Due Process in Parole-Release Decisions*

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In January 1961 Frank Nubin began serving an indeterminate prison sentence for assault with a deadly weapon. The California Adult Authority, an administrative agency that determines the length of the sentences for adult male felons,¹ fixed Nubin's term at 7-1/2 years and released him on parole in 1965. In August 1966, however, Nubin's parole officer accused him of excessive drinking, and the Authority revoked his parole and refixed his term at 10 years, the legal maximum for the offense. One year later, the Authority again refixed Nubin's term, this time lowering it to 8 years, and re-released him on parole. On January 3, 1969, one day before Nubin's refixed term was to expire, the Authority fixed it again at 10 years, revoked his parole, and ordered him returned to prison. These decisions were fully within the Authority's power, because Nubin had been charged with another criminal assault (the charge was later dropped), thereby giving the Authority "cause" for revocation.² But when the Authority notified Nubin of this action, a typist mistakenly reported the date of term-fixing and parole revocation as January 31, 1969, instead of January 3. Since the Adult Authority loses jurisdiction over a parolee at the expiration of his term,³ and Nubin's term as first refixed expired January 4, Nubin had no difficulty persuading a judge that the Authority's

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1. After determining the length of sentence, the Adult Authority may redetermine it from time to time. See text accompanying notes 17-23 *infra*. The Authority is also charged with granting paroles [see text accompanying notes 36-45 *infra*], setting parole conditions, and suspending or revoking existing paroles. CAL. PENAL CODE §§ 3020, 3040, 3052-53, 3060 (West 1972).

2. CAL. PENAL CODE § 3063 (West 1972) requires "cause" for revocation of parole; there is no similar statutory requirement governing the granting or denial of parole. See also *In re McLain*, 55 Cal. 2d 78, 85-87, 357 P.2d 1080, 1085-86, 9 Cal. Rptr. 824, 829-30 (1960).

3. See, e.g., CAL. PENAL CODE § 2940 (West 1972); *In re Cowen*, 27 Cal. 2d 637, 641, 166 P.2d 279, 281 (1946); *In re Beasley*, 256 Cal. App. 2d 721, 723, 64 Cal. Rptr. 540, 541 (1st Dist. 1971).

action taken against him on "January 31" was of no legal effect. Frank Nubin obtained a writ of habeas corpus and was released from San Quentin.

Months later, the Authority succeeded in convincing an appellate court that the date of the letter to Nubin was a clerical error, and that its action against Nubin had in fact been taken before it lost jurisdiction. Accordingly, on November 12, 1971, Nubin was once again ordered returned to prison. But on November 16, the entire sequence of events was reported in the San Francisco newspapers. An Authority spokesman was quoted as saying that Nubin would receive another parole hearing in December 1971, when the Authority held its next regularly scheduled parole-release session at San Quentin. The next day, however, the judge who had granted Nubin's writ of habeas corpus, commenting on Nubin's successful adjustment to civilian society during his extensive period of illusory freedom, publicly stated that to return him to prison for further confinement or rehabilitation was obviously not necessary. Two days later, after a special meeting at Adult Authority headquarters in Sacramento, the Authority, specifically denying that it was acting under the pressure of publicity, released Nubin on parole for the third time.

The Nubin affair⁴ focused public attention on the parole-release process, the power of the administering agency and the magnitude of possible error.⁵ By and large the judiciary, like the public, is unaccustomed to scrutinizing the criminal process once the trial is over. Traditionally, the concept "due process of law" has been applied almost exclusively in the accusatory and trial stages of the criminal process.⁶ At these stages the accused is lavishly afforded all due process rights, although most persons formally charged with crime eventually plead guilty before trial.⁷ By contrast, corrections, in many respects the most crucial stage, has been treated as a realm of unfettered administrative discretion. Until recently, the courts pursued a hands-off prison policy so thoroughgoing that the most egregious abuses in the correctional system went unchecked.⁸

4. The foregoing history was reported in the San Francisco Examiner, Nov. 16, 1971, at 1, col. 8; Nov. 17, 1971, at 1, col. 6; Nov. 20, 1971, at 1, col. 7.

5. BOARD OF CORRECTIONS, HUMAN RELATIONS AGENCY, COORDINATED CALIFORNIA CORRECTIONS; FIELD SERVICES 114 (1971) [hereinafter cited as CORRECTIONS: FIELD SERVICES].

6. Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 803-04 (1961).

7. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904-05 (1962); AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1 (tentative Draft, 1967) [hereinafter cited as ABA].

8. See generally Rubin, *Needed—New Legislation in Correction*, 17 CRIME AND DELINQUENCY 392 (1971); Turner, *Establishing the Rule of Law in Prisons: A Manual*

The past decade, however, has witnessed a dramatic increase in judicial willingness to apply due process principles to the post-conviction criminal process.⁹ Procedures comporting with due process are now required at the original sentencing,¹⁰ deferred sentencing,¹¹ or resentencing¹² of the offender. Several courts have held that an inmate cannot be segregated from the main prison population, placed in an inferior prison environment, or subjected to other forms of serious punishment for alleged infractions of prison rules, unless the authorities that adjudicate the charge adhere to the procedures required by due process.¹³ And in a significant recent decision,¹⁴ the Supreme Court held due process generally applicable to parole-revocation proceedings, mandating minimally fair procedures to ensure that a parolee has in fact violated the terms of his release before he is returned to prison.

In this continuum of post-conviction due process—which begins with sentencing, extends to discipline in prison, and continues through the revocation of parole—there is one conspicuous void: the parole-granting decision itself. Release on parole remains a subject of final, absolute, and thoroughly arbitrary administrative discretion. As the Second Circuit said in 1970, "Like an alien seeking entry into the United States . . . [the prisoner] does not qualify for procedural due process in seeking parole."¹⁵ In line with this philosophy, not one American court has disturbed a decision denying parole for failure to

for *Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Note, *Decency and Fairness: An Emerging Judicial Role In Prison Reform*, 57 VA. L. REV. 841 (1971).

9. See Carlson, *The Law and Corrections*, 6 U.S.F. L. REV. 77, 80 (1971), and articles cited *id.* n.4.

10. See discussion of *Mempa v. Rhay*, 389 U.S. 128 (1967) in note 65 *infra*.

11. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

12. *Braun v. Rhay*, 416 F.2d 1055, 1058 (9th Cir. 1969); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969) (counsel must be provided in probation revocation proceedings).

13. *Landman v. Royster*, 333 F. Supp. 621, 651-56 (E.D. Va. 1971) (subjects of prison disciplinary proceedings are entitled to call and cross-examine witnesses and to a decision based on the evidence before an impartial tribunal); *Clutchette v. Procter*, 328 F. Supp. 767, 778-85 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357, 9th Cir., Aug. 27, 1971 (inmate charged with prison rule violation that may be referred for prosecution in the state courts may call and cross-examine witnesses and is entitled to counsel, a decision based on the evidence by an impartial fact-finder, and a right to appeal); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971) (due process requires adequate notice and an impartial tribunal at a prison disciplinary hearing). See also *Sostre v. McGinnis*, 442 F.2d 178, 196-98 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (due process does not require prison disciplinary hearing with counsel and witnesses; however, the prisoner must be confronted with the charges and given a chance to respond); *Nolan v. Scafati*, 430 F.2d 548, 550 (1st Cir. 1970) (some assurances of elemental fairness are essential when prisoner's substantial interests are at stake).

14. *Morrissey v. Brewer*, 92 S. Ct. 2593 (1972).

15. *Menechino v. Oswald*, 430 F.2d 403, 408-09 (1970), *cert. denied*, 400 U.S. 1023 (1971).

conform to due process.¹⁶ To the contrary, by labeling the parole decision a matter of legislative grace, the courts have steadfastly refused to require parole boards to employ procedures or standards of any kind in exercising their unbounded discretion.

What follows is, first, a brief inquiry into the nature and purpose of parole, the determinants of the parole-granting decision, and the method by which that decision is made. This review will show that the existing parole-granting process exhibits fundamental infirmities in hearing procedures and standards for decision. It will be argued that the parole-granting process must conform to appropriate due process safeguards because it cannot be distinguished in principle from several other post-conviction proceedings in which due process requirements apply. Finally, several incidents of due process are suggested as appropriate and useful at parole-granting proceedings, in light of the interests of the offender and the legitimate needs of the state.

I

PAROLE: A REALM OF UNCONTROLLED ADMINISTRATIVE DISCRETION

Unless he grants probation,¹⁷ the California judge is obliged to sentence a felon to imprisonment in state prison.¹⁸ In imposing this sentence, however, the court may not fix the term of imprisonment.¹⁹ Rather, the term is initially prescribed by various statutory minima and maxima.²⁰ The statutory term is then refined by the California Adult Authority, an administrative board composed of eight²¹ appointed members who "determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall

16. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 85 (1967) [hereinafter cited as CORRECTIONS TASK FORCE]: "Claims that parole was wrongfully denied have been uniformly rejected by the courts. Even those courts that have insisted upon procedural safeguards on parole revocation, are reluctant to extend them to the parole granting decision. Courts are even more reluctant to review the merits of such decisions." The Supreme Court has repeatedly denied certiorari on appeals from such decisions. Rubin, *The Burger Court and the Penal System*, THE NATION, June 21, 1971, at 787.

17. The probation alternative is authorized by statute. CAL. PENAL CODE § 1203 (West 1972). The sentencing judge's decision whether to grant probation has been called "undoubtedly the most significant step in the proceedings for many defendants." Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357, 382-83 (1970).

18. For some offenses, the judge also has discretion to sentence the offender as a misdemeanor rather than a felon, in which case imprisonment would be in a county jail rather than state prison. CAL. PENAL CODE § 17 (West 1972).

19. CAL. PENAL CODE § 1168 (West 1972), known popularly as the Indeterminate Sentence Law.

20. *Id.* See, e.g., CAL. PENAL CODE § 213 (West 1972).

21. Actually the statute provides for nine members, but one position has never been filled. CAL. PENAL CODE § 5075 (West 1972).

be imprisoned.”²² Thus the California Adult Authority enjoys the full breadth of judicial sentencing power, restricted only by the loose confines of the statutory minima and maxima and by various special rules governing parole eligibility for particular crimes.²³ Generally, when determining the length of an offender's sentence, the Authority will also set a date for parole. In any event, unless and until it fixes a term,²⁴ the prisoner must serve the maximum specified by statute.²⁵

Many states other than California have parole boards that determine the length of imprisonment *de facto* if not *de jure* by exercising their power to grant or deny parole.²⁶ In most of those states, however, the judge may set a minimum sentence that is binding upon the paroling agency.²⁷ Nevertheless, despite the judicial minimum sentence, in practice the parole boards of other states enjoy enormous latitude in fixing the length of imprisonment, because there is typically a wide range between the minimum set by the judge and the maximum established by statute.

The curbing of judicial power²⁸ and the delegation of that power to an administrative body is the essence of California's indeterminate sentence law, which was heralded as a reform when enacted in its

22. CAL. PENAL CODE § 3020 (West 1972); *In re Schoengarth*, 66 Cal. 2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967).

23. See generally CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PRACTICE 514-25 (1969) [hereinafter cited as C.E.B.]; Note, *Sentencing Criminals in California—A Study in Haphazard Legislation*, 13 STAN. L. REV. 340 (1961).

24. The Authority must fix a prisoner's term and consider granting him parole before his earliest parole eligibility date. *Ex parte Harris*, 80 Cal. App. 2d 173, 181 P.2d 433 (1st Dist. 1947). It was recently reported that the Authority had decided as a matter of policy to set a tentative parole date for each prisoner within 6 months of imprisonment. *San Francisco Chronicle*, Jan. 18, 1972, at 20, col. 8. This apparently constitutes part of an effort to blunt the criticism that the indeterminate sentence leaves a prisoner feeling insecure about his uncertain release date. Of course, to the extent that parole dates will be set during the early stages of imprisonment, with reference only to the crime committed and not the individual characteristics of the offender, the Authority will be moving away from the fundamental theory of indeterminate sentencing. See discussion accompanying notes 50-62 *infra*. The California Supreme Court addressed this problem only recently in *In re Minnis*, 7 Cal. 3d 639, 498 P.2d 797, 102 Cal. Rptr. 749 (1972), and concluded that an Adult Authority policy of like treatment for all offenders convicted of a particular crime contravenes the premises of the indeterminate sentence law.

25. CAL. PENAL CODE § 2940 (West 1972).

26. See, e.g., N.Y. PENAL LAW § 70.00 (McKinney 1965); MODEL PENAL CODE § 305.3(2) (Proposed Official Draft, 1962).

27. This can be as much as 25 years. See, e.g., N.Y. PENAL LAW § 70.00 (McKinney 1965).

28. A good deal of the impetus for transferring the sentencing power to an administrative board came from the irrational disparities in the sentences formerly handed down by California trial judges. Johnson, *supra* note 17, at 385 n.120.

present form in 1917.²⁹ Indeterminate sentencing rests upon the humane premise that criminal offenders should be imprisoned only so long as they constitute a threat to person or property.³⁰ It is believed that to achieve this goal the sentencing authority must focus on the individual rather than the offense. The individual, in turn, can best be understood by entrusting decision to an administrative board removed in time, place and passion from the offense and ensuing trial (or, more frequently, a guilty plea). In theory, this board should be able to (1) gather facts concerning the offender and the circumstances of his crime; (2) observe over time the offender's adjustment or maladjustment to prison life; (3) employ uniform standards; and (4) bring to bear an acquired expertise.³¹ The result, according to the theory, will be a balanced, scientific decision made by experts, at a comparatively leisurely pace, upon ample and accurate information accumulated in the real-life post-conviction milieu. At the same time the reformation of the criminal will be fostered by his knowledge that good behavior will lead to an early release on parole.³² *In re Lee*, which first construed the California Indeterminate Sentence Law, expressed these goals rather poignantly:³³

These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing.³⁴

Given this view it is hardly surprising that legal challenges to the law would be shunted aside as impediments to its humane, mitigative purposes. Confronted with the argument that the law embodies an unconstitutional delegation of judicial power to an executive agency, the California Supreme Court responded by depicting the parole board's sentencing power as "administrative in character" and therefore implicitly insulated from judicial scrutiny.³⁵ Thus were invented the fictions that by pronouncing judgment and sending a felon to prison the court, rather than the parole board, imposes sentence (even though

29. See Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215, 1222 (1971).

30. Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 612 (1970); Note, *Criminal Law: The Indeterminate Sentence*, 7 CALIF. L. REV. 132 (1918).

31. See, e.g., Hayner, *Sentencing By An Administrative Board*, 23 LAW & CONTEMP. PROB. 477, 493-94 (1958).

32. Mitford, *Kind and Usual Punishment in California*, ATLANTIC, March, 1971, at 46-47.

33. 177 Cal. 690, 171 P. 958 (1918).

34. *Id.* at 692, 171 P. at 959.

35. *Id.* at 693, 171 P. at 959.

determination of the length of that sentence is wholly beyond judicial control), and that the parole board's tasks are merely administrative (even though it is the board, not the court, that decides the length of the sentence). These fictions were born of a *parens patriae* benevolence in 1917. But today they serve to sustain nearly every Adult Authority determination of sentence by immunizing its procedures from effective judicial review.³⁶

In California, the decision to grant or deny parole, like the decision to fix a term, is committed to the absolute discretion of the Adult Authority. Sitting in two-member panels at the initial parole hearing, the Authority roams at large over the landscape of the inmate's life. The members strive diligently to reach an intelligent decision, but they are frequently limited by a session lasting only ten to fifteen minutes, during which they take turns interviewing the inmate and reviewing the file of the next inmate scheduled to be heard. They may consider the offender's family background, marital relationships, criminal record, adjustment in prison, employment history and skills, psychological makeup, associations, and material and personal resources beyond prison walls. The members usually inform themselves by swiftly leafing through a thick case summary prepared by the prison staff. The summary contains a pre-sentence probation report, outlining the circumstances of the offense, psychiatric test results and analyses, a "rap sheet" on prior criminal offenses, a report on prison "beefs" (accusations by prison personnel that the subject is guilty of disciplinary infractions), and, in some cases, comments by the prosecutor and the sentencing judge.³⁷

The hearing itself adds little to the written case summary.³⁸ There

36. See, e.g., *People v. St. Martin*, 1 Cal. 3d 524, 538, 463 P.2d 390, 398, 83 Cal. Rptr. 166, 174 (1970); *In re Schoengarth*, 66 Cal. 2d 295, 304, 425 P.2d 200, 206, 57 Cal. Rptr. 600, 606 (1967); *In re Sandel*, 64 Cal. 2d 412, 415-16, 412 P.2d 806, 809, 50 Cal. Rptr. 462, 465 (1966); *People v. Ray*, 181 Cal. App. 2d 64, 68-69, 5 Cal. Rptr. 113, 115 (1st Dist. 1960), *cert. denied*, 366 U.S. 937 (1961). But cf. *In re Minnis*, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (Adult Authority's general procedures upheld as constitutional, but individual determination overturned because decided on the basis of a policy inconsistent with indeterminate sentencing theory). The federal government and all of the states have adopted some system of parole, and more than 60% of adult felons are released on parole prior to expiration of their maximum terms. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* 77 (2d ed. 1969).

37. See, e.g., CAL. PENAL CODE §§ 5007, 1203.01 (1972). The description of the prisoner's cumulative case summary, and the description which follows of the parole proceedings themselves, are based upon the writer's attendance at Adult Authority hearings at San Quentin Prison in November 1971, and interviews with the two Adult Authority members presiding over those proceedings. See also Mitford, *supra* note 32, at 49-50.

38. See, e.g., CORRECTIONS TASK FORCE, *supra* note 16, at 85:

Legislation usually provides for some type of hearing when parole eligibility is established, but does not further define the prisoner's rights. Parole boards

is no statutory requirement for a hearing,³⁹ or for notice of parole proceedings, and the California courts have held that notice and hearing are not constitutionally required.⁴⁰ The hearings are held strictly as a matter of grace. The inmate is permitted to attend, ask questions, and speak in his own behalf. But he has no right to counsel, to compulsory process, to present evidence, or to confront or cross-examine the faceless accusers responsible for "silent beefs" or for adverse commentary contained in the probation reports. The inmate's lawyer is not allowed to attend, nor does he even receive notice of the hearing unless he specifically requests it. Only the inmate, the two Adult Authority members and their aides, and an occasional public observer attend the proceedings. The prisoner is denied access to the contents of the case summary,⁴¹ as well as to other evidence adduced against him at the hearing. Finally, no complete record is kept of what occurs at the hearing itself.

In this setting, the Authority members (often only the one who reads the inmate's summary) ask a few questions about the inmate's criminal record, circumstances of his latest offense, activities in prison, and aspirations upon release. Decision may turn on an allegation contained in the probation report, but the inmate generally will not know this, much less be given a meaningful opportunity to refute the allegation. Similarly with "beefs": unless, fortuitously, the accusation was sustained at a prison disciplinary hearing where the inmate was afforded the chance to present a defense, the "beef" may reflect nothing more than a prison guard's momentary whim or vindictiveness.

Having skimmed through the case summary and observed and possibly heard the prisoner, the members decide whether to fix his term and give him a parole date. By Adult Authority policy, refusal to fix the term or set a date automatically postpones further consideration for one year.⁴² This crucial decision is made without any statutory guideposts.⁴³ The courts have not filled the statutory lacuna,⁴⁴ and

tend to rely primarily on pre-sentence and institutional reports, and parole investigations. They usually give prisoners what can best be described as an interview.

39. A new statute added in 1971 provides only that offenders with parole eligibility dates of less than 120 days shall be considered by the Adult Authority at a "parole meeting" to be held before that date. CAL. PENAL CODE § 3041(b) (West 1972).

40. See, e.g., *People v. St. Martin*, 1 Cal. 3d 524, 538, 463 P.2d 390, 398, 83 Cal. Rptr. 166, 174 (1970); *People v. Ray*, 181 Cal. App. 2d 64, 68, 5 Cal. Rptr. 113, 115 (1st Dist. 1960).

41. *Dorado v. Kerr*, 454 F.2d 842, 897-98 (9th Cir. 1972).

42. Adult Authority Policy Statement No. 16, June 19, 1964.

43. See *Johnson*, *supra* note 17, at 381: "The Penal Code provides no standards to guide the Adult Authority in exercising its vast discretion to release a prisoner or to confine him indefinitely." Cf. CAL. PENAL CODE §§ 3040, 5077 (West 1972).

44. While there must be "cause" for some Adult Authority decisions, for instance redetermination of sentence following revocation of parole (see note 2 *supra*), there is

the Authority itself has failed to develop viable administrative criteria.⁴⁵ It publishes a series of resolutions and policy statements, but these merely specify procedures; they do not contain any substantive standards to guide the parole-release decision.⁴⁶ Lack of standards notwithstanding, the members do reach a decision, by some mysterious alchemy, immediately upon completion of the hearing. This decision is written down in Adult Authority ledgers and orally transmitted to the inmate a few days later by a correctional counselor at the prison. In the past year the members have begun to indicate reasons for their decisions, although they are not required to do so. There is, as we have seen, no judicial review, nor indeed could there be in the absence of a record.

The foregoing description of the parole-granting process exposes two glaring deficiencies in the administration of the indeterminate sentence law. The first is the lack of fair procedures. The inmate receives neither notice of the information to be used against him, nor a fair hearing on the charges that can trigger an additional year in prison. The second is the absolute dearth of standards, which makes the parole-release process essentially arbitrary.⁴⁷ Each of these deficiencies has

no similar judicial requirement either for the determination of sentence or denial of parole. *See Azeria v. California Adult Authority*, 193 Cal. App. 2d 1, 5, 13 Cal. Rptr. 839, 842 (1st Dist. 1961): "The discretion lodged in the Authority is so broad that it is seldom that a case can be made out that would show an abuse of that discretion." To date, no court has found the Authority's cause so meager as to warrant upsetting a denial of parole. *But cf. In re Minnis*, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (parole may not be denied permanently at the outset of a term by refusal to give subsequent parole consideration).

45. It has frequently been suggested that administrative criteria should be formulated even where there are adequate statutory or judicial criteria, because of the administrators' supposed superior insight into the parole-release decision. *See, e.g., K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 130-33 (1969); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U.L.Q. 243, 300-03.

This lack of statutory, judicial or administrative criteria cannot be explained away by suggesting that the criteria are obvious, for there is little agreement in California as to the goals of the parole process, or as to the type of information needed to reach decisions in furtherance of those goals. INSTITUTE FOR THE STUDY OF CRIME AND DELINQUENCY, *THE PAROLE DECISION: SOME AGREEMENTS AND DISAGREEMENTS* 3, 5 (1964). *Cf. HUMAN RELATIONS AGENCY, BOARD OF CORRECTIONS, COORDINATED CALIFORNIA CORRECTIONS: THE SYSTEM* 24 (1971) [hereinafter cited as *CORRECTIONS: THE SYSTEM*]. Indeed, a recent study suggests that there exists no statistical relationship between time served in prison and a successful outcome on parole. CALIFORNIA ASSEMBLY, SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *PAROLE BOARD REFORM IN CALIFORNIA: ORDER OUT OF CHAOS* 13 (1970) [hereinafter cited *ORDER OUT OF CHAOS*].

46. In a recent decision of the Sacramento Superior Court, the Adult Authority was ordered to comply with the State Administrative Procedure Act in promulgating its Rules and Regulations. *American Friends Service Committee v. Procnunier*, No. 219,108 (June 30, 1972).

47. The absence of standards is critical. Given the apparent intent of indeterminate sentencing, the criteria governing the parole-release decision should relate

spawned massive criticism both by inmates and professional observers. Almost every recent prison study singles out parole procedures as a particularly serious irritant.⁴⁸ A recent report by the Human Relations

primarily to the likelihood of recidivism. Without standards, however, the Authority is free to rely on other, arguably impermissible factors, and it would appear that this is precisely what happens. One summary of Authority criteria, for example, concludes that the board does base its decision on the likelihood of recidivism, but only "[s]ubject to the considerations arising from the nature of the offense and the sentiment of the community towards the inmate. . . ." C.E.B., *supra* note 23, at 531 (emphasis added). See also Mitford, *supra* note 32, at 50. Thus, contrary to indeterminate sentencing theory, the decision turns on the crime, instead of the criminal; and on society's willingness to re-accept the offender, instead of the offender's ability to obey the laws of society. In a 1952 policy statement the Adult Authority went so far as to admit that offenses which "more grievously offend the public conscience . . . demand longer sentences" because "the punishment should fit the crime." CALIFORNIA ADULT AUTHORITY, PRINCIPLES, POLICIES AND PROGRAM 8-9 (1952), quoted in Johnson, *supra* note 17, at 381-82.

Parole boards employ numerous other "standards" unrelated to recidivism. Some prisoners are judged by whether they have participated in prison therapy programs, thereby evidencing a good "attitude", even when those programs are unavailable or oversubscribed. (In November 1971, for example, there were 4 psychiatrists at San Quentin prison to treat the roughly 5,000 inmates at the institution. Frequently Adult Authority members would indicate to the prisoner that participation in a therapy program is a prerequisite to release; the prisoner would reply that he had been on a waiting list for such a program for months with no immediate hope of gaining admittance.) Many boards deny parole where the likelihood of recidivism is slight to ensure that punishment is "seemly" (Crime X requires Y years), to support institutional discipline, or to avoid public criticism of the parole system. On the other hand, where the parole officials discount the consequences of a repeated offense, many boards release prisoners convicted of crimes of a non-assaultive nature despite high probabilities of recidivism. And parole will sometimes be granted notwithstanding the inmate's recidivist propensities as a reward for services he has performed as a prison informant. Dawson, *supra* note 45, at 248-95.

Perhaps some of these standards serve legislative ends. Facially, however, they all offend the ideal of the indeterminate sentence and should not be resorted to absent an express statutory or judicial authorization of their use.

48. A representative criticism calls for judicial inquiry into "the almost incredible freedom from procedural safeguards" enjoyed by the authority in granting or denying parole. Johnson, *supra* note 17, at 1390. See also Mitford, *supra* note 32, at 47; Rubin, *supra* note 8, at 393; Goldfarb, *The Voices Inside*, JURIS DOCTOR, Dec. 1971, at 49; Van Dyke, *supra* note 29, at 1223 n.37. The prisoners' grievances have been summarized as follows:

That parole is secret; without standards; granted or withheld without a hearing; the prisoner lacks the assistance of an attorney; there is no way to have unfair denials of parole reviewed. And finally, that the courts will neither require a fair procedure nor review unfair decisions.

Rubin, *supra* note 16, at 787.

It is beyond the scope of this Article to discuss the administration of parole in California in terms of the fairness of the individual Adult Authority members. It is interesting to note, however, that even some of the members of the parole staff feel that "the philosophy of the Adult Authority is . . . too punitive and retributive." CORRECTIONS: FIELD SERVICES, *supra* note 5, at 65. And a select committee of the legislature which reported on the Adult Authority in 1970 suggested replacing the present vague statute governing the composition of the Authority (CAL. PENAL CODE § 5075 (West 1972)) with a statute specifying various socio-legal disciplines from

Agency of the Board of Corrections⁴⁹ recommended that the burden of proof be on the Authority to justify continued imprisonment after any minimum periods prescribed by law.⁵⁰

A select committee of the California Assembly has suggested that the Adult Authority concentrate on developing policies and procedures rather than hearing individual cases. The Assembly committee also recommends placing the burden on the Authority to justify detention past the minimum parole eligibility date. Its proposed legislation would force the Adult Authority to fix terms and hold hearings at designated intervals and file written reports specifying reasons for its decisions. The committee would also give the Authority subpoena power, presumably to enable the taking of testimony at parole hearings and thereby improve the factual reliability of Authority decisions.⁵¹

The arbitrary, standardless nature of parole-release proceedings is hardly unique to California. The Federal parole board, for example, points with pride to the fact that it has evolved no general standards for parole release.⁵² Yet the board does admit to covert sub-standards, such as giving preference to Jehovah's Witnesses over other war resisters.⁵³ Professor Davis has characterized the Federal board's performance as "about as low in quality as anything I have seen in the

which Adult Authority appointees must be drawn. Apparently, the recent, only partially accurate characterization of the Authority's membership as "eight cops and a dentist" [San Francisco Sunday Examiner & Chronicle, Feb. 28, 1971, at 18, col. 3] contained enough truth to cause the committee to propose new requirements. The fact that every jurisdiction with an indeterminate sentencing system metes out terms of greater median length than their counterpart jurisdictions with judge set terms highlights the potential significance of the problems of fairness. Mitford, *supra* note 32, at 47.

49. The Board of Corrections, an agency coordinate and coequal with the Adult Authority, is charged with policymaking for, and custodial management of, the California state prisons.

50. CORRECTIONS: THE SYSTEM, *supra* note 45, at 91-92 (1971).

The Agency's Task Force on Parole pointed out that the Authority's power to refix previously set terms is one "granted to no court" and exercised "in a manner and under conditions not permitted in any court." CORRECTIONS: FIELD SERVICES, *supra* note 5, at 115.

51. ORDER OUT OF CHAOS, *supra* note 45, at 15. The report concludes that "[t]he parole board is one of the last bastions of unchecked and arbitrary power in America." *Id.*

52. Gaylin, *No Exit*, HARPER's, Nov. 1971, at 88-89.

53. The Administrative Conference of the United States recently unanimously approved a recommendation that the United States Board of Parole formulate standards to govern the grant, referral or denial of parole. The Conference also suggested that the Parole Board make disclosure of prisoner's file in connection with parole hearings "except for any information as to which disclosure is clearly unwarranted." The assistance of counsel or similar spokesman, as well as the issuance of a statement of reasons by the Board, were also recommended by the Conference. 40 U.S.L.W. 2830, 2831 (June 20, 1972).

federal government."⁵⁴ The parole boards of the other states typically lack any guidance as to the criteria for release. Seldom are there procedural requirements, and ultimate decision is committed to the unfettered discretion of the boards.⁵⁵ The Corrections Task Force of the President's Commission on Law Enforcement and Administration of Justice has urged state correctional authorities to develop policies and improve hearing procedures.⁵⁶ The drafters of the Model Penal Code, concerned about the general paucity of standards, would establish a policy of releasing prisoners at their minimum parole eligibility dates unless specified countervailing factors are shown.⁵⁷

Even the harshest critics of the parole process, however, favor retaining a flexible sentencing structure providing for deferred parole decisions made well after the time of trial.⁵⁸ Indeed, the trend has been to expand the paroling agencies' discretion⁵⁹ by reducing the length of statutory minimum sentences,⁶⁰ or abolishing them altogether.⁶¹ This approach seems perfectly justified. If only because they have the opportunity to engage in an ongoing evaluation and re-evaluation of the inmate over time, the boards are in a far better posi-

54. K. DAVIS, *supra* note 45, at 133.

55. Dawson, *supra* note 45, at 244. A typical standard states that the board "shall release on parole any person confined in any correctional institution . . . when in its opinion there is a reasonable probability that the prisoner can be released without detriment to the community or to himself." This "standard" comes from the Standard Probation and Parole Act, promulgated in 1955 by the National Council on Crime and Delinquency, later acknowledged to be deficient by one of its chief draftsmen. See Rubin, *supra* note 8, at 398. The Act serves as a model for the parole statutes of most states. Dawson, *supra* note 45, at 285. Other statutory standards include: a prediction that the inmate will be a "good citizen" if released; inmates may be released when "their conduct for a reasonable time has satisfied the department that they will be law-abiding, temperate, honest, and industrious"; the prisoner has shown a "disposition to reform" or will "lead a correct life." *Id.* at 290-91. Clearly, better statutory standards could be devised. *Id.* at 248-95.

56. CORRECTIONS TASK FORCE, *supra* note 16, at 82-83, 85-86.

57. MODEL PENAL CODE §§ 305.6, 305.9 (Proposed Official Draft, 1962). As in California, the trend nationally is to put the burden on correctional authorities to justify continued incarceration. See also Schrieber, *supra* note 30, at 632.

58. Kadish, *supra* note 7, at 929. The Joint Legislative Committee agrees:

California has pioneered with its indeterminate sentence and the consensus of informed opinion, with which we agree, is that it should not now be discarded. Such difficulties as have arisen in it involve the exercise of the term-setting and paroling power by the Adult Authority.

Cf. Ellhamer v. Wilson, 312 F. Supp. 1245, 1256 (N.D. Cal. 1969), *reversed*, 445 F.2d 856 (9th Cir. 1971). But see Mitford, *supra* note 32, at 45.

59. See, e.g., STATE OF CALIFORNIA, JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, TENTATIVE DRAFT No. 2, 20-21 (1968) [hereinafter cited as PENAL CODE REVISION].

60. See, e.g., Rubin, *supra* note 8, at 396, 403.

61. *Cf. Johnson*, *supra* note 17, at 385; CORRECTIONS: FIELD SERVICES, *supra* note 5, at 15. See also NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT 31 (1963).

tion to decide upon an appropriate disposition than is the judge immediately following the trial. Thus, the need is not to eliminate discretion but to control it by requiring minimally adequate standards and procedures. The discussion that follows will consider whether improved procedures,⁶² at least, are constitutionally required to ensure due process of law.

II

PAROLE-RELEASE PROCEEDINGS ARE SUBJECT TO DUE PROCESS CONSTRAINTS

The Supreme Court has frequently articulated the general proposition that every form of adjudicative governmental proceeding affecting important personal interests must be conducted in accordance with due process, although the specific requirements of due process depend upon "a complexity of factors."⁶³ In *Mempa v. Rhay*,⁶⁴ a unanimous Court had no difficulty extending this generalized due process argument to the setting of post-conviction sentencing.⁶⁵ The Court held that presence

62. The discussion which follows in Part II will deal solely with constitutional requirements affecting parole-release *procedures*, as distinct from standards. The formulation of ascertainable standards has not been considered constitutionally required for the imposition of punishment by judge or jury. *McGautha v. California*, 402 U.S. 183, 207 (1971); *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 n.8 (1966). This may now be changing. *Furman v. Georgia*, 92 S. Ct. 2726 (1972). However, the development of fair procedures will encourage the formulation of standards whether or not such standards are ultimately held required as a matter of substantive due process.

63. *Hanna v. Larche*, 363 U.S. 420, 442 (1960).

64. 389 U.S. 128 (1967).

65. *Id.* at 134. Actually the offenders in *Mempa* had originally been granted probation, and the sentencing at issue took place at the end of a proceeding in which the court first decided to revoke that probation for alleged violations. The Supreme Court thus refers to the sentencing aspect of the proceeding as "deferred sentencing."

The case arose in the State of Washington, which has a parole procedure similar to California's in that an administrative board determines the actual length of sentence after the judge imposes a "sentence" for the maximum term prescribed by law. The state argued that the actual sentencing took place when *Mempa* was originally granted probation, and that the subsequent imposition of "sentence" for the maximum term prescribed by law was merely a part of the probation-revocation proceeding. The court acknowledged that "sentencing in Washington offers fewer opportunities for the exercise of judicial discretion than in many other jurisdictions," but held nevertheless that "a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." *Id.* at 137. In so holding the court resurrected *Townsend v. Burke*, which, the court said, "illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing." *Id.* at 134. *Williams v. New York*, 334 U.S. 736 (1948), which the court felt constrained to distinguish in *Specht v. Patterson*, 386 U.S. 605 (1967), was not even mentioned in *Mempa*. See text accompanying notes 119, 121-22, and 170, *infra*.

The strength of the court's commitment to enforce due process requirements at judicial sentencing is evidenced by its willingness to declare the right to counsel in the

of counsel at sentencing was required as an aspect of 14th amendment due process because of the "critical nature of sentencing in a criminal case" and because substantial rights may be affected.⁶⁶ Lower courts, taking their cue from *Mempa*, have required due process protections at resentencing proceedings and in matters of prison discipline.⁶⁷ The Supreme Court itself has followed up *Mempa* by injecting certain incidents of due process into parole-revocation proceedings.⁶⁸

The prisoner up for parole stands bereft of any similar protections. His position of relative disadvantage is difficult enough to understand where, as in many states, the parole authority determines the effective length of a prisoner's term by deciding when he is released on parole. It is even more difficult to understand in a jurisdiction such as California where the administrative board determines not only the actual parole date but the formal length of imprisonment as well. There it is clear that the board, not the judge, determines the sentence. The

peculiar factual setting of *Mempa*. *Mempa* involved not only a deferred sort of sentencing, following the tentative granting of probation, but also the judicial "sentence" of the State of Washington, which, like California's, is little more than the formal pronouncement of the terms specified by statute. A fortiori, the protections of due process must after *Mempa* apply at original sentencing proceedings, and to the sentencing procedures of states where, unlike Washington or California, judges have the discretion to sentence for a definite term of years within the statutory range. See, e.g., Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 834 (1968) [hereinafter cited *Procedural Due Process*]. The Supreme Court itself has implicitly recognized since *Mempa* that due process protections apply at judicial sentencing proceedings generally. In *McGautha v. California*, 402 U.S. 183 (1971), for instance, the court said that it "has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." 402 U.S. at 218 (emphasis added). The assumption underlying this statement is that other incidents of due process—the right to counsel assured in *Mempa*, and the right to be sentenced upon reasonably reliable information, declared in *Townsend*—do obtain at judicial sentencing proceedings, original or deferred, in all the states.

66. 389 U.S. at 134.

67. See cases cited notes 12 & 13 *supra*.

68. *Morrissey v. Brewer*, 92 S. Ct. 2593 (1972). Actually, the Court in *Morrissey* partially distinguished *Mempa* by observing that parole revocation is not part of a "criminal prosecution" and therefore the parolee at such a proceeding is not entitled to the "full panoply" of rights due a defendant at judicial sentencing. *Id.* at 2600. The origin of this "criminal prosecution" language is not clear. As Chief Justice Burger's *Morrissey* opinion had earlier noted, the concern in *Mempa* was with due process rights at significant stages of a "criminal proceeding." *Id.* at 2597. The unexplained shift from the use of the word "proceeding" to the word "prosecution" is utilized in the opinion to make parole proceedings appear to be more removed from the heart of the criminal process than *Mempa* had suggested. In any event, even assuming a valid reason for the verbal gymnastics, the effect of the distinction in the Court's mind is only that the parolee does not deserve a "full panoply" of due process rights. And parole-release proceedings, of course, are even less removed, substantially and temporally, than parole-revocation proceedings from a criminal prosecution.

basic argument for applying due process protections to the parole-granting decision rests on this functional identity of the parole board and sentencing judge.

The courts have rejected every attempt to import a single incident of due process into the parole-release procedure.⁶⁹ The rationales of the decisions vary greatly, but broadly speaking they fall within the following five categories:

(1) The parole board does not really sentence in the sense intended by *Mempa v. Rhay*; the court, by ritually incanting the sentence "prescribed by law," does the actual sentencing.⁷⁰ Under this view the parole board performs a purely administrative function.⁷¹ (Implicit in this position is the assumption that administrative agencies are immune from the strictures of procedural due process.)

(2) Imprisonment strips the offender of all constitutional rights, and therefore the granting of parole is a matter of legislative grace. (This objection may be urged most strenuously in California, where the sentence "prescribed by law" is deemed in legal contemplation to be a sentence for the maximum possible term.)⁷²

(3) Release from prison under parole supervision is merely a transfer of the inmate from one form of custody to another, and the inmate's right to liberty is not therefore at stake in the parole-release decision.⁷³

(4) The parole-release decision requires expertise, which judicial scrutiny of parole boards would inevitably erode. An allied objec-

69. See, e.g., *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970); *Padilla v. Lynch*, 398 F.2d 481 (9th Cir. 1968); *People v. St. Martin*, 1 Cal. 3d 524, 463 P.2d 390, 83 Cal. Rptr. 166 (1970); *Briguglio v. New York State Board of Parole*, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969). The California Supreme Court recently paid lip service to the notion that parole may not be denied except by means consonant with due process, but then reverted to labels in disposing of the prisoner's claim of entitlement to the assistance of counsel. *In re Minnis*, 7 Cal. 3d 639, 499 P.2d 997, 102 Cal. Rptr. 749 (1972).

70. *Dorado v. Kerr*, 454 F.2d 892, 896 (9th Cir. 1972). For example, courts holding that no due process is applicable to parole-release proceedings say that sentence has already been "finally decreed" by the court. See, e.g., *Menechino v. Oswald*, 430 F.2d 403, 410 (2d Cir. 1970). Cf. *In re Tucker*, 5 Cal. 3d 171, 178 n.5, 486 P.2d 657, 660 n.5, 95 Cal. Rptr. 761, 764 n.5 (1971): the "actual sentence previously imposed by the court remains unaffected by either the parole or subsequent revocation thereof." The holding and rationale of *Menechino* were recently reaffirmed by the Second Circuit in *Walker v. Oswald*, 449 F.2d 481 (1971), where the court denied the right to counsel or any other incidents of due process at parole board proceedings fixing minimum terms of imprisonment within judicially determined maxima.

71. E.g., *Dorado v. Kerr*, 454 F.2d 892, 896-97 (9th Cir. 1972).

72. "It is fundamental to the indeterminate sentence law that every such sentence is for the maximum unless and until the Authority acts to fix a shorter term." *In re Mills*, 55 Cal. 2d 646, 653, 361 P.2d 15, 20, 12 Cal. Rptr. 483, 488 (1961).

73. E.g., *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971), quoted in *Morrissey v. Brewer*, 92 S. Ct. 2593, 2601 n.1 (1972).

tion is that the parole-release process, being concerned with the "whole man" and not just his deeds, is not adjudicative and therefore should not be hamstrung by due process constraints.

(5) There are very few procedural protections at judicial sentencing; due process cannot require greater protections for administrative sentencing carried on outside the judicial arena.

These rationales for refusing to apply familiar due process principles to parole-release proceedings will be discussed seriatim in this part of the Article. This examination concludes that each is either analytically faulty or is bottomed on demonstrably false factual premises. It should be stressed, however, that the courts have erred not merely by ruling that particular incidents of due process do not obtain at parole-release proceedings, but by holding that such proceedings are exempt in principle from any due process requirements whatsoever.

The exact features of parole-release proceedings, like all proceedings at which due process rights arguably obtain, must be determined by balancing the individual's interest and the government's need for summary adjudication.⁷⁴ Part III will discuss which due process rights are required by this balancing process.

A. Parole Boards Perform a Judicial Task

There are two fundamental flaws in the rationale which asserts that the parole board's task is merely administrative. First, the underlying factual assumption about the parole board's duties and methods of operation is false: the board performs the same tasks, with the same discretion and power, in the same manner and with the same effect on the offender as the sentencing judge. Second, even if the factual premise were correct, it would not follow that the parole-release decision should be free from the rudimentary elements of due process, for due process attaches to "administrative" as well as "judicial" proceedings that vitally affect significant individual interests.

The Supreme Court has taken a thoroughly practical approach to deciding whether due process requirements obtain at particular post-conviction phases of state criminal proceedings. In *Mempa v. Rhay* and its progeny, the Court considered whether due process demands the presence of counsel at a deferred judicial sentencing proceeding which

74. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263 (1969); *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1959). The flexible approach to due process exemplified by *Hannah* will be followed in Part III, *infra*, in considering which incidents of due process might be appropriately required at parole-release hearings, given the "nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding . . ." *Id.* at 442.

followed the offender's alleged infraction of a probation condition. Although in *Mempa* the Court expressed its conclusion in the shorthand proposition that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,"⁷⁵ its approach consisted of examining, first, the nature of the subject proceeding; second, its conceptual and temporal proximity to the primary determination of guilt; and finally, the impact upon the offender of the decision produced at that proceeding.

The Court's subjection of parole-revocation proceedings to due process limitations in *Morrissey v. Brewer*⁷⁶ illustrates this practical approach. After reviewing the Court's customary due process methodology, the opinion by Chief Justice Burger turned to examine the parolee's interest in continued liberty, and concluded that this interest was substantial. Since termination of that liberty was found to inflict a "grievous loss" on the parolee, the Court held that due process in general applies, even though parole-revocation proceedings are only tenuously related to the initial criminal trial and sentencing of the offender.⁷⁷

In line with the Court's practical approach to post-conviction due process, as exemplified by *Mempa* and *Morrissey*, we should undertake to ascertain whether an adverse parole-release decision inflicts a "grievous loss" on the prisoner, and whether the decision-making process itself is functionally equivalent to the judicial sentence. If so, then due process requirements should adhere to the process of parole release just as they now, after *Mempa* and *Morrissey*, adhere to the processes of post-conviction judicial sentencing and revocation of parole.

The functions of parole boards at release hearings and of judges at sentencing are virtually identical. In most systems the full range of judicial sentencing power is delegated to the parole board.⁷⁸ Parole

75. 389 U.S. 128, 134 (1967); for cases after *Mempa*, see *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *Braun v. Rhay*, 416 F.2d 1055 (9th Cir. 1969); *Ellhamer v. Wilson*, 312 F. Supp. 1245 (N.D. Cal. 1969), *rev'd*, 445 F.2d 856 (9th Cir. 1971). Cf. *In re Gault*, 387 U.S. 1 (1967).

76. 92 S. Ct. 2593 (1972).

77. *Id.* at 2600.

78. "[V]iewed objectively, the parole release proceeding . . . does seem in practical effect to be an extension of the sentencing process . . ." *Menechino v. Oswald*, 430 F.2d 403, 414 (2d Cir. 1970) (Feinberg, J., dissenting). In *Sturm v. California Adult Authority*, 395 F.2d 446 (9th Cir. 1967), Judge Browning, in concurrence, observed that the legislatively prescribed formal sentence, subject to parole board refinement, is no more than a "device for transferring the sentencing function from the state court to the state administrative agency . . ." *Id.* at 449. He argued that under settled due process principles such a device cannot be used to shield all agency actions from constitutional scrutiny. *Id.* In *In re Tucker*, 5 Cal. 3d 171, 189, 486 P.2d 657, 668, 95 Cal. Rptr. 761, 772 (1971), Justice Tobriner, dissenting, pointed out that the Adult Authority, like other administrative agencies, should be required to

boards often fix terms for parole eligibility, a function corresponding precisely with the authority of the judge in some jurisdictions to set a minimum sentence.⁷⁹ In many jurisdictions authority for setting maximum terms has been explicitly removed from the judge and given to the board.⁸⁰ California provides the most vivid illustration of the broad reach of parole discretion, for the Adult Authority makes the only crucial decision respecting the length of the offender's term. This results from the unrealistically long maximum terms provided for by statute; armed robbery, rape, second degree murder and first degree burglary, for example, are all punishable by life imprisonment. Yet in 1965 the median terms served by those on parole for these offenses ranged from three to 5.4 years.⁸¹ The discretion vested in the Adult Authority is not atypical; similar power is exercised by parole boards throughout the United States.⁸²

The considerable interaction between the judicial system and the parole system also suggests that parole decisions should conform to whatever due process constraints bind the sentencing judge. In several jurisdictions the judge, as well as the prosecutor, is expected to make sentencing recommendations to the parole board.⁸³ In doing so, judges may wield extraordinary influence, even when recommending continued incarceration for offenders they have not seen or heard of since the day of judicial sentencing. Such interaction has proved persuasive to a number of individual judges, although they have yet to convince a majority of any court that the parole-granting function is really only the judicial function in disguise.⁸⁴

observe "at least the basic elements of procedural due process." See *Goldberg v. Kelly*, 397 U.S. 254, 260-64, 267-71 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 426-29 (1969); *Willner v. Committee on Character*, 373 U.S. 96, 105-06 (1963); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1958).

CORRECTIONS TASK FORCE, *supra* note 16, at 86. Compare *Kadish*, *supra* note 6, at 812-13, with Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497 (1968):

The condition of the prisoner seeking parole is substantially the same as that of the convicted felon facing sentencing. Neither can be said to have a "right" to anything less than a maximum sentence—the maximum statutory limit for sentencing or the maximum imposed term for parole purposes. In all jurisdictions the parole board is granted some freedom within the maximum and minimum sentence to materially shorten the term of the prisoner, just as the court exercises its discretionary power in selecting a sentence.

79. Rubin, *supra* note 8, at 396 (1971).

80. *Id.*

81. Johnson, *supra* note 17, at 380-81. The Joint Legislative Committee for Revision of the Penal Code notes: "[T]he Adult Authority in the great majority of cases releases prisoners long before their maximum terms" PENAL CODE REVISION, *supra* note 59, at 17.

82. CORRECTIONS TASK FORCE, *supra* note 16, at 86.

83. Comment, *supra* note 78, at 505.

84. See note 78 *supra*. The extent of judicial influence is revealed in the following account of a California ex-convict:

In a striking recent decision the Supreme Court of New Jersey held, in *Monks v. Parole Bd.*,⁸⁵ that even apart from considerations of due process, parole board proceedings, like those of any other administrative agency, must be conducted with fundamental fairness.⁸⁶ The court required a parole board to issue a statement of reasons in connection with its repeated denials of parole to a state prisoner.⁸⁷ Grounding its decision in general administrative law, the court insisted that agencies of all kinds furnish reasons in support of their actions, both to ensure a fair and responsible determination and to afford a proper basis for judicial review.⁸⁸ The court also found that a record would not curb the board's legitimate discretion to grant or deny parole.⁸⁹

The Supreme Court in *Mempa* held that due process required counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."⁹⁰ "Criminal proceeding" has since been read broadly so as to require counsel at probation-revocation proceedings which take place long after the imposition of sentence (in *Mempa* itself, probation revocation and sentencing were decided concurrently), on the ground that such proceedings, while they do not result in the imposition of a new sentence, do result in a loss of liberty.⁹¹ And in *Morrissey*, the Supreme Court, despite its finding

[T]he judge wrote saying that if ever a man in the State of California had committed first degree murder, I was that man; that if ever a man deserved to go to the gas chamber, I was the man; that I should never be released from prison.

Each year [for 15 years] the judge and the office of the district attorney held to the above view and reaffirmed it in a letter to the Adult Authority before my parole hearing.

. . . . I was not released . . . until after the judge's death (the district attorney died of a heart attack three or four years after my trial). . . .

Connett, *Perspective of an Ex-Offender*, 6 U.S.F. L. REV. 7, 12-13 (1971). Cf. Mitford, *supra* note 32, at 50: Adult Authority decisions are "often based on hearsay in the form of letters from prosecutors or police agencies."

The trappings of parole boards also bear the hallmark of the judicial process. The Adult Authority considers itself a "quasi-judicial" body [remarks of Fred R. Dickson, then Chairman, California Adult Authority, reported in First Sentencing Institute for Superior Court Judges, 45 Cal. Rptr. App. 99 (1965)], has endowed its procedures with judicial sounding names [*In re Tucker*, 5 Cal. 3d 171, 175-76, 486 P.2d 657, 658-59, 95 Cal. Rptr. 761, 762-63 (1971).], and enjoys judicial immunity in performance of its authorized functions [*Silver v. Dickson*, 403 F.2d 642, 643 (9th Cir. 1968); *accord*, *Bennett v. California*, 406 F.2d 36 (9th Cir. 1969)].

85. 58 N.J. 238, 277 A.2d 193 (1971).

86. Interestingly, on remand from the court, the New Jersey parole board chose to release *Monks* at his next parole hearing rather than formulate a justification for his continued incarceration.

87. 58 N.J. at 244, 277 A.2d at 196.

88. *Id.* at 244-46, 277 A.2d at 196-97.

89. *Id.* at 249, 277 A.2d at 199.

90. 389 U.S. at 134.

91. *Hewett v. North Carolina*, 415 F.2d 1316, 1322 (4th Cir. 1969). Attempts to distinguish probationers from prisoners on the ground that the latter are hard-core,

that parole revocation is not part of a criminal "prosecution" and therefore need not entail the "full panoply" of due process rights,⁹² nevertheless held that due process applies in general and requires the use of several significant due process protections.⁹³

The case for requiring due process at parole-release hearings is a *fortiori*: parole denial not only means continued imprisonment, and hence continued loss of liberty, but in some states, like California, it constitutes the formal determination of sentence as well. Moreover, the parole-release hearing is more intimately related than the parole-revocation hearing to the criminal prosecution, both substantively and in point of time.

Parole boards, in sum, sentence. They should therefore obey the dictates of due process like the courts with which they share this awesome responsibility. Even though they are organized in an administrative form to carry out their essentially judicial tasks, they are not free from the demands of due process, which apply to administrative proceedings of all kinds and, more clearly still, to administrative extensions of the criminal process.

B. *The Concept of Grace*

The concept of grace, and its variant, the right-privilege distinction, have been so thoroughly discredited in scholarly commentary,⁹⁴ and, more recently, discarded by the courts,⁹⁵ that they may be disposed of here in rather summary fashion. Perhaps of greater pertinence, these notions have also been rejected recently in the entire realm of post-conviction and prison litigation, with the exception of the decision to release on parole.

The grace rationale, the "usual" answer to claims that due process applies to parole proceedings,⁹⁶ flows initially from the view that the criminal is stripped of all his civil and constitutional rights upon being

proven criminals who have somehow forfeited their rights to due process by their recurrent or more aggravated antisocial behavior are not empirically supportable. See, e.g., D. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* 97-98 (2d ed. 1969).

92. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2600 (1972).

93. *Id.* at 2600-05.

94. See generally, 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 7.16-17 (1958); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

95. *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970); *Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

96. CORRECTIONS TASK FORCE, *supra* note 16, at 85-86.

convicted and sentenced.⁹⁷ But courts now widely recognize that neither conviction nor imprisonment divests the offender of all constitutional rights.⁹⁸ In accordance with this recognition, the grace and right-privilege doctrines have been expressly repudiated in a variety of post-conviction and prison contexts.⁹⁹ The decisions are based on an increasing judicial understanding that constitutional rights are secured throughout a criminal process which continues well past trial.¹⁰⁰ There is no reason in principle why parole-release should be treated any differently. Moreover, assuming *arguendo* that release on parole is a benefit bestowed as a matter of executive grace, that benefit must still be dispensed by means consonant with due process.¹⁰¹

The path of the decisional law is obviously not very straight. The conception of grace, no longer employed in civil matters or anywhere else in the emerging body of post-conviction law, is still invoked to shield the parole-release decision from the requirements of due process. Aside from the presumptive desirability of a uniform application of the due process clause, there are sound reasons of policy which should undermine this judicial reversion to the conception of grace.

Among other things, parole can achieve significant economies for the state. It is undisputed that the cost of supervising a parolee is much less than that of maintaining a prisoner.¹⁰² There is some indi-

97. Kadish, *supra* note 7, at 920.

98. *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam); *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968); *Fortune Society v. McGinnis*, 319 F. Supp. 901, 903-04 (S.D.N.Y. 1970); *Talley v. Stephens*, 247 F. Supp. 683, 686 (E.D. Ark. 1965).

99. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2600 (1972) (parole revocation); *Sostre v. McGinnis*, 442 F.2d 178, 196 (2d Cir. 1971) *cert. denied*, 405 U.S. 978 (1972); *Cluchette v. Procunier*, 328 F. Supp. 767, 779-780 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357, 9th Cir., Aug. 27, 1971; *Landman v. Royster*, 333 F. Supp. 621, 651 (E.D. Va. 1971) (due process at prison disciplinary hearings); *United States ex rel. Bey v. Connecticut State Board of Parole*, 443 F.2d 1079, 1085-86 (2d Cir. 1971); *Hewett v. North Carolina*, 415 F.2d 1316, 1322 (4th Cir. 1969) (parole revocation); *Hester v. Craven*, 322 F. Supp. 1256, 1263 (C.D. Cal. 1971) (redetermination of sentence after parole revocation); *Carothers v. Follette*, 314 F. Supp. 1014, 1027 (S.D.N.Y. 1970) (revocation of prisoner's accumulated "good time").

100. *Tobriner, Procedural Due Process In The Post-Conviction Period*, 4A CALIFORNIA FORMS OF PLEADING & PRACTICE 1, 7 (1971).

101. *Hewett v. North Carolina*, 415 F.2d 1316, 1322-23 (4th Cir. 1969). *Accord*, *Sturm v. Calif. Adult Authority*, 395 F.2d 446, 450 (9th Cir. 1967) (Browning, J., concurring), *cert. denied*, 395 U.S. 947 (1969); *Hester v. Craven*, 322 F. Supp. 1256, 1262-63 (C.D. Cal. 1971).

102. The cost factor is particularly important. Writing of the parole system in California, Professor Johnson has said, "Undoubtedly it is part of the Authority's function to release prisoners who appear unlikely to offend again, not only for humanitarian reasons but also because it is extremely expensive to keep a person in prison." Johnson, *supra* note 17, at 581. He cites figures showing that the average cost of maintaining an adult prisoner may exceed by five times the cost of supervising a parolee for the same period. *Id.*

cation that statewide policy governing release has begun to respond to the potential of enormous cost savings attendant upon a more widespread use of parole.¹⁰³ Money matters aside, society benefits from parole because it serves to reduce the restrictions on a prisoner's freedom gradually, instead of granting him absolute liberty upon his release from incarceration.¹⁰⁴ In sum, as the Supreme Court has found, "rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed."¹⁰⁵ Against this background, notions of grace become misplaced and even hypocritical. As at judicial sentencing, where we now insist upon due process to ensure decisional fairness and reliability, the only issue at parole release is the appropriateness, for society's purposes, of the penal disposition.¹⁰⁶

C. *Substantiality of the Individual Prisoner's Interest*

The prisoner's current condition of confinement is offered as a basis for denying that he has a protectable interest in liberty warranting the safeguards of due process.¹⁰⁷ This argument contrasts the prisoner with the parolee, who has enjoyed a limited amount of freedom, thereby acquiring the requisite interest. Ironically, the argument also assumes a different form in which the importance of release on parole is denigrated, so that the denial of parole becomes merely a refusal to transfer the prisoner "from one form of custody to another."¹⁰⁸

This conception that the prisoner, unlike the parolee, has no present interest in his liberty bears little relation to reality. It is difficult to see why a movement from confinement to conditional liberty on

In the federal system the cost discrepancy is even greater: The Corrections Task Force reports that the yearly average parole cost is \$231.20 compared with \$1,912.60 for the man in prison. CORRECTIONS TASK FORCE, *supra* note 16, at 194. Cf. *Procedural Due Process*, *supra* note 65, at 823.

103. In California correctional authorities have emphasized the potential economic benefits of parole as the "major argument to gain support from a reluctant and suspicious public." INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, UNIVERSITY OF CALIFORNIA, LOS ANGELES, PEOPLE IN THE PAROLE ACTION SYSTEM: THEIR TASKS AND DILEMMAS 127 (1971).

104. Comment, *The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 507 (1968).

105. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2598 (1972).

106. See, e.g., Kadish, *supra* note 7, at 921.

107. *Menechino v. Oswald*, 430 F.2d 403, 408-09 (2d Cir. 1970), followed in, *Walker v. Oswald*, 449 F.2d 482, 484 (2d Cir. 1971); *United States ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079, 1086-87 (2d Cir. 1971); *Van Dyke*, *supra* note 29, at 1235 n.75.

108. *Padilla v. Lynch*, 398 F.2d 481, 482 (9th Cir. 1968).

parole is any less dramatic a change in status than a movement in the reverse direction. Furthermore, while almost every prisoner has a chance for parole, many parolees are never accused of wrongdoing and hence do not face parole revocation. The process of release on parole thus occupies a position at least as important, both statistically and substantially, as that of parole revocation, and should be treated identically insofar as the applicability of due process is concerned.¹⁰⁹

What makes the "present interest" argument so bewildering is that manifestly lesser interests are protected by due process. Governmental agencies are obliged to follow the requirements of due process when seeking to discharge public employees, revoke security clearances, deny unemployment compensation, and terminate welfare payments.¹¹⁰ In recent cases the Supreme Court has held that a state must give full notice and a fair hearing when its action might jeopardize an individual's reputation,¹¹¹ and even when it attempts to revoke a driver's license.¹¹²

Likewise there is a trend towards an increasing insistence upon procedural due process in aid of prisoner interests that are of lesser or at least no greater importance than those affected by the parole-release decision. Several courts have required fair procedures at prison disciplinary hearings which at worst lead to confinement in a more degrading section of the prison.¹¹³ In a situation closely analogous to

109. Indeed, the cost factors involved may indicate greater need for due process protections at parole release than at parole revocation. It may be that state-wide policy generally responds to the potential savings achievable through parole, and that therefore parole board members would usually be inclined to err on the side of release. But in certain instances the contrary may be true, since parole board members may be more concerned with a potentially hostile public reaction to release of a particular prisoner. The situation is different at parole revocation. Since administrative success is measured by the number of parolees who can "make it", the parole board has an additional interest in giving a parolee the benefit of the doubt. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2602 (1972); *In re Tucker*, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971) (concurring opinion of Mosk, J.). Even though state policy may benefit most prisoners, the protections of due process are vital on the occasions when extrinsic factors pressure parole officials against the interests of an individual offender.

110. *In re Tucker*, 5 Cal. 3d 171, 191-92, 486 P.2d 657, 670, 95 Cal. Rptr. 761, 764 (1971) (concurring and dissenting opinion of Tobriner, J.).

111. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

112. *Bell v. Burson*, 402 U.S. 535 (1971).

113. See cases cited note 13 *supra*. Interestingly, one reason commonly given by the courts for scrutinizing disciplinary matters from the standpoint of due process is that an adverse adjudication of a prison beef may affect consideration for parole. See, e.g., *Clintchette v. Procnier*, 328 F. Supp. 767, 780 (N.D. Cal. 1971) (*appeal docketed*, No. 71-2357, 9th Cir., Aug. 27, 1971). It is inconsistent, to say the least, that the same due process requirements can be ignored at the parole decision itself. The anomaly has prompted one observer to comment:

Daily housekeeping decisions in the conduct of an institution are not of the same order as sentencing-type decisions governing release and term, either in their impact upon the individual and their significance to him, in the close-

that of parole release, one court found a substantial prisoner interest in the loss of 60 days accumulated good time.¹¹⁴

Surely the prisoner's interest at a parole-release hearing is of comparable weight.¹¹⁵ Indeed, some judges have found the importance of the prisoner's interest too obvious to merit discussion.¹¹⁶

D. Expertise

A more troublesome objection is the concern that introducing due process principles into parole-release proceedings, with the potential for judicial review, will erode reliance on the parole board's expertise. The decision whether to release on parole is said to hinge on a host of subjective factors unrelated to past criminal behavior. It does not involve the making of charges or the proving of facts, is not adjudicative or adversary in nature, and thus ought not be limited by our traditional understandings about due process.¹¹⁷

This objection has arisen most commonly in cases where the prisoner claimed a due process right to the assistance of counsel.¹¹⁸ Perhaps for this reason the courts have been sidetracked in an ongoing

ness of relationship to the original processes of guilt determination, or in their potential for contaminating the mainstream of tradition with regard to notions of the rule of law.

Kadish, *supra* note 7, at 925.

114. Carothers v. Follette, 314 F. Supp. 1014, 1027 (S.D.N.Y. 1970).

115. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 474 n.6 (1971).

116. Menechino v. Oswald, 430 F.2d 403, 415 (2d Cir. 1970) (dissenting opinion by Feinberg, J.):

The most obvious consideration is that for the prisoner the stakes could hardly be higher. Since the Parole Board has the power to determine whether appellant must remain in prison for the rest of his life, he has an obvious interest in having his case for parole presented effectively.

See also Hewett v. North Carolina, 415 F.2d 1316, 1322 (4th Cir. 1969) (probation revocation).

The foregoing arguments also dispose of the "custody" variation on the "no protectible interest" rationale, whereby it is said that release on parole is nothing more than a transfer from one form of custody to another and therefore involves no significant prisoner interest.

117. Menechino v. Oswald, 430 F.2d 403, 412 (2d Cir. 1970); Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969). The general objection is apparently derived from Supreme Court cases which have underscored the importance of fact-finding in applying various protections of due process. In *Greene v. McElroy*, 360 U.S. 474, 496 (1959), for instance, the court stated: Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action . . . depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

118. See cases cited note 69 *supra*. Cf. *United States ex rel. Bey v. Connecticut Bd. of Parole*, 443 F.2d 1079, 1087-88 (2d Cir. 1971); *Wilburn v. Nelson*, 323 F. Supp. 585, 586-87 (N.D. Cal. 1970); and *Van Dyke*, *supra* note 29, at 1235 n.75 (1971).

debate over seemingly inconsistent language contained in several right-to-counsel cases decided by the United States Supreme Court.¹¹⁹ For instance, those courts which oppose counsel at parole-release proceedings point out that in *Mempa v. Rhay*,¹²⁰ the Supreme Court identified various legal functions that counsel could perform at sentencing (for instance, attacking a guilty plea), and argue that no similar functions remain to be performed at the parole-release stage of the criminal process. Alternatively, these courts observe that in *Specht v. Patterson*¹²¹ the Court required counsel only because commitment under the sex offender statute at issue required the making of a new charge and a finding that the accused fit the statutory criteria for commitment. Those courts favoring counsel, by contrast, rely on *Townsend v. Burke*,¹²² in which the Court stressed counsel's ability to ensure that sentencing proceeds upon factually accurate assumptions, and on passages from *Mempa* that note the value of counsel in marshalling the facts, introducing mitigating evidence, and assisting in the presentation of the defendant's case.¹²³

What the courts consistently overlook is that parole-release proceedings do involve, at least implicitly, the making of charges and the finding of facts.¹²⁴ Therefore while it may be true as a descriptive matter that parole-release proceedings are not adjudicative or adversary,¹²⁵ it is equally clear that they should be. In every case the parole board is presented with a copy of the offender's probation report, which details inter alia the circumstances of the offense. The board is free to rely on the report as an accurate portrayal of what happened, even if the accused was only convicted of a lesser offense, as will be the case in nearly every plea bargain. The credibility of the probation officer is thus at issue in every parole-release decision. Moreover, in an uncertain number of cases, decision will also hinge on "silent beefs," drawing into question the credibility of the complaining guard or other member of the prison staff. Unless such questions happen to have been adjudicated at a prior prison disciplinary hearing incorporating appropriate features of due process, the parole board will simply credit the "beef" to the extent it deems desirable. Professor Kadish

119. *Specht v. Patterson*, 386 U.S. 605 (1967); *Williams v. New York*, 337 U.S. 241 (1949); *Townsend v. Burke*, 334 U.S. 736 (1948). *Townsend* was followed most recently in *United States v. Tucker*, 92 S. Ct. 589 (1972).

120. 389 U.S. 128 (1967).

121. 386 U.S. 605 (1967).

122. 334 U.S. 736 (1948).

123. See *Mays v. Nelson*, 323 F. Supp. 587, 589 (N.D. Cal. 1971).

124. Comment, *The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 505 (1968).

125. See, e.g., *Briguglio v. New York State Bd. of Parole*, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969).

has suggested other factual matters at issue in every parole-release decision, including the offender's employment record, marital history, prior arrests, and other occurrences not constituting criminal behavior but indicative of personal instability.¹²⁶

The expertise argument is further undercut by the "formidable gap between the capabilities and the responsibilities of those charged with rehabilitative functions."¹²⁷ As other commentators have pointed out, the techniques and principles of the social sciences that form the basis of the rehabilitative model remain subject to vigorous debate,¹²⁸ and sentencing therefore continues to be, at best, an art instead of a scientific exercise. It is accordingly of utmost importance to provide an opportunity to challenge the assumptions and judgments of the parole board.¹²⁹

Another reason for judicial supervision of the parole-release decision grows out of the widely shared realization that we lack the institutional resources to effectuate the social scientists' prescriptions, even if we were to take on faith the validity of their diagnoses. The decision to retain an offender in a prison which is palpably unable to rehabilitate him becomes a problem more properly left to a court, which at least must state its reasons publicly and run the risk of public feedback. It should be added that requiring due process at parole-release proceedings would not inevitably frustrate what expertise the boards do have. If anything, due process, reasonably enforced,¹³⁰ should serve to improve a board's decisions by upgrading the quality of its input and by forcing it to come to grips with standards it may now be employing completely unconsciously.

E. The Comparison with Judicial Sentencing

The final objection considered here is that prisoners seeking parole should not benefit from procedural protections when so few such protections are extended to offenders at judicial sentencing. But certainly our error in failing to observe rudimentary elements of due process at judicial sentencing should not be compounded in administrative sen-

126. Kadish, *supra* note 7, at 927-28. Oral argument in *Morrissey v. Brewer*, 92 S. Ct. 2593 (1972), suggested that parole-release decisions turn on factual matters as fully as do parole-revocation decisions. 11 CRIM. L. REP. 4013, 4013-14 (1972).

127. Kadish, *supra* note 7, at 926-27.

128. *Procedural Due Process*, *supra* note 65, at 824-25. Even assuming that parole board members have a firm grasp on sound criteria for parole release, their effectiveness is seriously diminished because they are notoriously overworked. Tappan, *The Role of Counsel in Parole Matters*, 3 PRACTICAL LAWYER 21, 26 (1957); Kadish, *supra* note 6, at 832.

129. Kadish, *supra* note 7, at 927.

130. See Part III *infra*.

tencing. Some of the protections at judicial sentencing which are either required by or incorporated through due process have already been noted. *Townsend v. Burke*¹³¹ guarantees that a defendant will not be sentenced on the basis of materially false information, at least when the falsity appears of record. *Mempa v. Rhay*¹³² gives him the right to the assistance of counsel. More recently the Supreme Court held that due process requires that vindictiveness play no part in the sentence imposed after a new trial,¹³³ and the sentencing judge must now state his reasons for imposing a harsher sentence the second time around.¹³⁴

While the Supreme Court has sidestepped other fundamental questions of constitutional rights at sentencing,¹³⁵ the lower federal courts have found due process to embrace sentencing in several significant ways.¹³⁶ Most notably, they have held that sentencing judges are obliged to consider at least some of the types of sentencing information authorized by statute,¹³⁷ and that the sentencing information itself must be gathered by means consistent with the strictures of the fourth amendment.¹³⁸ Thus, although the length of a judicial sentence is generally unreviewable if within statutory limits,¹³⁹ the procedures culminating in that sentence are frequently reviewed by appellate courts for conformity to the demands of due process.¹⁴⁰ Administrative sentencing, by comparison, lacks both recognized constitutional constraints as well as statutory requirements.¹⁴¹ As has been argued above this discrepancy cannot be justified by differences in function, in the identity

131. 334 U.S. 736 (1948).

132. 389 U.S. 128 (1967).

133. *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

134. *Id.* at 726.

135. Most important of these is the Court's unwillingness to decide "whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." *McGautha v. California*, 402 U.S. 183, 218 (1971). The Court has also avoided deciding whether the common law right of allocution is of constitutional magnitude. See, e.g., *Id.* at 218-19 n.22; *Hill v. United States*, 368 U.S. 424, 429 (1962).

136. See generally cases collected in Note, *The Exclusionary Rule in Post-Conviction Proceedings—Verdugo v. United States* [402 F.2d 599 (9th Cir. 1968), cert. denied, 397 U.S. 925 (1970)]. 20 HAST. L.J. 1006, 1008-09 (1969) [hereinafter cited as *Exclusionary Rule*].

137. *Leach v. United States*, 334 F.2d 945, 951 (D.C. Cir. 1964).

138. *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968). But see *Williams v. New York*, 337 U.S. 241, 247 (1949).

139. The most recent case is *United States v. Tucker*, 92 S. Ct. 589 (1972).

140. Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379, 382 (1964).

141. But see *Rubin*, *supra* note 8, at 396-97: "Whereas the sentencing procedure must be surrounded by a fair amount of due process of law, the parole consideration is entirely devoid of either substantive or procedural due process requirements."

of the decision makers, or in the impact upon the offender.

Despite the foregoing protections, many courts and commentators are convinced that even judicial sentencing remains a comparatively primitive phase of the criminal process—anomalously so in view of its importance.¹⁴² The well-known judicial reluctance to review criminal sentences has been particularly inexplicable.¹⁴³

In general, the judiciary's niggardly attitude towards procedural regularity at sentencing is founded on the argument that sentencing is largely discretionary.¹⁴⁴ But this argument fails to distinguish the net result—a sentence of a particular length—from the method for reaching that result. The former can legitimately be a matter of discretion only if the latter is fair and accurate; and it is to fairness and accuracy more than anything else that the procedures traditionally associated with due process are addressed.¹⁴⁵ Thus the American Bar Association has proposed that in principle “judicial review should be given for all sentences imposed in cases where provision is made for review of the conviction.”¹⁴⁶ In light of the inadequacy of the arguments for constricting due process at judicial sentencing, it makes little sense to foist them upon administrative sentencing as well, and when basic sentencing deci-

142. See, e.g., *Smith v. United States*, 223 F.2d 750, 754 (5th Cir. 1955):

The lack of constitutional and evidentiary safeguards thrown around a convicted offender is in striking contrast to those surrounding him before he is found guilty. . . . Yet every lawyer engaged in defending criminal cases knows that often a finding of guilt is a foregone conclusion, and that the real issue centers about the severity of the punishment.

See also, *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 265 (1962). The Task Force on the Courts of the President's Commission on Law Enforcement and the Administration of Justice writes:

In view of the importance of sentencing to the defendant and to the effectiveness of the criminal processes it is unreasonable to consider sentencing as a matter of such exceptional discretion that it should be immune from appellate review.

TASK FORCE REPORT: THE COURTS 26 (1967).

143. One study concludes that this reluctance has been shaped by historical factors which are frequently unarticulated and always unpersuasive. ABA, *supra* note 7, at 14.

144. See also, *Exclusionary Rule*, *supra* note 136, at 1007. But see Dawson, *supra* note 45, at 298 n.163:

Courts have demonstrated great reluctance to review parole decisions; this is curious since many of them have apparently been able to overcome a similar reluctance to review the exercise of discretion by trial judges in sentencing.

145. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 26 (1967).

146. Kadish, *supra* note 7, at 904:

The coguate principle of procedural regularity and fairness, in short, due process of law, commands that the legal standard be applied to the individual with scrupulous fairness in order to minimize the chances of convicting the innocent, protect against abuse of official power, and generate an atmosphere of impartial justice.

146. ABA, *supra* note 7, at 7.

sions are made by underpaid and overworked appointees without any legal training, these arguments make no sense at all.

III

THE SHAPE OF DUE PROCESS AT PAROLE-RELEASE PROCEEDINGS

A. *Method of Analysis*

Assuming for the reasons advanced above that parole-release hearings do cross the threshold of due process, it remains to be considered how much process is due. Deciding who is entitled to which incidents of due process at what sorts of government proceedings is a vexing problem to be sure,¹⁴⁷ but one the courts have become increasingly adept at solving. No longer are judges dogged by the bugaboo of having to choose between affording every feature of due process or none.¹⁴⁸

Beginning in the early 1960's the Supreme Court has forged a flexible new methodology for selecting those incidents of due process that are likely to prove most useful to the individual yet impose the least possible burden on the state. Although this approach was pioneered primarily in civil cases,¹⁴⁹ the courts have used it to determine rights in post-conviction criminal proceedings as well.¹⁵⁰

In *Hannah v. Larche*,¹⁵¹ the Court identified a complex of factors determinative of whether a particular right is constitutionally required

147. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Newman, *The Process of Prescribing "Due Process"*, 49 CALIF. L. REV. 215 (1961).

148. Cf. *In re Tucker*, 5 Cal. 3d 171, 195-96, 486 P.2d 657, 671-72, 95 Cal. Rptr. 761, 779-80 (1971) (concurring and dissenting opinion of Tobriner, J.). The Supreme Court expressed a kindred fear in *Williams v. New York*, where, in denying the offender a constitutional right to examine the information used against him at sentencing, it wrote that "[t]he due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." 337 U.S. 241, 251 (1949).

149. *Hannah v. Larche*, 363 U.S. 420 (1960); *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Groppi v. Leslie*, 404 U.S. 496 (1972).

150. See *Morrissey v. Brewer*, 92 S. Ct. 2593, 2600, 2602-04 (1972) (parole revocation); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) and *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971) (appeal docketed No. 71-2357, 9th Cir., Aug. 27, 1971) (prison disciplinary hearings); *United States ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079 (2d Cir. 1971) (parole revocation); *Hester v. Craven*, 322 F. Supp. 1256 (C.D. Cal. 1971) (redetermination of sentence after parole revocation). Cf. *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), where the court misapplied the *Hannah* tests by using them to determine whether any due process is required at parole-release hearings, concluding in the negative.

151. 363 U.S. 420 (1960).

in proceedings (like parole-release hearings)¹⁵² which are partly but not wholly adjudicative. The significance of the claimed right, the nature of the proceedings, and the possible burden on that proceeding entailed by granting the right must all be taken into account.¹⁵³ In later cases the Court has expanded on this formulation, explaining that the first step is to identify precisely the government function furthered by the proceeding and the type of loss imposed upon the individual by an adverse decision.¹⁵⁴ The constitutionally compelled incidents of due process are then determined by balancing the individual's interest in avoiding that loss against the government's need for summary adjudication.¹⁵⁵

The advantage of this approach is that courts may require the use of some due process incidents but not others, depending upon the

152. The Supreme Court in *Hannah* stated that:

[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

363 U.S. at 442.

Parole-release proceedings appear to lie somewhere in between. In some respects, the parole-release hearing is strictly nonadjudicative. The parole board's assessment of an offender's psychological well-being or its evaluation of his employment prospects, for example, would seem to constitute part of a "general fact-finding investigation." But in other respects—where the board authoritatively determines the facts surrounding the inmate's offense or the extent of his involvement in a prison disciplinary infraction—the parole-release hearing partakes of the elements of full-scale adjudication.

This mixed nature of the parole-release hearing has engendered a good deal of confusion concerning the desirability of procedural protections.

On the one hand, such decisions can vitally affect the lives of offenders, and there is danger that they may be made on the basis of inadequate or incorrect information, or through prejudice. On the other hand, serious problems would be presented by subjecting these and similar actions to all of the traditional legal procedures associated with judicial due process requirements.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 181 (1967). But undeniably the heart, indeed the ideal, of indeterminate sentencing remains the sound exercise of discretion (Kadish, *supra* note 7, at 919), and discretion cannot thrive when the decisionmaker is thwarted at every turn by trial-type procedures. It would seem then that we should credit the discretionary nature of parole decisions at least sufficiently to recognize that parole proceedings are not wholly adjudicative, and therefore that *all* the incidents of due process which permeate a criminal trial need not be transplanted into the setting of administrative parole board sentencing.

153. 363 U.S. at 442. For a reformulation of these factors and their practical application to prison disciplinary proceedings, see Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27, 34-37 (1971).

154. *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

155. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

interests at stake in different kinds of proceedings. Thus, the Supreme Court has sometimes required only the right to notice and hearing,¹⁵⁶ while in other cases it has found that due process also requires rights to confrontation and cross-examination of adverse witnesses and to present affirmative evidence.¹⁵⁷ On some of these occasions the Court has specified the particular timing or content for the required notice¹⁵⁸ or hearing.¹⁵⁹

Reaffirming its flexible approach to the question of what process is due, the Court in *Morrissey v. Brewer*¹⁶⁰ selected certain due process incidents for parole-revocation proceedings, but not others, according to the parolee's interest and the government's countervailing need for a speedy and informal hearing. For the formal revocation hearing the Court found the "minimum requirements" of due process to include written notice of claimed parole violations, disclosure of evidence, opportunity to be heard and to present an affirmative defense, the right to confront and cross-examine adverse witnesses (except when good cause for not allowing confrontation is found), a "neutral and detached" hearing body, and a written specification of reasons for revoking parole.¹⁶¹

In order to arrive at an optimum due process configuration for the parole-release hearing, this Article will consider a limited number of due process incidents. Following the Supreme Court's approach, each incident will be tested by asking whether its absence tends towards unjustifiable denials of parole, and whether, on the other hand, its presence would infringe on the government's legitimate need to reach factually accurate decisions, consistent with indeterminate sentencing theory, in a reasonably expeditious manner.

Before doing so, however, a significant exception to the Supreme Court's usually ad hoc approach to due process must be noted. While the Court has indicated that most due process incidents must be put through the sifting and weighing process adumbrated in *Hanna*, its subsequent cases make clear that there are two incidents so universally essential to the fairness of governmental action that they are always required once it is determined that the proceeding is subject to any due process at all. Loosely speaking, these two automatically applicable

156. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); and *Groppi v. Leslie*, 404 U.S. 496, 502 (1972).

157. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

158. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

159. *Bell v. Burson*, 402 U.S. 535 (1971).

160. 92 S. Ct. 2593 (1972).

161. *Id.* at 2604.

incidents of due process are the right to notice and the right to be heard. The notice must be adequate to allow time to prepare for the hearing¹⁶² and must generally precede the challenged governmental action.¹⁶³ The content of the notice and the nature of the hearing may vary from case to case, but the individual must be given some notice and some opportunity to be heard in connection with every governmental proceeding at which due process obtains.

There are a staggering number and variety of arguably applicable incidents of due process.¹⁶⁴ They fall within the four general categories of notice, hearing, counsel, and decision.¹⁶⁵ Notice comprises notice of the nature and consequences of the impending government action, of the charges, implicit or explicit, to be preferred at the proceeding, and of the evidence to be adduced in support of those charges. Hearing subsumes the right to be present, to speak in one's own behalf (the common law right of allocution), to present oral evidence in the form of testimony, to subpoena witnesses for that purpose, to present written evidence, to confront adverse witnesses through cross-examination, and, possibly, the privilege against self-incrimination. Timing is a collateral issue; the prisoner has a right to hearing before he is subjected to further confinement. The third category, counsel, includes the right to retained counsel, to appointed counsel for indigents, and to the counsel of one's choice. Decision, the final category, includes the right to an impartial tribunal with separated accusatory and adjudicative functions which reaches results based upon intelligible standards and factually accurate data presented at a hearing, and which issues a written statement of reasons to allow appeal from its judgments.¹⁶⁶

It is beyond the scope of this Article to attempt to evaluate each of these many potential features of parole-release proceedings, but a few especially important due process incidents are identified and briefly discussed.

B. Notice and Hearing: The Problem of Disclosure of Charges

While notice and hearing must be provided in some form, the emerging issues are whether the notice must identify the informants

162. See *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

163. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2597 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971).

164. See generally, *Procedural Due Process*, *supra* note 65; Millemann, *supra* note 153; Tobriner, *supra* note 100, at 7-9; *Clutchette v. Procnier*, 328 F. Supp. 767, 781-84 (N.D. Cal. 1971) (*appeal docketed* No. 71-2357, 9th Cir., Aug. 27, 1971); Note, *supra* note 8, at 871-77.

165. Tobriner, *supra* note 100, at 7.

166. The foregoing compilation of due process incidents was gleaned from the authorities cited in note 164 *supra*.

and specify the charges and whether hearing includes a right to confront and cross-examine. Parole decisions often turn on particular factual allegations as to the offender's conduct prior to or during his imprisonment. If an adverse parole decision rests on the board's acceptance of the truth of such allegations, denying the prisoner opportunity for rebuttal conflicts with fundamental principles of due process. On the other hand, disclosing to the prisoner the identity of his accusers may pose a threat to their safety, thereby deterring potential informants from providing the parole board with valuable sentencing information. Also, disclosure of psychological reports to the prisoner may impede his rehabilitation. In the analogous debate over disclosure of presentence reports at courtroom sentencing, it has been persuasively argued that disclosure is essential to the factual accuracy of reports filed by overworked or undervigilant probation officers. Moreover, when disclosure has been tried it has not resulted in a measurable loss of sentencing information.¹⁶⁷

The Supreme Court has held that due process does not require disclosure of the contents of a presentence report or of any other information relied on by the sentencing judge,¹⁶⁸ and many federal judges still do not permit disclosure despite statutory discretion to do so.¹⁶⁹ But this absolutist position effectively prevents the offender from implementing his right to be sentenced on the basis of reasonably accurate information,¹⁷⁰ or his additional right, in some jurisdictions, to be sentenced on the basis of information gathered by means consonant with the fourth amendment.¹⁷¹ Furthermore, the courts have required disclosure of charges and cross-examination of adverse witnesses in connection with hearings involving termination of welfare benefits,¹⁷² social security disability benefits,¹⁷³ and eviction from public housing projects,¹⁷⁴ thereby protecting interests less compelling than the prisoner's

167. *Procedural Due Process*, *supra* note 65, at 835-41. See also *Exclusionary Rule*, *supra* note 136, at 1011-16.

168. *Williams v. New York*, 337 U.S. 241 (1949).

169. *Exclusionary Rule*, *supra* note 136, at 1012.

170. In *Townsend v. Burke*, 334 U.S. 736 (1948), the Supreme Court held that where the record discloses that an uncounselled defendant was sentenced on the basis of "assumptions concerning his criminal record which were materially untrue," the "result, whether caused by carelessness or design, is inconsistent with due process of law. . . ." *Id.* at 740, 741. The sentencing judge's false assumptions were revealed in the course of a colloquy with the defendant which showed that the judge believed him guilty of two prior offenses of which he had actually been acquitted. *Townsend* was followed most recently in *United States v. Tucker*, 404 U.S. 443 (1972).

171. *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 985 (1971).

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

173. *Cf. Richardson v. Perales*, 402 U.S. 389, 401-02, 406-07 (1971).

174. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

interest in liberty.¹⁷⁵ Concern about the safety of informants has not prevented California from allowing offenders to read their presentence probation reports.¹⁷⁶ The offender granted probation is as capable of menacing hostile informants as the prisoner granted parole.

Of course it is impossible, given the present state of empirical ignorance, to belittle out of hand the apprehensions that disclosure of psychological reports might hinder a prisoner's rehabilitation or that angry prisoners might take revenge on prison personnel who furnish unfavorable information. Therefore a balance should be struck between the interests of the prisoner and the state.

Certainly the prisoner's need for disclosure is greatest when the adverse information consists of specific accusations concerning the offense for which he was committed or his conduct since entering prison. The problem is that parole boards rely on both these kinds of information in almost every case. Juggling the variables, the Corrections Task Force has recommended that disclosure be made unless the case presents compelling reasons for non-disclosure of particular information.¹⁷⁷ Indeed this is essentially the compromise approved by the Supreme Court for parole-revocation hearings.¹⁷⁸ This sensible accommodation recognizes that non-disclosure is sometimes warranted, but only in the special case where the parole board can demonstrate that release of particular information would create unacceptable risks to an informant's physical safety or a prisoner's psychological well-being.

C. Counsel

That the prisoner should have the assistance of counsel at parole-release proceedings is a far less difficult proposition.¹⁷⁹ Although pa-

175. It may be argued of course that while the prisoner's interest is greater than that of the welfare client or public housing tenant, the state's interest—protecting an informant's safety—is far greater, too. It is difficult to weigh these interests since they present a host of factual variations. In one case, the prisoner might seek vengeance, in another not; in one case, parole may be denied, and the prisoner kept under confinement and prevented from wreaking vengeance, in another, parole might be granted; some informants might be deterred from giving information by the prospect that it would be disclosed to an inmate, others might not. Yet in each such case the prisoner's interest in liberty remains constant; and it is submitted that notwithstanding the admittedly greater state interest in confining a prisoner than in denying welfare benefits or evicting a public housing tenant, this prisoner interest warrants at least as much disclosure as is given in those other cases.

176. CAL. PENAL CODE § 1203 (West 1972).

177. CORRECTIONS TASK FORCE, *supra* note 16, at 86.

178. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2603 (1972). See also recommendations of the U.S. Administrative Conference, *supra* note 52.

179. Moreover, with one equivocating exception [*Menechino v. Oswald*, 430 F.2d 403, 419 (2d Cir. 1970) (Feinberg, J., dissenting)] it is agreed that if the parolee is allowed the services of retained counsel the indigent parolee must be given the same

role officials worry that the presence of counsel would obstruct their current modus operandi, the benefits for the inmate and for the sound application of indeterminate sentencing policy eclipse this hypothetical burden. The salutary uses of counsel at parole-release hearings have been amply documented elsewhere.¹⁸⁰ In summary, counsel enhance the factual accuracy of parole-release decisions, marshal facts in mitigation of punishment by conducting investigations beyond prison walls, and present the inmate's case more effectively than he could himself. Counsel could also facilitate the development of standards by insisting upon reasons for parole board decisions.¹⁸¹ Moreover, the attorney's presence might relieve the prisoner's sense of helplessness and aid the board in preparing a suitable plan for parole release.¹⁸² Finally, in answer to the contention that counsel is constitutionally required only when needed to protect "legal" rights,¹⁸³ counsel could ensure that parole boards follow constitutional mandates in formulating the conditions governing the inmate's conduct on parole.¹⁸⁴

Arrayed against these benefits is the possibility that counsel would obstruct parole-release hearings, consume an inordinate amount of time with objections over technical matters, and ultimately wreck existing parole procedures. At least 19 jurisdictions, however, including some of the largest industrial states, have for many years permitted the assistance of counsel either in preparation for the parole-release hearing or at the hearing itself. While the lawyer might consume more time than is currently allotted for parole hearings, the boards could prevent attorneys from objecting as extensively as they may in court. In any event, the agency retains authority to draw the ground rules for the proceeding.¹⁸⁵

The other major stumbling block is that state provision of counsel for the indigent would necessitate an enormous additional outlay of government funds. But to the extent that lawyers succeed in gaining earlier release on parole for a significant number of prisoners, state resources would actually be conserved.¹⁸⁶ But more important, a state's

services free of charge. See, for example, the majority opinion in *Menechino*. *Id.* at 410. As for the potential costs of state provision of counsel, see text accompanying notes 186 & 187 *infra*.

180. See generally Kadish, *supra* note 6; Tappan, *supra* note 128.

181. Kadish, *supra* note 6, at 831; Comment, *The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 507 (1968).

182. See generally, Kadish, *supra* note 6, at 830; CORRECTIONS TASK FORCE, *supra* note 16, at 86; Connett, *The Perspective of an Ex-Offender*, 6 U.S.F. L. REV. 7, 17 (1971).

183. *E.g.*, *Menechino v. Oswald*, 430 F.2d 403, 410 (2d Cir. 1970).

184. See, *e.g.*, *Hyland v. Procunier*, 311 F. Supp. 749 (N.D. Cal.1970).

185. See Kadish, *supra* note 6, at 838.

186. See note 102 *supra*.

financial difficulties cannot be dispositive of the question. There is no reason for limiting representation by retained counsel,¹⁸⁷ and although government-provided counsel for indigent offenders may burden available resources, the game seems clearly worth the candle.

D. Decision: Judicial Review and Record

The most significant aspect of decision is judicial review of parole decisions. It is needed for the same reasons that judicial review of judges' sentences is needed: to reduce excessive sentences, to spur the formulation and implementation of rational correctional goals, and to induce respect for the law.¹⁸⁸ There is also an additional reason, not applicable to judicially imposed sentences. In the few jurisdictions that have statutory standards governing release, parole boards exhibit a disturbing tendency to disregard them.¹⁸⁹ Knowledge that an abuse of discretion may be judicially reviewed provides incentives for better administrative behavior.¹⁹⁰

The prime concerns voiced by parole officials are that judicial review would bog down the system and that the reviewing courts would substitute their judgment for the board's. These fears misconceive the scope of the proposed review, which would extend primarily to the adequacy of parole board procedures. "[E]xperience with appellate review of sentencing decisions indicates that even if courts assumed the power to review parole decisions on the merits, reversals on the ground of an abuse of discretion would be rare."¹⁹¹ Moreover, greater adherence to procedural regularity—the making of findings, the giving of reasons, and the application of criteria—should preclude excessive judicial review.¹⁹² Prisoner allegations will be less credible when there are regular and fair procedures for making and reviewing correctional decisions.¹⁹³ For these reasons it has frequently been concluded that parole-release decisions should be reviewed by appellate courts, at least for procedural error¹⁹⁴ and perhaps for substantive unfairness as well.¹⁹⁵

Judicial review cannot be conducted without an agency statement

187. CORRECTIONS TASK FORCE, *supra* note 16, at 86.

188. See ABA, *supra* note 7, at 2-3.

189. Dawson, *supra* note 45, at 298.

190. K. DAVIS, *supra* note 45, at 133.

191. CORRECTIONS TASK FORCE, *supra* note 16, at 86.

192. Rubin, *supra* note 8, at 395.

193. Kimball and Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME AND DELINQUENCY 1, 11 (1968).

194. CORRECTIONS TASK FORCE, *supra* note 16, at 86.

195. K. DAVIS, *supra* note 45, at 130.

of reasons for its decision.¹⁹⁶ Whether a brief written opinion will suffice,¹⁹⁷ or whether a record of the proceedings will be necessary,¹⁹⁸ it is apparent that parole boards must state reasons for their decisions, relating the applicable law or their own criteria to the facts of the inmate's case.¹⁹⁹

CONCLUSION

During a period when the courts have looked so closely at the accusatory and guilt-determining stages of the criminal process, and have finally come to grips with the procedures for parole revocation, they have shown a nearly total disinterest in parole release.

This judicial disinterest deserves considerable examination because the decision to release on parole, along with the judicial sentence, is statistically and substantially the most crucial decision affecting the offender after conviction. Coupling the significance of the decision with the strength, after *Mempa* and *Morrissey*, of the constitutional argument for surrounding parole-release proceedings with the basic protections of due process, this disinterest is cause for speculation. What are some of the real reasons why deeply rooted constitutional principles, now enforced on behalf of offenders facing punitive segregation within the prisons, seem to vanish when those same offenders appear for their yearly encounter with the board of parole?

In a rare burst of judicial candor,²⁰⁰ the Second Circuit recently adverted to one such possible reason in a case involving prison disciplinary hearings.²⁰¹ The court recognized the "magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint," but said that the "proper tools for the job do not lie with a remote federal court. The

196. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 387 n.86 (1968). Professor Davis has said that a "major reason our legal system has failed to produce meaningful guides for sentencing is the absence of a satisfactory system of reasoned opinions and precedents." K. DAVIS, *supra* note 45, at 140.

197. *Procedural Due Process*, *supra* note 65, at 845.

198. CORRECTIONS TASK FORCE, *supra* note 16, at 86. Cf. Saferstein, *supra* note 196, at 387.

199. *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193 (1971).

200. The failure of the judiciary to face squarely the sorry state of the nation's prisons may reflect in part the dishonesty of the prison officials themselves in dealing with the courts. Penal experts gathered at a recent conference on corrections agreed that the "country's corrections officials have not been honest with the public, and as a result the officials themselves have prevented prison reform." New York Times, Dec. 9, 1971, at 9, col. 1. One official expressly acknowledged, "We have not been honest about our problems and our needs," perhaps, he suggested, because "correction has been so political." Another said the consensus was that too many correctional programs lack any substantially redeeming social value. *Id.*

201. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971).

sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with the legislators, executives, and citizens in their communities."²⁰²

The heart of this objection as it relates to procedures for parole release is the problem of compensating larger, more highly skilled and more efficient parole board staffs, and of providing lawyers for parolable inmates. But it cannot be determined in advance of such reforms whether they will in fact result in increased costs. If they result in earlier release for significant numbers of prisoners, they may well effect on balance a cost savings because the expense of maintaining a prisoner is so much greater than that of maintaining a parolee.²⁰³ If, by contrast, added care in the selection of good parole risks results in the retention of inmates for longer terms than they would otherwise serve under the present system, as seems likely in California,²⁰⁴ few would dispute that the extra cost of a more reliable selection process is a price worth paying. In any event, even if the median time served by inmates remained the same, we would gain the satisfaction of having done the job right, in accordance with the dictates of due process. This societal obligation not to deprive persons of liberty without due process of law cannot be evaded by legislative inaction, regardless of the potential price tag.

A second reason why due process rights continue unrecognized in parole matters is that the public interest in keeping a convicted offender in prison is deemed in every case to outweigh the individual's interest in due process. When it comes to the prisoner's treatment while still in confinement, we are far less tightfisted with due process of law. But if one proceeds upon the reasonable premise that little if any rehabilitation is accomplished in prison, and that lengthy prison stays often breed harder criminals or exacerbate existing criminal tendencies, then society's interest is in early release. Almost all inmates will obtain release eventually. Thus society has a vital interest in ensuring that rehabilitation will predate and outpace recidivism. If and when an inmate has both paid his debt and shown reasonable promise of adjusting to society, it is in the public interest that he be released without delay. Incarcerating him any longer can only postpone the time when rehabilitation can begin in earnest. The protections of due process, whatever shape they ultimately may take, will not only prevent arbitrary administrative denials of liberty, but will also aid in the rational determination of an appropriate time for release.²⁰⁵

202. *Id.* at 205. See also *Prisons and Lawyers*, JURIS DOCTOR, Dec. 1971, at 53.

203. See note 102 *supra*.

204. *Id.*

205. Rubin, *supra* note 8, at 395.

As has been widely recognized in the context of parole-revocation hearings,²⁰⁶ rehabilitation can begin with the parole process itself. There is a dawning awareness that at parole release no less than parole revocation,²⁰⁷ the cultivation of a sense of fair dealing in the offender is an essential ingredient of rehabilitation.²⁰⁸

The prime, albeit tacit, objection—the cost of due process in parole-release procedures—is best answered by reconsidering the purposes of indeterminate sentencing, which has become in the last half century a cornerstone of American correctional practice. By making the term of imprisonment suit the criminal instead of the crime, indeterminate sentencing holds out the carrot of parole, “to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing.”²⁰⁹ Equitable release procedures, conforming to the flexible demands of due process, would lead to the rehabilitation of the offender, as well as to the accuracy of judgments concerning release. Unless we are prepared to abandon the rehabilitative underpinning of the indeterminate sentence, these effects should in themselves be sufficient to warrant fitting parole-release procedures to the civilizing mold of due process.

206. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2602 (1972); *U.S. ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079, 1089 (2d Cir. 1971); *Fleming v. Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946).

207. *E.g.*, *Hester v. Craven*, 322 F. Supp. 1256, 1265-66 (C.D. Cal. 1971); *Monks v. New Jersey State Bd. of Parole*, 58 N.J. 238, 246, 277 A.2d 193, 197 (1971).

208. Kadish, *supra* note 6, at 830; Kadish, *supra* note 7, at 928.

209. *In re Lee*, 177 Cal. 690, 692, 171 P. 958, 959 (1918).