognized that whether the reasonable-doubt standard must be used depends not upon the form of the proceeding but upon the desirability in the particular case of avoiding erroneous adjudications of guilt. It seems clear that the more closely the individual's interest approximates the "transcending value" of the liberty of a criminal defendant, the greater is the desirability of avoiding error.\textsuperscript{131} At some point, the Constitution demands that level of certitude with which it protects the criminal defendant: proof beyond a reasonable doubt.

\textit{Gault} and \textit{Winship} established the core\textsuperscript{132} of the juvenile model of procedure. In addition to the rights they share with parolees and welfare recipients—the rights to receive advance notice of charges, to be heard, to present rebuttal evidence, and to confront and cross-examine adverse witnesses—juveniles have the rights to retained or appointed counsel, the privilege against self-incrimination, and the reasonable-doubt standard.

\begin{flushright}
\textsuperscript{129} 397 U.S. at 367.
\textsuperscript{130} "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.
\textsuperscript{131} One might, of course, argue that, whatever the value of an individual's interest, the state may have interests which override any interest of the individual and justify the preponderance-of-the-evidence standard. The Court's language, however, considered only the interest of the individual and so does not seem susceptible to such an interpretation. \textit{See} text at note 128 supra.
\textsuperscript{132} Juveniles also may claim protection against double jeopardy. \textit{See} note 134 infra.
\end{flushright}
The Court provided these additional rights because the juvenile’s liberty is at stake in a delinquency hearing. Because liberty, not property, is at stake, due process requires a higher level of protection from arbitrary decisions than the Goldberg procedures alone secure. While “the juvenile court proceeding has not yet been held to be a ‘criminal prosecution’ within the meaning and reach of the Sixth Amendment,” the Court plainly thought that the potential for depriving the juvenile of his liberty makes the delinquency hearing comparable in seriousness to a criminal trial.

By contrast, the Court has viewed the parolee’s liberty as a sort of statutory entitlement not achieving the magnitude of a true liberty interest. The Court has therefore assumed the parolee is not entitled to all the procedural safeguards afforded the juvenile: “A juvenile charged with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection.”

IV. THE LIBERTY INTERESTS OF THE PAROLEE AND THE JUVENILE

This Part criticizes the Court’s assumption that the juvenile’s liberty is different from and more important than the parolee’s. First, the Part analyzes and rejects possible distinctions.

133. However laudable its purposes, “commitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called ‘criminal’ or ‘civil.’” In re Gault, 387 U.S. 1, 50 (1967). See In re Winship, 397 U.S. 358, 365-66 (1970).

134. McKeiver v. Pennsylvania, 403 U.S. 528, 540 (1971). In McKeiver, the Court refused to extend the right to jury trial to juvenile proceedings. But the distinction between criminal and juvenile proceedings was narrowed in Breed v. Jones, 421 U.S. 519 (1975), where the Court held that the fifth amendment’s double jeopardy clause precludes a second proceeding based on the same charge following a juvenile proceeding. It had been commonly accepted that since a juvenile proceeding was neither criminal nor punitive, a subsequent proceeding in which the juvenile was prosecuted as an adult was not barred.

The holding in Breed, 421 U.S. at 529, implicitly rejected the logic of cases such as In re McDonald, 153 A.2d 651, 655 (D.C. 1959), which had stated:

Innocence or guilt are not in issue, but an adjudication of the child's status is. Retribution and punishment are not its purposes, but protection and rehabilitation of the child are. And if the detriments and stigma of a criminal trial do not attach to the juvenile before this court, then it follows that neither does he have the right to be tried as a criminal.

The Breed holding suggests that the distinction between juvenile and criminal proceedings is being eroded. While that distinction is still viable for some purposes, witness McKeiver, the Court is apparently taking a hard look at the procedural disparities and striking down those unrelated to the purposes of juvenile hearings.


136. See text following note 84 supra.

between the liberty interests of the parolee and the juvenile. Finding those interests constitutionally indistinguishable, it proposes that the privilege against self-incrimination, the right to counsel, and the reasonable-doubt standard be extended to parole revocation. The Part concludes by examining the effect of those changes on parole-revocation proceedings and arguing that the changes would not significantly undermine any state interest.

The Court's assumption that the juvenile is differently situated from, and entitled to a greater degree of protection than, the parolee suggests that the Court thinks the juvenile's interest is somehow different from, and more important than, the parolee's. But as will be seen, the interests are, for constitutional purposes, indistinguishable.

First, the parolee's interest, like the juvenile's, is liberty rather than property. Justice Douglas, dissenting in part in Morrissey, likened the grant of parole to a deed and the resultant liberty to a property interest. But that argument overlooks the important point that when the state grants parole, it simply removes the restrictions imposed by imprisonment. The parolee becomes free to act in any way not prohibited by the law or his parole conditions. That freedom to act is not, however, created by the grant of parole, but is restored by it. Such freedom was liberty before his incarceration, and it is liberty after he is released on parole. That the state need not have removed the restrictions and may reinstitute them if the parolee violates parole conditions does not change the nature of the parolee's interest. As the Court observed in Morrissey, that interest "includes

139. This notion of "natural liberty" was well stated by Justice Stevens in his dissent in Meachum v. Fano, 427 U.S. 215, 230 (1976), in which the Court held that the fourteenth amendment's due process clause does not entitle a state prison inmate to a fact-finding hearing prior to being transferred to a state prison whose conditions are substantially less favorable to him. In rejecting the majority's argument that liberty interests originate either in the Constitution or in state law, Justice Stevens said:

If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.
many of the core values of unqualified liberty." Thus, in parole revocation, as in delinquency hearings, the interest at stake is liberty.

Yet, it might be argued, the parolee’s liberty is different from the juvenile’s because it is conditioned upon his observance of parole conditions. Parole conditions do limit the parolee’s liberty. But the state also limits the juvenile’s liberty by laws not applicable to adults. For example, children generally may not purchase intoxicants, operate motor vehicles, or stay home from school. Juveniles who repeatedly violate such restrictions may be institutionalized. In this significant sense, the juvenile’s liberty, like the parolee’s liberty, is conditional.

Furthermore, the effect of an erroneous decision on a parolee is not less than the effect of an erroneous decision on a juvenile. Parole permits the individual to hold a job, to be with family and friends, to build a normal life—in short, to begin to regulate his own activities. If the parolee abides by the conditions of his parole, he is entitled to retain this freedom. A mistaken finding that he violated parole deprives him of this liberty, a consequence as serious, a disaster as painful:

140. 408 U.S. at 482.
141. See, e.g., Ariz. Rev. Stat. § 8-201-8 (1974), defining a delinquent act to include “any act that would constitute a public offense which could only be committed by a child or by a minor”; § 8-201-9 defining a delinquent child as “a child who is adjudicated to have committed a delinquent act”; § 8-241-(A)(2)(e) permitting the juvenile court to remand a delinquent child “[t]o the department of corrections.”
142. Parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.
144. “Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that revocation of parole is for the parolee.” Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974).

In Wolff, the Court recognized that a state prison inmate’s “interest [in retaining “good time” credits] has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state-created right is not arbitrarily abrogated,” 418 U.S. at 557. While the Court noted that the prisoner’s interest is not as significantly affected by deprivation of “good time” as is the parolee’s by revocation, 418 U.S. at 561, it nevertheless found such deprivation to be “a matter of considerable importance.” But the major factor which rendered the Morrissey procedures partially inapplicable was “the very different stake the State has in the structure and
Of course, it might be argued that, while an adjudication of delinquency deprives the juvenile of future unqualified liberty, parole revocation merely substitutes imprisonment for parole, i.e., for only qualified liberty. But if his parole is revoked for a criminal violation, the federal parolee loses credit for time spent on parole. This, by extending the period in which his liberty is

---

146. Michigan Law Review [Vol. 77:120

content of the prison disciplinary hearing." 418 U.S. at 561. Noting that "[p]rison disciplinary hearings . . . take place in a closed, tightly controlled environment[,]" 418 U.S. at 561, and that "imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them," 418 U.S. at 562, the Court held that the rights of confrontation and cross-examination, 418 U.S. at 567-68, and the right to counsel, 418 U.S. at 570, did not apply. Nevertheless, the mere recognition that even a prison inmate has a protectable liberty interest emphasizes the much greater interest of the parolee in retaining his liberty.

145. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972). The denial of credit for time spent on parole or "street time" dates from the original statute, An Act To parole United States prisoners, ch. 387, § 6, 36 Stat. 820 (1910): "If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

This was subsequently combined with other provisions for arrest of the parole violator:

A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.


Under the Federal Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976), the provision for denial of credit for street time is not quite so explicit. Section 4210(b)(2) provides that in the case of a parolee who has been convicted of a subsequent crime, "the Commission shall determine . . . whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense." According to the legislative history of the Act, H.R. Rep. No. 94-838, 94th Cong., 2d Sess. 32 (1976).

This subsection also provides that an individual whose parole has been revoked upon conviction of any new criminal offense . . . shall receive no credit for service of his sentence from the day he is released on parole until he either returns to Federal custody following completion of any sentence of incarceration or upon the Commission determining that the sentence run concurrently with any new sentence that may have been imposed.

In other words, a conviction resulting in revocation requires a loss of street time, but the Commission may make the unexpired portion run concurrently with any new sentence.

In the case of the parolee charged with but not convicted of a criminal violation, the Commission must conduct both of the hearings required by 18 U.S.C. § 4214(a). But a finding of a violation by a preponderance of the evidence may result in revocation here as well as in the case of the parolee who has been convicted. While the Commission must consider the fact or absence of a criminal conviction in deciding whether to revoke parole, 18 U.S.C. § 4214(d), no conviction is required for revocation.

No explicit provision is made for loss of street time by parolees not convicted in a
restricted, has the effect of extending his sentence and constitutes a new penalty rather than a carrying out of an old one. Furthermore, since the length of the extension depends on the amount of time spent on parole rather than on the violation charged, the penalty imposed by revocation may be far more severe than the statutory maximum under the criminal law.\textsuperscript{146} In a real sense, then, a parole-revocation proceeding is comparable in seriousness to a delinquency hearing.\textsuperscript{147}

\begin{itemize}
\item Criminal prosecution, but the absence thereof was probably an oversight, since that sanction was retained in the case of the convicted parolee and since no language in either the Act or the legislative history declares an intent to effect any change from the old act. Contrast this with the presence of language in the legislative history, H.R. Rep. No. 94-838, at 32, to the effect that a parolee who is reincarcerated for a violation other than "commission" of a crime retains credit for street time. If Congress had desired to allow credit for street time when parole was revoked on the basis of an unproved criminal charge, this intention could similarly have been affirmatively indicated in the act or the legislative history.

In short, while Congress did not explicitly provide for the denial of credit for street time, Congress has shown no intention to change its earlier policy, except in the case of technical violations, where the change is explicit. Thus it may be inferred that parole revocation based upon a criminal charge must result in loss of credit for street time unless the Commission chooses to allow the sentence to run concurrently with any sentence imposed for the crime committed while on parole.


\item For example, assume that a parolee has spent eight years on parole when his parole is revoked for a crime punishable under the criminal law by no more than three years' imprisonment. Because he receives no credit for time spent on parole, the parolee's sentence is extended by eight years, five more than could be imposed in a new criminal prosecution on the same charge. Cf. Murray v. Page, 429 F.2d 1359 (10th Cir. 1970) (parole summarily revoked after eight years).

\item It might be argued that juvenile-procedure safeguards are simply a response to the possibility that the proceeding will stigmatize the juvenile, and it is true that, while a parolee has already been convicted of a crime, a delinquent may have had no prior trouble with the law. Nevertheless, a significant proportion of persons who come before the juvenile court may be termed recidivists who have already been stigmatized. See, e.g., Report of the President's Comm. on Crime in the District of Columbia 773 (1966) (cited in In re Gault, 387 U.S. 1, 22 (1967)) (in fiscal 1965, 61% of persons referred to the Juvenile Receiving Home had been previously referred, and 42% had been referred at least twice before).

Moreover, a parolee whose parole is revoked is equally stigmatized. First and most important, the revocation reflects a finding that the parolee has violated his parole, often by committing a crime. That this finding is supported by a mere preponderance of the evidence is irrelevant—the stigma inherent in an adjudication of delinquency was one of the factors that motivated the Winship court to require the reasonable-doubt standard, 397 U.S. at 387. Second, the fact of and reasons for the revocation become a part of the parolee's record and are considered in deciding whether parole should be granted when the individual again becomes eligible, 18 U.S.C. § 4207(2)(1970), as well as in future sentencing decisions, 18 U.S.C. § 4205(d)(1970). (Compare In re Winship, 397 U.S. 368, 367-67(1970), where the Court found that stigma inhered in adjudication of delinquency despite the fact that New York law provided that such adjudication did not constitute a criminal conviction, did not deprive the juvenile of his civil rights, and was kept confidential). Thus, the potential for stigmatization does not distinguish juvenile hearings from parole-revocation proceedings.
\end{itemize}
If neither the nature and conditions of the parolee's liberty nor the consequences of its termination distinguishes the parolee's interest from the juvenile's, what distinction between those interests might explain the disparity in procedural rights? The distinction most readers are likely to perceive—and, this Note suggests, the one which influenced the Court—is that, while the juvenile's liberty is his birthright, the parolee's is the product of his release on parole. Or, to describe the distinction differently, since the state could simply have kept the parolee in prison, his liberty is merely a privilege not entitled to the same protection as that of the juvenile.

While it is intuitively appealing, however, this argument simply reiterates the right-privilege distinction, a tautology which the Court has rejected. While it might have done, the state did grant parole. The question is what due process requires when the state seeks to revoke that grant. To characterize the parolee's liberty as a "privilege" is merely to assert that the state will not protect it to the same extent that it protects a "right." If, for example, the parolee could not be deprived of his liberty unless a violation were proved beyond a reasonable doubt in a proceeding which afforded a full array of safeguards, that liberty, once granted, would be a "right" as surely as is the liberty of the juvenile. "Right" and "privilege" are thus conclusory labels, and the right-privilege distinction states only a tautology: Because the state does not protect the parolee's liberty to the same extent that it protects that of the juvenile, the parolee's liberty is a privilege; because it is a privilege, that liberty is not entitled to the same degree of protection as the liberty of the juvenile.

148. See text at note 63 supra.

149. It is by no means clear that the corrections system could survive in its present form if the state did not grant parole in a large number of cases. See note 176 infra.

150. It might be argued that since the state need not grant parole, it can condition the grant on the waiver of the parolee's right to demand due process in revocation. Similar arguments were advanced prior to the [*Morrisey*](#) decision. See note 20 supra (contract theory). The fundamental problem with the argument is that it would permit the conditioning of the grant on the waiver of constitutional rights, a result prohibited by the Court's decisions:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.


151. See Van Alstine, supra note 45, at 1460. The right-privilege distinction was first
that of the juvenile on the basis of this rationale is to hang an intuitive result on an illusory peg.

To summarize, the liberty interests of the parolee and juvenile are, for constitutional purposes, indistinguishable. The natures of those interests are the same; both are conditional; the consequences of deprivation are equally onerous; and characterizations as "rights" or "privileges" reflect, rather than determine, due process.

Enunciated by Justice Holmes, who was writing for the Supreme Judicial Court of Massachusetts in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). In that case the court denied relief to a policeman who had been discharged for violation of a regulation which restricted his political activity. Holmes dismissed the first amendment argument: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Professor Van Alstyne, in the seminal article on the right-privilege distinction, demonstrated that Holmes' epigram, and, in effect, the right-privilege distinction itself, stated a mere truism.

Holmes himself readily admitted that to deny that a person had a "right" to something was merely to announce the conclusion that a court would not give any relief; but the denial itself provides no reason why such relief should be denied.

The impact of the McAuliffe epigram on succeeding generations of courts has been a dual one. As used by Holmes it represents the inference that because public employment is not protected, retention of that privilege may be conditioned on the giving up of first amendment rights. This non sequitur has been exposed and rejected by the courts applying the unconstitutional conditions doctrine. The more invidious impact of the epigram, however, has been its use to supply a reason why public status is not protected in the first place — because such status is a privilege rather than a right. But as Holmes' own analysis shows, the epigram on this point yields no reason at all. If we take it as stating a reason, contrary to Holmes' intention, it becomes a perfectly circular argument.

Van Alstyne, supra note 45, at 1459-60 (footnotes omitted).

The right-privilege analysis wrongly presupposes a difference in the extent to which the parolee and juvenile are entitled to be free of arbitrary governmental action. The problem was most acute in the pre-Morrissey days, when it was commonly thought that revocation of parole was a matter entirely within the discretion of the parole board. The distinction between the situation of the juvenile and that of the parolee was thought to be that the juvenile had a right to be free from arbitrary governmental action to curtail his liberty, while the parolee did not. But there is no such independent right.

"Due process is not itself a protected entitlement. Rather, the sole protected interests are "life, liberty, [and] property." Due process stands in relation to these not as an equivalent constitutionally established entitlement, but only as a condition to be observed insofar as the state may move to imperil one of the named substantive interests.

Van Alstyne, supra note 32, at 462. The juvenile's due process rights derive from the fact that his liberty is imperiled. The recognition that the parolee's interest is also liberty led the Court in Morrissey to provide due process protection in parole revocation.

Yet the Court has not completely divested itself of the remnants of the old distinction. The Court determined the content of due process in the parole-revocation proceeding by the untested assumption that the juvenile is entitled to a higher degree of protection. But the Court's assumption depends upon the very due process protection it purports to determine and is, for this reason, entirely circular.
Because the liberty interest of the parolee is like that of the juvenile and unlike that of the welfare recipient, the juvenile model of procedural safeguards is the appropriate one for parole revocation. The rights to receive advance notification of charges, to appear and present evidence, to confront and cross-examine adverse witnesses, and to receive a written explanation of the decision are secured, of course, in the *Goldberg* model as well as the juvenile model. But the additional rights afforded by the juvenile model—the privilege against self-incrimination, representation by counsel, and the requirement of proof beyond a reasonable doubt—are necessary to protect adequately the parolee's liberty interest.

Yet three factors determine the content of due process in any given situation:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.152

This Note has shown that the individual's interest—liberty—is as important in parole revocations as in delinquency hearings153 and that the risk of erroneously depriving the parolee of liberty is too high under *Morrissey*.154 We must, therefore, consider the probable value of the proposed additional rights and their effect upon the state's interests.

The state's interests are by no means uniformly opposed to enhanced due process rights for parolees. On one hand, the state is interested in returning parole violators to prison promptly and without the expense or burden of a new adversary criminal proceeding.155 To this might be added a state interest in deterring antisocial conduct by minimizing procedural safeguards so that any errors in fact-finding cause parole to be revoked rather than continued. On the other hand, the state is interested in continuing parole if the parolee has not, in fact, violated any restrictions:

---

153. See text at notes 138-51 *supra*.
154. See text at notes 90-100 *supra*.
an erroneous revocation is an expensive mistake\textsuperscript{156} which may embitter the parolee and decrease the chance that he will be rehabilitated.\textsuperscript{157} This interest in continuing parole favors adding procedural safeguards to increase the accuracy of fact-finding and markedly weakens the state's contrary interest in reducing those safeguards. Applying the juvenile model of due process to parole revocation is fully consistent with the state's interest in accuracy, and doing so would not significantly interfere with its contrary interests in keeping proceedings simple and in returning actual violators to prison. All this being so, the societal value of each of the proposed safeguards outweighs any net detriment to the state of that safeguard, as the following paragraphs show.

First, the privilege against self-incrimination would be an important addition to a parolee's rights. The privilege would assure that confessions or admissions are trustworthy and not the product of fear, coercion, or the parolee's belief that the alternatives associated with silence are worse.\textsuperscript{158} Further, it would preclude the sub rosa shifting of the burden of proof to the parolee: his failure to testify could not become the basis for adverse inferences. Finally, the privilege would allow a parolee charged with a crime to receive fair treatment at the revocation hearing without having to reveal the defenses he will assert at his trial.\textsuperscript{159}

Neither would the self-incrimination privilege cripple the state's interests. The enhanced trustworthiness of confessions would further the state's interest in accuracy. Moreover, it would cost the state nothing to allow the parolee to remain silent. Nor would the privilege complicate the proceeding: indeed, the ab-

\textsuperscript{156} See note 176 infra.

\textsuperscript{157} Morrissey v. Brewer, 408 U.S. 471, 484 (1972):
The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

\textsuperscript{158} In re Gault, 387 U.S. 1, 47 (1967).

\textsuperscript{159} See Note, Revocation of Conditional Liberty, 74 Mich. L. Rev. 525, 536-37 (1976). The possibility of a criminal prosecution should itself justify providing the privilege to parolees: "The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . and it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." Murphy v. Waterfront Commn., 378 U.S. 52, 94 (1964) (White, J., concurring).
sence of the parolee’s testimony might speed its conclusion. The only interest that would be compromised by the availability of the privilege is the state’s interest in erring on the side of revocation. That interest, this Note asserts, is simply outweighed by the many interests favoring the privilege.

Second, the value of the right to counsel is well known. Representation by counsel would improve the development and presentation of possible defenses. Unlike the jailed parolee, a lawyer would have the mobility to acquire information and the skill to present it effectively. Furthermore, representation by counsel would make meaningful the parolee’s right to test the credibility of adverse witnesses through cross-examination.

The right to counsel is consistent with the state’s interest in reaching a correct decision. And, while the right could make the revocation proceeding somewhat more expensive and complicated, the Court has recognized that, in at least some revocation proceedings, the state’s interest in saving time and money is simply outweighed by the need for counsel. Thus, the Court held in *Gagnon v. Scarpelli* 160 that an indigent parolee who asserts a colorable claim of innocence is entitled to appointed counsel. 161 The Court found that “the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.” 162 The Court acknowledged that requiring appointed counsel would impose additional costs and prolong the proceeding. 163 But it held that when the effectiveness of the *Morrissey* rights depends upon skills which the parolee lacks, the state’s interest in efficiency must yield to the interest of the parolee and to the state’s interest in correct decisions. 164

This “colorable claim” standard, however, depends upon the Parole Commission’s assessment of the merits of the parolee’s defense, merits which are presented without the assistance of counsel. In such cases, the right to counsel depends on the assistance of counsel. For perhaps that reason, Congress has created a statutory right to retained or appointed counsel in federal parole-revocation proceedings; 165 Congress believed that the govern-

---

160. 411 U.S. 778 (1973); see note 77 supra.
161. 411 U.S. at 787.
162. 411 U.S. at 787.
163. 411 U.S. at 788.
164. 411 U.S. at 786-88.
ment’s interest in saving time and money is outweighed by the interest of all parties in a correct result. The interests favoring a correct result are, of course, equally strong in state revocation proceedings, and therefore constitutional underpinnings for the federal statutory right are needed to eliminate the chicken-and-egg “colorable claim” standard which now allocates the right in state revocation proceedings.

Third, the reasonable-doubt standard would reduce the margin of error in acknowledgement of the transcendent value of the interest at stake, the parolee’s liberty. Moreover, because of factors peculiar to the parolee’s situation, the state’s interest in reincarcerating actual parole violators would be adequately served by a reasonable-doubt standard. First, the parolee is subject to many specific restrictions, violations of which are objectively demonstrable without regard to his intent. Proof of parole violation is correspondingly simplified. Second, because the parolee’s conduct is monitored by his parole officer, evidence of violations is more easily discovered than evidence of a crime. For example, parole conditions may require that the parolee permit his parole officer to visit his home at any reasonable hour. Furthermore, search warrants are probably more freely issued in the case of a parolee than an ordinary citizen. Third, the hearing’s flexible procedure admits evidence such as letters, affidavits, and other material which would not be admissible in a criminal

166. See text at note 128 supra.

167. Virtually all parole conditions, except the condition which prohibits criminal violations, are prohibitions of specific acts such as consuming alcoholic beverages, driving an automobile without permission, or leaving the jurisdiction. See Jones v. Cunningham, 371 U.S. 236, 242 (1963). By contrast, intent, or mens rea, is a necessary element of most crimes, see, e.g., Morissette v. United States, 342 U.S. 246 (1952), and creates problems of proof whenever the defendant claims that the act was accidental.

There are, however, limits to the state’s ability to impose strict liability for parole violations. For example, in Arciniega v. Freeman, 404 U.S. 4 (1971), the Court held that unauthorized contacts with other ex-convicts were insufficient to justify parole revocation, since those contacts had been with other employees in the course of employment. Cf. United States v. Taylor, 321 F.2d 339 (4th Cir. 1963) (revocation may not be based upon nonpayment of a fine where the probationer pleads pauperism, since this would defeat congressional intent to allow release on the pauper’s oath, 18 U.S.C. §§ 3569, 3651 (1976), of federal prisoners imprisoned for failure to pay fines).

But in most cases, parole may be revoked if the parolee is shown to have committed an act prohibited by his parole conditions. 18 U.S.C. § 4214(d) (1976). See Morrissey v. Brewer, 408 U.S. 471, 495 (1972) (Douglas, J., dissenting in part).


170. “Other material” has, in some cases, included evidence obtained through illegal search and seizure. See, e.g., United States v. Hill, 447 F.2d 817 (7th Cir. 1971); United States ex rel. Sperling v. Fitzpatrick, 428 F.2d 1161 (2d Cir. 1970); People v. Dowery, 20
Fourth, the revocation proceeding is conducted by the Parole Commission, the members of which are experienced fact-finders who are less likely than a jury to be swayed by advocacy or pangs of sympathy for a parolee. The reasonable-doubt standard would not alter the informality, flexibility, or speed of the hearing which finds facts. It would simply require that the trier of fact be more confident that the parolee did the act with which he is charged.

V. CONCLUSION

In sum, the juvenile model of due process is the appropriate one for parole-revocation proceedings. The parolee's liberty interest is constitutionally indistinguishable from and equal in importance to the juvenile's. Moreover, no interest of the state is so significant that it justifies denying such safeguards to parolees. The juvenile model would not make the revocation proceeding significantly more difficult or expensive to administer, and any resulting problems of proof would be offset by the peculiar advantages the state would continue to have in parole-revocation proceedings.
At present, the risk of erroneously depriving the parolee of his liberty is intolerably high. The procedural safeguards now available were designed to protect the less significant property interest of the welfare recipient. The interest at stake is simply too important to allow mere administrative convenience or outmoded notions of rights and privileges to justify arbitrary decisions. Nothing less than the juvenile model of procedural safeguards, including the privilege against self-incrimination, the right to counsel, and the reasonable-doubt standard, can afford protection commensurate with the transcendent value of the parolee's liberty. Due process demands no less.177

framework of the law and his parole conditions, Morrissey v. Brewer, 408 U.S. 471, 478 (1972); opportunities for self-regulation are, of necessity, lacking in prison. Furthermore, "for at least some prisoners, parole is considered a more effective form of custody than physical incarceration, more likely to achieve society's goal of treatment of the prisoner to prevent future crimes." Bates v. Rivers, 323 F.2d 311, 315 (D.C. Cir. 1963) (Wright, J., dissenting). It might thus be better in the long run to allow some parole violators to go free than to eliminate the system totally. But while the possibility that adopting the juvenile model might endanger the system cannot be discounted entirely, that possibility cannot be permitted to overcome the demand of the Constitution that the parolee's liberty be adequately protected.

177. Because the reasonable-doubt standard should be extended to parole-revocation hearings, a parolee who faces revocation in consequence of an alleged criminal violation would receive not only the protection of the greater degree of certitude demanded of the trier of fact but of collateral estoppel as well. Standlee, thus, would have been acquitted of violating his parole, since he had been found not guilty in the criminal prosecution. See text at notes 2-3 supra. That result follows from the holding in Ashe v. Swenson, 397 U.S. 436 (1970), that collateral estoppel inheres in the fifth amendment's double jeopardy guarantee: "Whatever else that constitutional guarantee may embrace . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 446 (quoting Green v. United States, 355 U.S. 187, 190 (1957)).