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Right to Hearing Upon Extension of Probation

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RECENT DECISIONS

Right to Hearing Upon Extension of Probation—*Cook v. Commonwealth*

Aside from the fact that its use was originally limited and random in nature, the historical origin of the probation process is uncertain. Revolutionary changes in the theories controlling the treatment of convicted criminals, however, has resulted in the development of probation into the most widely used form of correctional treatment.¹ With the emergence of the probation process there has developed considerable controversy over the procedural and evidentiary safeguards to be afforded the probationer threatened with revocation of his conditional freedom.²

¹ See Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Memphis v. Rhy*, 47 TEXAS L. REV. 1, 26 (1968).

"Probation" means the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions. N.M. STATS. ANN. § 41-47-14 (1953).

The first state to enact a probation law was Massachusetts in 1878. See Bassett, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L.C. & P.S. 479, 480 n.11 (1969). The first federal law providing for probation was The Federal Probation Act of 1925. See *Roberts v. United States*, 320 U.S. 264 (1943).

For figures on the increased utilization of probation by the courts see Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 486-87 (1962). For a detailed discussion of the probation process see Bassett, *supra*; Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311 (1959).

² Of the jurisdictions with statutes providing for the right to a hearing upon revocation, few expressly provide for procedural and evidentiary rights to be accorded the probationer during the hearing. See ALASKA CODE CRIM. PROC. ANN. § 12.55.110 (1962) (probationer entitled to counsel at revocation hearing); GA. CODE ANN. § 27-2713 (Supp. 1970) (probationer may be heard in person or by counsel); IND. STATS. ANN. § 9-2211 (Burns Supp. 1970) (probationer entitled to counsel of his choice); MICH. COMP. LAWS ANN. § 771.4 (1967) (probationer entitled to a written copy of the charge against him); N.Y. CRIM. PROC. LAW § 410.70 (McKinney 1971) (probationer may present evidence on his behalf, may cross-examine witnesses, has right to counsel); N.C. GEN. STATS. § 15-200.1 (Supp. 1969) (probationer has right to counsel at hearing); TENN. CODE ANN. § 40-2907 (Supp. 1970) (probationer has the right to counsel and the right to introduce testimony on his own behalf).

In those jurisdictions without an express statutory provision on the probationers' rights during a hearing, the courts are in conflict over the procedural and evidentiary requirements to be employed. A majority of these jurisdictions have refused to hold such safeguards applicable in all instances in the belief that probation revocation hearings do not constitute criminal prosecutions. See, e.g., *United States v. Bryant*, 431

One such safeguard has been the right to hearing prior to revocation of probation.³

Revocation is not the sole means by which a court may alter a probationary period. Most jurisdictions have statutes permitting their courts to extend the period of probation.⁴ In a recent decision, *Cook v. Com-*

F.2d 425 (5th Cir. 1970); *Skidgell v. State*, — Me. —, 264 A.2d 8 (1970); *Knight v. State*, 7 Md. App. 313, 255 A.2d 441 (1969); *Jaime v. Rhay*, 59 Wash. 2d 58, 365 P.2d 772 (1961). A number of jurisdictions, however, have held that a probation revocation hearing is a criminal prosecution. *See, e.g.*, *In re Collyar*, 476 P.2d 354 (Okla. Crim. 1970); *Fariss v. Tipps*, 463 S.W.2d 176 (Tex. 1971); *Campbell v. State*, 456 S.W.2d 918 (Tex. Crim. 1970).

For a detailed discussion of the cases and statutes dealing with probation revocation hearings *see* Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964).

³ At present twenty-two jurisdictions expressly provide for a hearing upon probation revocation. *See* ALA. CODE tit. 42, § 24 (1958); COLO. REV. STATS. ANN. § 39-16-9 (1963); CONN. GEN. STATS. ANN. § 54-114 (1959); DEL. CODE ANN. § 4335 (Supp. 1968); IDAHO GEN. LAWS ANN. § 20-222 (1947); ILL. ANN. STATS. ch. 38, § 117.3 (Smith-Hurd 1964); IND. REV. STATS. ANN. § 9-2211 (Burns Supp. 1970); KY. REV. STATS. ANN. § 439.300 (Baldwin 1962); MAINE REV. STATS. ANN. § 34-1633 (Supp. 1970); MICH. COMP. LAWS ANN. § 771.4 (1967); MINN. STATS. ANN. § 609.14 (1964); MISS. CODE ANN. § 4004.25 (Supp. 1970); MO. STATS. ANN. § 39-549.101 (Vernon Supp. 1970); MONT. REV. CODE § 94-9831 (1947); N.H. REV. STATS. ANN. § 504:4 (1953); N.J. STATS. ANN. § 2A:168-4 (1952); N.M. STATS. ANN. § 41-17-28.1 (1953); N.Y. CRIM. PROC. LAW § 410.70 (McKinney 1971); N.C. GEN. STATS. § 15-200 (Supp. 1969); N.D. CENT. CODE ANN. § 12-53-11 (Supp. 1969); TENN. CODE ANN. § 40-2907 (Supp. 1970); TEXAS CODE CRIM. PROC. art. 42.12 (Vernon Supp. 1970).

Several jurisdictions, like Virginia, have statutes which would indicate that the probationer is to be accorded an opportunity to be heard before revocation. *See, e.g.*, 18 U.S.C. § 3653 (1964) (“... [T]he probationer shall be taken before the court. . . .”); FLA. STATS. ANN. § 948.06 (Supp. 1970) (probationer shall be given “. . . an opportunity to be fully heard. . . .”); HAWAII REV. STATS. § 711-80 (1965) (probationer is given an opportunity to appear “. . . to show cause. . . .”); MASS. GEN. LAWS ch. 279 § 3 (1959) (probationer shall be “. . . taken before the court. . . .”); R.I. GEN. LAWS § 12-19-9 (Supp. 1970) (“... in open court, in the presence of the defendant, the court may remove suspension. . . .”).

A number of jurisdictions have either failed to provide for any procedure upon revocation, or have provided that it is to be left to the discretion of the court. Decisions in several of these jurisdictions have recognized the right to a hearing upon revocation. *See, e.g.*, *State v. Walter*, 12 Ariz. App. 282, 469 P.2d 848 (1970); *State v. Chesnut*, 11 Utah 2d 142, 356 P.2d 36 (1960). In the absence of statute, California has refused to require a hearing upon revocation. *See, e.g.*, *People v. Jones*, 263 Cal. App. 2d 818, 70 Cal. Rptr. 13 (1968).

⁴ Thirty-six jurisdictions presently have statutes permitting their courts to extend or modify the period of probation. *See* 18 U.S.C. § 3651 (1964); ALA. CODE tit. 42, § 24 (1958); ALASKA CODE CRIM. PROC. ANN. § 12.55.090 (1962); ARIZ. REV. STATS. ANN. § 13-1657 (Supp. 1970); CAL. PENAL CODE § 1203.2 (West Supp. 1971); COLO. REV. STATS. ANN. § 39-16-9 (1963); CONN. GEN. STAT. ANN. § 54-113 (1959); DEL. CODE ANN. § 4334

monwealth,⁵ Virginia became the first American jurisdiction to hold that a probationer was entitled to a hearing before his probationary period was extended.⁶ Through the extension of Cook's probationary period

(Supp. 1968); D.C. CODE ANN. § 24-104 (1961); FLA. STATS. ANN. § 948.06 (Supp. 1970); GA. CODE ANN. § 27-2713 (Supp. 1970); IDAHO GEN. LAWS ANN. § 20-222 (1947); ILL. ANN. STATS. ch. 38, § 117.3 (Supp. 1971); IND. REV. STATS. ANN. § 9-2211 (Burns Supp. 1971); KANSAS STATS. ANN. § 21-4611 (Supp. 1970); KY. REV. STATS. ANN. § 439.270 (Baldwin 1962); LA. REV. STATS. § 15:305 (1968); MD. CODE ANN. § 27-641A (1970); MASS. GEN. LAWS ANN. ch. 279 § 1A (1952); MICH. COMP. LAWS ANN. § 771.5 (1967); MISS. CODE ANN. § 4004-25 (Supp. 1970); NEV. REV. STATS. § 176.215 (1967); N.H. REV. STATS. ANN. § 504:4 (1953); N.J. STATS. ANN. § 2A:168-4 (1952); N.Y. CRIM. PROC. LAW §§ 410.20, 410.70 (McKinney 1971); N.C. GEN. STATS. § 15-200 (Supp. 1969); N.D. CENT. CODE ANN. § 12-53-17 (1960); OHIO REV. CODE ANN. § 2951.07 (1968); R.I. GEN. LAWS § 12-19-13 (1956); S.C. CODE § 55-594 (1962); S.D. COMP. LAWS § 25-57-6 (1962); TEXAS CODE CRIM. PROC. art. 42.12 (Vernon Supp. 1970); UTAH CODE ANN. § 77-35-17 (1953); WASH. REV. CODE § 9.95.230 (1964); WIS. STATS. ANN. § 57.01 (Supp. 1970); WYO. STATS. ANN. § 7-321 (1957).

⁵ 211 Va. 290, 176 S.E.2d 815 (1970).

⁶ Though the *Cook* decision is the first to hold that a hearing is required upon probation extension, it is not the first decision to consider the question. See *United States v. Freeman*, 160 F. Supp. 532 (D.D.C. 1957), *aff'd on other grounds*, 254 F.2d 352 (D.C. Cir. 1958). The probationer was placed on probation on the condition that financial restitution be made. Upon failing to make restitution within the time specified, the probation period was extended without notice or a hearing. The court held that since the applicable statute did not provide for a hearing upon extension, the probationer was not denied any statutory rights. The court, however, went on to say:

The Court is now of the view that the extension of probationary periods in that manner [without a hearing] constitutes an unwise practice and thus in the future the Court will require appearances of probationers and counsel before extending such periods. *Id.* at 534.

The court in *Freeman* noted, however, that this rule would not apply where the probationer could not be located because of his failure to keep his probation officer informed of his whereabouts. It is particularly interesting to note that the court also excluded from this rule instances where the probationer has violated the laws of any jurisdiction and as a result has been imprisoned. In *Cook*, the probation period was extended because the probationer was imprisoned in another county charged with forgery. See *Cook v. Commonwealth*, 211 Va. 290, 291, 176 S.E.2d 815, 816 (1970). It is unlikely then, that the rule in *Freeman* would have been applicable to the facts in *Cook*.

See also *Jesseph v. People*, 164 Colo. 312, 435 P.2d 224 (1967). Here, again, the probation period was extended for failing to make restitution. In denying the right to hearing upon extension the court stated:

While better practice dictates that a hearing be held before a probationary period is extended, there is no constitutional requirement for such a hearing. . . . Nor does the statute dealing with extensions of probation require such a hearing. *Id.* at 313, 435 P.2d at 225.

The court did hold, however, that the period of probation could not be revoked for a violation subsequent to the extension order where the probationer had not, at the time of the violation, received notice of the extension.

the trial court was subsequently able to revoke his probation at a date beyond its original period of expiration.⁷ Cook was afforded neither notice or a hearing before the extension. The Virginia Supreme Court of Appeals held that although section 53-273,⁸ of the Code of Virginia, providing for extension of probation, did not call for a hearing before extension, "fundamental fairness" required that a judicial hearing of a summary nature be granted.⁹

The true dimensions of *Cook* must be considered in light of those statutes and decisions dealing with probation revocation. In *Slayton v. Commonwealth*,¹⁰ the Virginia court used the same rule of "fundamental fairness" in holding that section 53-275 of the Code of Virginia, the revo-

In those few cases that have dealt with probation extensions, the majority have involved extensions made in the presence of the defendant. These decisions have not elaborated on the right to a hearing upon extension. See, e.g., *United States v. Squillante*, 235 F.2d 46 (2d Cir. 1956); *United States v. Rosner*, 161 F. Supp. 234 (S.D.N.Y. 1958); *People v. Arguello*, — Cal. App. 2d — 27 Cal. Rptr. 200 (1963); *Lanham v. Commonwealth*, 353 S.W.2d 201 (Ky. 1962); *State v. Triplett*, 10 N.C. App. 165, 178 S.E.2d 38 (1970); *Jaime v. Rhay*, 59 Wash. 2d 58, 365 P.2d 772 (1961). But see *Holdren v. People*, — Colo. —, 452 P.2d 28 (1969), where the court held that a probationer has no statutory or constitutional right to a hearing upon extension of his probationary period.

⁷ The trial court, upon being informed that the probationer was confined in jail in another county charged with forgery, entered an order extending his period of probation for one year. The order was issued on July 26, 1968, the day of expiration of the probation period. The probationer was subsequently convicted of the forgeries on August 20, 1968. On the basis of the conviction, the suspended sentence was revoked pursuant to a hearing on September 6, 1968. See *Cook v. Commonwealth*, 211 Va. 290, 291, 176 S.E.2d 815, 816 (1970).

⁸ "The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation." VA. CODE ANN. § 53-273 (1967).

⁹ The court stated:

. . . [F]undamental fairness requires a judicial hearing of a summary nature for the probation period to be extended, since increasing the period of probation has the effect of extending the restraints on the probationer's liberty which are normally incident to his probation and extends the time period during which revocation may occur. 211 Va. at 292, 176 S.E.2d at 817-18.

In light of the peculiar factual situation present, the court's ruling is not a surprising one. See note 7 *supra*. The obvious motive behind the extension was to enable the trial court to retain control over the probationer until a revocation hearing could be held. The above passage from the court's opinion is evidence of the fact that it was influenced by the subsequent revocation. The court's treatment of section 53-273 in conjunction with section 53-275, dealing with probation revocation, indicates that it was aware of the fact that under the latter section the trial court would have been unable to revoke the probation subsequent to termination of the period. See 211 Va. at 292, 176 S.E.2d at 817-18.

¹⁰ 185 Va. 357, 38 S.E.2d 479 (1946).

cation statute, required a judicial hearing before probation revocation.¹¹ In *Slayton* the court had little difficulty finding that a judicial hearing was "implicit" in the revocation statute in view of the fact that the statute specified that upon revocation the probationer was to be "... brought before the court. . . ." ¹² It is significant that section 53-273 makes no such provision. The statute merely states, without elaboration, that the court may increase or decrease the period of probation.¹³

Though the complexity and volume of the various probation statutes has rapidly expanded, few jurisdictions have established procedural safeguards for probation extension, either through legislative enactment or judicial construction.¹⁴ It is these factors, however, that make the *Cook* decision potentially one of the most significant rulings to date in the area of probation.

At present the majority of American jurisdictions, adhering to the notion that probation is not a matter of right, but a privilege,¹⁵ have re-

¹¹ The rule of "fundamental fairness" is not apparent on the face of the court's opinion in *Slayton*. The court merely stated that since revocation of probation deprives the probationer of his liberty, he is entitled to a judicial hearing. See *Slayton v. Commonwealth*, 185 Va. 357, 366, 38 S.E.2d 479, 483 (1946). The rule of "fundamental fairness," however, appears to be the basis for the holding in *Slayton*, though not expressly set out in the opinion. It was the *Cook* decision only that made express reference to the rule. See *Cook v. Commonwealth*, 211 Va. 290, 292, 176 S.E.2d 815, 817 (1970).

¹² Virginia Acts of Assembly 1938, ch. 122, at 188 (now VA. CODE ANN. 53-275 (Cum. Supp. 1970)).

The "explicit" construction is not that of *Slayton*, but is the court's interpretation of that opinion in *Cook*. See *Cook v. Commonwealth*, 211 Va. 290, 292, 176 S.E.2d 815, 817 (1970).

¹³ See note 8 *supra*.

¹⁴ By far the most liberal probation modification statute now in force is contained in New York's new Criminal Procedure Law, effective September 1, 1971. See N.Y. CRIM. PROC. LAW § 410.701 (McKinney 1971). The statute provides for a hearing, cross-examination of witnesses by the defendant, presentation of evidence by the defendant in his own behalf, and the right to counsel before any modification of the probation period.

At present, no other jurisdiction has a statute expressly providing for procedure upon extension of probation. A few states, however, do have statutes which indicate that a hearing might be required upon extension. A lack of judicial construction of these statutes makes it impossible to predict how future decisions will hold. See FLA. STATS. ANN. § 948.06 (Supp. 1970); GA. CODE ANN. § 27-2713 (Supp. 1970); N.H. REV. STATS. ANN. § 504.4 (1953). See cases cited note 6 *supra*.

¹⁵ See, e.g., *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Holdren v. People*, — Colo. —, 452 P.2d 28 (1969); *Davis v. State*, — Ind. —, 267 N.E.2d 63 (1971); *Dobs v. State*, 47 Wis. 2d 20, 176 N.W.2d 289 (1970). But see *Hewert v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969). The Court of Appeals for the Fourth Circuit noted: "We are not impressed

fused to hold procedural due process applicable to probation revocation.¹⁶ These jurisdictions have permitted their trial courts to exercise broad discretion in all phases of probation.¹⁷ It now appears, however,

by the argument that probation is a 'mere' privilege . . . rather than a right. . . ." *Id.* at 1322.

Using similar expressions other courts have noted that probation is an act of grace, clemency or mercy. *See, e.g.,* United States *ex rel.* Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970); United States v. Longknife, 258 F. Supp. 303 (D. Hawaii 1966); State v. Walter, 12 Ariz. App. 282, 469 P.2d 848 (1970); Martin v. State, 243 So. 2d 189 (Fla. App. 1971); Skidgell v. State, — Me. — , 264 A.2d 8 (1970); State v. Follis, 81 N.M. 690, 472 P.2d 655 (1970). *But see* State v. Duitsman, 186 Neb. 39, 180 N.W.2d 685 (1970). The court, recognizing that probation is primarily rehabilitative in nature, refused to adhere to ". . . the archaic notion that probation constituted merely an act of clemency or mercy." *Id.* at 686.

The question has been raised as to whether probation is really to be considered a privilege; that since one convicted of a crime must choose between the threat of a long, indeterminate sentence and probation he really has no choice at all. *See* Hink, *supra* note 1, at 495. For further arguments against the concept that probation is a privilege *see* Bassett, *supra* note 1, at 289-91.

¹⁶ *See, e.g.,* Escoe v. Zerbst, 295 U.S. 490 (1935); Martin v. State, — Ala. Crim. — , 241 So. 2d 339 (1970); People v. Valdespino, — Cal. App. 3d — , 93 Cal. Rptr. 142 (1971); Skidgell v. State, — Me. — , 264 A.2d 8 (1970); *In re* Collyar, 476 P.2d 354 (Okla. Crim. 1970). *Cf.* United States v. Bryant, 431 F.2d 425 (5th Cir. 1970). A number of recent decisions, however, indicate that the present trend may be toward holding procedural due process applicable to probation revocation. *See, e.g.,* Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970); Edwardsen v. Petersen, 319 F. Supp. 1338 (E.D. Wis. 1970); Hamrick v. Boles, 231 F. Supp. 507 (N.D. W.Va. 1964); People v. Bacon, 124 Ill. App. 2d 262, 260 N.E.2d 357 (1970); State v. Atkinson, 7 N.C. App. 355, 172 S.E.2d 249 (1970); State v. Shannon, 60 Wash. 2d 883, 376 P.2d 646 (1962).

The focal point of the controversy over the constitutional right to counsel at a revocation hearing has been the case of *Mempa v. Rhay*, 389 U.S. 128 (1967). *Mempa* held that a probationer was entitled to counsel at a revocation hearing. A majority of American jurisdictions, however, have held this ruling applicable only to probation granted through the deferred sentencing procedure, rather than the suspended sentence. *See, e.g.,* Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); State *ex rel.* Robinson v. Henderson, 257 La. 179, 241 So. 2d 762 (1970); *Petition of* Brittingham, — Mont. — , 473 P.2d 830 (1970); State v. Shawyer, — W.Va. — , 177 S.E.2d 25 (1970). A number of decisions, on the other hand, have extended *Mempa* to both suspended and deferred sentencing. *See, e.g.,* Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Ashworth v. United States, 391 F.2d 245 (6th Cir. 1968); Scarpelli v. Gagnon, 317 F. Supp. 72 (E.D. Wis. 1970); State v. Atkinson, 7 N.C. App. 355, 172 S.E.2d 249 (1970); *Ex parte* Bird, 457 S.W.2d 559 (Tex. Crim. 1970).

For a discussion of *Mempa* and arguments in favor of the extended view *see* Cohen, *supra* note 1, at 1; Note, *Right to Counsel Extended to Include Probation Revocation Hearings*, 18 KAN. L. REV. 686 (1970).

¹⁷ *See, e.g.,* Burns v. United States, 287 U.S. 216 (1932); United States v. Clanton, 419 F.2d 1304 (5th Cir. 1969); United States *ex rel.* Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970); Gross v. State, 240 Ark. 926, 403 S.W.2d 75 (1966); People v. Smith,

that the trend may be turning toward applying due process requirements to probation revocation.¹⁸ Recent United States Supreme Court decisions have undermined the privilege-right distinction¹⁹ to the point where it has been considered, by at least one court, as no longer a basis for denying due process considerations in probation revocation.²⁰

12 Cal. App. 3d 621, 90 Cal. Rptr. 811 (1970); *People v. Williams*, — Ill. App. 2d —, 264 N.E.2d 589 (1970); *Davis v. State*, — Ind. —, 267 N.E.2d 63 (1971); *State v. Frye*, — Ore. App. —, 465 P.2d 736 (1970). Most jurisdictions have placed some restrictions on the discretion to be exercised by trial courts in dealing with probation. *See, e.g.*, *Parker v. Laws*, — Ark. —, 460 S.W.2d 337 (1970) (the court may not require the accused to make cash payments as a condition of probation); *People v. Ledford*, — Colo. —, 477 P.2d 374 (1970) (confinement may not be imposed as a condition of probation).

¹⁸ *See, e.g.*, *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *Ashworth v. United States*, 391 F.2d 245 (6th Cir. 1968); *Scarpelli v. Gagnon*, 317 F. Supp. 72 (E.D. Wis. 1970).

In *Cook*, the Commonwealth used the *Hewett* decision as authority for the proposition that a non-sentencing revocation proceeding is not a stage of the trial at which *Mempa* would be applicable. *See* Brief for Commonwealth at 10, *Cook v. Commonwealth*, 211 Va. 290, 176 S.E.2d 815 (1970). A reading of *Hewett* discloses that the holding in the decision was clearly that revocation of probation is a stage of the criminal proceeding to which *Mempa* would apply. *See Hewett v. North Carolina, supra* at 1322.

¹⁹ *See Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). In the *Goldberg* decision the Court held that a New York City resident who received financial aid under a federally assisted aid program was denied due process of law when the aid was terminated without prior notice and a hearing. The Court stated:

Their termination [the federal benefits] involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a "privilege" and not a "right." 397 U.S. at 262.

The Court went on to quote from a concurring opinion by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). The Court noted that:

The extent to which procedural due process must be afforded the recipient [of financial aid] is influenced by the extent to which he may be condemned to suffer grievous loss, . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. at 262-63.

In light of the Court's and Justice Frankfurter's remarks it is difficult to see how the conflict between *Goldberg* and *Escoe v. Zerbst*, 295 U.S. 490 (1935), holding procedural due process not applicable to probation revocation, can be reconciled; for there are few losses more grievous than the loss of one's freedom upon revocation of his probationary period.

For an excellent discussion of this subject *see* Alstynne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

²⁰ In *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970), the Court of Appeals for the Seventh Circuit, recognizing that the privilege-right distinction was no longer a valid basis for denying procedural due process upon probation revocation, sought to recon-

Because probation extension, unlike revocation, does not result in any greater restraints than those already imposed on the probationer, it is unlikely that future decisions will hold due process safeguards applicable.²¹ The *Cook* ruling, however, is consistent with the trend away from the privilege-right distinction. Because probation extension results in continued restraints on the probationer's liberty and prolongs his exposure to subsequent revocation, courts in the future will find it difficult to reconcile application of due process to probation revocation while denying that fundamental fairness warrants a hearing upon probation extension.

Irrespective of the due process considerations involved, the practical consequences of *Cook* are far-reaching. Probation is clearly reformatory in nature,²² and if social rehabilitation is to be achieved through the use of probation, the probationer must be assured that he will receive fair, consistent and straightforward treatment.²³ The degree of flexibility and predictability to be achieved through the use of a hearing before any alteration in the period of probation is obviously far more conducive to rehabilitation than subjecting the probationer to the boundless discretion of the court.

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cile the conflict between *Escoe v. Zerbst*, 295 U.S. 490 (1935), and *Goldberg v. Kelly*, 397 U.S. 254 (1970). The court of appeals noted that in *Escoe*, the Court, though denying a constitutional right to a hearing upon revocation, went on to grant the probationer a hearing as required by statute. The court interpreted this to indicate that the remarks concerning the constitutional right to a hearing in *Escoe* were only dicta; that the Court's opinion was based on a statutory right, and so did not constitute a "binding precedented rejection of such a constitutional right." *Hahn v. Burke*, *supra* at 105. See also *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

²¹ Even if the principals set out in *Goldberg* were to become the basis for holding procedural due process applicable to probation revocation, it is unlikely that probation extension would be considered a "grievous loss" to the probationer so as to bring it within the purview of that decision.

²² See, e.g., *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970); *State v. Hennessy*, 13 Ariz. 546, 479 P.2d 194 (1971); *State v. Saavedra*, 5 Conn. Cir. 367, 253 A.2d 677 (1968); *Belden v. Hugo*, 88 Conn. 500, 91 A. 369 (1914); *People v. Thomas*, — Ill. App. 2d —, 257 N.E.2d 480 (1970).

The reformatory nature of probation was recognized as early as the *Belden* decision where the court stated:

[Probation] is not ordered for the purpose of punishment for the wrong for which there has been a conviction, or for general wrongdoing. Its aim is reformatory and not punitive. It is to bring one who has fallen into evil ways under oversight and influences which may lead him to a better living. 88 Conn. at 504, 91 A. at 370.

²³ See, e.g., *State v. Walter*, 12 Ariz. App. 282, 469 P.2d 848 (1970) (concurring opinion); *State v. Zolantakis*, 70 Utah 296, 259 P. 1044 (1927); *Hink*, *supra* note 1, at 497.