Procedural Due Process in Parole Release Decisions

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Recent years have seen a dramatic increase in the procedural protections granted to inmates, probationers, and parolees in their disputes with officials of the corrections system.[1] Procedural due process rights have been extended to parolees threatened with revocation of their parole,[2] to probationers threatened with revocation of their probation,[3] and, most recently, to inmates threatened with serious disciplinary sanctions.[4] In the midst of this flurry of activity, one area of post-conviction administrative action remains a "conspicuous void."[5] That area is the parole granting decision itself.[6] The decision whether to

1. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). Historically, courts have been reluctant to intervene in disputes between convicted defendants and the officials who administer the corrections system. *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Siegal v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950); Ruffin v. Commonwealth, 62 Va. (21 Gratt. 790) 1024 (1871). *See generally* Rubin, *Needed—New Legislation in Correction*, 17 CRIME & DELINQUENCY 392 (1971); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Note, *Decency and Fairness: An Emerging Role in Prison Reform*, 57 VA. L. REV. 841 (1971). This judicial attitude, known as the "hands-off doctrine," Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963), was based on general principles of judicial restraint and deference to administrative expertise. *See, e.g.*, Haynes v. Harris, 344 F.2d 463, 465 (8th Cir. 1965); United States *ex rel.* Knight v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); Roberts v. Pegelow, 313 F.2d 548, 551 (4th Cir. 1964).

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

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

4. Wolff v. McDonnell, 418 U.S. 539 (1974).

5. Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1518, 1520 (1972).

6. For discussion of the policy and decisionmaking aspects of the parole release process, see Kastenmeier & Eglit, *Parole Release Decision Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477 (1973); O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651 (1972); *Parole Decision-Making in Oregon*, 55 ORE. L. REV. 303 (1976); Special Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975). For discussion of the role of due process in parole release decisions, see Divine, *Parole Release and Due Process*, 11 WAKE FOREST L. REV. 641 (1975); Gurfein, *The Federal Courts Look at Parole*, 50 ST. JOHN'S L. REV. 223 (1975); Parsons-Lewis, *supra* note 5; Note, *Judicial Application of Procedural Due Process in Parole Release and Revocation*, 11 AM. CRIM. L. REV. 1017 (1973); Comment, *Procedural Protection at Parole Release Hearings: The Need for Reform*, 1974 DUKE L.J. 1119

release on parole typically has been the subject of total and complete administrative discretion.[7] As a result, until recently courts have repeatedly held that the requirements of due process do not apply to the parole release process.[8] In the past several years, however, a growing number of federal courts have applied various due process protections to the parole release decision,[9] based in large part on the Supreme Court's opinions in *Morrissey v. Brewer*[10] and *Wolff v. McDonnell*.[11] The obvious importance of the issue to inmates and prison officials, and the contrary results reached by different courts of appeal[12] make this issue particularly ripe for Supreme Court resolution. Thus far, however, the issue has evaded such review.[13]

[hereinafter cited Comment, *Procedural Protection*]; Note, *The Federal Parole System: A Constitutional Analysis*, 17 How. L.J. 894 (1973) [hereinafter cited as Note, *The Federal Parole System*]; Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 Iowa L. Rev. 497 (1968); Note, *Procedural Due Process in Parole Release Proceedings—Existing Rules, Recent Court Decisions, and Experience in Prison*, 60 Minn. L. Rev. 341 (1976); Note, *Parole Release—Federal Circuits Conflict on Applicability of Due Process and Administrative Procedure Act to Parole Release Decisions*, 27 Vand. L. Rev. 1257 (1974); Comment, *Right to Counsel at Parole Release Hearings, Menechino v. Oswald*, 1971 Wash. U.L.Q. 502.

7. See text & notes 14-47 *infra*.

8. *See, e.g.*, Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 308 (1976); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), *vacated and remanded as moot*, 414 U.S. 809 (1973); Dorado v. Kerr, 454 F.2d 892 (9th Cir.), *cert. denied*, 409 U.S. 934 (1972); Madden v. New Jersey State Parole Bd., 438 F.2d 1189 (3d Cir. 1971); Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970); Schawartzberg v. United States Bd. of Parole, 399 F.2d 297 (10th Cir. 1968); Wynn v. United States, 402 F. Supp. 1207 (N.D. Ga. 1975); Wiley v. United States Bd. of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974); Barradale v. United States Bd. of Paroles & Pardons, 362 F. Supp. 338 (M.D. Pa. 1973); Williams v. United States, 327 F. Supp. 986 (S.D.N.Y. 1971).

9. *See, e.g.*, Richardson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) (statement of reasons required when parole is denied); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (due process requires explanatory guidelines as to the criteria to be considered in passing upon applications, and written statement of reasons when parole is denied); United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974) (due process requires statement of reasons when parole is denied); Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975) (due process requires written guidelines used by the board in considering applications, inmate access to their parole files, and written statement of reasons when parole is denied); Soloway v. Weger, 389 F. Supp. 409 (M.D. Pa. 1974) (due process requires statement of reasons when parole is denied).

10. 408 U.S. 471 (1972).

11. 418 U.S. 539 (1974).

12. *Compare* Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 308 (1976); Dorado v. Kerr, 454 F.2d 892 (9th Cir.), *cert. denied*, 409 U.S. 934 (1972); *and* Madden v. New Jersey State Parole Bd., 438 F.2d 1189 (3d Cir. 1971), *with* Richardson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); *and* United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

13. The Supreme Court has twice granted certiorari to decide the issue and twice has vacated on grounds of mootness before reaching the merits. *See* Scott v. Kentucky Bd. of Parole, No. 74-6438 (6th Cir. Jan. 15, 1975), *cert. granted*, 423 U.S. 1031 (1975), *vacated for consideration of mootness*, 423 U.S. 1072 (1976); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *cert. granted*, 421 U.S. 998, *vacated as moot*, 423 U.S. 147 (1975).

This Note will first consider the method by which parole release decisions are made in the United States. Then the rationales, both supporting and opposing the application of due process to parole release decisions will be discussed. This Note will argue that a constitutionally protected interest in parole can be defined in either of two ways: The inmate suffers a "grievous loss" of an interest in conditional liberty upon being denied parole; and the inmate has a claim of entitlement to parole which is constitutionally protected. The concluding section will discuss the specific procedural protections which arguably should be constitutionally due an inmate seeking parole.

THE MECHANICS OF MAKING PAROLE RELEASE DECISIONS

Parole is the means by which a prison inmate is selected for release before the expiration of his lawful sentence.[14] Although outside prison walls, parolees remain under the supervision of parole officials until the full terms of their sentences have expired.[15] As part of this supervision, parolees are subject to certain restraints on their behavior.[16] Parole has thus been termed "conditional liberty."[17] It is currently the most common form of release from prison,[18] and "has come to be considered a routine procedure by both inmates and staff in most institutions.[19]

All jurisdictions[20] provide statutory definitions describing when

14. H. BURNS, CORRECTIONS 268 (1975); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 390 (1973) [hereinafter cited as NAT'L ADVISORY COMM'N]; W. PARKER, PAROLE, CORRECTIONS-PAROLE-MDT-PROJECT 3 (American Correctional Ass'n Resource Document No. 1, 1972).

15. *See* H. BURNS, *supra* note 14, at 303-07; A. SMITH & L. BERLIN, INTRODUCTION TO PROBATION AND PAROLE 89-104 (1976).

16. Typical of the restraints imposed on the behavior of parolees are requirements that the individual not change his county of residence without the approval of his parole supervisor, that he refrain from the use of alcohol and narcotics, and that he refuse to associate with former inmates of penal institutions and individuals of bad character. H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED 498 (1974).

17. Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

18. NAT'L ADVISORY COMM'N, *supra* note 14, at 389; W. PARKER, *supra* note 14, at 5.

19. W. PARKER, *supra* note 14, at 5; *see* Morrissey v. Brewer, 408 U.S. 471, 477 (1972); Kastenmeier & Eglit, *supra* note 6, at 481-82.

20. In the United States, there are a total of 54 parole jurisdictions, including one board for each of the 50 states, the United States Parole Commission, which administers parole of federal prisoners, the District of Columbia Board of Parole, and autonomous boards with exclusive jurisdiction over female inmates in the States of California and Indiana. V. O'LEARY & J. NUFFIELD, THE ORGANIZATION OF PAROLE IN THE UNITED STATES xxx (2d ed. 1972). Challenges to the constitutionality of release procedures in all of these jurisdictions generally take the form of federal habeas corpus actions or actions under 42 U.S.C. § 1983 (1970). *See, e.g.*, Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 308 (1976); Richardson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975); Dorado v. Kerr, 454 F.2d 892 (9th Cir.), *cert. denied*, 409 U.S. 934 (1972). *See also* discussion note 39 *infra*. While this Note will focus primarily on federal court decisions, the due process principles discussed are applicable to both federal institutions under the fifth amendment and state institutions under the fourteenth amendment. *See* Richardson v. Wolff, 525

certain classes of prisoners will be eligible for release on parole.[21] These periods of eligibility vary from jurisdiction to jurisdiction and from case to case. In some cases, an inmate may be eligible for parole at any time in his sentence,[22] while in others, he must serve one-third of his maximum sentence,[23] 1 year,[24] or a minimum set by a judge or a specific statute.[25] Beyond the statutory period of eligibility, the parole release decision is wholly within the discretion of the parole board.[26] Parole boards are statutorily created agencies governing the administration of the parole system.[27] In carrying out their powers of administration, parole boards are bound by few guidelines. Typically, statutes broadly state that eligible inmates may be paroled if the board decides that such release is not incompatible with the welfare of society, and that there is a reasonable probability that the parolee will live and

F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975).

21. For a compilation of the laws of 52 jurisdictions (federal statutes are now obsolete; Indiana female authority excluded), see W. PARKER, *supra* note 14, at 37-188.

In 1976, Congress enacted the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 94 Stat. 219 (codified at 18 U.S.C.A. §§ 4201-4218 (Supp. 1976)). Among the minor changes found in the Reorganization Act is the change of name of the federal parole authority from the "United States Board of Parole" to the "United States Parole Commission." 18 U.S.C.A. § 4202 (Supp. 1976). More importantly, the Reorganization Act granted substantial procedural rights to applicants for parole in the federal system. *See id.* § 4205; *see* discussion note 38 *infra*.

22. *See, e.g.*, 18 U.S.C.A. § 4202 (Supp. 1976); ALAS. STAT. § 33.15.230(a)(2) (Cum. Supp. 1970); CAL. PENAL CODE § 3040 (West 1970); UTAH CODE ANN. § 77-62-9 (1953).

23. *See, e.g.*, 18 U.S.C.A. § 4208(a)(2) (Supp. 1976); ARIZ. REV. STAT. ANN. § 31-411(A)(1) (1976); DEL. CODE tit. 11, § 4346(a) (1974); OKLA. STAT. ANN. tit. 57, § 332.7 (West 1969).

24. *See* CAL. PENAL CODE § 3049 (West 1970); NEV. REV. STAT. § 213.120(2) (1973).

25. *See, e.g.*, ALAS. STAT. § 33.15.230(a)(1) (Cum. Supp. 1970); CAL. PENAL CODE §§ 3043-3048 (West 1970); COLO. REV. STAT. § 17-1-204 (1976); PA. STAT. ANN. tit. 61, § 331.21 (Purdon 1964).

26. *E.g.*, Juelich v. United States Bd. of Parole, 437 F.2d 1147, 1148 (7th Cir. 1971); Thompkins v. United States Bd. of Parole, 427 F.2d 222, 223 (5th Cir. 1970); United States v. Frederick, 405 F.2d 129, 133 (3d Cir. 1968); French v. Ciccone, 308 F. Supp. 256, 257 (W.D. Mo. 1969).

The name of the paroling agency varies from jurisdiction to jurisdiction, most commonly being referred to as the "parole board," "board of pardons," "board of paroles and pardons," or "board of probation and pardons." W. PARKER, *supra* note 14, at 38-39. This Note will refer to all of the above agencies by the term "parole board."

27. *See, e.g.*, 18 U.S.C.A. § 4201 (Supp. 1976); ARIZ. REV. STAT. ANN. § 31-401 (1976); CAL. PENAL CODE § 3000 (West 1970).

The number of members on parole boards presently ranges from 3 to 12 and the average is five. W. PARKER, *supra* note 14, at 42. Members of state boards generally are appointed by their state governor, with various provisions for legislative approval. For discussions of qualifications, methods of appointment, terms of office, and salary of parole board members in the different jurisdictions, see NAT'L ADVISORY COMM'N, *supra* note 14, at 398-400; W. PARKER, *supra* note 14, at 39-50.

Parole boards typically have four functions:

> (1) [T]he first is to select and place prisoners on parole. (2) The second is to aid, supervise, and provide continuing control of parolees in the community, according to previously established conditions. (3) When the parolee reaches a point where supervision is no longer necessary, or when his sentence is complete, the Parole Board exercises its third function, to discharge him from parole status. (4) However, if the parolee violates the terms of his parole, it

remain at liberty without violating the law.[28] The criteria by which this determination is made, however, in almost every case remains a mystery. Few parole boards have written criteria to be used in parole decisionmaking.[29] Since the statutes which govern parole leave a great deal of standard-setting in the hands of the parole board, the board's failure or refusal to publish parole criteria often leaves it with unfet-

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is the fourth function of the Parole Board to determine whether revocation and return to the institution are necessary.

Id. at 23. This Note concentrates on the impact of due process on the first of these functions.

28. *See, e.g.*, 18 U.S.C.A. § 4202 (Supp. 1976); ALAS. STAT. § 33.15.080. (1962); ARIZ. REV. STAT. ANN. § 31-411 (1970); D.C. CODE § 24-204 (1973); NEV. REV. STAT. § 2.3.1099 (1973). At least one court has expressed serious concern over the constitutionality of such broad standards. In Cicero v. Olgiati, 410 F. Supp. 1080 (S.D.N.Y. 1976), the plaintiffs alleged that N.Y. CORREC. LAW § 213 (McKinney 1969), which sets forth the grounds for granting parole, was void for vagueness because it was incapable of being applied rationally, fairly, and consistently. 410 F. Supp. at 1084. The statute in question states:

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of [*sic*] opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society.

N.Y. CORREC. LAW § 213 (McKinney 1969). The court found several problems with the statute. First, it questioned whether the word "opinion" used in the law meant "a belief based on faith, a judgment based on findings of fact, or an educated guess based on experience and intuitive responses. The statute also fails to specify how strongly the Board must hold its opinion." 410 F. Supp. at 1094. Second, the court felt the "without violating the law" standard might be vague: "Violations of the law may range from commissions of serious felonies to misdemeanors or even jay-walking, illegal parking or speeding on a highway." *Id.* Finally, the determination of whether an inmate's release would be compatible with the welfare of society must be made without standards. "The statute contains no objective standard as to what constitutes the welfare of society or what conduct is incompatible with that welfare." *Id.* The court held that the uncertainty of the meaning of section 213's critical terms raised serious questions as to the constitutionality of the statute and required overturning the district court's grant of the defendant's motion to dismiss. *Id.* at 1094-95.

29. W. PARKER, *supra* note 14, at 29-30. The United States Parole Commission is an exception to the general rule. The United States Commission has promulgated "systemized guidelines for parole release consideration." 28 C.F.R. §§ 2.19-.20 (1976). The guidelines establish the average total time that certain classes of inmates should serve before being released on parole. The particular range for an inmate is determined by a combination of two factors: (1) offense characteristics—severity of offense behavior; and (2) offender characteristics—parole prognosis (salient factor score). *See* Brown v. Lundgren, 528 F.2d 1050, 1052 (5th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 308 (1976). The degree of offense severity ranges from "low" to "greatest" in seven steps, and is determined according to the offense committed. The "low" category includes such offenses as immigration violations and minor theft, while the "greatest" category includes offenses such as homicide and kidnapping. *See* 28 C.F.R. § 2.20 (1976). The salient factor score is determined on the basis of certain characteristics of the individual inmate, and ranges from "very good" to "poor" in four steps. The score is derived from a consideration of nine weighted factors: (1) number of prior convictions; (2) number of prior incarcerations; (3) whether the inmates was an adult or juvenile at the time of his first commitment; (4) whether the first commitment offense involved auto theft; (5) whether defendant's parole was ever revoked or defendant ever committed for a new offense while on parole; (6) history of drug addiction; (7) whether a high school diploma or the equivalent was obtained prior to commitment; (8) verified employment of full-time school attendance for at least 6 months in the last 2 years in the community; (9) release plan to live with spouse or children. 28 C.F.R. § 2.20 (1976). *See* Brown v. Lundgren, 528 F.2d 1050, 1052 (5th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 308 (1976); Gurfein, *supra* note 6, at 238-41.

tered power to make decisions without adhering to any standard.[30]

Besides the lack of any well-defined standards to guide them, most parole boards consider any information regarding the parole applicant that can be obtained.[31] Information available to the board is usually prepared by the institutional staff.[32] Included in this material is information regarding the inmate's presentence report, summaries of contacts with other agencies, results of psychological and educational tests administered to the inmate while in prison, and evaluations of how well the inmate has adjusted to prison life.[33] Although there is a vast "complex of tangible and intangible factors"[34] which the board can consider, its decision may be based on any number of them, even to the extent of relying on one factor to the exclusion of all others.[35] Parole

30. One commentator has pointed out:

> Some critics maintain that the lack of published guidelines proves that parole board concerns focus on self protection. They argue that with no rules, the board cannot be accused of violating any. Having no written procedures thus provides an effective defense against accusations of bias, malice or undue political influence.

H. BURNS, *supra* note 14, at 291.

31. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 63 (1967) [hereinafter cited as TASK FORCE REPORT].

32. NAT'L ADVISORY COMM'N, *supra* note 14, at 400; TASK FORCE REPORT, *supra* note 31.

33. A. SMITH & L. BERLIN, *supra* note 15, at 63. The problem parole boards have in gathering adequate information is well known. The President's Commission on Law Enforcement and Administration of Justice characterized the problem and its consequences in this way:

> Far too typically, overworked institutional caseworkers must attempt to gather information on a prisoner from brief interviews with him, meager institutional records, and letters to community officials. This information is often fitted into a highly stereotyped format. Frequently, the sameness of reporting style and jargon makes it very difficult for board members to understand the individual aspects of a given case and assess them wisely. This can lead to decisions which are arbitrary and unfair as well as undesirable from a correctional standpoint.

TASK FORCE REPORT, *supra* note 31.

34. Wiley v. United States Bd. of Parole, 380 F. Supp. 1194, 1200 (M.D. Pa. 1974).

35. In Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir. 1973), the inmate alleged that the Board had considered only the inmate's prior criminal record in considering his application for parole. The inmate asserted that limiting consideration to that aspect of his record was unlawful and an abuse of discretion. The court held, however, that it was not unreasonable for the Board to base its ultimate decision on the inmate's past criminal record. *Id.* at 281; *accord*, Wayman v. Ciccone, 541 F.2d 189 (8th Cir. 1976); Foddrell v. Sigler, 418 F. Supp. 324 (M.D. Pa. 1976).

The application of due process to the parole release decision may have some impact on the type of information which the parole board may consider. In Morris v. United States, 399 F. Supp. 720 (E.D. Va. 1975), the inmate claimed that the parole board, in denying him parole, had abused its discretion by considering his marital status, his codefendant's homosexuality, incorrect information on the nature of his offense, his pending habeas corpus action, and by failing to consider evidence relevant to his parole status. *Id.* at 723. The court assumed that due process applied to parole release decisions and stated:

> The Parole Board's discretion on whether to give weight to the petitioner's marital status or his peer group's composition is unreviewable. These are factual matters that may be relevant to the petitioner's status as a rehabilitated individual. Yet, the Parole Board does not have the power to consider the petitioner's court petitions for a writ of habeas corpus in their deliberations. Nor does the Parole Board have the authority to consider an erroneous account

boards also may follow virtually any procedures they wish in making the parole release decision. A number of statutes require parole release hearings, at which the applicant may personally appear before the board;[36] most parole boards, as a matter of practice, do provide hearings.[37] Beyond this, however, there is wide variation in the procedures followed in reviewing parole applications.[38] The role of the judiciary in this process is narrowly circumscribed. Courts are without power to grant parole or even to judicially determine eligibility for parole.[39] The scope of judicial review of parole board decisions is uncertain.[40] Thus, courts have not been an effective force in rectifying any deficiencies in the parole release process.

> of the charge for which the petitioner was convicted. Prisoners have the right to unfettered access to the courts, and the right to have parole boards correctly assessed on the nature of their convictions. To hold otherwise would be to offend the traditional notions of justice and fair play that underlie the due process clause.

Id. Thus, to the extent that due process applies, the Parole Board may be precluded from considering information which is irrelevant to the inmate's status as a rehabilitated individual.

36. *See, e.g.*, 28 C.F.R. § 2.12 (1976); ARIZ. REV. STAT. ANN. § 31-411 (1975); KAN. STAT. § 62-2245 (1964); MD. ANN. CODE art. 41, § 112(b) (1957).

37. O'Leary & Nuffield, *supra* note 6, at 678.

38. A 1972 survey disclosed that of the 54 parole jurisdictions, see discussion note 19, *supra*, 30 jurisdictions bar the use of counsel, 34 preclude the inmate from presenting witnesses, 40 do not record the reasons for their decisions, 31 keep no verbatim record of the proceedings, and 29 do not directly inform the inmate of the decision. *Id.*

The recently enacted Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (codified at 18 U.S.C.A. §§ 4201-4218 (Supp. 1976)), grants inmates applying for parole a broad range of procedural rights. Thirty days prior to any parole determination, a parole applicant is entitled to written notice of the time and place of the proceeding, as well as "reasonable access to a report or other document to be used by the Commission in making its determination." 18 U.S.C.A. § 4208(b) (Supp. 1976). The inmate's access to Commission documents, however, does not apply to

> (1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program; (2) any document which reveals sources of information obtained upon a promise of confidentiality; or (3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

Id. § 4208(c). The act allows the prisoner to appear and testify on his own behalf at the parole determination proceeding. *Id.* § 4208(e). He may also, if he chooses, have a representative at the hearing. *Id.* § 4208(d)(2). The Parole Commission is required to keep a "full and complete" record of every proceeding and must make the record available to any prisoner requesting it. *Id.* § 4208(f). Finally, if parole is denied, "a personal conference shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding." *Id.* § 4208(g).

39. Thompkins v. United States, 427 F.2d 222 (5th Cir. 1970); United States v. Frederick, 405 F.2d 129 (3d Cir. 1968); Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967); Neal v. Hunter, 172 F.2d 660 (10th Cir. 1949). Even when an inmate raises a successful constitutional challenge to the procedures followed in denying him parole, his remedy is not release on parole, but a rehearing with appropriate procedural safeguards. *See* Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944 (2d Cir. 1976). However, if the parole board has not corrected the unconstitutional aspects of its decisionmaking process within a reasonable time, the court can then grant a writ of habeas corpus and order the inmate discharged from custody. *Id.*

40. The discretion of the federal parole board has been termed "almost unreviewable." *See* Langston v. Ciccone, 313 F. Supp. 56, 60 (W.D. Mo. 1970). Courts have repeatedly refused to act as "super-parole boards." *See, e.g.*, United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 930 (2d Cir.), *vacated for mootness sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Wiley v. United States

As a result of the current statutes and practices governing the con-

Bd. of Parole, 380 F. Supp. 1194, 1198 (M.D. Pa. 1974); Williams v. United States, 327 F. Supp. 986, 987 (S.D.N.Y. 1971). This conclusion is reached by analogy to the scope of review sections of the Administrative Procedure Act [APA], 5 U.S.C. §§ 701-706 (1970). Although section 706(2)(A) of the APA allows a court to set aside decisions constituting an abuse of agency discretion, that review is limited to the extent that "agency action is committed to agency discretion by law" within the meaning of section 701(a)(2). *See* Tedder v. United States Bd. of Parole, 527 F.2d 593, 594 n.1 (9th Cir. 1975). Since the decision to grant or deny parole generally is committed to the parole board's discretion by law, the *Tedder* court held it unreviewable. *Id.* at 594. This view finds some support in federal statutes. 18 U.S.C.A. § 4218(d) (Supp. 1976) specifically states that certain actions of the Parole Commission are exempted from judicial review under the APA because they are committed to agency discretion by law.

This approach has been rejected by several courts. In Zannino v. Arnold, 531 F.2d 687 (3d Cir. 1976), the court considered whether a court could, under its habeas corpus jurisdiction, review the adequacy of the evidence on which the parole board's conclusion is based. The court explicitly rejected the analogy to APA section 701(2)(A):

> The considerations relevant to the scope of review of agency action which could be challenged under the APA by anyone "suffering legal wrong because of agency action within the meaning of a relevant statute" (5 U.S.C. § 702) are not necessarily involved in review of agency action which is challenged by a person eligible to seek habeas corpus relief.

531 F.2d at 690. The court went on to define the proper scope of judicial review:

> The role of judicial review of a Parole Board decision on application for a writ of habeas corpus is to insure that the Board has followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious, nor based on impermissible considerations. In other words, the function of judicial review is to determine whether the Board abused its discretion. This function cannot be fulfilled without making some inquiry into the evidence relied on by the Board to support its expressed reasons for denying the parole. . . . The inquiry is not whether the Board is supported by the preponderance of the evidence, or even by substantial evidence; the inquiry is only whether there is a rational basis in the record for the Board's conclusions embodied in its statement of reasons.

Id. at 690-91. Another example of a court examining the sufficiency of the evidence to discover if the board has abused its discretion is Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973). In *Masiello*, the board classified the inmate as an organized crime figure based on allegations contained in the inmate's presentence report. This classification had an adverse impact on the inmate's parole chances. *Id.* at 1135. The court examined the report and found it to be "replete with hearsay, inferences, and conclusions" concerning alleged connection between the inmate and organized crime. *Id.* at 1136. It disclosed no identifiable sources of the accusations and did not even classify the sources as reliable. *Id.* The court held that the classification of the inmate as an organized crime figure on the basis of the presentence report was an abuse of discretion:

> [T]he Board failed to winnow the wheat from the chaff. They apparently accepted at face value some loosely-worded, unsupported assertions in the report and, in haste, determined that [the inmate] was a key figure in organized illegal activities. It seems obvious on the present record that there was no basis in fact for the Board to conclude, as its own regulations require, that [the inmate] was a professional criminal who played a significant role in a criminal organization.

Id.

In a different context, the Arizona Supreme Court recently held that unbridled discretion on the part of the Parole Board was not appropriate. In Grimm v. Arizona Bd. of Pardons & Paroles, — Ariz. —, 564 P.2d 1227 (1977), the parole board released an inmate on parole despite psychiatrists' reports that the inmate was a paranoid schizophrenic with definite potential for violence. *Id.* at —, 564 P.2d at 1230. The inmate, while on parole, killed one person and permanently injured another during a robbery. The court held that the discretion given the Parole Board to decide to grant or deny parole did not render the members of the Board absolutely immune from a wrongful death action for negligently releasing a dangerous prisoner. *Id.* at —, 564 P.2d at 1232. According to statute, parole should be granted only if it appears to the Board that there is a reasonable probability that the applicant will live and remain at liberty without

duct of parole boards, and the limited power of the judiciary,[41] the

violating the law. *See* ARIZ. REV. STAT. ANN. § 31-412 (1976). In *Grimm*, the Board's negligent release of a prisoner who could not be reasonably expected to live without violating the law constituted an abuse of discretion, subjecting the members of the Board to potential liability for damage caused by the inmate. — Ariz. at —, 564 P.2d at 1234. Just as a grossly negligent grant of parole outside the statutory guidelines is subject to judicial review, so should an allegation of arbitrary refusal of parole, where an inmate falls within the statutory guidelines, be subject to judicial review.

Even assuming parole board decisions are unreviewable because they are committed to agency discretion by law, a court may still review the decision to determine whether the agency exceeded its own statutory authority, violated its own regulations, or, most importantly, committed constitutional error. The consideration of constitutional challenges is an area particularly appropriate for judicial review. In Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971), the inmate alleged that the parole board had violated his first amendment rights. In establishing its ability to review the question, the district court stated:

> It is not suggested that the Board of Parole, whatever its expertise, has credentials qualifying it to rule finally upon such claims. Indeed, it is not indicated that the Board even purported to make a constitutional adjudication in any remotely adequate, adversary fashion. But it is urged that the Board's action is outside the court's power of review. It would be surprising and gravely questionable, if Congress had meant to confer such final authority upon *any* administrative agency, particularly one that makes no pretense to learning in constitutional law.

Id. at 1301 (emphasis in original). Other courts also have undertaken judicial review of parole board actions which were alleged to be constitutionally inadequate. United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 929 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); United States *ex rel.* Harrison v. Pace, 357 F. Supp. 354, 356 (E.D. Pa. 1973); Foggy v. Eyman, 110 Ariz. 185, 187, 516 P.2d 321, 323 (1973); *In re* Sturm, 11 Cal. 3d 258, 263, 521 P.2d 97, 103, 113 Cal. Rptr. 361, 366 (1974). Since the charge that parole board procedures fail to meet the standards of procedural due process is a constitutional challenge, it is perfectly proper for a court to hear such a claim.

41. In addition to virtual freedom from judicial intervention, most parole boards remain relatively free from the constraints imposed by principles of administrative law. On the federal side, the United States Parole Commission, formerly the United States Board of Parole, has continually resisted the application of the APA, 5 U.S.C. §§ 551-706 (1970), to parole administration. *See* Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459, 479 (1973). In recent years, however, courts have applied various provisions of the APA to parole release decisions. Several courts have held that the parole release decision falls under 5 U.S.C. § 555(e) (1970), which requires a statement of reasons for the denial of any written application, petition, or request made in connection with any agency proceeding. *See* Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); King v. United States, 492 F.2d 1337 (7th Cir. 1974); Mitchell v. Sigler, 389 F. Supp. 1012 (N.D. Ga. 1975). *See also* Comment, *Applying the Administrative Procedure Act to Federal Parole Decision Making*, 6 ST. MARY'S L.J. 478 (1974); Comment, *The Necessity for Written Reasons for Parole Denial: Two Approaches*, 44 U. CIN. L. REV. 115 (1975); Note, *Parole Release—Federal Circuits Conflict on Applicability of Due Process and Administrative Procedure Act to Parole Release Decisions*, 27 VAND. L. REV. 1257 (1974).

The Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219 (codified at 18 U.S.C.A. §§ 4201-4218 (Supp. 1976)), ends much of the controversy over the applicability of the APA to federal parole release decisions. The Parole Commission is defined as an "agency" for the purposes of the APA, with the notable exceptions of 5 U.S.C. §§ 554-557 (1970). *See* 18 U.S.C.A. § 4218(a) (Supp. 1976). This exempts the Parole Commission from the procedural requirements of those sections of the APA and apparently overrules Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); King v. United States, 492 F.2d 1337 (7th Cir. 1974); and Mitchell v. Sigler, 389 F. Supp. 1012 (N.D. Ga. 1975), which held that 5 U.S.C. § 555(e) (1970) required the United States Board of Pardons and Paroles to furnish inmates denied parole with a statement of reasons. In addition, 18 U.S.C.A. § 4218(d) (Supp. 1976) explicitly states that the parole release decision shall be considered to be an action committed to agency discretion for the purposes of 5 U.S.C. § 701(a)(2) (1970). This arguably removes all judicial review of the parole release decision from under the APA.

Another particular area of controversy is the applicability of the Freedom of Information Act, 5 U.S.C. §§ 552, 552a-552b (1970 & Supp. V 1975). In Philadelphia

possibility for the appearance or actuality of arbitrariness abounds.[42] Inmates find that the issue of their liberty is governed by a system where the information upon which the board relies, either weighing for or against the inmate, is unknown to him, where the standards by which he is judged are a mystery, where he is procedurally powerless to advance his cause, where he is not told the reasons for parole denial, and where the courts turn a deaf ear to his complaints.[43] The Court of Appeals for the Second Circuit has stated the problem succinctly: "To the inmate the Parole Board's decisions are a form of *arcana imperii.* His liberty appears to depend entirely on the whim, hunch or caprice of panel members."[44]

The present parole procedures harm both the inmate and the parole system. The parole board is often deprived of valuable information which the inmate could supply, and is thus less able to make a well informed and reasoned decision. In addition, prisoner reactions against the apparent arbitrariness of parole boards are serious obstacles to the successful rehabilitation of inmates.[45] The imposition of procedures comporting with the requirements of procedural due process would alleviate these problems to a great extent.[46] The impediment to this solution, however, has been the inability of courts to find a rationale consistent with accepted constitutional doctrine to justify imposing procedural due process protections.[47]

JUDICIAL VIEWS OF PAROLE RELEASE

The Supreme Court's approach to questions involving procedural due process is now fairly well established. A two step analysis is

Newspapers, Inc. v. United States Dep't of Justice, 405 F. Supp. 8 (E.D. Pa. 1975), a Philadelphia newspaper was successful in its effort under the Freedom of Information Act to obtain from the United States Board of Parole unexpurgated letters recommending parole for an inmate. The district court found that the disclosure of the letters, written mostly by friends and associates of the inmate, would be an invasion of privacy, but not an unwarranted one. *Id.* at 12. No court has yet considered whether an inmate may gain access to his prison files under the Freedom of Information Act, although 18 U.S.C.A. § 4218(a) (Supp. 1976) would seem to allow inmates to invoke the Act.

42. United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 932 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Comment, *Procedural Protection, supra* note 6, at 1123-25.

43. Kastenmeir & Eglit, *supra* note 6, at 488.

44. United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 932 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

45. A special New York State Commission formed to investigate the Attica uprising of 1971 reported that due to apparent inconsistencies in parole board decisions, inmates are left to speculate why parole is denied. "Corruption and chance are among the favorite inmate speculations." NEW YORK STATE SPECIAL COMMISSION ON ATTICA: OFFICIAL REPORT 97 (1972). Indeed, prison disturbances have been attributed to grievances based on apparent arbitrary practices of the parole board. Kastenmeier & Eglit, *supra* note 6, at 484, 490.

46. See text & notes 164-216 *infra.*

47. See text & notes 51-68 *infra.*

utilized.[48] First the Court determines whether there is an interest encompassed by the due process clause's protection of liberty or property.[49] Only upon finding such a constitutionally protected interest will the Court proceed to the second step, that of balancing the conflicting interests involved to determine what procedural safeguards will be required in the particular situation.[50] The problem in the parole release decision process is that few courts have been able to define an interest in parole which is encompassed within the liberty or property interests protected by the due process clause.

Prior to 1971 there was virtual unanimity of opinion that inmates possessed no interest in parole which justified constitutional protection.[51] This conclusion was reached on the basis of several different theories. Some courts characterized parole as an act of grace, controlled by legislative direction rather than constitutional necessity.[52] Parole was viewed as a privilege, to be granted or withheld at will, rather than a constitutional right.[53] Courts also held the granting of parole to be wholly within the administrative discretion of the parole board, and accorded the judiciary no role in the decisionmaking process.[54] Noting that even when an inmate was released on parole, he was still in the custody of the corrections administration, still other courts reasoned that the denial of parole was merely a failure to transfer the inmate from one form of custody to another, and that such failure on the part of the government violated no constitutional right.[55]

The most common argument for denying due process in the recent parole release decisions has been the so-called "present enjoyment doc-

48. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

49. Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

50. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

51. Cummings v. Regan, 45 App. Div. 2d 415, 419, 358 N.Y.S.2d 556, 560 (1974), *rev'd*, 36 N.Y.2d 950, 355 N.E.2d 857, 373 N.Y.S.2d 563 (1975).

52. Richardson v. Rivers, 335 F.2d 996, 999 (D.C. Cir. 1964); Berry v. Parole Bd., 266 F. Supp. 667, 668 (M.D. Pa. 1967); Woods v. Steiner, 207 F. Supp. 945, 951 (D. Md. 1962); State v. Rice, 110 Ariz. 210, 214, 516 P.2d 1222, 1226 (1973); Witt v. State *ex rel.* Eyman, 18 Ariz. App. 120, 121, 500 P.2d 905, 906 (1972).

53. Barnes v. United States, 445 F.2d 260, 261 (8th Cir. 1971); Jones v. United States, 419 F.2d 593, 599 (8th Cir. 1969); Cook v. Willingham, 389 F.2d 769, 770 (10th Cir. 1968); Carson v. Executive Director, Dep't of Parole, 292 F.2d 468, 469 (10th Cir. 1961); Hamilton v. Ford, 362 F. Supp. 739, 742 (E.D. Ky. 1973).

54. Barnes v. United States, 445 F.2d 260, 261 (8th Cir. 1971); Tarlton v. Clark, 441 F.2d 384, 385 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971); Juelich v. United States Bd. of Parole, 437 F.2d 1147, 1148 (7th Cir. 1971); Thompkins v. United States Bd. of Parole, 427 F.2d 222, 223 (5th Cir. 1970); United States v. Frederick, 405 F.2d 129, 133 (3d Cir. 1968); Brest v. Ciccone, 371 F.2d 981, 982 (8th Cir. 1967); French v. Ciccone, 308 F. Supp. 256, 257 (W.D. Mo. 1969).

55. Roach v. Board of Pardons & Paroles, 503 F.2d 1367, 1368 (8th Cir. 1974); Padilla v. Lynch, 398 F.2d 481, 482 (9th Cir. 1968).

trine."[56] According to this view, the only type of interest protected by procedural due process is one that is currently enjoyed.[57] Since an inmate, at the time of his application for parole, does not enjoy freedom of movement outside prison walls, it is asserted that there is no interest in liberty currently enjoyed. An inmate's interest in parole, therefore, is not deemed to be protected by the Constitution under this analysis.[58] The combined effect of these various theories was that parole could be granted, denied, or revoked without affecting any constitutionally protected interest.[59]

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56. *See* Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 308 (1976); Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

57. *See generally* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89.

58. Menechino v. Oswald, 430 F.2d 403, 408 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). The *Menechino* court advanced other reasons for denying the application of due process to parole release proceedings in addition to the present enjoyment argument. The court pointed out that the parole interview is not an adversary proceeding; the parole board had an identity of interest with the inmate to the extent that it sought to encourage and foster the inmate's rehabilitation and readjustment to society. *Id.* at 407. The court also noted that a notice of charges was not needed since there were no "charges" or accusations against the inmate. *Id.* The court made the additional observation that parole hearings usually involve few disputed issues of fact. *Id.* Finally, the court observed that since it was almost unanimously held that due process did not apply to parole revocation, there was no need for due process in the release process, where the inmate has less at stake than a parolee facing revocation. *Id.* at 408.

The above reasons for denying due process in parole release are clearly no longer valid after Morrissey v. Brewer, 408 U.S. 471 (1972). *Morrissey* directly refuted the *Menechino* court's argument based on the lack of due process in parole revocation. *Id.* at 481. In addition, the *Menechino* court's arguments regarding the identity of interest, the lack of charges or accusations, and the lack of disputed issues of fact all relate to the nature of the proceeding rather than the nature of the inmate's interest. The court in *Morrissey* made it clear that in determining whether due process applies, the nature of the individual's interest governs. *Id.* Thus, the *Menechino* court's arguments were relevant only to a determination of the amount of procedural protection required, not to a decision whether due process applies in the first instance.

59. *See, e.g.*, Roach v. Board of Pardons & Paroles, 503 F.2d 1367 (8th Cir. 1974); Earnest v. Moseley, 426 F.2d 466 (10th Cir. 1970); Padilla v. Lynch, 398 F.2d 481 (9th Cir. 1968); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); Carson v. Executive Director, Dep't of Parole, 292 F.2d 468 (10th Cir. 1961).

Several state courts, however, have required procedural protections in parole release based on common law and statutory interpretation. In Monks v. New Jersey State Bd. of Parole, 58 N.J. 238, 277 A.2d 193 (1971), *noted in* 33 OHIO ST. L.J. 219 (1972), the court held that the New Jersey Parole Board must give an inmate a statement of reasons for denial of parole. *Id.* at 244, 277 A.2d at 199. The court reasoned that "fairness and rightness" required that an inmate be given such a statement. *Id.*

> [A statement of reasons] as a general matter would serve the acknowledged interests of procedural fairness and would also serve as a suitable discipline on the Board's exercise of its wide powers. It would in no wise curb the Board's discretion on the grant or denial of parole nor would it impair the scope and effect of its expertise. It is evident to us that such incidental administrative burdens as result [*sic*] would not be undue; the reported experiences in the jurisdictions which have long furnished reasons have given us no grounds for pause.

Id. The court thus afforded the inmates in New Jersey prisons some measure of procedural protection in the parole release process. However, the court based its jurisdiction on "the comprehensive writ jurisdiction which it inherited from the King's Bench." *Id.* at 243, 277 A.2d at 198. Thus, while the New Jersey Supreme Court gave inmates a common law remedy for arbitrary procedures, it avoided any constitutional questions

The Effect of Morrissey

The Supreme Court's opinion in *Morrissey v. Brewer*[60] has profound impact on all the previous arguments for denying due process in parole release decisions. In *Morrissey*, the Court held that a parolee threatened with revocation of his parole must be afforded certain minimal protections of procedural due process.[61] In reaching this conclusion, the Court found that the conditional freedom of parole was a constitutionally protected liberty interest.[62] Although the specific holding in *Morrissey* was limited to parole revocation, the Court made several points in the course of its reasoning which are particularly relevant to parole release. First, it made clear that the characterization of parole as either a right or a privilege was irrelevant to the determination of whether it was a constitutionally protected liberty interest.[63] Furthermore, the Court rejected the argument that revocation is so totally

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of the application of due process to parole release decisions. *See* 33 OHIO ST. L.J. 219, 222 (1972).

Another state supreme court arrived at a similar conclusion, while employing a different analysis. The California Supreme Court held that an inmate facing a parole release hearing was entitled to have his application "duly considered." *In re* Schoengarth, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967). In *In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974), the court held that in order to insure that a parole applicant received due consideration, a statement of reasons was necessary to allow for meaningful judicial review. *Id.* at 273, 521 P.2d at 107, 113 Cal. Rptr. at 371. Both *Monks* and *Sturm*, although requiring certain procedural protections in the parole release decision, avoided any discussion of constitutional due process.

60. 408 U.S. 471 (1972).

61. *Id.* at 481.

62. *Id.* at 482.

63. *Id.*; *see* Board of Regents v. Roth, 408 U.S. 564, 571 (1972). Historically, due process guarantees were available for protection against deprivations of "rights," but not against denials of "privileges." *See* Barsky v. Board of Regents, 347 U.S. 442 (1954); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). The doctrine rested on the rationale that benefits which a state could deny altogether could be withheld on whatever terms the state chose. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968). The Supreme Court has rejected this rationale in recent years. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

A modified form of the right-privilege doctrine has reemerged in several recent cases. In Arnett v. Kennedy, 416 U.S. 134 (1973), the appellee, a non-probationary employee in the competitive United States Civil Service, was dismissed from his position for allegedly making recklessly false and defamatory statements about some of his co-employees. *Id.* at 137. The employee challenged the procedures by which he was dismissed. The Lloyd La Follete Act, 5 U.S.C. § 7501 (1970), which provided for removal of nonprobationary federal employees "only for such cause as will promote the efficiency of the service," 5 U.S.C. § 7501 (1970), also prescribed the procedures by which an employee could be dismissed. The Supreme Court found no constitutional inadequacy in the procedures. The reason given by Justice Rehnquist in the plurality opinion bears a strong right-privilege imprint: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." 416 U.S. at 153-54. This notion, however, carried only three members of the court. See discussion note 163 *infra*. In Goss v. Lopez, 419 U.S. 565 (1974), four members of the Court voiced a similar theory. *Id.* at 586 (Powell, J., dissenting).

a discretionary matter that procedural due process is inappropriate.[64] The Court reasoned that imposition of procedural protections would in no way interfere with the parole board's exercise of its discretion in deciding whether or not parole should be revoked.[65] Finally, the *Morrissey* Court rejected the argument that due process did not apply to revocation proceedings because revocation was merely a transfer from one form of custody to another.[66]

Morrissey thus severely weakened the foundation for every argument against finding a protected interest in parole release except the present enjoyment argument.[67] In *Morrissey*, the parolee's interest in being paroled was protected at least partially because he currently enjoyed the conditional liberty of parole. An inmate, on the other hand, does not currently possess the conditional freedom of parole, and therefore has only a hope of attaining it. Consequently, under this analysis, the inmate's interest in parole does not merit constitutional protection.[68]

PROTECTED INTERESTS IN PAROLE RELEASE

Although the present enjoyment rationale does create a discernible distinction between parole release and parole revocation, that distinction should not be held conclusive of whether an inmate has a protected interest at stake in parole release.[69] Admittedly, an inmate

64. 408 U.S. at 483.

65. *Id.*

66. *Id.* The precise analysis the Court used in ultimately finding a protected liberty interest is discussed at text & notes 71-79 *infra.*

67. See text & notes 56-58 *supra.* The survival of the present enjoyment theory in the parole release context is evinced in Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied,* — U.S. —, 97 S. Ct. 308 (1976); *accord,* Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), *vacated for mootness,* 414 U.S. 809 (1973); Lashley v. Florida, 413 F. Supp. 850 (M.D. Fla. 1976).

68. Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir. 1976), *cert. denied,* — U.S. —, 97 S. Ct. 308 (1976).

69. The present enjoyment theory finds little support in Supreme Court case law. The court in Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976), *cert. denied,* — U.S. —, 97 S. Ct. 308 (1976), stated this principle without a single citation of authority. *See* 528 F.2d at 1052-53. The court in Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), *vacated for mootness,* 414 U.S. 809 (1973), derived its holding from an examination of the Supreme Court cases of Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin of goods); Goldberg v. Kelly, 397 U.S. 354 (1970) (termination of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishment of wages); and Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (revocation of security clearance). 477 F.2d at 282 n.17. While it is true that in each of the cases cited by the *Scarpa* court, the individual was deprived of a benefit he currently possessed, it is questionable whether those cases should be read to impose that characteristic as a requirement. The present enjoyment argument is an extrapolation from the common factual characteristics of the Supreme Court cases cited. The present enjoyment argument extracts a common factual characteristic from these widely varying situations and elevates that factual distinction to the level of a constitutional doctrine. It totally disregards the particular form of analysis and reasoning in each case.

Further, in other cases, the Supreme Court has extended due process protections to benefits not yet in possession. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court noted that the foreclosure of a range of opportunities could amount to a

does not enjoy actual physical conditional liberty when he applies for parole. Nor does he have any absolute, vested right to be released on parole. That does not mean, however, that an inmate possesses no interest in parole which is constitutionally protected. It is possible to define a liberty interest in parole which is possessed by the inmate, as well as a property interest, both of which are constitutionally protected.

The Grievous Loss Analysis

In several cases, the Supreme Court has characterized both liberty and property interests as constitutionally protected by examining the particular interest and determining whether an individual was "condemned to suffer grievous loss" upon being deprived of that interest.[70] In *Morrissey v. Brewer*,[71] the Court was faced with the task of determining whether the conditional liberty enjoyed by a paroleee qualified as a constitutionally protected interest. The Court noted the great similarity between unconditional liberty and the conditional liberty of parole.[72] Parole enables a parolee to engage in a wide variety of activities open to persons who have never been convicted of any crime.[73] As a result, the liberty of parole contains "many of the core values of unqualified liberty."[74] The Court then examined the effect of government action on that qualified liberty interest to determine if revocation condemned the individual to suffer a grievous loss. In *Morrissey*, the termination of the parolee's conditional liberty and his reconfinement in prison were found to result in such a drastic change in conditions that the loss of parole was a grievous one.[75] The Court held, therefore,

deprivation of liberty, citing Willner v. Committee on Character, 373 U.S. 96 (1963), and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). 408 U.S. at 574. *Schware* and *Willner* each dealt with applicants who had been denied admission to the bar. The applicants challenged, on due process grounds, the procedures by which their applications were denied. Since the applicants possessed no vested right to be admitted to the bar, the present enjoyment argument would deny any due process protection. Like an inmate, the status of a bar applicant is not changed if admission is denied. However, the Supreme Court held that a state, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities in a manner that contravenes due process. Willner v. Committee on Character, 373 U.S. 96, 103 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957). Thus, the Supreme Court does not seem to have created any absolute kind of present enjoyment requirement in the procedural due process context.

70. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

71. 408 U.S. 471 (1972).

72. *Id.* at 482.

73. Subject to the conditions of his parole, [the parolee] can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.

Id.

74. *Id.*

75. *Id.*

that this grievous loss made a parolee's interest in the conditional liberty of parole a protected liberty interest which could not be terminated without the minimum protections of due process.[76]

The state in *Morrissey* had argued that a parolee had no protected liberty interest because parole revocation merely involved the transfer of the parolee from one form of custody to another.[77] The Supreme Court rejected this bald assertion, however. Looking beyond the labels the state presented, the Court examined the practical effect of revocation on a parolee—he is taken from a state of conditional liberty wherein he enjoyed many of the core values of unqualified liberty and is returned to physical incarceration.[78] Viewing the problem in this light, the Court found that although the parolee indeed was only transferred from one form of custody to another, that transfer inflicted a grievous loss upon the parolee and thus could not be carried out without observing the minimum procedures required by due process.[79]

An inmate denied parole similarly is "condemned to suffer a grievous loss." This conclusion results from examining what is at stake in the parole release decisionmaking process and comparing the two possible outcomes of that process. The interest with which the parole board is dealing in a parole release decision is the conditional liberty of parole. *Morrissey* held that conditional liberty to be a valuable liberty, possessing "many of the core values of unqualified liberty."[80] The parole release decision either results in an inmate being granted this valuable conditional liberty or being condemned to suffer continued incarceration. This failure to obtain such a valuable benefit can be characterized as a "grievous loss."[81]

Several courts have approached the problem in this way. In

76. *Id.*
77. *Id.* at 483.
78. *Id.* at 482.
79. *Id.* The specific procedures required by the *Morrissey* Court are set out in note 156 *infra.*
80. 408 U.S. at 482.
81. This is essentially the analysis used in Childs v. United States Bd. of Parole, 511 F.2d 1270, 1277-78 (D.C. Cir. 1974), and United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 926-28 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). Both courts held that parole release decisions are subject to minimum due process procedures. The Second Circuit in *Johnson* managed to reach this conclusion without overruling Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied,* 400 U.S. 1023 (1971), which had denied certain procedural safeguards at parole release hearings. The *Johnson* court distinguished *Menechino* on the basis of the relief requested. 500 F.2d at 926. Whereas the inmate in *Menechino* demanded a wide range of procedural rights, including the right to call witnesses and be represented by counsel, 430 F.2d at 404, the inmate in *Johnson* requested only a statement of reasons for denial of parole. 500 F.2d at 926. Thus, the *Johnson* court could uphold the due process challenge in that case without overruling *Menechino. See id.* at 927. However, the language of *Menechino* absolutely denying the application of due process to parole release proceedings, 430 F.2d at 412, clearly was disapproved in *Johnson. See* 500 F.2d at 926-27.

United States ex rel. Johnson v. Chairman, New York State Board of Parole,[82] the Court of Appeals for the Second Circuit pointed out the similarity in outcomes of a parole revocation hearing and a parole release decision. In both instances, the interest at stake is the conditional liberty of parole: "Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration."[83] Thus, the parole release decision determines whether an inmate is to be granted this conditional liberty which the Supreme Court recognized in *Morrissey* as a valuable, constitutionally protected interest.

In response to the present enjoyment argument—that the inmate cannot suffer a grievous loss of something he never possessed[84]—this analysis would assert that the failure to obtain a valuable benefit, while perhaps not as drastic as losing something already in possession, is nonetheless a grievous loss.[85] As the Court of Appeals for the District of Columbia pointed out in *Childs v. United States Board of Parole*,[86] the grievousness of the loss is at least partly measured by the value of the benefit. The *Childs* court stated: "The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the [*Morrissey*] Court."[87] While the immediacy of the loss and the particular procedures required to protect the interest may be different if the benefit is already possessed, the fact of loss depends to a great extent on the value of the benefit. Thus, in the parole release context, "[t]he result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty."[88]

A grievous loss analysis based on the principles of *Johnson* and

82. 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

83. *Id.* at 928. The court stated that to hold otherwise would be "to create a distinction too gossamer-thin to stand close analysis." *Id.* Language in Wolff v. McDonnell, 418 U.S. 539 (1974), lends support to this characterization of the interest at stake in parole release and parole revocation. The *Wolff* Court, in discussing *Morrissey*, stated: "Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him." *Id.* at 560. Clearly, release proceedings also determine whether the inmate will be free or in prison.

84. See text & notes 56-58 *supra*.

85. It has been argued that an individual cannot suffer a "grievous loss" of something he never possessed, and thus an inmate cannot properly "lose" parole because he never had it. *See* Comment, *Procedural Protection*, *supra* note 6, at 1142 n.120. However, an ordinary definition of the word "loss" would encompass situations in which a goal was not attained. For example, by the above argument, a team could never be said to have "lost" a football game, since it never possessed victory. The absurdity of this result is obvious. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1338 (1961).

86. 511 F.2d 1270 (D.C. Cir. 1974).

87. *Id.* at 1278.

88. *Id.*

Childs avoids the pitfalls of the present enjoyment argument. The reasoning of the *Johnson* and *Childs* courts eliminates the necessity of showing a currently possessed interest. The government is taking action which immediately affects the inmate, either favorably or adversely.[89] Merely because an adverse decision only continues the inmate's incarceration as it was before is not a sufficient reason to deny due process protection. This approach is consistent with the spirit of the decision in *Morrissey*; that is, rather than relying on arguments based on labels such as "custody" or "privilege," one should analyze the practical effect revocation of parole has on the individual.[90] While the approach of the *Johnson* and *Childs* courts gives a broad interpretation to the "grievous loss" language of *Morrissey*, this interpretation is not inconsistent with currently accepted constitutional doctrine.

Arguably, the Supreme Court's opinion in *Meachum v. Fano*[91] could be read to support a different result. In *Meachum* and its companion case, *Montanye v. Haymes*,[92] the Court held that due process does not entitle a state prisoner to a hearing when he is transferred to another prison, although the conditions of confinement there are substantially less favorable to the prisoner.[93] The Court concluded that the transfers did not infringe on any constitutionally protected interest of the inmates[94] primarily because, in both cases, there was no state law conditioning a transfer on proof of serious misconduct or the occurrence of other specific events.[95]

The Court's analysis in *Meachum* raises several questions regarding the application of due process in the parole release context. First, the Court rejects "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause."[96] However, this is little more than a restate-

89. The immediate impact of the government's action in a parole release decision distinguishes that situation from the circumstances in Moody v. Daggett, — U.S. —, 97 S. Ct. 274 (1976). In *Moody*, the Supreme Court held that a federal parolee imprisoned for a crime while on parole is not constitutionally entitled to a prompt parole revocation hearing when a parole violator warrant is issued and lodged with the institution of his confinement but not served on him. *Id.* at 278. The mere issuance of a parole violator warrant, however, has no operative impact on the parolee. *Id.* Only when the warrant is served on the parolee does the Parole Commission assume custody over him. *Id.* at 278-79. On the other hand, in the parole release context, the Commission's decision to grant or deny parole has immediate operative impact on the inmate. Thus, the denial of procedural protection in *Moody* has no relevance to the parole release decision.

90. See text & notes 71-79 *supra.*

91. 427 U.S. 215 (1976).

92. 427 U.S. 236 (1976).

93. 427 U.S. at 216.

94. *Id.* at 223-24.

95. *Id.* at 226-28.

96. *Id.* at 224 (emphasis in original).

ment of the principle from *Board of Regents v. Roth*[97] and *Morrissey v. Brewer*[98] that the due process clause applies only to "liberty" or "property" interests within the meaning of the fourteenth amendment. This principle holds that the crucial factor in determining whether an asserted interest is constitutionally protected is the nature, not the weight, of the interest.[99] Every grievous loss does not require due process protection, only the grievous loss of a constitutionally protected interest. The language of *Meachum* would seem to have little effect on the grievous loss analysis of *Johnson* and *Childs*.[100] Under these cases, a parole applicant suffers a grievous loss of the conditional liberty of parole, which is a constitutionally protected interest.

More significant is the Court's failure in *Meachum* to find a liberty interest when an inmate suffers a change in the conditions of his confinement which has a substantial adverse impact on him.[101] The impact of the transfer on the prisoner is totally disregarded. The Supreme Court concluded simply: "That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules."[102] The determining factor in the Court's view is the absence of any state law upon which the prisoner might base his claim that he is entitled to remain at the more favorable prison.[103] The Court points out that transfers between institutions are not conditioned on proof of serious misconduct but "are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate."[104] To require due process protections for any transfer to less favorable institutions, in the Court's view, "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts."[105]

By looking to state law to determine whether the inmate had a liberty interest in avoiding transfer to an institution where conditions are less favorable, the Court seemingly adopted the method of analysis customarily found in cases involving property interests. In *Board of*

97. 408 U.S. 564 (1972).
98. 408 U.S. 471 (1972).
99. Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
100. See text & notes 82-90 *supra*.
101. 427 U.S. at 224.
102. *Id.* at 225.
103. *Id.* at 226-28.
104. *Id.* at 225.
105. *Id.*

Regents v. Roth,[106] the Court noted that property interests arise from rules and understandings which stem from an independent source such as state law.[107] Yet in *Meachum*, the Court looked to state law to define a liberty interest. Justice White was explicit on this point. In distinguishing *Wolff v. McDonnell*,[108] Justice White notes: "The liberty interest protected in *Wolff* had its roots in state law."[109] In *Montanye v. Haymes*,[110] Justice White explained clearly the Court's analysis in *Meachum*:

> We held in *Meachum v. Fano*, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, *absent some right or justifiable expectation rooted in state law* that he will not be transferred except for misbehavior or upon the occurrence of other specified events.[111]

If the liberty interest in *Morrissey* is interpreted in the same manner, the reasoning of the *Johnson* and *Childs* courts is invalid. Under a *Meachum* analysis, the parolee's interest in the conditional liberty of parole was protected because he had a justifiable expectancy rooted in state law, that his conditional liberty would not be revoked absent the occurrence of certain specified conditions. This interpretation receives a measure of support by the Court's language in *Moody v. Daggett*,[112] where the Court noted that "the conditional freedom of a parolee *generated by statute* is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment."[113] However, the *Morrissey* Court's discussion of the parolee's liberty interest also stressed the nature of the conditional liberty enjoyed by a parolee—that is, it encompassed "many of the core values of unqualified liberty."[114] This type of conditional liberty is more akin to the unqualified liberty enjoyed by a prisoner before his conviction than to the property-like entitlement to liberty found by the Court in *Wolff* and absent in *Meachum*. As the *Johnson* and *Childs* courts pointed out, the parole release decision deals with this conditional liberty analogized to un-

106. 408 U.S. 564 (1972).
107. *Id.* at 577.
108. 418 U.S. 539 (1974).
109. 427 U.S. at 226. Justice White went on to assert that requiring due process protection to insure that state-created rights are not arbitrarily abrogated is consistent with the Court's approach in other due process cases (citing Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); and Goldberg v. Kelly, 397 U.S. 254 (1970)). Significantly, all four cases cited by the Court dealt with property interests.
110. 427 U.S. 236 (1976).
111. *Id.* at 242 (emphasis added).
112. — U.S. —, 97 S. Ct. 274 (1976).
113. *Id.* at 278 (emphasis added).
114. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

qualified liberty.[115] The analysis in *Meachum* is thus distinguishable from the grievous loss analysis of *Johnson* and *Childs*.

In *Meachum* Justice White indicated that the question of the application of due process to the parole release decision is yet to be decided.[116] Arguably, therefore, *Meachum* does not compel a result contrary to that reached in *Johnson* and *Childs*. Thus, although the inmate's interest in parole is different than the parolee's interest, the inmate's interest is a constitutionally protected interest in conditional liberty. The difference between the inmate's interest in parole and the parolee's interest is significant only in determining the extent and type of protection necessary, not in determining whether any protection is required.[117] In addition to a protected interest in conditional liberty, an inmate also arguably has a property interest at stake in the parole release decision. That interest is in the inmate's claim of entitlement to parole.

Claim of Entitlement. It can be argued that once the government has defined a range of intended recipients of a particular benefit, an individual's claim of entitlement to that benefit is protected by procedural due process. In *Board of Regents v. Roth*,[118] the Supreme Court noted that while the boundary of the fourteenth amendment term "property" was not infinite, protected property interests did extend beyond actual ownership of real estate, chattels, or money.[119] One of

115. See text & notes 82-90 *supra*.

116. 427 U.S. at 229 n.8.

117. The *Johnson* court did note that the Supreme Court in *Morrissey* referred in a footnote to an earlier Second Circuit case, United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971), which had stated: "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." 500 F.2d at 927 n.2 (quoting Morrissey v. Brewer, 408 U.S. 471, 482 n.8 (1972)). It is arguable that the Supreme Court intended to indicate by this footnote that the parole release situation was distinguishable from parole revocation. *See* Comment, *Procedural Protection, supra* note 6, at 1138. The *Johnson* court, however, maintained that the reference was simply a reinforcement of the Court's point that a parolee whose parole was revoked and who was returned to prison suffered a grievous loss. 500 F.2d at 927 n.2. The language of *Morrissey* prior to the footnote in question gives support to the latter view: "Though the State properly subjects [the parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." 408 U.S. at 482. In addition, since *Morrissey*, the Supreme Court has stated that the question of the application of due process to parole release decisions is still to be decided. *See* Meachum v. Fano, 427 U.S. 215, 229 n.8 (1976). Thus, it seems that the footnote in *Morrissey* is not an indication that the Court would necessarily find parole release unworthy of due process protection.

118. 408 U.S. 564 (1972). In *Roth*, a teacher at Wisconsin State University at Oshkosh was hired for a fixed term of 1 academic year. *Id.* at 566. After the teacher, Roth, had completed the term, he was informed he would not be rehired for the next academic year. *Id.* Roth challenged the procedures by which the University made the decision not to rehire him. *Id.* at 568. The Supreme Court held that Roth possessed no constitutionally protected property interest in being rehired and, thus, due process did not apply. *Id.* at 578. At the same time, the Court held that no liberty interest of Roth was infringed because Roth was free to seek other employment. *Id.* at 575.

119. *Id.* at 571-72.

these protected property interests was an individual's claim of entitlement to a government benefit.[120] This claim of entitlement must be more than an individual's abstract need or desire for the benefit. A unilateral expectation of receiving the benefit cannot support a claim of entitlement. Instead, there must be rules or understandings that stem from an independent source such as state law.[121] These rules or understandings secure certain benefits and give rise to a protected claim of entitlement.[122]

Since the protected interest is in the *claim* of entitlement,[123] there is no requirement that an individual already possess the benefit sought, or even have already shown himself to be one of the intended recipients. This is illustrated by the *Roth* Court's discussion of *Goldberg v. Kelly*.[124] In *Goldberg*, the Court held that procedural due process required a hearing before welfare benefits could be terminated.[125] The *Roth* Court noted that the welfare recipients in *Goldberg* had a claim of entitlement to welfare payments, not because they were already receiving payments, or even because they had already shown themselves within the statutory terms of eligibility, but because of the statutory and administrative standards defining eligibility.[126]

The Court in *Roth* also indicated that the discretionary nature of the decision granting or denying the benefit involved does not necessarily preclude the application of due process. The Court referred to the "related" case of *Goldsmith v. Board of Tax Appeals*,[127] in which a lawyer was refused admission to practice before the Board of Tax Appeals. The Board had published rules for admission of persons to practice before it.[128] The Board, in its discretion, could deny admission to any applicant or suspend or disbar any person after admission.[129]

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120. *Id.* at 576.
121. *Id.* at 577.
122. *Id.*
123. A protected interest in a *claim* of entitlement is distinguished from a protected *entitlement*, as was at issue in Goss v. Lopez, 419 U.S. 565 (1975), and Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074 (1976). In *Goss*, the students were statutorily entitled to a free public education. 419 U.S. at 567. In *Bishop*, the Court rejected a policeman's argument that a state statute entitled him to continued public employment. 426 U.S. at —, 96 S. Ct. at 2078. In both cases, the individuals claimed a right to continued receipt of government benefits. In the parole release context, the inmate's interest is of a different nature. Since he does not possess parole, he cannot argue for continued entitlement to parole. Rather, the inmate claims a right to show that he falls within the qualifications for the grant of parole. The distinction between a claim of entitlement and an entitlement is similar to that between parole release and parole revocation.
124. 397 U.S. 254 (1970), *discussed in* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
125. 397 U.S. at 264.
126. 408 U.S. at 577.
127. 270 U.S. 117 (1926), *discussed in* Board of Regents v. Roth, 408 U.S. 564, 576 n.15 (1972).
128. 270 U.S. at 119.
129. *Id.*

The Board denied admission to an applicant under its discretionary power, without a prior hearing or a statement of reasons for the denial.[130] Although the Court disposed of the case on other grounds, it did note that the existence of the Board's eligibility rules gave the applicant an interest and claim to practice before the Board to which procedural due process requirements applied.[131] It stated that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process."[132] It is important to note that the protected interest is the individual's claim of entitlement, not the individual's right to the benefit itself.[133] The rules or understandings do not give the individual an entitlement to the benefit itself; they merely give the applicant a sufficient interest in his claim of entitlement that the individual must be allowed to present his claim in a manner consistent with procedural due process.[134]

The parole release situation is arguably within this analysis. Parole is unquestionably a benefit for those receiving it. Statutes not only define eligibility for parole, in many cases they also lay out the conditions which must exist before parole should be granted.[135] The existence of these statutes, regulations, and understandings[136] gives an inmate a legitimate claim that he may be qualified for parole. Even though the decision whether an inmate is actually qualified for parole under the existing rules and understandings is discretionary, the rules and understandings create identifiable standards to guide the exercise of that discretion. An inmate may thus have a legitimate claim that he does fall within the area defined by these objective standards. In

130. *Id.* at 119-20.
131. *Id.* at 123.
132. *Id.*
133. The Supreme Court made this explicit in *Roth*'s companion case, Perry v. Sinderman, 408 U.S. 593 (1972). There, a faculty member's contract was not renewed after he had taught at Odessa Junior College for several years, normally enough time to have acquired tenure. Although there were no official tenure guidelines, the Faculty Guide stated that the administration of the college wished the faculty member "to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work." *Id.* at 600. The Court held that because the teacher had "alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause,'" the teacher must be given an opportunity "to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'" *Id.* at 602-03. Significantly, the Court noted that the rules and understandings in existence in *Perry* did not entitle the teacher to reinstatement, but merely to a hearing in which he could present his claim of entitlement to reinstatement. *Id.* at 603.
134. *Id.*
135. *See* text & notes 21-25 *supra.*
136. The Supreme Court has recognized the understandings under which the parole system operates. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court stated: "Its

this event, the inmate's claim of entitlement to parole must be afforded the minimum protections of procedural due process.[137]

As shown above, the problem of providing a theoretical rationale for the imposition of procedural due process on the parole release decision may be solved in either of two ways discussed—the grievous loss analysis, or the claim of entitlement construct. Under each method of analysis, an inmate can be seen to have a protected interest in the parole release decision. The conclusion that the due process clause has application to parole release proceedings, however, is only the beginning of the inquiry.

THE SPECIFIC REQUIREMENTS OF PROCEDURAL DUE PROCESS

The second stage of the procedural due process analysis is the definition of the contours of due process in the particular situation. It is generally stated that the exact boundaries of procedural due process are undefinable and that its contents vary according to specific factual contexts.[138] In determining what procedures are required in any given situation, the court will consider the nature of the interest of the individual involved, the nature of the proceeding, and the possible administrative burden imposed by any particular procedure.[139] It is therefore

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purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." *Id.* at 477. Thus, the Court has acknowledged that the parole system operates under the theory that qualified inmates should be released on parole as soon as possible.

137. A similar analysis was used in Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975). The court in *Bradford* focused on the inmate's right to consideration. The court reasoned that although release on parole is speculative, every inmate has a justifiable expectancy that he will receive consideration for parole. *Id.* at 732. This conclusion is supported by the government's recognition of the inmate's right to consideration. By enacting eligibility statutes, states have implicitly promised that eligible inmates will at least be considered for parole. In the federal system, the promise of consideration for parole is more than implicit. In Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975), the court held that inmates sentenced under the former federal indeterminate sentencing statute, 18 U.S.C. § 4208(a)(2) (1970), "are entitled to effective and meaningful parole consideration at or before the one-third point" in their sentence. 520 F.2d at 35. *See* Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974); Battle v. Norton, 365 F. Supp. 925 (D. Conn. 1973). *But see* Moody v. United States Bd. of Parole, 390 F. Supp. 1403, 1405 n.3 (N.D. Ga.), *aff'd*, 502 F.2d 1165 (5th Cir. 1974). Further evidence of the government's promise of consideration is seen in the creation of parole boards whose major functions include consideration of inmates for parole. See discussion note 27 *supra*. In addition, the great number of inmates actually considered for parole each year attests to governmental recognition of an inmate's right to be considered. State recognition of an individual's interest may arise through de facto treatment of the interest as well as through statutory provisions. *See* Perry v. Sinderman, 408 U.S. 593, 601-02 (1972). The combination of these factors gives each inmate eligible for parole a justifiable expectancy, rooted in state law and practice, that he will be considered for parole.

138. *E.g.*, Wolff v. McDonnell, 418 U.S. 539, 560 (1974); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Hannah v. Larche, 363 U.S. 420, 442 (1960).

139. *See* cases cited note 138 *supra*.

necessary to consider in detail the precise nature of the inmate's interest in parole, the governmental interests at stake in the parole release decision, and how these competing interests manifest themselves at a parole release hearing. Once the respective interests involved have been delineated, the minimum requirements of procedural due process can then be derived by balancing the interests.

The Interests at Stake

The first interest to be considered is that of the prisoner seeking parole. An inmate does not yet enjoy the conditional liberty of parole. At most, the inmate possesses the expectation or hope that he will be released on parole if he is deemed worthy. An inmate's specific interest in parole, then, is in showing himself to be a proper subject for release. This interest can manifest itself in two general ways during the parole release decision. First, the inmate needs a reasonable opportunity to demonstrate to the board that he falls within the established guidelines for release on parole.[140] Second, the inmate seeks the assurance that the parole board's decision will be consistent with the announced purposes and policies of parole and will be based on complete and accurate information.

Society also has a great stake in whatever may be the chance of restoring the inmate to a normal and useful life within the law.[141] The purpose of parole is to aid in bringing about this restoration as soon as possible.[142] In order to achieve this goal, an inmate should not be

140. The parole board must be convinced that release would not be incompatible with the welfare of society and that the inmate would probably live and remain at liberty without violating the law. *See* text & note 28 *supra*.

The traditional stance has been that the inmate and his record must make an affirmative case for parole. NAT'L ADVISORY COMM'N, *supra* note 14, at 400. There is a recent trend, however, to shift this burden. Under this newer view, the parole board would be obligated to release an eligible inmate unless it could establish reasons for not doing so. *See* MODEL PENAL CODE § 305.9 (Prop. Official Draft 1962); UNITED STATES NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 300 (1971); Johnson, *supra* note 41 at 482; Note, *The Federal Parole System*, *supra* note 6, at 905. This proposal has superficial appeal. It would further solidify an inmate's claim of entitlement to parole, thus making certain that due process protections would be required. However, strong policy arguments could be made against it. Inmates are in prison because they failed to abide by the law. It seems reasonable to require that they show that they can now live outside prison without breaking the law. The American penological system is not yet so efficient that the parole board can be required to assume an inmate is successfully rehabilitated and carry the burden of showing he is not. *See* Kastenmeir & Eglit, *supra* note 6, at 494-503.

141. *See* Note, *In Defense of Behavior Modification for Prisoners: Eighth Amendment Considerations*, 18 ARIZ. L. REV. 110, 112-14 (1976). *See generally* Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

142. In discussing the importance of the parole system, the *Morrissey* Court stated: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

paroled too early or too late.[143] If parole is granted before an inmate is ready, the chances that the parolee will violate the terms of his parole in a destructive manner may be great. Conversely, an erroneous decision that an inmate is not ready for parole will be harmful because it will breed frustration and bitterness.[144] Society thus has a vital interest in the accuracy of the parole board's decision regarding the possibility of an inmate's successfully reentering society.[145] Society has a further interest in treating the inmate with fundamental fairness. Fair treatment in making parole release decisions will enhance the chance of rehabilitation by avoiding inmate reactions to apparent arbitrariness.[146]

The interests of society and of the individual inmate are not the only ones affected in a parole release decision. Any procedural requirements imposed on the parole release decisionmaking process will have profound effect on the internal administration of the prison in which the decision takes place, and on the administration of the parole system itself.[147] Prison officials have a great interest in protecting the personal security of those in the institution.[148] Parole release decisions most directly affect the inmates of the institution—individuals who have violated the law and have been validly incarcerated for their actions. These individuals may have little regard for the safety of others or their property or for the rules designed to provide orderly and reasonably safe prison life.[149] Prison officials thus have a strong interest in maintaining the incidence of confrontation between inmate and staff or be-

143. Grimm v. Arizona Bd. of Pardons & Paroles, — Ariz. —, 564 P.2d 1227 (1977), is an example of the adverse consequences possible when the parole board releases an unprepared inmate. See discussion note 40 *supra.*

144. *See* United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 932-33 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). *Cf.* Morrissey v. Brewer, 408 U.S. 471 (1972). The Supreme Court stated in *Morrissey*:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.

Id. at 484.

145. The societal interest in making reasonable parole release decisions is virtually identical to the inmate's. In Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied sub nom.* Thompson v. United States Bd. of Parole, 375 U.S. 957 (1963), Judge (now Chief Justice) Warren Burger, described this identity of interest:

> The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible.

Id. at 237.

146. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (society has an interest in fair treatment in parole revocation).

147. See text & notes 148-153 *infra.*

148. *See* Wolff v. McDonnell, 418 U.S. 539, 561-63 (1974).

149. *Id.* at 561-62.

tween inmates at a level which is not threatening to the order and safety of the institution. Any procedure which threatens to introduce any element of disorder or potential for violence will be viewed with disfavor.[150]

The administrators of the parole system, while not having the same interest in order and safety, also bring weighty interests into the parole release situation. The nature of the parole release decision is such that the decisionmaking body requires great flexibility in considering each inmate. Every inmate brings a different background, personality, and history of rehabilitation into the parole release deliberations.[151] Parole boards must be free to consider the unique and individual aspects of each case. There would thus be "great unwisdom in encasing [parole release procedures] in an inflexible constitutional straitjacket"[152] which would prevent the parole board from considering all the relevant factors in each case. Any procedures required by due process must leave room for an appropriate degree of flexibility in the parole release process.[153]

The Balancing Process

Delineating the interests of the inmate and the government is necessary in order to consider the factors weighing for and against specific procedural protections. The respective weight of any one interest depends on the specific procedure being considered.[154] However, some general observations on the outcome of the balancing process are possible. First, since parole release proceedings are separate from criminal prosecutions, the "full panoply of rights" due a defendant in such proceedings does not apply.[155] Second, the outcome of the balancing test in the context of parole release decisions will differ from the outcomes in either *Morrissey*[156] or *Wolff*.[157] This

150. *Id.* at 563.
151. *Id.* at 561-62.
152. *Id.* at 563.
153. A final administrative interest deserves mention. The parole administrators must give thought to the burdens that may be imposed by any procedures held to be required by due process. The staggering number of inmates who apply for parole each year makes smooth, swift, and efficient administrative machinery imperative. *See In re* Sturm, 11 Cal. 3d 258, 263, 521 P.2d 97, 102, 113 Cal. Rptr. 361, 366 (1974).
154. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
155. *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Morrissey v. Brewer, 408 U.S. 471, 488 (1972).
156. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that due process required notice of claimed violations of parole, disclosure to the parolee of evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation, a neutral and detached hearing body, and a written statement by the factfinders as to the evidence relied upon and reasons for revoking parole. 408 U.S. at 489.
157. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court held the following

is because the interests of the respective individuals are different in parole release, parole revocation, and disciplinary hearings, and because the government's interests are different in each of those administrative proceedings. In parole revocation and disciplinary hearings, the government is chiefly concerned with ascertaining historical facts.[158] The parolee and the inmate facing disciplinary proceedings are confronted with specific charges of particular acts of misconduct.[159] The decision in parole release proceedings, on the other hand, involves a predictive determination of what will be best in terms of benefit to society and rehabilitation of the inmate.[160] Similarly, the inmate seeking parole is seldom concerned with the proof of historical facts.[161] The prospective parolee is interested primarily in knowing that the parole board will rely on accurate information regarding already proven facts.[162] In addition, he wants the opportunity to demonstrate to the board that he has the ability and desire to live outside the prison without violating the law. As a result of the distinctions between the interests of the government and those of the individual in these various situations, the requirements of procedural due process in the parole release context will be unique.[163] With this in mind, it is now possible

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procedures are required by due process in a prison disciplinary hearing: notice of the claimed disciplinary violation; a written statement of the factfindings, the evidence relied upon, and the reasons for the disciplinary action taken; and the right to call witnesses and present evidence, limited by prison officials' discretion regarding relevancy, necessity, and the danger of retaliation. *Id.* at 563-72.

The Supreme Court further defined the requirements of procedural due process in disciplinary hearings in Baxter v. Palmigiano, 425 U.S. 308 (1976). The Court affirmed its holding in *Wolff* that due process did not require a right to counsel in the disciplinary hearing, *id.* at 315, even though the inmate in *Baxter* also faced possible criminal charges for his institutional misconduct. *Id.* More significantly, the Court held that the procedures required by *Wolff* did not necessarily apply to situations where an inmate would face only a temporary suspension of privileges. *Id.* at 323.

158. Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

159. See cases cited note 158 *supra.*

160. Moody v. Daggett, — U.S. —, —, 97 S. Ct. 274, 279-80 (1976). In Wiley v. United States Bd. of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974), the court characterized the distinction in this way:

> While the parole revocation proceeding basically is concerned with making a factual determination with respect to parole violation, parole decision-making centers on making a diagnostic and predictive determination with respect to whether the rehabilitation of the prisoner and the welfare of society generally would be best served by granting the inmate conditional freedom rather than by his physical confinement.

Id. at 1200. *See also* discussion note 195 *infra.*

161. See discussion note 195 *infra.*

162. See discussion note 195 *infra.*

163. An important question which should be addressed initially is whether the procedures set out in the statutes which create the parole system are sufficient to comply with due process. In Arnett v. Kennedy, 416 U.S. 134 (1974), a competitive United States Civil Service worker was discharged from his position. The employee claimed a protected property interest in his continued employment. *Id.* at 151. He also claimed that his dismissal was because he was charged with dishonesty and thus infringed on a protected liberty interest. *Id.* at 156. The Court held that the procedures by which the employee was discharged complied with minimum due process requirements. *Id.*

to balance the respective interests in order to determine the specific procedures that should be required by due process in the parole release decision.

The Procedures Due

Generally speaking, two elements of procedural fairness are deemed so essential that whenever a proceeding is subject to the requirement of procedural due process, these rights automatically attach. These two incidents of due process are notice and a reasonable opportunity to be heard.[164] Both of these general requirements of due process find specific application in the parole situation.

Notice. In the context of parole release decisions, notice should include both prehearing notice, to allow the inmate to prepare adequately for the hearing, and posthearing notice of what action the parole board has taken.[165] First, the inmate should be furnished with a published list of the standards and guidelines the parole board uses in making the parole release decision.[166] Without notice of the standards against which he will be judged, an inmate cannot rationally at-

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at 163. Justice Rehnquist, writing for the plurality, reasoned that the same statute which created the individual's property interest in continued employment by the government absent good cause for termination also delineated the procedures by which that interest could be foreclosed. *Id.* at 151. The plurality declined to hold unconstitutional the procedures set out in the same statute which created the substantive property right. *Id.* at 153-54; see discussion note 63 *supra.* Justice Rehnquist then held that a post-dismissal hearing afforded the employee with sufficient opportunity to defend his reputation, thus protecting his liberty interest. 416 U.S. at 157. *Arnett,* however, is arguably inapplicable to the parole release situation, for two reasons. First, while the majority of the Court concurred in the result, Justice Rehnquist's reasoning regarding the employee's property interest was in a three to six minority. The majority of the Court felt that once the statute was deemed to create a constitutionally cognizable interest, the Constitution was the standard by which the procedures for foreclosing that interest would be judged. *Id.* at 166-67 (Powell, J., concurring). Second, Justice Rehnquist himself distinguished between the liberty interest at stake in *Morrissey* and the liberty interest at issue in *Arnett. Id.* at 157. Since the liberty interest of an inmate in parole is comparable to the liberty interest in *Morrissey,* the procedures found adequate in *Arnett* may not be constitutionally sufficient for parole release decisions.

164. The Court in Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313; *see* Parsons-Lewis, *supra* note 5, at 1548-49.

165. *Cf.* Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974) (advance written notice of the claimed violation and a post hearing written statement of the factfinders as to evidence relied upon and reasons for the action taken required in prison disciplinary proceedings). The notice of a parole release hearing should be given sufficiently in advance of the hearing to give the inmate reasonable time to prepare. Federal statutes, for example, require 30 days advance notice. 18 U.S.C.A. § 4208(b) (Supp. 1976). Similarly, posthearing notice should be given within a reasonable time of the parole board's decision.

166. Franklin v. Shields, 399 F. Supp. 309, 315 (W.D. Va. 1975). *Contra,* Haymes v. Regan, 525 F.2d 540, 544 (2d Cir. 1975).

tempt to meet the requirements for parole.[167] This requirement does not mean that parole boards will be bound to consider only certain items of information, or that a board must decide the case by following some sort of checklist. The board should retain its discretion to weigh each factor in individual cases as it sees fit.[168] Some consistency in its criteria should be required, however, so that an inmate appearing before the board knows generally what to expect.[169]

Providing inmates with a list of standards and guidelines prior to the parole release hearing will serve both the interest of the inmate in being able to show himself qualified for parole and the purpose of parole in releasing inmates at the earliest possible time. A list of standards will enable inmates who deserve parole to know exactly what must be done to convince the parole board that they should be released.[170] For these reasons, due process should require that inmates be given a copy of the standards and guidelines used in making parole release decisions. This requirement means not only that boards which use standards and guidelines must distribute them to inmates, but also that boards which currently operate without standards must formulate some.

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167. Franklin v. Shields, 399 F. Supp. 309, 315 (W.D. Va. 1975). *See also* Comment, *Procedural Protection, supra* note 6, at 1159.

168. *See* Wiley v. United States Bd. of Parole, 380 F. Supp. 1194, 1197 (M.D. Pa. 1974). The *Wiley* court pointed out that "while the guidelines structure the discretion of the Board within the broad statutory mandate, the Board remains free to consider each case on its merits." *Id.*; *accord*, Wayman v. Ciccone, 541 F.2d 189 (8th Cir. 1976); Morris v. United States, 399 F. Supp. 720 (E.D. Va. 1975).

169. The situation which this requirement is designed to prevent is described in W. PARKER, *supra* note 14:

> [I]t has not been unusual for an inmate who comes before two or more board members in successive parole interviews to find himself asked to do different things by different members. At the first hearing, he may be told to go to church, but when he meets the parole board the second time and can show them that he has been to church, the predominate member doing the interviewing may tell him to go to school or learn a trade, or go to group therapy, or any other number of things.

Id. at 29.

The courts requiring prior dissemination of the criteria upon which the parole board will base its decision have not explicitly described how specific the notice of criteria must be. In Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W. Va. 1976), a statute provided for release on parole if it is in the "best interest of the state and of the prisoner," and the board is satisfied that the prisoner, if released, "will conduct himself in a lawful manner and that his release is not incompatible with the best interests and welfare of society generally." W. VA. CODE § 62-12-13(4) (1931). The court held that this language did not provide a meaningful listing of criteria for parole. 423 F. Supp. at 1195. While not stating exactly what would be a meaningful listing, the court was confident that "Parole Board criteria are not so subjective as to defy standardization and expression." *Id.* at 1196.

170. Arguably, furnishing the inmate with a list of standards would allow him to give an inaccurate view of whether parole is warranted. By knowing what the parole board will consider important, the inmate can know what to do or say to please them, regardless of his sincerity. *See* A. MANOCCHIO & J. DUNN, THE TIME GAME 234 (1970). However, the standards can be drawn so that the main factors are items which may be objectively verified and are not so subject to manipulation. For instance, federal regulations currently require the parole board to consider such factors as the number of prior convictions or incarcerations, the inmate's history of narcotics use, his educational background, and other similar factors. *See* 28 C.F.R. § 2.20 (1976).

Posthearing notice requires that an inmate denied parole be given a statement of reasons and findings supporting the denial.[171] All the reasons supporting an inmate's right to know the criteria by which he will be judged apply with magnified force to his right to know the criteria by which he was judged. Just as an inmate must know the standards he is expected to meet, so must he know why he has not met them. If an inmate's interest in showing himself worthy of parole is to be given any meaning at all, he must know where he falls short and what he must do to correct his behavior.[172]

Not only would a statement of reasons serve the inmate's interest in showing himself deserving of parole, it would also serve society's interest in rehabilitation. A parole board's refusal to give reasons for its decision breeds needless frustration, hatred, cynicism, and disrespect for governmental and correctional institutions.[173] It frequently induces feelings of hopelessness or despondency which may lead inmates to cease efforts to improve themselves.[174] Requiring a statement of reasons would also serve the rehabilitative function of parole by furnishing a powerfully suggestive guide for future behavior.[175]

A requirement of a statement of reasons when parole is denied would increase the administrative burden on the parole system to some extent, but not prohibitively. More time would probably be spent for

171. Haymes v. Regan, 525 F.2d 540, 544 (2d Cir. 1975); Childs v. United States Bd. of Parole, 511 F.2d 1270, 1279-81 (D.C. Cir. 1974); United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 931-34 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Sites v. McKenzie, 423 F. Supp. 1190, 1196 (N.D.W. Va. 1976). *See also* Parsons-Lewis, *supra* note 5, at 1550; Comment, *Procedural Protection, supra* note 6, at 1160-61.

172. Childs v. United States Bd. of Parole, 511 F.2d 1270, 1281 (D.C. Cir. 1974); United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 929 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

This requirement assumes subsequent opportunities for an inmate to apply for parole. In the federal system, for instance, an inmate sentenced to less than 7 years is entitled by statute to apply for parole every 18 months; inmates with sentences 7 years or longer are entitled to parole consideration every 24 months. 18 U.S.C.A. § 4208(h) (Supp. 1976).

173. United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 932 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); NEW YORK STATE SPECIAL COMM'N ON ATTICA, OFFICIAL REPORT 97 (1972).

174. United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 932-33 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

175. *Id.* In addition to the advantages a statement of reasons would have for rehabilitation, the *Johnson* court found 10 other justifications for imposing such a requirement: (1) to aid in judicial review, *id.* at 929; (2) to discourage arbitrary and capricious decisionmaking, *id.*; (3) to inform the public of the grounds upon which the decision was made, *id.* at 930; (4) to insure that decisions are consistent with statutory objectives, are based on properly reasoned criteria, and have a factual basis in the prisoner's file, *id.* at 931; (5) to encourage the parole board to make a more thoroughly reasoned decision, *id.*; (6) to relieve inmate frustration by informing them how they might be more successful at obtaining parole, *id.* at 932; (7) to encourage the board to develop a body of "rules, principles, and precedents" that would promote consistency in decisions, *id.* at 933; (8) to provide experts in the area with a basis for critical appraisal of parole policies, *id.*; (9) to serve as a guide to trial courts in the exercise

each hearing, and additional clerical help may be required.[176] However, since a statement of reasons would only be required in the event parole was denied, which only occurs generally a little more than half the time,[177] the administrative burdens would not appear to be insurmountable.[178] The strong interests of the inmate in receiving a statement of reasons for parole denial would outweigh any administrative concerns.

The required content of this statement of reasons is of great importance. A parole board could give general reasons which would be meaningless to the particular inmate.[179] This possibility can be

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of their sentencing discretion by indicating the probability of release on parole in particular cases, *id.*; and (10) it will not present a significant administrative burden. *Id.* at 934.

176. *Id.; In re* Sturm, 11 Cal. 3d 258, 267, 521 P.2d 97, 106, 113 Cal. Rptr. 361, 370 (1974).

177. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 379 (1973).

178. The ability of parole boards to cope administratively with a requirement of a statement of reasons is amply illustrated by the number of jurisdictions that currently supply one as a matter of practice. *See* United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 934 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

179. Former federal regulations, for example, provided that the following may be given as reasons for denying parole:

> (1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.
> (2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.
> (3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.
> (4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law abiding life.

40 FED. REG. 10973 (1975).

Several courts held these reasons to be so vague as to be meaningless. Garcia v. United States Bd. of Parole, 409 F. Supp. 1230, 1239 (N.D. Ill. 1976); Stassi v. Hogan, 395 F. Supp. 141, 145 (N.D. Ga. 1975); Soloway v. Weger, 389 F. Supp. 409, 411-12 (M.D. Pa. 1974); Candarini v. Attorney Gen. of United States, 369 F. Supp. 1132, 1137 (E.D.N.Y. 1974). In *Soloway,* the court asked whether "the seriousness of the offense," 40 FED. REG. 10973 (1975), means "that the statutory offense itself is so serious that parole must be denied regardless of the facts of each case and an inmate's participation in it" or "that the circumstances of petitioner's particular offense and his involvement in it were so serious that his release would appear to diminish his culpability or depreciate the seriousness of this offense." 389 F. Supp. at 411. The court could not determine whether "seriousness of the offense" had the first or second meaning, and therefore ordered the United States Board of Parole to provide a more "meaningful statement of reasons." *Id.* at 412. However, the court said that if "seriousness" had the second meaning, "then the Court would not attempt to second-guess that conclusion." *Id.* at 411. The court thus properly deferred to the parole board where the issue involved an assessment based on particular facts, but required sufficient information to be able to ascertain whether that was what the parole board was doing. New federal regulations, promulgated after the passage of the Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219 (1976) (current version at 18 U.S.C.A. §§ 4201-4218 (Supp. 1976)), changed the required content of the statement of reasons only slightly. The new regulations provide:

> [R]easons for parole denial may include the following, with further specification as appropriate:
> (1) The prisoner has not substantially observed the rules of the institution or institutions in which confined;
> (2) Release, in the opinion of the Commission, would depreciate the seri-

avoided by requiring the statement of reasons to include the salient factors or facts on which the board based its decision.[180] To satisfy due process, the board must furnish to the inmate both the grounds for the decision[181] and the essential facts and resulting inferences of the individual inmate's case upon which the board's conclusions are based.[182] In this way the inmate denied parole would have some concrete idea of why he was unsuccessful and he may learn specifically what may be done to improve his chances for the next time.[183] It would also allow the inmate to check the information upon which the board relied in denying him parole. He could thus challenge any inaccurate, incomplete or untruthful information.[184]

An alternate method by which the inmate's interests, both in preparing for the hearing and in discovering whether the board relied on truthful and accurate information in its deliberations would be to allow the inmate access to the information considered by the board.[185] This device would allow inmates to refute or explain erroneous[186] or out-

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ousness of the offense or promote disrespect for the law; or

(3) Release, in the opinion of the Commission, would jeopardize the public welfare.

28 C.F.R. § 2.13(c) (1976). Although the stated reasons themselves are still as vague and general as those formerly required, the new regulations cure part of the deficiency found in the former regulations by requiring the Commission to include in its statement "the specific factors and information relied upon for any decision." *Id.* This requirement, however, applies only when the Commission decides to continue a prisoner beyond the average time prescribed for that particular class of prisoner by regulations. *Id.* See discussion note 29 *supra.*

180. Haymes v. Regan, 525 F.2d 540, 544 (2d Cir. 1975); Sites v. McKenzie, 423 F. Supp. 1190, 1196 (N.D.W. Va. 1976); Garcia v. United States Bd. of Parole, 409 F. Supp. 1230, 1238 (N.D. Ill. 1976); Childs v. United States Bd. of Parole, 371 F. Supp. 1246, 1247 (D.D.C. 1973), *modified,* 511 F.2d 1270 (D.C. Cir. 1974).

181. General language similar to that found in 28 C.F.R. § 2.13(c) (1976), would be sufficient for this purpose. See discussion note 179 *supra.*

182. The parole board could, for example, refer to the inmate's long record, the violent nature of the crime committed, the inmate's lack of a parole plan, his lack of employment skills or prospective employment, and other similar factors. *See* United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 934 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

183. The statement of reasons is also susceptible to the same criticism leveled at the publication of criteria—it allows possible inmate manipulation. See discussion note 170 *supra.* However, the distinction between inmate manipulation and genuine efforts to objectively show qualification for parole may be too fine to be meaningful.

184. For example, in Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974), the Board erroneously believed that the inmate had been convicted of extortion, whereas the conviction was only for conspiracy to commit extortion. *Id.* at 1218. The Board denied the inmate's parole application on the basis of the "seriousness of the offense," meaning extortion. *Id.* at 1219. The court held that the boilerplate reason given served only to conceal the Board's error and constituted a violation of due process. *Id.* at 1220. A statement of reasons specifically related to the inmate's case, the court concluded, would have disclosed the Board's error much sooner. *Id.*

185. Franklin v. Shields, 399 F. Supp. 309, 315 (W.D. Va. 1975); Cooley v. Sigler, 381 F. Supp. 441, 443 (D. Minn. 1974). *See also* Parsons-Lewis, *supra* note 5, at 1551; Comment, *Procedural Protection, supra* note 6, at 1155-56. *But see* La Bonte v. Gates, 406 F. Supp. 1227, 1232 (D. Conn. 1976). The Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified at 18 U.S.C.A. §§ 4201-4218 (Supp. 1976)), grants a parole applicant limited disclosure of file information. See discussion note 38 *supra.*

186. Franklin v. Shields, 399 F. Supp. 309, 315 (W.D. Va. 1975).

dated information which could result in denial of parole. Absent such access to files, some erroneous information might never be corrected. However, the interests weighing against this right are substantial. Undoubtedly, a portion of the information supplied in the reports may have been given with the understanding that it remain confidential.[187] Allowing inmates to gain access to files might therefore result in the board losing valuable sources of information. Also, in some cases a danger of reprisal might exist if the inmate is denied parole and discovers that a fellow inmate supplied information that adversely affected his chances.[188] Finally, psychiatric and psychological information in the files could easily be misunderstood by the inmate, and their revelation to him may well hinder his progress toward rehabilitation.[189]

After balancing the interests involved, it seems that very little can be accomplished by allowing inmates access to files that could not be accomplished in less disruptive and threatening ways. Any benefit derived from allowing the inmate to correct false information in his file could just as easily be obtained by requiring a full and complete statement of reasons if parole is denied, without creating the disadvantages which would arise if an inmate were allowed access to his files. Thus, the interest of the government in denying access to files outweighs the interest of the inmate in obtaining access. Due process should not require access to files.

To satisfy procedural due process, therefore, notice in the parole release process must consist, at a minimum, of published standards and guidelines furnished to all inmates applying for parole. Second, in the event parole is denied, the inmate must receive a statement of reasons for the denial, specifically relating to his particular case. There is little justification, however, for imposing the requirement that inmates be allowed to view their files prior to the parole release hearing.

Hearing. The second fundamental aspect of procedural due process is the requirement that an individual be given an opportunity to be heard before being deprived of protected property or liberty.[190] Although only three states do not currently grant parole release hearings,[191] the inmate's strong interest in having a hearing in which to

187. Information supplied under a promise of confidentiality is protected from disclosure by federal statute. *See* 18 U.S.C.A. § 4208(c)(2) (Supp. 1976).

188. In the federal system, information which could result in harm to an individual need not be disclosed. *See id.* § 4208(c)(3).

189. Franklin v. Shields, 399 F. Supp. 309, 315 (W.D. Va. 1975). *See also* 18 U.S.C.A. § 4208(c)(1) (Supp. 1976); Parsons-Lewis, *supra* note 5, at 1550.

190. Goss v. Lopez, 419 U.S. 565, 579 (1975); Mullane v. Central Hanover Trust Co., 339 U.S. 309, 313 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

191. Georgia, Hawaii, and Texas do not provide hearings. *See* O'Leary & Nuffield, *supra* note 6, at 658.

speak on his own behalf dictates that due process require such a hearing before an inmate's application for parole can be denied.[192]

The procedural protections which generally accompany the right to a hearing, at least in the context of a criminal trial, are the right to present evidence and call witnesses, the right of confrontation and cross-examination, and the right to counsel.[193] The Supreme Court, however, has been reluctant to require strict application of these rights to post-conviction administrative proceedings.[194] The Court has indicated that these procedures are more closely associated with adversary type trials or hearings and are not particularly appropriate in the context of informal, discretionary correctional administrative decisions.[195] Moreover, the Court has expressed concern that the imposition of these procedures would increase the incidence of confrontation between inmate and prison staff to an unmanageable level.[196] However, since these procedures would obviously serve the inmate's interest in parole, they will be discussed in more detail.

Allowing the inmate to present evidence at the parole release hearing would give him the opportunity to ensure that the parole board

192. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). In Goss v. Lopez, 419 U.S. 565 (1974), the Court again emphasized that an infringement on a protected interest required, at the very minimum, some kind of hearing. *Id.* at 579; *accord*, Mullane v. Central Hanover Trust Co., 339 U.S. 309, 313 (1950). It seems unquestionable, therefore, that a parole applicant must be given a hearing at some point in the decision-making process. The only possible issue is whether the hearing would be before or after the parole board's decision. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that due process required that a welfare recipient be given an evidentiary hearing before termination of benefits. *Id.* at 260. The Court reached its holding by balancing the government's need for prehearing termination with the hardship imposed on the recipient by summary termination of benefits. *Id.* In the parole release situation, there appears to be no governmental interest in holding the hearing after, rather than before, the decision. On the other hand, a parole applicant has a strong interest in speaking on his own behalf before the decision is rendered. *See* Parsons-Lewis, *supra* note 5, at 1549; Comment, *Procedural Protection, supra* note 6, at 1154-55.

193. Wolff v. McDonnell, 418 U.S. 539, 566-69 (1974).

194. *E.g.*, Baxter v. Palmigiano, 425 U.S. 308, 332 (1976) (no right to counsel in prison disciplinary hearings even when charge may also result in criminal penalties); Wolff v. McDonnell, 418 U.S. 539 (1974) (no right to counsel or confrontation in prison disciplinary hearings; right to present evidence limited by discretion of prison officials where appropriate); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no right to counsel in probation revocation proceedings); Morrissey v. Brewer, 408 U.S. 471 (1972) (no right to counsel in parole revocation proceedings).

195. *See* Baxter v. Palmigiano, 425 U.S. 308, 322 (1976); Wolff v. McDonnell, 418 U.S. 539, 566-70 (1974). In addition, these procedural safeguards are chiefly valuable as aids in factfinding, when historical facts are in dispute. A parole release hearing, however, is seldom called upon to determine the validity of specific facts, but is primarily concerned with predicting future behavior on the basis of commonly accepted historical facts. Franklin v. Shields, 399 F. Supp. 309, 317 (W.D. Va. 1975); Wiley v. United States Bd. of Parole, 380 F. Supp. 1194, 1200 (M.D. Pa. 1974). *See also* Moody v. Daggett, — U.S. —, —, 97 S. Ct. 274, 279 (1976).

196. "To some extent, the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 568 (1974).

considered all relevant, favorable information.[197] At the same time, the parole board members would be confident that they were making a well informed decision. The problem parole boards have in obtaining sufficient information to make a knowledgeable decision is chronic.[198] The interest weighing against the right would be the increased administrative expense of providing longer and more complicated hearings.[199] The magnitude of this disadvantage, however, could be kept within reasonable limits by allowing the board to restrict the right on grounds of irrelevance, lack of necessity, or the hazards presented in individual cases.[200] Since the reasons for restricting the right are dependent on the particular circumstances of each case, due process should not require an absolute right to present evidence and witnesses at all hearings. However, the general rule should be that an inmate is entitled to present favorable evidence absent some definite and articulable danger of disruption, unnecessary delay, or violence.[201]

The right of confrontation and cross-examination, on the other other hand, would be subject to the same criticisms those rights received in *Wolff*.[202] Parole release hearings, like disciplinary hearings, take place within the prison. Cross-examination in the parole release hearing would pit the applicant against other inmates or even prison officials. Thus, this right is particularly likely to raise the level of confrontation to an unmanageable degree.[203] Although these procedures would allow an inmate to insure that the parole board relied on truthful and accurate information in making its decision, that interest could be adequately protected by a statement of reasons if parole is denied.[204]

197. Comment, *Procedural Protection, supra* note 6, at 1158.

198. *See* Parsons-Lewis, *supra* note 5, at 1524; Comment, *Procedural Protection, supra* note 6, at 1123.

199. *Cf.* Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (similar concern in disciplinary hearing context).

200. *Cf. id.* at 567 (similar restriction in disciplinary hearing context).

201. This is consistent with the Supreme Court's analysis of similar situations in Baxter v. Palmigiano, 425 U.S. 308 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); and Morrissey v. Brewer, 408 U.S. 471 (1972). A parolee facing revocation of his parole was held to have the right to present testimonial and documentary evidence at his revocation hearing in *Morrissey*. *Id.* at 489. Revocation hearings do not involve persons within the prison, as do disciplinary hearings or parole release hearings. Thus, the Court did not have to consider any threat to institutional security. When the Court considered disciplinary hearings, however, which take place within the prison, the Court was much more concerned with the safety of those who live or work inside the prison. *See* Wolff v. McDonnell, 418 U.S. 539, 566 (1974). The Court has been reluctant to deprive prison administrators of the discretion necessary to protect institutional safety and security. *Id.*; *see* Baxter v. Palmigiano, 425 U.S. 308, 322 (1976).

202. The Court argued that "[i]f confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials. there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability." 418 U.S. at 567.

203. *See* Wolff v. McDonnell, 418 U.S. 539, 567 (1974); *accord*, Baxter v. Palmigiano, 425 U.S. 308, 322 (1976) (affirmance of refusal to require cross-examination in prison disciplinary hearings).

204. See text & notes 171-84 *supra*.

Thus, due process should not require the right of confrontation and cross-examination.

The right to counsel in parole release hearings presents a different problem. Commentators have eloquently outlined the substantial benefits which would result from the insertion of counsel in the parole release decisionmaking process.[205] The Supreme Court, however, has refused to extend this right to individuals in disciplinary hearings,[206] probation revocation proceedings,[207] and parole revocation hearings.[208] In *Gagnon v. Scarpelli*,[209] the Court discussed the disadvantages of granting an unrestricted right to counsel in probation revocation proceedings.[210] The Court stated that recognizing such a right would significantly alter the nature of the proceding.[211] If the probationer had counsel, the state would normally provide its own counsel. With the introduction of trained advocates into the proceeding, what would normally be a predictive and discretionary, and secondarily a fact-finding process would begin to take on the characteristics of a full-blown trial.[212] In greater self-consciousness of its quasi-judicial role, the hearing body might become less sensitive to the rehabilitative needs of the individual before it.[213] In addition, the decisionmaking process would be prolonged.[214]

As in probation revocation hearings, the need for counsel in parole release proceedings arises only in individual cases and not by the very

205. Counsel would be able to assist the inmate in a number of ways. Counsel could help the inmate gather evidence and present his case to the parole board in its most favorable light. He could investigate relevant evidence outside the prison (such as the inmate's family situation and the environment to which he may return) which is unavailable to the inmate. In addition, the presence of counsel at the parole release hearing would encourage the parole board to give the inmate as complete and as fair consideration as possible. *See* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correction Process*, 18 KAN. L. REV. 493 (1970); Comment, *The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497 (1968); Comment, *Right to Counsel at Parole Release Hearings*, 1971 WASH. U.L.Q. 502.

On the other hand, the court in Menechino v. Oswald, 430 F.2d 403, 408 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), argued that the issue to be resolved in a parole release decision "is not one which usually demands the traditional skills, training and expertise of legal counsel. Far more important is an understanding of the numerous other factors we have mentioned, which have to do with medicine, psychiatry, criminology, penology, psychology, and human relations."

206. In Wolff v. McDonnell, 418 U.S. 539, 570 (1974), the Court held that due process did not require representation by counsel in prison disciplinary hearings. The Court affirmed its holding in Baxter v. Palmigiano, 425 U.S. 308, 315 (1976), even though the inmate faced possible criminal charges for the institutional misconduct and although statements made in the disciplinary hearing would perhaps be used in later criminal prosecutions against the inmate.

207. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

208. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

209. 411 U.S. 778 (1973).

210. *Id.* at 787-91.

211. *Id.* at 787.

212. *Id.*

213. *Id.*

214. *Id.* at 788.

nature of the proceeding.[215] A parole applicant need not make a presentation to untrained jurors who do not understand the complexity of his specific case. There may be some situations, however, where fairness necessitates the appointment of counsel to aid the inmate in presenting his case to the parole board,[216] but those isolated situations do not justify imposing such a burdensome requirement on the parole release process. The decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the authorities charged with administering the parole system.

The parole release hearing is the culmination of a period of adjustment on the part of the inmate. If he has not demonstrated that he is worthy of parole by the time of the hearing, there is little he can do during the short interview before the parole board. Thus, due process should not require anything more than the opportunity to appear before the board and make a statement on his own behalf and a strictly limited right to present evidence that the board has perhaps overlooked or misunderstood. The problems raised by recognizing rights of confrontation, cross-examination, and counsel on the parole release hearing far outweigh the benefits the parole applicant would derive.

CONCLUSION

The parole release decision is one of crucial importance to inmates. The growing body of case law imposing procedural due process requirements on the decisionmaking process is an admirable attempt to provide parole applicants with vital elements of procedural fairness which should be supported by the Supreme Court. The arguments opposing the application of due process protections are based on archaic concepts and meaningless distinctions. The difference between parole release and parole revocation is relevant only in determining what procedures will be required by due process. The minimum procedures of due process will be beneficial to both the parole board and the parole applicant. Many of the problems faced by parole boards in making accurate and knowledgeable decisions will be eased. Inmates' feelings of frustration and powerlessness will be lessened. In this way, the rehabilitative goal of parole will be furthered.

215. *See id.* at 789.

216. In *Wolff*, the Court did note two situations in which an inmate should be free to seek some form of counsel substitute. Those situations are when the inmate is illiterate or when the complexity of the issues makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case. 418 U.S. at 570. The Court's holding in Baxter v. Palmigiano, 425 U.S. 308 (1976), seems to leave this possibility open. Perhaps a similar exception could be made in parole release hearings when an inmate does not appear to be able to make a clear and reasonable statement in his own behalf.