Fordham Law Review

Volume 56 | Issue 4 Article 6

1988

Due Process and Probation Revocation: The Written Statement Requirement

Mihal Nahari

DUE PROCESS AND PROBATION REVOCATION: THE WRITTEN STATEMENT REQUIREMENT

INTRODUCTION

In *Morrissey v. Brewer*,[1] the Supreme Court determined that although a parole[2] revocation hearing[3] does not trigger "the full panoply of protective rights due a defendant"[4] in a criminal proceeding,[5] the liberty[6] issues involved do implicate significant rights[7] protected by the due process clause of the fourteenth amendment.[8] The Court established that certain

1. 408 U.S. 471 (1972).

2. Parole concerns conditional release from prison. *See id.* at 496 n.6 (Douglas, J., dissenting); *see, e.g.*, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 4-5 (1979). The Sentencing Reform Act of 1984 abolished parole, effective November 1, 1987. *See* Pub. L. No. 98-473, 98 Stat. 2017, 2031, *amended by* Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266 (codified as amended at 18 U.S.C. § 4106 (d) (Supp. IV 1986)).

3. A parole revocation hearing determines whether a violation of parole has occurred and, if so, whether the offender should be reincarcerated. *See* Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972).

4. *Id.* at 480.

5. A "criminal proceeding" means a trial to determine the guilt or innocence of an individual accused of a particular crime. *See* W. LaFave & A. Scott, Jr., Criminal Law § 1.7, at 37 (2d ed. 1986). A parole revocation hearing differs from a criminal proceeding in numerous ways. A revocation hearing establishes a particular finding upon which the tribunal may exercise its discretion to continue or revoke the conditional liberty. *See* 18 U.S.C. § 3565 (Supp. IV. 1986).

Morrissey holds that revocation of parole does not constitute part of the criminal proceeding. *See Morrissey*, 408 U.S. at 480. Parole occurs after adjudication of guilt, partial service of the convict's sentence, and a determination that the individual is prepared to return to society, but is undeserving of the absolute liberty enjoyed by law-abiding citizens. *See id.* Revocation, therefore, involves the deprivation of only a conditional liberty. *See id.*; *see also infra* notes 81-82 and accompanying text (defining conditional liberty).

Disparities in procedure clearly distinguish a revocation hearing from a criminal trial. Formal rules of evidence strictly govern the criminal proceedings, while if employed at all at a revocation hearing, their impact is considerably relaxed. *See* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973). Moreover, in criminal trials, juries try the questions of fact. The judge, who is well-acquainted with the subject matter, *see id.*, makes all determinations in revocation hearings. *See id.* In a revocation proceeding, the state need not satisfy the traditional criminal standard of "beyond a reasonable doubt." Rather it must establish reasonable grounds for belief that a violation has occurred. *See Morrissey*, 408 U.S. at 485; *see also* United States v. Crawley, 837 F.2d 291, 292-93 (7th Cir. 1988) (applying a "reasonably satisfied" standard); United States v. Rice, 671 F.2d 455, 458 (11th Cir. 1982) (same); Merritt, *Parole Revocation: A Primer*, 11 U. Tol. L. Rev. 893, 907-09 (1980) (discussing burden of proof in revocation hearings). This standard requires more than mere probable cause. *See Morrissey*, 408 U.S. at 488. The cumulative effect of these differences provided the basis for the Supreme Court's decision to grant parole revocation hearings less than the full constitutional protections traditionally accorded in a criminal proceeding. *See* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973).

6. *See infra* notes 75-78 and accompanying text.

7. *See Morrissey*, 408 U.S. at 482.

8. *See Morrissey*, 408 U.S. at 472. The due process clause of the fourteenth amendment provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *Morrissey*, the

minimum requirements of due process apply to all parole revocation hearings.[9] It subsequently extended the same minimum requirements to probation[10] revocation hearings in *Gagnon v. Scarpelli*,[11] noting parole and probation are "constitutionally indistinguishable."[12]

One requirement, enunciated in *Morrissey* and incorporated in *Gagnon*, focuses on the probationer's right to receive a written statement by the fact finders as to the evidence relied on and reasons for revoking probation.[13] The courts refer to this mandate as the written statement requirement.[14] Most recently, the Supreme Court's opinion, in *Black v. Romano*,[15] reiterates the necessity for the written statement.[16] Neither

---

Supreme Court interpreted the fourteenth amendment to require the states to exercise a degree of care prior to revoking parole. *See Morrissey*, 408 U.S. at 472, 482. The fifth amendment ensures that the same due process requirements apply to the federal government. *Cf.* U.S. Const. amend. V.

9. The *Morrissey* Court enumerated six basic protections necessary to satisfy due process at the parole revocation hearing:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole.

Morrissey, 408 U.S. at 489.

10. The word probation derives from Latin, meaning "the period of proving or trial." P. Cromwell, Jr., G. Killinger, H. Kerper, & C. Walker, Probation and Parole in the Criminal Justice System 391 (2d ed. 1985) [hereinafter Cromwell]. The Sentencing Reform Act of 1984 technically classifies probation as a sentence. *See* 18 U.S.C. § 3561(a) (Supp. IV 1986); S. Rep. No. 225, 98th Cong., 2d. Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3271. Probation, however, evades simple definition as it is used in a variety of contexts. *See* R. Gray, *Probation: An Exploration in Meaning*, 50 Fed. Probation Dec. 1986, at 26. As commonly conceived probation reflects a comprehensive concept that relates to various aspects within the broader framework of criminal jurisprudence: probation is viewed as a process that encompasses the functions, activities, and services that constitute the probationary system's interaction with the courts, the offender, and the community. *See* Cromwell, *supra*, at 391. This Note focuses primarily on the process aspect of probation.

11. 411 U.S. 778, 782 (1973).

12. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 n.3 (1973); *infra* note 104 and accompanying text. Analysis of parole cases, therefore, is germane to the construction of the due process requirements of probation revocation hearings.

13. *See id.* at 782 (incorporating the procedural requirements of *Morrissey*); *cf.* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

14. *See, e.g.*, United States v. Martinez, 650 F.2d 744, 745 (5th Cir. Unit A July 1981) (per curiam); Baumgardner v. Commonwealth, 687 S.W.2d 560, 561 (Ky. Ct. App. 1985). The written statement requirement extends beyond parole and probation revocation processes. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 495-96 (1980) (inmates transferred to mental institutions); Wolff v. McDonnell, 418 U.S. 539, 563-65 (1974) (good time credits taken away from prison inmates); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (public welfare benefits).

15. 471 U.S. 606 (1985).

16. *Id.* at 612-14.

Morrissey,[17] *Scarpelli*,[18] nor *Black*,[19] however, discusses the form such a statement must take.

The Supreme Court's failure to address this issue has engendered a controversy over the constitutionally acceptable form of the written statement in probation revocation cases.[20] Probation revocation hearings take place before the sentencing court.[21] The majority position asserts that an oral statement by the trial judge indicating her reasons for the revocation, transcribed by the court reporter,[22] satisfies due process and eliminates the need for an independent written statement.[23] This view contends that the *Morrissey* written statement requirement was adopted to ensure accurate fact-finding and to provide a sufficient basis for appellate review.[24] The verbatim transcript fulfills these objectives and provides constitutionally adequate protection.[25]

The opposing view, espousing a stricter standard, requires that the defendant receive an independent written statement that provides the rea-

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

18. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

19. *See Black*, 471 U.S. at 612-14.

20. The Supreme Court in *Black* determined that the memorandum issued by the sentencing court in conjunction with the transcript of the hearing satisfied the written statement requirement. *See id.* at 616. The Court, however, discussed neither the content of the memorandum nor the reasons for its adequacy. The question of whether a detailed transcript alone, may prove constitutionally adequate, remains unresolved. *See* Saunders v. United States, 508 A.2d 92, 98 & n.11 (D.C. 1986) (acknowledging conflicting interpretations since *Black*).

21. *See* Pub. L. No. 98-473, 98 Stat. 2001 (codified at 18 U.S.C. § 3601 (Supp. III 1985)); Pub. L. No. 98-473, 98 Stat. 2002 codified at 18 U.S.C. §§ 3603(b), 3603(g) (Supp. III 1985)). Both *Morrissey* and *Gagnon* involved administrative proceedings before a nonjudicial forum. *See* Black v. Romano, 471 U.S. 606, 612 (1985).

22. Statute requires federal courts to record all hearings and to supply transcripts upon request. *See* 28 U.S.C. § 753(b) (1982). *See, e.g.*, United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 708, 710 (7th Cir. 1973) (in prison disciplinary matter, only statement of disposition permitted was one or two sentences on original conduct report), *cert. denied*, 414 U.S. 1146 (1974); Sostre v. McGinnis, 442 F.2d 178, 194-95, 198 (2d Cir. 1971) (en banc) (no requirement to record hearing and issue written decision for every serious prison disciplinary proceeding), *cert. denied*, 404 U.S. 1049 (1972).

23. *See* United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987), *cert. denied*, 108 S.Ct 1239 (1988) (mem.); Morishita v. Morris, 702 F.2d 207, 210 (10th Cir. 1983); United States v. Martinez, 650 F.2d 744, 745 n.1 (5th Cir. Unit A July 1981) (per curiam); United States v. Lacey, 648 F.2d 441, 444 (5th Cir. Unit A June 1981), *cert. denied*, 456 U.S. 961 (1982); United States v. Rilliet, 595 F.2d 1138, 1140 (9th Cir. 1979) (per curiam).

The dictates of *Morrissey* and *Gagnon* apply with equal force to the states. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 472, 487-90 (1972). Thus, numerous state courts sanction the verbatim transcript approach. *See, e.g.*, State v. Moreno, 21 Ariz. App. 462, 465, 520 P.2d 1139, 1141 (1974); State v. Fortier, 20 Or. App. 613, 615, 533 P.2d 187, 190 (1975); State v. Myers, 86 Wash. 2d 419, 429, 545 P.2d 538, 544 (1976) (en banc).

24. *See* Black v. Romano, 471 U.S. 606, 613-14 (1984); United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987), *cert. denied*, 108 S. Ct 1239 (1988) (mem.); Saunders v. United States, 508 A.2d 92, 97 (D.C. 1986).

25. *See Yancey*, 827 F.2d at 89; *Saunders*, 508 A.2d at 97-98.

sons for the revocation of probation.[26] By requiring the issuance of a separate written statement, the minority holds steadfastly to the belief that due process requirements set forth by the Supreme Court mandate exacting application.[27]

Part I of this Note examines the historical antecedents and the administration of the probation system, focusing on the model first adopted by the federal government. Part II traces the development of the due process protections in probation revocation hearings. Part III investigates the viability of the competing interpretations of the written statement requirement and balances the policy considerations implicated by the written statement requirement. This Note concludes that a verbatim transcript setting forth the evidence and reasons for the probation revocation satisfies procedural due process requirements.

I. HISTORICAL ANTECEDENTS AND ADMINISTRATION OF THE FEDERAL PROBATION SYSTEM

Probation represents one of the many rehabilitative options available to the criminal justice system today.[28] Probation offers a popular response[29] to overcrowded prisons[30] and the economic burdens of incarcer-

26. *See* United States v. Smith, 767 F.2d 521, 524 (8th Cir. 1985); Kartman v. Parratt, 535 F.2d 450, 457-58 (8th Cir. 1976); United States v. Bonanno, 452 F. Supp. 743, 747 (N.D. Cal. 1978), *aff'd mem.*, 595 F.2d 1229 (9th Cir. 1979).

Although the *Smith* decision represents a minority view within the federal system, several state court opinions interpreting both state and federal due process requirements support this interpretation. *See, e.g.*, Joiner v. State, 454 So. 2d 1048, 1049 (Ala. Crim. App. 1984); Taylor v. State, 405 So. 2d 55, 56 (Ala. Crim. App. 1981); Borst v. State 377 So. 2d 3, 4 (Ala. Crim. App. 1979); Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. Ct. App. 1985); Baumgardner v. Commonwealth, 687 S.W.2d 560, 561 (Ky. Ct. App. 1986).

27. *See* United States v. Smith, 767 F.2d 521, 524 (8th Cir. 1985); United States v. Bonanno, 452 F. Supp 743, 747 (N.D. Cal 1978), *aff'd mem.*, 595 F.2d 1229 (9th Cir. 1979); Taylor v. State, 405 So. 2d 55, 56 (Ala. Crim. App. 1981).

28. The Sentencing Reform Act provides for sentencing alternatives including: imprisonment, *see* 18 U.S.C. § 3581 (Supp. III 1985); making restitution to the victims, *see* 18 U.S.C. § 3556 (Supp. III 1985 & Supp. IV 1986); fines, *see* 18 U.S.C. § 3571(b) (Supp. III 1985 & Supp. IV 1986); notice and reasonable explanation of the conviction to the victims, so that victims may seek appropriate civil redress, *see* 18 U.S.C. § 3555 (Supp. III 1985 & Supp. IV 1986); and probation, *see* 18 U.S.C. § 3563 (Supp III 1985 & Supp IV 1986). *See also The United States Courts: A Pictorial Summary for the Twelve Month Period Ended June 30, 1981*, at 17 (Administrative Office of the United States Courts 1981), *reprinted in* Sourcebook of Criminal Justice Statistics 1984 at 622 (E. McGarrell & T. Flanagan eds.) [hereinafter Sourcebook 1984] (chart depicting various types of correctional supervision under Federal Probation System).

29. In 1984, federal prisons housed 221,815 inmates. *See* United States Department of Justice Bureau of Justice Statistics, *The 1983 Jail Census*, Bulletin NCJ-95536, at 2 (Wash., D.C. Dept. of Justice, Nov. 1984) [hereinafter *Jail Census*], *reprinted in* Sourcebook 1984, *supra* note 28, at 640. During the same year, federal judges sentenced 817,042 offenders to probation. *See id.* at 616. *See generally* The Federal Judicial Center, An Introduction to the Federal Probation System Q 41-43 app. (1976) [hereinafter Federal Probation].

30. In 1987, the adult prison population nationwide swelled to over half a million inmates, representing the most expansive decade of prison population growth yet exper-

ation.[31] More than one-half of all offenders are sentenced to probation.[32]

The main purpose of probation is to offer an alternative to confinement that also serves to rehabilitate the offender.[33] The theory underlying probation assumes that reintegrating the convict into society as a useful and productive member, rather than incarcerating her, provides her with incentive to reform.[34] The guilty defendant receives a chance to prove her repentance and reformation through peaceful reintegration.[35]

---

ienced. *See* New York Times, April 25, 1988, at 1, col. 3. During the period 1980 through 1987, prison population increased by 76%—from 329,821 inmates to a current total of 581,609. *See* United States Department of Justice Bureau of Justice Statistics, *Prisoners in 1987*, Bulletin NCJ-110331, at 1 (Wash., D.C. Dept. of Justice, Apr. 1988) [hereinafter *Prisoners in 1987*]. The decrease in the number of facilities available to house these offenders, compounded the problem. From 1978-83, available penological institutions in the correctional system nationwide decreased 4%. *See Jail Census*, *supra* note 29, at 2, *reprinted in* Sourcebook of Criminal Justice Statistics 1986, 393 (K. Jamieson & T. Flanagan eds. 1986) [hereinafter Sourcebook 1986]. Federal prisons have been estimated as operating between 37%—73% in excess of capacity. *See Prisoners in 1987*, *supra* note 30, at 2.

31. In 1978 the cost of supervising a federal probationer has been estimated at $.67 per day, or about 1/11 of the $7.54 per day it costs to maintain an institutionalized offender. *See* Campbell, The Law of Sentencing 74 (1978). More recent estimates have placed probation at 1/14th the cost of imprisonment. *See* ABA Standards § 18-2.3 (2d. ed. 1980); *see generally* Federal Probation, *supra* note 29, at Q-42 app.; J. Smykla, Probation and Parole: Crime Control in the Community 178 (1984).

Professor Smykla contends that in 1979 the federal government spent $385 million dollars to supervise approximately 1.5 million individuals on probation and parole. *See* J. Smykla, *supra*, at 178. In contrast, for the same year the prison system expended $3 billion dollars to supervise only 400,000 adults and juveniles incarcerated at that time. *See id.* While these figures clearly emphasize the cost benefits of parole and probation, Professor Smykla cautions that a comprehensive system of crime control could effectively eliminate the large cost disparity. *Id.* at 177-78. The implementation of, and accessibility to, costly social programs for community released offenders would raise the expenditure necessary for effective probation and parole programs. *See id.*

32. *See* U.S. Department of Justice, Statistics, *Prison Admissions and Releases 1983*, Special Report NCJ-100582 at 2, Table 1, 6, Table 8, (admission figures for thirty states' prisons); U.S. Department of Justice Statistics, *Probation and Parole Bulletin 1985*, NCJ-103683 at 2, *reprinted in* Sourcebook 1986, *supra* note 30, at 387 (total state and federal probation entries for 1985); Federal Probation, *supra* note 29, at Q-41 app.

33. *See* Roberts v. United States, 320 U.S. 264, 272 (1943); United States v. Murray, 275 U.S. 347, 357-58 (1928); U.S. v. Torres-Flores, 624 F.2d 776, 783 (7th Cir. 1980) (quoting Burns v. United States, 287 U.S. 216, 220 (1932)). During the debates over the Federal Probation Act, *see* Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259, sponsors of the bill emphasized that probation extended the opportunity for rehabilitation by giving the offender a chance to reform outside of prison. *See* H.R. Rep. No. 1377, 68th Cong., 2d. Sess. 2 (1925) ("probationer is encouraged in industrious, law-abiding habits" (memo in support of probation bill submitted by Sen. Copeland and Rep. Graham)). The legislative history of the Sentencing Reform Act, 18 U.S.C. §§ 3561-3566 (Supp. IV 1987), also reflects the rehabilitative aspect of probation. Probation makes available the options of "educational opportunit[ies and] vocational training." S. Rep. No. 225, 98th Cong., 2d. Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3274.

34. *See* United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975); State v. Muggins 192 Neb 415, 420, 222 N.W.2d 289, 292 (1974); *see generally* N. Cohen & J. Gobert, The Law of Probation and Parole 182-83 (1983); R. Henningsen, Probation and Parole 6-7 (G. Killinger ed.) (1981).

35. *See* H.R. Rep. No. 1377, *supra* note 33, at 2.

English courts used probationary practices as early as the fourteenth century.[36] These practices evolved as society moved away from a retributive approach to crime[37] and toward an enlightened sentiment of Christian charity[38] that embraced rehabilitation as a more effective means of combating crime.[39] Not until the nineteenth century did the psychosocial justification of probation attach as a method for treating antisocial behavior.[40]

During the fifteenth through the seventeenth centuries,[41] practices such as conditional release on bail,[42] "benefit of clergy,"[43] judicial reprieve,[44] filing of cases,[45] and release on one's own recognizance[46] foreshadowed the adoption of a comprehensive probationary system.[47] English prison reform of the late eighteenth century sought more humane conditions for prisoners,[48] which further contributed to this development. Finally, in the beginning of the nineteenth century, English concern for the treatment of juvenile and first-time offenders produced various experiments with probationary tactics intended "to save young and inexperienced offenders from the stigma of prison."[49]

The practice of probation developed much later in the United States. Massachusetts enacted the nation's earliest probation procedures in the late nineteenth century.[50] Favorable results there sparked similar legisla-

36. *See* Federal Probation, *supra* note 29, at 4. *See generally* C. Chute & M. Bell, Crime Courts and Probation 10-30 (1956) (outlining chronology of early British practices).

37. *See* C. Chute & M. Bell, *supra* note 36, at 2-5; S. Rubin, H. Weihofen, G. Edwards & S. Rosenzweig, The Law of Criminal Correction 176-79, 543-46 (1963) [hereinafter Rubin].

38. *See* R. Gray, *Probation: An Exploration in Meaning*, 40 Fed. Probation 26, 30 (1986).

39. *See* Rubin, *supra* note 38, at 176-79, 543-46.

40. *See* R. Gray, *supra* note 37, at 26.

41. *See* generally C. Chute & M. Bell, *supra* note 36, at 10-17.

42. *See* C. Chute & M. Bell, *supra* note 36, at 10-26. *See generally* R. Henningsen, *supra* note 34, at 14 (offender released if some type of security issued on his behalf).

43. This special dispensation, originated by the church, afforded members of the clergy and literate aristocracy a more lenient sentence after reciting a passage from the psalm *Miserere Me* in the bishop's court. *See* R. Henningsen, *supra* note 34, at 13. *See generally* C. Chute & M. Bell, *supra* note 36, at 12-15.

44. Judicial reprieve involved either a temporary stay of sentence, allowing the defendant time to apply for a pardon, or release due to court suspicion that the evidence presented was insufficient to impose a sentence. *See* R. Henningsen, *supra* note 34, at 13.

45. The filing of cases effected a suspension of sentence upon consent of both the prosecutor and the defendant. *See* R. Henningsen, *supra* note 34, at 14.

46. This practice allowed the state to release people suspected of committing crimes in return for a promise not to commit such offenses in the future, creating, in effect, a bond or surety for law-abiding behavior. *See* R. Henningsen, *supra* note 34, at 13-14.

47. *See* N. Cohen & J. Gobert, *supra* note 34, at 7 n.31 (citing United Nations The Legal Origins of Probation, in Probation and Parole; Selected Readings 3 (R. Carter & L. Wilking eds. 1970)).

48. *See* C. Chute & M. Bell, *supra* note 36, at 20-22.

49. *Id.* at 22.

50. *See* C. Chute & M. Bell, *supra* note, 36 at 58-59 (citing Massachusetts Acts 1878,

tive action among various states.[51]

The federal government, however, lagged behind the states in enacting probation legislation.[52] Nevertheless, lower federal courts routinely granted probation as a sentencing option.[53] In 1916, the Supreme Court condemned the common law practice as an abdication of the court's sentencing duty, and firmly held that probation was not a legitimate sentencing option.[54] Placing the offender on probation was deemed beyond the scope of the judiciary and infinged upon the separation of powers.[55] This decision set into motion Congressional efforts to create a federal probation system.[56] These efforts culminated nine years later, when Congress passed the bill creating a comprehensive federal probation system[57] (the "Probation Act" or the "Act"), currently subsumed under the Sentencing Reform Act of 1984.[58]

With its passage, the Act established a uniform system of probation.[59] The statute conferred broad powers upon the sentencing judge in setting the terms and conditions of probation.[60] Commitment to the rehabilita-

---

Ch. 198, § 1); Cromwell, supra note 10, at 10-12; Federal Probation, *supra* note 29, at 4. *See generally* R. Henningsen, *supra* note 34, at 14.

51. *See* C. Chute & M. Bell, *supra* note 36, at 67-68; N. Cohen & J. Gobert, *supra* note 34, at 7; Federal Probation, *supra* note 29, at 4; R. Henningsen, *supra* note 34, at 14-15; J. Smykla, *supra* note 31, at 67-68; *cf.* A. Smith & L. Berlin, Introduction to Probation and Parole 81 (1976) (adult probation statutes not adopted nationwide until 1967).

52. *See* N. Cohen & J. Gobert, *supra* note 34, at 8.

53. *See Ex parte* United States, 242 U.S. 27, 50-52 (1916).

54. *Id.*

55. *See id.* at 51-52; *see also* Frad v. Kelly, 302 U.S. 312, 315 (1937) (purpose of Act to cure judiciary's lack of power to suspend sentence) (citing *Ex parte* United States).

56. *See Ex parte* United States, 242 U.S. at 51-52; *see also* R. Henningsen, *supra* note 34, at 15 (describing the impact of *Ex parte* United States [commonly known as the *Killits* decision] on the development of a federal probation system).

57. Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259. The Act provided that upon entering judgment of conviction for crimes not punishable by death or life imprisonment, and when in the court's discretion:

> it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, [the court] shall have the power . . . to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best.

Id.

58. *See* Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984) *amended by* Pub. L. No. 100-182, 100 Stat. 1268 (1987) (codified at 18 U.S.C. §§ 3561-3566 (Supp. IV. 1986)). *See generally* S. Rep. No. 98-225, 98th Cong., 2d. Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3224, 3232-35, 3242, 3250-3251.

59. *See* N. Cohen & J. Gobert, *supra* note 36, at 8; R. Henningsen, *supra* note 34, at 15. *See generally* Act of Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259-60.

60. *See* Burns v. United States, 287 U.S. 216, 220-21 (1932); Porth v. Templar 453 F.2d 330, 333 (10th Cir. 1971); *see also* Note, *Judicial Review of Probation Conditions*, 67 Colum. L. Rev. 181, 185-86 (1967) (state probation statutes grant broad discretion to trial court); *cf.* 18 U.S.C. § 3583(d) (Supp. IV 1986) (present statutory framework under the Sentencing Reform Act of 1984, requires imposition of certain mandatory conditions as well as option to choose from a nonexhaustive list of discretionary conditions).

tive function of probation,[61] nevertheless, motivated courts to limit conditions of probation to those reasonably related to the achievement of this goal.[62] In response to earlier judicial concern over maintaining separation of powers,[63] the Probation Act also specifically vested power in the sentencing court to revoke or modify any condition of probation.[64]

Passage of the Act coincided with a realignment in federal penological thought. Traditionally, imprisonment and other sanctions served to further the retributive goals of the criminal justice system.[65] Reformers, however, argued that the purpose of sanctions against convicts should be to rehabilitate the offenders.[66] Rehabilitation, therefore, was a motivating factor in the passage of the Probation Act.[67] As a result, probation was viewed as a humanitarian and favorable alternative to prison.[68] This sentiment, coupled with broad judicial discretion to administer the system,[69] engendered an atmosphere of hostility and resistence toward affording procedural due process protections to the violating probationer;[70] courts believed that the manifest benevolence of probation estopped the offender from requesting greater procedural protections.[71]

II. PROCEDURAL DUE PROCESS, THE LIBERTY INTEREST, AND PROBATION REVOCATION

A. *Constitutional Due Process*

The due process clauses of the fifth[72] and fourteenth[73] amendments

61. *See* Burns v. United States, 287 U.S. 216, 220 (1932); United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975).

62. *See* Burns, 287 U.S. at 220-21; *Winsett*, 518 F.2d at 54-55; Note, *supra* note 60, at 185. *But see* United States v. Torrez-Flores, 624 F.2d 776, 783 (7th Cir. 1980) (conditions need not strictly further rehabilitative goal); Best & Birzon, *Conditions of Probation: An Analysis*, 51 Geo. L.J. 809, 810 (1963) (frequently courts imposed conditions that served neither the rehabilitative purpose of probation nor the societal interests involved). Pursuant to the Sentencing Reform Act of 1984, the sentencing judge should consider the following four basic objectives in formulating the various sentencing options: deterrence; incapacitation; just punishment; and rehabilitation. *See* S. Rep. No. 225, 98th Cong., 2d. Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3250.

63. *See Ex parte* United States, 242 U.S. 27, 51-52 (1916); *see also supra* note 56 and accompanying text.

64. *See* Sentencing Reform Act of 1984, ch. 211, § 3562, 98 Stat. 1992, currently codified at 18 U.S.C. § 3652 (Supp. III 1985). *See generally* Best & Birzon, supra note 62, at 817-19.

65. *See* C. Chute & M. Bell, *supra* note 36, at 1-5, 8; Cromwell, *supra* note 10, at 5.

66. *See* N. Cohen & J. Gobert, *supra* note 36, at 7; R. Henningsen, *supra* note 34, at 14; *see also supra* note 33.

67. *See* United States v. Consuelo-Gonzalez, 521 F.2d 259, 263 n.5 (9th Cir. 1975); *see also supra* note 33 and accompanying text.

68. *See Ex parte* United States, 242 U.S. 27, 51 (1916).

69. *See* Burns v. United States, 287 U.S. 216, 220-21 (1932); *supra* note 60 and accompanying text.

70. *See Burns*, 287 U.S. at 223; *infra* notes 88-98 and accompanying text.

71. *See* Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Burns v. United States, 287 U.S. 216, 220 (1932); *infra* notes 87-95 and accompanying text.

72. *See* U.S. Const. amend. V.

protect the populace from capricious government action.[74] Due process ensures against the deprivation of an individual's interest in life, liberty, or property without adequate procedural protection.[75] The liberty interest primarily contemplates freedom from bodily restraint.[76] When an individual stands to suffer a grievous loss,[77] the right or benefit implicated may not be terminated without affording the person appropriate protections.[78] Revocation of probation, which may result in imprisonment,[79] implicates the grievous loss of this liberty interest.[80] While the liberty interest at stake in a revocation proceeding is not absolute,[81] this conditional liberty deserves procedural protection.[82] The next logical inquiry

73. *See* U.S. Const. amend. XIV, § 1.

74. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

75. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law 452 (3d ed. 1986) [hereinafter Rotunda II]. The government has no affirmative duty to institute procedural protections unless an action constitutes an abusive deprivation of life, liberty, or property. *See* Parratt v. Taylor, 451 U.S. 527, 548-49 (1981), *overruled in part on other grounds*, (Powell, J., concurring) Daniels v. Williams, 474 U.S. 327 (1986). The difficulty arises in defining precisely which claims fall within the contemplation of a protected interest. *See* Fuentes v. Shevin, 407 U.S. 67, 84 (1972); *see also* Rotunda, *infra* note 191 at 415 (discussing Supreme Court's refusal to define "life").

76. Protection of physical liberty is the oldest and most accepted interpretation of this due process guarantee. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 673-74 (1977). *See generally* Shattuck, *The True Meaning of the Term "Liberty" in those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property,"* 4 Harv. L. Rev. 365 (1891). The Supreme Court also has determined that various other claims fall within the protected status granted by the liberty interest. *See generally* Rotunda II, *supra* note 75, at 468-72.

77. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). A grievous loss may best be defined by an analysis of the cases which have granted grievous loss status, *see, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (revocation of probation); Morrissey v. Brewer 408 U.S. 471, 482 (1972) (revocation of parole); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (loss of welfare benefits); Shepard v. United States Bd. of Parole, 541 F.2d 322, 325-26 (2d Cir. 1976) (loss of eligibility for rehabilitative programs or postponement of parole), *vacated*, 429 U.S. 1057 (1977), or denied grievous loss status, *see, e.g.*, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 9-11 (1979) (parole release merely an expectation, denial of which does not rise to level of protected grievous loss); Meachum v. Fano, 427 U.S. 215, 224 (1976) (valid conviction constitutionally deprives liberty interest); Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961) (property interest of government employee in retaining employment may be summarily terminated).

78. *See* Anti-Facist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

79. *See* 18 U.S.C. § 3565(a)(1)(2) (Supp. III 1985) (upon violation of probation, court may "continue him on probation . . . [or] revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing").

80. *See* Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972).

81. *See* Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 9 (1979); Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972). A liberty interest is conditional if the offender may be required to engage in or refrain from engaging in certain activities as a precondition to release. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972); *see also* 18 U.S.C. § 3563 (Supp. IV 1986) (conditions applicable to probation); *supra* notes 60-62.

82. *See* Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442

asks What process is due?[83]

The Supreme Court, in *Mathews v. Eldridge*,[84] specified three factors that must be weighed in any adequacy-of-process-analysis: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional safeguards; and the governmental interest in avoiding any fiscal and administrative burdens that the additional or substitute procedure entails.[85] In the context of probation revocation hearings, the assessment of the probable value of substitute procedural safeguards is especially significant.[86]

B. *Judicial Evolution of Procedural Due Process in Probation Revocation Hearings*

Traditionally, the judiciary's approach to the concept of procedural due process reflected a disposition toward flexibility.[87] In the area of probation revocation, this bias originally inspired opposition toward the application of procedural due process,[88] illustrated by the reluctance of the courts to expand the protections afforded to the convicted.[89] In particular, judicial disenchantment with probation reflected the sentiment of numerous judges opposed to the concept of rehabilitative punishment.[90]

U.S. 1, 12 (1979); Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); Morrissey v. Brewer, 408 U.S. 471, 482-84 (1972).

83. *See* Morrissey, 408 U.S. at 483.

84. *See* Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976).

85. *Id.* at 332-35.

86. *See infra* notes 113-46 and accompanying text.

87. *See, e.g.*, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12-13 (1979); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Hannah v. Larche, 363 U.S. 420, 442 (1960); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Douglas, J., concurring); FCC v. WJR, Inc., 337 U.S. 265, 275-76 (1949); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708-09 (1884).

88. *See* Morrissey v. Brewer, 408 U.S. 471, 481-90 (1972); Burns v. United States, 287 U.S. 216, 220 (1932).

89. *See* Evjen, *The Federal Probation System: The Struggle to Achieve It and Its First 25 Years*, 39 Fed. Probation, June 1975, at 3.

90. This response to the concept of a national probation act by Judge Westenhaver of the Northern District of Ohio is typical:

> Replying to your request for my opinion, I beg to say that I am opposed to the bill in its entirety. In my opinion, the power to suspend sentence and place offenders on [probation] should not be confided to the district judges nor anyone else . . . . In my opinion, the suspension, indeterminate sentence and parole systems wherever they exist, are one of the main causes contributing to the demoralization of the administration of criminal justice . . . . I sincerely hope your organization will abandon this project.

Letter from D.C. Westenhaver, U.S. District Judge, Northern District of Ohio, Dec. 14, 1923 to Charles L. Chute (an active advocate of the Probation Act), *reprinted in* Evjen, *supra* note 89, at 5 (use of the term parole instead of probation reflects an error commonly made even by those who should be familiar with the terminology); *see also* Letter from John F. McGee, U.S. District Judge, Minnesota Dec. 19, 1923 to Charles L. Chute, *reprinted in* Evjen, *supra* note 89, at 5; Letter from Honorable Arthur J. Tuttle, of Detroit

As a result of this recalcitrance, the courts developed numerous theories to justify limiting procedural protections in probation revocation hearings.[91] Restrictive rights theories—the grace theory,[92] the contract theory,[93] and the legal custody theory[94]—provided the courts with various rationales to support denial of procedural due process or, at the very least, curtail the quantum and quality of the protections available during probation revocation hearings.[95]

The Supreme Court initially viewed the revocation hearing as serving the sole purpose of enabling the probationer to defend against the claimed violation.[96] This appearance, therefore, did not entitle the accused to a trial or formalized procedure.[97] It was not until the gradual

---

Dec. 14, 1923 to Charles L. Chute, *reprinted in* Evjen, *supra* note 89, at 5 (expressing similar sentiments). This resistance contributed to the long battle in the development of a national probation system. *See* N. Cohen & J. Gobert, *supra* note 34, at 8 (development of a uniform federal probation system took nine years); Evjen, *supra* note 89, at 3-4. For a discussion of other factors affecting passage of the probation bill, see C. Chute & M. Bell, *supra* note 36, at 104 (principal reason for failure of probation bill due to the vociferous opposition of fanatic prohibitionists).

91. *See* Fisher, *Probation and Parole Revocation: The Anomaly of Divergent Procedures*, 38 Fed. Probation, Sept. 1974, at 24 [hereinafter Fisher I]; Fisher, *Parole and Probation Revocation Procedures After* Morrissey *and* Gagnon, 65 J. Crim. L. & Criminology 46, 47-49 (1974) [hereinafter Fisher II]; Note, *supra* note 60, at 191-92.

92. Under the grace theory, courts considered probation a gift, and therefore it was revocable upon violation of any of the specified conditions of the gift. *See* Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935); Burns v. United States, 287 U.S. 216, 220 (1932).

93. This theory deemed the signing of the conditions of probation to give rise to a contract between the state and the probationer. *See* Fisher I, *supra* note 91, at 24. By accepting the conditions, the convict implicitly relinquished all claims to future objections to the terms. *See, e.g.*, People v. Blankenship, 16 Cal. App. 2d 606, 608, 61 P.2d 352, 352-54 (Dist. Ct. App. 1936); State v. Simmington, 235 N.C. 612, 614, 70 S.E.2d 842, 844 (1952); *see also* Note, *supra* note 60, at 191-92. As a result, the probationer could not repudiate the agreement without risking imprisonment. *See* Fisher I, *supra* note 91, at 24.

94. This theory is premised upon the belief that the probationer remains under legal custody of the court. *Cf.* Hyser v. Reed, 318 F.2d 225, 258-59 (D.C. Cir.) (discussing retaking and rearrest of parolee), *cert. denied*, 375 U.S. 957 (1963). Two subtheories spawned from the legal custody theory. The first subtheory, the exhausted rights doctrine, viewed the defendant as having depleted all due process rights during the original trial and sentencing. *See* Fisher I, *supra* note 91, at 24; Fisher II, *supra* note 91, at 48. Thus, the postconviction status remained insulated from the protections of the fifth and sixth amendments. *See* Fisher I, *supra* note 91, at 24. Revocation, therefore, could take place in the absence of the protections traditionally afforded by these amendments. *See id.* at 24.

The second subtheory, the parens patriae rationale, considered both the state and the offender as having a common interest in rehabilitation. *See* Fisher II, *supra* note 91, at 48; Comment, The Parole System, 120 U. Pa. L. Rev. 284, 289 (1971). This bond drew the two entities together, eliminating the need for the further protections embodied in judicial review. *See* Fisher I, *supra* note 91, at 24. For a general discussion of these theories, see R. Henningsen, *supra* note 34, at 78-79; Comment, *supra*, at 286-89.

95. *See* Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935). *See generally* Note, *supra* note 60, at 188-89 (discussing effect of contract and grace theories on probationer's right to appeal conditions of probation).

96. *See* Escoe v. Zerbst, 295 U.S. 490, 493 (1935).

97. *See* Burns v. United States, 287 U.S. 216, 222 (1932); Escoe, 295 U.S. at 493.

erosion of the restrictive rights theories during the late 1960's and early 1970's that the door opened for the introduction of procedural protections.[98] Elimination of the restrictive theories eroded the credibility of the remaining resistance and eventually gave rise to the sentiment that no valid justification existed for the denial of procedural due process in the context of revocation.[99]

As a result of this gradual rejection, the Supreme Court in *Morrissey* recognized the need to establish procedural due process guidelines for parole revocation hearings.[100] The *Morrissey* requirements imposed six basic procedural protections on the revoking tribunal,[101] one of which, the written statement requirement, has presented a great deal of interpretive difficulty.[102] While the Court in *Morrissey* set forth the necessary contents of such a statement—the evidence relied on and the reasons for revoking probation[103]—the Court failed to designate the precise form that would satisfy this requirement.

III. THE WRITTEN STATEMENT REQUIREMENT

The *Morrissey* Court promulgated due process requirements to protect the essential liberty interests at stake in a revocation hearing.[104] The Court prescribed the written statement requirement as a means of ensuring that, in appearance and reality, the revocation comports with ideals of fairness.[105]

Accordingly, a factual basis must support the revocation decision.[106] The written statement enables the individual probationer to understand the grounds for the revocation[107] and also provides the record upon which to prepare for appeal.[108] By enabling an appellate court to review

98. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Hewett v. North Carolina, 415 F.2d 1316, 1324-25 (4th Cir. 1969); Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968).

99. *See Morrissey*, 408 U.S. at 484.

100. *See id.* at 482.

101. *See id.* at 486-89; *see also supra* note 9 and accompanying text (delineating *Morrissey* requirements).

102. *See, e.g.*, Morishita v. Morris, 702 F.2d 207, 209-10 (10th Cir. 1983); Saunders v. United States, 508 A.2d 92, 98 & n.11 (D.C. 1986); *see also infra* notes 105-188 and accompanying text.

103. *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

104. *See id.* The Court, in Gagnon v. Scarpelli, 411 U.S. 778 (1973), extended the *Morrissey* protections to probation revocation hearings, finding that parole and probation revocation raised identical constitutional implications. *Id.* at 782 n.3. Therefore, this Note treats the *Morrissey* holding as directly applicable to probation revocations.

105. *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *accord* Wolff v. McDonnell, 418 U.S. 539, 565 (1974).

106. *See* Black v. Romano, 471 U.S. 606, 614 (1985); Kartman v. Parratt, 535 F.2d 450, 457-58 (8th Cir. 1976); *cf.* United States v. Williams, 668 F.2d 1064, 1072 (9th Cir. 1981) (judge's acceptance of unreliable information for sentencing violates defendant's due process rights).

107. *See* Haymes v. Regan, 525 F.2d 540, 544 (2d Cir. 1975); Rastelli v. Warden, 610 F. Supp. 961, 974 (S.D.N.Y. 1985), *reversed in part*, 782 F.2d 17 (2d Cir. 1986).

108. *See* Saunders v. United States, 508 A.2d 92, 97-98 & n.9 (D.C. 1986); *cf.* Wolff v.

the trial court's reasons for revocation, a written statement that sets out all the relevant facts and evidence protects against arbitrary and capricous revocations of probation.[109] Moreover, in addition to protecting against the grievous loss caused by an erroneous deprivation of liberty,[110] a written statement reduces the possibility of collateral effects, such as inability to contribute financially to family support,[111] that could result from an improper termination of probation. Thus, the main concern behind the written statement requirement is a desire to ensure protection of the liberty interest itself; the chosen method—the separate written statement—simply provides a means for achieving this goal. Therefore, an alternative method that equally protects the probationer's liberty interest would satisfy the prescription of the Supreme Court.

A. *A Written Transcript Offers a Constitutionally Adequate Substitute for the Written Statement Requirement*

In promulgating the due process requirements for revocation hearings, the *Morrissey* decision, through *Gagnon*, elevated the status of the probationer's interest from a privilege[112] to a protected liberty interest.[113] *Morrissey*, however, did not indicate that any *form* be rigidly followed.[114] Rather, the Court emphasized a desire to keep the revocation proceedings informal and flexible,[115] cautioning that the revocation process is not a criminal adjudication.[116]

Although circumstances exist in which due process requires an explanation for the reasons underlying a decision,[117] the existence of other procedural safeguards that minimize the risk of unfairness weakens the justification for imposing an inflexible mandate upon the judge.[118] In the probation revocation context, *Gagnon*, extending *Morrissey*, established

McDonnell, 418 U.S. 539, 565 (1974) (espousing similar rationale in context of prison disciplinary matters). *But see* N. Cohen & J. Gobert, *supra* note 34, at 157 (verbatim transcript does not "appreciably minimize" probability of erroneous hearing).

109. *See* Haymes v. Regan, 525 F.2d 540, 543-44 (2d Cir. 1975); *see also* Black v. Romano, 471 U.S. 606, 613-14 (1985); Holup v. Gates, 544 F.2d 82, 86 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977).

110. *See* Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972); *see also supra* notes 77-78.

111. *See Morrissey*, 408 U.S. at 482; Best & Birzon, *supra* note 62, at 810. (citing National Probation and Parole Ass'n Advisory Council of Judges). In addition, loss of probation further discourages potential employers from hiring the defendant when she is ultimately released from prison. *See* Fisher II, *supra* note 91, at 52.

112. *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

113. *See Morrissey*, 408 U.S. at 480-82.

114. *See id.*

115. *See id.* at 490.

116. *See id.* at 480; *id.* at 499 (Douglas, J., dissenting in part).

117. *See* Harris v. Rivera, 454 U.S. 339, 344 & n.10, 345 (1981).

118. *See* Black v. Romano, 471 U.S. 606, 613 (1985) (citing Harris v. Rivera, 454 U.S. 339, 344-45 (1981)). In *Black*, the separate written statement eliminated the need for an additional enunciation of other options to incarceration. *Id.* at 616.

six procedural safeguards.[119] The presence of these other protections relaxes the rigidity otherwise necessary in construing the written statement requirement.[120] Adherence to rigid procedures undercuts flexibility—the touchstone of due process.[121] In light of these motivations and concerns, the verbatim transcript satisfies the underlying purposes of the written statement requirement.

The majority of courts that have addressed this issue adopt the view that the transcript may substitute for the written statement if the record includes the evidence relied upon and the reasons for the revocation.[122] A written verbatim transcript provides the evidence,[123] reasoning,[124] and conclusions of the proceeding,[125] thereby offering the identical information supplied by the separate written statement.[126] A written transcript, therefore, qualifies as a constitutionally acceptable method of satisfying due process dictates.[127] When a variety of interpretive alternatives exist, preference for one form may suggest that it constitutes a superior method of compliance with constitutional strictures.[128] The courts, however, do not weigh preference in the determination of constitutional adequacy.[129] On appeal, the reviewing court will uphold a decision, provided the court below employed a constitutionally adequate method.[130]

An argument frequently advanced in favor of the separate written statement cites the utility of the separate written statement in minimizing the risk of an erroneous termination of probation.[131] Nevertheless, by transcribing everything that takes place at the hearing, including the

119. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)); *see also supra* note 9 and accompanying text.

120. *See Morrissey*, 408 U.S. at 490.

121. *See* S. Rep. No. 225, 98th Cong., 2d. Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3252; *supra* note 87 and accompanying text.

122. *See* Morishita v. Morris, 702 F.2d 207, 209-10 (10th Cir. 1983); United States v. Martinez, 650 F.2d 744, 745 (5th Cir. Unit A July 1981) (per curiam); United States v. Lacey, 648 F.2d 441, 445 (5th Cir. Unit A June 1981), *cert. denied*, 456 U.S. 961 (1982).

123. *See* Blake v. United States, 372 F. Supp. 186, 190 (M.D. Fla. 1973), *aff'd*, 489 F.2d 1402 (5th Cir. 1974) (per curiam); N. Cohen & J. Gobert, *supra* note 34, at 639-40 (listing other benefits of verbatim transcript); *see also infra* notes 133-35 and accompanying text.

124. *See* United States v. Rilliet, 595 F.2d 1138, 1140 (9th Cir. 1979) (per curiam); Blake v. United States, 372 F. Supp. 186, 190 (M.D. Fla. 1973), *aff'd*, 489 F.2d 1402 (5th Cir. 1974); *accord* Saunders v. United States, 508 A.2d 92, 96-97 (D.C. 1986); Soden v. State, 71 Md. App. 1, 6 n.4, 523 A.2d 1015, 1017 n.4 (1987); *infra* notes 133-35 and accompanying text.

125. *See* United States v. Martinez, 650 F.2d 744, 745 n.1 (5th Cir. Unit A July 1981); Blake v. United States, 372 F. Supp. 186, 190 (M.D. Fla. 1973), *aff'd*, 489 F.2d 1402 (5th Cir. 1974) (per curiam); *see also infra* notes 133-35 and accompanying text.

126. *See* N. Cohen & J. Gobert, *supra* note 34, at 641.

127. *See* United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987), *cert. denied*, 108 S.Ct 1239 (1988) (mem.); Saunders v. United States, 508 A.2d 92, 98 (D.C. 1986); Soden v. State, 71 Md. App. 1, 6 n.4, 523 A.2d 1015, 1017 n.4 (1987).

128. *See Yancey*, 827 F.2d at 89; *Saunders*, 508 A.2d at 98 n.12.

129. *See Yancey*, 827 F.2d at 89; Saunders, 508 A.2d at 98-99 & n.12.

130. *See Yancey*, 827 F.2d at 89; *Saunders*, 508 A.2d at 98-99.

131. *See* Black v. Romano, 471 U.S. 606, 613-14 (1985); Gagnon v. Scarpelli, 411 U.S.

judge's oral pronouncements, the transcript reflects the court proceeding and protects against judicial, as well as procedural, impropriety.[132] If the transcript fails to reflect the reasons for the revocation,[133] or the reviewing court cannot discern the reasons for the revocation,[134] a separate written statement must explain these reasons.[135]

Economic realities underlie the growing acceptability of a verbatim transcript. Because the verbatim transcript includes the requisite information,[136] issuing a separate statement proves duplicative, creating unnecessary expense.[137] While the problem of additional expense does not necessarily justify the use of procedures that fall below optimal constitutional standards,[138] the existence of substitute procedures that fulfill the constitutional mandate, while simultaneously preserving institutional resources, offers a viable alternative.[139]

Courts should interpret *Morrissey's* written statement requirement to be satisfied by the verbatim transcript available in every court of record.[140] A strict interpretation of the *Morrissey* standards runs contrary to the spirit of flexibility with which the Supreme Court promulgated the *Morrissey* and *Gagnon* due process requirements.[141] By incorporating

778, 786 (1973). When revocation of a liberty interest rests on the occurrence of particular events, legal process functions to ensure the veracity of those events.

> Because of the broad spectrum of concerns to which [legal process] must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

132. *See* N. Cohen & J. Gobert, *supra* note 34, at 90-91.

133. *See* Morishita v. Morris, 702 F.2d 207, 209-10 (10th Cir. 1983); United States v. Martinez, 650 F.2d 744, 745 (5th Cir. Unit A July 1981).

134. *See* United States v. Martinez, 650 F.2d 744, 744-45 (5th Cir. Unit A July 1981) (per curiam); United States v. Lacey, 648 F.2d 441, 444-45 (5th Cir. Unit A June 1981), *cert. denied*, 456 U.S. 961 (1982).

135. An allegation that the trial judge failed to issue a separate written statement arises on appeal. It is the reviewing court that makes a determination of the adequacy of the statement issued and determines whether or not the deficiency requires reversal or simply a remand to enter the additional facts and reasons. *See, e.g.*, Morishita v. Morris, 702 F.2d 207, 209-10 (10th Cir. 1983) (affirming); *Martinez*, 650 F.2d at 744 (remanding); *Lacey*, 648 F.2d at 444-45 (remanding); Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. Ct. App. 1986) (remand sufficient to correct procedural defect).

136. *See* United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987), *cert. denied*, 108 S.Ct 1239 (1988) (mem.).

137. *Cf.* Richardson v. Wright, 405 U.S. 208, 227 (1972) (Brennan, J., dissenting) (administrative burdens and expense can be minimized through " 'skillful use of personnel and facilitites.' " (quoting Goldberg v. Kelly, 397 U.S. 254, 266 (1970)); *see also supra* note 135; *infra* note 142.

138. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

139. *See* Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976).

140. *See supra* note 22; *see also* Fed. R. App. P. 10 (b)(1) (requiring appellant to order transcript from district court for appeal).

141. *See supra* note 87 and accompanying text.

the evidence presented,[142] the reasons for revocation,[143] and the evidence relied upon for the conclusion,[144] the verbatim transcript provides a constitutionally adequate substitute. If, on appeal, the reviewing court determines that no factual basis supports the revocation decision, it has the power to correct this mistake by remanding or overturning the lower court decision.[145] Issuing a separate written statement, therefore, results in duplicative effort and unnecessary expenditure of institutional resources. Moreover, the transcript also protects against collateral consequences of an improper termination. A verbatim transcript thus fulfills all the functions of a separate written statement,[146] thereby preserving the probationer's due process protections.

B. *Erroneous Justifications Underlie Strict Adherence to the Separate Written Statement Requirement*

The jurisdictions that adopt the separate written statement approach base their reasoning on the belief that the dictates of *Morrissey* and *Gagnon* must be construed strictly.[147] These courts read *Morrissey* as applied through *Gagnon* to say that one of the minimum requirements of due process is a separate written statement[148] and that this statement must issue before probation may be revoked.[149] Failure to follow these

142. *See* Blake v. United States, 372 F. Supp. 186, 190 (M.D. Fla. 1973), *aff'd*, 489 F.2d 1402 (5th Cir. 1974) (per curiam); N. Cohen & J. Gobert, *supra* note 34, at 640.

143. *See* United States v. Rilliet, 595 F.2d 1138, 1140 (9th Cir. 1979) (per curiam); *Blake*, 372 F. Supp. at 190; Saunders v. United States, 508 A.2d 92, 98 (D.C. 1986); Soden v. State, 71 Md. App. 1, 6 n.4, 523 A.2d 1015, 1017 n.4 (1987).

144. *See* United States v. Martinez, 650 F.2d 744, 745 n.1 (5th Cir. Unit A July 1981); Blake v. United States, 372 F. Supp. 186, 190 (M.D. Fla. 1973), *aff'd*, 489 F.2d 1402 (5th Cir. 1974) (per curiam). *But see* Merritt, *Parole Revocation: A Primer*, 11 U. Tol. L. Rev. 893, 936 (1980) (transcript fails to clearly indicate which evidence judge relied upon for decision, since transcripts include contentions of both parties).

145. *See supra* note 135.

146. *See* United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987), *cert. denied*, 108 S.Ct 1239 (1988) (mem.); United States v. Rilliet, 595 F.2d 1138, 1140 (9th Cir. 1979) (per curiam); State v. Moreno, 21 Ariz. App. 462, 465, 520 P.2d 1139, 1141 (1974); State v. Fortier, 20 Or. App. 613, 615, 533 P.2d 187, 190 (1975); State v. Myers, 86 Wash. 2d 419, 429, 545 P.2d 538, 544 (1976) (en banc).

147. *See* United State v. Bonanno, 452 F. Supp 743, 747 (N.D. Cal. 1978), *aff'd mem.*, 595 F.2d 1229 (1979); Joiner v. State, 454 So. 2d 1048, 1049 (Ala. Crim. App. 1984); Taylor v. State, 405 So. 2d 55, 56 (Ala. Crim. App. 1981); Borst v. State, 377 So. 2d 3, 4 (Ala. Crim. App. 1979); Armstrong v. State, 312 So. 2d 620, 622-23 (Ala. 1975); *id.* at 628 (Maddox, J., concurring specially); Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. Ct. App. 1986); Baumgardner v. Commonwealth, 687 S.W.2d 560, 561 (Ky. Ct. App. 1985).

148. *See, e.g.*, Taylor v. State, 405 So. 2d 55, 56 (Ala. Crim. App. 1981); Armstrong v. State, 312 So. 2d 620, 622-23 (Ala. 1975); *id.* at 628 (Maddox, J., concurring specially); *Baumgardner*, 687 S.W.2d at 561.

149. *See, e.g.*, Joiner v. State, 454 So. 2d 1048, 1049 (Ala. Crim. App. 1984); Taylor v. State, 405 So. 2d 55, 56 (Ala. Crim. App.); Borst v. State, 377 So. 2d 3, 4 (Ala. Crim. App. 1979); Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. Ct. App. 1986); Baumgardner v. Commonwealth, 687 S.W.2d 560, 561 (Ky. Ct. App. 1985).

express requirements must result in reversal and remand.[150] This interpretation, however, fails to consider the fundamental concern for judicial flexibility enunciated simultaneously with the procedural requirements.[151] Strict adherence to precedent vitiates this notion of flexibility,[152] frustrating the law's ability to adapt to the demands of present conditions and realities.[153]

While commitment to stare decisis forms the primary justification for strict adherence to the separate written statement requirement,[154] supporters of a strict interpretation can glean additional support from analogous Supreme Court authority.[155] In *Wolff v. McDonnell*,[156] the Court acknowledged that deprivation of a prisoner's "good time" credits constituted a matter of considerable importance.[157] Despite the Court's refusal to equate deprivation of "good time" credits with parole revocation,[158] it adopted two of the *Morrissey* requirements as prerequisites to minimum due process: "advance notice of the claimed violation and a written statement of the fact finder as to the evidence relied upon and the reason for the disciplinary action taken."[159] Proponents of the separate written statement requirement, therefore, might argue that the Supreme Court has recognized the separate written statement as one of the most fundamental procedural protections.[160]

While *Wolff* appears to lend support to the view that due process requires that a separate written statement issue in probation revocation cases, even those before a court of record, reliance on this case is misplaced. *Wolff* involved hearings before an administrative agency,[161] where a written transcript of the proceeding is not always required or available.[162] Such situations leave the defendant without any record of

150. *See* Joiner v. State, 454 So. 2d 1048, 1049 (Ala. Crim. App. 1984); Austin v. State, 375 So. 2d 1295, 1296 (Ala. Crim. App. 1979); Borst v. State, 377 So. 2d 3, 4 (Ala. Crim. App. 1979).

151. *See supra* note 116 and accompanying text.

152. *See supra* note 87 and accompanying text.

153. *See* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 161-63 (1951) (Frankfurter, J., concurring); *cf.* L. Tribe, American Constitutional Law 1475 (2d ed. 1988) (discussing Supreme Court's overturning of separate-but-equal precedent).

154. *See supra* notes 147-50 and accompanying text.

155. The relevance of parole cases in light of *Gagnon*'s adoption of the *Morrissey* requirements and rationale underscores their applicability in the probation context. *See supra* notes 12, 104 and accompanying text. Prison disciplinary matters also provide analogous support arising from the importance of the written statement requirement. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 563 (1974) (written statement required for deprivation of "good time" credits).

156. 418 U.S. 539 (1974).

157. *See id.* at 561. For a complete discussion of *Wolff* and its implications, see Note, *The Written Statement Requirement of* Wolff v. McDonnell: *An Argument for Factual Specificity*, 55 Fordham L. Rev. 943 (1987).

158. *See Wolff*, 418 U.S. at 561.

159. *See id.* at 563.

160. *See id.* at 564-65.

161. *See id.* at 544-53, 548 n.8.

162. *See, e.g.*, United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 710 (7th Cir.

the proceeding or summation of the evidence presented against her. This severely jeopardizes the inherent fairness of the proceeding and frustrates the ability to evaluate grounds for appellate review[163] and to prepare an adequate defense in contemplation of such an appeal.[164] In mandating the separate written statement, the *Wolff* Court responded to the complete absence of substitute procedural protections.[165] Thus, *Wolff* differs from probation revocation proceedings before a court of record where a transcript of the proceeding routinely is available.[166] This distinction undermines *Wolff's* applicability as persuasive authority in determining the procedural requirements before a court of record.

The minority view also focuses on the importance of the independent written statement. The courts following this view clearly articulate the two purposes that justify its issuance: facilitation of judicial review,[167] and promotion of thought by the fact finders, compelling them to highlight relevant points and to separate irrelevant or unimportant issues present in the record.[168] Rationale gleaned from analogous cases requiring the issuance of a written statement prior to the curtailment of a liberty interest provides two additional reasons to support this minority position: promotion of rehabilitation,[169] and establishment of a body of rules,[170] precedents, and principles promoting consistency.[171]

1973) (for prison disciplinary infraction only written statement received by inmate was one or two sentences on the original conduct report), *cert. denied*, 414 U.S. 1146 (1974); Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971) (rejecting judicial requirement of recorded hearing and written decision for every serious prison disciplinary proceeding), *cert. denied*, 404 U.S. 1049 (1972).

163. *See supra* note 108 and accompanying text.

164. *See* N. Cohen & J. Gobert, *supra* note 34, at 640.

165. *See* Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974) (no indication that inmate ever received written statement by Committee as to evidence or reasons underlying disciplinary action taken).

166. *See* 28 U.S.C. § 753(b) (1982). While *Morrissey* is silent on the issue of who must receive a copy of the revocation hearing report, many jurisdictions provide for the probationer to receive a copy of the report. *See* N. Cohen & J. Gobert, *supra* note 34, at 643-44. Under doctrines espoused by the Supreme Court, an indigent would receive the transcript free of charge. *See* Wade v. Wilson, 396 U.S. 282 (1970); Draper v. Washington, 372 U.S. 487 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Griffin v. Illinois, 351 U.S. 12, 19 (1956). Problems that might arise if the courts determined that a fee should be charged for the transcript are beyond the scope of this Note.

167. *See* United States v. Smith, 767 F.2d 521, 523 (8th Cir. 1985); Kartman v. Parratt, 535 F.2d 450, 457-58 (8th Cir. 1976); N. Cohen & J. Gobert, *supra* note 34, at 639; *cf.* Nebraska Penal Inmates v. Greenholtz, 576 F.2d 1274, 1282-83 (8th Cir. 1978), *rev'd*, 442 U.S. 1 (1979) (prison release context).

168. *See* United States v. Smith, 767 F.2d 521, 524 (8th Cir. 1985) (judge did not indicate which of two asserted violations, or if both, contained in record constituted the basis for revocation); *cf. Greenholtz*, 576 F.2d at 1282-83 (parole determination); Haymes v. Regan, 525 F.2d 540, 543-44 (2d Cir. 1975) (same).

169. N. Cohen & J. Gobert, *supra* note 34, at 639-40; *cf. Greenholtz*, 576 F.2d at 1282-83.

170. *See Greenholtz*, 576 F.2d at 1282-83. *Morrissey* specifically determined that the promulgation of procedure rested with the individual state legislatures. *See* Morrissey v. Brewer, 408 U.S. 471, 488 (1972); *id.* at 499 (Douglas, J., dissenting in part) (court does not sit as procedural "ombudsman" to the state).

In *Greenholtz v. Nebraska Penal Inmates*,[172] the Supreme Court rejected reliance on these factors as absolute justification for a separate written statement in a case involving parole release.[173] The Court determined that when a decision involves agency discretion, reviewing courts should remain reluctant to impose any undue burden, such as issuance of a separate written statement, that might interfere with the free exercise of the administrative function.[174]

Although the judicial system governs probation decisions, initial probation determinations involve considerable discretion.[175] The judicial discretion implicated in probation administration does not rise to the same level of deference accorded agency actions.[176] Probation, however, as reflected in the construction of the probation statute,[177] initially grants the sentencing judge a degree of freedom far greater than that traditionally exercised in prisoner matters.[178] The sentencing court still presides

171. *See Greenholtz*, 576 F.2d at 1282-83. The Eighth Circuit consistently has mandated the written statement in probation revocation as well as prison disciplinary matters. *See, e.g.*, United States v. Smith, 767 F.2d 521, 524 (8th Cir. 1985).

172. 442 U.S. 1 (1979). In *Greenholtz*, the Nebraska Board of Parole challenged the Nebraska parole release statute, *see id.* at 5-6, and the trial court ruling that every adverse parole decision include a written statement of the evidence relied upon. *See id.* at 14. The Court emphasized that parole release could not be equated with parole revocation. *See id.* at 9. A critical distinction exists between losing a conditional liberty one already enjoys and losing the chance for a conditional liberty one desires. *Id. But see id.* at 19 (Powell, J., concurring in part and dissenting in part) (parole release as important to prisoner as parole revocation). While the Court determined that the statute under scrutiny created some liberty interest entitled to a measure of procedural protection, *see id.* at 12, the Court noted that each state's statute must be individually examined to determine if such a liberty interest exists. *Id.* Nevertheless, the *Greenholtz* majority concluded that the procedural protections provided by the statute passed constitutional scrutiny. *See id.* at 16.

173. *See id.* at 13 (imposition of too many burdens on state may prompt abolition of parole commissions).

174. *See id.*

175. *See* 18 U.S.C. § 3562(a) (Supp. IV 1986) (court determines whether to impose a confinement or award probation). The legislative history indicates that the sentencing reforms were meant to provide guidelines for the sentencing judge. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3235. In her judgment, the judge may still choose to override the guidelines in conformity with the particular circumstances. *Id.*

176. *See* K. Davis, Administrative Law Treatise §§ 28.1-28.15 (2d ed. 1984) (discussing reviewability of agency decisions); B. Schwartz, Administrative Law 609 (1976) (courts reluctant to substitute their discretion for that of an agency). *Cf.* Dubois v. Thomas, 820 F.2d 943, 947 (8th Cir. 1987) (" 'agency charged with administering the statute is entitled to considerable deference' " (quoting Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985) (construing Federal Water Pollution Control Act))).

177. *See* Burns v. United States, 287 U.S. 216, 221 (1932) (only limitation as to grant or modification of probation: not to exceed five years); *see also* S. Rep. No. 225, 98th Cong., 2d Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3221.

178. *See* 18 U.S.C. § 3651 (1982) ("court may . . . place defendant on probation . . . upon such terms . . . as the court deems best"); S. Rep. No. 225, 98th Cong., 2d. Sess. 88, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3221 (discussing "unfetterred and sweeping" discretion afforded judges from lack of statutory guidance).

over the revocation decision.[179] Arguably, this illustrates a desire to delegate great discretion to the trier of fact, already well-acquainted with the substantive and procedural history of the case.[180] Consequently, the concern for discretion that motivated the Court in *Greenholtz* provides analogous support for discretion and flexibility within the realm of probation revocation.

Greenholtz also rejects the separate written statement requirement because it would tend to convert parole determination into an adversarial proceeding resembling guilt determination.[181] Likewise, the probation decision follows guilt determination,[182] and therefore does not constitute part of the criminal prosecution.[183] This common distinction provides additional support for the notion that the nonadjudicative nature of the revocation proceedings deserves a greater degree of deference.

The minority approach demonstrates a staunch adherence to form over substance, without legitimate justification.[184] While on first impression the rationales cited by those espousing this view may seem well-founded, closer examination reveals that this position fails to provide any overriding concerns or policy arguments to justify issuing a separate written statement.[185] While the minority correctly assesses the purposes behind the written statement,[186] none of the functions suggested exceed

179. *See* Pub. L. No. 98-473, § 3601, 98 Stat. 1837, 2001 (codified at 18 U.S.C. § 3601 (Supp. III 1985)); Pub. L. No. 98-473, §§ 3663(b), (d) 98 Stat. 1837, 2002 (codified at 18 U.S.C. §§ 3603(b), 3603(g) (Supp. III 1985)) (sentencing court retains jurisdiction over probationer).

180. *Cf.* United States v. Bazzano, 570 F.2d 1120, 1131 (3d Cir. 1977) (Adams, J., concurring) (sentencing judges traditionally given wide discretion "by virtue of their knowledge of the circumstances of a criminal case," which puts them "in the best position to impose a penalty, taking into account the individual conditions of the defendant and the nature of his crime" (footnotes omitted)), *cert. denied*, 436 U.S. 917 (1978); Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 80, 84-86 (1965) (opportunity to observe and interview both defendant and witnesses allows judge to make informed assessments).

181. *See* Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 15-16 (1979).

182. *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); *cf.* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (parole follows guilt determination).

183. *See Gagnon*, 411 U.S. at 781-82; *cf. Morrissey*, 408 U.S. at 480-84 (revocation hearing not part of the criminal prosecution); *see also supra* note 5 (distinguishing revocation hearing from criminal proceeding).

184. In upholding the separate written statement requirement, one judge stated: "I think we all know that the trial judge relied on the testimony . . . in revoking Armstrong's probation . . . but one of the *Gagnon* standards does say that the factfinder . . . must make a written statement; therefore, I think this written record needs to be made for whatever benefit, if any . . . ." Armstrong v. State, 312 So. 2d 620, 628 (Ala. 1975) (Maddox, J., concurring specially).

185. *See, e.g.*, Taylor v. State, 405 So. 2d 55, 56 (Ala. Crim. App. 1981); *Armstrong*, 312 So. 2d at 630 (Maddox, J., concurring specially) ("I do not understand why a trial judge should be required to [issue a separate written statement] but *Gagnon* does set it out as a standard").

186. *See supra* notes 107-11 and accompanying text.

the scope of a verbatim transcript.[187] Issuance of a separate written statement, therefore, increases the burden on the judiciary, depleting valuable institutional resources. In light of these criticisms, adherence to precedent remains the only justification that supports this view. This reasoning contradicts the *Morrissey* admonition against rigidity and the predeliction of the courts in general toward flexibility in evaluating procedural due process.[188]

C. *Policy Concerns and the Balancing Test*

Any decision affecting the extent of procedural due process also requires courts to balance society's institutional needs against the constitutional protections of the individual.[189] Such a balancing test "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[190]

In cases implicating procedural due process, courts employ the balancing test in three basic areas:[191] to determine whether an individual must receive a hearing prior to a termination that constitutes deprivation of life, liberty or property;[192] to determine the exact procedures required at the hearing;[193] and, in an adversarial proceeding, to determine the standard of proof necessary to support the termination.[194] Under each, three basic factors must be analyzed and weighed: the private interest at stake; the public interest in the present system, including the fiscal and administrative burdens of alternate methods; and the risk of erroneous deprivation as a result of procedures employed, as compared with the value of additional or substitute methods.[195]

The private interest segment of the balancing test addresses the probationer's concerns. The probationer posesses an overriding interest in protecting "a status that is considerably more desirable than that of a

187. *See supra* notes 131-46 and accompanying text.

188. *See* Morrissey v. Brewer, 408 U.S. 471, 481, 490 (1972); *see also supra* note 87 and accompanying text.

189. *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

190. Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

191. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law 561-62 (2d ed. 1983); *see also* Rotunda II, *supra* note 75, at 460-61 (discussing due process requirements in criminal justice system).

192. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

193. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973) (determining whether indigent entitled to counsel at probation revocation hearing); Morrissey v. Brewer, 408 U.S. 471, 487-89 (1972) (setting forth parole revocation hearing guidelines).

194. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979); Addington v. Texas, 441 U.S. 418 (1979).

195. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Zurak v. Regan, 550 F.2d 86, 98 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977). The *Mathews* test has evolved as the standard for determining the scope and timing of due process protections. *See* Campo v. New York City Employees' Retirement Sys., 843 F.2d 96, 99 (2d Cir. 1988).

prisoner."[196] Probation revocation appears on the probationer's record and affects his reputation upon ultimate release from prison.[197] Therefore, revocation of probation severely limits employment opportunities,[198] as well as opportunities to participate in community-based rehabilitive programs.[199] Thus, the probationer seeks appropriate protection to prevent erroneous termination and the personal ramifications inherent in such a decision.

The public interest involves the rehabilitive function of probation[200] and the maintenance of adequate due process to ensure that the system fosters rehabilitation.[201] Society also has a vested interest in conserving valuable institutional resources.[202] If the choice exists between two procedures that provide the same level of protection, it is preferable to select that alternative that eliminates unnecessary expenditure of fiscal resources.[203] Thus, society must strive to reconcile two significant interests without compromising either.

The risk of erroneous deprivation—the final prong of the balancing analysis—does not adversely affect the validity of the verbatim transcript.[204] Both the separate statement and the written transcript include information that safeguards the integrity of the judicial process, as well as the factual veracity of the underlying decision.[205] As a result, use of the written transcript in place of the separate written statement does not increase the risk that the probation revocation rests upon faulty reasoning.[206]

The relative interests of both the probationer and society nevertheless implicate serious considerations.[207] The interests of society in utilizing the substitute procedure outweigh those of the probationer because the verbatim transcript advances the interests of society without jeopardizing

196. United States v. *ex rel* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1087 (2d Cir.) (quoting Rose v. Haskins, 388 F.2d 91, 103 (6th Cir. 1968) (Celebreze, J., dissenting)), *vacated*, 404 U.S. 879 (1971).

197. *See* Fisher II, *supra* note 91, at 52.

198. *See* Fisher II, *supra* note 91, at 52; *supra* note 465 and accompanying text.

199. *See* J. Smykla, *supra* note 31, at 218-20.

200. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 484 (1972) ("[S]ociety has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." (citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83, 88 (1967))).

201. *See id.*

202. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

203. *See id.* at 261-63 (determining that procedures used were not constitutionally adequate and therefore, conservation of fiscal resources was not a sufficient consideration to justify summary terminations); *see*, e.g., People v. Cozad, 158 Ill. App. 3d. 664, 675, 511 N.E.2d 211, 219 (requirement that judge specify one of two identical grounds for revocation rejected as wasteful), *appeal denied*, 515 N.E.2d 115 (1987), *cert. denied*, 108 S. Ct. 1233 (1988).

204. *See supra* note 140-46 and accomapanying text.

205. *See supra* note 132 and accompanying text.

206. *See* Armstrong v. State, 312 So. 2d 620, 630 (Ala. 1975) (Maddox, J., concurring).

207. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

those of the probationer. Where an individual may avail herself of other protections, the private interest that may be affected by an erroneous termination is less likely to cause undue hardship.[208] Moreover, the Supreme Court has established that where procedural costs significantly outweigh the countervailing benefits, due process does not mandate the implementation of such procedure.[209]

CONCLUSION

The final probation revocation hearing determines issues that substantially affect the probationer and society. Society's interest in the procedure adopted stems from the desire to protect probation as a valuable rehabilitative tool. Minimizing the rigidity of the form of the written statement enhances this goal. A verbatim transcript provides the probationer with alternate protection, not less protection. A verbatim transcript of the proceedings that records the judge's oral statements, citing the reasons for revocation and the evidence relied upon, satisfies the requirements set out by *Morrissey* and its progeny. Requiring a separate written statement when a verbatim transcript exists subverts the court's desire to refrain from creating formal and rigid requirements. Allowing a reporter's transcript to fulfill the written statement requirement reduces administrative burdens and expense.

In balancing the interests of society against those of the probationer, the balance militates in favor of the verbatim transcript. Although the concern for procedural protections weighs heavily in favor of the probationer, the value of the substitute method outweighs these concerns. The verbatim transcript protects against the possibility of erroneous deprivation with force equal to that of a separate written statement. Reducing institutional burdens alone rarely constitutes a legitimate justification for reducing procedural protections. It does, however, become a viable consideration when the availablity of alternative means eliminates the risk of unfairly abrogating constitutional protections. The verbatim transcript constitutes a substitute method that satisfies these two competeting interests, and as a result, the balance tips in favor of its use. A verbatim transcript constitutes a harmless departure from a literal interpretation

208. *See* Mathews v. Eldridge, 424 U.S. 319, 339-43 (1976). In the case of disability benefits, for example, the *Mathews* Court weighed heavily the fact that the recipient whose benefits were terminated could receive other forms of government assistance. *Id.* at 340-44. In determining whether due process required an evidentiary hearing prior to termination, the Court balanced the fiscal and administrative burdens against the benefits. *Id.* at 347-49. Finding the costs significantly outweighed the countervailing benefits, the Court determined that due process did not mandate such a procedure. *Id.* at 347-49; *see also* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-19 (1978) (applying *Mathews* balancing test).

209. *See* Mathews, 424 U.S. at 348-49.

of the *Morrissey* written statement requirement and qualifies as a constitutionally adequate substitute within the contemplation of the courts.

Mihal Nahari