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Procedural Due Process in Parole Release Proceedings--Existing Rules, Recent Court Decisions, and Experience in the Prison

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Note: Procedural Due Process in Parole Release Proceedings—Existing Rules, Recent Court Decisions, and Experience in the Prison

Although courts traditionally have adopted a "hands off" approach to legal proceedings involving prisoners,¹ the Supreme Court in the last decade has required prison officials to observe procedural due process in all significant areas of the correctional process except parole release decisionmaking.² The Court has not addressed a claim for due process by a potential parolee. Such a claim would merit particularly close scrutiny, for a prisoner's interest in parole release may be as strong as or stronger than any other prisoner interest that has been accorded procedural protection.

This Note will explore the issues that have been raised in recent circuit courts of appeals decisions regarding the role of procedural due process in parole release proceedings. Consideration will initially focus on whether procedural due process is required in this context. It will be shown that the interests of a potential parolee are significant and are constitutionally protected. The Note then will assess each procedural safeguard that might be extended to inmates seeking parole by determining whether it is supported by case law³ and whether, in view of

1. The courts have generally refused to interfere with the discretion of prison officials but nevertheless have recognized that people in prison do retain certain fundamental rights. See Comment, *Due Process at In-Prison Disciplinary Proceedings*, 50 *CHI.-KENT L. REV.* 498, 499 (1973). For an example of judicial intervention to protect a fundamental right, see *Cruz v. Beto*, 405 U.S. 319 (1972) (freedom of religion).

2. Comment, *Procedural Protection at Parole Release Hearings: The Need for Reform*, 1974 *DUKE L.J.* 1119. The decision-making process usually is triggered when an inmate whose eligibility for parole is determined by his sentencing judge applies for parole after serving a minimum term. See, e.g., Rules of the United States Board of Parole, 28 C.F.R. §§ 2.2-2.11 (1975).

3. This Note will not analyze legislative establishment of procedural due process in parole release decisions. Two circuit courts have held that section 6(d) of the Administrative Procedure Act (APA), 5 U.S.C. § 555(e) (1970), compels the United States Board of Parole to furnish federal prisoners with a statement of reasons upon denial of parole. *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337 (7th Cir. 1974). The Board's rules incorporate this requirement. 28 C.F.R. § 2.13 (1975).

The courts should not rely on the APA, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344 (1970), as an excuse for failing to recognize the due proc-

the pertinent prisoner and government interests, it otherwise merits constitutional status. Since the United States Board of Parole has recently promulgated new rules to govern federal parole proceedings, the Note will also outline the salient features of those rules and comment on the extent to which they are desirable and are in conformity with the Constitution.⁴

I. THE NECESSITY OF REQUIRING DUE PROCESS IN PAROLE RELEASE PROCEEDINGS

A. PRESENT AVAILABILITY OF PROCEDURAL SAFEGUARDS TO PRISONERS

The Supreme Court requires the government to observe procedural due process only in connection with action that may deprive an individual of a fourteenth or fifth amendment interest in liberty or property.⁵ The words "liberty" and "property,"

ess rights of prisoners, however, for the solution it offers is incomplete. For example, the "brief statement" of reasons required under APA standards may necessitate only a sentence or two of individualized explanation, see *King v. United States*, 492 F.2d 1337, 1340 (7th Cir. 1974) (dictum), and thus may be insufficient in the context of a parole release proceeding. See notes 154-59, 166-67 *infra* and accompanying text. Furthermore, the APA does not guarantee all procedural safeguards, particularly those that have little relationship to the ability of a court to review an agency decision. Cf. *Dorado v. Kerr*, 454 F.2d 892 (9th Cir.), *cert. denied*, 409 U.S. 934 (1972). Thus, the judiciary must intervene to ensure the development of adequate procedural safeguards for prisoners.

4. The availability of specific procedures in federal prisons will be highlighted because the impact of United States Board of Parole practices has been documented much more thoroughly than has the impact of similar state practices. In addition, the procedural rules promulgated by the Board are generally more progressive than state parole board rules. Data regarding the efficacy of certain federal procedures support making those procedures available on the state level as well.

5. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Analysis of due process rights and the protections afforded an individual under the fifth amendment parallels the ratiocination of fourteenth amendment procedural due process claims. See, e.g., *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1277-84 (D.C. Cir. 1974).

The Supreme Court has frequently stated that the threatened deprivation must constitute a "grievous loss." E.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). This language is hazy at best, however, and the courts generally have assumed that denial of parole inflicts a grievous loss on the prisoner. In *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1278 (D.C. Cir. 1974), for example, the court resolved the "grievous loss" issue in one paragraph of discussion. Recognition of parole denial as a "grievous loss" is appropriate because prisoners justifiably perceive the release decision as one of overwhelming importance. See notes 58-62 *infra* and accompanying text.

according to the Court, are "broad and majestic terms" that must be flexibly defined.⁶ It consequently has rejected the theory that procedural due process applies only when a petitioner has claimed a right as opposed to a privilege.⁷

In light of the breadth of protection embodied in these amendments, the Court has established that "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."⁸ Procedural claims have therefore been upheld in several decision-making contexts, some of which resemble parole release proceedings. The results reached by the Court with respect to each of these situations provide a background against which the argument of a potential parolee can be considered.⁹

In *Morrissey v. Brewer*¹⁰ the Supreme Court observed that

6. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). For example, the term "liberty" denotes not only freedom from bodily restraint but also the right of the individual to engage in any of the common occupations of life, to acquire useful knowledge, to marry, and to establish a home and raise children. *Id.* at 572.

7. "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the application of procedural due process rights." *Id.* at 571.

8. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

9. Since procedural due process is required in a hearing where probation may be revoked and a deferred sentence imposed, *Mempa v. Rhay*, 389 U.S. 128 (1967), the similarity between parole release and deferred sentencing merits some attention. Parole release has been analogized to deferred sentencing because the parole board considers the same factors as the sentencing judge, and its determination has the same effect as the judge's decision. *Menechino v. Oswald*, 430 F.2d 403, 414 (2d Cir. 1970) (Feinberg, J., dissenting), *cert. denied*, 400 U.S. 1023 (1971); *Hearings on H.R. 13118 Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 15, pt. 7, at 194 (1972) (testimony of Professor Robert Dawson, University of Texas Law School) [hereinafter cited as *Hearings on H.R. 13118*]. The majority in *Menechino* rejected this analogy, however, and concluded that the need for counsel, at least, is much more urgent in the deferred sentencing context, since there the right to appeal and the right to revoke a guilty plea are available. 430 F.2d at 409. The attitude of the Supreme Court is revealed in *Warden v. Marrero*, 417 U.S. 653 (1974), where the Court distinguished the parole release decision from that of the sentencing judge who effectively determines when an inmate will first become eligible for parole:

[T]he District Judge, at the time of sentencing, [finally] determines [whether and] when the offender will become eligible for consideration for parole and the Board's action simply implements that determination. . . . [T]he parole decision . . . is made long after the "prosecution" terminates
Id. at 659 (emphasis in original). See *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) ("[p]arole arises after the end of the criminal prosecution, including imposition of sentence").

10. 408 U.S. 471, 477 (1972).

parole, an "integral part of the penological system," is something much more than an "*ad hoc* exercise of clemency," and held that due process applies to parole *revocation* proceedings. The Court articulated a fairly comprehensive list of procedures that must be observed both at the preliminary hearing (held to determine whether there is probable cause to suspect that parole conditions have been violated) and at the actual parole revocation hearing.¹¹ The spectrum of rights applicable to parole revocation proceedings applies to probation revocation proceedings as well.¹² The prisoner subject to disciplinary proceedings, however, can claim the benefit of fewer due process protections than the parolee or probationer. In *Wolff v. McDonnell*¹³ the Supreme Court held that only two procedural rights must be unconditionally recognized by prison officials seeking to revoke an inmate's good-time credit:¹⁴ the right to advance notice of charges and the right to a written statement of reasons for the action taken. Other procedural protections were either limited¹⁵ or not guaranteed at all.¹⁶ Thus, the Court has accorded recognition to claims to some degree of process in several corrections instances, but the number of safeguards that it has required has varied with the nature of each proceeding.

B. EXTENSION OF PROCEDURAL SAFEGUARDS TO POTENTIAL PAROLEES

1. *Deprivation of Liberty*

Liberty is so important an interest that its enjoyment need not be absolute to warrant due process protection. A prisoner

11. The parolee is entitled to (a) written notice of the claimed violations of parole, (b) disclosure of the evidence against him, (c) an opportunity to be heard in person and to present witnesses and documentary evidence, (d) an opportunity to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), (e) a neutral and detached hearing body, and (f) a written statement by the factfinder as to the evidence relied on and the reasons for revoking parole. *Id.* at 489.

12. *Gagnon v. Scarpelli*, 411 U.S. 773 (1973).

13. 418 U.S. 539, 563-65 (1974).

14. "Good time" is the sentence reduction granted to inmates who have been on good behavior during a portion of their prison term.

15. The prisoner's opportunity to call witnesses, to present documentary evidence, and to receive written findings regarding the evidence relied on to justify disciplinary action may be denied by prison officials if they believe that such procedures would threaten personal or institutional safety. *Id.* at 565-69.

16. The Court refused to extend to prisoners an opportunity to confront and cross-examine adverse witnesses, and to have counsel present during disciplinary proceedings. *Id.* at 567-70.

on parole is subject to supervision, yet revocation of his limited freedom must satisfy procedural due process because a parolee enjoys "many of the core values of unqualified liberty."¹⁷

Several courts have held that an inmate seeking parole, unlike a parolee, presently enjoys no freedom and therefore is not entitled to the protection of the fourteenth or fifth amendments.¹⁸ Before *Morrissey*, the Court of Appeals for the Second Circuit advanced this argument as an alternative ground for denying procedural due process to the prisoner seeking parole in *Menechino v. Oswald*.¹⁹ And in *United States ex rel. Bey v. Connecticut State Board of Parole*²⁰ the same court observed that "[i]t 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." Quoting this language in *Morrissey*,²¹ the Supreme Court may have been impressed by the "present enjoyment" rationale; although *Morrissey* concerned parole revocation, the opinion might be read as minimizing the liberty interest of a potential parolee.²² The Second Circuit, at least, in *United States ex rel. Johnson v. Chairman of New York State Board of Parole*²³ subsequently disavowed any such interpretation of its statement in *Bey*:

We recognize that in *Morrissey* the Supreme Court referred in a footnote to our language in *United States ex rel. Bey v. Connecticut* But this hardly indicates that due process is to be applied to parole revocation merely because the conditional freedom was presently being enjoyed The Court was

17. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). The parolee may have been on parole for a number of years and may have formed potentially long-lasting employment and social relationships. *Id.*

18. This argument stems from the statement in *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972), that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." The argument was embraced for the purpose of distinguishing parole release and parole revocation in *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 282 (5th Cir.) (en banc), *vacated and remanded for consideration of mootness*, 414 U.S. 809 (1973); and *United States ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971).

19. 430 F.2d 403, 408 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

20. 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971).

21. 408 U.S. at 482 n.8.

22. *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 936 (2d Cir.) (dissenting opinion), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974).

23. *Id.* at 927-28 n.2 (majority opinion).

simply reinforcing its point that conditional liberty permits much greater freedom . . . than does confinement in prison.

Basing its decision on a broad reading of *Morrissey*, the court went on to reject the "present enjoyment" concept²⁴ it had advanced in *Menechino* as a variation of the thoroughly discredited right-privilege dichotomy, and held that procedural due process was required in parole release hearings.

That the Supreme Court in *Wolff v. McDonnell* did not consider "present enjoyment" before extending procedural safeguards to prison disciplinary proceedings may further undermine the relevance of the concept in due process inquiries. Had a "present enjoyment" test been applied, the prisoner would likely have been denied procedural protection, since deprivation of good time affects the length of confinement²⁵ but not the present enjoyment of liberty. Rather, the Court observed that, barring serious misconduct, each prisoner was statutorily entitled to good-time credit²⁶ and held that procedural due process was required because of this entitlement alone.

Since the Constitution guarantees due process upon the deprivation of a protected interest,²⁷ and since it is easier to perceive the deprivation of an interest that is presently enjoyed, the "present enjoyment" concept might understandably be thought to have constitutional significance. Nevertheless, in other contexts the Supreme Court has refused to embrace the concept as a prerequisite to establishing the necessary deprivation.²⁸ Indeed, the notion of "present enjoyment" is somewhat

24. *Id.* The "present enjoyment" concept has been vigorously attacked in *Bradford v. Weinstein*, 519 F.2d 728, 731-32 (4th Cir. 1974), *vacated as moot*, 96 S. Ct. 347 (1975) (per curiam), and *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1278 (D.C. Cir. 1974), as well.

25. When a prison administrator rescinds a day of good time, the duration of confinement is extended one full day.

26. 418 U.S. at 557.

27. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV; *accord*, *id.* amend. V.

28. See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958) (procedural due process required where appellants had been denied tax exemptions because they had refused to subscribe to loyalty oaths); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (procedural due process required before state may exercise its discretion to deny an applicant the opportunity to qualify for the practice of law); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926) (notice and a hearing required before the Board of Tax Appeals could exercise its discretion to grant or deny application for admission to practice before the Board because CPA was within the class of those entitled to such admission). Notwithstanding the position of the Supreme Court, the "present enjoy-

illusory. As the Court of Appeals for the District of Columbia Circuit postulated in *Childs v. United States Board of Parole*,²⁹ parole revocation is a highly visible deprivation of liberty because it involves "taking away"; parole denial, on the other hand, involves "refus[ing] to grant,"³⁰ but is nonetheless an equally potent deprivation. Thus, denial of parole affects the prisoner in much the same way as revocation of parole, to which due process rights attach. In both situations, a favorable decision by the parole board results in conditional liberty and a negative decision results in incarceration.³¹

The taint created by certain types of government action against an individual also may constitute a deprivation of liberty. An employee can demand procedural protection when the state damages his standing in the community by declining to reemploy him, for "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury"³² The threat of stigmatization is more important to a potential parolee than to a government employee, since an initial negative parole board decision may adversely affect subsequent release determinations and thus perpetuate his literal imprisonment.³³

ment" rationale, in the context of parole release proceedings, was adopted in two circuit courts of appeals decisions. *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 282 (5th Cir.) (en banc), *vacated and remanded for consideration of mootness*, 414 U.S. 809 (1973); *Menechino v. Oswald*, 430 F.2d 403, 408-09 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

29. 511 F.2d 1270 (D.C. Cir. 1974).

30. *Id.* at 1277-78. Similarly, a child is generally considered deprived or underprivileged if he lacks educational opportunities. The child need not have been initially exposed to those opportunities.

31. *Id.*

32. *Board of Regents v. Roth*, 408 U.S. 564, 574 (1972). It appears that the stigma must have at least a substantial adverse effect; although what exactly the Court meant by "substantial" is unclear, in *Roth* it required something more than making the applicant "somewhat less attractive to some other employers." *Id.* at 574 n.13.

33. *Bradford v. Weinstein*, 519 F.2d 728, 732 (1974), *vacated as moot*, 96 S. Ct. 347 (1975) (per curiam). In some cases, a negative decision means that the inmate must wait three years before he is reconsidered for parole. See Rules of the United States Board of Parole, 28 C.F.R. § 2.14(c) (1975).

The impact of parole denial on subsequent hearings merits consideration even though a prisoner may not be stigmatized in the eyes of all parole board members. Cf. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). In *Constantineau* a statute provided for "posting" the name of any person who "by excessive drinking" exposed himself or his family "to want" or became "dangerous to the peace." The Supreme Court held that to label an individual by "posting" his name so stigmatizes him in the eyes of some members of the community that he must be given notice and an opportunity to be heard prior to the "posting."

In any event, the deprivation of liberty that results from denial of parole must be analyzed in light of the Supreme Court's statement that "there can be no doubt that the meaning of 'liberty' must be broad indeed."³⁴ Not only does it follow that a prisoner retains a residuum of constitutional rights even though he has been placed behind bars;³⁵ the Court's statement also suggests that if the government seeks to deny a prisoner any aspect of this remaining liberty, it must accord him the protection of procedural due process.

2. *Deprivation of Property*

A prisoner's interest in parole release might also be characterized as property, in view of the breadth the Supreme Court has ascribed to that term. It is evident that property for purposes of due process analysis is not limited to conventional interests such as those in real estate, chattels, or money.³⁶ "[Property interests] 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."³⁷ Thus, the existence of a property interest is determined by examining the basis for a particular claim, rather than the nature of the particular benefit sought.³⁸

Some courts have suggested that procedural due process is inapposite in parole release proceedings because no statute guarantees parole and therefore the prisoner cannot advance a claim

34. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

35. "The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts." *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). See also *In re Gault*, 387 U.S. 1 (1967) (a child, even though traditionally considered to be in the custody of the state as *parens patriae*, may claim certain procedural protections in a hearing to adjudicate his delinquency).

"Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial." *Wolff v. McDonnell*, 418 U.S. 539, 594 (1974) (Douglas, J., concurring and dissenting).

36. *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

37. *Id.* at 577. The "entitlement" concept has been justifiably attacked as discrimination between persons claiming "rights" and those claiming "privileges." See Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89, 98-99.

38. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972).

of entitlement.³⁹ By narrowly construing the nature of entitlement, these courts have ignored the breadth of the property concept articulated by the Supreme Court. A claim of entitlement, to be cognizable for due process purposes, can rest on less than a statutory guarantee of a particular *result*.⁴⁰ Thus, a cognizable claim of entitlement is embodied in the parole process in the form of both a statutory right to *consideration* for parole and an expectation of, or a conditional entitlement to, release.

Consideration for parole is guaranteed by statute in virtually all jurisdictions.⁴¹ Since these statutes "support claims of entitlement" to consideration for parole release, it ineluctably follows from the Court's analysis that they create a protected property interest. An inmate within the statutorily defined class of those eligible to be considered for parole is therefore entitled to procedural due process.⁴²

The Court of Appeals for the Second Circuit has based an alternative theory in support of an inmate's property interest in parole on the concept of "conditional entitlement." In *United States ex rel. Johnson v. Chairman of New York State Board of Parole*⁴³ that court suggested that a prisoner's expectation of parole is so strong and realistic⁴⁴ that it should be accorded

39. *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 282 (5th Cir.) (en banc), *vacated and remanded for consideration of mootness*, 414 U.S. 809 (1973) (a prisoner has only a *possibility* of conditional freedom); *Menechino v. Oswald*, 430 F.2d 403, 408-09 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (a prisoner "is entitled only to be released after full service of his sentence").

40. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); cases cited in note 31 *supra*. In *Goldberg* the Supreme Court based a property right on a claim of entitlement to welfare benefits, the eligibility for which had been defined by statute. The recipients had not actually shown that they were within the statutory terms of eligibility, but the Court held that they had a right to a hearing at which they might attempt to do so. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing *Goldberg*). Thus, it is clear that entitlement encompasses a claim to benefits and that proof of an absolute right to those benefits is unnecessary. Any other interpretation of "entitlement" would appear to be inconsistent with the rejection of the right-privilege dichotomy, because privileges and "less than absolute entitlements" are strikingly similar constructs.

41. See 18 U.S.C. §§ 4202, 4203(a) (1970). All the states have some form of parole statutes for the discretionary release of prisoners, although a few prisoners are never eligible for release because of the egregious nature of their crimes. Newman, *Court Intervention in the Parole Process*, 36 ALBANY L. REV. 257 (1972).

42. See *Bradford v. Weinstein*, 519 F.2d 728, 731-32 (4th Cir. 1974), *vacated as moot*, 96 S. Ct. 347 (1975) (per curiam).

43. 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974).

44. "Fifty-four percent of all prisoners released from prison in 1970

protection. Critics of this "expectancy" analysis have countered that because the parole decision is discretionary and the outcome is therefore not guaranteed, a prisoner's expectation must fall short of entitlement to release.⁴⁵ The Supreme Court has recognized in other contexts, however, that an expectation may arise from an implied, as well as an express, agreement and has protected that expectation so long as the implication of the agreement is sufficiently objective to be understood by the parties involved.⁴⁶ In this respect, a prisoner's interest in parole is more than a subjective expectancy, for most inmates are eventually paroled.⁴⁷ Indeed, the vast majority of initial parole applica-

. . . left as parolees. In New York the figure is even higher. In 1972, . . . the New York State Parole Board released . . . 75.4% of the [inmates in] cases coming before it." *Id.* at 928.

45. See, e.g., *Menechino v. Oswald*, 430 F.2d 403, 408 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

46. "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." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See *Goss v. Lopez*, 419 U.S. 565 (1975) (Ohio statute directing local authorities to provide school-age children with a free education fostered an expectancy that a school principal could suspend pupils only "for cause" and hence created property and liberty interests in remaining in school even though the statute did not include a "for cause" requirement); *Perry v. Sindermann*, 408 U.S. 593 (1972) (faculty guide stating that the administration of a college wanted a teacher to feel that he had tenure so long as his teaching services were satisfactory constituted an understanding similar to an implied contract that dismissal would not follow cooperative and satisfactory performance on the part of the teacher and therefore created a property interest in employment notwithstanding his lack of formal tenure).

An implied agreement is exemplified in the parole revocation context: "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole." *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972). Although the implicit promise in *Morrissey* went to the creation of protected "conditional liberty," a property interest arguably was imbedded in the parolee's claim. Because property rights are a function of certainty of possession rather than the nature of what is possessed, a person may have a property interest in liberty.

47. In 1970, state boards paroled anywhere from two to 97 percent of the prisoners who petitioned for release. The average rate of release among the states was 57 percent. *Hearings on H.R. 13118*, *supra* note 9, at 222 (testimony of Don Gottfredson, Program Director, National Council on Crime and Delinquency Research Center). It must be emphasized that these are annual figures. Ninety-seven percent of all prisoners eventually return to society and for every 10 that leave prison, nine do so by virtue of a parole board decision. *Id.* at 85 (testimony of Professor Leonard Orland, University of Connecticut Law School). Moreover, parole as a method of release from prison has increased steadily over the last several years. *Id.* at 222 (testimony of Don Gottfredson, Program Director, National Council on Crime and Delinquency Research Center).

tions are granted.⁴⁸ Parole board discretion has become increasingly limited by the use in board deliberations of objective criteria and statistical aids,⁴⁹ which allow the prisoner to more accurately determine the likelihood of his release. As the Supreme Court noted in *Morrissey*, "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system."⁵⁰

The concrete expectation creating a "conditional entitlement" to parole may be analogized to the protected "conditional liberty" of the parolee who has been released. The parolee's liberty is premised on his accepting and abiding by the restrictions of parole.⁵¹ The prisoner's legitimate anticipation of release stems not only from statistical probability,⁵² but also from the policy that parole will be granted unless it is shown that such action would jeopardize the community or retard rehabilitation of the inmate.⁵³ Because the parole release decision is sufficiently objective to create an expectation of, or conditional entitlement to, release, the potential parolee's interest merits due process protection.

In the wake of the Supreme Court's decision in *Morrissey* to grant procedural rights in parole revocation proceedings, six circuit courts of appeals have discussed the relationship of due process and parole release. Five of them have so interpreted the

48. *Menechino v. Oswald*, 430 F.2d 403, 416 n.16 (2d Cir. 1970) (dissenting opinion), *cert. denied*, 400 U.S. 1023 (1971).

49. To "promote a more consistent exercise of discretion," the United States Board of Parole uses statistical parole experience tables to help determine whether a prisoner is ready to reenter society. 28 C.F.R. § 2.20 (1975). Such statistical determinations now control almost all initial parole release decisions. *Project—Parole Release Decision-making and the Sentencing Process*, 84 YALE L.J. 810, 825 (1975) [hereinafter cited as *Parole Release Decisionmaking*].

50. 408 U.S. at 477 (emphasis added). Antonin Scalia, Chairman of the Administrative Conference of the United States, has indicated:

Parole cannot be viewed as simply a windfall, because in fact the entire penal system is premised on its availability. Congress prescribes maximum sentences and judges sentence individual defendants with the knowledge that parole is available Grants of parole are not a series of random acts, but a major and regular part of the administration of our system of criminal justice.

Hearings on H.R. 1598 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 25, at 163-64 (1973) [hereinafter cited as *Hearings on the Parole Reorganization Act*].

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

52. See notes 47-48 *supra* and accompanying text.

53. See, e.g., 28 C.F.R. §§ 2.13(b), 2.18 (1975).

constitutional concepts of liberty and property⁵⁴ to require due process protection in release proceedings.⁵⁵ These courts have rejected the "present enjoyment" concept and have affirmed the strength of the prisoner's liberty interest in parole release. They additionally have found property interests embodied in the inmate's statutory right to consideration for parole and his objective expectation of release. In sum, these courts have properly concluded that because denial of parole constitutes a significant deprivation of liberty and property, parole release proceedings must meet the standards of due process.

II. THE PROCESS THAT IS DUE IN PAROLE RELEASE HEARINGS

Concluding that *some* process is required in parole release

54. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

55. The courts of appeals in *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 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), and *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), invoked the due process clause to require parole boards to provide a prisoner with a statement of the reasons for the denial of parole. The Court of Appeals for the Fourth Circuit recognized the potential parolee's right to due process but did not determine the scope of that right. *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 96 S. Ct. 347 (1975) (per curiam). In *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1975), the Tenth Circuit applied section 555(e) of the APA to require a brief statement of the grounds on which parole had been denied. While the court did not reach the constitutional issues, it nevertheless suggested that a strong argument could be made that some degree of due process should be accorded the potential parolee. *Id.* at 397.

The protected status of a prisoner requesting parole technically remains in doubt, however, for several earlier circuit court opinions unfavorable to his status have not been explicitly overruled. *E.g.*, *Madden v. New Jersey State Parole Bd.*, 438 F.2d 1189 (3d Cir. 1971). *See also Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.) (en banc), *vacated and remanded for considerations of mootness*, 414 U.S. 809 (1973); *Dorado v. Kerr*, 454 F.2d 892 (9th Cir.), *cert. denied*, 409 U.S. 934 (1972). *But cf. Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974), *cert. granted sub nom. Enomoto v. Clutchette*, 420 U.S. 1010 (1975). While the Court of Appeals for the Second Circuit in *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), had denied procedural due process to a prisoner seeking parole, it subsequently decided that because the Supreme Court's rejection of the right-privilege dichotomy cast grave doubt on the validity of *Menechino*, an inmate denied parole must be provided a written statement of the reasons for the parole board's decision. *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 927-28 & n.2 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974). *Menechino* was not overruled but was limited to the principle that when an inmate is considered for parole he is not entitled to a full array of due process rights.

proceedings makes it necessary to determine the number and type of procedural safeguards that must be made available to the potential parolee. The courts have used a balancing technique to resolve the extent to which procedural due process must be observed in a particular context:

[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.⁵⁶

Because the correctional system seeks to accomplish both custody-security and treatment-rehabilitation, objectives that sometimes diverge,⁵⁷ a balancing technique seems to be an appropriate method of determining the rights of prisoners.

The strength and nature of the prisoner's interest in parole as well as the several significant government interests suggest that a wide range of procedural protections is appropriate in parole release proceedings. With respect to the prisoner, it is obvious that his interest in parole is intense; no concern occupies more of his time.⁵⁸ The Supreme Court described this interest as a matter "of obvious great moment" in *Wolff*⁵⁹ and reiterated its importance in *Morrissey*,⁶⁰ holding that revocation proceedings must incorporate a substantial measure of process. Since denial of parole might delay release for so long as three years,⁶¹ an effect parallel in significance to reincarceration, *Morrissey* can be relied on as analogous support for a wide range of procedures in the release context as well.⁶²

56. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

57. *Hearings on H.R. 13118*, *supra* note 9, at 81 (testimony of Professor Leonard Orland, University of Connecticut Law School).

58. "In the fall and winter of 1971-72, the subcommittee visited jails and prisons in five States and the District of Columbia, talking to hundreds of prisoners and corresponding with hundreds of others. One issue, one concern, has loomed above all others and that is parole." *Hearings on the Parole Reorganization Act*, *supra* note 50, at 125 (comments of Representative Robert Kastenmeier). "[P]arole has far more importance than the other aspects of an institutional operation—the food, the clothing, the medical care." *Id.* at 210 (testimony of Norman Carlson, Director, Federal Bureau of Prisons). "[P]arole is the overwhelming consideration for every prisoner." *Id.* at 359 (testimony of James Bennett, former Director, United States Bureau of Prisons).

59. 418 U.S. at 560.

60. *See* 408 U.S. at 482.

61. *See* Rules of the United States Board of Parole, 28 C.F.R. § 2.14 (c) (1975).

62. The immediate impact of a negative parole decision distinguishes that determination from the disciplinary revocation of good-time

The government, too, will advance its own significant interests if procedural safeguards are incorporated in the parole release process. It might not be immediately evident that interests in rehabilitating criminals⁶³ and maintaining order within prisons⁶⁴ would be advanced by such safeguards; but, because persons who perceive that correctional authorities have treated them unfairly are likely to resist rehabilitation or become disruptive,⁶⁵ even the appearance of fairness should produce a desirable stabilizing effect. Moreover, the possibility of rehabilitation deteriorates as the government incarcerates the prisoner year after year.⁶⁶ Such considerations led the Supreme Court to conclude that substantial procedural protection in parole revocation proceedings will "enhance the chance of rehabilitation by avoiding reactions to arbitrariness."⁶⁷

The government might nevertheless assert several other interests in seeking to deny a wide range of procedural protections to the potential parolee. Valid concerns for the prevention of disruption and the manageability of the parole process arguably require release proceedings to be unencumbered by procedural niceties more appropriate in other contexts. Thus, the Supreme Court found that important government interests in "law and order" and in "manageability" might be frustrated if a wide range of procedural requirements were imposed on prison disciplinary proceedings.⁶⁸ And it reached this conclusion notwith-

credit as characterized by the majority in *Wolff v. McDonnell*. Since good-time credit can be restored by prison officials, the Court reasoned, its revocation might not affect the actual date of parole or extend the maximum term to be served. The Court concluded that because restoration of credit was possible, the prisoner's interest in its immediate retention lessened in significance. 418 U.S. at 560-61. By contrast, although parole release might be granted after it is once denied, the short-term consequences of a denial are immediate and irreversible. Indeed, a prisoner may wait so long as three years for a second hearing. See note 33 *supra*.

The Court has implicitly recognized the importance of a parole release decision by acknowledging the significance of a sentencing judge's parole eligibility decision as the first step leading to parole release. See *Warden v. Marrero*, 417 U.S. 653, 659, 662-63 (1974).

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

64. *Wolff v. McDonnell*, 418 U.S. 539, 562-63 (1974).

65. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967) [hereinafter cited as TASK FORCE REPORT].

66. See *Hearings on H.R. 13118*, *supra* note 9, at 609 (comments of Representative Abner Mikva).

67. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (citing TASK FORCE REPORT, *supra* note 65, at 83, 88).

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

standing its observations that such proceedings are conducted against a background of "frustration, resentment and despair"⁶⁹ and that, in such a milieu, "[w]ith some, rehabilitation may be best achieved by simulating procedures of a free society."⁷⁰

But prevention of disruption, while obviously desirable, is a broad construct that can interfere with a reasoned analysis of a particular problem. Thus, it is inaccurate to analogize parole release proceedings to disciplinary proceedings, for it is questionable whether similar government interests would be frustrated if parole release incorporated substantial procedural safeguards.

Unlike disciplinary proceedings, which in the Court's view often require "swift and sure" punishment to prevent disruption,⁷¹ parole release proceedings serve a number of interests of which the prevention of disruption is but one. In fact, sensitive institutional issues rarely receive much attention at hearings conducted under the federal Parole Board Guidelines.⁷² Certainly, a prisoner who is denied parole might become frustrated and even disruptive, but this is hardly a reason for denying him a significant number of procedural safeguards. If anything, it suggests that the appearance of fairness embodied in such procedures becomes all the more important.

With respect to manageability, it seems indisputable that additional procedural safeguards would lengthen parole release proceedings and render them more costly, although the extent to which time and expense would increase is problematical.⁷³ It

69. *Id.* at 562.

70. *Id.* at 563.

71. This recommendation of "swift and sure" punishment is questionable even in the disciplinary context. The majority supports its belief by referring to A. BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* (1969); L. KRASNER & L. ULLMANN, *RESEARCH IN BEHAVIOR MODIFICATION* (1965); and B. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* (1953). *Wolff v. McDonnell*, 418 U.S. 539, 563 n.14 (1974). The evidence on which the dissenters relies is more persuasive, for it reflects the experience of corrections officials who have incorporated due process safeguards in disciplinary hearings and who have observed no significant effect on prison safety or security. Instead, the quality of hearings was upgraded and inmate feelings of powerlessness and frustration were relieved. *Id.* at 588-89 (Marshall, J., dissenting) (citing ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, *SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES* 21-22 (1974); TASK FORCE REPORT, *supra* note 65, at 13, 82-83).

72. *Parole Release Decisionmaking*, *supra* note 47, at 853.

73. Parole Board hearings last 10 to 15 minutes on the average. *Hearings on H.R. 13118*, *supra* note 9 at 579. The Second Circuit has asserted that the expansion of procedural guarantees would prolong release deliberations and require appropriations for additional manpower.

is difficult to see, however, how these burdens could outweigh the prisoner's interest in a particular procedure. Time, of course, is inextricably bound up with expense. And the state's financial interest has generally been discounted where due process is at stake.⁷⁴ Discounting this interest seems especially appropriate here, because parole has been the most poorly financed aspect of the corrections system.⁷⁵ Moreover, if safeguards did result in speedier release, the change might pay for itself.⁷⁶

As a general proposition, then, maximization of procedural protections in parole release proceedings should follow from the contrast between prisoner interests of substantial strength and government interests of questionable applicability. The Supreme Court in *Morrissey v. Brewer* relied on a broad perspective of private and government interests as a basis for determining what procedural safeguards were required before parole revocation. Similarly, the preceding overview will be employed to ascertain the desirability of specific procedures⁷⁷ and thus to evaluate the federal regulations governing parole release proceedings.

Menechino v. Oswald, 430 F.2d 403, 409-10 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

74. "The least weighty of these interests in the procedural due process scale is thrift." *Clutchette v. Proconier*, 497 F.2d 809, 816 (9th Cir. 1974), *cert. granted sub nom. Enomoto v. Clutchette*, 420 U.S. 1010 (1975). See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (drain on fiscal resources alone could not overcome an individual's interest in a hearing prior to termination of welfare benefits). But cf. *Ortwein v. Schwab*, 410 U.S. 656 (1973). In *Ortwein* the Court upheld a \$25 appellant's filing fee, perhaps thereby precluding welfare claimants from obtaining judicial review of administrative findings. The state's interest in conserving its financial resources was the only justification advanced for imposition of the fee—other than the supposition that such fees deter frivolous claims.

75. See F. Cönen, *The Legal Challenge to Corrections* (consultant's paper for the Joint Commission on Correctional Manpower and Training), reprinted in part in *Hearings on H.R. 13118*, *supra* note 9, at 1030, 1034 (only 3.5 percent of all correctional appropriations are spent on the adult parole system).

76. Maintaining a parolee is roughly 17 percent as expensive as maintaining a prisoner. See TASK FORCE REPORT, *supra* note 65, at 194.

77. Six of the seven due process elements required in parole revocation proceedings will be examined. Application of other procedural protections to parole release proceedings may well be warranted, but primary consideration should be accorded those "minimum requisites of due process" outlined in *Morrissey* and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation). Because parole release decisions are always made by a parole board or its representative examiners, Newman, *supra* note 41, at 261, discussion of the right to a neutral hearing body will be omitted.

A. OPPORTUNITY TO BE HEARD AND TO PRESENT WITNESSES
AND DOCUMENTARY EVIDENCE

The rules of the United States Board of Parole ensure a hearing to federal prisoners eligible for parole.⁷⁸ At this proceeding, hearing examiners must discuss with the inmate his institutional conduct and a statistical evaluation of his readiness for release.⁷⁹ The potential parolee is unable to present witnesses on his behalf,⁸⁰ but may include documentary evidence in his application for parole.⁸¹ Although excluded from the hearing itself, "attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Board of Parole" may secure such an interview on written request.⁸²

Since these rules guarantee the inmate an opportunity to be heard, they appear to satisfy the "fundamental requisite of due process."⁸³ Moreover, since they allow the prisoner to express himself orally, they appear to satisfy the more precise requirement, articulated by the Supreme Court in *Goldberg v. Kelly*, that such an opportunity be "tailored to the capacities and circumstances of those who are to be heard."⁸⁴ In that case, the Court held that welfare recipients were entitled not only to be heard but also to present evidence orally before their benefits

78. See 28 C.F.R. §§ 2.13, 2.14 (1975). In 1973, all but three states provided a hearing to prisoners seeking parole. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 400 (1973). In four states, parole boards screened the files of eligible prisoners and heard only those cases that merited further consideration. *Id.*

79. 28 C.F.R. § 2.13(a) (1975). The statistical evaluation is derived from guidelines quantifying the severity of the offense and the potential risk of a parole violation. See *id.* § 2.20. See also note 49 *supra*.

80. In 17 states, witnesses for the prisoner may appear at the parole hearing. O'Leary & Nuffield, *A National Survey of Parole Decision-making*, 19 CRIME & DELIN. 378, 387 (1973).

81. Prisoners must be furnished with an inmate background statement for completion prior to the initial hearing. 40 Fed. Reg. 41,332 (1975) (to be codified as 28 C.F.R. § 2.11(d)). This form permits the prisoner to present his version of facts that the hearing examiners designate as material to the potential risk of parole violation. *Id.* at 41,328 (discussion of rule changes by Maurice Sigler, Chairman, United States Board of Parole).

82. 28 C.F.R. § 2.22 (1975). "The Board encourages the submission of . . . [all available relevant and pertinent] information by interested persons." *Id.* § 2.21. And in almost all states the inmate's counsel, family, and acquaintances may consult with board members before the parole hearing. O'Leary & Nuffield, *supra* note 80, at 387.

83. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

84. *Id.* at 268-69.

were terminated. It reasoned that many recipients had difficulty writing effectively and would be unable in a written presentation to adapt their arguments for eligibility to issues that the decision-maker might regard as important.⁸⁵ Since the recipient's credibility was at stake, the Court observed, an oral presentation assumed even greater importance.⁸⁶

On the other hand, insofar as the federal parole rules deny the prisoner an opportunity to present witnesses at his parole hearing, they may fail to meet constitutional standards. In the parole revocation context of *Morrissey v. Brewer*, the Supreme Court required that a parolee be accorded not only an opportunity to confront his supervising officer and present documentary evidence, but also an opportunity to call witnesses on his behalf.⁸⁷ And in *Wolff v. McDonnell*, a prisoner charged with serious misconduct was given the right to present witnesses as well as documentary evidence before prison officials could impose solitary confinement or deprive him of good-time credit.⁸⁸ In *Wolff*, however, the Court did place limits on the right to call witnesses and to present documentary evidence: If prison officials determine that the exercise of those rights would jeopardize institutional safety or correctional goals, they can exclude a particular witness from the hearing or restrict a prisoner's access to sources of evidence.⁸⁹

Goldberg, *Morrissey*, and *Wolff* suggest that the potential parolee has a constitutional right not only to present his case orally and to offer documentary evidence at a parole release hearing, but also to call his own witnesses at that hearing. An oral presentation is necessary because prisoners, like welfare recipients, may be unable to effectively express themselves in writing.⁹⁰ And the opportunity to call witnesses is especially crucial, since prisoners have a severe credibility problem.⁹¹ Indeed, their evidentiary needs are compelling:

Without [both the power to present documentary material and summon witnesses], how can [the prisoner] corroborate his own

85. *Id.* at 269.

86. *Id.*

87. 408 U.S. at 487, 489.

88. 418 U.S. at 564.

89. *Id.* at 566. The Court considered it useful, but unnecessary, for the disciplinary committee to state its reasons for refusing to call a witness. *Id.*

90. *Hearings on H.R. 13118*, *supra* note 9, at 344 (testimony of Sanford Rosen, Assistant Legal Director, American Civil Liberties Union).

91. *Clutchette v. Procunier*, 497 F.2d 809, 818 (9th Cir. 1974), *cert. granted sub nom. Enomoto v. Clutchette*, 420 U.S. 1010 (1975).

story? Without corroboration, will the Board be likely to believe him if his version of the facts is different from the prison's? Suppose, for example, there is a notation in the file that he attacked another prisoner. If he can merely deny it, will that be likely to impress the Board? [The prisoner requires supporting evidence and testimony.]⁹²

The interviews with interested persons that the federal rules presently sanction are insufficient in this regard for two reasons. First, the interview is conducted by staff personnel and not by hearing examiners.⁹³ Thus, the persons initially considering the parole application do not see or hear the "witness" and are therefore unable to pass on the credibility of the testimony or experience the full impact of a personal presentation. Second, because the potential parolee is not present at the interview, he has no opportunity to ensure that the views of the interested person will be adequately presented to the staff representative. If a prisoner were able to call witnesses at his parole release hearing, not only could the hearing examiners confront the witnesses and benefit from the full impact of their testimony, but the prisoner could be certain that nothing relevant to the release determination had been forgotten or excluded. In view of the urgency of the prisoner's need to present his own witnesses, the government must be able to demonstrate substantial countervailing interests to succeed in denying him this opportunity or in limiting it to personal interviews of interested persons by a representative of the Board of Parole.

As previously suggested, the government can claim interests in preventing disruption, maintaining manageability, and minimizing costs, each or all of which may bear on the desirability of a particular procedural safeguard. With respect to disruption, it is difficult to see how allowing a prisoner to introduce *affirmative* testimony about his readiness for parole would create an unreasonable risk, if any risk at all. Since only those fellow inmates who desired to testify would do so, neither their well-being nor general prison security would be jeopardized. Even in *Wolff*, where a majority of the Court speculated that an unrestricted right to call witnesses would create, in the context of disciplinary hearings, the potential for disruption,⁹⁴ there was a

92. *Hearings on H.R. 13118*, *supra* note 9, at 601 (testimony of Senator Charles Goodell, Chairman, Committee on the Study of Incarceration). Credibility may be pivotal because the Board in making its determination considers subjective factors, such as misconduct, 28 C.F.R. § 2.19(f) (2) (ii) (1975), in addition to objective criteria.

93. 28 C.F.R. § 2.22 (1975).

94. 418 U.S. at 566.

failure to explain or cite any authority for this belief. And in any event, the Court did accord prisoners at least a qualified right to call witnesses, as could be done here. Hence, particular witnesses could be excluded or heard in camera if it is determined that their presence would jeopardize institutional security.

"Manageability," of course, is scarcely susceptible of reasoned analysis in the absence of empirical evidence concerning what might actually occur at hearings that include witnesses presented by the prisoner. Certainly, such additional testimony would consume more time and, as a result, perhaps render parole release hearings less manageable. But it seems more appropriate to ask whether release hearings would become *unmanageable*, before denying the prisoner a crucial safeguard. That is, to prevail, the government should be required to establish by empirical proof that the presence of these witnesses would be so burdensome as to halt the release process or slow it down dramatically.

Whatever the appropriate weight for due process purposes of the government's related interest in fiscal economy, the parole board could prevent abuse of the right to call witnesses by prohibiting cumulative or irrelevant testimony.⁹⁵ And in any event, it is unclear in the first instance that such a right would strain the government's financial resources.⁹⁶ Indeed, since such procedures have rehabilitative potential,⁹⁷ they seem consistent in several respects with the interests of the government.

B. NOTICE OF HEARING AND ACCESS TO THE EVIDENCE TO BE CONSIDERED BY THE BOARD

The federal parole rules require the Parole Board to notify a federal prisoner of the time and place of his release hearing.⁹⁸ These rules, which previously embodied a general policy of confidentiality with respect to parole records,⁹⁹ now reflect the requirements of the Freedom of Information Act¹⁰⁰ and permit

95. For a similar suggestion in the context of disciplinary proceedings, see *Wolff v. McDonnell*, 418 U.S. 539, 584 (1974) (Marshall, J., dissenting).

96. See note 76 *supra* and accompanying text.

97. TASK FORCE REPORT, *supra* note 65, at 83.

98. 28 C.F.R. § 2.12(a) (1975). A minority of states require that a prisoner receive notice of the date and time of his parole release hearing. See W. PARKER, *PAROLE: ORIGINS, DEVELOPMENT, CURRENT PRACTICES AND STATUTES* 57-188 (1972).

99. See 40 Fed. Reg. 10,974 (1975) (formerly codified as 28 C.F.R. § 2.12(b)); *id.* at 10,984 (formerly codified as 28 C.F.R. § 2.57(b)).

100. 5 U.S.C. § 552 (1970), as amended, (Supp. IV, 1974).

disclosure to the inmate of factual material bearing on his offense, behavior, personal history, and institutional progress.¹⁰¹ The Freedom of Information Act contains a number of exemptions, however, and the Board's new rules contain parallel restrictions on disclosure of a prisoner's file.¹⁰² Information may be withheld if its release would "(1) threaten the life or physical safety of any person; (2) interfere with law enforcement proceedings; (3) disclose investigative techniques of a law enforcement agency; or (4) constitute a clearly unwarranted invasion of personal privacy."¹⁰³

The Board's recent amendment of its rules is a welcome shift from an emphasis on confidentiality, but broad exceptions to disclosure requirements ought not impair a parolee's access to information. Thus, the exemptions must be analyzed in light of several Supreme Court opinions in which disclosure has been required in related contexts. In revocation proceedings, for example, the Court has required that an accused parolee be provided a list of alleged parole violations, as well as notice of both his preliminary probable cause and subsequent revocation hearings.¹⁰⁴ A parolee is also entitled to examine the evidence that may be used against him during revocation proceedings.¹⁰⁵ Similarly, in *Wolff*, the Court held that a prisoner charged with misconduct must be given notice 24 hours before a disciplinary hearing may be held.¹⁰⁶ The alleged infraction of rules must be specified in this notice so that the accused prisoner will be able to pre-

101. 40 Fed. Reg. 41,342 (1975) (to be codified as 28 C.F.R. § 2.57 (a)). In contrast, the state prisoner generally is uninformed of the facts that will be used against him. See PARKER, *supra* note 98, at 57-118.

102. 40 Fed. Reg. 41,328 (1975) (discussion of rule changes by Maurice Sigler, Chairman, United States Board of Parole).

103. *Id.* at 41,342 (to be codified within 28 C.F.R. § 2.57(a)).

The primary document in a prisoner's file is usually the presentence investigation report. Administrative Conference of the United States, Recommendation 72-3: Procedures of the United States Board of Parole, June 9, 1972, reprinted in *Hearings on the Parole Reorganization Act*, *supra* note 59, at 200. The court that sentenced the prisoner retains sole authority to disclose the report. 40 Fed. Reg. 41,342 (1975) (to be codified as 28 C.F.R. § 2.57(c)); *id.* at 41,328 (explanation by Maurice Sigler, Chairman, United States Board of Parole); see *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968).

104. *Morrissey v. Brewer*, 408 U.S. 471, 486-89 (1971).

105. *Id.* at 489. The Court in *Morrissey* failed to specify the length of the period, after disclosure and before the hearing, in which the parolee may prepare his defense.

106. 418 U.S. at 563-64.

pare his defense.¹⁰⁷ The Court was not asked to consider whether disclosure of adverse evidence is required, however, and made no mention of the issue in its opinion.

Because the need for preparation obviously is as strong in parole release proceedings as in parole revocation or disciplinary proceedings, *Morrissey* and *Wolff* support the notice requirement included in the federal rules. They fall short, however, of requiring that inmates be accorded an unrestricted right to examine the evidence to be introduced in release proceedings. Although *Morrissey* and *Wolff* might be read to require parole officials to provide the prisoner a complete summary of the information in his file, such an interpretation is unwarranted in light of the Court's brief treatment of the issue in those cases.¹⁰⁸

That prisoners have considerable interest in disclosure is suggested by their apprehension over the quality of information in their files.¹⁰⁹ This apprehension is justified insofar as most corrections departments have failed to develop adequate data collection methods.¹¹⁰ Because caseworkers who prepare reports for the parole board record primarily subjective impressions¹¹¹ and have relatively little opportunity to observe inmates,¹¹² the documents that are filed are often misleading or inaccurate.¹¹³ Examination of the contents of his file would enable

107. *Id.*

108. Even though *Morrissey* requires a specific and complete disclosure before parole revocation, the Court did not emphasize the importance of such a procedure. There was no discussion of the disclosure issue in *Wolff*.

The one circuit court of appeals that has considered whether prisoners seeking parole should be guaranteed full access to information has deferred its decision pending further exploration by the district court of developments in constitutional law that had occurred since the district court rendered its decision. *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974).

109. *Hearings on H.R. 13118*, *supra* note 9, at 812 (testimony of Dr. Stephen Fox, Professor of Psychology, University of Iowa).

110. PARKER, *supra* note 98, at 8.

111. Interviews and experience with institutional caseworkers indicate that "[d]iagnostic categories used in correctional agencies tend to be arbitrary, ambiguous and *ad hoc*. Prevailing diagnostic programs in these agencies are self-serving, concerned primarily with lubricating the work flow and reducing to a minimum the upsets in established routines." Shover, "Experts" and *Diagnosis in Correctional Agencies*, 20 CRIME & DELIN. 347 (1974).

112. O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97, 112 (1972).

113. See *Hearings on H.R. 13118*, *supra* note 9, at 452 (testimony of Professor Willard Gaylin, President, Institute of Society, Ethics, and the Life Sciences).

a prisoner to locate and direct the attention of the parole board to any errors it contains.

To assess the merits of particular disclosures, however, it is necessary to balance the prisoner's need for that information against the government's need for withholding it. If disclosure of an item of information merely involved opening a file, fiscal concerns would be of little importance.¹¹⁴ But the exemptions incorporated in the rules recognize government interests other than those in economic administration, any one of which—in a specific instance—could be compelling. Nevertheless, the potential for abuse inheres in the broad language of these exemptions¹¹⁵ and that language must therefore not be permitted—in a specific instance—to obscure the particularized balancing process advanced here. For example, the parole board may receive evidence from an informer that, if believed, would make parole unlikely. The potential parolee has a substantial interest in learning both the source and content of this information so that he can impeach the credibility of the informer and offer rebuttal evidence at the release hearing. On the other hand, the government has interests in protecting the informer and preserving the secrecy of its investigative processes.

Admittedly, resolution of this hypothetical situation is difficult. Indeed, it is not susceptible of resolution in the absence of specific facts. Notwithstanding the difficulty of the problem, however, the strength of the prisoner's interest in such information is sufficient to justify requiring the parole board to evaluate—as precisely as possible—the likelihood that government interests are genuinely threatened by its disclosure. The board must be required to justify nondisclosure of either the source or content of adverse evidence on more than the general theory that

114. Additional information relevant to the release determination could probably be included at a minimal cost with information presently required to be divulged. Cf. *Parole Release Decisionmaking*, *supra* note 49, at 865.

115. For example, social and investigative agencies often demand confidentiality before providing data to the parole board, see *Hearings on H.R. 13118*, *supra* note 9, at 382-83 (testimony of George Reed, Chairman, United States Board of Parole). It is the policy of the federal parole board to restrict disclosure "in order to prevent clearly unwarranted invasions of the personal privacy of prisoners, ex-convicts, and persons communicating with the Board on the assumption of confidentiality." 40 Fed. Reg. 41,329 (1975) (discussion of rule changes by Maurice Sigler, Chairman, United States Board of Parole). If the above-mentioned agencies required confidentiality in all cases, this exemption could be employed to circumvent the general requirement of disclosure.

the work of informers necessitates confidentiality.¹¹⁶ And in any event, a determination that the person who supplied the evidence needs protection fails, without more, to justify nondisclosure of its content. Indeed, it has been suggested that in all cases the prisoner should receive a general summary of the undisclosed adverse information.¹¹⁷

In cases in which an attorney represents the prisoner, the latter's needs could be met and problems of security could probably be avoided if the attorney had full access to material withheld from the prisoner.¹¹⁸ Through his lawyer, then, the prisoner could correct omissions and mistakes, seek clarification, question credibility, and adequately rebut any derogatory information that the parole board might consider in making its decision.

The federal rules fail to require the fact of nondisclosure to be noted in the record of the parole release hearing. Because knowledge of information on which the parole board relied is necessary for adequate administrative or judicial review of its decision,¹¹⁹ this is a significant omission which ought to be remedied.

C. CONFRONTATION AND CROSS-EXAMINATION OF ADVERSE WITNESSES

Although its rules were recently amended, the United States Board of Parole did not change prior law to provide federal prisoners with the opportunity to confront and cross-examine adverse witnesses at parole release hearings.¹²⁰ The Supreme

116. Nondisclosure might be a relatively rare problem, for in a small sampling of presentence reports, less than 10 percent contained confidential or other information that even arguably needed to be withheld from the prisoner or his counsel. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 169 (testimony of Antonin Scalia, Chairman, Administrative Conference of the United States).

117. Administrative Conference of the United States, Recommendation 72-3: Procedures of the United States Board of Parole, June 9, 1972, reprinted in *Hearings on the Parole Reorganization Act*, *supra* note 50, at 200, 201.

118. This privilege of examination should not be accorded other prisoners who serve as representatives and who may interact with the prisoner socially and be tempted to use the information in an unprofessional manner.

119. Working Papers of the National Conference on Criminal Justice (quoted in *Hearings on the Parole Reorganization Act*, *supra* note 50, at 250).

120. Confrontation and cross-examination are rarely permitted by state parole boards. See PARKER, *supra* note 98, at 57-188.

Court has recognized, however, that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."¹²¹ The Court applied this precept in *Goldberg v. Kelly* to proceedings for the termination of public assistance payments, where the denial of welfare benefits was based on a caseworker's observation of a recipient's activities. It observed that confrontation and cross-examination are particularly important procedural safeguards in these circumstances, because "the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."¹²² The caseworker's motives were not directly impugned in *Goldberg*, but the Court recognized that human error might occur and that the attitude of some witnesses toward those receiving welfare might prejudice the recipient's case.¹²³

The parolee, like the welfare recipient, is in receipt of benefits that may be terminated on the basis of factual determinations. Thus, in *Morrissey* a limited form of cross-examination was permitted at the two hearings required prior to parole revocation.¹²⁴ The Court refused to allow questioning of an adverse witness only where the hearing officer had determined that the witness would be subjected to possible harm were his identity disclosed.¹²⁵ In contrast, the majority in *Wolff* denied prisoners the opportunity to confront and cross-examine adverse witnesses at prison disciplinary hearings on the grounds that if these protections were granted, there would be "considerable potential for havoc inside the prison walls," and "proceedings

121. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1971).

122. *Id.* at 270 (quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)). See also J. WIGMORE, EVIDENCE § 1367, at 32 (3d ed. 1940):

The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

123. In *Richardson v. Perales*, 402 U.S. 389 (1971), however, the Court held that a claimant of disability insurance benefits who failed to subpoena the written report of a physician who had examined him could not use cross-examination to subsequently challenge the doctor's findings. It assumed that the report was "routine, standard and unbiased" because the physician had seen the patient only once and because five specialists who independently had examined Perales reached consistent conclusions. *Id.* at 402-04.

124. 408 U.S. at 487-89.

125. *Id.* at 487.

would inevitably be longer and tend to unmanageability."¹²⁶ It reasoned that cross-examination of *known* inmate accusers or guards may not present much danger,¹²⁷ but that reprisal might follow cross-examination of previously unknown informants.¹²⁸ Moreover, the Court observed that persons otherwise willing to comment on inmate behavior might refuse to do so if compelled to testify publicly.¹²⁹ The chance to cross-examine was denied even where the questioning of a particular adverse witness would not prove sufficiently disruptive to outweigh the prisoner's interest in cross-examination, because the Court felt that a constitutional guarantee, although limited, would produce substantial litigation and provide little basis for upsetting the assessments of prison officials as to the extent of potential disorder.¹³⁰ In sum, the Court left the provision of this procedure in disciplinary proceedings to the discretion of prison officials. Thus, cross-examination was permitted in *Morrissey*, where a parole officer testified about a parolee's behavior during release, but denied in *Wolff*, where other inmates and prison personnel testified about a prisoner's conduct. Direct, in-prison contact between accuser and accused distinguished the potentially more explosive disciplinary proceeding from the parole revocation proceeding.

If inmates and prison personnel testify or otherwise submit evidence against a potential parolee at his release hearing,¹³¹ rigid adherence to precedent would preclude him from confronting and cross-examining them. A blanket refusal to provide for the availability of cross-examination, however, may not accurately reflect the balance of prisoner and government interests in this context.

The Court's rationale for denying this safeguard in all disciplinary proceedings—its desire to avoid extensive litigation of

126. 418 U.S. at 567.

127. *Id.* at 568-69.

128. *Id.* at 568.

129. *Id.*

130. *Id.* at 568-69. *Wolff* seems to depart from prior cases in which cross-examination was permitted upon a showing of arguably greater government interests and lesser private interests than those advanced with respect to disciplinary proceedings. See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959) (national security versus right to employment).

131. The United States Board of Parole, for example, considers institutional experience (including interpersonal relationships with staff and inmates), behavior (including misconduct), and reports of the officials in each institution in which the parole applicant has been confined. 28 C.F.R. §§ 2.19(f) (2), 2.21 (1975).

a constitutional standard that would be subsumed in any event by the deference that must be given the judgment of prison officials—fails to fully acknowledge the strength of an inmate's need to be able to conduct cross-examination where punishment is at stake.¹³² Like the decision to terminate welfare benefits, a disciplinary determination involves important private interests¹³³ and turns on questions of fact.¹³⁴ Not only might witnesses make perceptual mistakes, but they might also be motivated by vindictiveness.¹³⁵ And while the majority in *Wolff* offers no empirical data in support of its claim that cross-examination would jeopardize institutional order and safety, a majority of states permit confrontation and some form of cross-examination in prison disciplinary proceedings without noticeable effect on security or safety.¹³⁶ There is thus no cogent basis for a blanket refusal of cross-examination of every adverse witness in each disciplinary proceeding; however, if prison officials establish that the government's interest in institutional and personal safety is genuinely endangered by the disclosure of the identity of a particular witness through questioning, then cross-examination of that witness might be proscribed.¹³⁷ Since the government's interest in prison security is rarely implicated in parole release proceedings,¹³⁸ there, too, cross-examination should be permitted except in extraordinary circumstances. Nevertheless, some courts have attempted to minimize the need for cross-examination in parole release hearings by asserting that the

132. See *Wolff v. McDonnell*, 418 U.S. 539, 584-90 (1974) (Marshall & Brennan, JJ., dissenting); *id.* at 595-97 (Douglas, J., dissenting); *Clutchette v. Procunier*, 497 F.2d 809, 819-20 (9th Cir. 1974), *cert. granted sub nom.* *Enomoto v. Clutchette*, 420 U.S. 1010 (1975).

133. Justice Marshall, writing for himself and Justice Brennan, noted that the right to cross-examination is available when the loss of a job is at stake and reasoned that an additional prison sentence is a penalty at least as serious as loss of employment. *Id.* at 585 (dissenting opinion). See note 130 *supra*.

134. *Id.*

135. *Id.* at 586. See *id.* at 593 (Douglas, J., dissenting).

136. *Id.* at 489 (Marshall, J., dissenting). Inmate frustration has, in fact, been relieved by allowing cross-examination. *Id.* at 588-89 (citing ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES 20-22 (1974); TASK FORCE REPORT, *supra* note 65, at 13, 82-83).

137. The Court adopted this approach in *Morrissey* with respect to parole revocation proceedings, see text accompanying note 125 *supra*, and Justice Marshall recommended it in his dissent in *Wolff*, 418 U.S. at 589. See *Clutchette v. Procunier*, 497 F.2d 809, 819-20 (9th Cir. 1974), *cert. granted sub nom.* *Enomoto v. Clutchette*, 420 U.S. 1010 (1975).

138. See note 72 *supra* and accompanying text.

parole board is not the adversary of the potential parolee.¹³⁹ They fail to recognize, however, that if the parole determination were truly nonadversarial, granting this due process protection would create little potential for disruption. Moreover, the assertion that parole release decisions are benign determinations is open to question.¹⁴⁰ Indeed, because hearing examiners may be required to resolve factual disputes, the burden of establishing that cross-examination would be superfluous is a heavy one.¹⁴¹

Cross-examination, restricted only if a bona fide threat of disruption exists, presents no substantial danger to government interests.¹⁴² Even where questioning would disclose the identity of an informant, in some circumstances the prisoner's need for examining the credibility of that witness might be so great that the balance of prisoner and government interests would favor cross-examination. In such a situation, protecting a testifying inmate through temporary segregation¹⁴³ or permitting examination of the witness by the prisoner's attorney in a closed hearing might accommodate the competing interests. Where both the prisoner and his attorney are denied the opportunity to question an adverse witness, the hearing panel should examine the informant in camera, probe his credibility, and note the absence of cross-examination in its statement of decision.¹⁴⁴

D. WRITTEN STATEMENT OF THE EVIDENCE RELIED ON AND THE REASONS FOR DENYING PAROLE

At the conclusion of a federal parole hearing, the hearing examiners must inform the prisoner of their tentative decision and, if parole is to be denied, the reasons therefor.¹⁴⁵ In addi-

139. See, e.g., *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

140. See notes 184-85 *infra* and accompanying text.

141. See text accompanying note 121 *supra*.

142. Permitting cross-examination may make parole release hearings more time-consuming. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 589 (1974) (Marshall, J., dissenting) (prison disciplinary proceedings). But given the strong need of the potential parolee to cross-examine adverse witnesses, the government interest in brisk administration of parole determinations seems diminutive. Cf. *id.*

143. *Clutchette v. Procnier*, 497 F.2d 809, 817 (9th Cir. 1974), *cert. granted sub nom. Enomoto v. Clutchette*, 420 U.S. 1010 (1975).

144. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 590 (1974) (Marshall, J., dissenting).

145. 28 C.F.R. § 2.13(a) (1975). In 1972, reasons for denial of parole were provided to applicants in 34 states. *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 934 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974).

tion, within 15 working days of the hearing, the prisoner must receive written notification of the final decision, including reasons for the determination if parole is denied.¹⁴⁶ The reasons that are furnished in either instance might be sweeping; however, the federal parole rules also provide for further specificity in certain circumstances.¹⁴⁷

The general procedure embodied in the federal rules requiring a statement of reasons for parole denial resembles the communication of reasons for agency action that has been constitutionally mandated in other contexts. In *Goldberg v. Kelly* the

146. 28 C.F.R. § 2.13(d) (1975). Written records of the reasons for parole denial were kept by only 11 parole boards in 1972. O'Leary & Nuffield, *A National Survey of Parole Decision-making*, 19 CRIME & DELIN. 378, 387 (1973).

147. The parole board rules now provide:

(b) . . . [T]he reasons for parole denial may include, but are not limited to, the following reasons, with further specification where appropriate:

(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life.

(c) In lieu of or in combination with the reasons in paragraph (b) (1) and (2) of this section the prisoner after initial hearings shall be furnished a guideline evaluation statement which includes the prisoner's salient factor score and offense severity rating . . . , as well as the reasons for a decision to continue the prisoner for a period outside the range indicated by the guidelines.

28 C.F.R. §§ 2.13(b), (c) (1975). Two of the acceptable reasons for parole denial contained in subsection (b) are made more specific by subsection (c). The guideline evaluation statement furnished the prisoner under subsection (c) permits him to discover the evidence on which the Board relied in reaching its decision. In addition, the Board must justify its decision that the prisoner remain incarcerated beyond the term set for his release, as determined by application of the statistical guidelines to the numerical factors of the guideline evaluation statement. Where the Board's decision conforms to the guidelines, the policies underlying the guidelines implicitly provide this further justification. Thus, a prisoner denied parole on the basis of paragraph (1) or (2) of subsection (b) has an opportunity to learn of the evidence said to support the decision and to receive a further explanation as to the reasons these facts should preclude his release.

In contrast, the other enumerated acceptable reasons for denying parole, paragraphs (3) and (4) of subsection (b), are not specifically explanative, do not reveal the evidence underlying the decision, and are not subject to refinement by the operation of subsection (c). Subsection (b), however, does provide for "further specification where appropriate."

decisionmaker was required to disclose his rationale for denying welfare eligibility and to indicate the evidence on which he relied in making that determination.¹⁴⁸ Although the Court required a statement of reasons sufficient to verify that the decisionmaker reached his conclusion in accordance with the rules of evidence under which the hearing had been conducted, it did not demand a full opinion or formal findings of fact and conclusions of law.¹⁴⁹

The Supreme Court applied the *Goldberg* approach in *Morrissey v. Brewer* in requiring a statement of reasons after both the preliminary probable cause hearing and subsequent parole revocation hearing.¹⁵⁰ Similarly, the Court in *Wolff v. McDonnell* required a written decision and statement of reasons following prison disciplinary proceedings; however, hearing officers were allowed to omit certain evidentiary items if personal or institutional safety is implicated, although the prisoner must be informed of the omission.¹⁵¹ A statement of reasons was required because disciplinary actions may be reviewed by other bodies;¹⁵² moreover, prisoners need protection against collateral consequences that might arise if the basis for the original disciplinary decision were misunderstood.¹⁵³

Several circuit courts of appeals have concluded that individual and government interests are enhanced if parole boards are required to provide written reasons for denial of parole.¹⁵⁴ These courts are convinced that a written rationale will facilitate judicial review,¹⁵⁵ provide a more effective check on arbitrariness,¹⁵⁶ promote thoughtful decisionmaking by the parole

148. 397 U.S. at 271.

149. *Id.*

150. 408 U.S. at 487, 489. The procedure was intended to "reduc[e] the risk of error." *Id.* at 487.

151. 418 U.S. at 565.

152. Disciplinary matters may be considered in deciding whether to transfer a prisoner from one institution to another; in addition, prisoner conduct is often considered at parole release hearings. Disciplinary decisions also may be subjected to public and judicial scrutiny. If the reasons for punishment were divulged in all cases, administrators subject to review would have an additional incentive to act fairly in their dealings with inmates. *Id.*

153. *Id.*

154. *E.g.*, *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974); *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).

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

156. *Id.* at 929-31 (concern expressed over the enormous discretion exercised by boards of parole).

board,¹⁵⁷ enhance consistency of decisions by establishing a body of precedent,¹⁵⁸ and relieve the frustration of prisoners by apprising them of ways to improve their conduct and thereby qualify for parole.¹⁵⁹

A right to know the reasons for parole denial might be qualified in deference to government interests in efficient and economical parole administration and preservation of personal or institutional safety. The evidence gleaned from a pilot project recently conducted by the United States Board of Parole indicates, however, that the provision of reasons for parole denial need not impair the conservation of financial resources and the maintenance of order in the prison.¹⁶⁰ In that project, the Board communicated its parole decision and reasons therefor to the applicant within five days of the release hearing,¹⁶¹ thus minimizing the anxiety that prisoners normally experience during the waiting period. Not only were the informed inmates

157. Parole decisions are made in a matter of a few minutes, and time constraints often cause much important information to be overlooked. *Id.* at 933. *Accord*, *King v. United States*, 492 F.2d 1337, 1340-41 n.11 (7th Cir. 1974) (quoting Johnson, *Federal Parole Procedures*, 25 *AN. L. REV.* 459, 484-85 (1973)):

It is not to impugn the good faith or competence of the Board to suggest the possibility that in some cases it might rely on reasons for denying parole that the courts would feel were improper or unconstitutional if they knew of them.

158. Establishment of precedent would also educate judges who set minimum sentences and are expected to "play an important part in the parole process." *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 933 (2d Cir.), *vacated as moot sub nom. Reagan v. Johnson*, 419 U.S. 1015 (1974).

159. 500 F.2d at 932-33; see Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise and the Demise of Mythology*, 22 *AM. U.L. REV.* 477, 503-10 (1973) (reporting that prison disturbances have been attributed to unexpected denials of parole); *Hearings on H.R. 13118*, *supra* note 9, at 270-71 (testimony of former prisoner Raymond Harlan) (prisoners perceive no discernible pattern in parole decisionmaking, a problem that could be alleviated by providing reasons for denial of parole).

160. The National Conference on Criminal Justice has recommended that parole examiners specify in detail and in writing the reasons for their decisions. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 250. The President's Commission on Law Enforcement and the Administration of Justice similarly concluded that "Board members can also influence the behavior of inmates by . . . frankly discussing with them, at appropriate times, the probable consequences of failure to participate in proceedings or of misconduct." *TASK FORCE REPORT*, *supra* note 65, at 64.

161. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 128 (statement of Maurice Sigler, Chairman, United States Board of Parole).

better able to understand how to improve their behavior, but the procedure enhanced their attitude about the parole process as well.¹⁶² This experiment supports the finding of a number of state corrections authorities that disclosure of reasons following denial of parole is an improvement over their earlier practices.¹⁶³

Thus, both case law and experience in the prison suggest that the balance of prisoner and government interests in the parole release context requires that a statement of the reasons and evidence relied on for parole denial be given to the prisoner.¹⁶⁴ Moreover, the prisoner and government interests in a statement of reasons for parole denial would be fully served only if the reasons were in writing and stated with specificity. The courts have shown a particular and appropriate awareness of the necessity for *written* feedback.¹⁶⁵ And while either a written or an oral statement of reasons may facilitate prisoner rehabilitation, an oral communication cannot aid a reviewing court that must decide whether a parole board has abused its discretion. Furthermore, reasons for parole denial become meaningful to prisoners only when they are stated in detail.¹⁶⁶ It would be unreasonable to demand that a parole board issue a full opinion after each hearing; however, courts should require that a statement be written with significant elaboration.¹⁶⁷ The most stringent

162. *Id.* at 128-29. The results of the pilot study were so encouraging that the Board made definite plans to implement many features of the project on a more extensive basis. *Id.* at 127.

163. TASK FORCE REPORT, *supra* note 65, at 65.

164. Institutional or personal safety, the government interest found sufficient in *Wolff* to qualify the right to know certain evidence on which officials relied in a particular disciplinary determination, might be accommodated through one of the exemptions for disclosure requirements: the source and specific content of the evidence relied on to deny parole should be withheld only insofar as necessary to guard against a genuine threat to personal safety. See text accompanying notes 114-16 *supra*. If certain evidentiary items are not disclosed to the prisoner, the statement should indicate the fact of the omission. Cf. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

165. See notes 154-59 *supra* and accompanying text.

166. "It does no good to tell a prisoner he is being denied parole because he is a danger to society unless he is told why he is so regarded, and whether there is anything he can do to convince the Board otherwise." Johnson, *supra* note 157, at 485.

The United States Board of Parole experimented with a checklist form in communicating to prisoners the reasons for denial of parole. This checklist was supplemented by a sentence or two of individualized explanation, but the brief communication proved to be unsatisfactory. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 203.

167. A "brief" statement of reasons indicating that early parole

elaboration mandated by the federal parole board rules¹⁶⁸ is illustrative of the particularity with which reasons must be stated to meet the standards of due process.

E. RIGHT TO COUNSEL

A federal prisoner may choose a person to represent him at parole release proceedings.¹⁶⁹ The role of such a representative is limited, however, to providing information requested by the examining panel and presenting a concluding statement.¹⁷⁰ Present federal law fails to guarantee representation to indigent prisoners.¹⁷¹

By contrast, the Supreme Court has enabled retained counsel to take a more active role in public assistance eligibility hearings because an attorney can help "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."¹⁷² The Court in *Goldberg v. Kelly* rejected the argument that legal assistance would unduly prolong or encumber a welfare eligibility hearing.¹⁷³ It embraced a similar argument in *Gagnon v. Scarpelli*,¹⁷⁴ however, in holding that

would deprecate the seriousness of the petitioner's *particular* offense and encouraging him to continue his "excellent institutional adjustment and well conceived parole plans" satisfied minimum due process requirements, according to the court in *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975). The generality of this brief statement, however, is an insufficient basis on which a reviewing court might scrutinize the parole board's decision; moreover, it fails to apprise the prisoner of what he must do in order to obtain parole release.

168. See note 147 *supra*.

169. 28 C.F.R. § 2.12(a) (1975).

170. *Id.* The Board recently reaffirmed its policy limiting the participation of representatives throughout the release hearing. 40 Fed. Reg. 41,330 (1975). This limitation reduces the utility of representation on the federal level because prisoner representatives are urged to comment on factors that rarely determine the outcome of the hearing. *Parole Release Decisionmaking*, *supra* note 49, at 839.

171. While indigents are rarely guaranteed representation at state parole hearings, the presence of counsel during such hearings is permitted in 21 states. O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97, 113 (1972). In most of these states, counsel may only offer statements or petitions in writing that are incorporated with other information considered by the parole board. Rarely may counsel engage in oral argument at the hearing. Newman, *Intervention in the Parole Process*, 36 ALBANY L. REV. 257, 265 (1972).

172. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

173. *Id.* at 271.

174. 411 U.S. 778 (1973).

the right to appointed counsel at a parole or probation revocation hearing must be determined on a case-by-case basis.¹⁷⁵ The Court acknowledged that the effectiveness of due process rights generally depends on a parolee's education and skill,¹⁷⁶ but asserted that since there usually is no doubt about the guilt of a probationer or parolee, the simplicity of the issues refutes any requirement of representation by counsel.¹⁷⁷ The Court also maintained that the introduction of counsel injects an adversary element into revocation proceedings, thereby retarding rehabilitation.¹⁷⁸ In *Wolff v. McDonnell* the Court refused to recognize a right to legal representation at disciplinary hearings unless the particular prisoner is illiterate or otherwise unable to cope with the complexity of the issues. In such circumstances, he may request aid from a fellow inmate or one of the prison staff.¹⁷⁹ The *Wolff* Court emphasized the adversarial tendencies of counsel, as well as the delay and cost that would result if needy prisoners were provided attorneys.¹⁸⁰

The focus of the majority of the Court on adversariness, delay, and cost provides little support for the unconditional right of a potential parolee to appointed counsel.¹⁸¹ The Court has not

175. Although the Court clearly wished to discourage the presence of counsel at revocation hearings, it identified two situations in which counsel would be presumptively required: (1) when the probationer or parolee makes a timely and colorable claim that he has committed no violation, or (2) when there are substantial factors mitigating the violation. *Id.* at 790. This presumption could arise in almost every hearing, since a hearing generally presupposes a legitimate factual dispute over a colorable claim on the part of the prisoner.

The Court has, in fact, required the assistance of counsel in a combined probation revocation-deferred sentencing hearing. *Mempa v. Rhay*, 389 U.S. 128 (1967). If due process is mandated in parole release proceedings because of the similarity of parole release and deferred sentencing, *see* note 10 *supra*, *Mempa* is persuasive support for a right to counsel during the release proceedings.

176. "[T]he unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence." 411 U.S. at 787.

177. *Id.* Typically, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him. The Court reasoned that mitigating evidence does not require complex presentation or evaluation. *Id.*

178. *Id.*

179. 418 U.S. at 570.

180. *Id.*

181. If a prisoner is peculiarly unable to deal with the issues to be raised at a parole hearing, he might have a right to appointed counsel. *Cf.* note 175 *supra* and accompanying text.

completely rejected the role of the attorney in parole release proceedings, however. It should be noted that government interests in efficiency and economy have not been heavily weighted by the courts in other contexts;¹⁸² conversely, the importance of an attorney to a potential parolee should not be minimized. While parole hearings have been characterized as benign determinations of readiness to reenter society,¹⁸³ there are indications that parole release is indeed an adversarial determination¹⁸⁴ and that rehabilitation is not necessarily a predominant concern of parole board members.¹⁸⁵ If the setting were truly adversarial and the motives of parole board members were not always benign, elementary notions of due process would require that the prisoner have the benefit of a forceful advocate. But even if release hearings were entirely nonadversarial, the courts could reconcile individual and government interests by tailoring the role of the attorney to the character and precise requirements of the proceedings.¹⁸⁶ For example, a lawyer might be allowed to examine his client's file and advise him before, during, and after the hearing. During the hearing counsel might be permitted to comment on the facts, cross-examine adverse witnesses,¹⁸⁷ and offer closing remarks, yet be prohibited from making formal objections. In sum, an attorney could advance significant prisoner interests without disrupting the parole process.

182. See note 74 *supra* and accompanying text.

183. See note 139 *supra* and accompanying text.

184. See *Hearings on H.R. 13118*, *supra* note 9, at 500 (testimony of William Parker, Senior Research Associate, Parole Corrections Project, American Correctional Institution); cf. *Hyser v. Reed*, 318 F.2d 225, 253 (D.C. Cir.) (Bazelon, C.J., & Edgerton, J., concurring in part and dissenting in part), *cert. denied*, 375 U.S. 957 (1963); Recent Decision, *Constitutional Law—Parole Release Hearings Not Subject to Judicial Review Nor Do Procedural Due Process Rights Adhere*, 23 EMORY L.J. 597, 612-13 (1974).

185. Parole has been denied to facilitate the management of inmates and to avoid the risk of public criticism. On the other hand, it has been granted to reward informants, to relieve overcrowding in the prison, and to maintain a given population level in order to sustain prison industry or justify the budget. *Hearings on H.R. 13118*, *supra* note 9, at 237 (testimony of Professor Fred Cohen, State University of New York).

186. The Supreme Court has recognized a "nonadversarial" role for counsel in noncriminal juvenile proceedings, *In re Gault*, 387 U.S. 1, 36 (1961), and in welfare investigations. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

187. Permitting counsel to exercise the right of cross-examination for his client probably would inject a further element of adversariness into the proceeding, but it would also make the right more effective. Presumably, counsel would recognize that unnecessary or abusive questioning would not further his client's application for parole. See text accompanying note 190 *infra*.

Prisoners often request lay assistance at parole release hearings.¹⁸⁸ In this connection, attorney substitutes may be capable of providing effective representation for inmates since the questions involved in parole release are not distinctly legal.¹⁸⁹ Indeed, nonlegal representatives have received more positive treatment from federal hearing examiners than have lawyers and law students;¹⁹⁰ examiners have reacted most favorably to the representation provided by institutional employees.¹⁹¹ And while the overall impact of argument by attorneys or attorney substitutes is disputed,¹⁹² such representatives are at least considered to be more objective than the inmate himself;¹⁹³ in fact, they have demonstrably influenced some parole board decisions.¹⁹⁴ Since the questions considered by a parole board are often complex¹⁹⁵ and since many inmates are minimally educated,¹⁹⁶ the right to such representation seems consistent with the interests of both the prisoner and the parole board.

In a pilot project undertaken by the United States Board of Parole, each inmate was permitted to have a representative present at his parole interview. Representation served the interests of the prisoners, in that they previously had expressed considerable frustration at the fact that they were given no counseling before their parole release hearings.¹⁹⁷ Representation es-

188. *Parole Release Decisionmaking*, *supra* note 49, at 840.

189. *Hearings on H.R. 13118*, *supra* note 9, at 535 (testimony of Llewellyn Linde, Chairman, Minnesota Adult Corrections Commission).

190. *Parole Release Decisionmaking*, *supra* note 49, at 839-40.

191. *Id.* at 841.

192. On the federal level, presence of a representative correlates with a small reduction in the time served before release *within* the discretionary range permitted under the statistical guidelines. *Id.*

193. *Hearings on H.R. 13118*, *supra* note 9, at 344 (testimony of Sanford Rosen, Assistant Legal Director, American Civil Liberties Union).

194. "I have absolutely no doubt that . . . the ability of well-educated, relatively objective counsel to marshal facts and to explain circumstances was the difference between freedom and continued or renewed incarceration in a number of cases." *Id.* at 342. See also *Parole Release Decisionmaking*, *supra* note 49, at 840 n.138 (advocacy of institutional caseworkers influenced federal hearing examiners in two release proceedings).

195. It would be logically inconsistent to emphasize the administrative burden of permitting the assistance of counsel and at the same time deny the need for the active participation of counsel in resolving a number of complicated questions.

196. *Hearings on H.R. 13118*, *supra* note 9, at 344 (testimony of Sanford Rosen, Assistant Legal Director, American Civil Liberties Union).

197. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 151 (comments of Representative Tom Railsback).

pecially benefited inmates who had difficulty expressing themselves.¹⁹⁸ Government interests in rehabilitation and maintenance of prison order were served as well, because one source of prison disruption had been eliminated.¹⁹⁹ Although attorneys were initially barred from participating in the experiment,

[t]he Board [subsequently concluded] that there is no need to preclude an attorney from appearing as an inmate's representative . . . simply because he is an attorney, as long as he realizes that parole release determinations do not, and should not, involve an adversary presentation of issues of law or fact.²⁰⁰

Moreover, the Board found that the presence of an advocate was neither unduly expensive nor time-consuming.²⁰¹

III. CONCLUSION

Five circuit courts of appeals have interpreted recent Supreme Court decisions as requiring procedural due process at parole release hearings. This interpretation vindicates the rights of prisoners, for denial of parole deprives them of both liberty and property interests. On the basis of case law and experience in the prison, rights to notice, a hearing, and a statement of the reasons and evidence on which the deciding authority relied should be unqualifiedly extended to prisoners seeking parole. Although precedent points to qualified prehearing disclosure of adverse evidence, a qualified right to call witnesses, denial of confrontation and cross-examination, and the exclusion of counsel from release proceedings, experience in the prison fails to support the government's claim that such limitations are necessary. Indeed, the prisoner's interest in each of these procedures often appears to outweigh the government's generalized interests in prison security and manageability. Consequently, although the new federal rules take a desirable first step toward securing the rights of prisoners, their provisions with respect to the calling

198. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 128 (testimony of Maurice Sigler, Chairman, United States Board of Parole).

199. One of the major causes of prison disturbances appears to be the arbitrary manner in which parole is denied. *Hearings on H.R. 13118*, *supra* note 9, at 644 (comments of Representative Stewart McKinney).

200. *Hearings on the Parole Reorganization Act*, *supra* note 50, at 128 (testimony of Maurice Sigler, Chairman, United States Board of Parole).

201. Representatives were not requested in 60 percent of the interviews. *Id.* at 135. If appeal of the Board's decision is contemplated, counsel could reduce judicial workload by sorting out frivolous claims and petitions. Recent Decision, *supra* note 184, at 613.

of witnesses, confrontation, and cross-examination may be unconstitutional, and their nondisclosure provisions may be unconstitutionally applied.

But even apart from issues of constitutionality, an erroneous parole release determination is obviously an undesirable event that should be avoided. Thus, it is perfectly clear that neglect of appropriate procedural safeguards in parole release proceedings will benefit neither the individual nor society.