Judicial Review of Parole Release Decisionmaking

Thomas B. Grier
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/iustitia

Part of the Criminal Procedure Commons, Criminology and Criminal Justice Commons, Fourteenth Amendment Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/iustitia/vol4/iss1/1

This Article is brought to you for free and open access by Digital Repository @ Maurer Law. It has been accepted for inclusion in IUSTITIA by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
An inmate at a federal penal institution "is entitled only to be released after full service of his sentence less good time earned during incarceration." He or she is not entitled to parole, for parole is not a right but a privilege, a matter of "legislative grace". The United States Board of Parole has "absolute discretion" in deciding whether and when to grant parole. The judiciary will not interfere with the Board, as "courts are without power to grant a parole or to determine judicially eligibility for parole." And since the Board is statutorily authorized to exercise broad discretion, and its "conclusions . . . are based upon numerous determinations of fact, and, more important, judgment, which in turn are influenced by personal observations that cannot be brought before a reviewing court," a "hands off" approach to judicial review of parole release decisionmaking has seemed warranted.

If, however, the above reasoning can be demonstrated to be invalid, and other forces militating toward a "hands off" policy are shown to be less than compelling, then non-reviewability of Board determinations would be neither desirable nor possible.

**Entitlement theory**

Although an inmate may not be "entitled" to leave prison prior to the expiration of his judicially imposed sentence (less good time), Congress has provided him a means for doing so. The United States Board of Parole "may in its discretion authorize the release of [a prisoner] on parole" if it concludes that "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society. . . ."

Parole Board statistics indicate that in fiscal 1970 nearly forty percent of the releases from federal penal institutions were parolees. Board figures are fiscal years 1966-1970 demonstrate that from 41.5% (1966) to 56.2%
(1969) of those annually considered for parole were in fact paroled.\textsuperscript{11} Percentages from fiscal 1972 illustrate that average time served for all prisoners is slightly above one-half of the judicially imposed sentence, while inmates released on parole serve, on an average, 37.9\% of their sentences.\textsuperscript{12}

Thus one may fairly conclude that prisoners have a legitimate expectation of gaining release on parole. Although it has been argued that the above-mentioned figures demonstrate a reasonable reliance on parole — such reliance taking on the color of a right\textsuperscript{15} — it is doubtful that the judiciary could find that such an expectation, based upon statistics unrelated to any particular individual, is an interest to be accorded the full panoply of due process protections. But, at a minimum, considerations of "rightness and fairness"\textsuperscript{14} should require the institution of "fair" procedures and judicial review of Parole Board decisionmaking.

Although parole is not considered an "entitlement", it is viewed as "an integral and vigorous part of our modern penological system",\textsuperscript{15} an aspect of prison discipline and hence a part of the "rehabilitative process".\textsuperscript{16} As such, parole has a direct and significant impact upon prison behavior. To ensure that inmates are treated fairly, which is essential for prison morale, discipline and rehabilitation,\textsuperscript{17} parole release decisionmaking must be efficient as well as equitable. To ensure that it is, courts must be available for review of parole release decisions.\textsuperscript{18}

Several important interests are safeguarded by judicial review: the government's interest in efficiency and the ends promoted by fairness; society's interest, generally, in the fair treatment of individuals and the avoidance of arbitrary decisions or decisions based on erroneous information; and the prisoner's interest, at least his "legitimate expectation", in conditional liberty.\textsuperscript{19} Thus, protection of these interests and basic fairness strongly suggest that abandonment of the "entitlement" theory is appropriate.

\textit{Rejection of the "right-privilege" distinction}

Determination of "what procedures due process may require under any given set of circumstances"\textsuperscript{20} depends, not upon whether a right or privilege is at stake,\textsuperscript{21} but upon the "extent to which an individual will be condemned to suffer grievous loss."\textsuperscript{22} Traditionally due process protections obtain when one is about to be "deprived" of an "interest" which is "presently enjoyed".\textsuperscript{23} Inmates seeking parole may not fit into this framework,\textsuperscript{24} for deprivation connotes something presently enjoyed, which is about to be lost "because of what the government is doing to him".\textsuperscript{25} A prisoner's interest in parole — "conditional liberty" — seems at best to be a legitimate expectation, something to which due process has not been heretofore extended.\textsuperscript{26}

Nevertheless a prisoner's interest in prospective parole has been accorded due process protections by the judiciary.\textsuperscript{27} Relying on \textit{Morrissey v. Brewer} (requiring that minimal due process safeguards attach during the parole revocation process),\textsuperscript{28} \textit{United States ex rel. Johnson v. Chairman of New York State Board of Parole,}\textsuperscript{29} held that "a prisoner's interest in prospective parole or 'conditional entitlement' " must be treated, in like fashion, as a
parolee's interest in continued conditional freedom. "To hold otherwise
would be to create a distinction too gossamer-thin to stand close analysis.
Whether the immediate issue be release or revocation, the stakes are the
same: conditional freedom versus incarceration."\textsuperscript{30}

\textit{Childs v. United States Board of Parole}\textsuperscript{31} applied a similar rationale:

When we examine the nature of the interest of the parolee facing
revocation and that of the parole applicant in the light of the
ultimate effect of the Parole Board's determination, it appears
obvious that the difference is not enough to exclude the applicant
from due process protections. This is so simply because the stakes
are the same, incarceration or conditional freedom.\textsuperscript{32}

\textit{Candarini v. Attorney General of the United States}\textsuperscript{33} looked to the impact of
a parole denial:

To the inmate a negative decision from the Board surely condemns
him to suffer grievous loss. The inmate's interest in conditional
liberty requires that minimum due process attach.\textsuperscript{34}

In accord is \textit{Bradford v. Weinstein}.\textsuperscript{35}

\textit{Johnson, Childs, Candarini} and \textit{Bradford} upon the substantially
similar interests of the parole applicant and the parolee in conditional
liberty and the "grievous loss" inflicted by an adverse Board decision. Thus,
due process procedural protections were held to apply. The \textit{Johnson}
analysis, however, may be viewed as an overreaching of \textit{Morrissey}, leaving
the former's underlying rationale subject to attack. If one looks simply to
the interests at stake, one finds much more than a conceptual difference
between continued incarceration (for the unsuccessful parole applicant) and
revocation of parole (for the unsuccessful parolee).\textsuperscript{36} A much better
approach, that used by \textit{Johnson}, is to examine the "nature"\textsuperscript{37} of the interest
— conditional liberty. When the question is so considered, \textit{Johnson} is
correct that the stakes in conditional liberty, for the parole applicant and
parolee, are not "qualitatively and quantitatively different".\textsuperscript{38}

If \textit{Johnson}'s reading of \textit{Morrissey} is correct, the next question is: What
process is due? \textit{Goldberg v. Kelly}\textsuperscript{39} and \textit{Cafeteria \\& Restaurant Workers' Union v. McElroy},\textsuperscript{40} provide the method by which an answer is obtained:

Consideration 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 interest involved as well as of
the private interest that has been [or will be] affected by
governmental action.\textsuperscript{41}

The interest of the government, and the Board of Parole, is primarily
efficiency, as it always is. But since parole is an important part of the
penological system (discipline, morale and rehabilitation), both the
government and the Board have an interest in fair treatment of inmates.
Parole is also an alternative to incarceration, which is expensive; therefore,
government has a financial interest in parole. And, pursuant to its enabling
legislation,\textsuperscript{42} the Board of Parole has a strong interest in the safety and
welfare of society.
Against these governmental interests must be weighed the inmate's interests in the termination of incarceration, the fair and individualized consideration of his case on its merits, and the avoidance of erroneous determinations. Absent efficiency (depending upon how that word is defined), the inmate and the Board have a virtual identity of interests.

Efficiency to the Board may (and probably does) mean speed and convenience. But that kind of efficiency is obtained only at the sacrifice of the other identified, and significant, interests. Efficiency can and should mean the absence of undue or unnecessary delays. So considered, efficiency can accommodate other important interests. On balance, then, the Board's decisionmaking process should be constructed to assure fair and accurate decisions and to avoid abuses of discretion.

Morrissey's safeguards, representing the "minimum requirements" of due process, and providing the guidepost for determination of how much due process applies to parole release decisionmaking, include:

1. Written notice;
2. Disclosure of adverse evidence;
3. Hearing;
4. Opportunity to present witnesses and documentary evidence;
5. Confrontation and cross-examination;
6. A neutral and detached hearing body; and
7. A written statement of the fact-finders justifying their action.

Presence of counsel is not necessarily required. Wolff v. McDonell (applying some of the Morrissey protections to an in-prison disciplinary proceeding) found that Morrissey's procedural protections must accommodate a legitimate and overriding governmental interest in the maintenance of prison discipline, order and authority. Thus confrontation, cross-examination and counsel are not required for disciplinary hearings within the prison. How much due process is necessary in Board decisionmaking lies somewhere between Morrissey and Wolff.

Following the Wolff rationale, each of Morrissey's procedural protections would apply, save those which adversely affect the Board's need for efficiency. An initial determination of procedures which might affect efficiency must begin with a recitation of the procedures currently observed by the Board of Parole pursuant to its own Rules and Regulations, for such rules are a persuasive statement that the adopted procedures are not disruptive of efficiency.

The Board's rules provide for notice of time and place for parole release hearings, a hearing at or before which documentary evidence may be submitted, representation by a person of the parole applicant's choice (such person may be an attorney, although a lawyer's presence might be counterproductive), and a statement by the parole applicant or his representative. The hearing body is, theoretically at least, neutral and detached and is thought to have an identity of interest with the inmate. If
parole is denied, a written statement is to be provided explaining the reasons for the denial. Additionally, the Board’s rules provide a checklist of reasons for which parole may be denied and guidelines by which prisoners can estimate their chances of obtaining parole.

Omitted from this list of “musts” is an opportunity to learn of evidence or information detrimental to the parole applicant, an opportunity to challenge such evidence or parties advocating a prisoner’s continued incarceration, and a statement of legitimate and meaningful reasons for parole denial. Attempts by inmates to secure these procedural protections were, until Morrissey, generally unsuccessful since the judiciary feared that incorporation of due process safeguards would impose an unnecessary burden upon the Board of Parole. However, Morrissey “wiped the slate all but clean”, and the courts are gradually, on a case by case basis, approaching application of the minimal protections guaranteed by Morrissey. (The implications of this trend will be discussed below.) Unless the Johnson rationale is completely inaccurate and Morrissey, though it applies to in-prison disciplinary proceedings, is strongly distinguishable from parole-release hearings, that parole is not a right no longer justifies invocation of “hands off.”

Legislative grace

The demise of the right-privilege distinction and the role played by parole in “our modern penological system” demonstrate the conceptual invalidity of a continued invocation of “hands off”. The courts have traditionally been available for review of procedures adopted by the government to confer or terminate its statutorily created benefits. Once the government decides to confer a benefit, it must do so by means which are essentially evenhanded and rational. Labeling parole an act of grace is but a substitution of assertion for analysis and in no way justifies insulation of the parole decisionmaking process from judicial review. That parole is viewed as an integral part of the rehabilitative process, and is seen as important to in-prison discipline and as an economic alternative to incarceration, serves only to emphasize the fact that parole is far more than an “act of grace” and that the judiciary cannot refuse to oversee the Board of Parole on such a basis.

Absolute discretion

If Morrissey v. Brewer “wiped the due process slate all but clean” regarding parole release decisionmaking, the Administrative Procedure Act provides another slate upon which to write. For, irrespective of the extent to which the Morrissey rationale applies to the procedures utilized by the Board of Parole, if the Board’s exercise of discretion is not absolute, the APA requires the institution of fair procedures and judicial review of the Board’s actions. Whether the Board’s discretion is, in fact, absolute is not simply a question of semantics. It is, rather, determinative of the power of the Board.

Regarding the institution of statutorily prescribed procedures, whether the Board’s power is absolute or merely broad does not seem to be of consequence. The Court of Appeals for the Seventh Circuit in King v. United States held that the Board of Parole was an “agency” within the
meaning of the Administrative Procedure Act and that at least a portion of
the Act's provisions were to apply to the Board. The Court of Appeals for the District of Columbia in Pickus v. United States Board of Parole held that the rule-making provisions of the APA apply to the Board. Both King and Pickus limited the impact of an earlier decision in the D.C. Circuit, Hyser v. Reed, holding that the APA did not apply to the Board because the Board of Parole did not "adjudicate, after hearing". Both cases also have stimulated the Board to action and laid the groundwork for more significant challenge to the Board's authority — challenges in an area where the absolute-broad distinction in discretion is crucial.

Pursuant to sections 701-706 of the Administrative Procedure Act, actions of an "agency" or "authority of the Government of the United States" are subject to judicial review, save those agency actions exempted by §701(a). Unless judicial review has been precluded by statute, "agency action is committed to agency discretion by law," "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." "Exemptions from the . . . Administrative Procedure Act are not lightly to be presumed." Rather, there is a presumption of reviewability. Although the Board of Parole consistently argues to the contrary, there is no indication that Congress intended to restrict judicial review under §701(c)(1). More compelling however, is the assertion that Board action is not subject to review pursuant to §701(c)(2). For the Board "may in its discretion" authorize parole release if it concludes that a parole applicant has been rehabilitated and his release from prison is not inimical to the interests of society.

Citizens to Preserve Overton Park v. Volpe indicates that, to determine whether agency action is within the §701(c)(2) exemption, one should, first, examine closely the manner in which, statutorily and actually, discretion is to be exercised. Statutorily, Congress has not provided much guidance. On a theoretical level, it is presumed that several factors are to be considered: institutional conduct, nature of the offense, probability of reform, age, prior associations, habits, inclinations and traits of character, the impact upon public security of an inmate's release, and many psychological and sociological factors detected and evaluated by the prison staff. The complexity and importance of these factors is thought to be such that only experienced penologists can accurately determine the optimum moment at which parole should be granted. Thus it would seem entirely appropriate to find the Board of Parole's action within the §701(a)(2) exemption.

Unfortunately, the theory of the Board's decisionmaking is not consistent with reality. An overwhelming majority of decisions to release on parole are made within guidelines recently adopted by the Board of Parole.

The Guidelines themselves represent an abandonment by the Parole Board of its . . . pose of expertise in the area of rehabilitation and the Board no longer claims to act on information not before the [trial] court at sentencing. By placing primary reliance on the
Guidelines in its release decisions, the [United States Board of Parole] has shifted its orientation from rehabilitation to achieving relatively longer incapacitation of likely recidivists, and to furthering the 'punitive' functions of deterrence, retribution and denunciation."

By exercising its authority in this fashion, the Board has removed any compelling justification for complete judicial deference to the judgment of the Board of Parole.

After scrutinizing the manner in which an agency exercises its discretion, Overton Park suggests a second inquiry. "The legislative history of the Administration Procedure Act indicates that it [§701(c)(2)] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'." To determine whether there is law to apply, one must look to 18 U.S.C. §4203, which contemplates that the Board will be concerned with considerations of rehabilitation. As stated above, the Guidelines are a persuasive statement that the Board is not so concerned and does not pretend to be. Rather, the Board has disregarded its statutory purpose and is concerned chiefly with ensuring that "similar persons are dealt with in similar ways in similar situations." Adoption of and reliance upon the Guidelines has placed the Board in a dilemma. On the one hand, the Board has "abandon[ed] rehabilitation as a primary goal of the parole system" and "eliminate[d] a major justification for the existence of the parole system as a second stage in the decision as to length of incarceration," thereby removing any need for judicial deference to the Board's expertise. On the other hand, the Guidelines represent a clear departure from the Board's statutory mandate and permit a reviewing court to determine where the Board has arrogated to itself decisions properly made only by the legislature, when the Board's decision in a case is inconsistent with its statutory directives, when improper criteria are used, or when its decision has no basis in the prisoner's file.

Thus, the Board has removed from itself any need or rational reason to find §701(c)(2) applicable to its actions — providing, as it were, a crack in its own door through which judicial review under the APA might enter.

Courts lack power to determine eligibility for or grant parole

The fact that the judiciary has neither the power nor the expertise to make decisions about an inmate's suitability for parole has very little to do with an examination of the procedures utilized by the Board of Parole. Judicial oversight requires nothing more than insistence that the Board comply with its enabling statute and the Constitution, that its procedures are neither arbitrary nor capricious and that it adheres to its own rules and regulations.

A judge need not be an expert in penology to determine whether the Board is within or without its statutory mandate, whether its procedures meet the standards imposed by the Administrative Procedure Act or by due process, whether the Board's actions are in compliance with 28 CFR Pt. 2, or whether such actions constitute an abuse of discretion. These are tasks
with which judges are familiar. And it misses the issue entirely to say that because a court may not, due to a lack of expertise or power, grant parole it must leave a parole applicant to the tender mercies of the Board of Parole.

**Exercise of the Board’s discretion requires a peculiar expertise**

The Board of Parole, pursuant to 28 CFR §2.19, purports to consider several factors in deciding whether and where to grant parole. Several of these factors do involve matters of judgment and observation difficult for evaluation by a reviewing court. In point of fact, however, the overwhelming majority — over 90% — of parole release decisions are made pursuant to and within the Board’s guidelines, 28 CFR §2.20. The guidelines consider very little, if anything, which was not available to the trial judge at sentencing. With the Board’s rejection of expertise — explicit in usage of the guidelines — the Board has also rejected any necessity for courts to defer the Board’s judgments.

The above fairly demonstrates that determinations of the Board of Parole may be reviewed by the judiciary, and that some elements of due process and the Administrative Procedure Act apply to Board actions and procedures. A next step, and one which is to be surveyed below, is an attack upon the reasons for a denial of parole.

After King v. United States and United States ex rel. Johnson v. Chairman of New York State Board of Parole and promulgation of 28 CFR §32.13, a statement of reasons is to be given for the denial of a parole application. Written reasons serve several important purposes:

To require the decision-maker to articulate his reasons focuses in him an awareness that his discretion must be exercised in a principled and consistent way. A statement of reasons may promote, as well, the rehabilitative goals of the parole system, since informing the prisoner of the reasons for denying him parole is an obvious first step toward enabling him to conform his institutional conduct to proper standards, should such issue be before the Board. [We] note . . . that society has a further interest in treating the potential parolee with basic fairness: fair treatment in parole denials will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

And most importantly, for immediate purposes:

. . . a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protect the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations.

A convenient and logical starting point is provided by the Board’s Rules and Regulations. As discussed above, the Board notifies prisoners eligible and applying for parole that there will be a “hearing” (the term “hearing” is really a euphemism — “appearance” would more accurately describe the reality of the situation), and the date and location at which he, or a representative of his choice, may speak or present documentary evidence.
After the hearing, the examiners orally inform the parole applicant of their decision — which is not final. Within a short period of time — fifteen working days — the inmate is to receive official word of the Board's decision. This decision is in written form and, if parole has been denied, is accompanied by a statement of the grounds of decision.

Parole applicants are not entitled to the effective presence of an attorney, may not have access to adverse information in their files, may not challenge statements or documents detrimental to their chances for parole, nor are they often told of the real reason for parole denials. Each of these deprivations provides a means by which a parole denial may be challenged.

**Presence of effective counsel**

Counsel, *per se*, is not excluded from the parole decisionmaking process. But if a parole applicant chooses to have counsel present, the attorney's role is limited. Section 2.12 of the Board's regulations permits him only to offer a statement to or answer questions of the hearing examiners. Section 2.22 requires attorneys and others seeking a personal interview with a Board representative to submit a written request to the Board "setting forth the nature of the information to be discussed".

The reasoning which does not allow counsel to participate as an adversary is grounded in the assumption that the parole hearing is not adversarial; the inmate and Board have an identity of interest and the Board makes no finding of fact. This reasoning is fallacious.

To the extent that the Board seeks to encourage and foster an inmate's rehabilitation and readjustment, it is not his adversary. However, rehabilitation is no longer a significant factor in determining an inmate's date of release. Since more than ninety per cent of all parole releases are within the Guidelines period, and only those release decisions which are *outside* the Guidelines are subject to review, at least those inmates whose Guideline sentence does not call for parole at the time of Board consideration are in an adversarial relationship with the hearing examiners. In a very real sense, a prisoner must argue why deviation from the Guidelines is warranted. If the examiners are persuaded by an inmate's presentation, they must either justify their result or interpret the Guidelines to correspond with their decision. The former result seems unsavory to the examiners while the latter calls for less than exemplary behavior. In either case the actions of the hearing examiners are not conducive to rehabilitation and place the inmate in an adversarial posture — one in which he *does* need an effective voice in his behalf.

Secondly, there is not often an identity of interest between inmate and Parole Board. The former hopes to serve as little time as possible, while the Board is, statutorily, to release an inmate only when, in its opinion, he will neither commit further crimes nor pose a menace to society. Additionally, the Guidelines seek to correct disparities in sentencing, add predictability to institutional life and serve a multitude of other interests, virtually all of which do not necessarily correspond to an inmate's desire to leave prison as soon as possible.
Finally it is thought that the Board is not concerned with a sorting or evaluation of facts. However, the Parole Policy Guidelines are a persuasive statement to the contrary. Since all federal offenses are not mentioned in the "severity offense behavior" list, the inmate's explanation of the crime may well determine how serious the hearing examiners regard his criminal conduct. The salient factor score also requires resolution of fact. These two categories — offense severity and salient factor — automatically determine the length of an inmate's sentence. An error of fact, or computation, can mean an additional year, or even years, of incarceration.

Additionally, the Board considers what it terms "mitigating and aggravating factors" surrounding the commission of an offense. Those factors are of paramount importance to a prisoner who plea-bargained, against whom criminal charges had been dropped, or about whom there were allegations of other criminal activities. The Board often considers not only the offense for which an inmate has been convicted and is incarcerated, but also alleged crimes. The result can be an increase in offense severity and a concomitant increase in time to be served. Not only is it unfair to punish a man for an offense of which he has not been convicted, but ignorance of this Board practice, for example, may well vitiate an otherwise valid guilty plea under Rule 11, Federal Rules of Criminal Procedure.

Even though it would seem to be of benefit to the Board, the inmate and society (in view of their respective interests in fair and accurate parole release decisionmaking) to have counsel present at Board hearings to act as a proponent of the parole applicant's cause, the Board is of the position that any gains which might result from this procedure are more than outweighed by strains on administrative time, manpower and money. The Board is undoubtedly correct — in a sense. Hearings might become more time-consuming, require more, or more qualified, hearing examiners and create a need for a larger budget. But convenience is not of paramount importance — a correct and equitable decision in each individual case is. So the question becomes not whether the presence of an advocate for an inmate detracts from Board efficiency, but whether such presence helps to ensure that the Board does not make mistakes.

Before indicating the means by which presence of an advocate can be introduced into parole release decisionmaking, it is important to emphasize two points: (1) Counsel's presence, or the presence of a personal representative, is already permitted by the Board's regulations, and (2) To argue that an inmate is to be allowed the presence of an advocate is not to argue that he is to be guaranteed counsel as of right. This is a distinction which the Court of Appeals for the Second Circuit failed to grasp in Menechino v. Oswald. Whether this advocate must be an attorney, or whether the state must provide indigents with counsel, is another, though not unrelated, matter.

Morrissey v. Brewer, Gagnon v. Scarpelli, and Wolff v. McDonnell indicate that minimum due process is not satisfied by the limited role permitted an advocate by current Board rules. The advocate, to effectively assist a parole applicant, is to be made aware of data relevant to the inmate's suitability for parole, and be accorded an opportunity to discuss and challenge information in the inmate's file and present and argue
evidence favorable to him. Section 555 of the Administrative Procedure Act (a portion of which, §555(c) already applies to the Board\textsuperscript{119}), would also require the Board to permit, with due regard to "the orderly conduct of [its] business", an inmate's representative, whether or not an attorney, to act as an advocate.\textsuperscript{119}

Thus parole release decisionmaking, which denies an applicant an effective voice in his own behalf, is contrary to the requirements of minimum due process and the statutory dictates of the APA. In addition, such procedure is not in harmony with the procedural protections accorded at sentencing.\textsuperscript{120} Counsel is required at sentencing to ensure that rights are not waived by a defendant, to ensure factual accuracy, to argue for minimal punishment, and to present the defendant in the best light possible. \textit{Mempha v. Rhay}\textsuperscript{121} is thought to be inapplicable to parole release decisionmaking\textsuperscript{122} because, for example, the Board's function is not a part of the criminal process, parole denial is not resentencing and new findings of fact are not required. Parole is nevertheless seen as an "integral part" of the penological system, which in turn is directly related to, and often the end result of, the criminal process. The Board of Parole, considering the same factors as a sentencing judge, does pass on issues of fact. Additionally, sentencing and parole decisionmaking are similar in that both are, in essence, dispositional, rather than adjudicative, and both involve delicate and perhaps sophisticated judgments which require a weighing of non-legal, imprecise factors.

The courts have recognized the importance and relevance of lawyer's skills of investigation, verification of evidence, and factual distinction in reaching [sentencing] decisions. There is thus little justification for judicial reasoning that currently affords counsel at sentencing but denies it at parole hearings.\textsuperscript{123}

It may well be that parole decisionmaking can be validly distinguished from sentencing because the former is not part of the criminal process. But the necessity for having an effective advocate in both situations is the same. The essential similarity in all respects of the two hearings logically compels that the presence of an advocate in parole release decisionmaking be accorded parole applicants.

\textit{Access to adverse information}

The Board of Parole consistently argues that allowing inmates to see reports or documents unfavorable to their parole applications would have two unfortunate results: (1) Persons submitting information to the Board might feel inhibited if the inmates were given free access to such information. Thus, all important data might not be given to the hearing examiners. (2) Some reports, in the hands of inmates, could be counterproductive to rehabilitation and prison discipline.\textsuperscript{124} Both objections pointed to by the Board are valid. But obviously all information or reports need not be withheld on these bases. Just as obviously a parole applicant cannot respond to information of which he has no knowledge and he cannot effectively argue why he should be paroled if the hearing examiners have access to information which the inmate is unable to refute.\textsuperscript{125}

Although case workers and other prison officials might temper their remarks in reports to the Board of Parole if prisoners were allowed to review them,
so might improper or unsubstantiated material be deleted. To the extent that
the author of a report may be called upon to verify his facts, he will be
careful to ensure that his observations are based in truth. It is, in the final
analysis, a value judgment: Which is more likely to serve the policies of
parole and its decisionmaking process (a likelihood of no further criminal
activity, society’s safety, and fair and accurate parole decisions): secrecy or
openness?

The second fear of the Board is that access to this information might
cause problems within the penal institution. Information which the prisoner
cannot understand, like a psychological profile, or which could spark a
violent reaction or retaliatory measures on the part of a parole applicant,
such as a report from a fellow inmate of violations of institutional
regulations which can be verified independently, may be withheld. The
important point, however, is that there must be some check on the veracity
of information considered by the hearing examiners. And one of the best
means is to allow a parole applicant to study the information so that he
will have an opportunity to respond.

Several courts have considered this issue and have generally denied
prisoner access to such information. 126 Menechino v. Oswald, 127 the leading
case in this area and often cited as authority, reasoned that since the Board
was not the inmate’s adversary, did not resolve issues of fact, and was
concerned with numerous non-legal factors, an inmate could not obtain this
information prior to the parole release hearing. However, Menechino was
pre-Morrissey v. Brewer, 128 and has since been distinguished as a right to
counsel and cross-examination case. 129 United States ex rel. Johnson v.
Chairman of New York State Board of Parole 130 did not expressly overrule
Menechino, but did incorporate some of Morrissey’s minimal due process
safeguards — one of which is access to adverse information (see also Wolff
v. McDonnell 131) — into the parole release decisionmaking process.

The Administrative Procedure Act, §§556(d), 132 also indicates that access by
an inmate to adverse information is to be permitted. This, of course, is
independent of the requirements of §§554, 133 from which the Board was
excluded by Hyser v. Reed, 134 King v. United States, 135 other cases construing
the applicability of the APA to the Board, 136 and most specifically National
Prison Project v. Sigler, 137 strongly suggest that Hyser is no longer
applicable; the Board’s actions would be almost entirely subject to the
dictates of the Act and that access to this information must be provided parole
applicants.

**Challenge to information in Board files**

If an inmate is to challenge information before the Board, he must have
prior access to it. And if he is given access, it does him little good if he is
unable to challenge or question the information. The Board’s objections to
allowing challenges is, again, rooted in considerations of time and efficiency.
But due process 138 and the Administrative Procedure Act 139 require that the
Board permit parole applicants to rebut or challenge adverse information.
The opportunity for such challenge must be a part of the parole release
decisionmaking process if Board decisions are to be accurate, fair, and serve
the interests of all parties concerned.
Thus a parole denial may successfully be challenged on the basis that certain fundamental procedural protections were not accorded a parole applicant, i.e., that his hearing was, constitutionally or statutorily, inadequate. Another means of attack is the sufficiency of reasons given for a denial of parole.

**Sufficiency of reasons**

An attack upon the reasons for a denial of parole begins, as it ends, with the Board's Guidelines. These Guidelines, by means of a ranking of offense severity and offender characteristics, or "salient factors", determine the "customary range of time to be served before release". Offense severity, rated from "low" to "greatest", is, theoretically at least, based on a legislative judgment of just how serious any given criminal offense is to be viewed. The salient factors are intended to give the Board a rough approximation of the likelihood of success on parole. The Board, after totaling a salient factor score, on a scale of zero to eleven, coordinates the offender characteristic score with the offense committed.

The Guidelines were adopted to meet the criticism that the Board acted arbitrarily, that its decisionmaking process was utterly devoid of structure, and that its mode of operation was not conducive to inmate rehabilitation. Thus in response, the Board has attempted

[t]o establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decisionmaking without removing individual case consideration. . . .

By and large, the judiciary has viewed the Board's effort with approval, thus accepting the validity of the Guidelines. That they may be unlawful will be considered below, but first, challenges of denials, within the framework utilized by the Board, will be surveyed.

If the Guidelines are accepted as valid, an inmate whom the Guidelines indicate is not yet ready for parole release perhaps must be satisfied with the "boiler-plate language" of the Guidelines:

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.

The above reasons, from the Board's regulations, are acceptable only if the Guidelines are valid and the parole applicant's time served is not equivalent to that which is "customary". These reasons, however, are not sufficient for one detained longer than indicated by the Guidelines. Whether viewed as
an abuse of discretion, failure to adhere to its own rules, or an arbitrary action, the Board must justify all continuances which result in incarceration in excess of the Guideline period.

For an inmate not yet within the Guidelines, a denial may be attached if the hearing was procedurally inadequate (as discussed above), or if the hearing examiners relied on incorrect or inadequate information. And it may well be that the "boilerplate" language is not, in fact, sufficient and that the Board must be explicit and detailed. The reasoning underlying this position is that such reasons, as contained in the Guidelines, provide no guidance to inmates who would hope to rehabilitate themselves. But if rehabilitation remains one important function of parole, a serious question arises regarding the validity of the Guidelines.

On its face, the Guidelines purport to establish a national sentencing policy, remove the disparity occasioned by varying severity among trial judges, and import incapacitation and retribution into the parole system. These goals can be demonstrated to be both a departure from Congress' will, as expressed in 18 U.S.C. §4203, and unconstitutional.

The Guidelines, in effect, remove sentencing from the province of the trial court. The judge's intent can be and is completely frustrated and rendered superfluous by the Board's current policy. The Guidelines do not account for length or type of sentence, but look to severity of crime. If such a drastic change is to be forced upon our criminal justice system, it is for the legislature to effect through explicit action.

The Guidelines eschew rehabilitation as a factor in determining when parole should be granted. The criteria utilized by the Board are the facts known to the trial court at sentencing and remain roughly static throughout an inmate's incarceration. Additionally the Guidelines do not consider an inmate as an individual — only as an offender of a given class. Recent cases indicate that a sentencing court or the Board of Parole, in Youth Correction Act cases, employing a "fixed and mechanical approach" in determining the length of sentence, "rather than a careful appraisal of the variable components relevant to the sentence based upon an individual basis" have acted in an unlawful fashion. The Congressional mandate to the Board of Parole strongly suggests that a similar approach by the Board in making normal parole release decisions, as evidenced by its Guidelines, is at least "questionable" and perhaps invalid.

The two bases of the Guidelines — salient factor score and offense severity — are arbitrary and capricious and, hence, unconstitutional. The salient factor procedure is unconcerned with an inmate's institutional behavior — the only factor unknown to the judge at sentencing. Its selection of, and dependence on, past criminal activity is simply arbitrary. Although such criteria may be justified as being partially determinative of success on parole, other rehabilitative factors must be considered to make the salient factor score valid.

Finally, the offense severity criteria are based not on the United States Code, but on California's penal code. As a result, offenses are not categorized by severity of punishment, but on a particular state's judgment of which offenses are more or less important. And several federal offenses are
either omitted from the Guideline list, or can be inserted at any of several levels. Thus the Board can and does exercise considerable discretion and is able to disguise abuses by placing offenses in whichever category suits the hearing examiner's sentiments regarding length of incarceration.\textsuperscript{158}

In sum, it is to be noted that the Board of Parole, in its exercise of considerable discretion, is not immune from judicial review. The justifications for not according procedural protections to parole applicants are not persuasive and close judicial scrutiny of the Board's present procedures may well invalidate them.
FOOTNOTES

1Menechino v. Oswald, 430 F. 2d 403, 408 (2nd Cir. 1970).

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

3United States v. Frederick, 405 F. 2d 129 (3rd Cir. 1968).

4Tarlton v. Clark, 441 F. 2d 384 (5th Cir. 1971).

5Buchanan v. Clark, 446 F. 2d 1379, 1380 (5th Cir. 1971).


11Id, at 397 (Table IX).


19United States ex rel. Marrero v. Warden, 483 F. 2d 656 (3rd Cir. 1974).

18Monks, supra note 14, and Kastenmeier and Eglit, supra note 13.

17Nelson v. Railsback, 12 Cr. L. 2076 (7th Cir. 1972).


26Menechino, supra note 1.

27Scarpa v. United States Board of Parole, 477 F. 2d 278 (5th Cir. 1973). Although the continuing validity of Scarpa is questionable, Ridley v. McCall, 496 F. 2d 213 (5th Cir. 1974), holding that Scarpa had "no precedential value", and Cook v. Whiteside, 505 F. 2d 32 (5th Cir. 1974), in accord with Ridley, its rationale has not been completely rejected. See, e.g., Wiley v. United States Board of Parole, 380 F. Supp. 1194 (M.D.Pa 1974).


20
12/7/73); Moore v. Florida Parole and Probation Comm., (Fla. S.Ct. 2/6/74); Sturm v. California Adult Authority, 595 F. 2d 446 (9th Cir. 1967); and Bradford v. Weinstein, No. 73-1751 (4th Cir., 11/22/74).

29500 F. 2d 925 (2nd Cir. 1974).
3Id, at 928.
32Id, at 1247.
34Id, at 1136.
35Bradford v. Weinstein, No. 73-1751 (4th Cir., 11/22/74).
36See Morrissey v. Brewer, 408 U.S. 471, 482, fn. 8, citing with approval United States ex rel. Bey v. Connecticut Board of Parole, 443 F. 2d 1079 (2nd Cir. 1971). Bey distinguished a "justifiable reliance" in continued conditional freedom from a parole applicant's "mere anticipation or hope of freedom".
41Id, at 895.
43Menechino v. Oswald, 430 F. 2d 403 (2nd Cir. 1970).
4628 C.F.R. §2.12. All C.F.R. citations are to chapter 1, part 2.
4728 C.F.R. §2.12.
4828 C.F.R. §2.21.
4928 C.F.R. §2.12.
50See Newman, supra note 19, at 839-840.
5128 C.F.R. §2.12.
52See, e.g., Menechino, supra note 43.
5328 C.F.R. §2.13.
5528 C.F.R. §2.20.
57Brest v. Ciccone, 371 F. 2d 981 (8th Cir. 1967); Menechino v. Oswald, supra note 43; Reese v. Barnes, 445 F. 2d 260 (8th Cir. 1971); Scarpa v. United States Board of Parole, 477 F. 2d 278 (5th Cir. 1973); Wiley v. United States Board of Parole, 380 F. Supp. 1194 (M.D.Pa. 1974); Diaz v. Norton, 376 F. Supp. 112 (D.Conn. 1974); Newman, supra note 19, at


59Menechino, supra note 43.

60Childs, supra note 44.

61See Newman, supra note 19.

62Supra, note 15.


64Goldberg v. Kelly, supra note 37.


66Supra, note 60.


68Id.

69492 F. 2d 1337 (7th Cir. 1974).

705 U.S.C. §555(e).

71504 F. 2d 396 (10th Cir. 1974).

72507 F. 2d 1107 (D.C. Cir. 1974).


74See 28 C.F.R. Pt. 2.


80Candarini, supra note 33, which assumed, perhaps too lightly, that Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1973) was clear authority for the proposition that the Parole Board did not enjoy the §701(a)(2) exemption.
Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971). Sobell provides an excellent example of why the judiciary might be persuaded to view the Board with some hostility. It seems fair to point out that if the Board, and its members, behave with such disdain of a court's dignity as evidenced in Sobell, one could expect that inmates are given little respect.


8Grasso v. Norton, 376 F. Supp. 116 (D.Conn. 1974) indicates that between 92% and 94% of all paroles granted fall within the Board's adopted Guidelines.

87Newman, supra note 19 at 848.

8Citizens to Preserve Overton Park, supra note 83.


9Newman, supra note 19 at 828.

9Johnson, supra note 29.

9See, e.g., Johnson, supra note 29; Billiteri v. United States Board of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974); Candarini, supra note 33.

9Citizens to Preserve Overton Park, supra note 83. Overton also indicates the standard of review.

9See Newman, supra note 19, fn. 74 at 825.

9Supra, note 69.

9Supra, note 29.

9See Pickus v. United States Board of Parole, 507 F. 2d 1107 (D.C.Cir. 1974).


9Supra, note 29, at 929.

10Supra, note 43.


10Supra, note 43.

10Id.

1028 C.F.R. §2.23(c).

10See Newman, supra note 19, fn. 290 at 868.

10Newman, supra note 19, at 887-89.

10Supra, note 105.

1028 C.F.R. §2.20.

1028 C.F.R. §2.19(b)(2).


11Rule 11 indicates that a "voluntary" plea includes an "understanding of the nature of the charge and the consequences of the plea". A consequence is that a defendant will serve a sentence within the Guidelines — regardless of length or type of sentence imposed by the trial judge.
113 Supra, note 43.
11428 C.F.R. §2.12.
115 Supra, note 43.
118 Supra, note 69.
122 Supra, note 43.
123 Newman, supra note 19, at 857-858.
126 See note 56, supra.
127 Supra, note 43.
128 Supra, note 115.
129 Supra, note 29.
130 Id.
131 Supra, note 11.
134 Supra, note 2.
135 Supra, note 69.
136 Mower v. Britton, supra note 71; Pickus, supra note 97; Candinini, supra note 33; Billiteri v. United States Board of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974).
137 16 Cr.L. 2508 (D.D.C. 1/17/75).
139 U.S.C. §556(d).
14028 C.F.R. §2.20(b).
1428 C.F.R. §2.20(a).
14628 C.F.R. §2.13(b).


148 Candarini, supra note 33.


155 United States v. Schwartz, 500 F. 2d 1350 (2nd Cir. 1974).


157 Newman, supra note 19, fn. 67 at 823.