CONSTITUTIONAL LAW—PROBATION REVOCATION WITHOUT A HEARING HELD UNCONSTITUTIONAL—*Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970).

On September 12, 1964, petitioner, Frank Hahn, pleaded guilty to a charge of burglary and was sentenced to five years in the state prison. However, execution of the sentence was stayed and he was placed on five years probation. Thereafter, on December 4, 1964, his probation was revoked, without a hearing, because he allegedly violated the terms of its conditions by absconding to California. On returning to Wisconsin, Hahn was arrested and incarcerated. Contending that his constitutional rights to due process and equal protection were being violated, petitioner, after being refused relief by the Wisconsin Supreme Court, sought to obtain a writ of habeas corpus from the United States District Court. The writ was denied, but on appeal, the Court of Appeals for the Seventh Circuit reversed the district court's decision.[1] The circuit court declared the Wisconsin probation statute[2] unconstitutional because it violated petitioner's right to due process by failing to provide for a hearing in probation revocation proceedings.

The court in *Hahn v. Burke* denied credence to assertions of two theories upon which probation revocation without a hearing is justified: the contract theory,[3] and the privilege-right distinction.[4] There are other theories[5] which have received less attention, and to which this court did not address itself.

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1 Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970).

2 WIS. STAT. ANN. § 57.03 (1957), which provides in pertinent part:

(1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if already sentenced may order him to prison; and the term of sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.

Statutes are divergent as to what protection a probationer is entitled. *See* CAL. PENAL CODE § 1203.2 (West 1970), where the accused is afforded no hearing; FLA. STAT. ANN. § 948.06(1) (Supp. 1970) and § 924.06 (Supp. 1970), which grants the accused both the opportunity to be fully heard and the right to appeal; MISS. CODE ANN. § 4004-25 (Supp. 1968), which provides that "the court . . . shall cause the defendant to be brought before it"; N.J. STAT. ANN. § 2A:168-4 (1953), where the accused is to be given a summary hearing.

3 430 F.2d at 104.

4 *Id.* at 103.

5 Two additional theories are the constructive custody theory and the exhaustion of constitutional rights at trial theory. Under the first, the defendant is said to be serving his sentence, but outside the prison walls, and therefore has lost nothing if his probation, parole or conditional pardon is revoked. *See* McCoy v. Harris, 108 Utah 407, 160 P.2d 721 (1945), where the Supreme Court of Utah goes into some detail in discussing the theory in general and its application to parole specifically. The court states that liberty to the

Some courts have dismissed assertions of constitutional rights as to revocation proceedings on the ground that probation is similar to a contract between the court and the offender:

> When a court extends clemency under the statute, the relationship existing is, in a way, contractual—that is, the court agrees with the convict that clemency by way of probation will be extended if he will keep and perform certain requirements and conditions, the violation of which will authorize the revocation of the probation.[6]

Once these conditions have been accepted the contract is created and these conditions can and often do call for summary revocation.[7] The probationer is therefore prevented from attacking his revocation on procedural due process grounds.[8]

The court in *Hahn* summarily dismissed the contract theory: "Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state."[9] The defendant

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convicted person does not change his status but merely provides wider freedom by pushing back the prison walls. The prisoner is just as much in custody, however, as the prisoner allowed the liberty of the prison yard. *See also* Note, *Parole Revocation Procedures*, 65 HARV. L. REV. 309, 311 (1951), where the author argues that the custody theory ignores the difference between the custody involved in imprisonment in a cell and custody as applied to a person who is at liberty in the world.

The exhaustion of constitutional rights at trial theory rests upon the concept that since a revocation is not a criminal prosecution, constitutional safeguards are not applicable and the rights granted to a defendant are those solely embodied in the statutes. *See* Rose v. Haskins, 388 F.2d 91, 95 (6th Cir. 1968), where the court, in denying defendant's petition for a hearing before revocation of his parole, stated:

> The constitutional rights of Rose, which he claims were violated, apply *prior* to conviction. They are not applicable to a convicted felon whose convictions and sentences are valid and unassailable, and whose sentences have not been served.

See also Burns v. United States, 287 U.S. 216 (1932) (probation revocation); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963) (parole revocation).

Both of the above theories are discussed in Note, 65 HARV. L. REV. 309, *supra*; Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 646-48 (1966).

6 Wilson v. State, 156 Tex. Crim. 228, 230, 240 S.W.2d 774, 775 (1951). *See also* Fuller v. State, 122 Ala. 32, 26 So. 146 (1899), where the court recognized a parole granted by the governor as contractual; Lee v. Superior Court, 89 Cal. App. 2d 716, 201 P.2d 882 (Dist. Ct. App. 1949), where the defendant refused to accept a condition to his probation and the court said that upon the contract theory this was possible; Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 324 (1959).

7 *See* CAL. PENAL CODE § 1203.2 (West 1970), where a probationer is not afforded a hearing; IOWA CODE ANN. § 247.26 (1969), which provides:

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

8 Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L. & C. 531, 533 (1942).

9 430 F.2d at 104.

is not only on an unequal footing with the state, but he may be confronted with conditions which are either not to his liking,[10] unusual and quite severe,[11] or contrary to public policy and unenforceable under the established rules of contract law.[12]

The second theory rests on the privilege-right distinction which has its very foundation in the definition of probation.

> Probation is not a matter of right but a matter of grace and clemency and when granted it confers no vested right upon a defendant. It is a system of tutelage under the control of the court having jurisdiction over the convicted defendant and it is concerned with the rehabilitation of moral character.[13]

Being an act of grace it cannot be demanded as a matter of right,[14] and as the courts have the discretionary power to grant probation, they also have the discretionary power to revoke it.[15]

The case primarily responsible for the privilege-right distinction is *Escoe v. Zerbst*,[16] which, like *Hahn*, also involved summary revocation of probation. In deciding that case, the Court held that the applicable federal statute[17] under which defendant was released guaranteed a

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10 *See* Lee v. Superior Court, 89 Cal. App. 2d 716, 201 P.2d 882 (Dist. Ct. App. 1949), where the defendant chose to serve a prison term rather than pay a fine. The court held that an applicant for probation has the right to decline the offer when he deems the terms in excess of the court's jurisdiction or too onerous.

11 *See* People v. Blankenship, 16 Cal. App. 2d 606, 607-08, 61 P.2d 352, 353 (Dist. Ct. App. 1936), where sterilization was made a condition of probation. The court held this not to be an unreasonable condition to be placed upon a 23 year old convicted rapist who had communicated a venereal disease to his 13 year old victim.

12 For a good discussion of probation conditions and the contract theory in relation thereto, *see* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181 (1967).

13 Kirsch v. United States, 173 F.2d 652, 654 (8th Cir. 1949). *See also* Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1949) ("a legislative grace and not a thing of right"); Poole v. Stevens, 190 F. Supp. 938, 941 (E.D. Mich. 1960) (an act of grace); *Ex parte* Trombley, 31 Cal. 2d 801, 808, 193 P.2d 734, 741 (1948) (an act of grace or clemency to be granted in a proper case, and a person is not entitled to it as a matter of right).

14 *See* Burns v. United States, 287 U.S. 216, 223 (1932) (revocation is a matter within the discretion of the district judge).

15 *See* Manning v. United States, 161 F.2d 827 (5th Cir.), *cert. denied*, 332 U.S. 792 (1947), where the defendant was convicted of possessing misbranded drugs and was placed on probation. In affirming a revocation of that probation on the ground that the defendant, while on probation, had used the mails to defraud, the court said:

> Action of a trial judge in revoking probation is an exercise of broad discretionary power, and on appeal the question is simply whether there has been an abuse of discretion.

Id. at 829.

16 295 U.S. 490 (1935).

17 Federal Probation Act of March 4, 1925, ch. 521, § 2, 43 Stat. 1260, *as amended*, 18 U.S.C. § 3653 (1964).

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest.

hearing, but on the issue of the constitutional guarantee of due process, the Court continued:

> In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. 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.[18]

In *Rose v. Haskins*,[19] the Court of Appeals for the Sixth Circuit reiterated this view in respect to parole revocation. It reasoned that since a parole system is not constitutionally compelled, parole status is merely a privilege regulated by statute and not circumscribed by either the specific constitutional guarantees applicable to a criminal proceeding, or the traditional safeguards of procedural due process.[20]

The first apparent break with *Escoe* was *Fleenor v. Hammond*,[21]

Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

18 295 U.S. at 492-93. *See also* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), where an action was brought to challenge petitioner's dismissal from the police force. One of the conditions of the petitioner's employment was that he not engage in political activities; petitioner breached this condition and upon his discharge from the force attacked it on the ground that it was unconstitutional as violative of the first amendment right of freedom of speech. The court held petitioner may have a constitutional right to engage in political activities but he had no constitutional right to be a policeman.

19 388 F.2d 91 (6th Cir. 1968).

20 *Id.* at 93-95. Judge Celebrezze dissented vigorously, stating:

> Parole, however, is an integral part of the penalty set for the commission of a crime. That it is an ameliorative part of that penalty should make it no less subject to the constitutional restrictions placed on the legislature's power to define crimes and set the penalty for the commission of them.

Id. at 99.

21 116 F.2d 982 (6th Cir. 1941). This same court, in Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968), decided twenty-seven years later, attempts to distinguish *Fleenor v. Hammond* as follows:

> Our decision in Fleenor v. Hammond . . . is inapposite. That case involved revocation of a conditional pardon, not parole. A conditional pardon had been granted by a Governor of Kentucky and the pardon was revoked by his successor without notice or hearing. There were no statutory regulations in Kentucky governing the issuing of conditional pardons. After receiving the pardon, the convict was no longer in custody or under control of the state. While the granting of the pardon was an act of grace, yet, when it was granted, the convict acquired rights which could not be taken away from him without notice or hearing.

388 F.2d at 96. *See* notes 19-20 and accompanying text *supra*. *See also* Note, 65 HARV. L. REV. 309, *supra* note 5, at 310; Weihofen, *supra* note 8, at 532-33, both of which stress the import of *Fleenor* as the first case to break with the strict *Escoe* rule.

where the court of appeals, in dealing with the summary revocation of a conditional executive pardon,[22] stated:

> We may grant at once that the giving of a pardon is an act of grace . . . . It does not follow, however, from the reservation of a right to revoke, that it may be exercised arbitrarily or upon whim, caprice, or rumor. Upon the granting of a pardon, albeit conditionally, the convict was entitled to his liberty and possessed of a right which could be forfeited only by reason of a breach of the conditions of the grant. In the present case it carried with it ultimate restoration of full civil rights.[23]

The *Hahn* court distinguished Justice Cardozo's opinion in *Escoe* as follows:

> We interpret the dicta in *Escoe* to indicate only that the Court's opinion was not based on a constitutional right to a hearing and not as a binding precedented rejection of such a constitutional right.[24]

The court further stated that "essential procedural due process no longer turns on the distinction between a privilege and a right."[25]

Recent United States Supreme Court decisions have so undercut the basic assumptions surrounding the privilege-right distinction that the analyses and conclusions of the decisions denying hearings and other constitutional protections to those free on conditional liberty have been rendered highly questionable.[26] *Wieman v. Updegraff*[27] con-

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22 The court stated:

> The granting of a conditional executive pardon may be assimilated to probation, or the imposition of a suspended sentence.

116 F.2d at 986.

23 *Id. See also* People v. Moore, 62 Mich. 496, 29 N.W. 80 (1886), where, also dealing with revocation of a conditional executive pardon, the court showed particular insight stating:

> [The released] becomes once more a full citizen, clothed with all the rights, privileges, and prerogatives that belong to any other freeman. He cannot be sent out half free and half slave. He is not to be let out with a rope around his body . . . to be hauled back at the caprice of that officer [governor]. . . . He is clothed, as he passes out of the prison door, with the same garb of freedom that was removed from him when he went in.

Id. at 500, 29 N.W. at 81; Mason v. Cochran, 209 Miss. 163, 166-71, 46 So. 2d 106, 108-09 (1950) (revocation of a suspended sentence without a hearing held to be a violation of due process).

24 430 F.2d at 105.

25 *Id.* at 103.

26 *See* Note, *Constitutional Law: Parole Status and the Privilege Concept*, 1969 DUKE L.J. 139, where the author discusses the general demise of the privilege-right distinction and, in particular, its relation to Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968).

27 344 U.S. 183 (1952) (appellant refused to take a loyalty oath in accordance with an Oklahoma statute before taking a civil service job; the state contended there was no constitutional right to public employment).

cerned an individual's right to public employment, and the Court concluded:

> To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[28]

The state, in *Hewett v. North Carolina*,[29] unconvincingly raised the privilege-right theory as a justification for refusing to allow a probationer counsel at his revocation hearing. In rejecting this contention, the court of appeals stated:

> [W]e recognize that at stake in a revocation of probation proceeding is individual liberty, and the substantiality of this right may not be disputed. We are not impressed by the argument that probation is a "mere" privilege, or a matter of grace, rather than a right and that, therefore, various constitutional mandates, including the right to counsel, should be held to be inapplicable.[30]

The most significant recent decision rejecting the privilege-right distinction is *Goldberg v. Kelly*,[31] where the Court held that welfare benefits, considered by many to be a privilege, cannot be terminated until the recipient has had the opportunity to be heard.

The future of *Hahn* is anything but certain.[32] In 1963, Warren Burger, then Chief Judge of the Court of Appeals for the District of Columbia, authored the opinion in the case of *Hyser v. Reed*.[33] *Hyser* dealt with the issue of an indigent parolee's right to appointed counsel at his parole revocation hearing. In his opinion, Judge Burger stated:

> [A]ppellants are neither totally free men who are being proceeded against by the government for commission of a crime, nor are they prisoners being disciplined within the walls of a federal penitentiary. They stand somewhere between these two. A paroled prisoner can hardly be regarded as a "free" man; he has already lost his freedom by due process of law . . . . [I]t is hardly helpful to com-

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28 *Id.* at 191-92.

29 415 F.2d 1316 (4th Cir. 1969) (North Carolina statutes provided probationers with a hearing before revocation of their probation but did not allow counsel).

30 *Id.* at 1322.

31 397 U.S. 254 (1970). For a thorough analysis of the entire privilege-right concept, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

32 In a recent conversation with George M. St. Peter, counsel for Mr. Hahn, the author was informed that the State of Wisconsin recently filed for certiorari.

33 318 F.2d 225 (D.C. Cir. 1963).

pare his rights in that posture with his rights before he was duly convicted.[34]

The purpose of probation is to reform the convicted.[35] As the court suggested in *State v. Zolantakis*,[36] probation implies a duty upon the state:

> Reformation can certainly best be accomplished by fair, consistent, and straightforward treatment of the person sought to be reformed.[37]

The traditional distinction between the "rights" of the accused and the "privileges" of the convicted defendant is unrealistic and injures the professed objectives of our modern system of criminal justice.[38] The majority of jurisdictions realize that an effective system depends on fair treatment of the individual probationer.[39] If for no other reason, it would seem that providing for a hearing would most appeal to a man's sense of justice:

> No society is free where government makes one person's liberty depend upon the arbitrary will of another.[40]

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34 *Id.* at 235 (Judge Burger's opinion is in accord with the exhaustion of constitutional rights at trial theory discussed in footnote 5 *supra*).

35 *See* McCoy v. Harris, 108 Utah 407, 410, 160 P.2d 721, 722 (1945), where the court states:

> The parole system is reformatory and founded upon a plan and policy of helping the inmate to gain strength and resistance to temptation, to build up his self control, . . . and it aims to extend his liberties and opportunities for normal living within the social fabric as his strength to meet new responsibilities grows and develops.

See also State v. Zolantakis, 70 Utah 296, 303, 259 P. 1044, 1046 (1927), where the court states:

> The purpose of the law permitting the suspension of sentence is clearly reformatory. If those who are to be reformed cannot implicitly rely upon promises or orders contained in the suspension of sentence, then we may well expect the law to fail in its purpose.

36 70 Utah 296, 259 P. 1044 (1927).

37 *Id.* at 303, 259 P. at 1046.

38 *See* Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483 (1962).

39 Comment, 12 WAYNE L. REV. 638, *supra* note 5, at 650.

40 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 217 (1953) (Jackson, J., dissenting) (deportation of a resident alien), *quoted at* 430 F.2d at 105.