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DUE PROCESS IN PAROLE GRANTING: A CURRENT ASSESSMENT

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INTRODUCTION

Parole, which has become an accepted feature of the American correctional system over the last sixty years, is the conditional release of an individual into the community under supervision after a period of incarceration.[1] It is a bifurcated process, characterized initially by the decision to release on parole and subsequently by community supervision.[2] The decision to release on parole, which is the primary concern of this article, consists predominantly of the parole release hearing, perhaps the most important stage in the entire corrections process.[3]

The decision by the parole board to grant or deny parole is, of course, incredibly important to the inmate.[4] Yet, despite the fact that parole boards are the arbiters of such monumental decisions, they have been characterized by the corrections profession as "largely uncontrolled by legal standards, protections, or remedies."[5]

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1. For a discussion of the history of parole see S. RUBIN, THE LAW OF CRIMINAL CORRECTION 620-22 (2d ed. 1973).

2. The parole release decision, rather than community supervision, is the primary function of the parole board. Supervision of the individuals admitted to parole is undertaken by parole officers who frequently are not under the control of the parole authority.

3. *See generally* Kastenmeier & Eglit, *Parole Release Decision-Makking: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AMER. U.L. REV. 477 (1973).

4. Release on parole is the first opportunity which most incarcerated felons have for release from the institution. As a consequence, parole can and does coerce individuals into behavior which they would not otherwise undertake. *Cf.* N. MORRIS, THE FUTURE OF IMPRISONMENT 12-20 (1974). The importance of the parole release decision in the minds of inmates is demonstrated by the fact that it is the subject of numerous inmate complaints. D. FOGEL, WE ARE THE LIVING PROOF 301-03 (1975); INSIDE PRISON AMERICAN STYLE 157-93 (J. Minton, Jr. ed. 1971); L. ORLAND, PRISONS: HOUSES OF DARKNESS 129, 134-36 (1975). *See also* ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMM'N ON ATTICA 97 (Bantam ed. 1972).

5. THE AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 279 (3d ed. 1966). *See also Hearings on H.R. 13118 Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 15, pt. 7A, at 235-36, 501 (1972).

Few cases afford a glimpse of the decision-making processes of parole authorities. In those few cases where such a glimpse has been afforded, examples of inaccurate or misleading data being utilized by the parole authority in making its parole release decision have been found.[6] In addition, parole boards have been found to be employing data which is constitutionally infirm.[7] In at least one case, it was seriously contended that the parole board was considering the religion of the inmate in determining whether to grant parole.[8] Another case suggested that parole was being employed to reward those who pleaded guilty and to punish those who elected to exercise their constitutional right to stand trial.[9]

Perhaps the most blatant example of infringement of constitutional rights by a parole board was the rule adopted by the Tennessee Parole Board denying parole to anyone who filed a petition for a writ of habeas corpus in the federal courts collaterally attacking his sentence. The Court of Appeals for the Sixth Circuit had little difficulty in striking this rule as violative of the inmate's right of access to the courts.[10] Had this been an unwritten policy rather than a written rule, the absence of written decisions and other procedural due process safeguards might well have made it impossible to prove the existence of the policy absent an outright admission by the members of the parole board.[11]

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6. *See* Calabro v. United States Bd. of Parole, 525 F.2d 660 (5th Cir. 1975); Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974) and 391 F. Supp. 260 (W.D.N.Y. 1975); Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973). *Cf.* Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975); Morris v. United States, 399 F. Supp. 720 (E.D. Va. 1975); United States v. Mackey, 387 F. Supp. 1121 (D. Nev. 1975).

7. *See* Leonard v. Mississippi State Probation & Parole Bd., 509 F.2d 820 (5th Cir.), *cert. denied*, 96 S. Ct. 428 (1975); Wren v. United States Bd. of Parole, 389 F. Supp. 938 (N.D. Ga. 1975).

8. Farries v. United States Bd. of Parole, 484 F.2d 948 (7th Cir. 1973).

9. United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925, 931 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974). In Smith v. North Carolina, 528 F.2d 807 (4th Cir. 1975), the court determined that the inmate had been denied parole because he had successfully challenged the failure to credit his sentence with the time he had spent in custody prior to trial. The court found that this failure to release the individual constituted an infringement of his right of access to the courts and therefore ordered Smith's immediate release on parole.

10. Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967).

11. This problem should be particularly borne in mind when weighing the competing interests to determine what process is required by due process. If the procedure is too rudimentary, it will not catch any but the most blatant use of inappropriate factors or data in reaching a parole decision. The problem demonstrates what value there is in the unorthodox approach to due process which looks to the potentiality of error rather than the nature of the interest. *See* note 22 and accompanying text *infra*.

Parole boards make mistakes[12] and parole board members have biases and prejudices which are difficult to put aside in reaching a decision whether to grant parole.[13] The fact that such mistakes do occur and that such biases are present supports the need for some reasonable procedures to minimize the effects of bias and to lessen the possibility of error. This article, after providing a brief synopsis of the protective developments which have been incorporated into the entire parole procedure, will suggest various means by which the "parole release decision" may be improved in order to ensure a fair and swift parole disposition.

THE APPLICATION OF DUE PROCESS TO PAROLE BOARD DECISIONS

Prior to the leading case of *Morrissey v. Brewer*,[14] it was generally accepted that the actions of a parole authority in granting, denying or revoking parole were not reviewable.[15] Most courts accepted the proposition that the determination whether to grant or deny parole was wholly within the discretion of the parole board and could only be reviewed for an abuse of discretion.[16] These decisions, which did not distinguish between parole granting and parole revocation, were cast in doubt, however, by *Morrissey* which held that procedural due process was applicable to the parole revocation process. The determination in *Morrissey* that parole revocation decisions were not only reviewable but also subject to procedural due process, seriously undercut the basis upon which the lower courts had refused to review parole granting decisions.

One of the persistent questions concerning the granting of parole has been whether any procedural rights are to be accorded the individual being considered for parole under the due process clauses of the fifth and fourteenth amendments. The failure to accord any due process rights in parole proceedings, prior to the *Morrissey* decision, was predicated upon the belief that parole was a "privilege";[17] consequently, due process con-

12. *See Hearings on H.R. 13118 Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 15, pt. 7A, at 263-76, 451 (1972).

13. *See* Oswald, *Decisions! Decisions! Decisions!*, 34 FED. PROBATION 27 (March 1970); Thomas, *An Analysis of Parole Selection*, 9 CRIME & DEL. 173, 175-76 (1963).

14. 408 U.S. 471 (1972).

15. *See* Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).

16. *See, e.g.*, United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968); Palermo v. Rockefeller, 323 F. Supp. 478 (S.D.N.Y. 1971).

17. Menechino v. Oswald, 430 F.2d 403, 408 n.3 (2d Cir. 1970).

siderations did not appertain. Since the state was not required to grant parole to an inmate, when it did so it was not required to grant the individual fourteenth amendment due process rights. Immediately preceeding *Morrissey*, however, the Supreme Court sounded the death knell to the "right-privilege dichotomy." No longer were due process safeguards contingent upon whether the transaction involved was traditionally classified a right or privilege.[18]

Morrissey dealt only with the application of due process to parole revocation, and did not purport to discuss the application of procedural due process to the granting of parole. However, to attempt to distinguish *Morrissey* from the parole granting setting on the basis that the individual on parole possesses a conditional freedom while the individual being considered for parole is only attempting to gain the status of conditional release, is merely to attempt a reincarnation of the right-privilege dichotomy in a not too deceptive disguise. To date the courts have, on the whole, rejected that distinction as a basis for refusing to extend due process to parole granting.[19]

While there is no "right" to be paroled, it is clear that the parole board holds the key to an inmate's conditional freedom. Clearly, the determination of whether an inmate has met the criteria established for his conditional release is discretionary. The discretion exercised in such a situation can be analogized to the discretion invoked by the state in granting various licenses. For example, an individual is not entitled to a liquor license or an apartment in public housing, yet he is entitled to fair consideration of his application for either of these and the Constitution guarantees him such due process as is necessary to ensure the fairness of these considerations.[20] Similarly, no individual has a right to a license to practice law, yet it is clear that any individual desiring such a license has a right to due process in the consideration of his application.[21]

The Supreme Court, in *Morrissey*, established that the critical factor in determining the applicability of due process is whether the party involved would be subjected to a "grievous loss" with regard to a protected interest.[22] In determining this

18. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971); Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

19. *See, e.g.*, United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925, 927-28 n.2 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974).

20. Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

21. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

22. Morrissey v. Brewer, 408 U.S. 471 (1972); *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The Supreme Court, in Meachum v. Fano, 19 CRIM. L. RPTR.

the court must ascertain whether the individual's interest in avoiding the unfavorable action outweighs the governmental interest in summary adjudication.[23]

In *Morrissey*, the Court determined that an individual suffers a grievous loss when his parole is *revoked*. The individual being considered for parole is not attempting to *maintain* his freedom, but is attempting to *gain* his conditional liberty and

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3167 (U.S. June 25, 1976), reemphasized the fact that the interest involved must be one protected by the due process clause.

A second, although unorthodox analysis, can also be applied in determining whether due process appertains in any given situation. The first step in employing this approach is to determine whether there is a need to provide some procedural assurance of a correct result by determining the likelihood of any erroneous result. *See* Arnett v. Kennedy, 416 U.S. 134, 171-203 (1974) (White, J., concurring) (in shaping rules of procedure the courts are to be guided by risks of error). The question of potential error in any transaction does not really go to the individual's interest, rather it works to reinforce or justify the result reached by balancing the individual's interest against the state's interest. Thus, in Goldberg v. Kelly, 397 U.S. 254 (1970), the petitioner's real interest was in obtaining money through welfare to purchase food. The question of the harm which would be visited by an erroneous termination of welfare is simply a reinforcement of the decision which could be reached by balancing the interests without considering the risk of error or the resulting harm. Similarly, in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the strong interest that an individual has in the availability of his personal funds to pay his debts would be sufficient to support the requirement of notice and a hearing prior to any garnishment of wages, without consideration of the risk of error in such proceedings, although the risk of error and potential harm certainly support the result.

In the orthodox, or grievous loss approach, a review of the possibilities of an erroneous result may be employed, as a secondary rationale, after it has been determined that the transaction involves a grievous loss. The basic difference between the orthodox approach and the unorthodox approach is that the first employs three distinct steps. It requires that there be a life, liberty or property interest protected by due process; second, the action must visit a grievous loss; third, the individual's and state's interests must be balanced to determine what process, if any, is due. The unorthodox approach, on the other hand, assumes that the drafters of the Bill of Rights intended to cover all possible interests in the phrase "life, liberty or property." In determining the procedure to be required, the unorthodox approach then looks to the risk of error and weighs the interests to determine the procedure to be required, if any.

The purpose to be served through the imposition of procedural due process strictures on any governmental decision-making process is to assure that the decision is rational and fair. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). Thus, it can be suggested that procedural due process is nothing more than those collective processes which the law requires to assure a result which comports with substantive due process. For example, there is difficulty in determining whether the setting aside of a decision for a total absence of evidence is a violation of substantive due process or procedural due process. *See* Douglas v. Buder, 412 U.S. 430 (1973); Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960); Caton v. Smith, 486 F.2d 733 (7th Cir. 1973). While the Supreme Court seems firmly committed to the grievous loss approach, *see* Meachum v. Fano, 19 CRIM. L. RPTR. 3167 (U.S. June 25, 1976), the unorthodox approach commends itself because it goes far to obliterate any sharp distinction between substantive due process and procedural due process while retaining considerable flexibility in the particular procedures to be required to assure fairness.

23. Fuentes v. Shevin, 407 U.S. 67 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

thus also has a strong interest in being assured that the decision is neither arbitrary nor based on erroneous information. While the denial of release on this conditional liberty is not as great a loss as the loss of such conditional liberty once granted, it is nevertheless the denial of freedom from incarceration, and thus could certainly be considered a grievous loss.[24]

In weighing the interests involved, both the state and the individual have strong interests to be served through the injection of some due process controls into the parole release decisional process which would clearly appear to outweigh the state's competing interest in a prompt and summary administrative proceeding. The state has no interest in having an individual arbitrarily denied parole; incarceration is costly to the state. First, there is the economic and social cost of maintaining the individual within the correctional institution.[25] Second, the economic and social benefit to the community, which the individual would contribute were he free in the community, is lost.[26] Fur-

24. This conclusion is supported by the Supreme Court's decision in Wolff v. McDonnell, 418 U.S. 539 (1974), where the Court determined that major discipline within a correctional institution (placement in solitary confinement or segregation or loss of accumulated good time) constituted a grievous loss entitling the inmate to some procedural due process protections. This conclusion was premised, in part, upon the effects that these actions had upon the inmates' chances of release on parole. *See also* Childs v. United States Bd. of Parole, 511 F.2d 1270, 1278 (D.C. Cir. 1974).

25. There are at least three costs involved in incarcerating an individual. These are the loss of the income which the individual would have made, the costs of supporting any individuals who are economically dependent upon the inmate and the actual cost of keeping him in prison. Data demonstrating this last cost is available. The following table demonstrates the costs of maintaining an individual in prison on a yearly basis.

State	Prison Population*	Cost Of Operating Inst.**	Cost Per Inmate Per Yr.***
California	16,970	$ 152,410,000	$ 8,981.20
Illinois	5,630	50,549,000	8,978.51
Michigan	8,471	40,029,000	4,725.42
Massachusetts	1,856	41,107,000	22,148.17
New York	11,693	115,414,000	9,870.35
Ohio	8,276	68,070,000	8,224.99
Texas	15,709	36,152,000	2,301.36
United States****	196,183	1,139,419,000	5,575.85

* Actual population as of December 31, 1972. Source: LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1971, 1972, AND 1973 (National Prisoner Statistics Bulletin No. SD-NPS-PSF-1, 1975).

** Source: U.S. BUREAU OF CENSUS AND LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, EXPENDITURE AND EMPLOYMENT DATA FOR THE CRIMINAL JUSTICE SYSTEM 1972-73, at 266 (1975).

*** Since the expenditures are for the fiscal year of the particular state, while the population figures represent the population of a particular day rather than the average population during the budget period, the result may be slightly distorted.

**** Total of both state and federal governments.

26. For a discussion of the social costs of imprisonment to the community and the benefits to the community from permitting the offender

ther, if the need for imprisonment has ceased (signified by the determination that the individual should be paroled) then the interest of society which caused the individual to be imprisoned has ceased.[27]

Since the decision in *Morrissey*, a number of courts have been called upon to consider whether the denial of parole constitutes a grievous loss. The majority of these courts have determined that it does and that due process appertains in the parole granting process.[28] Pressed by these decisions and other critics,[29] the United States Board of Parole has adopted extensive regulations structuring the exercise of its discretion;[30] these regulations, in turn, have been partially codified.[31]

WHAT PROCESS IS DUE?

With the determination that procedural due process appertains in the parole granting process, it is necessary to determine what procedures are constitutionally required. The procedures to be required must be sufficient to minimize the perceived abuses of discretion without imposing unnecessary restraints upon the paroling authority. The authority should not be burdened with unnecessary or excessive procedural processes which do not significantly improve the quality of the decision.

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to remain in the community, *see generally* CORRECTIONAL ECONOMICS CENTER OF THE AMERICAN BAR ASS'N, COMMUNITY PROGRAMS FOR WOMEN OFFENDERS: COST AND ECONOMIC CONSIDERATIONS 13-21 (1975).

27. There are generally considered to be four plausible purposes for imprisonment: rehabilitation, retribution, deterrence and incapacitation. This article will not undertake to suggest which of the four purposes should underlie the decision to release an individual on parole. Necessarily, the amount of time for incarceration will vary depending upon the theory adopted. However, it is obvious that if the need to retain the individual within the institution has actually ceased then the public has no interest in retention. For a discussion of the four theories see A. VON HIRSCH, DOING JUSTICE 9-55 (1976).

28. Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); 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); Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974); Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975); Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); Freeman v. Schoen, 370 F. Supp. 1144 (D. Minn. 1974); Candarini v. Attorney General, 369 F. Supp. 1132 (E.D.N.Y. 1974); United States *ex rel.* Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973); *In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971); Solari v. Vincent, 46 App. Div. 2d 453, 363 N.Y.S.2d 332 (1975); Cummings v. Regan, 45 App. Div. 2d 222, 357 N.Y.S.2d 260, *rev'd and dismissed as moot*, 36 N.Y.2d 969, 373 N.Y.S.2d 563 (1974).

29. *See* K. DAVIS, DISCRETIONARY JUSTICE 128-29 (1969).

30. 28 C.F.R. §§ 2.1 et seq. (1975).

31. Pub. L. No. 94-233 (March 15, 1976).

The parole release decisional process presently consists of an inmate making a short personal appearance before one or more members of the parole board at the institution where the individual is incarcerated.[32] These members will interview the inmate and hear anything which he may have to say on his own behalf. They may be empowered to make the decision at the institution, or they may be required to make a recommendation to the entire parole board or a constituent committee.[33] At the time of the inmate's appearance before the board and during the decisional process, the board has before it, and presumably refers to, a file containing data on the inmate: his crime, his institutional behavior, his plans should he be paroled, statements from the inmate and his family, statements from the sentencing judge and the prosecuting attorney, statements from the victim and his family and statements from the general public.[34] The

32. *See* V. O'LEARY & J. NUFFIELD, THE ORGANIZATION OF PAROLE SYSTEMS IN THE UNITED STATES xxix (1972); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 633-35 (2d ed. 1973). For an in-depth discussion of the comparative operational and decisional procedures of four parole boards see R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 222-98 (1969).

33. For a state by state analysis of the operation of the parole authorities see V. O'LEARY & J. NUFFIELD, THE ORGANIZATION OF PAROLE SYSTEMS IN THE UNITED STATES (1972).

34. The Illinois statute is typical. ILL. REV. STAT. ch. 38, § 1003-3-4(d)-(e) (1975) provides in part:

> (d) In making its determination of parole, the Board shall consider:
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> (1) material transmitted to the Department by the clerk of the committing court, under Section 5-4-1 or Section 5-10 of the Juvenile Court Act;
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> (2) the report under Section 3-8-2 or 3-10-2;
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> (3) a report by the Department and any report by the chief administrative officer of the institution or facility;
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> (4) a parole progress report;
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> (5) a medical and psychological report, if requested by the Board;
>
> (6) material submitted by the person whose parole is being considered.
>
> (e) The prosecuting State's Attorney's office shall receive reasonable written notice not less than 15 days prior to the parole hearing and may submit relevant information to the Board for its consideration. . . .

Frank Austin, in his study of the Illinois Parole and Pardon Board, found five classes of data present:

> The information contained in these files was divided into five general typologies. This division was based upon:
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> (a) *Criminal History*: Within this category we were concerned with the official documentations of the parole candidate's history of arrests and/or convictions, the nature of these crimes, and the inmate's previous probationary and/or parole outcomes. The sources of this data were F.B.I. arrest sheets and police reports.
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> (b) *Instant Offense*: This category refers to those factors associated with the crime (which the inmate was convicted of). Such areas as the (1) nature of the crime, (2) type of sentence received, (3) plea entered and (4) number of persons involved in the crime are included. Again, the data recorded is based primarily on police reports plus documents submitted by the court.
>
> (c) *Social-Psychological Characteristics:* This category in-

contents of this file are generally not revealed to the individual being considered for parole.[35] After the decision has been reached, the inmate is informed of it in a written statement which may or may not set forth reasons for the denial of parole.[36]

Disclosure of File Data

While the hearing or appearance certainly has some effect on the parole release decision, it appears that the parole decision is made principally on the basis of the data which is in the inmate's file.[37] This is not necessarily inappropriate,[38] but the secrecy of the file contents means that inaccurate or misleading information may be utilized without challenge.[39]

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cluded an array of characteristics ascribed to the parole candidate based upon psychological, sociological, and psychiatric interviews; psychometric test results; employment records and correspondence from family members. All of this information was gathered immediately after the inmate's arrival at the prison.

(d) *Institutional Adjustment*: This category refers to those aspects of the inmate's behavior within the institution as recorded by prison staff. Such factors as the inmate's security status, discipline record, program participation, and time served were felt to be possibly relevant to Board members in reaching their decisions.

(e) *Parole Data*: This category included data relating to the inmate's plans for release from prison such as residence, employment, and special activities such as returning to school, attending a trade school, or being admitted to a drug abuse program. This data was secured from the parole report submitted by the professional staff to the Parole Board.

F. Austin, The Parole and Pardon Board: Decision-Making in the Criminal Justice System, 63-64, September 1974 (unpublished masters thesis presented to the Graduate School Department of Sociology DePaul University).

35. The practice is neither statutory nor regulatory, however, the practice is not inconsistent with the statutes on parole records. *See, e.g.*, ILL. REV. STAT. ch. 38, § 1003-5-1 (1975). *See* S. RUBIN, THE LAW OF CRIMINAL CORRECTION 635 (2d ed. 1973).

36. For one parole authority's rationale for not giving reasons see K. DAVIS, DISCRETIONARY JUSTICE 127-29 (1969).

37. The hearings are far too short to develop any meaningful data upon which the decision could be based. *See* Cohen, *The Discovery of Prison Reform*, 21 BUFFALO L. REV. 855 (1972).

38. *See* Matthews v. Eldridge, 96 S. Ct. 893, 902-08 (1976); Friendly, *"Some Kind of Hearing,"* 123 U. PENN. L. REV. 1267, 1287 (1975).

39. Law enforcement records are not always accurate, as is demonstrated in Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974), and United States v. Mackey, 387 F. Supp. 1121 (D. Nev. 1975). Arrest records may be poor indicators of criminal propensity and may demonstrate some racial bias, as is illustrated in Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975), and Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972). Prison records may contain erroneous or constitutionally impermissible information, as is shown in Leonard v. Mississippi State Probation & Parole Bd., 509 F.2d 820 (5th Cir.), *cert. denied*, 423 U.S. 998 (1975), and Morris v. United States, 399 F. Supp. 720 (E.D. Va. 1975).

It is an essential rule of due process that an individual have an opportunity to comment upon evidence entering into a decision affecting him. Greene v. McElroy, 360 U.S. 474, 496 (1959); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937).

The most traditional notions of procedural due process include notice of a hearing and an opportunity to rebut damaging evidence.[40] While this is generally achieved through discovery, the use of witnesses and cross-examination,[41] such is not always the case.[42] For example, the decision as to the appropriate sentence which should be imposed by the court is made on the basis of a large quantity of written data.[43] It is well settled that due process does not require that this data be developed through oral testimony, although the courts may use that device where there is a conflict as to material facts entering into the sentencing decision.[44] The Supreme Court has also recently determined that the decision whether to terminate disability benefits, which is based primarily upon medical opinion, is a decision made most appropriately on written records rather than oral testimony.[45]

The parole release decision would similarly appear to be a decision best made upon a written record. Most of the facts which are brought to the parole authority's attention will not be contested for their accuracy; convictions, arrests, biographical and similar data are generally factually accurate, although not always complete. To require this information to be elicited through testimony would consume large amounts of time needlessly. Mistakes, however, do occur and records may be incomplete. These can be corrected in writing, provided the inmate has access to the file sufficiently prior to the decision to permit him to obtain the appropriate documents to correct the error or omission and cause them to be added to the file. Irrelevant and constitutionally impermissible information can be attacked by a memorandum calling to the attention of the parole board the fact that it is impermissible, rather than through time-consuming testimony. Thus, there would seem little to be gained by requiring a hearing with witnesses and cross-examination when just results can be accomplished by opening the file to the inmate, giving him an opportunity to add, correct, contest or supplement the data in writing prior to the parole hearing.[46]

40. *In re* Gault, 387 U.S. 1, 33-34 (1967); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

41. *See* Chambers v. Mississippi, 410 U.S. 284, 294-95, 302 (1973); Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Greene v. McElroy, 360 U.S. 474, 496 (1959).

42. *See* Baxter v. Palmigiano, 96 S. Ct. 1551, 1559-60 (1976); Matthews v. Eldridge, 96 S. Ct. 893, 902-03 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Friendly, *"Some Kind of Hearing,"* 123 U. PENN. L. REV. 1267 (1975).

43. *See* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 15-99 (1969); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 81-177 (2d ed. 1973).

44. Williams v. New York, 337 U.S. 241 (1949).

45. Matthews v. Eldridge, 96 S. Ct. 893 (1976).

46. However, the parole authority should establish a procedure

Access to the inmate's file is consistent with generally accepted principles of due process; specifically, individuals have the right to know the evidence against them and they should be afforded an opportunity to refute any information which they believe to be erroneous.[47] Such disclosure is necessary to ensure that the parole board's decision is based on the facts as they exist. Law enforcement agency reports are not always accurate[48] and factual errors in presentence reports and parole files are not unknown.[49] Improper and inappropriate information has been found in the data files upon which sentencing and parole release decisions are made.[50] Thus, disclosure of this data would seem to be an appropriate procedure to assure the proper exercise of the parole authority's discretion.

The question whether due process requires the disclosure of data such as that upon which the parole authority makes its decision is not new, as it was recently debated with regard to the disclosure of presentence reports. Those opposing such disclosure advanced three major arguments in support of their position. They felt that disclosure would dry-up sources of informa-

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through which evidence can be taken in appropriate cases for those few cases where the disputes of fact will be of considerable magnitude and it is impossible to reach a decision without resolving these factual conflicts. It is doubtful that this will occur with any frequency.

47. Greene v. McElroy, 360 U.S. 474, 496-97 (1959); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 300-05 (1937); United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973).

> [D]isclosure and comment are essential to our commitment to respect for individual dignity in the criminal process. They insure that the defendant is treated as a citizen entitled to know what is happening to him and why and how it is happening—not as a Kafkaesque victim of Star Chamber secret proceedings.

United States v. Dockery, 447 F.2d 1178, 1191 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971) (Wright, J., dissenting).

48. *See* Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); Maney v. Ratcliff, 399 F. Supp. 760 (E.D. Wis. 1975); United States v. Mackey, 387 F. Supp. 1121 (D. Nev. 1975).

49. *See* United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948); Baker v. United States, 388 F.2d 931, 932-33 (4th Cir. 1968); Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973).

50. *See* United States v. Tucker, 404 U.S. 443 (1972); Leonard v. Mississippi State Probation & Parole Bd., 509 F.2d 820 (5th Cir. 1975); Shelton v. United States, 497 F.2d 156 (5th Cir. 1974); United States v. Latimer, 415 F.2d 1288 (6th Cir. 1969); Baker v. United States, 388 F.2d 931 (4th Cir. 1968); Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974). *Cf.* United States v. Trice, 412 F.2d 209 (6th Cir. 1969) (error in failing to reveal contents of memorandum handed to the court by the prosecution at sentencing not reversible error where the court specifically eschewed reliance upon the contents); United States v. Stubblefield, 408 F.2d 309 (6th Cir. 1969) (disparity between sentences for co-defendants valid where not based upon improper factors); Lingo v. Stone, 401 F. Supp. 464 (N.D. Cal. 1975) (court troubled by characterization of inmate as violent by parole authority where inmate had no serious record of violence and the suggestion by the parole authority that the inmate needed programs where he had actively participated in all available programs).

tion, hinder rehabilitation, and inordinately protract the sentencing proceeding by introducing a myriad of factual issues.[51]

As to the last point, if the inmate is given access to his file sufficiently prior to the hearing, the proceedings would not be prolonged to any great extent. In this way, he would have sufficient time to amplify, clarify, or rebut any evidence by means of affidavit, additional official records or other written means before the hearing commenced. Given the fact that oral disputes are not permitted in the absence of serious factual controversy, this process may actually shorten the hearing process where the file data is clearly negative or clearly positive.[52] Such a policy of limiting the inmate to disputation or supplementation of the record in writing would seem to accomplish the objective of securing an accurate record while remaining consistent with due process.[53]

The second argument, that disclosure of information would hinder rehabilitation, was adequately addressed by the drafters of Rule 32(c)(3) of the Federal Rules of Criminal Procedure:

> (3) *Disclosure.*
>
> (A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation,
>
> . . . .

This rule recognizes an exception which, for the purposes of the parole granting hearing, might be narrowed even further. Release of diagnostic material cannot disrupt a program of rehabilitation unless that program is presently being provided to the inmate or there is a strong probability that the program will be provided to the inmate in the immediate future.[54] If a program of rehabilitation is in progress, the need for confidentiality could

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51. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 188 (1973).

52. *See* Matthews v. Eldridge, 96 S. Ct. 893 (1976); United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973) (the second circuit would permit oral testimony to rebut data in the presentence report, but obviously preferred reliance upon documents, written statements and affidavits).

53. *See* Friendly, *"Some Kind of Hearing,"* 123 U. PENN. L. REV. 1267, 1287 (1975).

54. To permit the utilization of a less narrow exception would permit the parole authority to employ the exception as a cover for other bases of denial. Where the individual is not presently receiving treatment and the institution does not have any facilities for such treatment nor is there any chance of his being transferred to an institution which does provide treatment, there seems to be no reason not to permit the individual to know any diagnostic opinion of him. *See also* AMERICAN BAR ASS'N, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.4(b) (1968).

be certified by the professional who is examining the inmate and this certification should be within that portion of the file which is released to the inmate.

The final argument is that disclosure would tend to dry-up the sources of information for these reports. Experience in those states which have mandatory disclosure of presentence report laws, however, has not demonstrated the accuracy of the prognostication.[55] Moreover, the individual gathering the information can rarely promise that the sources will be kept confidential.[56] Thus, where the information is volunteered by individuals in the community, as letters of protest to a proposed parole, the individuals cannot reasonably expect that this data will not be made available to the inmate.[57] Where the data is the official record of a public official there would seem to be no reason for secrecy.

The debate over whether or not due process required the presentence report to be revealed to the defendant was inclusive. While the debate was being pressed with vigor, many states and the federal system adopted rules or statutes mandating or permitting such disclosure.[58] Even before this occurred numerous courts had found that disclosure was required.[59] Additionally, courts and commentators considering the question have suggested that the file data be made available to the inmate prior to

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55. *See* AMERICAN BAR ASS'N, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.4(b) (1968); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 188 (1973).

56. Many states permit release of the presentence report in the discretion of the sentencing judge. *See, e.g.*, ILL. REV. STAT. ch. 38, § 1005-3-4(b) (1975); OHIO REV. CODE ANN. § 2951.03 (Supp. 1972). Thus, the individual gathering this information cannot accurately represent that the information gathered will be kept confidential. The presentence report constitutes one of the largest single items of information to be placed in the record which the parole board considers. *See* ILL. REV. STAT. ch. 38, § 1005-4-1(d) (1975).

57. The individual does not have a reasonable expectation of privacy. *Cf.* United States v. Miller, 96 S. Ct. 1619 (1976). The Illinois Parole and Pardon Board would seem to welcome statements from the general public regarding the granting of parole. *See* Chicago Tribune, April 11, 1976, § 2, at 8, col. 1.

58. *See, e.g.*, FED. R. CRIM. P. 32(c)(3); ILL. REV. STAT. ch. 38, § 1005-3-4(b) (1975); OHIO REV. CODE ANN. § 2951.03 (Supp. 1972).

59. United States v. Miller, 495 F.2d 362 (7th Cir. 1974); State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969); Commonwealth v. Phelps, 450 Pa. 597, 301 A.2d 678 (1973). *Cf.* United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973); United States v. Needles, 472 F.2d 652 (2d Cir. 1973); Baker v. United States, 388 F.2d 931 (4th Cir. 1968). *See also* AMERICAN BAR ASS'N, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 4.3-4.5 (1968); 10 UNIFORM LAWS ANN., MODEL PENAL CODE § 7.07 (Master ed. 1974); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 188-89 (1973); COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 4 (2d ed. 1972).

the parole hearing and that he be afforded an opportunity to comment on such data in writing.[60]

The provision of access to the inmate's file data, prior to the parole hearing, with the opportunity to amplify, clarify and rebut its contents in writing prior to the ultimate decision, provides the inmate with notice of the entire factual basis upon which the decision is to be made. It provides some assurances against decisions based upon erroneous or misleading data, but it does not assure that the decision will be rational or that irrelevant or impermissible considerations will not enter into the decision. To provide protection against these occurrences, it is necessary to require that the paroling authority provide a written rationale for its decision.

Written Reasons for the Decision

The provision of written reasons for the denial of parole, when coupled with a disclosure of the inmate's file, tends to limit the discretion of the parole authority by requiring elucidation of the specific facts and criteria which are employed in determining whether to grant parole.[61] Failure to provide reasons for denial of parole cannot help but frustrate and embitter the inmate.[62] It is suggested that this failure may be one of the contributing factors of prison disturbances.[63]

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60. Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); *In re* Prewitt, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 47 (1973); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 422 (1973); L. ORLAND, PRISONS: HOUSES OF DARKNESS 149-50 (1975); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 635 (2d ed. 1973); Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459, 484-85 (1973); Project—*Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 865-66 (1975). *Cf.* Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 96 S. Ct. 347 (1975); Hrynko v. Crawford, 402 F. Supp. 1083 (E.D. Pa. 1975).

61. This necessarily is the objective of infusion of due process into the parole granting process. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 93-94, 326-27 (3d ed. 1972).

62. . . . The prisoner then returns to prison routine and awaits the decision in a state of anguish.

To be denied parole is frustrating. But to be denied parole without any explanation for the decision is embittering and rancorous.

Because no rationale is given, the prisoner, comparing his case to that of others who were granted parole, may see the denial as a capricious decision. He is often at a loss to understand what he has done wrong or how he can improve his performance. Parole board silence compounds his cynicism and his hostility to authority.

NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PAROLE DECISIONS (1972) (a policy statement approved by the Council's Board of Directors on Oct. 31, 1972).

63. The report of the Commission appointed to investigate the causes of the Attica riot is very revealing:

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 pa-

Procedural due process has been held to require a written statement of adequate reasons for a particular action by an administrative body.[64] The purpose of requiring a written statement specifying the facts upon which the decision is based is to facilitate review of the decision and to determine whether the decision-maker has properly exercised his discretion.[65] The requirement of written reasons for the denial of parole also will assist the inmate in determining what he must do in order to be favorably considered for release upon his next appearance.[66] Without disclosing the facts upon which it makes its decision or stating reasons for its actions, the parole board's decision could be based upon facts which do not exist, facts which are totally irrelevant or considerations not permitted by relevant statute or constitution.[67]

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role), 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 generalities the criteria used by the board in arriving at its decisions. Institutional parole officers give inmates pointers on what might subsequently impress the board, such as enrolling in Bible classes. But inmates who follow this advice carefully often find they are hit nevertheless. As a result, inmates are left to speculate among themselves as to the reasons for the board's decisions. Corruption and chance are among the favorite inmate speculations.

ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMM'N ON ATTICA 97 (Bantam ed. 1972).

64. S.E.C. v. Chenery Corp., 318 U.S. 80 (1943).

65. *Id.*

66. [T]he provision for a written record [of the decision] 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. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others . . . [W]e perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

Wolff v. McDonnell, 418 U.S. 539, 565 (1974).

When dealing with administrative agencies generally we have long pointed to the need for suitable expression of the controlling findings or reasons. . . . 'not only in insuring a responsible and just determination' by the agency but also 'in affording a proper basis for effective judicial review.'

. . . .

So here, fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons. That course as a general matter would serve the acknowledged interests of procedural fairness and would also serve as a suitable and significant discipline on the Board's exercise of its wide powers. It would in nowise curb the Board's discretion on the grant or denial of parole nor would it impair the scope and effect of its expertise.

Monks v. New Jersey State Parole Bd., 58 N.J. 238, 244-45, 249, 277 A.2d 193, 196, 199 (1971).

67. The failure to state reasons has additional consequences. Even the most flagrant abuse of discretion is likely to go uncorrected. If a board member is in such a hurry to get to his golf game that he votes in sixteen cases without looking inside the files, no one under the board's system can ever know the difference, even

The parole authorities in the United States are well aware that an explanation of the basis for denial of parole is appropriate and desirable.[68] Indeed, the judiciary has emphasized on numerous occasions the necessity of such an explanation.[69] Since *Morrissey*, several jurisdictions have ruled that procedural due process applies to parole granting, and the vast majority of these jurisdictions have determined that written reasons for the denial of parole is at least one element of the required due process.[70]

Obviously, there is a considerable spectrum of statements which can be deemed to be explanations for parole authority actions. At one end would be a simple check-list on which the printed "formula explanation" most relevant to the specific prisoner would be checked. At the other end would be an extensive recitation of the factors relied upon, the decisional processes employed, and the rationale for the ultimate decision.

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though the personal liberty of sixteen men may be at stake. How could a board member have less incentive to avoid prejudice or undue haste than by a system in which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered. Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power?

K. DAVIS, DISCRETIONARY JUSTICE 128-29 (1969).

68. *See* O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651, 658, Table II (1972).

69. The seventh circuit has indicated in a nonconstitutional setting that:

> 'Giving reasons for denying parole is desirable for both rehabilitational and legal reasons. A prisoner may feel less resentful of a negative decision if he knows the reasons for it, and in planning his activities in the institution he ought to understand clearly what will help him to obtain an early parole. When the nature of his crime is such that early parole is not likely in any event, he should be protected from unrealistic hopes that can only lead to disappointment and bitterness. All this is the job of a prison counselor in any case, but the Parole Board can make that job much easier by formally stating its reasons.'

King v. United States, 492 F.2d 1337, 1340 n.11 (7th Cir. 1974).

An explanation of the basis for a denial is in accord with the recommendations of the American Bar Association, *see* AMERICAN BAR ASS'N, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES pt. 2, at 133C (1974); the National Advisory Commission, *see* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 422 (1973); and the Administrative Conference of the United States, *see* Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459, 484-85 (1973).

70. United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974); Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975); Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); Candarini v. Attorney General, 369 F. Supp. 1132 (E.D.N.Y. 1974); United States *ex rel.* Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973); *In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971); Cummings v. Regan, 45 App. Div. 2d 222, 357 N.Y.S.2d 260, *rev'd and dismissed as moot*, 36 N.Y.2d 969, 373 N.Y.S.2d 563 (1974). *Contra*, Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976).

In determining the sufficiency of the written explanation for a parole denial, it is appropriate to consider once again the functions served by such a requirement. It is suggested that a written explanation of the basis for a decision serves at least three separate, but interrelated, functions. The first is to assure that the parole authority is properly exercising its discretion[71] and that it does not employ erroneous information or improper criteria.[72] The second function is to serve as a guide to the inmate to improve himself in order that he might be paroled at a later date.[73] The third function is to provide a basis for judicial review of the administrative action.[74]

Sufficiency of the Written Explanation

If the written reasons are to serve these purposes, it is obvious that a mere check-list will not be sufficient,[75] nor will a mere recitation of broad criteria such as that frequently established by statute or regulation.[76] General statutory language, which obviously cannot be tailored to individual fact situations, would not indicate to the inmate what actions he should undertake to improve his chances for parole. This general language would not provide a basis for review nor would it provide a means to determine whether the parole authority has properly exercised its discretion.

In order for a written explanation to accomplish the three enumerated purposes it is necessary to provide some factual

71. *See* Wolff v. McDonnell, 418 U.S. 539, 565 (1974).

72. *See* Smith v. North Carolina, 528 F.2d 807 (4th Cir. 1975); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967); Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974).

73. King v. United States, 492 F.2d 1337, 1340 n.11 (7th Cir. 1974); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 246, 277 A.2d 193, 197 (1971). *See* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 257-58 (1969).

74. S.E.C. v. Chenery Corp., 318 U.S. 80, 94 (1943). The Supreme Court has noted the difficulty inherent in reviewing a decision where there are no written findings or reasons. *In re* Gault, 387 U.S. 1, 58 (1967).

75. Speaking of the effectiveness of a checklist, Professor Vincent O'Leary, Director of the National Parole Institute, indicated that:

> Most of the time it would be difficult at best. Most of the time I think an inmate is asking for more information than that. . . . [I]t seems to me the more information you can give the inmate, the more likely you are going to have a salutory effect on him. It would be difficult for me to see [how] a preordained checklist would satisfy the kind of information they would need.

Hearings on H.R. 13118 Before a Subcomm. of the House Comm. on the Judiciary, 92d Cong., 2d Sess., ser. 15, pt. 7A, at 219-20 (1972). *See also* 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).

76. *See* Strassi v. Hogan, 395 F. Supp. 141 (N.D. Ga. 1975); Craft v. Attorney General, 379 F. Supp. 538 (M.D. Pa. 1974); Candarini v. Attorney General, 369 F. Supp. 1132 (E.D.N.Y. 1974).

development in addition to a conclusory statement of the reasons for a decision. This factual development would necessarily have to be consistent with and supportive of the stated reasons for a denial of parole. If the stated facts were inaccurate or not reflective of the totality of the facts available to the board, this would be known to the inmate through his access to the data file and could readily be called to the attention of the parole board upon petition for rehearing or, if necessary, to the judiciary.

The Second Circuit Court of Appeals has provided an outline of what is required to constitute an adequate explanation:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision (e.g., that in its view the prisoner would, if released, probably engage in criminal activity) and the essential facts upon which the Board's inferences are based (e.g., the prisoner's long record, prior experience on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing, and his drug addiction).[77]

In several states there are statutes or regulations which establish guidelines to assist the parole authority in determining whether to grant parole. Several lower courts have determined that a mere recitation of the language of these guidelines, without more, does not comport with due process.[78]

The seventh circuit considered the sufficiency of a parole board's stated reasons in the recent case of *United States ex rel. Richerson v. Wolff*.[79] There, the decision denying parole not only recited the statutory language, "release at this time would depreciate the seriousness of the offense," but also referred to the facts of the particular offense upon which it based its conclusion and noted that the institutional record of the individual was excellent.[80] The court held that this recitation satisfied the standards established by the second circuit in *United States ex rel. Johnson v. Chairman of New York Board of Parole*,[81] which

77. United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925, 934 (2d Cir.), *vacated as moot,* 419 U.S. 1015 (1974).

78. Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Craft v. Attorney General, 379 F. Supp. 538 (M.D. Pa. 1974); Candarini v. Attorney General, 369 F. Supp. 1132 (E.D.N.Y. 1974), and the cases cited therein at 1137.

79. 525 F.2d 797 (7th Cir. 1975). *See also* McGee v. Aaron, 523 F.2d 825 (7th Cir. 1975).

80. 525 F.2d 797, 801 (7th Cir. 1975).

81. 500 F.2d 925 (2d Cir.), *vacated as moot,* 419 U.S. 1015 (1974).

the seventh circuit cited with approval.[82] While the court expressly pretermitted the question whether a mere recitation of the statutory criteria for granting parole would be sufficient to satisfy due process, the court's discussion would seem to indicate that it was assuming a negative position on that question.[83]

The requirement of a written explanation for denial of parole, setting forth both the rationale and the factual basis of the decision, coupled with the inmate's access to his file data, goes far towards assuring the proper exercise of the parole authority's discretion. Together, they provide much of the control that procedural due process requires without unnecessarily intruding into the efficient operation of the parole system. At present, they appear to be recognized elements of procedural due process in the parole release decisional process.[84]

Establishment of Criteria for the Decision

The adoption of established criteria to determine whether to grant or deny parole is an additional procedural safeguard which has been suggested by some courts and commentators. The Supreme Court has strongly suggested that administrative agencies adopt criteria to guide their decision-making[85] and this has been echoed by various courts of appeals.[86] As a result, most statutes establishing parole authorities provide some basic criteria to assist the board in determining whether to release the individual on parole.[87]

Publication of such criteria serves to guide the decision-maker in reaching his decision and provides some assurance that the decision is not arbitrary. At the same time, it provides the inmate with some indication of what evidence he should present to the board and what he must accomplish to gain his release.[88]

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82. 525 F.2d 797, 804 (7th Cir. 1975).
83. *Id.* at 805.
84. *See* notes 73 and 83 *supra.*
85. S.E.C. v. Chenery Corp., 332 U.S. 194, 202 (1947).
86. *See, e.g.*, White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976); Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495 (4th Cir. 1973); Silva v. Romney, 473 F.2d 287, 292 (1st Cir. 1973); Environmental Defense Fund Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). Noncompliance with vague or unknown rules cannot be punished. Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969).
The United States Board of Parole, previously operating without established criteria, had proclaimed publicly that its members had no knowledge of the reasons or considerations which entered into the votes of fellow Board members. *See* K. DAVIS, DISCRETIONARY JUSTICE 128-29 (1969). This practice has since been terminated and replaced with an elaborate set of regulations and criteria. *See* notes 39-40 *supra. See also* Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974).
87. *See, e.g.*, ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1975).
88. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 93-94 (3d ed. 1972).

However, while such criteria may be adequate to indicate in general terms the determination which the parole authority must make, they are generally far too vague to serve as a guide in the determination whether parole should be granted in any particular situation.[89]

One district court has determined that due process requires the establishment and publication of written criteria for the granting of parole.[90] The Second Circuit Court of Appeals, however, has held recently that such a safeguard is not required by due process.[91] The court reasoned that since due process requires written reasons for a denial of parole and since these reasons must demonstrate the criteria and reasoning process for the decision, such decisions over a period of time would establish a body of criteria similar to the body of precedent employed by the courts.[92] The court ruled that, until this process was found to be ineffective, it would not require the establishment of such criteria as a matter of constitutional law.[93]

While the establishment and publication of criteria in some form seems highly desirable, the stare decisis approach seems workable, if not preferable, to an attempt to develop a full written set of criteria. The success of this approach depends, of course, upon the availability of the parole authority's decisions to prospective parolees.[94] Without such availability, the individual

89. These statutory criteria speak in terms of broad principles and do not indicate the weight or relevance to be given any particular factual item. An example is criterion 1.1 from form 911-912-913-046 of the Ohio Adult Parole Authority (Aug. 1, 1975) which provides, "there is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under Administrative Regulation 816." This broad guideline does not indicate what evidence is to be considered or how it should be considered. Assuming that the inmate is a first offender, what weight should be given to the nature of the particular crime? Are there some crimes to which greater attention must be paid? Does the fact that the individual has a high school education enter into this decision? What about institutional discipline? What about military service? Should his mother's recent death be considered? All of these factors probably have some relevance, but to what degree is not clear. With 60 years of experience in parole proceedings, it would seem that considerably more definite factual criteria could be indicated to guide the parole authority and the inmate, even if it is totally impossible to construct a rough formula for the determination whether to release on parole.

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

91. Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975).

92. *Id.* at 543-44.

93. *Id.* at 544.

94. The question whether parole board decisions are available to persons other than the individual being considered for parole has been faced directly. In National Prison Project of the American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F. Supp. 789 (D.D.C. 1975) the court held that parole decisions are public records. In Hrynko v. Crawford, 402 F. Supp. 1083 (E.D. Pa. 1975) a Pennsylvania district court stated, in dicta, that a record of the parole hearing was producible under the

being considered for parole has no assurance that the decision in his case is consistent with prior cases and little assurance that his behavior is in conformity with those standards which the parole authority has established for the granting of parole.

Forced by judicial construction of the Administrative Procedure Act, the United States Board of Parole recently has adopted extensive criteria to guide it in determining whether to grant parole.[95] While these guidelines and their use by the Board have been subject to criticism, they do represent a serious step towards confining the discretion of the paroling authority without stripping it of its discretionary authority.[96]

CONCLUSION

The injection of procedural due process into the parole release decision is not a panacea for the problem of determining who should be paroled. It is not a direct response to those critics who suggest that parole is inherently unfair or unworkable and should be abolished.[97] The procedures required by due process, however, will, at the least, provide a considerably more accurate picture of the workability of the parole system.[98]

While the United States Supreme Court will not consider the issue until the October, 1976 term, it has given some indications that it will find due process applicable to the parole release decision.[99] The agreement among the lower federal courts with

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Freedom of Information Act. *See also* Philadelphia Newspapers, Inc. v. United States Dep't of Justice, 405 F. Supp. 8 (E.D. Pa. 1975).

95. Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974). *See* note 39 *supra*.

96. The primary judicial criticism has been that the regulations fail to take into account different sentencing statutes creating different minimum sentences. *See* Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974) (involving a sentence under 18 U.S.C. § 4208(a)(2) which authorizes immediate eligibility for parole); Kortness v. United States, 514 F.2d 167 (8th Cir. 1975) (same); Fletcher v. Levi, 18 CRIM. L. RPTR. 2441-42 (D.D.C. 1976) (application of regulations to an individual sentenced under the federal Youth Corrections Act held invalid because of lack of consideration for rehabilitation).

97. *See* D. FOGEL, WE ARE THE LIVING PROOF (1975); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); L. ORLAND, PRISONS: HOUSES OF DARKNESS (1975); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); A. VON HIRSCH, DOING JUSTICE (1976).

98. R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS (1969), is one of the more complete analyses of parole board operations. However, Dawson's descriptive non-statistical approach misses many operational nuances. Studies, such as Frank Austin's master's thesis, *see* note 44 *supra*, which combine description with supporting statistical data, are not generally available. It is suggested that this paucity of data is attributable to an unwillingness of parole boards to open their files to researchers who might be critical of their procedures. This unwillingness is demonstrated by the fact that Austin was not permitted to utilize the name of the board he was observing, although he was an employee of the Illinois Department of Corrections at the time that his thesis was written.

99. One of the factors which entered into the Court's decision in Wolff

respect to the applicability of due process to the parole release decision, coupled with almost equal agreement on its constituent elements, would seem to support such an assessment.[100]

Procedural due process is presently being applied to the parole release decision by the courts. Although the results of this application cannot be predicted with certainty, it seems inevitable that one product will be a better understanding of parole authority operations. Due process will not solve all the deficiencies of the parole system, but it will bring them into focus so that they can be dealt with more easily. If the injection of due process into the parole granting process does nothing more, it will have admirably served its purpose.

v. McDonnell, 418 U.S. 539 (1974), was disciplinary action which had the effect of lengthening the period of incarceration. The Court held that this constituted a "grievous loss." It certainly would seem that the liberty interest inherently affected in the denial of parole is as great. Presently the Supreme Court has before it Scott v. Kentucky Bd. of Parole, *cert. granted*, 44 U.S.L.W. 3358 (U.S. Dec. 15, 1975) (No. 74-6438), *mootness suggested*, 44 U.S.L.W. 3416 (U.S. Jan. 20, 1976).

100. *See* notes 73 and 83 *supra*.

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