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Due Process Protection Extended to Prisoners Applying for Conditional Release (Zurak v. Regan)

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DUE PROCESS PROTECTION EXTENDED TO PRISONERS APPLYING FOR CONDITIONAL RELEASE

Zurak v. Regan

Modern legal thought no longer embraces the view that an individual is deprived of all constitutional rights upon being convicted of a crime and sentenced to prison.[1] Courts have gradually recognized that inmates retain such essential rights as religious freedom, humane treatment, and access to the courts.[2] The Supreme Court has expanded the due process rights of convicted felons by mandating that certain procedural safeguards be provided in the parole revocation process.[3] Before parole may be validly revoked, a parolee must be given a written statement of his alleged violations, informed of the evidence to be used against him, and afforded an opportunity to appear personally and establish a defense. Upon

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[1] Illustrative of the historical view that prisoners forfeited their constitutional rights is the decision in Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871). There, the Supreme Court of Appeals of Virginia held that a prisoner who had committed a crime need not stand trial where the crime was committed. The court observed that such a holding did not violate the constitutional requirement that an accused be tried in his vicinage since "[t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead." *Id.* at 796.

[2] *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (prisoner who claimed prison authorities did not permit him to practice his religious beliefs stated a valid cause of action for which judicial relief was available); Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (segregation of prisoners by race violates the fourteenth amendment); *Ex parte* Hull, 312 U.S. 546 (1941) (prison officials may not deny prisoner the right to apply to the courts for a writ of habeas corpus); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (placing nude prisoner in solitary confinement without sanitary facilities and with an open window in subfreezing weather consitutes cruel and unusual punishment); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (extreme unsanitary conditions in unventilated, unlighted, and unfurnished dry cell in which prisoner was placed without clothing violates the Constitution); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1965).

[3] Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972). In response to the *Morrissey* decision, the Second Circuit in United States *ex rel.* Johnson v. Board of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974) altered its earlier position and held that certain minimal due process safeguards also are required in the initial parole-granting process. Previously, the Second Circuit in Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), had held that the due process clause did not apply to parole proceedings. The *Johnson* court distinguished *Menechino*, finding that in the latter the defendant had argued for the full "panoply of due process rights," including the right to counsel and a fair hearing. 500 F.2d at 928. In *Johnson*, on the other hand, the plaintiff merely requested a statement of reasons for the denial of his parole. *Id.* at 926. Thus, the denial of due process protection in *Menechino* was considered by the *Johnson* court to be only a rejection of the contention that due process in the parole situation requires a full complement of procedural protection. *Id.* at 927-28. For a brief discussion of *Johnson*, see Gurfein, *The Federal Courts Look at Parole*, 50 ST. JOHN'S L. REV. 223, 233-38 (1975).

revocation of parole, the individual must be furnished a statement delineating the reasons for and the evidence considered in rendering the decision.[4] A number of federal courts, relying upon this Supreme Court authority, have extended due process protection to inmates being considered for parole release.[5] Recently, in *Zurak v. Regan*,[6] the Second Circuit was called upon to determine whether the procedural safeguards emanating from the due process clause also should be afforded to individuals seeking conditional release, an early discharge mechanism for prisoners serving a definite sentence of less than one year.[7] Determining that conditional release is analogous to parole release, the Second Circuit held that the operation of the conditional release process is circumscribed by certain due process requirements.[8] Specifically, the court declared that inmates incarcerated at Rikers Island Correctional Facility who apply for conditional release must be processed in order of eligibility, within 60 to 90 days of arrival at the institution.[9] In addition, the Second Circuit held that although a personal appearance before the parole board is not constitutionally required, the applicant must be provided with a written explanation should his conditional release request be denied or deferred.[10]

The *Zurak* plaintiffs, six inmates serving sentences of more than 90 days and less than 1 year at Rikers Island Correctional Facility, instituted a class action in federal district court on behalf of all prisoners actually or potentially eligible for conditional re-

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[4] Morrisey v. Brewer, 408 U.S. 471, 488-89 (1972).

[5] United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); United States *ex rel.* Johnson v. Board of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); *see* note 52 *infra*.

[6] 550 F.2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977).

[7] N.Y. PENAL LAW § 70.40(2) (McKinney 1975) provides in pertinent part:

> A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30.

In New York, definite sentences are imposed for Class A, Class B, and unclassified misdemeanors as well as violations. *See id.* § 70.15. Additionally, a person who is sentenced for a Class D, E or other enumerated felony and is not a second or persistent offender, may at the discretion of the court be sentenced to a definite sentence if it is believed that an indeterminate sentence would result in undue harshness. *See id.* § 70.00(4) (McKinney 1975 & Supp. 1977-1978). Definite sentences may not exceed one year. *Id.*

[8] 550 F.2d at 93.

[9] *Id.* at 89.

[10] *Id.* at 95.

[11] *Id.* at 90. The class was authorized to proceed by the district court pursuant to FED. R. CIV. P. 23(b)(2). 550 F.2d at 90. Additionally, the district court granted appellees' post-

lease.[11] Judicial intervention was sought to remedy alleged inadequacies in the conditional release decisional process.[12] In particular, the plaintiffs alleged that New York's failure to afford conditional release applicants the procedural safeguards provided parolees[13] violated the constitutional guarantees of due process and equal protection.[14] Finding that the procedure employed in administering the conditional release program was "chaotic,"[15] the district court held that, under the due process clause, applicants must be processed in order of eligibility within a specified time period, and supplied with a statement of reasons for the parole board's determination.[16] In addition, the lower court concluded that upon the denial of the conditional release request, applicants must be afforded an opportunity to appear personally before the parole board.[17]

On appeal, the Second Circuit addressed the threshold question whether an inmate's interest in conditional release is sufficient to require procedural due process protection.[18] The Second Circuit

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trial motion to include in the class those prisoners who were transferred from Rikers Island but were still serviced by that institution's parole staff. This increased the class by approximately 100 to 200 inmates. *Id.* at 90 n.4. By the time the case reached the Second Circuit, the plaintiffs who had instituted the action had been released from Rikers Island. *Id.* at 90 n.3; *see* note 19 *infra*.

[12] 550 F.2d at 90.

[13] *Id.*

[14] *Id.* at 90.

[15] *Id.* at 90 n.5. In order to be considered for conditional release, an inmate first must be interviewed by a parole officer. At the time of the *Zurak* action, however, these interviews were granted on a random basis without regard to the amount of time the prisoner had been incarcerated. *Id.* at 90-91. Additionally, there existed no guidelines delineating the manner in which the interviews were to be conducted. *Id.* at 90. On the basis of the interview and the information contained in the inmate's pre-sentence file, the parole officer would prepare a report which would be placed in the file and sent to the commissioner of the parole board. *Id.* at 91. The parole board would consider this report in deciding whether to grant conditional release. Demonstrative of the system's inadequacies is the testimony of one individual who had applied for conditional release upon his arrival at Rikers Island but had not yet received an interview 8 months later. *Id.* at 90 n.5. Other witnesses testified that a period of 3 to 4 months had lapsed before they were informed of the denial of their applications. *Id.*

[16] *Id.* at 89. In September, 1975, the parole board began to provide applicants who had been denied conditional release a statement of reasons and facts. Prior to this time, an inmate whose application had been denied was not given an explanation. *Id.* at 91.

[17] *Id.* at 89.

[18] *Id.* at 92. Prior to discussing the merits of the case, the Second Circuit disposed of the contention that the release of all the original plaintiffs from prison had rendered the action moot. While noting that under ordinary circumstances a plaintiff must be a member of the relevant class at the time the class is certified, *id.* at 91 (citing Sosna v. Iowa, 419 U.S. 393, 402-03 (1975)), the court found that the present action fit within one of the "suitable exception[s]" to that requirement. 550 F.2d at 91 (citing Gerstein v. Pugh, 420 U.S. 103, 110-11 n.11 (1975)). Under this exception, an issue capable of evading review may nonetheless be decided even though the controversy has been resolved with respect to the original plain-

majority, in an opinion authored by Judge Lumbard,[19] relied on its earlier decision in *United States* ex rel. *Johnson v. Board of Parole,*[20] which held that a prisoner's interest in parole release is within the scope of the due process clause.[21] Judge Lumbard reasoned that the nature of the inmate's interest in conditional release and parole release is identical: " 'conditional freedom versus incarceration.' "[22] The court therefore concluded that the due process clause has application to the conditional release process.[23]

Having decided that due process protection is warranted, the Second Circuit next considered the specific type of procedures constitutionally required. In making this determination, Judge Lumbard looked to the three factors identified by the Supreme Court as relevant in determining the procedural safeguards necessary to satisfy due process: the individual interest involved; the possible danger of "erroneous deprivation" under the current procedures; and the effect that a change in the procedures would have on the public interest, taking into consideration the additional financial and administrative expenditures required to implement the additional safeguards.[24] Weighing the relative interests of the applicant for

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tiffs. 550 F.2d at 91-92. The *Zurak* panel found that, due to the brief periods of imprisonment involved, the exception was applicable to the instant action. *Id.*

[19] The majority consisted of Judge Lumbard and District Judge Bonsal of the Southern District of New York. Judge Van Graafeiland concurred in part and dissented in part in a separate opinion.

[20] 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

[21] 500 F.2d at 928.

[22] 550 F.2d at 92 (quoting United States *ex rel.* Johnson v. Board of Parole, 500 F.2d 925, 928 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974)).

[23] 550 F.2d at 92-93. In reaching this determination, the majority relied on the Supreme Court's decision in Meachum v. Fano, 427 U.S. 215 (1976), which indicated that the nature of the interests involved is determinative of whether due process protection is required. *See* note 56 *infra.* The Second Circuit found that New York law gives rise to a " 'justifiable expectation' " that prisoners will be released if parole board standards are met. 550 F.2d at 92 (citation omitted).

[24] 550 F.2d at 93 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). In *Mathews,* the Supreme Court held that due process does not require a formal hearing prior to the discontinuation of Social Security disability payments. 424 U.S. at 349. This conclusion was based in part on the extensive procedural protection built into the Social Security System. The Supreme Court summarized these procedures as follows:

> If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant . . . is entitled to request discretionary review by the SSA Appeals Council, and finally may obtain judicial review.
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> Should it be determined at any point after termination of benefits, that the

conditional release and the potential parolee,[25] the *Zurak* court found that the likelihood of obtaining conditional release is not as strong as the possibility of obtaining parole.[26] The conditional release applicant, moreover, will be serving a shorter sentence than the applicant for parole.[27] Judge Lumbard therefore intimated that the inmate's interest in conditional release is "less substantial" than that in parole release and requires less due process protection.[28]

Against this backdrop, the Second Circuit evaluated the specific procedural requirements imposed by the district court. Judge Lumbard noted that the essence of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[29] Accordingly, the *Zurak* panel upheld that portion of the lower court order requiring that conditional release applicants "be processed in order of eligibility and within 60-90 days of an inmate's arrival" at Rikers Island.[30] Observing that, in general, applications are currently processed within such time limits,[31] the court reasoned that

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claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments.

Id. at 339 (citations omitted).

[25] 550 F.2d at 93. Judge Lumbard, in distinguishing parole from conditional release, relied upon the distinction previously drawn by the Supreme Court between a prisoner's interest in the parole release and parole revocation decision-making processes. *Id. See* Morrissey v. Brewer, 408 U.S. 471 (1972), where the Supreme Court stated: "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Id.* at 482 n.8 (quoting United States *ex rel.* Bey v. Connecticut Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir. 1971)). Another factor differentiating parole release from parole revocation is the wide discretionary authority afforded the parole board in granting parole, which is not present in the revocation process. 550 F.2d at 93. Such broad discretion "necessarily lessens the required content of due process." *Id.*

[26] 550 F.2d at 93. The court noted that board statistics indicated that in 1972 75.4% of parole applicants were successful as opposed to 1974 statistics which indicated that only 29% of conditional release applications were approved. *Id.* at 93 n.12.

[27] *Id.* at 86. The plaintiffs contended that the consequences of being denied conditional release actually are similar to the consequences of being denied parole. The plaintiffs pointed out that an inmate serving the longest definite sentence, 2 years, is eligible for conditional release after 60 days, while an inmate serving the shortest indeterminate sentence, 3 years, may obtain parole after 1 year. Under these circumstances a prisoner denied parole at his original eligibility date will serve an additional 24 months, and an individual refused conditional release will serve an additional 22 months, a differential of only 2 months. Relying upon these calculations, the plaintiffs concluded that prisoners in both situations have similar interests. The court dismissed this argument, finding the calculations based upon a rare situation not demonstrative of the majority of cases. *Id.* at 93 n.13.

[28] *Id.* at 93.

[29] *Id.* at 94 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

[30] 550 F.2d at 94. The court found it necessary to qualify the time limitations it prescribed, stating that the guidelines are to be applied only to the extent that fairness and practicality so permit. *Id.*

[31] *Id.*

adherence to this requirement would not place an undue burden on the state.[32] As to the district court's direction that an inmate be furnished with a statement of reasons and facts if his application for conditional release is denied, the Second Circuit determined that such a procedure is necessary to protect against arbitrary and capricious decisions by the parole board.[33] Judge Lumbard held, however, that in light of the short span of time between a prisoner's arrival and the conditional release decision, as well as the nonadversary nature of conditional release proceedings,[34] due process does not require that a conditional release applicant be permitted a personal appearance before the board.[35] Pointing to the substantial monetary and administrative strain that would be placed on the state if a personal appearance were mandatory, the Second Circuit panel concluded that the statement of reasons and facts provided to the inmate, coupled with the availability of judicial review, will be sufficient to insulate the conditional release applicant from inequitable decisions.[36]

Judge Van Graafeiland strenuously dissented from that portion of the panel's opinion which held that conditional release applicants must be processed in order of eligibility and within designated time limits.[37] The dissent was of the opinion that a judicially imposed regimentation of the release process would constitute an unwarranted extension of federal authority into an area of overriding state concern.[38] In addition, Judge Van Graafeiland suggested that the majority's order-of-processing directive could lead to the inequita-

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[32] *Id.* at 95-96.

[33] *Id.* at 95. Although the parole board has been voluntarily issuing a statement of reasons to inmates since 1975, the court, relying upon Allee v. Medrano, 416 U.S. 802, 810-11 (1974), stated that this "voluntary compliance does not make [the] controversy moot." 550 F.2d at 95 n.17.

[34] The court noted that in conditional release hearings, unlike parole revocation hearings, both the parole board and the prisoner have an "interest in obtaining the inmate's release." 550 F.2d at 95 (citing Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973)).

[35] 550 F.2d at 96.

[36] *Id.* Relying upon Marshall v. United States, 414 U.S. 417 (1974) and Baldwin v. New York, 399 U.S. 66 (1970), the Second Circuit also rejected the plaintiffs' contention that affording greater procedural protection to potential parolees than conditional release applicants is violative of the equal protection clause. 550 F.2d at 96. The *Zurak* court found that since parole applicants are serving longer sentences than conditional release applicants, there exists a rational basis for certain distinctions in treatment. *Id.* at 93.

[37] 550 F.2d at 97 (Van Graafeiland, J., dissenting).

[38] *Id.* (Van Graafeiland, J., dissenting). Judge Van Graafeiland believed that the majority, by intimately involving itself with the administration of New York prisons, ignored the Supreme Court's warning that "federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the states." *Id.* at 97 (Van Graafeiland, J., dissenting) (quoting Meachum v. Fano, 427 U.S. 215 (1976)).

ble treatment of many inmates.[39] It was Judge Van Graafeiland's belief that such a requirement would delay the release of an inmate who promptly filed his request, as prisoners who filed at a later time but had earlier eligibility dates would be given administrative priority.[40]

The Second Circuit holding in *Zurak* appears to be an extension of its earlier decision in *United States* ex rel. *Johnson v. Board of Parole*.[41] *Johnson* was the first decision of a federal court of appeals holding that a prisoner's interest in parole release is within the ambit of the due process clause.[42] The *Johnson* court drew support from the Supreme Court's decision in *Morrissey v. Brewer*,[43] a case which mandated that certain due process safeguards be provided in the parole revocation process.[44] Although the *Morrissey* Court suggested, in dicta, that it might be possible to distinguish the interests at stake in parole revocation from those involved in parole release,[45]

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[39] 550 F.2d at 97 (Van Graafeiland, J., dissenting).

[40] *Id.* (Van Graafeiland, J., dissenting).

[41] 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

[42] Shortly after *Johnson* was decided, the District of Columbia Circuit in Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) and the Fourth Circuit in Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975) extended due process protection to the parole release applicant.

[43] 408 U.S. 471 (1972).

[44] *See* notes 3 & 4 *supra*. The *Morrissey* Court held that two hearings are required prior to the revocation of parole, one at the time of arrest and another at the time parole is officially revoked. In addition, upon the formal revocation of parole, the following safeguards are required: the individual must be supplied with a written statement of his alleged violations and informed of the evidence to be used against him; he is to be afforded an opportunity to appear personally before the parole board and establish a defense, at which time he may present oral or written evidence and examine adverse witnesses; the parolee is entitled to a hearing before a neutral and detached administrative body; and upon the revocation of parole, the individual must be furnished a written statement delineating the reasons for and the evidence employed in rendering the decision. 408 U.S. at 489. For a discussion of *Morrissey*, see Cohn, *A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616, 619-21 (1972); *The Supreme Court, 1971 Term, Right to Hearing at Parole Revocation*, 86 HARV. L. REV. 1, 95 (1972).

[45] 408 U.S. at 482. The *Morrissey* Court noted that an individual released on parole is in a very different situation than an inmate in prison. *Id.* at 482 n.8 (citing United States *ex rel.* Bey v. Connecticut Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir. 1971)).

The question whether due process protection must be provided in the initial parole release process has frequently been presented to the Supreme Court, but the Court has consistently remanded the cases for consideration of mootness. *See* Scott v. Kentucky Bd. of Parole, 429 U.S. 60 (1976) (per curiam); Regan v. Johnson, 419 U.S. 1015 (1974); Scarpa v. United States Bd. of Parole, 414 U.S. 809 (1974). In *Scott* a prisoner claimed that his constitutional right to due process was violated by the parole board's failure to provide him with minimum procedural safeguards. The prisoner had been granted parole by the time the case reached the Supreme Court, and for this reason the action was dismissed as moot. Three justices vigorously dissented, finding that the issue was not moot, since the paroled prisoner

the Second Circuit in *Johnson* rejected such a distinction, characterizing it as "too gossamer-thin to stand close analysis."[46]

The circuits which have considered the parole release issue subsequent to *Johnson* have been divided.[47] The Fifth Circuit has tacitly rejected *Morrissey* as a basis for extending constitutional protection to the parole granting process.[48] That court distinguished parole revocation from parole release, noting that a presently enjoyed interest is involved only in the revocation of parole.[49] Reasoning that this present-future dichotomy is determinative of whether an interest is entitled to due process protection, the Fifth Circuit concluded that such protection should not attach to the parole release process.[50] A clear majority of the circuits which have addressed

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would continue to be under the supervision of parole officials. Mr. Justice Stevens stated that resolution of the due process issue is "extremely important" due to the large number of decisions parole boards must render each year, the grave ramifications of such decisions on prisoners, and the divergence of opinion among the circuits on the question. Noting that the Court has had a number of opportunities to resolve this issue but on each occasion has remanded the case for mootness, Mr. Justice Stevens concluded: "A suggestion of mootness which this Court can readily decide should not be permitted to have such far-reaching consequences." 429 U.S. at 64.

[46] 500 F.2d at 928. In reference to decisions which had denied due process protection to parole applicants, *see* note 3 *supra*, the *Johnson* court stated: "In our view *Morrissey* not only cast grave doubt upon these decisions but, more important for present purposes, rejected the concept that due process might be denied in parole proceedings on the grounds that parole was a 'privilege' rather than a 'right.'" 500 F.2d at 927.

[47] In Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, 429 U.S. 917 (1976), the Fifth Circuit held that due process protection does not apply to the initial parole release process. The court reasoned that since the prisoner is still in legal custody at the time of the parole board's determination, there is only a "mere expectation interest involved and not a present liberty or property interest." 528 F.2d at 1053. The Fifth Circuit's decision in *Brown* is consistent with its earlier holdings in Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (en banc), *vacated and remanded as moot*, 414 U.S. 809 (1973) and Sexton v. Wise, 494 F.2d 1176 (5th Cir. 1974). The Sixth Circuit in Scott v. Kentucky Bd. of Parole, No. 74-1899 (6th Cir. January 15, 1975), *vacated and remanded as moot*, 429 U.S. 60 (1976) (per curiam), employed a similar rationale in holding that a prisoner's interest in the parole process is not within the scope of the due process clause.

The Fourth Circuit, however, in Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975) held that due process attaches to the parole release process. 519 F.2d at 733. In reaching its decision, the *Bradford* court relied on the Supreme Court's holding in Wolff v. McDonnell, 418 U.S. 539 (1974), which required that procedural safeguards be afforded a prisoner whose good-time credit is revoked. In accord with the Second and Fourth Circuits, the Seventh Circuit in United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) and the District of Columbia Circuit in Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) held that due process requires that a statement of reasons be given prisoners upon the denial of parole. *See generally* 44 CIN. L. REV. 115 (1975); 27 VAND. L. REV. 1257 (1974).

[48] *See* Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 & n.17 (5th Cir.) (en banc), *vacated as moot*, 414 U.S. 809 (1973).

[49] 477 F.2d at 282 & n.17.

[50] *Id.* at 283. The *Scarpa* court stated: "It may be that Congress in its legislative wisdom

the issue, however, have held that an inmate's expectation of parole release is sufficient to require due process protection even though no present liberty interest is at stake.[51] These latter decisions, unlike the position of the Fifth Circuit, are consonant with recent Supreme Court authority indicating that due process requirements attach even where only a future interest is involved.[52]

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will see fit to adopt the procedures here urged, but this we refuse to do by judicial fiat based on some theory of justification through constitutional compulsion." *Id.*

It is suggested that the Fifth Circuit's present interest-future interest dichtomy is reminiscent of the now discredited right-privilege distinction. *See* Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir.) (en banc), *vacated and remanded as moot*, 414 U.S. 809 (1973). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court stated that "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' " *Id.* at 481 (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)). The notion that constitutional safeguards may be denied on the ground that the interest at stake is a privilege and not a right is exemplified by the decision in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), in which the plaintiff, a policeman, alleged that his right to free speech was violated by his employer. Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, stated: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

The characterization of parole release as a privilege not entitled to due process protection is traceable to dictum appearing in Escoe v. Zerbst, 295 U.S. 490 (1935). In *Escoe*, a prisoner's probation was revoked without a prior hearing. The inmate thereupon filed for habeas corpus relief, claiming that his continuing incarceration violated the due process clause. Although the Court found a hearing was required under the relevant statutory provisions, Mr. Justice Cardozo stated:

> In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.

Id. at 492-93. For an in-depth discussion of the right-privilege distinction, see Van Alystne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[51] *See* United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) (justifiable expectation interest creates need for due process protection); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975) (due process attaches even though there is no present liberty interest at stake); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (due process protection attaches to the parole board's decision since the government has created a justifiable expectation interest); United States *ex rel.* Johnson v. Board of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974) (minimum due process protection attaches to the initial parole release process since the prisoner has a justifiable expectation of being released); *cf.* Meachum v. Fano, 427 U.S. 215 (1976). In *Meachum*, the Supreme Court held that a prisoner is not entitled to due process safeguards prior to being transferred from one prison to another, less favorable institution. Finding no liberty interest of the prisoner involved, *id.* at 225, the Court stated that "[w]e reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Id.* at 224 (emphasis in original).

[52] *See* Willner v. Committee on Character, 373 U.S. 96 (1963). In *Willner*, the petitioner,

Viewed in light of *Johnson* and its progeny, the Second Circuit's extension of due process protection to conditional release applicants appears sound. The only significant difference between the parole release and the conditional release situation is the length of the inmate's initial sentence.[53] In both instances, the prisoner nonetheless has an interest in obtaining conditional freedom. Since due process of law is required before an individual may be deprived of any non-de-minimis interest,[54] irrespective of the length and significance of the threatened deprivation,[55] the applicant for conditional release, like the potential parolee, should be afforded some measure of constitutional protection.

Having determined that the conditional release procedure is

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an applicant to the New York State Bar, was denied admission thereto based on his past activities. He was not afforded a hearing by the bar examiners or permitted to confront adverse witnesses. Although the New York statute appeared to grant absolute discretion to the bar examiners, the Supreme Court held that due process requires a hearing before an applicant is denied admission to the bar. *Id.* at 106. It would appear that an application of the nonpresent interest test in *Willner* would have led to the conclusion that due process does not require such a hearing, since the only interest involved is a future one, *i.e.*, the future practice of law. By holding that due process is applicable, however, the Supreme Court appears to have concluded that it is the nature of the interest and not the time of its enjoyment that is controlling. *Cf.* Meachum v. Fano, 427 U.S. 215 (1976) (nature of the interest determines whether due process applies).

[53] *See* Goss v. Lopez, 419 U.S. 565, 576 (1975). In *Goss,* students who were suspended from school for 10 days without a hearing contended their right to due process was violated. The school argued a 10-day period was not serious enough to require a hearing. In holding that due process attached to the suspension, the Court stated: "[T]he length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, is not decisive of the basic right to a hearing of some kind." *Id.* In Fuentes v. Shevin, 407 U.S. 67 (1972) the constitutionality of a Florida replevin statute which permitted a creditor to obtain a prejudgment writ of replevin and seize a debtor's property without a prior hearing was challenged. Although the property could be retrieved within 3 days by posting bond for double the value of the property, the Court held the statute unconstitutional stating:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

Id. at 86.

[54] *See* Goss v. Lopez, 419 U.S. 565, 576 (1975); Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring). Conditional release is certainly not considered a de minimis interest by the applicant. As the Commission on Attica found: "By 1971 conditional release and parole had become by far the greatest source of inmate anxiety and frustration . . . . There were very few inmates interviewed by the Commission who did not list parole and 'CR' [conditional release] among their chief grievances." NEW YORK STATE SPECIAL COMMISSION ON ATTICA—OFFICIAL REPORT ON ATTICA 91-92 (1972).

[55] 550 F.2d at 96.

subject to due process limitations, the Second Circuit was confronted with the task of identifying those safeguards necessary to bring the procedure in line with constitutional requirements. The court refused to order that applicants be provided a prerelease hearing, but instead directed that they be processed in order of eligibility, within a delineated time period, and afforded a statement of reasons upon denial of conditional release.[56] It is submitted that, in so doing, the *Zurak* panel has denied conditional release applicants an effective opportunity to be heard. The safeguards required by the due process clause vary greatly, depending upon the interest at stake in a particular proceeding.[57] Generally, the minimal requirment is the right to a hearing prior to the deprivation of a protected interest,[58] but under certain limited circumstances a prior formal hearing may be unnecessary.[59] At a minimum, however, the procedural safeguards imposed must ensure protection from arbitrary and capricious governmental deprivation of the interest involved.[60] The individual, therefore, may not be denied an

[56] *See* Morrissey v. Brewer, 408 U.S. 471 (1972) wherein the Court stated: "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 481; Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

[57] *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254, 269 (1970); *accord,* Arnett v. Kennedy, 416 U.S. 134, 164 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); *In re* Ruffalo, 390 U.S. 544 (1968); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); Grannis v. Ordean, 234 U.S. 385 (1914).

The Court in Wolff v. McDonnell, 418 U.S. 539 (1974), has stated: "The analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." *Id.* at 557-58. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court held that a hearing is required prior to terminating welfare benefits even though the recipient is afforded: 1) a statement of reasons for the discontinuation of payments; 2) a right to appeal and an opportunity to submit statements as to why his benefits should not be discontinued; 3) the right to elect a hearing after termination of payments; 4) all back payments if it is later held that the benefits were unjustifiably discontinued. The Court found constitutionally insufficient the oppportunity afforded the recipient to present his case in writing or through a caseworker, *id.* at 269, reasoning that written statements are not an adequate safeguard in light of the lack of education on the part of many recipients. *Id.* It is suggested that a large number of inmates suffer from this disability. Surveys have revealed that in New York State approximately 80% of those incarcerated never graduated from high school, and 15% to 50% could be classified as functionally illiterate. NEW YORK STATE COMMISSION OF INVESTIGATIONS, REPORT ON COUNTY JAILS AND PENITENTIARIES IN NEW YORK 37 (1966).

[58] *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319 (1976) (hearing *after* termination of social security disability benefits held sufficient to meet due process requirements); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (creditor may obtain writ of sequestration for goods without prior hearing when provision is made for automatic hearing after confiscation of goods, and security is placed with court).

[59] *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

[60] *See* Fuentes v. Shevin, 407 U.S. 67 (1972). As the *Fuentes* Court stated: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose

"opportunity to be heard"[61] at a time when a hearing can be useful in protecting his interests from unjustifiable governmental interference.[62] This basic principle of procedural protection has been applied even in instances where the liberty interest at issue is conditional in nature.[63]

In denying the plaintiffs the right to a hearing before the parole board, the Second Circuit reasoned that judicial review would be available to ensure that arbitrary determinations are not rendered by the board.[64] The effectiveness of such judicial review, however, is cast in serious doubt by the court's own recognition that an inmate is not likely to obtain court intervention while still incarcerated.[65] The absence of an opportunity for the prisoner to be heard in his defense is apparent in this situation. While the *Zurak* decision provides an avenue of communication from the parole board to the prisoner via the statement of reasons upon denial, there is no provision made for the prisoner to transmit information to the board.[66]

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rights are to be affected are entitled to be heard . . . .'" *Id.* at 80 (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863)); *accord*, Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[61] *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[62] *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process protection applies to an individual's interest in probation and a hearing is required); Morrissey v. Brewer, 408 U.S. 471 (1972) (individual released on parole entitled to hearing before parole may be revoked, even though the liberty interest involved is conditioned on meeting the criteria established by the parole board).

[63] 550 F.2d at 96.

[64] *Id.* at 92. As the *Zurak* court stated: "Because of the relatively short periods of incarceration involved and the possibility of conditional release, the alleged harm can hardly be redressed while any possible plaintiff is still an inmate." *Id.*

[65] The importance of a hearing has been noted by Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1950) (Frankfurter, J., concurring):

> Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy a serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Id. at 171-72.

[66] Congress has laid down the requirement that a federal prisoner be provided an opportunity for a hearing upon the denial of parole. *See* 18 U.S.C. § 4208 (1969 & Supp. 1977). The Senate report underlying this legislation stated: "It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions." [1976] U.S. CODE CONG. & AD. NEWS 340. The Model Penal Code also provided for a hearing upon the denial of parole. MODEL PENAL CODE § 305.6 (1974). The drafters of that Code were of the opinion that "[t]here can be no real question of the desirability of providing a hearing to the prisoner. Indeed, it is essential if he is to believe in the fairness of the system of granting paroles." *Id.* § 305.10, comment (Tent. Draft No. 5, 1956). In addition, New York provides for a hearing for parole applicants. *See* N.Y. CORREC. LAW § 214 (McKinney 1968 & Supp. 1977-1978).

The financial burden that must be borne to implement such a procedure, while an important aspect to be considered, should not be dispositive of the question whether adequate protection is being afforded conditional release applicants.[67] In calculating the monetary burden that would be placed on the state by implementing a hearing procedure, consideration must be given to the fact that incarceration is by far the most expensive form of state supervision.[68] If by virtue of the added due process protection inmates who might unjustifiably be denied release were granted conditional release, the financial outlay would be reduced to some extent.

Nevertheless, the procedures mandated by the Second Circuit should have the effect of making the conditional release process more efficient. This increased efficiency will be reflected in the elimination of the heretofore existing 6-month waiting period for the board to reach a decision.[69] In addition, these requirements should rectify the past practice of the parole board in failing to schedule required interviews for as long as 8 months after arrival at Rikers Island.[70] In the final analysis, since due process is such a flexible concept, it is difficult to determine with any degree of certainty the procedures necessary to ensure adequate, or even minimal, protection under any given set of circumstances. Although perhaps not extending all safeguards necessary to assure adequate protection of an inmate's expectation interest in conditional release, the Second Circuit's decision in *Zurak* has further advanced the rights of state prisoners, an advancement which few other jurisdictions have recognized to date.

Vincent J. LaGreca

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[67] In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court stated: "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." *Id.* at 261.

[68] As of 1964, the cost of keeping an individual incarcerated was seven dollars per day. In contrast, it costs only one dollar per day to supervise an individual on conditional release. TEMPORARY STATE COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW § 30.40 (1964).

[69] *See* 550 F.2d at 90 n.5.

[70] *See id.*