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# Recent Developments

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# RECENT DEVELOPMENTS

## Parole Release—Federal Circuits Conflict on Applicability of Due Process and Administrative Procedure Act to Parole Release Decisions

### I. INTRODUCTION

The power to parole prisoners derives from the legislative power to define crimes and set penalties for offenses, and has been delegated by Congress and state legislatures to the federal and state parole boards.[1] Recent litigation of inmates' post-conviction rights in federal and state correctional systems has focused increasingly[2] on the broad discretionary power that parole boards exercise by performing their statutory mandate.[3] While prisoners have contended that due process under the fifth[4] and fourteenth[5] amendments, in addition to the federal and state administrative procedure acts,[6] entitle them to procedural safeguards in parole board proceedings,[7] courts traditionally have rejected such contentions under the theory that release on parole is a "privilege," not a vested prisoner "right," and is not subject to judicial review,[8] or because parole boards are not subject to administrative procedure statutes because of their unique functions.[9] In *Hyser v. Reed*,[10] the District of Colum-

1. 33 LA. L. REV. 708 (1973).

2. Loewenstein, *Accelerating Change in Correctional Law: The Impact of Morrissey*, 7 CLEARINGHOUSE REV. 528, 535 (1974).

3. Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 481-83 (1973).

4. The fifth amendment to the United States Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

5. The fourteenth amendment to the United States Constitution provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

6. *See* notes 11 and 33 *infra*.

7. Prisoners typically seek recognition of procedural rights such as a right to a written statement of reasons for parole denial or revocation, the right to confrontation and cross-examination, the right to counsel, the right to compel attendance of witnesses, the right of discovery of adverse information in government files, and the right to a decision by an impartial tribunal. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

8. *See* note 40 *infra* and accompanying text.

9. *See* note 31 *infra* and accompanying text.

10. 318 F.2d 225 (D.C. Cir.), *cert. denied sub nom.* Thompson v. United States Bd. of Parole, 375 U.S. 957 (1963).

bia Circuit Court held that proceedings of the United States Board of Parole were not subject to the adjudicatory provisions of the Administrative Procedure Act (APA),[11] reasoning that the Board does not "adjudicate," because it shares a nonadversary interest with the prisoner in his rehabilitation, and because the Board is not required by statute to adjudicate after a hearing, a specific requisite for APA applicability. Subsequently, in *Menechino v. Oswald*,[12] the Second Circuit found that no due process rights attach to parole release proceedings, following the *Hyser* analysis that parole proceedings are nonadversary, and holding that an inmate has no presently enjoyed right to which due process can attach. The recent development of a fiexible concept of due process,[13] however, has permitted a finer balancing of governmental and individual interests than the prior requirement of a "full panoply" of procedural safeguards, or none at all, and has tolled the demise of the "right-privilege" constitutional law doctrine. In *Morrissey v. Brewer*,[14] the Supreme Court held that parolees were entitled to limited procedural due process rights in United States Board of Parole proceedings to revoke parole. The Court rejected the concept that parole is a privilege, and stressed that both the government and the inmate have substantial interests in avoiding the "grievous loss" inflicted by premature parole termination. Lower courts recently have confronted the issue whether due process, under the *Morrissey* rationale, requires a statement of reasons for denial of parole. Although the Fifth Circuit, in *Scarpa v. United States Board of Parole*,[15] refused to recognize that due process attaches to parole release proceedings because an inmate has no right endangered by the proceedings, but only a possibility of conditional freedom, the Second Circuit, in *United States, ex rel. Johnson v. New York Board of Parole*,[16] has held that *Morrissey* requires that a state Board of Parole provide an inmate with a written statement of reasons for denial of his parole application. Moreover, the Seventh Circuit, in *King v. United States*,[17] has held that section 555(e)[18] of the APA requires the United States Board of Parole provide similar state-

11. Administrative Procedure Act § 5, 5 U.S.C. § 554 (1970).

12. 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

13. *See* notes 48-52 *infra* and accompanying text.

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

15. 468 F.2d 31 (5th Cir. 1972) *rev'd*, 477 F.2d 278 (5th Cir. 1973) (*en banc*), *cert. granted, vacated and remanded for consideration of mootness*, 414 U.S. 809 (1973).

16. 500 F.2d 925 (2d Cir. 1974).

17. 492 F.2d 1337 (7th Cir. 1974).

18. *See* note 32 *infra*.

ments to federal prisoners. This Comment will analyze the status of due process and statutory rights in federal parole release hearings in light of these post-*Morrissey* decisions and suggest a rationale that may allow more consistent results in adjudication of future questions of due process rights in parole release proceedings.

## II. Evolution of Judicial Attitudes Toward Parole Release Proceedings

### *A. Application of Administrative Procedure Act to Parole Proceedings*

The APA applies to each "agency," meaning "each authority of the Government of the United States, whether or not it is within . . . another agency . . . ."[19] The United States Board of Parole is by statute a part of the Department of Justice,[20] with authority to release eligible federal prisoners on parole.[21] Despite the congressional intent to maximize the coverage of the APA,[22] the Fifth Circuit held in a 1949 decision, *Hiatt v. Compagna*,[23] that the adjudication and judicial review portions of the Act were not applicable to the Board's parole revocation proceedings, observing that "[t]he full dress procedure [the APA] requires would render it practically impossible for the Board to handle its business."[24] The *Hiatt* court's initial premise was that parole was a matter of legislative grace, not a prisoner right; apparently accepting the Board's contention that the parole system was *sui generis* among federal administrative processes, the court then reasoned that because it was a privilege parole release could properly be committed by statute to the nonreviewable discretion of the Board of Parole.[25] While the *Hiatt* holding was limited to parole revocation proceedings, the court discussed the APA in broad structural terms,[26] and later decisions have cited

19. Administrative Procedure Act § 2(a), 5 U.S.C. § 551(1) (1970).

20. 18 U.S.C. § 4201 (1970).

21. 18 U.S.C. §§ 4203(a), 4208 (1970). The Board of Parole has promulgated regulations pursuant to the statute that control the procedures for parole release and administration. 28 C.F.R. § 2 (1974); 39 Fed. Reg. 20029, 23261 (1974).

22. "The definition of agency in . . . the bill is perfectly simple . . . . [T]here is included any authority regardless of its form or organization . . . . In short, whoever has the authority to act with respect to the matters later defined is an agency." S. Doc. No. 248, 79th Cong., 2d Sess. 354 (1946). *See* note 19 *supra* and accompanying text.

23. 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950).

24. *Id.* at 45. The court stated that the APA "has never been thought applicable by the Board or the Attorney General who appoints its members and approves its rules. The full dress procedure it requires would render it practically impossible for the Board to handle its business." *Id.* at 44-45.

25. *See* note 21 *supra*.

26. *See* note 24 *supra*.

*Hiatt* without further analysis for the position that the APA does not apply to the proceedings of the Board of Parole.[27] In the leading case of *Hyser v. Reed*,[28] however, Chief Justice (then Judge) Burger in 1963 articulated a more precise rationale for the inapplicability of the adjudication section of the Act to parole revocation proceedings. Noting that section 554 of the Act, entitled "Adjudications,"[29] applies only to cases "required by statute to be determined on the record after opportunity for an agency hearing," the *Hyser* majority found that the Board was exempt from the section because no statute required the Board to adjudicate on a record after an agency hearing. The court further reasoned that the Board did not "adjudicate" because the Board and the prisoners subject to it had an identity of interest in efficient prisoner rehabilitation that rendered parole proceedings essentially nonadversary in character.[30] Although commentators[31] subsequently have pointed out that other sections of the APA, particularly section 555(e),[32] requiring a statement of reasons for denial of written applications to an agency, may apply to the Board,[33] *Hyser* and *Hiatt* remain unchallenged authority that the Board is not subject to the adjudication and judicial review sections of the Act.[34] In 1972, however, the federal Administrative Conference[35] adopted a resolution calling upon the Board to give reasons for denial of parole applications.[36] The Board subse-

27. Washington v. Hagan, 287 F.2d 332, 334 (3rd Cir. 1960); Moore v. Reid, 142 F. Supp. 481, 483 (D.D.C. 1956). *But see* Hurley v. Reed, 288 F.2d 844, 846-47 (D.C. Cir. 1961).

28. 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

29. Administrative Procedure Act § 5, 5 U.S.C. § 554 (1970).

30. 318 F.2d 225, 237, 258. The *Hyser* court's finding that the Board is different from other agencies because it is not an adversary to its subject prisoners would seem comparable to the contention that the Fifth Circuit apparently accepted in *Hiatt* that the Board is *sui generis* among agencies, although more persuasively articulated. *Compare* Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963) *with* Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1948).

31. Professor Davis has been the most outspoken critic of the Board and has commented at length on the thesis that the Board may he operating in violation of the APA. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 126-33 (1969); Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459, 479-80 (1973).

32. Section 555(e) of the APA provides as follows: "Prompt notice shall be given of the denial in whole or in part of a written application . . . of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." Administrative Procedure Act § 6(d), 5 U.S.C. § 555(e) (1970). Federal parole proceedings are initiated by a written application from a prisoner. 39 Fed. Reg. 20029 (1974).

33. Two state decisions bave held that the principle of administrative fairness, independent of statutory provisions, requires a statement of reasons for denial of parole. *In re* Sturm, 15 CRIM. L. REP. 2159 (Cal. 1974); Monks v. New Jersey Bd. of Parole, 58 N.J. 238, 277 A.2d 193 (1971).

34. *See* Johnson, *supra* note 31, at 479-80.

35. 25 AD. L. REV. 531 (1973) (resolution adopted June 7, 1972).

36. *Id.* at 534.

quently initiated a limited pilot program of stating such reasons, and more recently has promulgated new regulations providing for a statement of reasons together with more precise standards for evaluation of parole applications.[37]

### B. *Application of Due Process Requirements to Parole Proceedings*

Because parole release derives from the legislative power to define crimes and set penalties for offenses,[38] courts until recently viewed parole as a "privilege," an entitlement dependent upon legislative grace, rather than a "right,"[39] and rebuffed prisoner challenges to any aspect of the parole decision process,[40] reasoning that the parole release question is committed to the unreviewable discretion of the Board of Parole.[41] Thus, the "doctrine of rights and privileges" provided a rationale for judicial abdication of any role in parole administration, and precluded the applicability of any due process safeguards to parole proceedings.[42] By contrast, the Supreme Court in a series of cases beginning with *Hannah v. Larche*[43] recognized that governmental proceedings could jeopardize a variety of private interests,[44] and that varying combinations of due process safeguards may be appropriate to protect those interests,[45] de-

37. 39 Fed. Reg. 20029, 23261 (1974).

38. *See* note 1 *supra*.

39. The doctrine that parole or probation is a matter of grace may be traced to Cardozo's dictum that any probation or suspension of a criminal sentence comes as an "act of grace." Escoe v. Zerbst, 295 U.S. 490, 492 (1935). Despite the rejection of the doctrine by the Supreme Court, it still appears in isolated opinions. *Compare* Graham v. Richardson, 403 U.S. 365, 374 (1971), *with* Scarpa v. United States Bd. of Parole, 468 F.2d 31, 39 (5th Cir. 1972) (dissenting opinion). The Supreme Court has specifically discarded the doctrine that parole is a matter of grace or privilege. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

40. *See, e.g.*, Losieau v. Hunter, 193 F.2d 41 (D.C. Cir. 1951) (denial of parole after two-minute interview not a reviewable abuse of discretion).

41. *See, e.g.*, Juelich v. United States Bd. of Parole, 437 F.2d 1147 (7th Cir. 1971); Thompkins v. United States Bd. of Parole, 427 F.2d 222 (5th Cir. 1970); United States v. Frederick, 405 F.2d 129 (3d Cir. 1968); Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967). *Contra*, Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961) (prisoner may obtain judicial review of alleged violation of constitutional rights by Board action in declaratory judgment proceeding).

42. *See generally* Loewenstein, *supra* note 2, at 533. The doctrine that parole was a privilege was also part of the judicial rationale for refusing to hold that the Board of Parole was subject to APA. *See* notes 23-24 *supra* and accompanying text.

43. 363 U.S. 420, 442 (1960). *See* note 44 *infra*.

44. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (some due process necessary in state proceeding to revoke driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits cannot be terminated without notice and hearing); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (government employee cannot he fired without minimum of due process).

45. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (six separate due process elements necessary in parole revocation proceedings); Goldberg v. Kelly, 397 U.S. 254 (1970) (ten due process safeguards required in welfare termination proceeding).

pending upon the character of the proceeding and the urgency of the governmental need for summary adjudication. In applying this new mode of due process analysis, which eventually spelled the end of the right-privilege doctrine, the Court developed a three-step analysis[46] by which the courts initially could ascertain the governmental interest furthered by the challenged proceedings, then identify the potential loss a private party might suffer because of an adverse decision in the proceeding, and finally, select the elements of due process appropriate to the proceeding by balancing the magnitude of the potential private loss against the extent of the government's interest in summary adjudication. Because the flexibility of the new concept has allowed courts to tailor the applicability of due process safeguards to the character and gravity of the proceeding, it has permitted a finer balancing of governmental and individual interests.[47] The new concept of due process thus furnishes an alternative to the traditional due process mandate of a "full panoply"[48] of trial-type procedural safeguards, or none at all, and has eliminated the right-privilege distinction as an element of constitutional law.[49]

In the leading case of *Menechino v. Oswald*,[50] decided in 1970, the Second Circuit eschewed the terms of the right-privilege doctrine but applied it in substance[51] to hold that no due process rights attached to parole release proceedings. First, the court reasoned that due process rights were required only in governmental proceedings that threatened an existing private interest; the court followed *Hyser*[52] in concluding that parole proceedings were nonadversary in character, and therefore not an appropriate setting for due process protections, because of the identity of Board and prisoner interests in rehabilitation. Secondly, the *Menechino* court observed that even

46. *See* Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1518, 1547 (1972).

47. *See* cases cited note 45 *supra*.

48. The phrase "full panoply" has become a term of art in current due process analysis for the traditional array of trial-type procedural safeguards that are associated with criminal prosecutions, including but not limited to notice and hearing, right to counsel, right to disclosure of adverse evidence, right to confrontation and cross-examination, and right to a decision by an impartial tribunal. The term was first used in Hannah v. Larche, 363 U.S. 420, 442 (1960). *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480 (1972); United States *ex rel.* Johnson v. New York Bd. of Parole, 500 F.2d 925 (2d Cir. 1974).

49. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.16-.17 (1958). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

50. 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

51. *See* United States *ex rel.* Johnson v. New York Bd. of Parole, 500 F.2d 925 (2d Cir. 1974); note 53 *infra*.

52. 430 F.2d at 407.

if parole proceedings were adversary in nature, a prisoner had no right that was vulnerable in the proceeding, reasoning that only presently enjoyed rights should be accorded due process protection, and a prisoner seeking parole has no such right, but merely an "expectation" of freedom on parole.[53] By employing the flexible due process concept, however, the Supreme Court has held that the interests of convicts must be accorded due process protection at points both before and after the parole release interview—post-conviction sentencing,[54] prison disciplinary proceedings,[55] and parole revocation.[56] In *Morrissey v. Brewer*,[57] a landmark 1972 decision, the Court held that summary revocation procedures grievously affected a parolee's interest in retaining the conditional freedom of parole, causing significant loss to the inmate and damage to the government's economic[58] and societal[59] interests in rehabilitating him, and that some procedural due process therefore was required in the revocation proceeding. Chief Justice Burger's majority opinion noted at the outset that parole release had become an integral

53. One analysis of *Menechino* has characterized the distinction between rights that are presently enjoyed and rights that are merely "expectations" as "essentially the rigbt-privilege distinction in not-too-deceptive disguise." Comment, *The Parole Process*, 120 U. PA. L. REV. 282, 363 (1971). The Second Circuit apparently agreed with this critique in the 1974 decision in United States *ex rel.* Johnson v. New York Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), in which the majority described a due process distinction based on whether a right is "presently enjoyed" as "nothing more than a reincarnation of the rigbt-privilege dichotomy in not-too-deceptive disguise."

54. Mempa v. Rhay, 389 U.S. 128 (1967) (right to appointed counsel at post-conviction sentencing or probation revocation).

55. Wolff v. McDonnell, 94 S. Ct. 2963 (1974) (some due process rights attacb to prison disciplinary proceedings).

56. Morrissey v. Brewer, 408 U.S. 471 (1972) (minimal due process required in parole revocation proceeding); *see* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (*Morrissey* bolding may additionally require counsel at parole revocation proceeding).

57. 408 U.S. 471 (1972).

58. Releasing prisoners on parole is economical for the government, since the cost of supervising a parolee is much less than that of maintaining a prisoner. In 1967 the cost differential between parole and imprisonment in the federal correctional system was more than $1,500.00 annually per prisoner. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 194 (1967). Judge Celebrezze has suggested that the cost of imprisonment is so much greater than that of the parole system that the expense of additional judicially imposed procedural requirements will not lessen the government's economic motivation to parole as many prisoners as possible. Rose v. Haskins, 388 F.2d 91, 102 & n.16 (6th Cir. 1968) (dissenting opinion).

59. A numher of commentators have singled out parole procedures and administration as major causes for prisoner anxiety and frustration, because of the lack of consistency in administration and the absence of standards for release. At a miniinum these conditions would seem to work against rehabilitation by denying a prisoner an opportunity to identify the objectionable aspects of his record and to work to improve them. *See, e.g.*, Kastenmeier & Eglit, *supra* note 3, at 487; Rogge, *An Overview of Administrative Due Process*, 19 VILL. L. REV. 197, 198 (1973); Parsons-Lewis, *supra* note 47, at 1527.

part of the modern theory of rehabilitative penology, serving to "help individuals reintegrate into society as constructive individuals as soon as they are able."[60] Rejecting the right-privilege distinction as irrelevant to due process analysis, the Court first observed that the touchstone for procedural protections was whether an individual was condemned by a governmental proceeding to suffer "grievous loss." The Court then found that the conditional liberty of the parolee was substantially analogous to unqualified freedom, and that the termination of parole inflicted "grievous loss" upon the parolee. The Court concluded that society,[61] in addition to the prisoner, had an interest in avoiding erroneous revocation, and that a balancing of these interests required that the revocation hearing should be structured with due process safeguards that would allow it to remain informal, while assuring an accurate picture of the facts to the tribunal.[62]

## III. The Impact of Morrissey on Parole Release Proceedings

### A. *The Applicability of the APA—King v. United States*

In *King v. United States*,[63] a 1974 decision, the Seventh Circuit held that the Board of Parole was required to give a written statement of reasons for denial of parole because a parole release interview is an "agency proceeding" governed by section 555(e) of the APA.[64] In *King*, plaintiff prisoner brought a declaratory judgment action against the Board of Parole and other governmental authorities,[65] contending that the Board's refusal to state reasons for denial

60. 408 U.S. at 477.

61. Notes 59 & 60 *supra*; 408 U.S. at 484.

62. 408 U.S. at 489. The Court specified 6 procedural safeguards as the minimum of due process required in parole revocation proceedings: written notice of the claimed violation of parole; disclosure of evidence against the parolee; opportunity to be heard in person and present witnesses and documentary evidence; right to confront and cross-examine adverse witnesses; right to decision by an impartial tribunal; and a written statement by the fact-finder summarizing the evidence upon which the decision was based. *Id.*

63. 492 F.2d 1337 (7th Cir. 1974).

64. The current regulations of the Board of Parole require a parole release "hearing" or interview before a parole decision is made. The interview is informal and rarely lasts more than 10 to 15 minutes. Though the present regulations permit the inmate to be represented by counsel, the Board's administrative law judge may arhitrarily restrict the role of counsel, and few prisoners are in fact represented by counsel at interviews. In addition, prisoners are never given access to the institutional file upon which the parole decision is usually based. 39 Fed. Reg. 20029 (1974); Johnson, *supra* note 31, at 468-69. A description of a parole interview from the prisoner's perspective may be found in Scarpa v. United States Bd. of Parole, 468 F.2d 31, 34-35 (5th Cir. 1972).

65. Named as defendants were the Chairman of the United States Board of Parole, the Director of the Bureau of Prisons, the Attorney General of the United States, and the United States.

of his application for parole violated the due process clause[66] and section 555(e) of the APA.[67] The federal district court accepted defendants' argument that the administration of parole was committed to the unreviewable discretion of the Board, and dismissed the action.[68] The Seventh Circuit pointed out, however, that even if the Board's discretionary actions were unreviewable, the courts still had jurisdiction to determine whether the Board had contravened a separate statutory command that it state reasons for a discretionary decision.[69] Moreover, although the court declined to rest its decision on due process grounds because of the alternative ground of disposition available under the APA, it discussed the constitutional question at unusual length,[70] and concluded that, in view of *Morrissey*, a "substantial" due process argument now exists for requiring a statement of reasons for denial of parole.[71]

Turning to the statutory issue, the court reviewed the 1972

66. Note 4 *supra*.

67. Note 32 *supra*.

68. King v. United States, No. TH-C-126 (S.D. Ind. 1973). The order of dismissal and memorandum opinion by Noland, J., was not reported, and the present summary of the trial dismissal relies on the synopsis in the appellate opinion. The dismissal was predicated upon the rationale of Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967), which held that the Parole Board's exercise of discretion under 18 U.S.C. 4203(a) is not judicially reviewable. *See* notes 40-41 *supra* and accompanying text.

69. *Cf.* Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961) (federal prisoner may obtain review of alleged violation of constitutional rights by Board in declaratory judgment proceeding). *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 369-70 (1968).

70. The Seventh Circuit apparently relied in *King* on the principle articulated by Justice Brandeis in *Ashwander v. TVA* that a constitutional question will not be decided if it may be avoided by a "fair construction of statute." 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). Although the *King* court's extensive discussion of due process rights in parole proceedings is dictum, the length of the discussion gives it significance when compared to the terse treatment usually given to undecided constitutional issues by appellate courts. *See, e.g.*, Peters v. Hobby, 349 U.S. 331, 338 (1955). Another factor lending importance to the due process analysis in *King* is that the Seventh Circuit had previously construed *Morrissey* to indicate that "[a] residuum of constitutionally protected rights" remains after criminal conviction. United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973). Reviewing the post-conviction trend in current due process law in *King*, the court noted that the right-privilege distinction "has ceased being a touchstone" for the applicability of due process, and that the *Morrissey* and *Miller* decisions had recognized due process rights at points before and after the parole release hearing—parole revocation proceedings in *Morrissey*; prison disciplinary proceedings in *Miller*. The court apparently concluded that in view of *Morrissey* and *Miller* the rationale of *Menechino v. Oswald*, *see* notes 50-53 *supra* and accompanying text, was no longer persuasive, and that a "substantial argument" can now be made that at least minimal due process should attend parole denials. The court's discussion would seem to indicate that if the statutory ground of disposition had not been available, the court would have recognized the due process right to a statement of reasons for parole denial, though this position of course cannot be ascertained. 492 F.2d at 1342-43.

71. *Id.*

recommendations of the Federal Administrative Conference[72] and found that the current trend was toward greater procedural safeguards in parole release hearings. The court observed, nevertheless, that a statutory mandate for a requirement of reasons was necessary before plaintiff could succeed. Examining the definitional provisions of the APA, the court then concluded that the Board of Parole was a governmental agency within the purview of the Act.[73] An analysis of earlier decisions holding portions of the APA inapplicable to the Board's proceedings persuaded the court that the holdings of *Hyser*[74] and *Hiatt*[75] extended no further than precluding the applicability of the adjudication and judicial review portions of the Act.[76] Recognizing that the relationship of section 555(e) to parole release decisions therefore posed a question of first impression, the court looked to the language of the statute and the congressional intent behind it to ascertain the extent of its coverage. The express terms of section 555(e) required any agency that denied a written application made "in connection with any agency proceeding" to provide a brief statement of the ground for denial. Finding that the federal parole proceedings are initiated by a written application from the prisoner,[77] the court then reached the controlling issue: whether a parole release hearing or interview is an "agency proceeding" within the scope of section 555(e). The court determined that, in light of the legislative purpose for its inclusion in the APA, section 555(e) should apply to all types of agency decision processes, whether formal or informal and whether or not based upon a "hearing."[78] Since the parole release interview was an integral part of the Board's procedure in reaching final disposition of a parole application,[79] the court concluded that the hearing fell within the scope of section 555(e) and that the Board therefore was required to provide the affected prisoner with a short written statement of the reasons for denial of his parole application.[80]

72. *See* material cited note 35 *supra*.
73. *See* notes 11 & 22 *supra* and accompanying text.
74. Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).
75. Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949).
76. *See* notes 22-28 *supra* and accompanying text.
77. *See* note 31 *supra*.
78. *See* note 64 *supra*.
79. *Id.*
80. The court expressed concern that the requirement of providing a statement of reasons should not become a burden on the Board's decision process that would delay delivery of parole decisions, and directed the district court to retain jurisdiction over the timing of the delivery of the statement so that communication of the decision itself to inmates would not be impeded. 492 F.2d at 1345 n.27. The court's interest in the administrative practicality of the newly imposed requirement may have been prompted by a recent commentator's

### B. *The Applicability of Due Process—Scarpa v. United States Board of Parole and United States ex rel. Johnson v. New York Board of Parole*

In 1973, a divided Fifth Circuit concluded in *Scarpa v. United States Board of Parole*[81] that due process does not attach to parole release proceedings because a prisoner who seeks parole has no presently enjoyed right that may be injured in a parole release proceeding, but merely a "possibility of conditional freedom."[82] Scarpa alleged that the Board had denied a fair hearing to him by placing undue emphasis on his past criminal record in denying his parole application. He contended that the Board could not act in a manner completely lacking in due process, and that the courts should not insulate the Board from responding to charges of abuse of discretion. On first hearing the majority held that the precedents for applying due process safeguards to parole revocation proceedings were persuasive authority for the conclusion that "at least something other than an absolute unbridled exercise of discretion by the Board" is required in parole release proceedings.[83] Judge Gewin dissented[84] vigorously, however, arguing that parole was a privilege, not a right, and that therefore parole matters were not subject to judicial review, and that recoguizing due process rights in parole release proceedings would inundate the courts with prisoner lawsuits.[85] On rehearing *en banc*,[86] Judge Gewin's majority opinion reversed the first decision, but articulated different grounds from those in his dissent. Though the *en banc* majority did not cite *Menechino v. Oswald*[87] as authority for its reasoning, it relied on factors similar to the grounds of the *Menechino* decision in holding that no due process applies to parole release proceedings.[88] The majority noted, first, that due process applies only in proceedings that may affect a

observation about the need for a balanced approach to reform of parole procedures:

> [T]he likely practical consequences of any procedural reform ought to be kept squarely in mind. The United States Board of Parole presently conducts approximately 12,000 hearings per year, and it is of the highest importance that it make well-considered decisions very promptly. Any "reform" that distracted the Board from this primary responsibility would be a step in the wrong direction.

Johnson, *supra* note 32, at 460.

81. 468 F.2d 31 (5th Cir. 1972), *rev'd*, 477 F.2d 280 (*en banc*), *cert. granted, vacated and remanded for consideration of mootness*, 414 U.S. 809 (1973).

82. 477 F.2d at 282.

83. 468 F.2d at 37.

84. 468 F.2d at 39.

85. *Id. Contra*, note 40 *supra*.

86. 477 F.2d 278 (5th Cir. 1973) (*en banc*). The *en banc* opinion was delivered after the Supreme Court had announced the *Morrissey* decision.

87. *See* notes 50-53 *supra* and accompanying text.

88. *Id.*

presently enjoyed right,[89] and secondly, that parole proceedings are not adversary in character.[90] Reasoning that no due process is necessary until *after* the government confers a benefit such as parole release, the *en banc* opinion stated that "[i]f the Board refuses to grant parole, Scarpa has suffered no deprivations."[91] Judge Tuttle's cogent dissent[92] suggested that the majority had misconstrued *Morrissey* by directing its analysis toward the existence of a present benefit, rather than looking to whether denial of parole inflicted "grievous loss" on a prisoner. He further observed that *Morrissey* supported the holding of the first hearing that arbitrary and unfair procedures of the board of parole are generally subject to court review on due process grounds, arguing that the basic language of *Morrissey* was equally applicable to both parole revocation and parole release.[93]

In *United States ex rel. Johnson v. New York Board of Parole*,[94] the Second Circuit distinguished its holding in *Menechino v. Oswald*[95] and held that due process entitles a prisoner in the state correctional system to a written statement of reasons for the denial of his parole application. The opinion of the federal district court in *Johnson*[96] had refused to follow *Menechino* or *Scarpa* and had

89. *Compare* Menechino v. Oswald, 430 F.2d 403, 407-08 (2d Cir. 1970) *with* Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir. 1973).

90. *Id.*

91. 477 F.2d at 282.

92. Scarpa v. United States Bd. of Parole, 477 F.2d 278, 284 (5th Cir. 1973) (Tuttle, J., dissenting).

93. *Id.* at 287.

94. 500 F.2d 925 (2d Cir. 1974).

95. 430 F.2d 403 (2d Cir. 1970).

96. United States *ex rel.* Johnson v. New York Bd. of Parole, 363 F. Supp. 416 (E.D.N.Y. 1973). A number of federal district courts have recognized a due process right to a statement of reasons for denial of parole within the past two years. Application of Candarini, 369 F. Supp. 1132 (E.D.N.Y. 1974) (federal parole proceedings); Childs v. United States Bd. of Parole, 371 F. Supp. 1246 (D.D.C. 1973) (federal parole proceedings); United States *ex rel.* Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973) (federal parole proceedings); Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973) (dictum) (state parole proceedings). Only one federal district court has refused to recognize the due process right to a statement of reasons. Barradale v. United States Bd. of Parole, 362 F. Supp. 338 (M.D. Pa. 1973) (rationale analogous to *Menechino v. Oswald*). The decision in *Childs v. United States Bd. of Parole, supra*, contains the most sweeping language of any of the district court opinions except *Johnson*, stating that "it seems fair to say that the slate [with regard to the parole system] has been all but wiped clean by Morrissey v. Brewer." 371 F. Supp. at 1247. The *Childs* court found numerous areas of potential abuse in current parole administration, including practices allowing filing errors and omissions, cases of confusion in parole decisions stemming from instances of mistaken identity, possible reliance on outdated and superseded information, reliance on unsubstantiated assertions, and reliance on conflicting and in some cases not apparently reliable psychological testing data and information. 371 F. Supp. at 1248. The relief granted in *Childs* also went beyond that yet decreed by any federal or state court. The court found that due process in parole proceedings requires that the Board give narrative written statements of reasons for denial of parole, based upon the salient characteristics of

recognized a due process right to a statement of reasons, holding that a prisoner has a legally cognizable "right" to parole when there is a substantial correlation between his situation and the terms of the state parole statute.[97] While the Second Circuit majority did not adopt this novel position[98] that a prisoner may have a "right" to parole, the appellate opinion distinguished *Menechino* on two grounds. First, petitioners in *Menechino* had been interested principally in obtaining the right to be represented by counsel and the right to cross-examination in parole release hearings, and the *Menechino* court had not considered the question of granting partial relief in the form of a right to a statement of reasons for parole denial. Secondly, the *Johnson* court felt that *Morrissey* cast "grave doubt" upon the validity of *Menechino* because of the unequivocal rejection in *Morrissey* of the right-privilege distinction; the court recognized that the *Menechino* requirement that a right must be presently enjoyed before meriting due process safeguards was "nothing more than a reincarnation of the right-privilege dichotomy in a not-too-deceptive disguise."[99] The court did not overrule

each case; that the Board revise its regulations to allow prisoners a right of access and reply to the information upon which the parole decision is based; and that the Board distribute explanatory material to prisoners to guide them in understanding the factors upon which the Board relies in reaching parole decisions. 371 F. Supp. at 1248. In this context, see also Freeman v. Schoen, 370 F. Supp. 1144 (D. Minn. 1974) (denial of opportunity for parole to qualified prisoner because of nature of crime is abuse of discretion).

97. 363 F. Supp. at 418.

98. No other reported opinion has adopted the position that a prisoner has a legal "right" to parole when a substantial correlation exists between the prisoner's situation and the terms of the parole statute, though the decision in Freeman v. Schoen, 370 F. Supp. 1144 (D. Minn. 1974), could be read to support the theory. In *Freeman*, a prisoner who was eligible for release was refused an opportunity for parole by the state board because of the highly publicized nature of the crimes he had committed, the possibility that his release would foster adverse community sentiment, and the nature of the crimes he had committed (grand theft). The court found that if the prisoner were denied an opportunity for parole in the first instance, he would never be eligible for parole release again under the community work-detention program sponsored by the state correctional system. The court reasoned that depriving the prisoner of his only chance for parole for the stated reasons, when he was otherwise qualified, constituted a "grievous loss" within the purview of the *Morrissey v. Brewer* holding, and that the refusal to grant parole to the prisoner was therefore an abuse of discretion.

Though the district court opinions in *Johnson* and *Freeman* are in accord with the weight of authority in recoguizing that due process rights exist in parole proceedings, *see* note 96 *supra*, the proposition that a prisoner can have a "right" to parole would seem contrary to the analysis used in *Morrissey*, which was directed toward evaluating the practical effect of parole revocation rather than abstractly classifying the legal interests involved. Moreover, asserting that a right to parole exists seems to resurrect the terms of the right-privilege doctrine, *see* notes 39-46 *supra* and accompanying text, and the Supreme Court has rejected that doctrine hy name. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

99. 500 F.2d at 928. Compare this language with the analysis of *Menechino v. Oswald* in Comment, *The Parole Process*, 120 U. PA. L. REV. 282, 361-63 (1971). *See* note 50 *supra*.

*Menechino*, however, observing that it had established the valid principle that an inmate being considered for parole was not entitled to a full array of due process rights. Having distinguished *Menechino*, the court applied a three-step analysis similar to that used in *Morrissey*.[100] It initially noted that the difference between incarceration and parole release meant that the prisoner had an enormous interest at stake in the parole release proceeding. Turning to an evaluation of the governmental aspect, the court characterized the board of parole as "an extraordinarily powerful administrative body, possessing vast discretionary authority."[101] and stressed that the board had failed to publish any criteria that would assure responsible exercise of its discretion. The court concluded that a balancing of these factors indicated that "some degree" of due process attached to parole release hearings, extending at least to a statement of reasons for denial of parole in view of the minimal burden that the requirement of reasons would impose on the board's administrative machinery.[102] In its discussion of the policies supporting a statement of reasons, the court dwelled at length on the importance of judicial review of parole proceedings, noting three instances in which review could correct an abuse of discretion in parole decision—when the decision was inconsistent with statutory directives, based on improper criteria, or not supported by evidence in the prisoner's file. The court further observed that a requirement of written reasons promoted more thorough analysis by a decisionmaker, and gave the affected prisoner an opportunity to improve his record and better his chances for parole. The court concluded that a final benefit of the requirement might be the creation of a body of written precedents, which could serve the threefold purpose of promoting consistency in board decisions, providing a basis for critical appraisal of the board's efficacy, and assisting courts in a just exercise of their sentencing powers.

## IV. Critique—Due Process and Statutory Rights in Parole Release Proceedings

### *A. Inadequacy of the Federal APA*

By holding in *King v. United States* that the United States

100. Notes 57-63 *supra* and accompanying text.

101. 500 F.2d at 929.

102. The court reasoned that the administrative burden would be small because of two factors: first, the assumption that parole is granted in a majority of cases and that statements of reasons would be required only in a minority of cases; secondly, the failure of the state board of parole to make any attempt to show that the requirement would impose a significant burden on the state. *But see* material quoted note 80 *supra*.

Board of Parole is subject to section 555(e) of the APA, and must give a written statement of reasons for denial of a parole application, the Seventh Circuit reached a result consonant with the positions of the commentators[103] and apparently with that of the Board itself.[104] As the Second Circuit indicated in *Johnson*, the requirement of a statement of reasons discourages arbitrary decisions by assuring that proper factors were considered in arriving at the decision, and provides a record from which prisoners may seek judicial review of denials made on improper grounds.[105] Nevertheless, the straightforward ease with which the *King* court found the Board subject to section 555(e) raises the question why this position could not have been reached much earlier in the history of the APA. Though the increasing number of state and federal decisions recognizing post-conviction rights may have provided a necessary milieu for the holding, a review of *Hiatt*[106] and *Hyser*[107] suggests that the courts previously have relied upon an unarticulated premise that the Board's functions and the scheme of the APA are disjoint—the APA, designed to systematize the proceedings of agencies that regulate and administer to free citizens, was apparently deemed unsuitable to apply to the activities of the Board, which exercises a custodial, discretionary power over a captive population. As a perceptive commentator[108] has remarked, the premise that administrative action is committed to agency discretion and is unreviewable usually derives from the judicial conclusion that "on practical and policy grounds an agency determination should not be subject to direct review."[109] In the Board's case, such practical and policy grounds include the fear that applying the APA would put an impossible burden on its administrative machinery,[110] the belief that the Board's decisions

103. *See* note 31 *supra*.

104. The Board recently has completed a revision of its regulations, providing *inter alia* for a statement of reasons for parole denial, more specific criteria for parole release, and a prisoner's right to be represented by counsel and present evidence. 39 Fed. Reg. 20029, 23261 (1974). As of September, 1974, however, these regulations were effective only in the Board's Northeast, South Central and Western regions. *Id.* At least one federal district court has taken a skeptical attitude toward the constitutional adequacy of the new regulations with regard to the statement of reasons for denial, stating that the decision on the sufficiency of the statement of reasons should be postponed until the Board's revision of its regulations had progressed beyond the stage of a pilot program, and encouraging the Board to provide better statements. Battle v. Norton, 365 F. Supp. 925 (D. Conn. 1973).

105. 500 F.2d at 931-33.

106. Hiatt v. Compagua, 178 F.2d 42 (5th Cir. 1949).

107. Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).

108. Saferstein, *supra* note 69 at 368.

109. *Id.*

110. Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1949).

are based on unique expertise and administrative perspective,[111] and the judicial desire to avoid a deluge of prisoner requests for review of parole decisions.[112] Notwithstanding the undeniable need for improvement of Board procedures,[113] an examination of the potential results of *King v. United States* suggests that the variance between the Board's functions and the framework of the APA, so long unquestioned by the courts, should remain a relevant factor in reform efforts. For example, section 555(b) of the APA (right to retained counsel in agency proceedings)[114] and parts of section 552 (the "Freedom of Information" Act)[115] seem equally applicable to the Board under the *King* analysis. Moreover, applying each section to parole release proceedings would seem to continue the trend of increased procedural protection of prisoner interests by subjecting the Board's actions to adversary examination and judicial inspection.[116] Yet, in some circumstances, these sections and section 555(e) could deprive the Board of desirable administrative flexibility and could further burden the administrative machinery through which it annually must reach thousands of parole decisions of critical importance. The Board may have valid reasons for withholding a statement of reasons for denial of parole,[117] but section 555(e) leaves no

111. Hyser v. Reed, 318 F.2d 225, 242 (D.C. Cir. 1963).

112. Hiatt v. Compagna, 178 F.2d 42, 46 (5th Cir. 1949).

113. There are no defenders of the parole system among current commentators. *See, e.g.*, Johnson, *supra* note 31, at 469-70; DAVIS, *supra* note 31; Kastenmeier and Eglit, *supra* note 3, at 483-84; Parsons-Lewis, *supra* note 46, at 1520.

114. Administrative Procedure Act § 6(a), 5 U.S.C. § 555(b) (1970) provides that when a person is "compelled to appear" before an agency or its representative he is entitled to be accompanied by counsel. Though the relevance of the section may seem problematic in view of the recent revision of Board regulations allowing counsel to be present at parole hearings, see note 104 *supra*, a separate statutory right would not be entirely moot since the Board's new regulations are not effective in all federal prisons. Additionally, recognition of a statutory right could prevent the interest of a prisoner in being represented by counsel from being eliminated by administrative fiat. The premise for applicability of section 555(b) derives from the language of the current regulations that when a prisoner has applied for parole he "shall" appear before the Board's administrative law judge for a hearing. The mandatory language of the regulation would seem to satisfy the statutory requisite that a party be under compulsion to appear. 39 Fed. Reg. 20029-30 (1974). *But see* Johnson, *supra* note 31, at 481.

115. Administrative Procedure Act § 3(b)-(c), 5 U.S.C. §§ 552(a)(2), (4) (1970), require each agency subject to the Act to make availahle for public inspection, *inter alia*, a record of decisions made by the agency and statements of policy and interpretations made by the agency but not published in the Federal Register. Another requirement is a public record of votes cast by each member of the agency in agency proceedings; in the context of the Board, this provision apparently would require a record not only of parole decisions made by administrative law judges, but of the agency review within the Board of parole decisions. 39 Fed. Reg. 20029, 20030 (1974).

116. *Cf.* King v. United States, 492 F.2d 1337, 1342 (7th Cir. 1974) (administrative trend toward greater procedural safeguards in parole proceedings).

117. For example, it may be desirable to withhold disclosure of reasons when parole is

discretion for doing so. Recognition of a statutory right to counsel in parole hearings, or to public examination of Board files, could slow drastically both the decision process and the delivery of decisions to prisoners, engaging the Board in constant litigation over discovery of its files and diverting personnel from decision-making. Though the goal of making the Board's procedures more open to prophylactic public and judicial scrutiny is commendable and timely, the APA may thus prove to be only a speciously attractive means to the end. The critical position of the Board in the area of correctional penology calls for a finer balance among the interests of prisoner rehabilitation, the safety of the general public, and administrative efficiency. New legislation, tailored to the unique aspects of the Board's function, may be the most promising course.[118] Alternatively, the courts may find a more apposite vehicle for the protection of prisoner and public interests in the procedural application of the flexible due process doctrine.[119]

### *B. Suggested Role of Due Process in Parole Release Proceedings*

The recognition in *United States ex rel. Johnson v. New York Board of Parole* that a degree of due process attaches to parole release proceedings fills a significant hiatus in the range of post-conviction rights.[120] Because it is based on constitutional rather than statutory grounds, the *Johnson* decision will probably have a broad impact on other state parole boards, since few had adopted the practice of giving reasons for parole denials as of 1973.[121] Under the authority of *Scarpa*, however, no due process is yet recognized in federal parole release proceedings, though the due process question, with regard to requiring a statement of reasons, may be rendered

denied on psychiatric grounds, if disclosure would be harmful to the applicant. *See* Monks v. New Jersey State Parole Bd., 58 N.J. 238, 247-48, 277 A.2d 193, 197-98 (1971).

118. Increasing congressional attention has been directed toward parole reform in recent years; several major bills to overhaul the parole system have been introduced in recent terms of Congress, though none have been adopted. See Kastenmeier and Eglit, *supra* note 3, at 480 & n.13.

119. *Cf.* Van Alstyne, *supra* note 49, at 1454: "[A] right to procedural due process is desirable; a hearing can expose to public view arbitrary or inequitable grounds for a decision, thus facilitating a political remedy even where no legal remedy is available, and may serve to establish the channels for an individual to present his viewpoint to otherwise inaccessible administrators." It should be noted, however, that the availability of the APA as a ground of decision may limit recognition of due process rights by federal courts. *Cf.* notes 70, 114-15 *supra*.

120. *See* notes 51, 54-57 *supra* and accompanying text.

121. As of 1973 there were 40 state parole boards that did not state reasons for denial of parole applications; 26 did not even inform the inmate directly of the decision to deny his application. Kastenmeier & Eglit, *supra* note 3, at 481-82.

moot at the present time by the *King* decision and the Board's recently revised regulations.[122] The questions nonetheless remain whether the split between the *Scarpa* and *Johnson* holdings may be reconciled, and if not, which rationale should prevail, since due process requirements other than written reasons may be germane to parole release proceedings.[123] A review of the analysis used in *Scarpa*[124] suggests that the Fifth Circuit majority relied on virtually the same factors previously set out in *Menechino v. Oswald*[125] by the Second Circuit to conclude that no due process obtained in parole release proceedings. As in *Menechino*, the *Scarpa* court emphasized that a prisoner has no cognizable due process right unless he is presently enjoying some governmental benefit; as in *Menechino*, the *Scarpa* court stressed that even if a right existed, parole proceedings would not threaten it because they are nonadversary in character.[126] In view of the Second Circuit's apparent repudiation in *Johnson* of the *Menechino* rationale,[127] if not the result, the only possible ground of reconciliation between *Scarpa* and *Johnson* may be that *Scarpa*, like *Menechino*, holds that the "full panoply" of due process rights does not apply to parole release proceedings. None of the opinions in *Scarpa* indicate that the Fifth Circuit considered the question of limited relief in the form of a requirement of reasons for the parole decision, and the *Johnson* court distinguished *Menechino* on this ground.[128] Since at least one other circuit[129] has found *Scarpa* persuasive on the collateral issue of the discretionary character of the Board's duties,[130] however, a choice between the *Scarpa* and *Johnson* approaches to judicial treatment of parole procedures seems inevitable. From this perspective, *Johnson* appears to be more consistent analytically with the policies relied on in *Morrissey*, which pointed first, toward a realistic evaluation of the impact of

122. *See* 104 *supra*.

123. *See* Childs v. United States Bd. of Parole, 371 F. Supp. 1246 (D.D.C. 1973) (minimum due process in parole proceeding includes fully reasoned decision, right of access to information upon which decision is based, and published criteria for decision).

124. *See* notes 88-91 *supra* and accompanying text.

125. *Id.*

126. *Id.*

127. United States *ex rel.* Johnson v. New York Bd. of Parole, 500 F.2d 925 (2d Cir. 1974).

128. *Id.*

129. United States Bd. of Parole v. Merhige, 487 F.2d 25 (4th Cir. 1973), held that inmates in juvenile correctional institutes may not obtain discovery of Board files and other information about its performance of statutory duties. The Fourth Circuit noted specifically that the Supreme Court's disposition of *Scarpa* (the Court granted certiorari, vacated the decree and remanded the case for a consideration of mootness, 414 U.S. 809 (1973)) did not detract from its persuasiveness. 487 F.2d at 30.

130. *Id.*

an adverse parole decision on the prisoner, and secondly, toward recognition of the social interest in avoiding inaccurate decisions in parole proceedings.[131] The *Johnson* court discarded the distinction based on whether a right is presently enjoyed, relied on in *Menechino* and *Scarpa*, as a throwback to the now rejected right-privilege doctrine; this renunciation would seem the more persuasive since both *Menechino* and *Johnson* were decided by the same circuit.[132] The conclusion in *Johnson* that a prisoner, irrespective of whether his right is "presently enjoyed," has an interest at stake in parole proceedings that merits due process protection because of the difference between continued incarceration and parole release seems appropriate both in light of *Morrissey*[133] and common sense.[134] Finally, the thorough appraisal in *Johnson* of the need to structure the discretionary powers of parole boards, leading to the conclusion that the government itself has an interest in improving parole procedures, is in accord with *Morrissey*[135] and the weight of scholarly authority.[136]

In view of the *Johnson* holding that "some degree" of due process attaches to parole release proceedings, the question arises whether safeguards in addition to a written statement of reasons may be appropriate. Future litigation in this area seems certain to include the adequacy of the written statement of reasons—how brief may a statement be and still satisfy the due process minimum?[137] The *Johnson* opinion discussed ten separate policy justifications for a reasons requirement,[138] including, *inter alia* ,facilitation of judicial

131. *See* notes 57-62 and accompanying text *supra*.

132. In addition, both the *Menechino* and *Johnson* opinions were written by Judge Mansfield. United States *ex rel.* Johnson v. New York Bd. of Parole, 500 F.2d 925 (2d Cir. 1974); Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970).

133. *Cf.* Scarpa v. United States Bd. of Parole, 477 F.2d 278, 284 (5th Cir. 1973) (dissenting opinion); Menechino v. Oswald, 430 F.2d 403, 415 (2d Cir. 1970) (dissenting opinion).

134. *See* Parsons-Lewis, *supra* note 46, at 1540.

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

136. Materials cited note 113 *supra*.

137. This issue was litigated, though not decided, with regard to the current Board regulations in Battle v. Norton, 365 F. Supp. 925, 930-31 (D. Conn. 1973). The prisoner involved in *Battle* had received the explanation that his parole application had been denied because his release would "depreciate the seriousness of the offense." *Id.* at 926. The court took notice of the experimental status of the Board's program of stating reasons for denial of parole, and declined to evaluate the adequacy of the statement while the program was still in the pilot stage. Though the court denied any relief to the prisoner, it strongly encouraged the Board to continue improving its procedures. *Id.* at 932. *But see* Application of Wilkerson, 371 F. Supp. 123 (E.D.N.Y. 1973) (cursory statement of reasons permissible in context of institutional file).

138. The policy justifications articulated by the *Johnson* court are: (1) the statement of reasons provides a basis for judicial review; (2) the statement protects against arbitrary and capricious decision-making; (3) the statement discloses the grounds upon which the

review, of thoughtful decision-making and of prisoner rehabilitation. Few of these goals would seem served by a statement to a prisoner such as, "Your release at this time would depreciate the seriousness of the offense."[139] A more appropriate result may be judicial extension of the reasons requirement into a fully reasoned decision from the Board's administrative law judge. Requiring a reasoned decision would promote the development of a "body of rules, principles and precedent"[140] that would provide guidance for recurring parole situations[141] while informing the bench and the public of the criteria actually employed by the Board in reaching parole decisions.[142] The *Johnson* decision therefore establishes a basis for future judicial action that could upgrade significantly the quality of the Board's decision-making. The majority opinion in *Morrissey* suggests another due process right that could contribute to the same result—the disclosure to the prisoner of adverse information in the file upon which the decision will be made.[143] The majority in *Morrissey* stressed that the need exists to provide the parole decision-maker with an accurate knowledge of the facts relevant to the proceeding;[144] that rationale would seem equally applicable to parole release decisions.[145] Disclosing adverse information to a prisoner may thus contribute to better parole decisions by allowing an opportunity to rebut untrue or misleading information while contributing to the prisoner's rehabilitation by providing a fully disclosed factual basis for adverse decisions.[146]

Questions of due process in parole proceedings should not, however, be decided without an awareness of their administrative im-

decision was made, informing the public; (4) the statement discourages decisions that are legislative in nature, are inconsistent with statutory directives, are based on improper criteria, or have no basis in the prisoner's file; (5) the statement promotes a more thoroughly reasoned decision; (6) the statement relieves prisoner frustrations by letting them know how they might more successfully attempt to obtain parole; (7) the statement could encourage the board of parole to develop a body of "rules, principles, and precedents" that would promote consistency in decisions; (8) the statement would provide a basis for critical appraisal of parole policies by experts in the area; (9) the statement could serve as a guide to trial courts in the exercise of their sentencing discretion by indicating the probability of parole in particular cases; (10) the statement poses no significant burden on the administrative machinery of the board of parole. 500 F.2d 925 (2d Cir. 1974).

139. *See* note 138 *supra*.

140. United States *ex rel.* Johnson v. New York Bd. of Parole, 500 F.2d 925, 933 (2d Cir. 1974).

141. *Id.*

142. *Id.*

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

144. *Id.* at 484.

145. *Cf.* Scarpa v. United States Bd. of Parole, 477 F.2d 278, 287 (5th Cir. 1973) (dissenting opinion).

146. *Cf.* Johnson, *supra* note 31, at 469.

pact.[147] The Board of Parole makes more than 12,000 decisions annually[148] and the imposition of due process rights that could overburden the Board's administrative machinery may prove counterproductive by resulting in serious delays in delivery of parole decisions.[149] For this reason the recognition of mandatory rights to counsel, confrontation and cross-examination, compulsory attendance of witnesses, or complete discovery of Board files would seem problematic in light of the administrative burdens they could impose. The advantage of due process analysis in this sensitive area, in contrast to proceedings under the APA, is that the flexible application of due process exemplified in *Morrissey* offers a more appropriate method of balancing the interests of the prisoner, the government, and the general public in reaching prompt and correct parole decisions through more efficient use of the existing administrative framework.

## V. CONCLUSION

Recent decisions of the Supreme Court have established that due process attaches to some post-conviction proceedings, but have not considered whether prisoner interests in parole release proceedings merit due process safeguards. In view of the leading decision in *Morrissey v. Brewer*, the split among federal circuits on the issue of due process in parole release should be resolved by recognizing that limited due process rights apply in release proceedings. The more pressing issue of which safeguards should be allowed remains to be solved, however, by an appropriate balance of the prisoner, public and governmental interests—the degree to which a particular due process right may improve the decision-making process, against the extent to which it burdens and slows the Board's functioning. This Comment has suggested that the availability of this balancing procedure renders due process analysis superior to the APA as a means of reforming parole administration, and has suggested limited due process rights that promise to improve the quality of parole release decisions.

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147. Materials quoted note 80 *supra*.
148. *Id.*
149. *See generally* Johnson, *supra* note 31, at 469-70.