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THE FEDERAL COURTS LOOK AT PAROLE

Murray I. Gurfein*

This year marks the centenary of the birth of parole as a form of early release from prison. New York State's Elmira Reformatory, using a system adopted from the British Penal Servitudes Act, pioneered the introduction of parole into this country. In Britain, parole, or the "ticket of leave" as it was called, was based upon industry and good conduct in prison. From its inception, however, American penal experts expected the parole system to achieve ends beyond the mere maintenance of prison discipline. The promoters of parole saw it as a progressive tool for the rehabilitation of prisoners, made more attractive by the coercive threat of revocation and return to prison.

By 1910, when Congress created the federal Board of Parole, *

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† I am grateful to my law clerk, Vicki C. Jackson, for editing my manuscript to its betterment and for providing valuable authorities for the footnotes from her great store of knowledge of the subject. Ms. Jackson was one of the authors of Project, Parole Release Decisionmaking and the Sentencing Process, 84 YALE L.J. 810 (1975), discussed in note 7 infra.

1 This Article emphasizes decisions of the United States Supreme Court and the Court of Appeals for the Second Circuit concerning federal parole as well as decisions of state courts within this circuit relating to the parole of state prisoners. For reasons of space this Article does not cover the availability of judicial review of federal parole decisions under the Administrative Procedure Act, 5 U.S.C. § 554 (1970). For an early decision denying review, see Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir.) (en banc), cert. denied, 375 U.S. 957 (1963) ("the [United States] Board [of Parole] does not adjudicate"). Recent decisions, however, have found various provisions of the Administrative Procedure Act applicable to the Board of Parole. See, e.g., Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1108-13 (D.C. Cir. 1974); Mower v. Britton, 504 F.2d 396, 397-99 (10th Cir. 1974); King v. United States, 492 F.2d 1337, 1343-45 (7th Cir. 1974); Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217, 1218-19 (W.D.N.Y. 1974).


the concept of parole had grown in popularity and had developed a character distinct from what became known as "good time" laws which provided for mandatory release earlier than the expiration of the maximum sentence. As an added avenue of mercy and relief from excessively long sentences, the increased use of parole saw a corresponding decrease in the relative importance of the executive pardon power. Today, parole is the expected form of release for most prisoners in this country.

Because parole boards were meant to foster rehabilitation by the use of difficult predictive decisions, they were commonly given broad discretion to determine whether and when to release an inmate. The federal parole statute quite typically provides:

If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, 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, the Board may in its discretion authorize the release of such prisoner on parole.

The two criteria mentioned in the statute, together with the statutory reservation of decisions to the Board's discretion, shed no light, however, on the functional relationship between the parole board and the sentencing judge.

As a matter of logic, the parole decision is an extension of the sentencing responsibility initially exercised by the judge in the sense that it determines the length of imprisonment under a

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6 By Act of June 21, 1902, ch. 1140, § 1, 32 Stat. 397 (now 18 U.S.C. § 4161 (1970)), Congress provided for the automatic reduction of maximum prison sentences by the number of days accumulated for good conduct while in prison. Until 1932, prisoners released at the end of their sentence, less this "good time," had no supervision since the "good time" laws focused narrowly upon the inmate's conduct in prison. But, by Act of June 29, 1932, ch. 310, § 4, 47 Stat. 381 (now 18 U.S.C. § 4164 (1970)), Congress provided that persons mandatorily released are to be treated as if they had been released on parole. The "good time" laws, however, continue to be sharply distinguishable from laws governing parole. Although accumulated "good time" may be revoked or suspended for bad behavior, the Supreme Court has required that certain procedural safeguards accompany the forfeiture of "good time." Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974). And, reflecting an orientation towards in-prison conduct, mandatory release involves no discretionary judgment since the accumulation of credits is governed by statute. See 18 U.S.C. §§ 4161, 4163 (1970). But see id. § 4162.

7 See Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 814 nn.4 & 6 (1975) [hereinafter cited as Project, Parole Release Decisionmaking]. This valuable work was written by three law students who were permitted to observe actual parole hearings, conducted under the new federal guidelines, see notes 62-70 and accompanying text infra, at the Danbury, Lewisburg, and Alderson federal facilities.

sentence previously imposed. Since the early reformers emphasized mitigating the harsh punishment imposed by judges and individualizing treatment of offenders with a view towards rehabilitation, parole decisions were understandably lodged in agencies which were not involved in the original sentencing decision. In theory, parole boards would need to know more about the individual offender than the judge could and would measure rehabilitation inside the prison in terms of individual progress.

In this country's century old experience with parole, however, public, judicial, and correctional concerns have varied to reflect a wide spectrum of attitudes and expectations. In recent years, the division of responsibility between judges and parole boards has resulted, at times, in an appearance of unaccountability, indeed of chaos and failure, in our system of postconviction justice. Recidivism statistics, crime rates, prison riots, and disrespect for law and legal institutions are all testaments that this appearance of failure is no illusion. And public malaise about recidivism tends to focus blame on the parole process.

This anniversary year may be a particularly appropriate time, therefore, to reconsider the functions of judges and parole boards in the sentencing process. Two forces have become prominent in recent years: unhappiness with the operation of parole from the standpoint of society and greater concern for the convicted felon. In response to these concerns, during the past three years there has been a greater willingness by the courts to review legal challenges to the parole decisionmaking process. Some parole boards have voluntarily abandoned old practices and instituted startlingly new procedures. Moreover, in long-awaited response to years of criticism of the federal penal code and sentencing and parole laws, Congress is now considering several bills to revise these statutes. The reforms, by and large, commendably aim at better protection of the rights of prisoners. Since such major revisions cannot be hoped for more often than once in several decades, those who look to legislative reform in this area must speak now.

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10 Substantive reform of the prison system has largely been neglected by legislators and is not within the scope of this Article.
Until recently parole boards of the states and the nation were free from judicial review of any kind. A convicted felon was held to be a “slave” of the state, and the amelioration of punishment which probation or parole provided was deemed a “privilege.” Justice Cardozo wrote that the Constitution did not require that a revocation of probation be accompanied by notice or a hearing since probation “comes as an act of grace.”

Though not originated by Justice Cardozo, this conception set the tone that led courts to deny review of parole decisions for three decades, thereby precluding review on the merits and, presumptively, even of the fairness of the procedure that led to the parole decision. Nor was the normal presumption that agency action is reviewable applied, since the courts assumed that parole release was merely a privilege dependent upon the bounty of a governmental agency to whose sole discretion the release decision had been committed.

Tied to the right-privilege theory was the additional justification that the parole board acted as paterfamilias. The parole board, as such, was thought to need no help from anyone, least of all the prisoner, in deciding whether to grant parole. One could scarcely have an adversary proceeding with one’s own father since both father and child have the same goal: the child’s happiness.

13 See, e.g., Richardson v. Rivers, 335 F.2d 996, 999 (D.C. Cir. 1964); Godoy v. United States Bd. of Parole, 345 F. Supp. 1292, 1295 (C.D. Cal. 1972); United States v. Lewis, 274 F. Supp. 184, 189 (S.D.N.Y. 1967); Berry v. United States Bd. of Parole, 266 F. Supp. 667, 668 (M.D. Pa. 1967). For an excellent discussion of other theories justifying judicial nonintervention, see Comment, The Parole System, 120 U. Pa. L. Rev. 284, 286-97 (1971). One example is the “change in custody” theory which views parole as a mere change in the degree of custody imposed and hence purely an internal matter for prison authorities to decide. One final theory of parole, favored by some penologists, is the “contract theory.” According to this concept, the parole release decision is arrived at through a mutual agreement between the inmate and the parole decide regarding the conditions of the prospective parolee’s release. If the inmate refuses to agree, he is not released, and if, after release, he violates a condition, due process is not required to revoke his parole since the matter involves only the enforcement of a contract. Even this theory has proved vulnerable to judicial review in recent years, however, because the courts invoke equitable doctrines to redress the imbalance in bargaining power that prevails in such situations. See, e.g., United States ex rel. Schuster v. Vincent, 524 F.2d 153 (2d Cir. 1975).
16 Chief Justice Burger noted that “realistically the failure of the parolee is in a sense a failure for his supervising officer.” Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972) (footnote omitted). The implication is that a parole officer is more a social worker than a policeman. When he was a circuit judge, the Chief Justice wrote that “the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not
Carried to its logical conclusion, this meant that the prisoner had no constitutional right to due process under the fifth or fourteenth amendments.\(^7\)

In recent years the distinction between rights and privileges as the basis for determining the applicability of due process protection has been elided in a line of cases beginning with *Sherbert v. Verner*.\(^8\) In terms of prisoners' rights, the Supreme Court came to recognize by the early 1960's that a prisoner did not lose all his constitutional rights when the door of the prison closed behind him. The vague prohibitions of the eighth amendment were no longer considered the sole constitutional protector of the convicted prisoner. Cases involving judicial supervision of prison conditions, including prison discipline, are now legion. Violations of due process and first amendment rights in both federal and state penal institutions have come within the jurisdiction of the federal courts,\(^9\) and federal judges now regulate and close state detention facilities as a matter of course when necessary to protect the rights of inmates.\(^20\)

The extension of constitutional standards and meaningful judicial review to the parole process, however, required a new view of parole as well as of changing constitutional doctrine. In *Morrissey v. Brewer*,\(^21\) Chief Justice Burger, writing for the majority, rejected the theory that parole was a "mere privilege" and held that due process requires certain minimal procedural protections when revocation of parole is sought. These include an inquiry in the nature of a preliminary hearing to determine probable cause, to be conducted at or reasonably near the place of the alleged parole violation or arrest as promptly as possible, and a revocation hearing at which certain specified minimal due process requirements must

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\(^7\) The sixth amendment was said by the then Circuit Judge Warren Burger to be inapplicable to parole revocation proceedings because by its terms it governs only "criminal prosecutions." *Hyster v. Reed*, 318 F.2d 225, 237 (D.C. Cir.) (en banc), *cert. denied*, 375 U.S. 957 (1963). See also *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 281 (5th Cir.) (en banc), *vacated and remanded*, 414 U.S. 809, *dismissed as moot*, 501 F.2d 992 (5th Cir. 1973).


\(^20\) 408 U.S. 471 (1972).
be observed. The opinion emphasized that "[d]uring the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system . . . [and is not] an ad hoc exercise of clemency . . . ." This recognition that parole release is part of the process of justice was an important departure from the earlier view.

In rejecting the view that parole is an act of grace, the Court, both in Morrissey and in Gagnon v. Scarpelli, placed great emphasis on both the rehabilitative functions of parole and the nonadversarial relationship between prisoner and board. In holding that under certain circumstances a probationer or parolee is entitled to retained or appointed counsel at a revocation hearing, the Court in Scarpelli echoed the language of Morrissey: "the 'purpose [of probation and parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able . . . ." Additionally, the Court implied that the dominant context of parole decisions other than revocation is one of nonadversarial benevolence — the paterfamilias view.

The Morrissey Court, in extending due process to parole revocation, adopted a different analysis from that of Mempa v. Rhay, where the Court had held that the imposition of a deferred sentence after revocation of probation was part of the initial prosecution and required the presence of counsel. In Morrissey there was no suggestion that revocation of parole was part of the sentencing process. Parole revocation now stood on its own as a process requiring minimum due process, which, as the Court recognized in Scarpelli, included a limited right to counsel.

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22 At the revocation hearing the minimal requirements include: (1) a written notice of claimed parole violations; (2) disclosure of the evidence against the parolee; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body such as a traditional parole board; and (6) a written statement by the factfinders of the evidence relied upon and the reasons for revocation of parole. Id. at 489.


27 The Mempa Court had emphasized three reasons for its holding: (1) protection of those rights of the defendant that might otherwise be waived; (2) enhancement of the accuracy of the sentencing determination; and (3) introduction and presentation of mitigating evidence in support of minimal punishment. Id. at 135-37. The latter two reasons seem to have some application to parole release and revocation determinations. For a discussion of the similarity between parole release and sentencing decisions for Mempa due process purposes, see Kadish, The Advocate and the Expert — Counsel in the Peno-Correctional Process, 45 MINN. L. REV. 803, 827 (1961); Project, Parole Release Decisionmaking, supra note 7, at 854-58; Comment, Due Process: The Right to Counsel in Parole Release Hearings, 54 IOWA L. REV. 497 (1968).
Once the Supreme Court had opened the door to judicial review of the revocation stage of the parole process, the lower courts were under increased pressure to extend the protections of the fifth and fourteenth amendments to the initial grant or denial of parole as well.\footnote{The impact of time and intervening decisions on a receptive judicial mind may be seen by comparing Judge Burger's views on parole revocation procedures, as expressed in Hyser v. Reed, 318 F.2d 225 (D.C. Cir.) (en banc), cert. denied, 375 U.S. 957 (1963), with his views as Chief Justice, as expressed in Morrissey v. Brewer, 408 U.S. 471 (1972). Those nine years had seen a revolution insofar as abrogation of the right-privilege distinction is concerned. See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).} The obvious question became whether the due process minima required in the parole revocation process are also required in the parole release process.

Several arguments have been made to support a distinction. For example, it has been urged that the grievous loss suffered by the parolee, who has found a new life, and by his family, which now has him home again, is more serious than the loss of an expectation of parole suffered by the incarcerated person. It has also been suggested that while the threshold ground for revocation is more likely to be an allegation of a specific fact, release proceedings typically involve congeries of factual considerations, many requiring prophetic judgments. Finally, whereas the balancing of individual interests with the practical needs of a parole system may weigh against the individual in prerelease procedures because of the sheer number of inmates subject to parole release decisions, comparatively few parolees are involved in parole revocation.

The Supreme Court has not yet addressed the question of due process in parole release proceedings, although it has recently granted certiorari in *Scott v. Kentucky Parole Board*. The Second Circuit, meanwhile, has had an unsteady time with the problem. The question of whether a prisoner has a constitutionally protected right to due process at a parole release hearing first arose in the Second Circuit in 1970 in *Menechino v. Oswald*. Judge Mansfield, writing for himself and Judge Anderson, with Judge Feinberg dissenting, affirmed the decision of the district court and answered the question in the negative. The prisoner, who contended that his due process rights were violated by the procedure utilized in two hearings before the New York State Board of Parole resulting in parole denial, sought a declaratory judgment that he was entitled, under the due process clause of the fourteenth amendment, to: (1) notice of charges with a substantial summary of the evidence; (2) a fair hearing, including the right to counsel, confrontation, and cross-examination; (3) the right to present favorable evidence and to compel the attendance of witnesses; and (4) a specification of the grounds and underlying facts upon which the determination to deny parole was based.

In affirming the district court's dismissal of the complaint, the court began with the basic propositions that, under New York law, release is discretionary with the New York Board and a parole denial is beyond judicial review unless the Board has violated a positive statutory requirement. Focusing upon a rule of the Board which provided that the inmate's attorney could not be present at the hearing, the court set forth several reasons why no process was due an inmate being considered for parole release. As a matter of substantive law, the court said, two of the essential

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29 96 S. Ct. 561 (1975), granting cert. to Bell v. Kentucky Parole Bd., No. 74-1899 (6th Cir., Jan. 15, 1975) (per curiam). In *Bell*, the district court dismissed a class action challenge to the procedures of the Kentucky Parole Board on the ground that due process does not attach to the parole release decision.


conditions for requiring procedural due process were missing. First, the Board was not appellant's adversary and its release proceedings, involving discretionary predictive judgments, did not require the resolution of disputed issues of fact characteristic of adversary proceedings and demanding lawyers' skills. Second, the court, arguing that due process protects interests which are presently enjoyed, and that a prisoner behind prison walls has no such present interest entitling him to freedom, held that the prisoner's interest in parole is not the type of interest protected by the due process clause, whether that interest be labeled a right or a privilege. In so holding the court analogized the situation of a prisoner seeking parole to that of an alien seeking entry to the United States.\(^\text{34}\)

Since prisoners, unlike parolees in the revocation situation, do not enjoy a present interest, the court further reasoned as a matter of logical deduction that, in view of the unanimous rejection by various courts of due process claims in revocation proceedings, prisoners seeking parole a fortiori are not entitled to due process. The application of due process to parole release proceedings, moreover, was regarded by the court as an undue burden on legitimate governmental interests, since extending various due process requirements to the thousands of release decisions made each year would place too heavy a burden on the state. And, if counsel were allowed to appear with those able to pay, the court continued, counsel would also have to be provided for the indigent, who comprise the majority of prisoners.

Focusing on the prisoner's right to counsel claim, Judge Mansfield rejected the applicability of \textit{Mempa}. A parole release determination, he explained, is not simply a continuation or deferment of sentencing. While a lawyer may perform functions of a legal nature at sentencing, he has none to perform at the parole release proceeding because the release decision is predictive and discretionary. The court did not follow the import of that portion of the \textit{Mempa} opinion which indicated that counsel could be useful in assisting the sentencing judge in reaching sensitive discretionary judgments involving predictions.\(^\text{35}\) Obviously, the actual holding of \textit{Mempa}, as distinct from its language, did not require a different result. In line with the manner in which it distinguished \textit{Mempa}, the

\(^{34}\) 430 F.2d at 408-09. The court was already struggling with the moribund right-privilege distinction. \textit{Id.} at 408 n.3.

court concluded that the determination of whether a prisoner is a good parole risk represents an aspect of prison discipline, not an adversarial adjudication of rights. Moreover, should federal judges undertake supervision of disciplinary proceedings, the Menechino court warned, courts would be flooded with suits for which they "are not equipped by training and experience."36

One year before Morrissey was decided, in United States ex rel. Bey v. Connecticut State Board of Parole,37 the Second Circuit held that the Constitution requires that parolees be afforded legal assistance at any proceeding to determine whether parole status should be revoked. To reach this result, Judge (now Chief Judge) Kaufman distinguished Menechino principally on the ground that it involved parole release, as opposed to revocation, proceedings.

One might have supposed that the Bey court’s emphasis on the distinction between revocation and release proceedings boded ill for the rights of inmates in parole release determinations. In United States ex rel. Johnson v. Chairman of New York State Board of Parole,38 however, Judge Mansfield, again writing on the parole release question, but this time after Morrissey, offered a different concept of parole. Johnson was a New York State prisoner who had been denied parole, but was given no written reasons for the denial. After losing in a state court review proceeding, Johnson brought a petition for habeas corpus in the federal court. Treating the proceeding as a civil rights action, the district court held that the due process clause of the fourteenth amendment requires that a state parole board provide inmates with a written statement of reasons when parole is denied. The panel affirmed.

The State argued, of course, that Menechino precluded such a result. Nevertheless, Judge Mansfield distinguished his earlier opinion in Menechino on two grounds. First, while the appellant there had asked for "a whole gamut of due process rights which he sought as a package,"39 Johnson was seeking merely a written

36 430 F.2d at 412.
37 443 F.2d 1079 (2d Cir.), vacated as moot, 404 U.S. 879 (1971). See also People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971). In Bey, the court, emphasizing the analogy to Mempa, held that the presence of counsel is required in all parole revocation proceedings. This holding has since been modified, however, by Gagnon v. Scarpelli, 411 U.S. 778 (1973), where the Court held that the presence of counsel at revocation proceedings is required only under limited circumstances. For a recent Second Circuit case involving parole revocation, see Argo v. United States, 505 F.2d 1374 (2d Cir. 1974).
38 500 F.2d 925 (2d Cir.), vacated as moot, 419 U.S. 1015 (1974). Other circuits also have stated that a denial of parole without a statement of reasons would be a denial of due process. United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 96 S. Ct. 347 (1975) (dictum); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974).
39 500 F.2d at 926.
statement of reasons, a form of partial relief to which the *Menechino* court had given no consideration. Second, the decision in *Menechino* — that the New York Board had absolute power to deny parole and that the prisoner seeking release lacked a sufficient interest to entitle him to due process — had been "superseded" by the Supreme Court's rejection of similar reasoning in *Morrissey*. Though the decision in *Morrissey* did not relate to parole release proceedings, the Second Circuit easily made the leap by relying upon the broad language of that opinion.

Although, as we have seen, the *Bey* court by implication sharply distinguished parole revocation proceedings from parole release proceedings, the *Johnson* court now reasoned that "[w]hether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration." This is a logical deduction, but logic does not explain why the court reversed its earlier view that the future interest of a prisoner in parole was so different from a present interest that due process was inapplicable at a release hearing. The explanation perhaps lies in the *Johnson* court's recognition that to the average prisoner parole is no longer merely a hope but a fixed expectation. Prison and parole authorities, judges, and prisoners themselves share this expectation. As the *Johnson* court wrote:

Our view is strengthened by the fact that most inmates in New York can expect parole. Fifty-four percent of all prisoners released from prison in 1970, according to 46 reporting jurisdictions, left as parolees. . . . In New York the figure is even higher. In 1972, for instance, the New York State Parole Board released 4,412 inmates on parole, or 75.4% of the cases coming before it. . . . Thus, the average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a substantial "interest" in the outcome. For him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty.

One might assume, after all this, that *Menechino* should be considered overruled. Not so, said the author of both opinions. While *some* degree of due process attaches to parole release proceedings, that does "not necessarily entitle [the inmate] to the full panoply [of rights]." In explaining why a parole board must

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40 *Id.* at 926-27.
41 *Id.* at 928.
42 *Id.* (citations omitted).
43 *Id.* We note that we have all accepted the tautology of "full panoply." In due process language it has become almost a phrase of art. *See, e.g.*, Scarpa v. United States Bd. of Parole,
state its reasons for denying parole, the court seems to have considered parole to be an integral part of the sentencing process, a view which appears to bring the parole cases closer to *Mempa*. For example, the *Johnson* opinion suggests that requiring that reasons be given for denying parole would serve to build a body of rules and precedents which would tend to educate the courts "concerning the probability of parole in particular cases, an education sorely needed, since judges who exercise their power to set minimum sentences . . . are expected to play an important role in the parole process." In sum, the court recognized that in the vast majority of cases the prisoner is actually released on parole and that judges must therefore have a better appreciation of the likelihood of parole within given periods of time. The opinion recognized that this knowledge, in turn, will affect the form and substance of the sentence itself.

The implication of *Johnson* seems to be that a statement of reasons is more useful to the parole board itself than to the judges called upon to review board decisions. The opinion acknowledges, quite properly, that the statutory standards governing parole release are so vague that it would be difficult for a court to find that a parole board had abused its discretion even when a written statement of its reasons accompanied the denial. Yet, the *Johnson* court noted that a statement of reasons would at least enable a reviewing court to determine whether a board had followed rational and consistent criteria and might thereby protect the inmate from arbitrary and capricious decisions or actions based on impermissible considerations. In offering additional policy reasons for its decision, the court touched upon what might seem more proper considerations for a legislative body, namely, promoting rehabilitation, avoiding inmate frustration, and the like, worthy goals to be sure. The due process clause of the fourteenth amendment finally entered into the *Johnson* opinion as a reflection of the eighth amendment prohibition against cruel and inhuman punishment:

The probability of release on parole having been held out to most prisoners and the possibility of release to the balance,
fundamental fairness would seem to dictate that rather than subject a prisoner who is denied parole to the inhumanity of ignorance the state should as a matter of minimum due process provide him with the reasons.\textsuperscript{46}

The majority opinion in \textit{Johnson} ended with the following invitation to administrative or legislative action:

Nor are we persuaded that guidelines in this area will be so difficult to formulate that a reasons requirement will lead inevitably to endless litigation concerning the sufficiency of the written statement provided by the Parole Board.\textsuperscript{47}

This prophecy, uttered in June 1974, was reconsidered by the Second Circuit in October 1975, when it decided the case of \textit{Haymes v. Regan}.\textsuperscript{48}

\textit{Haymes} was an appeal from an order of the district court requiring the New York State Board of Parole (1) to provide the appellee with a statement of the reasons for its decision to deny him parole as well as the essential facts upon which such denial was based and (2) to disclose in writing the release criteria utilized in its decision. Haymes had received only the following as the written "reason" for the denial: "Held to July 1975 Board with improved record."\textsuperscript{49} The court of appeals affirmed the first part of the order, but reversed the second. Disclosure of the release criteria, the court held, is not at this time required as part of the minimum due process to be accorded the state parole applicant.

The Second Circuit rejected plaintiff's argument that \textit{Johnson}, decided just two terms earlier, made it necessary for a board to disclose the criteria it employed in arriving at the release determination. In \textit{Johnson}, Judge Mansfield had stated that

unless and until the Board (1) discloses the release criteria observed by it and the factors considered by it in determining whether these criteria are met, and (2) states the grounds for denial of parole in each case where it is denied, the prisoner, the community and a reviewing court are left in the dark as to whether it applied permissible criteria, considered relevant factors and acted rationally rather than pursuant to whim and caprice in any given case.\textsuperscript{50}


\textsuperscript{47} 500 F.2d at 934.


\textsuperscript{49} 394 F. Supp. at 714.

\textsuperscript{50} 500 F.2d at 930 (footnote omitted).
Chief Judge Kaufman, writing for himself and Judges Friendly and Smith, dismissed the above as mere dicta, noting that the only relief sought in *Johnson* was that a written statement of reasons be provided when parole is denied.

The holding in *Haymes* appears to be based squarely on a balancing of interests test which can change over time. The panel agreed with the *Johnson* court's characterization of the interests of the potential parolee and the power and discretion of the parole board. Although it acknowledged that "the formulation and promulgation of more precise rules and criteria" would greatly assist reviewing courts and improve release decisionmaking, the court found that "the 'need for and usefulness' of such disclosure are diminished to a critical degree where a specific statement of reasons and underlying facts is furnished to every prisoner denied parole." The *Haymes* holding on disclosure of criteria, however, was curiously qualified. As the court stated, "such disclosure is not, *at this time*, required as part of the minimum due process to be accorded the parole applicant." The *Haymes* court did not squarely base its decision on the assumption that there were adequate release criteria in existence. In fact, it accepted the premise that even in the absence of formulated criteria an articulated parole decision would "enable a reviewing body to determine whether appropriate and rational criteria have been followed . . ." It was noted, however, that in June 1975 the New York Legislature had established by amendment that prisoners must be informed in writing "of 'the facts and reason or reasons for . . . denial [of parole].'" The qualification "at this time" may therefore have been a warning to the New York Legislature to take the next step and require disclosure of the criteria of judgment as well, lest the failure to disclose criteria assume constitutional significance.

In theory, the application of procedural due process to statements of why parole decisions are made implies a concomitant right of equal protection; for, in theory, a process due one prisoner should be due another in similar circumstances. It may be that the panel in *Johnson* stopped short of requiring disclosure of the

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51 525 F.2d at 543.
52 Id.
53 Id. at 542 (emphasis added).
54 Id. at 544.
criteria employed by a parole board for the very reason that disclosure of criteria might, at the same time, disclose unjustified disparity in treatment, thereby enabling a disappointed prisoner to contend that "fair play" had been unfairly administered.56

If the panel in Haymes intended to scotch judicial review of disparity in parole dispositions, it was not inconsistent with the judiciary's practice of refusing to review alleged disparity in sentencing. Indeed, the requirement that a parole board state its reasons for denial of parole asks more of that board than is required of the judge who pronounced sentence; for the judge, at this time, need give no reason at all.57 It is not easy to discern why a judge should be required to state reasons only if so mandated by statute, while a parole board must state reasons because the Constitution requires it. Each has discretion within statutory limits, and under the federal guidelines, the factors relied upon by courts and parole boards in reaching their respective decisions seem very similar.58 The courts have resisted equal protection attacks on the disparity of judicial sentences.59 There is hardly a logical basis for applying a different constitutional test to parole decisions affecting a subset (prisoners) of the very group (convicted defendants) which may have been sentenced without reasons or criteria. A convicted person can hardly expect to find a more generous Constitution when he becomes a prison inmate.

Yet, we must recognize that inmate bitterness is often caused less by a sense of injustice to self than by resentment of the release

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56 The Supreme Court has recognized an equal protection claim where an indigent prisoner, required to repay legal defense costs advanced by the state, was not afforded protective exemptions available to other civil judgment debtors. James v. Strange, 407 U.S. 128 (1972). And in Solari v. Vincent, 46 App. Div. 2d 453, 363 N.Y.S.2d 332 (2d Dep't 1975), it was held that inmates similarly situated have a right to equal parole treatment. See also Bel v. Chernoff, 390 F. Supp. 1256 (D. Mass. 1975) (state has burden of justifying seemingly disparate parole classifications). In McGinnis v. Royster, 410 U.S. 263, 270 (1973), the Court said that the "determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings, which . . . require only some rational basis to sustain them."

58 See Project, Parole Release Decisionmaking, supra note 7, at 892-98.
59 Claims attacking the length or fairness of a sentence are generally defeated on the principle that the sentencing decision is committed to the discretion of the judge. Gore v. United States, 357 U.S. 386, 393 (1958); Blockburger v. United States, 284 U.S. 299, 305 (1934). In McGautha v. California, 402 U.S. 183, 196-208 (1971), the Court rejected claims that due process requires that the legislature articulate for the jury rational standards to guide the decision whether to impose the death penalty. See Weigel, Appellate Revision of Sentences: To Make the Punishment Fit the Crime, 20 STAN. L. REV. 405 (1968); Note, Equal Protection Applied to Sentencing, 58 IOWA L. REV. 596 (1973). Nonetheless, at least one circuit has vacated and remanded for reconsideration a sentence pursuant to which a male defendant had received a longer prison term than his codefendant on account of his sex. This was said to be an impermissible criterion. United States v. Maples, 501 F.2d 985 (4th Cir. 1974).
of a fellow inmate thought to be less deserving. The furnishing of a statement of reasons touches only the denial of parole. It is the failure to circulate the reason why the man in the next cell has been released that arouses resentment. This core problem can hardly be solved by the courts. In the many jurisdictions in which the parole decisionmakers' intuitive responses to the inmate's appearance and demeanor at a hearing are decisive factors, judicial review is as unpalatable as appellate court review of the credibility of witnesses. And in jurisdictions using objective criteria, like those of the United States Board of Parole, substantive review of release decisions could automatically add several thousand cases to federal dockets as disappointed prisoners denied parole seek judicial relief.

II

Recent attempts to obtain judicial supervision of the process used by the parole systems on constitutional grounds have met with partial success. But more profoundly, these same attempts by prisoners have brought responses from legislatures and parole boards. The enactment of new statutes and codes of procedure removes the heaviest impediment to judicial intervention. The efforts made in the microcosm of parole are themselves a teaching instrument revealing what public opinion considers "due" prisoners. If parole authorities put their own houses in order, courts will have to worry less that, as supervisors of the parole systems, they will be simply overwhelmed by garden variety claims. Thus, when the court of appeals in Johnson rejected the argument that the New York Board would be overburdened if it were required to state reasons for denial of parole, it was fortified by the knowledge that the United States Board of Parole had already taken this very step on its own. And, as we have seen, the New York Legislature followed suit in June 1975.

Insofar as the formulation and disclosure of release criteria are concerned, the Haymes court recognized that the United States Board had already promulgated "systemized guidelines for parole release consideration." In denying "at this time" the constitutional

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60 The United States Board of Parole now permits inmates to appear at the initial interview with a representative who may be an attorney. 28 C.F.R. § 2.12(a) (1975); U.S. Parole Board Chairman Outlines Reform; Opposes Parts of House Bill, 13 BNA Crim. L. Rep. 2491 (1973), cited in Parole Release Hearings, supra note 2, at 614 n.83. Counsel is not, however, provided for indigents. Compare Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969) (appointment of counsel to appear for indigents at revocation hearings mandated whenever retained counsel may appear) with Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974) (state board not required to appoint counsel for indigents at release hearing).

61 See 500 F.2d at 933.

claim that the divulgence of release criteria should be required in the individual case, the *Haymes* court nevertheless urged the New York Board to institute such a requirement on its own. That is wise; for the United States Board of Parole under Chairman Sigler has moved far ahead of the courts, and indeed, of the parole boards of most of the states in adopting procedural and substantive reforms in the parole release decision process. Among the procedural reforms the Board has adopted by rule are the following: written reasons specifying certain grounds for the decision are provided within two weeks of the hearing; inmates are allowed to have a "representative," who may be a friend, other inmate, caseworker, spouse, or attorney, present at the hearing; all hearings are conducted by at least two hearing examiners; and inmates have a right of administrative appeal from parole denials. In addition to these procedural reforms — rapidly being adopted in many states — the Federal Board has created, published, and is using a set of guidelines for decisionmaking.

The guidelines deal with the average total time to be served by the inmate (including jail time) before release. They establish categories of offense characteristics based upon the severity of the behavior associated with the offense. The particular categories range from "low," for immigration violations or minor theft, through "low moderate," "moderate," "high," and "very high," to "greatest," which includes such aggravated felonies as the sale of hard drugs for profit after a previous conviction, homicide, and kidnapping. The inmate who has committed a particular offense is graded individually for his "offender characteristics" and given a "salient factor score" of "very good," "good," "fair," or "poor" in terms of parole prognosis. The salient factors, that is, those found to predict the likelihood of success on parole, consist primarily of facts in the inmate's past criminal record and reflect neither institutional conduct or adjustment nor other psychological factors. Correlating the offense severity rating with the offender's salient factor score leads, in turn, to a specific maximum

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63 *See generally* Van Blaricom v. Forscht, 473 F.2d 1323 (5th Cir. 1973).
64 *See Project, Parole Release Decisionmaking, supra* note 7, at 816 & n.17; United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925, 933-34 (2d Cir. 1974) (34 states furnished either oral or written reasons for parole denial).
65 There are nine weighted items: (1) number of prior convictions; (2) number of prior incarcerations; (3) age at first commitment (whether 18 or older); (4) whether commitment offense involved auto theft; (5) whether defendant's parole was ever revoked or defendant was committed for new offense while on parole; (6) history of drug addiction; (7) whether high school diploma or equivalent was obtained prior to commitment; (8) verified employment or full-time school attendance for at least six months in last two years in community; (9) release plan to live with spouse or children. 28 C.F.R. § 2.20 (1975).
and minimum number of months that should generally be served before release on parole (except for inmates in the "greatest" offense severity category).

The guidelines are intended to be objective and to reduce disparity.\(^6\) If the hearing examiners decide to release an inmate on parole before or after the time called for by the guidelines, they must justify this decision by additional explanations in writing, and the decision must be reviewed by a Board member. Statistics indicate that in the first two years of use, between 80 and 90 percent of the Board's decisions were within the guidelines.\(^6\)

The guidelines are surely subject to criticism on substantive grounds: First, the accuracy of parole prognoses is not great; and second, the Board may have assumed legislative functions in establishing, without congressional direction, which offenses should be rated more severely than others.\(^6\) Moreover, there is little doubt that the emphasis of earlier penologists on individualized treatment has been diminished by the guidelines in favor of more uniformity. Strict adherence to the guidelines, with reduced emphasis on conduct in prison, arguably brings them closer to being equivalent to the actual sentence with minimum and maximum fixed terms. Attack has already been mounted against guidelines as a fixed and mechanical approach to a discretionary decision.\(^6\) One may predict that the ingenuity of counsel and the "jailhouse lawyers" will spur such efforts and that the sincere attempt by the Federal Board to put its house in order may become a nostrum rather than a cure insofar as the unwelcome involvement of federal judges is concerned. Nevertheless, the value

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\(^6\) The Yale Project wisely suggests that probation officers who compile presentence reports should be instructed about how the guideline table works and should write their reports gearing accurate information to the guideline classifications. See Project, Parole Release Decisionmaking, supra note 7, at 899. District courts may add to the contents of presentence reports as provided in rule 32(c) of the Federal Rules of Criminal Procedure.

\(^6\) Project, Parole Release Decisionmaking, supra note 7, at 869 n.293. The 80% to 90% figures on the number of decisions within the guidelines are for 1974 and early 1975. See generally id. at 867.

\(^6\) In a thoughtful discussion in Battle v. Norton, 365 F. Supp. 925, 932 (D. Conn. 1973), Judge Newman concluded that although in some cases "parole decisions will establish a minimum sentence," such a result "does not . . . interfere with the sentencing jurisdiction of the courts." Id. In that case, Chairman Sigler of the United States Board of Parole tendered an affidavit in which he stated that offenders who commit the most serious crimes often tend to be among the best parole risks, while offenders committing certain less serious offenses often tend to be among the poorest risks. See also United States v. Jenkins, 403 F. Supp. 407 (D. Conn. 1975) (Newman, J.). See addendum.

of the guidelines, to the inmate and to society, as a principled rule of law diminishing disparities in parole treatment is of such importance that, if this goal is achievable, much else may be forgiven.\textsuperscript{70}

III

Yet the United States Board of Parole's use of the guidelines presents important and novel questions which the federal courts will have to answer in coming years.\textsuperscript{71} It would be impossible to deal in this brief Article with all of the challenges that may arise.\textsuperscript{72}

\textsuperscript{70} See Project, Parole Release Decisionmaking, supra note 7, at 828-40. Some of the hearings observed in the course of the Yale Project, it should be noted, raised disturbing questions. For example, two hearing examiners were reported to have made decisions beyond the guideline range because they felt the judge had been too lenient in sentencing. \textit{Id.} at 889 n.382.

\textsuperscript{71} The codification of rules and regulations may make general resort to the Constitution unnecessary. Such rules will also tend to limit the breadth of the issues presented to the courts.

\textsuperscript{72} Two potential challenges to the guidelines do merit some attention. It has been reported that "as part of the Offense Severity Rating, the Guidelines contemplate consideration of offenses which are either charged in counts dropped as part of the plea agreement or alleged but not officially charged by the U.S. Attorney." \textit{Project, Parole Release Decisionmaking, supra note 7, at 881; see Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975). And the more remote the incidents relied upon are from the crime for which the offender was sentenced, the greater is the likelihood that an erroneous factual basis is being used. In Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974), the offense had been rated "very high" on the basis that the offender used a gun in committing a robbery. Apparently he had not. The court held that due process had been denied. See also Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation that petitioner's father was member of organized crime).

This raises the question whether, under Fed. R. Crim. P. 11, which requires a defendant who pleads guilty to understand "the consequences of the plea," he must be informed of the Board's policy on parole release, if indeed, such a policy exists. The assumption to date probably has been that, aside from salient personal factors, a plea to a lesser offense makes only that count relevant on parole. A mandatory explanation of what may turn out to be a pure hypothesis could seriously affect the process of plea bargaining, but it may become necessary. Compare United States ex rel. Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975) with Kelleher v. Henderson, No. 75-2137 (2d Cir., Feb. 18, 1976).

Second, while we have discussed the Board's search for uniformity through the use of its guidelines, there are exceptions. One is the classification of a prisoner as a "special offender" or "special case." The label is given by the Bureau of Prisons and the Federal Board to about 500 of the 23,500 inmates in the federal penal system. In euphemistic terms it is applied to "certain special categories of offenders who require greater case management supervision than the usual case." Bureau of Prisons, Policy Statement 7900.47, Apr. 30, 1974. In practice, this generally means that the offender is "a known associate of persons connected with organized criminal activity." It also means that the invidious classification may retard parole release, since "special offenders" are within the "original jurisdiction" of the Board and may be granted parole only through its own en banc action. 28 C.F.R. § 2.17 (1975).

As a further extension of procedural due process, in Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975), it was held that a prisoner is entitled to notice and certain procedural safeguards before being specially classified. The court based its conclusion, in part, on the ground that the classification may preclude eligibility for parole release or other "important rehabilitative programs." \textit{Id.} at 994-95 (footnote omitted). The availability of counsel in a special classification hearing is apparently limited, however, to situations in which "the issues are
One problem that is ultimately beyond the resolve of the courts alone, however, has been the subject of judicial consideration in recent Second Circuit cases and will be examined briefly here: the relationship between the parole board's function and that of the sentencing judge.\footnote{73}

In its attempt to reduce disparity in parole treatment, the guidelines virtually ignore, as a factor in parole release consideration, the type and length of sentence imposed. As a consequence, inmates whose sentences are relatively short often are not eligible for parole under the guidelines at all, \textit{i.e.} the minimum time called for under the guidelines arrives after the mandatory release date. Even inmates with lengthy sentences may serve substantially more time than the judge had in mind.\footnote{74}

Under the standard federal sentencing provisions, 18 U.S.C. § 4202,\footnote{75} the inmate is eligible for parole after serving a third of the sentence imposed. Under section 4208(a)(1),\footnote{76} however, the court may impose a minimum term less than this third at the expiration of which the prisoner becomes eligible for parole. And under section 4208(a)(2), the court may specify that the prisoner shall become eligible for parole “at such time as the board of parole may determine.”\footnote{77} The (a)(2) sentence was originally established to give complex or the inmate appears unable to collect or present his evidence.”\footnote{Id. at 996. The court left open whether there is any judicial review of what is “complex.”}

Earlier, the Ninth Circuit, in Dennis v. California Adult Auth., 456 F.2d 1240 (9th Cir. 1972), had held that alternatives to representation by counsel could be adequate “in routine cases” and that “it would be neither necessary nor wise to define administrative due process strictly in the precise terms of these procedural rights.”\footnote{Id. at 1241. The Supreme Court itself has used “complex” as a differentiating factor. See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). The need for counsel and other due process protections in this area is apparent from such cases as Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975); Robinson v. United States Bd. of Parole, 403 F. Supp. 638 (W.D.N.Y. 1975); Kohlman v. Norton, \textit{supra}; and Masiello v. Norton, \textit{supra}.}
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For a more extensive discussion of the relationship between the function of the parole board and that of the sentencing judge, see \textit{Project, Parole Release Decisionmaking, supra} note 7, at 882-97.

Effective May 1, 1971, Congress repealed the law which, \textit{inter alia}, had prohibited most narcotics offenders from being eligible for parole. Act of Oct. 27, 1970, Pub. L. No. 91-513, § 1101(4)(A), 84 Stat. 1292, \textit{repealing} Act of Nov. 8, 1966, Pub. L. No. 89-793, § 501, 80 Stat. 1449. Although the former provision was preserved for prosecutions for violations occurring before May 1, 1971, the saving clause did not speak expressly to future parole eligibility. Act of Oct. 27, 1970, Pub. L. No. 91-513, § 1103, 84 Stat. 1294. In Warden v. Marrero, 417 U.S. 653 (1974), and Bradley v. United States, 410 U.S. 605 (1973), the Court held that the determination of parole eligibility is part of the sentencing decision and emphasized that “a pragmatic view of sentencing” indicates that sentencing decisions would “be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible for parole.” 417 U.S. at 658. The Court concluded, therefore, that the preservation of the former law for \textit{prosecutions} meant that persons prosecuted for violations before the May 1, 1971 date would remain ineligible for parole under the relevant parole provisions, since sentencing itself was part of the prosecution.\footnote{75} 18 U.S.C. § 4202 (1970).

\footnote{76}Id. § 4208(a)(1).
\footnote{77}Id. § 4208(a)(2).
judges the power to allow parole boards to release an inmate whenever his release would maximally enhance prospects for rehabilitation even if that point came before a third of the sentence had been served.78 As a general matter, the (a)(2) sentence has been assumed by district judges to signal the Board that the prisoner is expected to be considered for parole before he has served the statutory minimum time.79 In other words, it is used merely as a more general counterpart of an (a)(1) sentence which also makes the prisoner eligible for parole before the statutory minimum has been served.

Under the new parole guidelines, however, rehabilitative progress and psychological readiness rarely seem to play a role in the decision as to when release will be allowed.80 Institutional factors justify release prior to the time indicated by the guidelines only in exceptional circumstances. Once the guidelines came into use, it became Board practice to give prisoners sentenced under (a)(2) a hearing shortly after their imprisonment began, determining at that time the probable release date. In many cases this date would be after the expiration of the sentence,81 and in a majority of cases well after a third of the sentence had been served. Because (a)(2) prisoners at the time of this hearing were in the institution only a short while, there was little information on institutional factors. In Grasso v. Norton82 this practice was challenged on the theory that, contrary to statutory and judicial intent, it afforded (a)(2) prisoners less opportunity than other inmates to exhibit exceptional institutional performance justifying release before the "guideline time."83


79 See Grasso v. Norton, 520 F.2d 27, 33 (2d Cir. 1975). In Project, Parole Release Decisionmaking, supra note 7, at 890 n.388, it is reported that many judges believe that when they impose an (a)(2) sentence they are indicating to the Board that the inmate's rehabilitative progress during incarceration should be the most important factor in determining when to release him on parole. This finding was based upon a survey questionnaire completed by 64 out of 132 active district court judges in the Board's Northeast Region. See id. at 844 n.159.

80 Less than 20% of the parole release decisions now made are outside either end of the guidelines. See Project, Parole Release Decisionmaking, supra note 7, at 869 n.293. See also Díaz v. Norton, 376 F. Supp. 112, 115 (D. Conn. 1974).

81 For example, an inmate who had received a two-year sentence for possession of marijuana, who had not finished high school, had no dependents, and had been previously convicted and incarcerated as a juvenile, would be rated as "moderate" in offense severity and "fair" in parole prognosis under the guidelines. He would ordinarily have to serve 20 to 24 months prior to release on parole. See Boston Evening Globe, Nov. 20, 1974, at 1, col. 4 (interview with U.S. District Judge Joseph Tauro).

82 520 F.2d 27 (2d Cir. 1975).

83 Much interesting data remains uncollated in the Board's research department com-
Grasso had been sentenced under (a)(2) to a three-year term and had had his parole hearing less than three months after his incarceration began. He was notified that his parole was denied and that his confinement would be continued without a further parole hearing through the expiration of his three-year sentence. District Judge Newman held that Grasso was entitled to another hearing at the expiration of a third of his sentence, the normal eligibility time, so that he might demonstrate institutional performance and program achievement to justify his parole release.\(^6^4\)

On appeal, the Second Circuit reviewed the divergent positions several courts have taken with regard to (a)(2) sentences.\(^5^5\) The Grasso court concluded that, in order to promote the statutory purpose, a prisoner under an (a)(2) sentence is entitled to "serious and meaningful parole consideration" before and at "the one-third point of his sentence."\(^8^6\) After lengthy analysis the court concluded:

The decision of the sentencing judge to impose an (a)(2) sentence, beside relieving a defendant from the restriction placed on eligibility for parole by Section 4202, is an expression of the court's expectations (1) that serious and meaningful parole consideration will be given to the prisoner by the Parole Board at an earlier date than the one-third point of his sentence permitted by 18 U.S.C. § 4202; and (2) that institutional performance and

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\(^6^4\) Grasso v. Norton, 371 F. Supp. 171, 175 (D. Conn. 1974). Judge Newman later directed that Grasso be discharged because the Board had failed to give Grasso an institutional hearing even though a conditional writ of habeas corpus, see id., had previously been granted. Grasso v. Norton, 376 F. Supp. 116 (D. Conn. 1974). It is from this latter judgment that the appeal was taken.

\(^5^5\) 520 F.2d at 31. Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974), is in accord with both positions taken in the district court Grasso cases. While in Stroud v. Weger, 380 F. Supp. 897 (M.D. Pa. 1974), the court agreed that full consideration should be given to (a)(2) prisoners at "the one-third point," it was held that a file hearing, i.e. a review of the inmate's file alone, rather than an institutional hearing, would suffice. In contrast, in Moody v. United States Bd. of Parole, 390 F. Supp. 1403 (N.D. Ga.), aff'd mem., 502 F.2d 1165 (5th Cir. 1974), the court disagreed with Grasso and held that a comparable decision by the Board was not reviewable.

In addition to the cases discussed in the opinion, the following cases have also considered the (a)(2) sentence question: McGee v. Aaron, 523 F.2d 825 (7th Cir. 1975); Bijeol v. Benson, 513 F.2d 965 (7th Cir. 1975); Salazar v. United States Bd. of Parole, 392 F. Supp. 1079 (E.D. Mich. 1975); Reed v. United States, 388 F. Supp. 725 (D. Kan. 1975).

\(^8^6\) 520 F.2d at 33.
response to rehabilitative programs will be given due effect by the Parole Board in determining whether parole should be granted.

These expectations are in accord with the purposes of Section 4208(a)(2), as indicated by its legislative history ....

The decision thus recognized the statutorily defined role of the sentencing judge in determining eligibility for parole.

But, while acknowledging that a major congressional purpose was to advance rehabilitation by permitting release at a psychologically beneficial time, the panel, in an opinion by Judge Frederick van Pelt Bryan, also emphasized the interest of Congress in reducing sentence disparity. Although the court sanctioned the use of the guidelines as applied to (a)(2) prisoners, it reversed Judge Newman on the question of whether a second hearing must be held at the "one-third point," thereby sustaining the Board's procedure of conducting a "file review." Judge Feinberg, dissenting from this second holding, argued that institutional factors relating to conduct and rehabilitation should be aired at an institutional hearing just as they are for regular adult (section 4202) prisoners. What is clear from the majority decision is that the Menechino view — that decisions of the parole board relate primarily to prison discipline — has been abandoned.

The circuit's view of the guidelines poses problems for sentencing judges. In United States v. Slutsky, the court reversed the district court's denial of a motion for reduction of sentence under rule 35 of the Federal Rules of Criminal Procedure. The defendants had been sentenced to five years of imprisonment under section 4208(a)(2) in the spring of 1974, when the use of the guidelines by the Board was not widely known or understood by federal judges. Relying on this lack of understanding, the defend-

87 Id.
88 Though providing for a file review at the "one-third point" of the sentence would be sufficient for the future, Judge Newman's grant of the conditional writ was affirmed because he had not abused his discretion in making such a grant, which had then been ignored by the Board. Judge Feinberg concurred in the affirmance, but dissented from the majority's conclusion that a "file review" is enough. He reasoned that "the procedures used by the Parole Board give insufficient weight to the congressional emphasis on rehabilitation as a standard for release of (a)(2) prisoners and, in fact, treat them less favorably in this respect than other inmates ...." Id. at 40 (Feinberg, J., concurring and dissenting).

Subsequent to the Second Circuit's decision in Grasso the United States Board of Parole adopted rules which assure an (a)(2) prisoner the right to a hearing at the "one-third point" of his sentence. The Board, going beyond the requirements enunciated by the Second Circuit, provided for an in-person hearing rather than a "file review." 40 Fed. Reg. 41,328, 41,332 (1975). Although these rules moot the actual holding in Grasso, the discussion of Grasso is intended to illustrate the type of problems which could arise through the use of the guidelines.

89 514 F.2d 1222 (2d Cir. 1975).
The court agreed that in view of the guidelines’ treatment of (a)(2) prisoners, “the parole consideration afforded the Slutskys is likely to depart substantially from what we must assume were the reasonable expectations of the district judge.” The case was remanded for resentencing on the theory, recognized in United States v. Malcolm and United States v. Brown, that sentences based on material inaccuracies of fact should be vacated.

What is significant in Slutsky is that “the parole implications of a sentence [were recognized as] a necessary and important factor for the consideration of the sentencing judge.” With the increasing emphasis on parole as an important part of the sentencing process, it would seem that an understanding sentencing decision must take account of the likely parole implications. The Sentencing Committee of the Judicial Council of the Second Circuit is now studying methods for diminishing disparity of sentences in light of the United States Board of Parole guidelines.

IV

From time to time, the news media report public outrage at the early parole of a criminal who had received a facially long sentence for having committed a heinous offense. On the other hand, many inmates are themselves given cause for resentment when they feel that the parole board has failed to act as the sentencing judge expected it to. Yet, in the federal system, the tradition approving the sentencing judge’s abandonment of responsibility for imprisoned defendants is enforced by law. Under rule 35 of the Federal Rules of Criminal Procedure, on motions made more than 120 days after sentence or affirmance of convic-

90 Id. at 1226.
91 Id. at 1227.
92 432 F.2d 809, 816 (2d Cir. 1970).
93 479 F.2d 1170 (2d Cir. 1973).
95 United States v. Slutsky, 514 F.2d 1222, 1229 (2d Cir. 1975). In Kortness v. United States, 514 F.2d 167 (8th Cir. 1975), the Eighth Circuit recently held that a sentence, imposed on the day of publication of guidelines making the prisoner virtually nonparolable for a period of time, should be vacated under 28 U.S.C. § 2255 (1970). The court reasoned that the sentence may have been imposed under the mistaken belief that the prisoner would receive meaningful parole consideration in the early part of his term — “a critical error . . . by the sentencing court.” 514 F.2d at 170.
96 See generally United States v. Brown, 479 F.2d 1170, 1173 (2d Cir. 1973); United States v. Malcolm, 432 F.2d 809, 818-19 (2d Cir. 1970). In United States ex rel. Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975), Judge Smith, writing for the panel, found that a guilty plea entered without knowledge of the minimum statutory period of parole eligibility was involuntary.
tion, federal judges have no discretionary power over the length of a prisoner's incarceration. Once the judge has imposed a prison sentence, and four months have elapsed from the time of sentence or affirmance on appeal, he or she is generally powerless to overrule the Board of Parole no matter how much the parole decision is out of line with the court's original intention in imposing the sentence. The only exception is when some legal error occurred in the sentencing.

In *D'Allessandro v. United States*, the court was compelled to reverse a district judge's attempt to circumvent the 120-day jurisdictional limit of rule 35. After having sentenced the defendant, in December 1972, to a prison term of four years, the district judge denied a timely filed motion to reduce. Nineteen months after the sentence was imposed, the defendant wrote the judge, asking that his conviction on a plea of guilty be vacated. He went on to complain that despite an exemplary institutional record and a recommendation from the judge, under the new guideline system he had been denied parole and was continued to the expiration of his sentence. At the hearing on this motion, there was substantial discussion of how the judge could have originally sentenced D'Allessandro to achieve a more favorable parole result. Ruling that the original plea was not voluntarily entered, the district judge encouraged the defendant to replead, which he did, and imposed a reduced sentence which resulted in the prisoner's immediate release.

Since it found that there had been no defect in the original plea, the court of appeals reversed the judgment vacating the conviction. The court found that the district judge was actually attempting to avoid the results of the guidelines' effect on the sentence he imposed. The court wrote that after the 120-day period of rule 35,

release from a stated term of imprisonment is in the hands of the Board of Parole . . . . [I]n this case the district judge has, in effect, taken over functions belonging to the Board.\(^9\)

As a result, the defendant, sentenced with the apparent expectation that he would be considered for and released on parole at an early date, will serve an amount of time greater than that intended by the sentencing judge.

This is, perhaps, the inevitable result of the statutory scheme now governing sentencing and parole in the federal system. It is a

\(^9\) 517 F.2d 429 (2d Cir. 1975).
\(^9\) Id. at 430 (citation omitted).
commonplace that trial is by jury and sentence by the judge. But is it really? The punishment and deterrence of crime has always been considered a function of the judicial branch. Congress has provided a wide range of sentencing options for most offenses so as to afford district judges great discretion in imposing the initial sentence. Yet the district judge is not the final arbiter of what really happens to the convicted defendant. He makes the important decision whether or not to grant probation, and he may exercise supervisory powers over that term, but once the district judge decides against probation, his power to control the course and duration of the sentence imposed is greatly diminished. It is the Bureau of Prisons which decides where the sentence is to be served and the Board of Parole which decides, within a wide range, how much of the sentence will actually be served.

Neither the statutory criteria of parole eligibility nor the guideline system adopted sua sponte by the Federal Board of Parole justify this allocation of power.\textsuperscript{99} Prison discipline and conduct is adequately controlled by "good time" laws and generally counts for little in present-day federal parole decisionmaking. Nor is the argument valid that the judge's views need not be regarded as a weighty factor because judges are not trained in psychology, penology, sociology, or what makes a malefactor tick; for it is the same untrained sentencing judge who had to prescribe individualized treatment for the convicted defendant on the original sentence using the probation report as a tool and who had to decide, for example, whether to grant youthful offender or NARA treatment. The probation report deals with salient aspects of the offender's personality, including such matters as parental dominance, sibling rivalry, teenage associations, and the like, and in fact is heavily relied upon by the Board itself. Thus, it would seem proper for the judge to have some impact in determining when a prisoner is released on parole. The experience with (a)(2) sentences, however, shows that this is hardly the case. Decisions with respect to parole release may quite regularly be outside the probable expectations of the sentencing judge.\textsuperscript{100}

\textsuperscript{99} Judge Frankel, in commenting upon parole board practice to deny early release on the grounds of offense severity, stated: "If there was anything for which the sentencing judge would not be looking to psychologists and other experts outside the law, it was guidance as to 'the nature of the offense.'" M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 45 (1973).

\textsuperscript{100} Project, Parole Release Decisionmaking, supra note 7, at 844-45, 882-83 nn. 360 & 361, 894. Communication from judges to the Board has not, in the past, been prevalent. Id. at 893 n.401.
Perhaps the existence of the guidelines will better enable the sentencing judge to predict how much of the sentence he imposes the defendant is likely to serve. It may lead him, in cases requiring a shorter prison term, to rely more on the split sentence device, i.e. a maximum of six months in a jail-type institution with probation for the rest of the term. 101 In view of the difficulties which the guidelines pose for sentencing judges, Congress might well consider raising the maximum of the jail portion of the split sentence from six months to twelve. The torture of not knowing a fixed date for release may be a deterrent to the rehabilitative process itself. There are many cases involving first offenders where a fixed one-year term in prison to be followed by a term of supervised probation is enough to meet the needs of society.

In sum, the Board of Parole is under no obligation to consider the reasons behind the judge's sentence, and the judge is under no obligation to state his reasons. The Board cannot minimize disparities between those sentenced to prison and those placed on probation. 102 The sentencing judge may not be able to fulfill his sentencing responsibilities without reliance on the Board's guidelines. Yet, in the event of changed Board policy, the judge is often powerless, as we have seen, to make effective his own sentencing aims.

Congress has, in effect, provided such a wide range of sanctions for each offense, with no standards for their application, that in the exercise of their discretion some judges will inevitably impose sentences disparate from the norm. There is substantial need for sentence reform. 103 But effective reform of sentencing must be coordinated with changes in the parole system. 104 This task of


102 It may be that the most serious disparities in sentencing occur between those granted probation and those sentenced to prison. See Semi-Annual Report of the Director, Administrative Office of the United States Courts 71, Figure 46 (1975).


104 In a bill recently introduced by Senator Kennedy, a "Commission on Sentencing" would be established to set guidelines for sentencing judges. S. 2699, 94th Cong., 1st Sess. (1975). Perhaps the application of these guidelines will be similar to that of the guidelines of the United States Board of Parole. Other proposals to reform sentencing and parole laws are found in S. 1, H.R. 3907, 94th Cong., 1st Sess. (1975); S. 1109, 94th Cong., 1st Sess. (1975); H.R. 2322, 94th Cong., 1st Sess. (1975); and H.R. 5727, 94th Cong., 1st Sess. (1975).
coordination is one for the legislature. Moreover, while certain courts have timidly relaxed some of the limitations on the reviewability of sentences,\textsuperscript{105} many of the judicially imposed reforms applicable to the parole process—specifically, the requirement of reasons—cannot, in the face of judicial precedent, be extended to sentencing in the absence of statute. Efforts are being made in the Second Circuit to formulate benchmarks which will serve as a normal yardstick, subject to stated variations based on significant personal characteristics of the defendant, to guide judges in sentencing those who have committed various common offenses. That will, concededly, not be as easy to accomplish with so many independent district judges as it was to create a set of guidelines for use by a single administrative board.

In addition to the problems created by the confines of precedent and statute, there are substantial questions of jurisdiction which arise from the efforts of the federal judiciary to meet the challenges of state parole systems. In the case of federal prisoners directly challenging parole decisions, this circuit has seemingly approved a habeas corpus basis for jurisdiction.\textsuperscript{106} Under this theory, the prisoner asserts that he is being illegally confined because he was unlawfully denied parole due to a defect in the decision process. In the case of state prisoners, however, it is not so easy. In Johnson, and again in Haymes, the court treated the challenges of state prisoners to parole release procedures as arising under section 1983 of the Civil Rights Act of 1871.\textsuperscript{107} The theory employed is that the prisoners complain not of the final denial of parole but of the unconstitutional manner in which the decision is made.\textsuperscript{108} If state prisoners continue to assert jurisdiction under section 1983, prisoners need not exhaust state remedies, as they would be required to do in habeas corpus jurisdiction. And the federal courts might well become, almost unwittingly, the reviewing courts of first instance of state parole board decisions—surely an undesirable result.

\textsuperscript{105} See, e.g., United States v. Hendrix, 505 F.2d 1233, 1235-37 (2d Cir. 1974); United States v. Maples, 501 F.2d 985, 986-87 (4th Cir. 1974); United States v. Daniels, 446 F.2d 967, 971-72 (6th Cir. 1971).


\textsuperscript{108} In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court seemed to suggest that challenges related to the "fact or duration" of the confinement itself should, in most cases, be brought as habeas corpus actions. Id. at 498-99. See also Morrisey v. Brewer, 408 U.S. 471 (1972) (habeas corpus action).
Thus, the wisdom of the Haymes decision becomes apparent, for it places the duty to move forward where it belongs: on the states and, by implication, on the executive and legislative branches of the federal government. It is sometimes better not to stretch the Constitution to the limit, but to use it flexibly as a threat overhanging the political process. This is particularly so when the desirability of retaining the parole board's present role of determining release dates is placed in doubt by disclosures which suggest that the sentencing judge could just as easily and just as well fix the date for presumptive release at sentencing, thereby adding commendably to the certainty of the punishment imposed.109 With the parole system becoming so stratified, and with inmate behavior no longer critical, the question must inevitably arise: Is the journey through the parole system still necessary?

CONCLUSION

The need for legislative action on both the state and national levels is urgent. While the federal courts have proved adequate protectors of procedural rights in the parole process, the goals of the sentencing and parole system and the authority of judges and parole boards to implement them can best be determined by the legislature. But it must always be remembered that neither courts nor legislatures can, by procedural reform alone, promote the ultimate goal of rehabilitating offenders so as to eliminate recidivism. The hope for rehabilitation, at the least, requires us to recognize that inmates must be vocationally trained for economic survival in lawful pursuits with a good chance for a job. When the revolving doors of our prisons spew forth the untrained and the jobless, we are, in many cases, simply guaranteeing their return. That is why, I think, decisions granting parole so often turn out to be sadly wrong. Reform of our sentencing and parole systems will not materially affect the recidivism problem without fundamental changes in our prisons.110 And this will require money and patience, commodities which the Constitution does not provide.


110 As was reluctantly acknowledged in United States ex rel. Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925, 931 n.5 (2d Cir. 1974), there is grave doubt as to whether prisons have the capacity to perform the rehabilitative functions which have been assigned to them. See generally I. Kaufman, Prison: The Judges' Dilemma (1973); Task Force on Corrections, supra note 9, at 45-47. And we are aware that the parole board may have no more expertise than the sentencing judge in detecting or promoting that illusive goal. See Kastenmeier & Eglit, Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology, 22 AM. U.L. REV. 477 (1973).
Addendum

On March 15, 1976, the President signed the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219. The law becomes effective sixty days from that date and was passed and signed after this Article had been written and had gone to press. The law creates a Commission replacing the present United States Board of Parole. The Commission is expressly empowered to promulgate guidelines for the exercise of its power to grant or deny applications for parole. § 4203(a)(1). Among other items, the new law authorizes the use of hearing examiners and the division of the country into regions for the administrative purposes of the Commission. The law retains the present sentencing provisions embodied in 18 U.S.C. §§ 4202, 4208(a) (1970) in new § 4205(a),(b). The criteria for parole eligibility as provided in the new law, § 4206(a),(d), differ in language from those presently contained in 18 U.S.C. § 4203 (1970), as amended, (Supp. IV, 1974); however, they do not appear at first reading to be significantly more specific or to provide any more guidance for the exercise of the Commission's broad discretion than do the criteria mentioned in the text accompanying note 8 supra. The Act does seem to provide for a presumption of parole release after two-thirds of the sentence imposed has been served if the sentence exceeds five years. Section 4206(d).

One notable change wrought by the new law is that the sentencing judge may "at any time upon motion of the Bureau of Prisons . . . reduce any minimum term to the time the defendant has served." § 4205(g). However, the law fails to address many of the problems noted in the text above which the guidelines pose for the sentencing judge. The new law contains many other noteworthy provisions, such as those governing access by the prisoner to information in his case files, of which the press of time does not permit discussion or mention.