Right to Counsel at Parole Release Hearings
Menechino v. Oswald
430 F.2d 403 (2d Cir. 1970)

Menechino, following revocation of his parole, appeared twice before the Board of Parole for reconsideration of his parole release; release was denied on both occasions.[1] Under New York Parole Board rules and regulations, assistance of counsel at the release hearing was expressly prohibited.[2] Appellant sought a declaratory judgment in federal court[3] that he was entitled to assistance of retained counsel at his parole release hearing as a minimum requirement of procedural due process.[4] The district court granted summary judgment dismissing the petition.[5] On appeal to the Second Circuit Court of Appeals, *held:* the due process clause of the fourteenth amendment does not foreclose excluding retained counsel at parole release hearings.[6]

A. Prerequisites for Requiring Procedural Due Process

The majority in *Menechino* considered three prerequisites to the imposition of procedural due process protections: an adversary proceeding requiring the traditional skills of counsel;[7] the existence of a private interest presently enjoyed by the complaining party;[8] and an acceptable administrative burden placed upon the state.[9] The majority

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1. Menechino v. Oswald, 430 F.2d 403, 404 (2d Cir. 1970).

2. 9 N.Y. Code of Rules & Reg. § 155.9.

> *Attendance at hearings.* Neither the inmate's attorney nor any other party will be permitted to attend or speak in person in the inmate's behalf or against him at any meeting of the Board of Parole at which the inmate's release on parole is being considered. The board shall have complete discretion with respect to the presence of any other persons at such hearings.

430 F.2d at 406, 413.

3. Jurisdiction invoked pursuant to 28 U.S.C. §§ 1331, 1343(3), 1361 and 42 U.S.C. § 1983 (Supp. 1971), 430 F.2d at 404.

4. Appellant specifically claimed he was entitled to:

> ". . . (i) notice of charges including a substantial summary of the evidence and reports before the Board, (ii) a fair hearing, including the right of counsel, to cross-examination and confrontation and to present favorable evidence and compel the specification of the grounds and underlying facts upon which the determination is based . . . ."

430 F.2d at 405.

5. Menechino v. Oswald, 311 F. Supp. 319 (S.D.N.Y. 1970).

6. 430 F.2d at 403. Appellant's prior claims to right to counsel at his parole revocation hearing were also denied: *In re* Menechino, 57 Misc. 2d 865, 293 N.Y.S.2d 741 (Sup. Ct. Special Term 1968), *rev'd,* 301 N.Y.S.2d 350 (Sup. Ct. App. Div. 1969).

7. 430 F.2d at 407-08.

8. *Id.* at 408.

9. *Id.* at 409-10.

implicitly accepted the arguments that these three elements do not exist at a parole release hearing.

The majority began with the premise that the Board of Parole is not the prisoner's adversary:

> On the contrary the Board has an identity of interest with him to the extent that it is seeking to encourage and foster his rehabilitation and readjustment to society.[10]

Apparently no evidence was presented to establish that the practice of the Board created an adversary atmosphere. The court pointed out that the Board was not normally called upon to resolve disputed issues of fact, but rather to weigh medical, psychiatric, criminological, penological and human relation considerations.[11] Since the proceeding did not involve charges or accusations, the court concluded that the proceeding was not adversary in nature and, therefore, did not require the traditional skills of counsel.[12]

Next, although recognizing the prisoner's interest in liberty, the majority found missing the existence of a "private interest enjoyed[13] by the prisoner." Relying upon Justice Cardozo's dictum in *Escoe v. Zerbst,*[14] the court echoed the traditional view that parole is not a right but a matter of grace,[15] and likened a parole petitioner to an alien seeking entry into the United States.[16]

Finally the majority concluded an unacceptable administrative burden would be placed on the state if assistance of counsel were allowed. This conclusion was based upon four interrelated factors: (1) the large volume of parole release hearings in the state; (2) a concern that assistance of

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10. *Id.* at 407.

11. *Id.* at 408.

12. *Id.* at 407-08.

13. *Id.* at 408.

14. 295 U.S. 490 (1935).

15. "[P]robation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions or respect of its duration as the legislature may impose." *Id.* at 492-93.

16. 430 F.2d at 408-09. The court specifically found release on parole is more a "privilege" than a "right" and the Board is given absolute discretion in instituting release proceeding and possible granting of parole. As such the prisoner is "[l]ike an alien seeking entry into the United States . . . he does not qualify for procedural due process in seeking parole". The majority's comparison of prisoners to aliens is similar to the outdated "slave of the state" doctrine. Although prisoners were once considered "slaves of the state", Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 796 (1871), this concept is now rejected, Coffin v. Reichard, 145 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 355 U.S. 887 (1945). *See generally* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962).

counsel "would be followed by demands by appellant and others for the full panoply of procedural rights";[17] (3) the resulting clogged calendars for hearings before the Board;[18] and (4) a possible requirement that counsel be appointed for indigent prisoners.

A critical evaluation of the majority's treatment of the due process issue necessitates a consideration of the following problems. First, in considering the adversary nature of parole proceeding and need for counsel, it should be recognized that even in a classical adversary proceeding, *e.g.*, criminal trial, many "non-factual" issues arise requiring assistance of counsel.[19] An example of this is the testimony of expert witnesses. Questions of scientific fact are never purely questions of fact but often require the opinions of the observer to put the observations into a meaningful context. Counsel's role in these situations can be viewed as establishing a reasonable doubt that the opinions of the experts are correct. This could be easily applied to medical and social examiners at parole hearings also.[20]

More importantly the need for counsel has been recognized at proceedings not traditionally viewed as adversary.[21] For example, counsel is required during certain phases of a juvenile proceeding.[22] Actually the majority's comparison of the Parole Board to the petitioner's parents[23]

17. 430 F.2d at 412.

> . . . [W]e have no doubt that this [right to counsel] would be followed by demands (by appellant or others) for the full panoply of procedural rights demanded in the complaint, including cross-examination of doctors, psychiatrists, case workers, prison officials, and the like. *We believe that to embark upon such a course would be unwise.* (Emphasis added).

Such action could severely interfere with personal and subjective elements necessary for the Parole Board's decision, *see* N.Y. CORR. L. § 214 (4)(McKinney 1968)(Prisoner's attitude toward society, judge, district attorney, policemen, crime for which imprisoned in addition to mental and psychiatric evidence). *See also* Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 WASH. U.L.Q. 243, 299; Note, *Due Process: The Right to Counsel in Parole Release Hearings,* 54 IOWA L. REV. 497, 507-09 (1968).

18. 430 F.2d at 410.

19. *See* note 11 *supra* and accompanying text.

20. Another non-factual context in an adversary proceeding requiring assistance of counsel is the numerous motions involving legal issues. Of course by definition this indicates a need for and requirement for *legal* counsel.

21. Goldberg v. Kelly, 397 U.S. 254 (1970) (revocation of welfare benefits); Shone v. Maine, 406 F.2d 844 (1st Cir.), *vacated as moot,* 396 U.S. 6 (1969)(juvenile offenders being transferred from boys' training center to men's correctional institution); United States *ex rel.* Schuster v. Herald, 410 F.2d 1071 (2d Cir. 1969) (transferring prisoner to state institution for insane prisoners); Sostre v. Rockefeller, 312 F. Supp. 863 (1970) *aff'd in part sub nom,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)(placing in solitary confinement for more than a year).

22. *In re* Gault, 387 U.S. 1 (1967).

23. 430 F.2d at 407. "Here we do not have pursurer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board . . . occupies the role of parent withholding

is strikingly similar to the *parens patriae* theory once used in denying assistance of counsel to juveniles.[24]

Second, although foreclosing procedural due process protections by classifying parole release as a privilege has received substantial judicial support,[25] the theory's validity was destroyed[26] in *Goldberg v. Kelly*[27]. There the Supreme Court stated:

> . . . the constitutional challenge cannot be answered by an argument that [a party's interest] is a privilege and not a right . . . . The extent to which procedural due process must be afforded . . . depends upon whether the recipient's interest . . . outweighs the governmental interest in summary adjudication.[28]

This statement indicates two things: as the dissent in *Menechino* suggests, what is of primary importance is not the present *enjoyment* but the *nature* of the interest,[29] and the determination of whether procedural due process is required must be made by balancing the interests of the individual and the government.[30] If the *privilege v. right*

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a privilege from an errant child . . . ." quoting Judge (now Chief Justice) Burger in Hyser v. Reed, 318 F.2d 225, *cert. denied sub nom,* Thompson v. United States Board of Parole, 375 U.S. 957 (1963).

24. *See, e.g.,* White v. Reid, 125 F. Supp. 647 (D.D.C. 1954).

25. In supporting its conclusion that a prisoner is not entitled to counsel at a parole release hearing as a matter of constitutional right, the court cited: Mead v. California Adult Authority, 415 F.2d 767 (9th Cir. 1969); Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968); Hodge v. Markley, 339 F.2d 973 (7th Cir. 1965); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied,* 382 U.S. 946 (1964); Hyser v. Reed, 318 F.2d 225, *cert. denied sub nom,* Thompson v. United States Board of Parole, 375 U.S. 957 (1963); Washington v. Hagan, 287 F.2d 332 (3d Cir. 1960), *cert. denied,* 366 U.S. 970 (1961). *See also* Briguglio v. New York State Board of Parole, 24 N.Y. 2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969); People *ex rel.* Ochs v. LaVallee, 60 Misc.2d 629, 303 N.Y.S.2d 774 (1969).

26. *See* Hewett v. North Carolina, 415 F.2d 1316, 1322-23 (1969); Van Alstype, *The Demise of the Right—Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968). Also under statutes such as the Model Penal Code, it is possible to argue that release on parole is a right. Model Penal Code §§ 305.6, 305.9 (Proposed Official Draft 1962), 305.6 ("Every prisoner sentenced to an indefinite term . . . shall be eligible for release on parole upon completion of his minimum term . . .") and 305.9(1) ("Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, *it shall be the policy of the Board to order his release, unless* . . . .") (emphasis added).

27. 397 U.S. 254 (1970).

28. *Id.* at 262-63.

29. 430 F.2d at 418-19. *See also* 397 U.S. at 266-67.

30. Due process is an elusive and flexible concept. Based upon the principal that governmental power is potentially destructive to the conditions inherent to a free society, certain actions are constitutionally proscribed. Beyond this concept, however, is the recognition that improper exercise of otherwise appropriate governmental powers is also potentially destructive. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism,* 66 YALE L.J. 319, 340-41 (1957) [hereinafter cited as Kadish]. This recognition necessitates the regulation of governmental

distinction is discarded, it is apparent that the prisoner has an interest in his return to society. This could be balanced against the government's interest in maintaining an acceptable administrative burden.[31]

Third, in assessing the administrative burden that would be placed upon the state if assistance of counsel were permitted, it is necessary to examine how different states have responded to the problem. Several states allow assistance of counsel through either legislation or Parole Board Regulation.[32] There is no evidence that the parole release process in these states has been adversely affected.[33] No sound conclusion can

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actions through procedural safeguards to insure a "fundamental concept of fairness", Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); 15 KAN. L. REV. 374, 377 (1967); the basic issue, therefore, is what attenuation of "traditional procedures" is acceptable in the proceedings at hand so as to remain consistent with this fundamental concept of fairness. Professor Sanford H. Kadish has suggested a three step analysis of this question focusing on the following areas:

1. the impact upon the personal life of the individual as to whom [the decision] is made;
2. justification for attenuation in terms of the values it purports to further and the indispensability of the attenuated procedures in furthering these objectives;
3. effect upon society when procedures fall short of the reliability insured by traditional procedures.

Kadish, 350. *See also* 15 KAN. L. REV. 374, 378-79 (1967). A similar analysis was followed by the Supreme Court in *Goldberg:* "consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." 397 U.S. at 263. Such analysis indicates a balancing of interests—those of the individual on one side against those of the government government which are furthered attenuated proceedings on the other. The propriety of this inquiry should not be colored because the individual is incarcerated, *see* note 10 *supra.*

31. The importance of a decision which deprives a person of his liberty is one of the major reasons that the Constitution provides for the right to counsel in federal and state criminal proceedings. Gideon v. Wainwright, 372 U.S. 335, 341 (1963); Johnson v. Zerbst, 304 U.S. 458, 463 (1938). *See also In re* W., 5 Cal. 3d 296, 486 P.2d ——, 96 Cal. Rptr. 1 (1971) (". . . interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding [rather than criminal]") Kadish at 337-41 (State interest in effective hearing outweighs administration objection). *But see* MODEL PENAL CODE § 305.7 (Proposed Official Draft 1962) ("a prisoner shall be permitted to advise with with . . . counsel, on *for a hearing* [not present] before the Board of Parole.") (Emphasis added).

32. The Model Penal Code lists eighteen states: Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Louisiana, Michigan, Mississippi, Montana, Nevada, New Mexico, North Carolina, Pennsylvania, Tennessee, Virginia, Utah and Washington. MODEL PENAL CODE § 305.10, comment at 88 (Tent. Draft No. 5, 1956).

33. Although the states listed allow counsel, this may not be direct evidence of the effect of having to provide counsel in all cases. Two inferences could be drawn, either the effect of providing counsel is not great or the necessity of providing counsel has not been judicially tested and such assistance not provided. *See also* Sklar, *Law and Practice in Probation and Parole Revocation Hearings,* 55 J. CRIM. L. C. & P.S. 175 (1964) (parole revocation hearings). A governmental interest in administrative burden is legitimate and has been found sufficiently important to outweigh

be drawn from this information, however, since no empirical data is available which indicates the frequency or the manner in which this right is exercised. Nonetheless, studies clearly show that states have a large volume of parole release hearings.[34] The argument that assistance of counsel at these hearings would be followed by demands for the full panoply of procedural rights is difficult to refute. The same is true for the argument that the allowance of this full panoply would clog the calendars of the Parole Boards. The critical issue, therefore, is whether these demands would be granted by the Parole Board or the courts. In this regard courts have consistently held that the nature of the proceeding will dictate the extent of counsel's participation. The typical position was stated in *Fleming v. Tate*:[35]

> The presence of counsel does not mean that he may take over control of the proceedings . . . [t]he participation by counsel in a proceeding . . . need be not greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed . . . . [T]he presence of counsel is meant as a measure of protection to the prisoner; it should not be permitted to become a measure of embarrassment to the tribunal.[36]

A strong argument can be made to support the proposition that appointment of counsel for indigent prisoners would be required by the equal protection clause.[37] There is, however, case law which might suggest a contrary result. In civil cases, placing burdens on the poor is not necessarily violative of the equal protection clause. The Supreme Court in *James v. Valtierra*[38] stated ". . . of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection."[39] Similarly in *Goldberg v. Kelly*[40] the Court recently

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otherwise constitutionally protected interests. *See* United States v. O'Brien, 391 U.S. 367 (1968) (adverse administrative effects on selective service system sufficiently important to justify conviction for draft card burning as symbol of protest).

34. 430 F.2d at 409-10.

35. 156 F.2d 848 (D.C. Cir. 1946).

36. *Id.* at 849.

It should be noted that this case involved parole revocation not release. Such a setting involves more of a guilt determining decision than do release hearings; right to counsel, therefore, might be more strongly urged. *See generally* 54 IOWA L. REV. 497, 507-09 (1968).

37. Douglas v. California, 372 U.S. 353, 355-56 (1963) (If state provides appellate review and an individual who retains counsel has an advantage, state must provide counsel for indigents). *See also* Mempa v. Rhay, 389 U.S. 128 (1967)(must provide counsel for indigent at probation revocation hearing); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969).

38. 91 S.Ct. 1331 (1971) (requirement for referendums for low income housing not violative of equal protection clause).

39. *Id.* at 1334.

40. 397 U.S. 254 (1970).

stated: "We do not say that counsel must be provided at [a welfare revocation] . . . hearing, but *only* that the [party] must be allowed to retain an attorney if he so desires".[41] The critical issue, therefore, may be whether parole release hearings are considered criminal in nature or are classified as civil or administrative. Although these cases do not require a conclusion that assistance of retained counsel should be allowed at parole release hearings, they do suggest that the concern over potential mandatory appointment of counsel for indigent prisoners need not necessarily foreclose the retention of counsel by others.

B. *The Impact of Mempa v. Rhay*[42]

In an attempt to place parole release hearings in a context permitting assistance of counsel, the petitioner claimed that parole release proceedings were an extension of the sentencing process. His argument was based upon the proposition that parole release hearings are "essentially a continuation of sentencing[43] and, "at sentencing he would have been entitled to assistance of retained counsel".[44]

The majority distinguished sentencing and parole release on the ground that "the prisoner's sentence has already been finally decreed by the court and cannot be changed."[45] In support of the petitioner's contention, the dissent gave substantial weight to the increased use of indeterminate sentencing as a means of dividing the responsibility of sentencing between the judge and the parole board.[46] The dissent also pointed out that for the prisoner the "stakes" were the same: imprisonment for some period—followed by return to society.

The majority and the dissent both relied heavily on *Mempa v. Rhay.*[47]

41. *Id.* at 270-71. [Although the Goldberg decision talks in terms of "means to live", it should be kept in mind this was a civil, not a criminal, proceeding. This distinction may be crucial to the Court's speaking in like manner in a Parole proceeding].

42. 389 U.S. 128 (1967).

43. 430 F.2d at 410.

44. *Id.*

45. *Id.*

46. In line with this trend of dividing responsibility, the prisoner in *Menechino* was sentenced to an indeterminate term by the judge, and after serving one year became eligible for parole at the discretion of the state Board of Parole. 430 F.2d at 414.

See also Senate Report on bill 18 U.S.C. § 4208: ". . . would permit the court, at its discretion, to share with the executive branch the responsibility for determining how long a prisoner should actually serve." S. REP. NO. 2013, 85th Cong., 2d Sess. (1958) U.S. CODE CONG. ADM. NEWS, 3891, 3892; TASK FORCE REPORT ON CORRECTIONS, PRESIDENT'S COMM'N ON LAW ENFORCEMENT 86 (1967) (Parole legislation involves essentially a delegation of sentencing power to the parole board). 18 U.S.C. §§ 4201, 4208 (Supp. 1971); N.Y. Penal L. § 70.40 (McKinney 1967).

47. 389 U.S. 128 (1967).

In *Mempa* the Supreme Court held that an indigent petitioner has a constitutional right to appointed counsel at a proceeding "whether it be labeled a revocation of probation or a deferred sentence."[48] Since the petitioner in *Mempa* was originally released on probation without a sentence being imposed, the revocation proceedings resulted in the initial imposition of sentence. The *Menechino* majority supported its distinction between parole release proceeding and revocation of probation or a deferred sentence on the grounds that in *Mempa* legal rights could have been waived at the subsequent sentencing. This interpretation was based upon the Supreme Court's statement in *Mempa* that:

> Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage. For one, Washington law provides that an appeal in a case involving a plea of guilty followed by probation can only be taken after sentence is imposed following revocation of probation . . . Therefore in a case where an accused agreed to plead guilty, although he had a valid defense, because he was offered probation absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal.[49]

The dissent, however, found the controlling factor in *Mempa* to be the requirement that the judge impose the maximum sentence and then make recommendations on the period of imprisonment.[50] In *Mempa* the Supreme Court stated:

> Obviously to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshalling facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.[51]

The dissent in *Menechino* suggested that this language indicated that counsel is required at "all sentencing proceedings and that 'sentencing' is not confined to what a judge first proscribes after trial."[52]

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48. 389 U.S. at 137.

49. *Id.* at 135-36; *see also* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 TEX. L. REV. 1 (1968).

50. Statute required judge to sentence person to maximum term provided by law, with actual determination of length of time to be served to be made by Board of Prison Terms and Paroles, 389 U.S. at 135.

51. *Id.*

52. 430 F.2d at 417. For an application of *Mempa v. Rhay* in an even more extreme case, *see* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd in part sub nom,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). The court held that a prisoner who was placed in solitary

The conflicting views as to the basis of the decision in *Mempa*[53] must be examined in light of *Townsend v. Burke.*[54] In *Mempa* the Court quoting in part from *Townsend* stated:

> In 1948 this court held in Townsend v. Burke . . . that the absence of counsel during sentencing after a plea of guilty coupled with "assumptions concerning his criminal record which were materially untrue" deprived the defendant in that case of due process. Mr. Justice Jackson there stated in conclusion: "In this case, counsel might not have changed the sentence but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner."[55]

If counsel's role in *Townsend* is viewed as protection of a legal right, as is suggested by the *Menechino* majority's interpretation of *Mempa,* the conclusion that the traditional skills of counsel are not required at parole release hearings seems substantially weakened. For if a right was to be protected by counsel in *Townsend,* the case suggests that it was the right to fair play,[56] including at least the prevention of the use of materially untrue assumptions in determining the sentence. Even the majority in *Menechino* accepted the view that counsel could assist in parole release hearings by protecting "against Board decisions based on misinformation or lack of adequate information."[57] Regardless of the absence of factual issues at a parole proceeding, therefore, *Townsend*

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confinement for more than a year was "in effect" sentenced and therefore entitled to: (1) written notice of charge; (2) hearing with right of cross-examination and calling of witnesses; (3) written record of hearing; and (4) retention of counsel or a counsel substitute. *Id.* at 872.

53. *Compare* Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); State v. Alkinson, 172 S.E.2d 249 (N.C. 1970); *Ex parte* Fuller, 435 S.W.2d 515 (Texas 1969) *with* Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968); Holder v. United States, 285 F. Supp. 380 (E.D. Tex. 1968); State v. Phillips, 443 S.W.2d 139 (Mo. 1969). *See also* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 TEX. L. REV. 1 (1968); 56 IOWA L. REV. 199 (1970).

54. 334 U.S. 736 (1948).

55. 389 U.S. at 133.

56. It seems the Parole Board's immediate goal should be at least a fair, complete and adequate hearing. *See generally* N.Y. CORR. L. §§ 210, 211, 214(4) (McKinney 1968). *See also* extensive criteria for parole eligibility in MODEL PENAL CODE § 305.10 (Proposed Official Draft 1962), including, "(8) such other relevant information concerning the prisoner as may be reasonably available"; 56 IOWA L. REV. 199, 205 (1970)(state also has interest in fair hearing); 54 IOWA L. REV. 497, 502, 507 (1968); Hewett v. North Carolina, 415 F.2d 1316, 1322-23 (4th Cir. 1969); *cf.* Kent v. United States, 383 U.S. 541, 562 (1966).

57. 430 F.2d at 408 n. 2. "There appears to be little dispute, for instance, that such a representative could sometimes assist the board by obtaining and presenting additional relevant evidence, such as facts with respect to the prisoner's employment prospects, family and community

suggests that preventing use of misinformation is at least a traditional role of counsel.

Conclusion

The *Menechino* court based its decision on the questionable *right-privilege* dichotomy as well as a narrow view of the traditional role of counsel. Such a position tends to ignore the element of "fair play" required in governmental hearings and constitutionally mandated when a person's liberty is at stake. The heavy loads placed upon Parole Boards and the tendency toward summary parole release hearing, coupled with virtually complete discretion of the Parole Boards indicate a need for at least some safeguard to assure that standards of "fair play" are maintained.[58] Assistance of retained counsel has long been recognized as one means of assuring "fair play".

In addition, viewing sentencing as merely a declaration from the bench which can not be changed,[59] ignores a sentence's most critical aspect—the period of incarceration[60] which is not fixed and can be changed.[61] This together with current sentencing practices,[62] would seem

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life, and could protect against Board decisions based on misinformation or lack of adequate information. Usually the inmate is a person of limited education. Furthermore he is unlikely because of nervous tension to be able to express himself as logically to the Board as he might in a different setting."

58. According to the majority the Annual Report of the New York Division of Parole for the year of 1967 evidenced more than 11,000 interviews annually. 430 F.2d at 409-10. *See also* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS [1969], 156-64, 284-92; TASK FORCE REPORT ON CORRECTION, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT 186-190 (1967); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 WASH. U.L.Q. 243, 299-300; Tappan, *Role of Counsel in Parole Matters,* 3 PRAC. LAWYER 21, 26 (1957); *cf.* Sklar, *Law and Practice in Probation and Parole Revocation Hearings,* 55 J. CRIM. L. C. & P.S. 174, 186-87 (1964).

59. 430 F.2d at 410.

60. *Cf.* Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968). It is not the *sentencing* but the possible period of incarceration under a sentence that is the crucial factor in determining whether a trial by jury is constitutionally mandated.

61. 430 F.2d at 410.

62. *See* note 46 *supra* and 430 F.2d at 414. ("In New York, the standards in making that determination [whether prisoner entitled to freedom] are remarkably similar. Indeed the Correction Law of the State of New York refers to the Board's role in a parole release proceeding as a 'judicial function'. If the functions of judge and Parole Board under these arrangements are viewed objectively, the parole release proceeding in New York, as elsewhere, does seem in practical effect to be an extension of the sentencing process".' *Citing* N.Y. PEN. L. §§ 65.00, 65.05 (McKinney 1967), N.Y. CORR. L. §§ 212, 213 (McKinney, 1968). *See also* Note, *Due Process: The Right to Counsel in Parole Hearing,* 54 IOWA L. REV. 497, 505 (1968).

to support an argument that parole proceedings are an extension of the sentencing process.[63] If this position is maintained, *Mempa* may support a finding that retained counsel can not be barred from parole hearings.[64]

63. The New York statute provides that after serving his minimum time the prisoner comes under the jurisdiction of the Board of Parole. Also once released on parole the Board has authority to terminate the prisoner's sentence. Thus it could be argued that upon serving the minimum time the prisoner's sentence enters a new phase: one that is not fixed, and one that can be changed. During this phase parole release would be a critical element in a possible termination of the prisoner's sentence, *i.e.* sentencing process. N.Y. CORR. L. § 220 (McKinney, 1968).

64. There may at the same time, however, be internal inconsistencies in this position. If *Mempa* is to be used to require allowance of *retained counsel*, it must be remembered that *Mempa* actually mandated appointment of counsel to indigents at a parole revocation hearing. This could work at cross purposes with the position that just because retained counsel is allowed, appointed counsel [and thus an intolerable administrative burden] would not necessarily follow.