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Due Process and the Parole Release Decision

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COMMENTS

DUE PROCESS AND THE PAROLE RELEASE DECISION

INTRODUCTION

Even a prisoner who has been deprived of his liberty by due process of law continues to be protected by the Constitution. The extent to which prisoners' rights are constitutionally protected, however, is an area of the law which is still evolving. Although recent decisions by the United States Supreme Court have extended due process into the areas of parole revocation and inmate disciplinary proceedings, the controversy has since focused upon whether due process should apply to parole release proceedings. The Court's latest attempt at resolving this issue is Scott v. Kentucky Parole Board.

In Scott the prisoner filed a class action in federal district court on behalf of all inmates subject to the jurisdiction of the Kentucky Parole Board. The action challenged the constitutionality of the state board's parole release proceedings on the grounds that they were conducted without minimum procedural safeguards. The opinion of the district court, holding that the prisoner was not entitled to due process protection in parole release proceedings, was affirmed by the Court of Appeals for the Sixth Circuit. The United States Supreme Court subsequently granted certiorari. Since petitioner Scott was released on parole during the action, the Court vacated the order after

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1 "But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).
5 Although the action was never certified as a class action, it was treated as such by the district court and the court of appeals. Reply Brief for Petitioner at 17, Scott v. Kentucky Parole Bd., 429 U.S. 60 (1976).
6 The other named petitioner, Calvin Bell, had been released on parole and subse-
hearing oral argument and remanded the case to the court of appeals to consider the question of mootness.

The Supreme Court has been faced with the problem of mootness several times in attempting to decide whether due process applies to the parole release decision. The issue appears to be one that is "capable of repetition, yet evading review." As Justice Stevens pointed out in his dissent in Scott, the issue demands the Court's resolution in view of the great number of parole release decisions each year, the significance of the decision to the prisoner, and the increasing amount of litigation and conflicting decisions in the federal courts.


7 Other cases evading the Court's review because of mootness include: Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); United States ex rel. Johnson v. Chairman of 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); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), vacated and remanded for consideration of mootness, 414 U.S. 809 (1973), dismissed as moot, 501 F.2d 992 (5th Cir. 1973).

8 Scott v. Kentucky Parole Bd., 429 U.S. 60, 63-64 (1976) (Stevens, J. joined by Brennan and Powell, JJ., dissenting). If a petitioner is not permitted to bring a class action because of lack of certification, see note 5, supra, review is still possible under the "capable of repetition, yet evading review" doctrine. The Court in Weinstein v. Bradford, 423 U.S. 147, 149 (1975), noted that an issue will not be held moot if the challenged action has too short a duration to be fully litigated before expiration and there is a reasonable expectation that the same party will be subjected to the action again. In Scott both requirements are met. The petitioner remains a parolee and, in view of the fact noted in Morrissey v. Brewer, 408 U.S. 471, 479 (1972), that 35%-45% of all paroles are revoked, Scott has a reasonable expectation of parole revocation and subsequent application for a release before the same parole board. Furthermore, since Scott claims he would not presently be subject to "close parole supervision" if he had received due process rights during his parole release proceedings, he has a "direct and immediate interest." 429 U.S. at 61 (dissenting opinion).

9 429 U.S. at 61 (dissenting opinion).

Comments

Whether the Court has the opportunity to decide Scott or subsequently is presented a similar case, it will be faced with two questions: (1) does procedural due process apply to parole release proceedings? and (2) if so, what minimum procedures are required?11

I. THE PRISONER'S INTEREST IN DUE PROCESS

Before due process can be held to apply to parole release proceedings, the prisoner must be considered to have a constitutionally protected interest in receiving parole. Two Supreme Court decisions are important in interpreting the nature of the prisoner's interest in parole release. In Morrissey v. Brewer12 the Court held that an individual already released on parole has sufficient interest in keeping his "conditional liberty" so as to require due process in parole revocation proceedings.13 Wolff v. McDonnell14 dealt more directly with inmates' rights, requiring due process before a prisoner's good-time credits15 may be revoked in a disciplinary proceeding. These recent extensions of due process into the areas of parole revocation and inmate disciplinary proceedings urge a reconsideration of the traditional concepts regarding the nature of the prisoner's interest in parole release.16

But see Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), cert. denied, 429 U.S. 917 (1976). For earlier cases holding that due process is inapplicable, see Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), vacated and remanded for consideration of mootness, 414 U.S. 809 (1973), dismissed as moot, 501 F.2d 992 (5th Cir. 1973); Mosley v. Ashby, 459 F.2d 477 (3d Cir. 1972); Dorado v. Kerr, 454 F.2d 892 (9th Cir.), cert. denied, 409 U.S. 934 (1972); Barnes v. United States, 445 F.2d 260 (8th Cir. 1971); Madden v. New Jersey State Parole Bd., 438 F.2d 1189 (3d Cir. 1971); Schwartzberg v. United States Bd. of Parole, 399 F.2d 297 (10th Cir.1968).

11 Brief for Petitioner, supra note 6, at 4.
12 408 U.S. 471 (1972).
13 See also Gagnon v. Scarpelli, 411 U.S. 778 (1973), in which the Court held that due process guarantees similar to those in Morrissey are also required before probation is revoked.
15 Good-time credits are reductions of the prisoner's term of sentence, awarded for good behavior and subject to forfeiture as a sanction for serious misconduct. Id. at 546 n.6.
16 With the exceptions of the Fifth and Sixth Circuits, all of the courts of appeals which have considered the issue since Wolff have held that due process applies to some extent in the parole release decision. See note 10 supra, for a listing of such cases.
A. Background of Morrissey and Wolff

One argument against applying due process in parole release is the "present enjoyment" rationale—the idea that a prisoner does not possess liberty and therefore is not deprived of it when parole is denied. Admittedly, a parolee's interest in due process would be greater than that of a prisoner applying for parole in that the parolee already enjoys freedom, even though it is restricted. Yet had the Court applied the "present enjoyment" rationale in Wolff, due process safeguards could not have been extended to disciplinary proceedings. Loss of good time, like denial of parole, lengthens the actual period of imprisonment although it does not affect the inmate's present freedom.

Another argument is that the "right-privilege" distinction prevents the application of due process in the parole release proceeding. The "right-privilege" theory holds that application of due process depends upon whether a governmental benefit is characterized as an absolute "right" or a mere "privilege." However, the "right-privilege" theory has been rejected soundly by the Court. Instead, the test today is whether the individual is "condemned to suffer grievous loss" because of the absence of due process. Under this requirement, whether

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17 Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir. 1973). The "present enjoyment" rationale has been attacked in Bradford v. Weinstein, 519 F.2d 728, 731-32 (4th Cir. 1974), and in Childs v. United States Bd. of Parole, 511 F.2d 1270, 1278 (D.C. Cir. 1974).

18 "It is not sophistic to attach greater importance to a person's justifiable reliance on maintaining his conditional freedom . . . than to his mere anticipation or hope of freedom." Morrissey v. Brewer, 408 U.S. at 482 n.8 (quoting United States ex rel Bey v. Connecticut Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir.), vacated as moot, 404 U.S. 879 (1971)).


The Supreme Court has applied procedural safeguards to several proceedings in which applicants did not presently enjoy benefits. See, e.g., Willner v. Committee on Character, 373 U.S. 96 (1963), and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (denial of admission to state bar); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (denial of admission to practice before the Board of Tax Appeals).


the prisoner suffers a "grievous loss" upon denial of parole does not depend upon the gravity of the loss, but rather upon its nature—whether the prisoner's interest is one involving liberty or property and thus entitled to protection under the Constitution.

B. Liberty

The Constitution guarantees that no one will be deprived of "life, liberty, or property, without due process of law." "Liberty" has been construed broadly to mean more than mere freedom from physical restraint. The Court in Morrissey held that a parolee's interest in retaining his conditional liberty requires due process safeguards in the revocation proceedings. However, the result of parole revocation and the result of parole denial are identical: incarceration or conditional liberty. It would seem, therefore, that the prisoner applying for parole would be entitled to the same due process rights as the parolee faced with revocation.

A comparison with the situation in Wolff is even more convincing, for the parole applicant's interest in liberty is at least as strong as that of the prisoner who may be deprived of

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24 "The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty . . . . The result of the Board's exercise of its discretion is that an applicant either suffers a 'grievous loss' or gains a conditional liberty," Childs v. United States Bd. of Parole, 511 F.2d 1270, 1278 (D.C. Cir. 1974). But see Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976) (loss of mere expectation of release is not a "grievous loss").
25 U.S. Const. amends. V, XIV.
26 The Supreme Court stated:
   Without doubt it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . ., and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.
   Board of Regents v. Roth, 408 U.S. 564, 572 (1972)(failure to renew nontenured teacher's contract held not to be deprivation of liberty or property in particular instance) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
27 "To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration."
   United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 928 (2d Cir. 1974).
28 Brief for Petitioner, supra note 6, at 33-34. Accord, Childs v. United States Bd. of Parole, 511 F.2d 1270, 1277-78 (D.C. Cir. 1974).
good-time credits. In each instance there is no immediate loss or change in status either upon denial of parole or upon forfeiture of good time. Yet both actions result in extending the length of imprisonment. The prisoner who is denied parole suffers an additional deprivation of liberty; whereas good time can be restored to the inmate, the prisoner initially denied parole may be forced to wait several years before his application is again considered.29

C. Property

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement . . . ."30 The prisoner's "legitimate claim of entitlement" to parole may be found in the statutory right to be considered for parole.31 The Supreme Court in Wolff found that the inmate's interest in statutorily created good-time credits had "real substance" and was therefore entitled to protection under due process.32

The parole applicant derives an additional property interest in that he has a reasonable expectation of parole release.33 This is a justifiable expectation based upon the integral part parole plays in the penological system34 and upon the large

29 Note, supra note 19, at 347.

The Kentucky Parole Board is required to make an initial review of parole release within specified times. Any further reviews are made at the discretion of the Board. 501 Ky. ADMIN. REG. 1:010 §§ 1-4 (1976). Therefore the prisoner who is denied parole may have to wait indefinitely for a second review.

See also Parole Commission and Reorganization Act, 18 U.S.C.A. § 4208(h)(Supp. 1977). Under the new act federal prisoners serving terms of 7 years or less are entitled to subsequent hearings every 18 months after the initial denial of parole; those with terms longer than 7 years are entitled to hearings every 24 months.

30 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).


32 418 U.S. at 557.

33 Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

34 "[W]here the federal government has made parole an integral part of the
number of inmates released on parole each year. Recent studies show that seventy-two percent of those felons released from prisons in 1970 were released on parole. In 1974 and 1975, of the 2,676 inmates interviewed by the Kentucky Parole Board, 1,410 were granted parole. The prisoner applying for parole thus has a justifiable expectation that the parole board will not arbitrarily deny parole if his prison record shows him to be sufficiently rehabilitated.

II. THE PROCESS THAT IS DUE

A. The Balancing Analysis

If due process is held to apply to parole release proceedings, the next step would be to decide what procedural safeguards are necessary. The most restrictive approach is to limit the prisoner's protections to those set out in the statute granting the right to consideration of parole. However, parole statutes often place such broad discretion in the parole board that there are no legally enforceable safeguards. Therefore, once the prisoner is held to have a protected interest in parole, the procedures governing denial must be measured not by statutory definitions, but by constitutional standards that guaran-
The determination of what procedural safeguards are required in parole release proceedings must rest on a balancing of the state's interests against those of the prisoner. The state's primary interests in the parole release decision are to ensure efficient administration and use of accurate and relevant information as the basis of the decisions and to promote rehabilitation by creating fairness in the process, thereby relieving inmate hostility and frustration. Obviously, the prisoner's interests are furthered by the elements of fairness and accuracy in the process. The conflict of interest lies in the state's desire for speed and efficiency. Although decreasing the administrative burden is a legitimate state interest, it cannot override a constitutionally protected right. When a parole board hears as many as forty cases a day, thereby allowing an average of only seven or eight minutes per hearing, it is clear that speed is the main concern. The Supreme Court considered this increased administr-
tive burden justified in parole revocation and disciplinary proceedings. Although there are some differences between the parole revocation and release processes, the similarities are more significant in that both involve factfinding, prediction and discretion within the decision-making process, and both entail the same interest in conditional liberty. Following a balancing analysis, the Supreme Court in *Morrissey* held that the parolee is entitled to the following procedural safeguards before his parole can be revoked: (1) prior written notice of the alleged parole violations and disclosure of the evidence to be used against him; (2) opportunity to appear and present witnesses and documentary evidence before a neutral body; (3) opportunity to confront and cross-examine adverse witnesses, unless there is good cause shown to restrict this right; and (4) right to a written statement revealing the evidence relied upon and the reasons for revocation. The *Morrissey* Court placed particular emphasis on the need for procedures that would ensure flexibility, as well as accurate factfinding. However, they made it clear that the full range of due process rights attaching to adversary criminal proceedings are not required where "conditional liberty" is involved. The particular procedures required must be tailored to fit the nature of the individual proceeding.

B. *Prior Notice and Access to Evidence*

The most fundamental procedural safeguard is the opportunity for the parole applicant to know in advance what material the parole board will rely upon in making its determination. Without prior access to his file, a prisoner is incapable of

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48 There are two related analyses in determining what procedures are necessary in the parole release process. The primary theory is the "grievous loss" analysis, which requires first an interest protected by due process, a deprivation amounting to a "grievous loss," and then a balancing of the interests involved. The "potential error" analysis, on the other hand, begins by balancing interests. The risk of potential error and resulting harm serves to strengthen or justify application of due process to the government action and to determine what procedures are necessary. Merritt, *supra* note 44, at 97 n.22.
50 408 U.S. at 488, 489.
51 Id. at 480.
effectively rebutting adverse evidence. Thus, mere notice that a parole review will be held is meaningless.52

The prisoner who has appeared before the Kentucky Parole Board may have no idea of what information the board relied upon in its decision. There is no organized method of collecting information for the file,53 no check on the accuracy of the material, and thus no possible way for the applicant to rebut false or incomplete information.54 In such a situation, the risk that the board will rely on erroneous data in denying parole is substantial.55 Prior access to his file would allow the parole applicant to submit documented evidence rebutting false information and supplying omitted relevant material. Such access would also permit the applicant to point out any constitution-

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52 The United States Parole Commission is required to give notice and to allow access to the parole applicant's files at least 30 days before the hearing. Parole Commission and Reorganization Act, 18 U.S.C.A. § 4208(b) (Supp. 1977).
53 [T]he bureau of corrections shall obtain all pertinent information regarding each prisoner . . . . Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The bureau of corrections shall furnish the circumstances of his offense and his previous social history to the institution and the board . . . and shall prepare a report on such information as it obtains. It shall be the duty of the bureau of corrections to supplement this report with such material as the board may request and submit such report to the board. KRS § 439.340(1) (1975) (emphasis added).
54 Brief for Petitioner, supra note 6, at 11.
55 Present practices and procedures do not provide reasonable assurance that the Board's decisions on applications for parole will be based upon reasonably reliable determinations of fact. In fact, under present Parole Board practices and procedures, there exists a substantial danger of decisions which are based upon clearly erroneous assumptions of fact.

. . . The sources of said danger of error include evidence of filing errors and omissions, confusion stemming from instances of mistaken identity; possible reliance upon outdated and superseded information; reliance upon unsubstantiated assertions; reliance upon conflicting, unclear, and in some instances not apparently reliable psychological testing data and similar information; and the like.

ally impermissible material included in the file. This updating of the file would not only save time during the subsequent hearing, but would also prevent any prior misconceptions the board might entertain upon an initial reading of the file.

Of course there may be information which the board does not wish to reveal to the inmate. The United States Parole Commission guidelines provide that the Commission must furnish a summary of the information in the file. However, the summary may be limited in cases where the information would disrupt the prisoner's rehabilitation program, where the information was obtained through a promise of confidentiality, or where disclosure would harm an individual. Yet even with these restrictions on disclosure, the primary goal of "accurate finding of fact and informed use of discretion" will be advanced. Furthermore, the board will have a more reliable basis on which to predict the applicant's ability to function outside of prison.

C. Prior Submission of Written Statement and Rebuttal at Hearing

The present procedure of the Kentucky Parole Board allows the applicant to speak and ask questions during the interview, but not to present argument or evidence. Because of this procedure, the prisoner can do little to change any unfavorable impression that may have been created from a reading of his file. However, if he is allowed to submit a written statement for the board to read initially with his file and is allowed to explain or rebut before the board any adverse information contained therein, the limited time available for the interview would be used more advantageously. The emphasis would be on the written record, with oral testimony made largely unnecessary.

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56 Merritt, supra note 44, at 102 n.46, 103.
57 Brief for Petitioner, supra note 6, at 56.
60 Brief for Petitioner, supra note 6, at 45.
61 Id. at 10. In 1972, 17 jurisdictions allowed the applicant to present witnesses before the parole board; 34 did not. O'Leary & Nuffield, supra note 40, at 658.
62 Merritt, supra note 44, at 102.
The parolee faced with parole revocation has a right to confront and cross-examine adverse witnesses during his hearing. On the other hand, the inmate has no such right in disciplinary proceedings. There are several arguments against allowing confrontation and cross-examination in a parole release hearing. First, it has been argued that since the proceeding is predictive and nonaccusatory in nature, there is no need for a cross-examination. Furthermore, some argue that since the prisoner already has the opportunity to submit favorable information, confrontation and cross-examination would have only a minor advantage. Although these arguments do have a reasonable basis in the ordinary case, confrontation and cross-examination should be allowed in those cases where there are material factual disputes and no security or safety problems.

D. Written Reasons for Denial of Parole

Even if the parole applicant were given all the protections of full adversary hearing, these safeguards would mean little without the requirement that parole boards give written reasons for denial of parole. The majority of jurisdictions do not require the parole board to inform the prisoner of the reasons.

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63 This right to confrontation and cross-examination during the revocation hearing is curtailed when "good cause," such as a security problem, is shown. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

64 In Wolff the Court recognized the right of the inmate to call witnesses and to present documentary evidence unless the disciplinary committee showed good reason not to allow it. However, the right of confrontation and cross-examination was considered unnecessary, since the proceeding did not constitute a criminal trial involving a serious deprivation. 418 U.S. at 566-67. Another reason for refusing to allow confrontation was the possibility of retaliation against informing inmates and guards. Id. at 562. But see the opinions of Mr. Justice Marshall and Mr. Justice Douglas, in which they argue in favor of giving the inmate the rights of cross-examination and confrontation. 418 U.S. at 586-86 (concurring in part and dissenting in part), 595-97 (dissenting in part and concurring in the result in part).


67 Merritt, supra note 44, at 102 n.46.

68 "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).
for denying his application. In Kentucky there is no summary or verbatim record of the hearing. The board orally announces its decision after deliberation. There is no requirement, nor is it common, for the board to inform the prisoner why he is being denied parole, nor what he can do to improve his chances for future parole.

In this area the state's rationale again is that the requirement of written reasons would be too burdensome. "The short answer to that argument is that it is not burdensome to give reasons when reasons exist." On the other hand, there are many purposes that can be served merely by giving the prisoner a written statement as to the basis of the board's decisions. The primary advantage would be to force the parole board to be rational in denying parole. By making its reasons public, the parole board would be forced to consider only relevant, constitutionally permissible material and to make principled decisions.

Requiring written reasons would also facilitate judicial review. Faced with the almost total discretion of the parole board, the prisoner has nothing on which to base an appeal. The board should furnish not only the factual grounds for denial, but also the specific evidentiary bases relied upon. Exhustive detail would not be required, but instead merely enough specificity to allow an appellate body to determine whether there has been an abuse of discretion.

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69 The results of the 1973 survey by O'Leary & Nuffield, supra note 40, at 658, show that only 11 of the 54 jurisdictions provide written reasons for denial of parole.
70 Twenty of the 54 jurisdictions surveyed keep a verbatim record of the parole release hearing. Id.
71 Brief for Petitioner, supra note 6, at 11. The Kentucky Supreme Court has left the matter of giving written reasons for decisions to the state parole board as an administrative policy decision, deferring to the board's discretion in making predictions about future inmate behavior. Harrison v. Robuck, 508 S.W.2d 767, 768 (Ky. 1974).
73 "[T]he provision for a written record helps insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." Wolff v. McDonnell, 418 U.S. 539, 565 (1974).
74 United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 931 (2d Cir. 1974).
75 Id. at 929.
76 To satisfy due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been
Specific written bases for denial of parole would serve a rehabilitative function by relieving inmates' frustrations and bitterness at the apparent arbitrariness of the release decision.\textsuperscript{77} Equally important is the fact that the prisoner would have some guidance as to how to modify his behavior and improve his chances for parole.\textsuperscript{78} Articulated reasons for denial may also lead to a consistent system of precedent and rules that would aid the courts in initial sentencing and provide a basis for improvements within the penological system.\textsuperscript{79}

E. Right to Counsel

At present no jurisdiction recognizes a right to appointed
counsel for the indigent parole applicant.80 Twenty-one jurisdictions allow the presence of retained counsel during the hearing; thirty do not.81 Yet a real need for some kind of legal assistance during the release proceedings is often obvious. Many inmates have little education and limited intelligence;82 thus the aid of an attorney or law student would be helpful in examining the prisoner's file for improperly included information and in obtaining relevant material outside of prison. Furthermore, the mere presence of an advocate would serve as some restraint on biased or arbitrary board actions during the hearing.83

The Supreme Court in Morrissey specifically refused to decide whether the indigent parolee has a right either to retained or appointed counsel during revocation proceedings.84 Those opposing interjection of counsel into the parole release decision fear increased costs and delays and the limitation of the board's necessary discretion in making predictions. It is feared that the presence of counsel might change the board's predictive, rehabilitative function into one that has a less tolerant, factfinding focus.85

The United States Parole Commission allows the parole applicant to consult retained counsel before the release hearing86 and to provide himself with a representative during the interview. However, the function of the representative during the hearing is limited to furnishing any additional information the panel might request and making a concluding statement.87 Therefore the limited function of counsel during the interview would not significantly change the nature of the board's inquiry nor restrict the board's discretion. However, the indigent parole applicant has no right to appointed counsel in the federal

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80 O'Leary & Nuffield, supra note 40, at 659.
81 Id. at 658.
83 Brief for Petitioner, supra note 6, at 69-60.
84 408 U.S. at 489 (1972). But see Justice Brennan's concurring opinion joined by Justice Marshall, stating that the parolee should have the right to retained counsel but that the right of appointed counsel should remain an open question. Id. at 491.
87 28 C.F.R. § 2.12(b) (1976).
parole system\textsuperscript{48} and is thus barred from receiving the same benefits wealthier prisoners can afford.\textsuperscript{49}

Another way to strike a balance between the competing interests is the Supreme Court's approach in probation and parole revocation proceedings. In \textit{Gagnon v. Scarpelli},\textsuperscript{90} decided after \textit{Morrissey}, the Court leaned in favor of permitting the revocation board to decide on a case-by-case basis whether counsel should be appointed for the indigent probationer or parolee.\textsuperscript{91} The Court set forth a two-step procedure. First, the individual facing revocation proceedings must make a timely request for appointed counsel based on either a denial of the alleged parole or probation violation, or the presence of complex mitigating circumstances that would be difficult to present. The revocation board then considers whether the individual is capable of effectively representing himself. The board must state its grounds for denying the request for counsel.\textsuperscript{92} The \textit{Gagnon} approach eliminates the problem of an unnecessary state burden by refusing to appoint counsel when it is not required, as when the individual admits violation of probation or parole or the evidence is easy to present.\textsuperscript{93}

Thus if the Court's approach in \textit{Gagnon} were implemented in the parole release decision, the applicant would be allowed to have full representation by retained or appointed counsel only if the parole board considered it necessary in the particular case;\textsuperscript{94} there would still be no broad right to counsel in every case.\textsuperscript{95} Since the presence of counsel would be determined ac-

\textsuperscript{48} The Parole Commission and Reorganization Act, 18 U.S.C.A. § 4208(d) (1), (2) (Supp. 1977), allows the prisoner to consult with a representative before the hearing and to be represented at the parole hearing. There is no provision for appointed counsel in the act.

\textsuperscript{49} The major case involving discrimination on the basis of wealth is San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

\textsuperscript{90} 411 U.S. 778 (1973).

\textsuperscript{91} The \textit{Morrissey} Court had left open the question of whether the indigent parolee facing parole revocation has any right to counsel, either retained or appointed. 408 U.S. at 489.

\textsuperscript{92} 411 U.S. at 791-92.

\textsuperscript{93} Id. at 788.

\textsuperscript{94} In \textit{Gagnon} the Court describes the situations in which counsel must be appointed for the indigent parolee or probationer, but does not decide whether counsel may be retained in the other cases where appointed counsel would not be considered necessary. \textit{Id.} at 784 n.6.

\textsuperscript{95} The Supreme Court in \textit{Wolff} also held that the inmate has no right to counsel in disciplinary proceedings. That holding notwithstanding, where the issues are com-
according to the complexity of the case, there would be no potential equal protection discrimination against indigent parole applicants who could not afford the benefits of counsel. The main disadvantage would be the fact that the discretion would again rest with the parole board to decide whether counsel is needed. The danger is that the board, as a state agency, may lean in favor of efficiency and economy, to the detriment of the prisoner whose case requires the aid of counsel. Assuming the board would consider all requests for counsel without being overly influenced by the state budget or the additional burden on the board’s case load, there still would be the necessity of a preliminary determination as to the complexity of the case and the prisoner’s capabilities, a determination which might lead to an informal decision on the merits before the applicant has even had an opportunity to speak.

The parole applicant’s right to counsel must be molded to the particular situation by weighing the conflicting needs of the state and the individual. The prisoner’s due process interests and the goal of accurate factfinding can be furthered without significantly burdening the state by requiring prior notice and access to files; the right to submit a written statement and rebut adverse evidence before the board; and the requirement of written reasons for denial of parole. The obligation of the state to provide every indigent parole applicant with counsel to represent him during his hearing would be unnecessary in clear-cut cases. Nevertheless, the state should provide all prisoners with some type of legal aid in preparing their applications, either from the staff or a legal services program. A carefully prepared written statement submitted before the hearing would facilitate the interview and lessen the need for counsel during the hearing. If the parole board considered the prisoner’s request for counsel during the hearing justifiable, it could allow retained or appointed counsel to appear in a limited manner, as in the federal parole system. Given the right to submit a prior written statement, the restriction of counsel’s

plex and the prisoner is unable to present his evidence effectively, he may obtain assistance from other inmates or as provided by the staff. 418 U.S. at 570.

Cf. Douglas v. California, 372 U.S. 353 (1963) (if state grants statutory right to first appeal, then the indigent appellant has a right to appointed counsel).

28 C.F.R. § 2.12(b) (1976).
function to supplying additional information and presenting a concluding statement during the prisoner's hearing would meet the applicant's need for effective representation without unnecessarily obstructing the proceedings or hindering the board's decisionmaking discretion.

**CONCLUSION**

In the past, courts have been reluctant to enter the area of parole release decisions because of deference to the *parens patriae* concept, the idea that the state's paternal relationship with the prisoner made due process safeguards unnecessary. The parole board was not considered part of the criminal process, but rather as having a rehabilitative and predictive function. Thus it was necessary for the board to develop a "special expertise" involving many non-legal considerations that

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99 The *parens patriae* (parent of the country) concept involves the sovereign power of the state to act as guardian for those individuals with legal disabilities. BLACK'S LAW DICTIONARY 1269 (4th ed. 1968).

501 Ky. ADMIN. REG. 1:010 § 9 (1976) states:

In reaching their decision, the board shall consider:

(1) Current offense;
(2) Prior record;
(3) Institutional adjustment and conduct:
   (a) Disciplinary reports,
   (b) Loss of good time,
   (c) Work and program involvement.
(4) Attitude toward authority:
   (a) Before incarceration,
   (b) During incarceration.
(5) History of alcohol or drug involvement;
(6) History of prior probation, shock probation or parole violations;
(7) Educational and job skills;
(8) Prior employment history;
(9) Emotional stability;
(10) Mental capacities;
(11) Terminal illness;
(12) History of deviant behavior;
(13) Official and community attitudes toward accepting inmate back in the county of conviction;
(14) Review of parole plan:
   (a) Housing,
   (b) Employment,
   (c) Need for community treatment and follow-up resources such as: 1. Halfway houses and residential treatment centers,
   2. Comprehensive care centers,
   3. Service centers,
would be hindered by the intrusion of adversary criminal procedures. Because both state and prisoner were considered to have a "unity of interest" in rehabilitation, there was no need for procedural safeguards.\textsuperscript{109}

However, the \textit{parens patriae} concept cannot justify the absolute discretion to make a decision which will significantly affect an individual's liberty.\textsuperscript{108} In the area of juvenile proceedings, the Supreme Court rejected the \textit{parens patriae} rationale as an impermissible barrier to due process, stating: "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."\textsuperscript{102} Instead of blindly deferring to the state, courts should take a new look at the realistic concept of parole—its effect on the prisoner's liberty and its integral part within the penological system today.

Parole release is no longer an act of clemency granted to a few well-behaved inmates. It is a prevalent rehabilitative measure that reintegrates prisoners into society.\textsuperscript{103} In 1970 seventy-

\begin{itemize}
\item[4.] Individual counselling with private social agencies and private treatment resources such as psychiatrists and psychologists.
\item[(15)] Any other factors involved that would relate to the inmate's needs and the safety of the public.
\end{itemize}

\textsuperscript{108} O'Leary & Nuffield, \textit{supra} note 40, at 653. The federal district court, relying on the need to give parole boards total discretion, dismissed petitioner Scott's action. "[T]he nature of this 'practical and troublesome area' demands that the states be left free to develop correctional remedies unhampered by pervasive judicial interference in the mechanics of conditional release." Bell v. Kentucky Parole Bd. (E.D. Ky., filed Mar. 15, 1974) (memorandum opinion).

\textsuperscript{102} \textit{In re Gault}, 387 U.S. 1, 18 (1967). The Court went on to say:

The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

\textit{Id.} at 18-19.

\textsuperscript{103} During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system . . . . Rather than being an \textit{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 . . . . It also serves to alleviate the costs to society of keeping an individual in prison.

two percent of the felons released from prison were released on parole. Furthermore, the significance of parole release is not limited to the penal system. The availability of parole is viewed by most judges as a relevant factor in the sentencing of prisoners. As a realistic matter, the parole board itself effectively acts as a sentencing judge, for actual determination of how long the prisoner remains in confinement is ultimately decided by the parole board.

Thus the parole board wields a significant power over the prisoner's liberty, a power that is virtually unchecked by the courts. In Kentucky the law states, "The orders of the board shall not be reviewable except as to compliance with the terms of [the parole act]." Yet there are no specific provisions for review within the act. Judicial review has been held available only where the parole board's decision is so clearly arbitrary as to be an abuse of discretion. The parole release process has been described as "the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." Yet the absence of due process safeguards leaves the denied applicant with no avenue to review and no way to prove an abuse of discretion by the parole board. The frustration and hostility that inevitably result only work to thwart the chief purpose of parole—rehabilitation. A reevaluation of the

104 Brief for Petitioner, supra note 6, at 23.
105 Of those judges responding to the survey, 88% regularly considered the availability of parole as a factor in sentencing. Project, supra note 43, at 882 n.361.
106 Brief for Petitioner, supra note 6, at 32.
107 KRS § 439.330(3) (1975). See also Willard v. Ferguson, 358 S.W.2d 516 (Ky. 1962).
108 Brown v. Lundgren, 528 F.2d 1050, 1055 (5th Cir.) (2-1 decision), cert. denied, 429 U.S. 917 (1976). An even more extreme view is found in Ornitz v. Robuck, 366 F. Supp. 183, 184 (E.D. Ky. 1973), in which the court stated that the sole discretion of the parole board was unreviewable since parole applicants had no procedural rights.
109 Brief for Petitioner, supra note 6, at 20. (quoting H.R. REP. No. 94-184, 94th Cong., 1st Sess. 3 (1975)).
110 While the board acts favorably in most cases, it engenders hostility because of the inconsistency of its rationale. Some inmates who have had good behavior records in prison are "hit" (denied parole), while others with many infractions are granted parole. Some inmates with a long record of prior offenses may receive parole, while others, including first offenders, may be denied it. Nobody gives the inmate an explanation for these obviously inconsistent decisions or describes in anything more than meaningless gener-
modern concept of parole is long overdue. The legislatures have provided only vague statutory guidelines, leaving parole boards with virtually unchecked discretion. It is time courts take the necessary steps to protect the prisoner's right to a fair consideration of parole and to force some degree of order within the parole release decision.

*Author's Note.* Upon remand from the United States Supreme Court, the Court of Appeals for the Sixth Circuit has decided the question of mootness in *Bell v. Kentucky Parole Bd.*, 556 F.2d 805 (6th Cir. 1977). In a per curiam order the court dismissed as moot the appeal of Calvin Bell, who had died. The court determined however that the issues were not moot as to appellant Scott for several reasons. First, even if the appellant obtains parole, the Kentucky Parole Board may execute the detainer issued against him. (Although Scott had been released on parole at the time of the remand to the Sixth Circuit, the court's opinion indicates that Scott is not on parole at present and will not become eligible for parole until June 1978). Furthermore, the rules and regulations in effect at the time of the complaint have not been revised, nor are any relevant changes expected soon. Finally, it is probable that Scott will be subject to Kentucky's parole system again in the future. Having determined that Scott's appeal is not moot, the Court of Appeals affirmed the district court's dismissal of the complaint on the grounds that there was no violation of the plaintiff's constitutional rights.