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Constitutional Law - Due Process - Parolee's Right under the Due Process Clause of the Fourteenth Amendment to an Opportunity to Be Heard Prior to Revoking His Parole

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of 1343(3) jurisdiction. Therefore, it seems the Court did in fact fail to properly support its blanket statement that it had "never" invoked a personal-property distinction.

The *Lynch* decision is perhaps erroneous in the underlying considerations of the formulation of the *Hague* distinction. The Court was perhaps presumptuous in distinguishing Household Finance's precedent as to a personal-property distinction. But, given the general policy, seemingly pursued by the Court, on an expanded federal forum for an expanded segment of the populus in the area of civil rights, *Lynch* is indeed understandable.

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CONSTITUTIONAL LAW—DUE PROCESS—PAROLEE'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO AN OPPORTUNITY TO BE HEARD PRIOR TO REVOKING HIS PAROLE—The United States Supreme Court has held that a parolee's liberty involves significant values within the protection of the due process clause of the fourteenth amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation.

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

Petitioners Morrissey and Booher were each convicted of forgery and sentenced to a term in an Iowa penitentiary. Over a year later each was released on parole. Approximately six months after their release, at their parole officers' discretion, each was arrested for parole violations and confined in a local jail. At the end of the following week, solely on the basis of a written report by their parole officers, the Iowa Board of Parole revoked their parole and the petitioners were returned to the penitentiary. At no time during any of the proceedings which led to the parole revocations were the petitioners granted any type of hearing.

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The district court held

on the basis of controlling authority that the state's failure to accord a hearing prior to parole revocation was not a violation of due process.[1] Their appeals were consolidated in the court of appeals which in each case affirmed the decision of the district court by a four to three vote holding that due process did not require a hearing.[2]

The United States Supreme Court granted certiorari to resolve the question whether the due process clause of the fourteenth amendment requires that a state afford an individual some opportunity to be heard prior to revoking his parole.[3]

Chief Justice Burger, speaking for the majority, began with the proposition that because parole arises after the end of the criminal prosecution, including imposition of sentence, the *full* panoply of rights due a defendant in such a proceeding does not apply to parole revocations.[4] Stating this, the Court turned to the question of what requirements of due process, if any, do in fact apply to parole revocations. In deciding this question the Court examined the nature of the interest of the parolee in his continued liberty, as well as the interest of the state and society in parole revocation.

In discussing the nature of the interest of the parolee the Court stated that it rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or a "privilege."[5] Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss,"[6] and whether the nature of the interest involved is one within the contemplation of the "liberty or property" language of the fourteenth amendment.[7] The Court stated that the liberty of a parolee enables him to engage in a wide range of activities open to persons

1. Morrissey v. Brewer, 443 F.2d 942, 943 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972).
2. 443 F.2d 942 (8th Cir. 1971).
3. 404 U.S. 999 (1971). This question had arisen many times in the lower courts throughout the country because many of the states were required by their *statutes* to provide some type of hearing, while others were bound by no legal requirement to grant a hearing of any kind. Morrissey v. Brewer, 408 U.S. 471, 488-89 n.15 (1972).
4. *Id.* at 480 (emphasis added).
5. *See* Graham v. Richardson, 403 U.S. 365 (1971) (held that state statutes which deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a required number of years are violative of the equal protection clause).
6. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (held that the due process clause of the fifth amendment barred the federal government from designating organizations as Communist on a list disseminated for the purpose of aiding loyalty investigations of government employees, without first affording them notice and the opportunity to be heard).
7. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (held that due process required that a person be afforded a hearing prior to the taking of his chattels under the replevin statutes of the states involved).

who have never been convicted of any crime. He can be gainfully employed and is free to be with family and friends and form the other enduring attachments of normal life.[8] The liberty of a parolee, although conditional, includes many of the core values of unqualified liberty and its revocation inflicts a "grievous loss" on the parolee.[9] Whether a parolee's liberty is a "right" or a "privilege" it is valuable and within the contemplation and protection of the "liberty or property" language of the fourteenth amendment.[10] Its termination calls for some process, however informal.

In deciding what process is due, the Court stated that society, as well as the parolee, has an interest in not having parole revoked erroneously or arbitrarily because the fair treatment of the parolee will increase the chances of his rehabilitation and restoration to a normal and useful life within the law by the avoidance of any unfavorable reactions on his part to arbitrariness.[11] In contrast to this the Court found that the state has no interest in revoking parole without some informal procedural guarantees. A simple factual hearing would not be an undue burden on the administration of parole and would not interfere with the exercise of discretion by the state parole board. Balancing these interests, the Court concluded that due process requires that a parolee be given, prior to the revocation of his parole, an informal hearing structured to assure that the finding of a parole violation will be based on verified facts, and that the exercise of discretion by the parole board will be informed by accurate knowledge of the parolee's behavior.[12]

In the past, the denial of the rights of procedural due process to a parolee facing the termination of his conditional freedom had been most commonly based on the right-privilege distinction. The United States Supreme Court held in *Ughbanks v. Armstrong*[13] that parole was not a constitutional right but rather a "present" from the state to the prisoner.[14] This characterization of the grant of parole as an act of grace resulted in the status of the conditional liberty of the parolee being considered a privilege and not a right.[15] Where it had

8. 408 U.S. at 482.
9. *Id.*
10. *Id.*
11. *Id.* at 484.
12. *Id.*
13. 208 U.S. 481 (1908).
14. *Id.* at 487-88.
15. *See* Hiatt v. Campagna, 340 U.S. 880 (1950) (affirmed the lower court's decision

been possible to characterize the private interest involved as a mere privilege, it had been traditionally held that the procedural due process requirements of notice and hearing did not have to be met in order to revoke the privilege.[16] Therefore, the conditional liberty of the parolee was surrounded by no procedural protections in regard to its revocation other than those provided by the state through its legislature.[17] It was not protected by the due process clause of the fourteenth amendment.

Today, however, the right-privilege distinction no longer enjoys vitality.[18] The leading case regarding the demise of the right-privilege distinction is *Goldberg v. Kelly*[19] which held that welfare payments could not be terminated in accordance with due process unless the recipient was afforded an evidentiary hearing prior to their termination.[20] In its reasoning in *Goldberg* the Court stated that the question whether due process applied in this situation could no longer be answered by arguing that public assistance benefits are a "privilege" and not a "right." Rather, there should be an examination of the nature of the individual's interest involved to determine if it falls within the protection of the due process clause.[21] If it does, then the individual's interest and the harm that might result, of being deprived of his means of support, must be balanced against any governmental interest in summary revocation.[22]

The main thrust of the Court's decision in *Morrissey* is its recognition of the demise of the right-privilege distinction and its application of the rationale used in *Goldberg* for parole revocations. The Court in *Goldberg* found that public assistance payments, which are a statutory entitlement to persons qualified to receive them, are within the protection of procedural due process and cannot be revoked without a prior evidentiary hearing because the immediacy of the desperation of a welfare recipient who has been denied his payments outweighs any governmental interest in summary revocation.[23] Logically, the Court

which held that parole was a matter of legislative grace and not a right, and that the legislature could affix such conditions and provide such administration as it saw fit).

16. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

17. At the present time thirty states require that the parolee should receive some type of hearing in parole revocation. 408 U.S. at 488-89 n.15.

18. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

19. 397 U.S. 254 (1970).

20. *Id.* at 261.

21. *Id.* at 262-63.

22. *Id.*

23. *Id.* at 266.

in *Morrissey* could reach the same result in applying this rationale to parole revocation. Both cases involve the termination of statutorily authorized benefits, one dealing with welfare payments and the other with conditional liberty. Furthermore, the immediacy of the desperation of a welfare recipient who is denied payments is no greater than the desperation of a parolee who is being denied his freedom.[24] Since the burden of an evidentiary hearing is no greater in parole revocation than it is in revocation of welfare payments, it follows logically that if due process requires a hearing prior to revocation of welfare payments, it should also require a hearing prior to parole revocation.

Hyser v. Reed,[25] which was decided before *Goldberg* ended the right-privilege distinction, seems to be an intermediate step between denial of an evidentiary hearing in parole revocation and the decision in *Morrissey*. In *Hyser* the court held that even though a parolee was not entitled to a hearing prior to the revocation of his parole, he was entitled to a *preliminary interview* before a person designated by the parole board.[26] The court reasoned that the entire statutory scheme of parole and the formalizing of revocation procedures show that Congress intended, and the parole board undertook to establish, a retaking process based on concepts of basic fairness.[27] It noted that the revocation of parole can have serious consequences to individuals, and, therefore, the revocation process should live up to certain minimal notions of fairness.[28] In doing this the court cloaked the preliminary interview in constitutional standards of basic fairness and opened the door to the application in parole revocation of constitutional due process under the fourteenth amendment.[29] The idea of a preliminary interview found in *Hyser* seems to have been a stepping stone from requiring no hearing of any kind to the decision in *Morrissey*.

There have also been developments in the collateral area of probation which seem to have led the Court in *Morrissey* to reach its decision. In the past, the dicta in *Escoe v. Zerbst*[30] was used to deny

24. *Cf.* Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970) (stated that the immediacy of the desperation of a welfare recipient is no greater than the desperation of a *probationer* who is being denied his freedom).
25. 318 F.2d 225 (D.C. Cir. 1963).
26. *Id.* at 243. It should be noted that this preliminary interview was not an innovation by the court, but rather, was required in federal parole revocations in the Parole Act, 18 U.S.C. § 4207 (1970).
27. 318 F.2d at 243. The court examined the Parole Act, 18 U.S.C. §§ 4201-10 (1970).
28. 318 F.2d at 243.
29. *Id.* at 243-44.
30. 295 U.S. 490 (1935). The Court held that the probationer was entitled to a hearing

probationers a hearing prior to revocation of their probation. Justice Cardozo stated in his opinion that probationers did not have a constitutional right to a hearing because probation was conferred upon them as a privilege and not a right.[31] However, the Court in *Mempa v. Rhay*[32] held that a lawyer must be afforded to the probationer at the revocation proceedings as a matter of federal constitutional law because certain legal rights might be lost if not exercised at this stage.[33] This seems to imply that if there is a constitutional right to a lawyer there is also a constitutional right to the hearing.

One recent case in this area is *Hahn v. Burke*,[34] which held that the probationer is entitled to an evidentiary hearing prior to the revocation of his probation, under the due process clause of the fourteenth amendment.[35] The court based its decision on the demise of the right-privilege distinction and applied the rationale used in *Goldberg*.[36] The court reasoned that the immediacy of the desperation of a welfare recipient who is denied payments is no greater than the desperation of a probationer who is being denied his freedom.[37] Weighing the extent to which petitioner may be condemned to suffer "grievous loss"[38] against the governmental interest in summary adjudication the court found the petitioner's loss of freedom to outweigh the added state burden of providing a limited hearing.[39] This decision seems to be an exact forerunner of the decision in *Morrissey*. It follows logically that the *Hahn* requirement of a prior hearing should be extended to parole revocation because of the similarities between revocation of probation and parole. Both involve a possible loss of freedom and both require a factual determination of the commission of conduct not involved in the original criminal conviction.[40]

The decision in *Morrissey* may be taken one step further in the future. This extension would be that a parolee is entitled to this in-

prior to revocation of his probation. Its decision, however, was based on a statute requiring a hearing and not on any constitutional requirement.

31. *Id.* at 492. This is the same rationale that had been used to deny a parolee a hearing. *See* Hiatt v. Campagna, 340 U.S. 880 (1950).

32. 389 U.S. 128 (1967).

33. *Id.* at 135.

34. 430 F.2d 100 (7th Cir. 1970).

35. *Id.* at 103.

36. *Id.*

37. *Id.* at 104.

38. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

39. 430 F.2d at 104.

40. Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197, 205 (1970).

formal evidentiary hearing *prior* to his retaking and return to a local jail or prison. This idea appeared in the dissent of Judge Skelly Wright in *Hyser v. Reed.* He stated that if the alleged parole violations are not serious, such as the commission of a crime, there is no reason for not granting a parolee a hearing prior to his incarceration.[41] Also, in *In re Tucker,*[42] the dissent said ". . . the parole revocation hearing should occur prior to the incarceration of the parolee who is charged with technical parole violations not constituting criminal conduct."[43]

The rationale of these opinions seem to be the avoidance of the unnecessary harm to a parolee who is taken into custody, given a hearing at which time he proves his innocence regarding any of the alleged parole violations, and then is permitted to return to society. The harm is that he will have lost his job, his status in the community, and the other benefits of conditional liberty without good reason.[44] The state and society have no interest to balance against the harm to the parolee unless the alleged violation involves criminal conduct, thereby constituting a danger of possible harm to the community if the parolee is permitted to maintain his freedom.[45] This idea of providing the parole revocation hearing prior to the incarceration of the parolee also appears in the dissent of Justice Douglas in *Morrissey.*[46]

A hearing prior to the retaking, with the exception for alleged violations criminal in nature, seems to be the next logical step that the Court is likely to take. Applying the rationale of *Morrissey* to the question of whether the hearing should occur prior to the retaking, we find the nature of the parolee's interest in his conditional liberty remains the same. And, provided no commission of criminal conduct is alleged, this interest seems to outweigh any interest of the state in retaking without a hearing.[47] The logical extension, however, may not be the proper extension.

The decision reached in *Morrissey* was predictable. Based on the demise of the right-privilege distinction, the adoption of the balancing

41. 318 F.2d 225, 261 (D.C. Cir. 1963) (dissenting opinion).
42. 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971) (dissenting opinion).
43. *Id.* at 196, 486 P.2d at 676, 95 Cal. Rptr. at 780.
44. *Id.* at 203, 486 P.2d at 678, 95 Cal. Rptr. at 782.
45. *Id.* Since the parolee has already allegedly committed one crime while on parole, the possibility of his committing another crime is good, thus constituting a danger to society.
46. 408 U.S. at 497 (Douglas, J., dissenting in part).
47. The interest of the state in retaking a parolee not charged with committing a new criminal offense, without a hearing, appears to be no greater than its interest in revoking parole without any hearing. The burden of the hearing would be no greater and there is no greater interference with the exercise of discretion by the parole board.

test used in *Goldberg*, and the recent development in the area of probation, it would have been illogical for the Court to have reached another decision in *Morrissey*. If the revocation of welfare payments is within the procedural protections of due process, it seems justifiable that the revocation of conditional liberty also should be protected. The possible harm to the parolee appears to be just as serious as the possible harm to the welfare recipient. Had the Court held that a parolee was not entitled to a hearing, it would have been giving the revocation of monetary benefits greater protection than the revocation of freedom or liberty. This would have been difficult to justify.

However, the Court must be careful in maintaining a distinction between the conditional liberty of a parolee and the absolute freedom of a citizen never convicted of a crime. It must be kept in mind that the parolee has already been convicted in accordance with the requirements of due process. The revocation of any conditional liberty which is granted after the initial conviction should not entitle him to receive, once again, the full panoply of rights which he has already received at his initial conviction. To do this would be to equate conditional liberty with absolute liberty. If, in the future, the Court follows the logical extension of its rationale and holds that a parolee is entitled to a hearing *prior* to his retaking, it will have crossed the line of distinction between conditional and absolute freedom. The conditional liberty will be granted a protection that even the absolute liberty does not enjoy. A parolee would be entitled to a hearing before he could be incarcerated, whereas, an ordinary citizen could be confined in a jail, if there were probable cause to believe he had committed a crime, without any hearing at all. Both involve the loss of freedom, and there would seem to be little justification for such a preferential treatment of conditional liberty.

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