PAROLE LAW:

A Practical Guide to

Making Parole Decisions

and Parole Policy

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FOREWORD

Parole served a unique function in the criminal justice system, and parole law is often not well understood by attorneys who have practiced primarily in other areas. This monograph provides information about parole law for parole board members and staff, as well as attorneys who are new to parole. It can serve as a reference when general questions arise, but should not be used to answer specific legal questions because parole law differs from state to State.

Over the past several years, the National Institute of Corrections has provided assistance to state paroling authorities. Assistance has included onsite consulting, training at the National Academy of Corrections, and publication of monographs. Increasingly, the Institute has heard that information of parole law needs to be made understandable and readily available, and we believe that this document responds to that need.

M. Wayne Huggins, Director

National Institute of Corrections

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Victoria Palacios

INTRODUCTION

Every day members of parole boards across the country make decisions which have far-reaching impact. These decisions cause dramatic changes in the lives of offenders and their families. They are decisions which affect public safety, state policies and agency budgets as well. Frequently, parole decisionmakers find themselves in precarious and uncharted waters. Time and resources necessary to navigate these legal perils are often scarce.

This monograph is written with these purposes in mind:

- To provide parole board members with an overview of parole law sufficient to alert them to questions which may require legal consultation

- To introduce legal counsel newly appointed to represent parole boards to basic concepts of law such that one may more expeditiously begin to master the statutes and rules in his or her jurisdiction and

- To assist more experienced counsel with sufficient legal citations to facilitate further research into more specialized areas of parole law.

The reader is cautioned that it is not intended that the monograph be used to answer specific legal questions. General rules and major variations to those rules are presented in this work. While most of the discussion accurately represents the usual state of the law, critical variations may occur in a given jurisdiction. Those important variations can be ascertained only by referring to the constitution, statutes, and regulations of that jurisdiction.

Parole decisions in each jurisdiction derive from a combination of formal and informal sources. Formal sources include federal and state constitutions, statutes, regulations, and the court decisions interpreting any of them. Informal sources of parole decisions are varied and are reflected in board practices -- themselves products of individual philosophies of board members, the political climate of the state, the condition of the state coffers, and the collective experience of professionals in the area of criminal justice.

For board members and counsel wishing to research issues further, additional sources are listed in the Appendix.

As a final introductory matter, throughout this work the reader is referred to the "purpose of parole" enunciated as a policy choice by his or her jurisdiction. It is critical that a jurisdiction examine and understand its philosophical choices thoroughly and select and formally articulate its primary purpose or purposes. From a practical standpoint, such an articulation serves to focus all parts of the criminal justice system so that the same end is sought. From a legal standpoint, reference to the state's "purpose" in the parole system provides necessary policy underpinnings from which rules and decisions follow.

Section I

PAROLE POWER

Central to understanding the legal parameters within which parole decisions occur is an understanding of clemency. Clemency is part of the very fabric of sovereignty. Just as a sovereign government has inherent power to create and enforce laws, so has that government the power to forego punishing someone who has violated the law. Clemency is a pronouncement, usually by the chief executive, that one lawfully convicted of a crime is relieved of the legal consequences. Forms of clemency include pardons, paroles, commutations, reprieves, respites, and terminations of parole and sentence.'

THE DISCRETIONARY NATURE OF PAROLE

Parole, as a type of clemency, is release from incarceration before the end of a sentence on the condition that the offender follow certain rules for a period of time (Morrissey v. Brewer, 408 U.S. 471 (1972)). The literature and court decisions speak of parole using terms such as "grace," "mercy," and "sovereign prerogative." Offenders have no federal constitutional or inherent right to parole (Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, (1979)). While most states have elected to maintain parole as a privilege rather than a right, some states have unwittingly created a right to parole. In Greenholtz, the United States Supreme Court found that the particular statutory language created a liberty interest in parole, and therefore entitled the offender to some due process protection.'

The statute contained these provisions:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
> (a) There is a substantial risk that he will not conform to the conditions of parole;
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
> (c) His release would have a substantially adverse effect on institutional discipline; or
> (d) His continued correctional treatment, medical care, or vocational or other training in the, facility will substantially enhance his capacity to lead a law-abiding life when released at a later date. Neb. Rev. Stat. Sec 83-1,114(l) (1976).[3]

The combination of the mandatory language ("shall" with "unless") created an expectancy of parole which can be denied only in accordance with due process principles (Board of Pardons v. Allen, 482 U.S. 369 (1987)).

The consequences of failing to provide appropriate due process in board hearings may be far-reaching. When parole is denied because of a violation of due process, the parole board may have to conduct the hearing over again. It is also possible that failure to follow procedures (due process and otherwise)

may lead to liability for damages suffered as a consequence of the act of an improperly released offender.[4]

Other decisions have clarified the parameters of parole. In Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), the U.S. Supreme Court dealing with a commutation matter addressed the question of whether frequent grants of clemency created an expectation deserving of constitutional protection. It held that statistical probability standing alone generates no constitutional protection. According to Roach v. Board of Pardons and Paroles. State of Arkansas, 503 F.2d 1367 (C.A. 8, 1974), denial of parole is not a multiple punishment because it merely preserves the status quo.

JUDICIAL REVIEW

While procedural attacks are frequent, the merits of a claim to release on parole are usually not reviewable by courts because boards exercise discretionary power (Briguglio v. N.Y. State Board of Parole, 246 N.E.2d 512 (N.Y., 1969); Hall v.Cupp 537 P.2d 584 (Or. App., 1975), and Tyler v. State Department of Public Welfare, 119 N.W.2d 460 (Wise., 1963)).

Generally, abuse of discretion is the single ground upon which parole decisions may be challenged. Such challenges may be grounded on the allegation that the action of the paroling authority went beyond specific constraints of a statute (Willard v. Ferguson, 358 S.W.Ed 516 (KY., 1962)), or violated the general constraints of a constitution (Brown v. Lundgren, 528 F.2d 1050 (C.A. 5, 1976)). Still, when a court addresses the abuse of discretion question, necessarily there must be an inquiry into the record to determine whether sufficient facts exist to support the reasons given for the denial" Courts will not substitute their own judgement for that of the paroling authority, nor will they act as ,"superboards" (Zannino v. Arnold, 531 F.2d 687 (C.A. 3, 1976)).

Many boards are required to give reasons for denial. It is said that such a requirement facilitates judicial review, aids the offender's rehabilitative efforts, assists future panels in assessing progress from one hearing to the next, assures the paroling authority has followed its own rules and is acting rationally, structures decisionmaking in an area of broad discretion, and promotes integrity in board member voting by forcing the voter to articulate his or her position. On the other hand, explicit statements of reasons for denial may promote vexatious suits. Further, many of the benefits listed might be achieved through such means as policy and decision guidelines.

A final caution is in order relative to judicial review. Boards and legislatures should exercise extreme care in promulgating rules and statutes which prescribe parole hearing procedures. Because the federal constitution is the "supreme law of the land," it creates rights of a higher order than those created by state constitutions or statutes. Federal constitutional rights represent the minimum protection for people. State constitutions and statutes may enlarge these rights but may not reduce them. Parole boards are routinely permitted to adopt their own procedural rules but must follow them. To a lesser extent, program requirements and supervision standards may bind an agency. The parole agreement, nothing other than private law-making between entities, is also a source of law to parole boards. See Illustration 1.

Section 2

THE PAROLE GRANT PROCESS

For many years, the U.S. Supreme Court had adopted a 'hands off' posture in the area of parole. It had rejected equal protection attacks against parole because litigants could not establish a suspect classification, i.e., they could not prove that parole decisions were made according to impermissible groupings such as race or religion (McGinnis v. Royster, 410 U.S. 263 (1973)).

In 1972, however, in Morrissey v. Brewer, supra, the Court looked at the parole revocation process and held that an offender on parole has a liberty interest to which due process protection attaches. The decision caused concern that the Court had opened the door to examination of parole and corrections administration. Some believed that challenges to the parole grand process would eventually result in the full application of due process principles to parole grant hearings transforming them into mine fields of legal technicalities like criminal trials.

IS THERE A RIGHT TO PAROLE?

The issue of whether there existed a right to parole entitled to due process considerations was placed squarely before the supreme Court in Greenholtz in 1979 (see earlier discussion). Though it was found that Nebraska's particular statute had created a conditional liberty interest in parole (i.e., a statutory expectation), the Court made it clear in preliminary observations that the U.S. Constitution does not guarantee parole as a right. It stated:

> That the state hold out the possibility of parole provides no more than a mere hope that the benefit will be obtained. *** To that extent the general interest asserted here is no more than the inmate's hope. Greenholtz, 11.

Up to this time, challenges to parole were based on federal constitutional arguments. The decision in Greenholtz shifted the focus of attack to state statutes and regulations which might create rights greater than those created by the federal constitution. See Illustration 2.

As an example of this principle in operation, consider Date v. Mickelson, 797 F.2d 574 (C.A. 8, 1986) where the parole statute in South Dakota used the term "may", but state regulation provided that the paroling authority "shall" consider certain factors in parole decisionmaking. The Eighth Circuit held that the mandatory language in the regulation imposed a greater legal obligation beyond that required by statute.

NO STATUTORY EXPECTATION OF PAROLE

Where a jurisdiction has not created an expectation of parole, due process and other constitutional requirements are few. At the very least, we know that the parole authority must follow the procedure rules created by the state. Further, it is safe to say that once an inmate is eligible for parole under the state's rules, the board must give him due consideration in making its decision (People ex rel. Abner v. Kinney, 195 N.E. 2d 651 (Ill., 1964)). Generally, a parole board has the discretion to refuse parole to an offender who it deems to be a danger to society; this may persist until the offender demonstrates some rehabilitation or until his or her sentence expires (Re Foss, 519 P.2d 1073 (Cal., 1974)).

STATUTORY EXPECTATION OF PAROLE

For those jurisdictions which have created a statutory expectation to parole, the consequence of such a decision is somewhat uncertain. In Greenholtz, supra, the Court stated that the existence of a statutory expectation

> cannot mean that in addition to the full panoply of due process required to convict and confine there must also be repeated, adversary hearings in order to continue confinement. Greenholtz, at 14.

The Supreme Court instructed that something less than the "full panoply" of due process is required (see also Barr v. U.S., 415 F. Supp. 990 (W.D. Okla., 1976)), and concluded that the Nebraska procedure passed constitutional muster. Unfortunately, the Court left us to wonder whether a jurisdiction offering lesser protection would run afoul of the Constitution if such an expectation exists.

A likely consequence of creating a statutory expectation to parole is that due process claims may be filed under Sec. 1983 of the Civil Rights Act of 1871. With a successful claim, an inmate could receive injunctive relief as to constitutionally required parole procedures.

When due process applies, meaningful notice'is likely to be required. Notice is not meaningful unless it is given far enough in advance to allow the inmate an opportunity to prepare for the parole hearing. Further, it must contain the time, place and purpose of the hearing. Though notice need not be written, a parole board can avoid proof problems by putting notice in writing. In some jurisdictions, notice includes informing the inmate of the rules which apply to the decisions (Parker v. Corrothers, 750 F.2d 653 (C.A. 8, 1984)), the right to examine information to be relied upon by the board in making the decision, and perhaps even representation.

In Greenholtz, supra, it was determined that notice was sufficient when the inmate was told one month in advance the date upon which his hearing would be held. It was permissible for the board to post the exact hour of the hearing on the day it was to be held.

Parole procedures which must meet minimal due process requirements may be informal and need not encompass the exclusionary rule. Miranda warnings need not be given at parole hearings as a general rule. Finally, the merits of the case tried to a jury or judge may not be raised before the parole board (Goble v. Bounds, 188 S.E.2d 347 (N.C., 1972)).

In jurisdictions where due process is required, courts are split regarding inspection of the inmates' files, particularly differentiating between therapeutic and non-therapeutic settings. It has been held that a parole board must allow the inmate to explain information which is incorrect or mitigate information which is adverse (William v. Missouri Bd. of Probation and Parole, 661 F.2d 697, superseded on other grounds, (C.A. 8, 1981)). Other courts have determined that the interests of the prisoner in locating errors is outweighed by the need for confidentiality in treatment settings (Sites v. McKenzie, 423 F. Supp. 1190 (N.D.W.Va., 1976)). The few states which have had the foresight to address confidentiality align themselves on opposite ends of the spectrum. Some allow inmates a right to inspect files, while others have determined to hold their file absolutely confidential absent a court order. Morris v. State, 272 S.E.Ed 254 (Ga., 1980), for example, held it was constitutional for state to enact a statute which classified the files of the parole board as confidential.

Unfortunately, most state statutes are silent on the topic resulting in case-by-case determinations. The position of the federal government is that probationers are entitled to inspect files with these exceptions: Diagnostic reports, documents which reveal the source of information obtained upon a promise of confidentiality, and other information which, if disclosed, might result in harm, physical or otherwise to any person.

Where a statutory expectation of parole has been created, due process is said to require a written statement of the parole board's reasons for denying parole. Courts have held that such statements need not be particularly specific, given the discretionary nature of the decision (Schuemann v. Colorado state Board of Adult Parole, 624 F.2d 172 (C.A. 10, 1980)). On the other hand, they may not be pro forma either (Page v. U.S., 428 F. Supp. 1007 (S.D. Fla., 1977) where the court found perfunctory reasons insufficient).[6] Pardo v. Chrans, 528 N.E.2d 1071 (Ill. App. 4 Dist., 1988), held that to satisfy minimum due process requirements the statement of reasons for denial should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all.

Under circumstances in which an expectation of liberty is said to have been created by state statute, it is still uncertain whether one is entitled to an attorney. The U.S. Supreme Court clearly skirted the issue in Greenholtz. A few courts have held that no right to counsel exists at parole hearings even when due process is said to apply (Billiteri v. U.S. Bd. of Parole, 541 F.2d 938 (C.A. 2, 1976)). As a practical matter, participation by lawyers can mean that the parole board will have heard a succinct, relevant presentation of the merits of the offender's case. On the other hand, it might mean that parole grant hearings could become technical, adversarial, and cumbersome. With proper rule-making authority, the parole board can determine which will result.

As to the right to confront, in Wolff v. McDonnell, 418 U.S. 539 (1974), the Court disallowed the right to confrontation in disciplinary hearings. Concerns expressed there may apply to parole as well. Confrontation may prolong the proceeding, make it less manageable, increase the risk of reprisal, and resentment might adversely affect the rehabilitation of the offender.

PAROLE ELIGIBILITY

Parole may be granted at any time the holder of the power sees fit unless state constitution or state statute provide otherwise...and most do. Usually state constitution, statute, or rules provide that a minimum period must elapse before an inmate is eligible for parole. Often, there is also stated a maximum period below which the paroling authority must release.

Some states deny parole eligibility to certain narrow classes of offenders. These might include very serious offenders and those with sentences so short that the administrative cost of parole outweighs the benefits. Denial of parole to specified classes of inmates has been upheld against various constitutional attacks. In State v. Barnett, 617 P.2d 1132 (Ariz., 1980) it was held that mandatory minima do not constitute cruel and unusual punishment, rejecting the argument that it makes the status of being a prisoner punishable. Nor is the lack of individual consideration in mandatory minimum statute cruel and unusual punishment (Id.).

Courts steadfastly maintain that, without statutory authority, it is impermissible for a Parole board to delegate the parole eligibility determination to a department of corrections. (Abner. supra, at 654). This may raise questions as to why departments of correction frequently administers good time credits. A good time credit system reflects a state legislature's policy decision to promote internal control of the prison by allowing prison

officials a narrow area of discretion relative to the prisoner's release date. Such a system exists apart from and independent of the parole system.

Ultimately, decisions regarding eligibility in circumstances such as consecutive sentences,' concurrent sentences, and good time credits are largely a function of individual state statutes. Allowing credit for time served awaiting trial may be the responsibility of the court or the responsibility of the paroling authority (State v. Alvillar, 748 P.2d 207 (Utah App., 1988)).

CRITERIA FOR PAROLE

In parole decisionmaking, there is an assumption that there is a correlation between the likelihood of success and the factors considered for parole. Boards should have a wide range of information available to them to make predictive appraisals, particularly where jurisdictions cite risk control as the purpose of parole (Shuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172 (C.A. 10, 1980)).

In addition to offense behavior, several other categories of information are customarily used as bases for parole decisions. There are also groups of factors which are seldom articulated as well as those which have been held to be impermissible.

Length and seriousness of an inmate's criminal history are among the most important factors in parole decisionmaking (Nunez-Guardado v. Hadden, 722 F.2d 618 (C.A. 10, 1983) and Roach v. Board of Pardons and Paroles, 503 F.2d 1367 (C.A. 8, 1974)). Use of the criminal history is approved in the Model Penal Code together with the prisoner's conduct and attitude during previous probations or paroles. The impact of criminal history on parole decisions is justified because recidivism has been noted to correlate with the number of prior convictions.' Courts have approved the use of dismissed crimes and plea bargains unless doing so would be contrary to a representation by the government or a plea bargain (Robinson v. Hadden, 723 F.2d 59 (C.A. 10, 1983)). Even overturned convictions may be considered without violating an inmate's constitutional rights so long as they are not based on a finding of innocence (Shuemann, supra).

The social history of an inmate is an important consideration in assessing release readiness. The Model Penal Code lists the inmate's intelligence and training; his ability and readiness to assume responsibilities; and his employment history and occupational skills as factors a board may consider in setting a parole date. These factors bear on an inmate's ability to ultimately provide a living for himself and his dependents. Additionally, other factors such as substance abuse and the offender's mental and physical health are considerations under the Model Penal Code.

Most boards consider evidence of rehabilitation in making parole release decisions. The Model Penal Code specifically cites the offender's personality and subsequent development as well as his attitude toward law and authority as possible indices of release readiness. Another useful criterion in assessing rehabilitation is the inmate's performance in the institution during the course of his incarceration, according to the Model Penal Code.

Many boards weigh heavily the adequacy of the release plans of the potential parolee. In addition, the Model Penal Code recommends an evaluation of the offender's family status, the quality of his support system in the community, and the type of residence and neighborhood in which the offender proposes to reside.

Other factors commonly used to make release decisions include miscellaneous offender-related factors such as the uniformity-ensuring function of the board. Recommendations of the sentencing judge have been used as well (Wayman v. Ciccone, 541 F.2d 189 (C.A. 8, 1976)). Courts have applied to paroling authorities the U.S. Supreme Court ruling that the Constitution does not restrict the information and evidence which a trial judge may be use to sentence (Edwards v. U.S., 574 F.2d 937 (C.A. 8, 1978)).

There are also included in the parole decisionmaking concerns which for a number of reasons may go unarticulated. Although some of these factors may be permissible under state law, they may not receive a great deal of public discussion. Others, though prohibited, may nevertheless find their way into discussions of parole readiness. Such factors include: public criticism; the effect of parole grant or denial on other inmates; the offender's social, political and moral views; treatment of the offender by the court; the potential benefit of further incarceration to the offender; the need for additional time to evaluate the offender; the effect of parole on the offender's family; the existence of an outstanding detainer or deportation order; belief by the board that the offender has committed uncharged crimes;. the value of the offender to the prison; the offender's cooperation with law enforcement investigations; the offender's health and the cost of his medical care; the offender's age at the onset of criminality and at the time of parole consideration; the offender's sex; and the offender's economic status.

In some jurisdictions, formalized population reduction procedures legitimize the use of prison crowding as a criterion in release decisions. In others, boards take the view that, like many judges, boards have the duty to mete out justice in the abstract without regard to resources. According to this view, it is the responsibility of departments of corrections to find the resources to carry out court and board orders. In any event, to the extent a board orders special conditions pro forma, it-risks spreading available resources too thin. When offenders who most need a resource are able to receive only a watered-down version because a program is over-subscribed, then both public safety and rehabilitation suffer.

Finally, there are some kinds of criteria which have been expressly prohibited in parole decisionmaking. Block v. Potter, 631 F.2d 233 (C.A. 3, 1980), disallowed race as a criterion and, similarly, Candelaria v. Griffin, 641 F.2d 868 (C.A. 10, 1980), held that it is a violation of the Equal Protection Clause to deny parole based on Hispanic origin. Likewise, parole decisions based on religion and poverty have been stricken (Fabries v. U.S. Bd. of Parole, 484 F.2d 948 (C.A. 7, 1973), and Cruz v. Skelton, 543 F.2d 86 (C.A. 5, 1976)). Though courts are willing to consider innovative remedies for the filing of vexatious suits', the Sixth Circuit invalidated a parole board rule which postponed parole consideration for one year whenever the offender filed an unsuccessful habeas corpus petition (Smartt v. Avery, 370 F.2d 788 (C.A. 6, 1967)).

GUIDELINES IN RELEASE DECISIONS

Guidelines, both mandatory and advisory, have been adopted by many jurisdictions for a variety of reasons. Among those articulated are: (1) to minimize disparity and promote uniformity in sentencing, (2) to assure proportionality in terms of incarceration, (3) to provide structure to decisionmaking, and (4) to make more predictable plea bargain outcomes.

Courts have given significant consideration to the application of guidelines. Parker v. Corrothers, supra, held that offenders must be considered for parole under the guidelines in use at the time they committed the first crime for which they are imprisoned. In Harris v. Martin, 834 F.2d 361 (1988), however, the Third Circuit held that a board may apply new, stricter guidelines to the offender to whom the old guidelines would apply so long as the guidelines are advisory rather than mandatory.

DISCOVERY AND CORRECTION OF INFORMATION RELIED UPON BY THE BOARD

A major source of information available to parole authorities is the presentence or postsentence investigation report (PSI). Because of the reliance courts and parole boards place on PSI's, accuracy of information contained in these reports has become the subject of legal challenges by inmates. Most federal courts agree that it is the responsibility of the judge to determine that the defendant and counsel have had an opportunity to read and discuss the PSI (U.S. v. Stevens, 851 F.2d 141 (C.A. 6, 1988)).

Federal circuit courts have adopted different views as to what may be challenged. In the Eleventh Circuit, challenges to the accuracy of the PSI must be based on specific facts rather than a claim that the report is generally inaccurate (U.S. v. Aleman, 832 F.2d 142 (C.A. 11, 1987)). The rule in the Third Circuit is broader, allowing challenges of misleading statements as well (U.S. v. Gomez, 831 F.2d 453 (C.A. 3, 1987)).

Section 3

PAROLE RESCISSIONS

It has been established that there is no entitlement to parole in the first instance. What is the legal consequence of having granted a parole?

PROCEDURAL DUE PROCESS

In rescissions, as in other parole decision proceedings, the cardinal rule is to follow one's own constitution, statutes and procedures. In De Zimm v. New York State Bd. of Parole, 524 N.Y.S.2d 851 (N.Y.A.D. 3 Dept., 1988), an offender successfully challenged the rescission of his parole eligibility date based on the parole authority's failure to file its rules with the Secretary of state as it was required to do by statute.

Aside from situations like that in De Zimm, however, it is not likely that a larger due process right exists. In Morrissey, supra, and Gagnon v. Scarpelli, 411 U.S. 778 (1973), the U.S. Supreme Court held that the conditional liberty interest created by the grant of parole justified imposing due process requirements on the revocation process. In Greenholtz, supra, the Court found an insufficient liberty interest in parole grant hearings to warrant due process protection. Rescissions, it would seem, are somewhere in between. Nevertheless, the U.S. Supreme Court has specifically rejected the argument that granting a parole creates a liberty interest which would entitle one to due process (Jago v. Van Curen, 454 U.S. 14 (1981)). Of course, if parole were mandated rather than discretionary, greater due process protection might be in order (Johnson v. Commonwealth, 532 A.2d 50 (Pa. Cmwlth., 1987)).

Several jurisdictions have adopted statutes which limit a board's power to rescind by specifically setting out grounds for rescission. For example, California statute provides that the inmate may review his or her file and have something that appears to be a right to confront. On the other hand, without such a statute, a court may hold that no hearing at all is required to rescind (Williams v. New Mexico Dept. of Corrections, 504 P.2d 631 (N.M., 1972)).

There is widespread agreement that rescissions may be based on behavior which took place after the offender's parole hearing. There is a split in authority regarding the permissibility of rescissions based on information which existed at the time of the hearing but which came to light after the parole date was given.

Ready v. U.S. Parole Commission, 483 F. Supp. 1273 (M.D. Pa., 1980), held that rescissions could be based on pre-existing information only if it was not discoverable with due diligence at the time the parole was granted. There, the court found that the parole commission had notice of allegations of additional criminal activity at the time it set a parole. Because the agency failed to seek additional information, it could not subsequently rescind a parole date when that discoverable information was submitted by the IRS. The disadvantage of this view is that it tends to force the parole authority into the role of an investigative agency. It further allows manipulation of the

parole process in that an inmate who successfully conceals certain information until after the hearing, is rewarded when the authority is estopped form considering it in the future.

In Fox v. U.S. Parole Commission, 517 F. Supp. 855 (D.C., 1981), however, the court rejected the Ready view. It held that regardless of whether the commission was on notice and should have investigated, it could still use subsequently discovered information to rescind. This view fits the purpose of parole more closely in that it allows boards to continue to incarcerate' poor risks. It has the decided disadvantage however, of intensifying the influence of public pressure on the deliberations of the paroling authority by allowing an avenue to response to public outcry caused by an unpopular decision.

In any event, the behavior or information should have been significant enough to consider denial of parole at the initial hearing (or a longer period of incarceration in jurisdictions where the board operates as a sentencing commission).

GROUNDS FOR RESCISSION

In some jurisdictions, parole dates can be rescinded only upon a finding of cause (Karger v. Sigler, 384 F. Supp. 10 (D. Mass. 1974)). In others, parole may be rescinded without a showing of cause because it has not yet become effective (State ex rel. Newman v. Lowery, 105 N.E.2d 643 (Ohio, 1952)). There are many permutations between these positions but, again, the cardinal rule is that the constitution, statutes and rules in a given state are the first sources of authority. What constitutes "cause" is somewhat uncertain.

Public reactions to announced decisions have led California courts to articulate rather broad rescission power in the paroling authority of that state. In re Fain, 135 Cal. Reptr. 543 (1977), involved an offender who was sentenced to life in prison for murder and to prescribed terms for two counts of armed robbery, one count of escape, and one of auto theft. In 1975 William Fain appeared before a two-member panel of parole board members and received a parole date of October 12, 1976. That action was approved by the signature of a third parole board member who reviewed the case. Statute and the rules of the paroling authority indicated that a parole decision acted upon in this fashion was "final." The parole date was subsequently adjusted to allow good time credit according to applicable rules. One month prior to Fain's release, the parole board chairman, in response to public outcry and pressure from legislators who opposed the decision, convened a review committee pursuant to board rules. That group decided that it was appropriate to review Fain's release. The chairman further indicated that the purpose of the review was to ascertain whether the parole date was appropriate in light of the gravity of the offenses, Fain's prior criminal history and subsequent conduct and whether the public's safety was being protected by the extant decision.

Fain challenged the action prior to the scheduled rescission hearing, and the trial court issued a writ of habeas corpus. It found the board to be without the authority to review the decision of one of its panels which had become final under its rules and that the review of an administrative agency is within the exclusive purview of the courts. It cited the California statute which permitted revocations for just cause only. In reversing the

trial court, the appellate court initially observed that a parole decision was purely administrative in nature and that any deliberative body -- administrative, judicial or legislative -- has the inherent power to reconsider its previous actions unless specifically prohibited by law. That conclusion, it continued, is consistent with the notion of administrative autonomy allowing an agency to discover and correct its own errors (McKart v. U.S., 395 U.S. 185, (1969)). The court declined to infer from existing statutes and procedures that the board's authority had lapsed.

Having determined that the board had jurisdiction, the court turned to the questions of whether the board had "cause" to rescind as required by its rules. The appellate court recounted that parole is not a vested right. It noted that the board's rules allowed rescission for (1) disciplinaries, (2) psychiatric deterioration, and (3) "any new information which indicated that parole should not occur." Public outcry, it found, was just such "new information." Continuing the discussion, the court found that the enunciated grounds were not exclusive in any event because of the board's inherent power to reconsider. Finally, it said that "cause" included the board's determination that a previous parole date was "improvidently granted.""

The notion that public outcry may properly trigger reconsideration of parole was later reaffirmed. In re Powell, 755 P.2d 881 (Cal., 1988), involved one of the principals characterized in the novel, The Onion Field. The Board of Prison Terms set a parole date in 1983 but review of Gregory Powell's parole plans revealed a counselor who questioned Powell's readiness for release. The board ordered a psychological evaluation; it supported parole. One month after the psychological report was received a dramatic enactment of The Onion Field was aired on television. There was a public reaction against the parole decision. More psychological reports were ordered. Some supported parole; others did not. At a rescission hearing, the board found that (1) the data raised questions about potential for violence and (2) the earlier board had committed fundamental error and granted improvident release by failing to consider some disciplinaries. The Supreme Court of California upheld the rescission; because there was "some evidence" of unsuitability, the rescission would stand.

Even where a parole board enjoys very broad rescission authority, there are still constitutional parameters to observe. The inmate retains those constitutional rights not inconsistent with his or her status as a prisoner and with the safety interests of the state (Wolff v. McDonnell, supra). A parole board may not rescind an offender's parole date because of his or her activities as a jailhouse lawyer (Martinez v. Oswald, 425 F. Supp. 112 (W.D.N.Y., 1977), related to another retaliatory action by the prison, but the same principle applies).

A difficult area is a prisoner's failure to reveal facts about his or her own criminal behavior. Is punishment after subsequent discovery of concealed criminal behavior a penalty for exercising one's Fifth Amendment right? Most commentators believe it is not because, unlike other civil rights, disclosure of criminal activity relates directly to appropriateness of release.

Section 4

PAROLE REVOCATION

The revocation process carries with it the ultimate undoing of parole -- in most instances, the potential for reincarceration to the end of the parolee's sentence. Because the Fourteenth Amendment guarantees that no one will be deprived of his or her liberty without due process of law, parole boards and their counsel are called upon to establish and follow what amounts to rules of fair play before removing an offender from parole status. Generally, offenders have no right to parole; however, once a parole takes effect, the offender has a protectable interest in liberty.

The following general principles govern in the area of parole revocations. Interestingly, it has been held that revocation is not punitive in nature, but remedial because it seeks to protect the welfare of the parolee and the safety of society (Gagnon v. Scarpelli, supra, and Morrissey v. Brewer, supra). Selective enforcement based on suspect classification is prohibited by the Equal Protection Clause. Absent proof to the contrary, there is a presumption that parole revocations are undertaken in good faith and in a nondiscriminatory manner (Barton v. Malley, 626 F.2d 151 (C.A. 10, 1980)).

Usually, the constitutional guarantee against double jeopardy, made applicable to states through the Due Process Clause, is not applicable to parole revocations (Moody v. Daggett, 429 U.S. 78 (1976)). The same behavior may amount to both a criminal act and a violation of one's parole. An acquittal on a criminal charge means that the state failed to prove beyond a reasonable doubt that the accused committed certain behavior. If the state (the parole officer) can prove by the preponderance of the evidence that the offender committed the behavior, that finding may serve as the basis for a parole revocation and reincarceration in prison. [NOTE: The standard for violation of probation in the federal system is reasonable certainty.] Because findings of parole violation may be based on a lower standard, an acquittal in criminal court does not preclude revocation based on the same behavior (Perry v. U.S. Parole Com'n. 831 F.2d 811 (C.A. 8, 1987) and Standlee v. Rhay, 557 F.2d 1303 (C.A. 9, 1977)). In Standlee, the court held that collateral estoppel did not apply both because the standards of proof differed and because the nature of the sanction differed as well. No estoppel, double jeopardy, or res judicata problems arise unless the parolee was acquitted on a successful affirmative defense such as entrapment (People ex rel. Dowdy v. Smith, 399 N.E.Ed 894 (N.Y., 1979)).

THE BASICS OF MORRISSEY V. BREWER

Writing on a clean slate, the United States Supreme Court set out to establish a due process requirement for parole revocation hearings in Morrissey v. Brewer, supra. It might have enunciated either of the extremes: a full hearing similar to a jury trial or ex parte, purely administrative proceedings. Establishing a middle-of-the-road due process requirement, the court called for an informal process structured to assure that the finding 'of a parole violation will be based on verified facts and that the consequences

will be driven by an accurate knowledge of the parolee's behavior. Ex Parte Martinez, 742 5.W.2d 289 (Tex. Cr. App., 1987), specifically struck down a statute which provided for an administrative revocation of parole without a hearing. The court reasoned that, even though the revocation was based on proof of a new conviction which he couldn't relitigate, Morrissey entitled the offender to present mitigation to the parole board.

Morrissey's due process requirements appear dismayingly nonspecific, but it is clear that they contemplate a two-tiered hearing. The first tier is the preliminary revocation hearing (also known as the "prelim" or "pre-rev") which addresses the question of whether there is probable cause to deprive a parolee of his or her liberty for the period it would take to prove a violation of parole. The second tier is the revocation hearing (also called the "violation" or "PV" hearing) at which it is established as a matter of fact whether there was a violation of the parole agreement and it is decided whether to reincarcerate the parole violator.

The court dubbed this a "two-tiered process" to emphasize that the two issues -- (1) adequacy of evidence to detain and (2) adequacy of evidence to revoke
must be addressed separately because they fulfill different purposes. At the prerev hearing, the probable cause question must be asked and answered affirmatively before the parolee's living, working, and treatment arrangements are interrupted for a significant period of time. At the revocation hearing, the ultimate factual finding is made (i.e., whether the offender violated parole). If arrangements can be made to conduct both "tiers" of the process at a single hearing, it is permissible to do so. The Court's emphasis is not separate hearings, but rather the accomplishment of the separate purposes. Single hearings present the usually insurmountable difficulty of garnering all the evidence necessary to prove a violation in a short period of time.

The pre-rev hearing must be held in instances where the board exercised its power to deprive the parolee of his or her liberty (Moody v. Dagget, supra). Where an authority other than the parole board is responsible for arresting and detaining the parolee, the preliminary hearing need not be conducted by the parole authority. There are other avenues for determining where there is probable cause to believe the parolee committed a criminal act (i.e., a violation of parole). Though there are differing views, most courts hold that the probable cause hearing is not required if the parolee is already convicted and was never held on a board warrant. Some jurisdictions acknowledge a bindover on criminal charges to suffice as probable cause for parole violation purposes (In re Law, 513 P.2d 621 (Cal., 1973)).

Each of the hearings has its own sub-set of due process requirements. The preliminary hearing must be held at or near the place of the alleged violation or the arrest, and it must be held as promptly as convenient after the arrest, while information is still fresh and sources are readily available. Hansen v. Dugger, 515 So.2d 1345 (Fla. App. 1 Dist., 1987), indicates that conducting the hearing in the adjacent county was permissible because it was close enough for the parolee's witnesses to attend.

The preliminary hearing must be conducted by an "independent officer" who need not be a judge. It may even be another parole officer so long as he or she was not involved in the case (Morrissey, supra.) The parolee is entitled to receive notice of the time, place, and purpose of the hearing as

well as a copy of the allegations against him. The parolee has the right to appear at the hearing and present evidence. There is a limited right to cross-examine witnesses. The final requirement of the pre-revocation hearing is the written summary of evidence and conclusion as to probable cause.

Similarly, the final revocation hearing has a sub-set of due process requirements which must be met in the course of resolving factual questions and determining whether parole should be revoked. The parolee is entitled to notice of the time, place and purpose of the revocation hearing, as well as to receive a copy of the allegations being brought against him. At the hearing, he has a right to be heard and to refute evidence presented against him. He must be allowed to argue that his parole should not be revoked even if a finding of violation is made. As in the prerevocation hearing, at the P.V. hearing, the accused violator enjoys only a limited right to cross-examine witnesses. The limitations and their implications are discussed below. Finally, the revocation hearing must take place within a reasonable time.

THE LABYRINTH OF DUE PROCESS

Timeliness

To the novice parole board member or counsel who attempts to glean guidance for his or her own revocation practices, the direction in Morrissey is maddeningly vague. At no point is the refusal to prescribe exact requirements more apparent than on the subject of timeliness. Timeliness is a concept which is frequently used in reference to a number of different actions: whether the misbehavior took place prior to being placed on supervision, the period of time which the parole officer allows to pass before initiating the revocation process, the time which passes prior to the conduct of the pre-revocation hearing, and the time which passes prior to the conduct of the final revocation hearing. Within limits, each of these can be set within a reasonable time according to the circumstances and the rules of each jurisdiction.

A preliminary question that frequently occurs in the timeliness context is whether one can be revoked for misbehavior which took place before he was placed on supervision. In U.S. v. Daley, 839 F.2d 598 (C.A. 9, 1988), the court held that the doctrine of "fraud on the court" allows the court to revoke probation before commencement where the sentencing judge would not have granted it had he been aware of the facts the offender concealed. Nevertheless, in affirming the revocation, the court relied on the more direct rule that postsentence, pre-probation conduct may serve as the basis for revocation: In Livingston v. State, 749 P.2d 119 (Okl. Cr., 1988), the court affirmed a probation revocation for pre-probation activities. The offender had gained probation by offering testimony which turned out to be perjured. Though the behavior took place before he was placed on probation, the judge found it a violation of the spirit of probation.

The genesis of the timeliness requirement for initiation of the parole revocation proceeding is the Due Process Clause. U.S. v. Tyler, 605 F.2d 851 (C.A. 5, 1979), held that the parole officer's waiting one to two years was fundamentally unfair. It allowed that deception or some other unusual circumstance might justify such a delay. By contrast, six and ten months between violations and probable cause hearing were permissible where the

parole officer was allowing a parolee to have a second chance (Kartman v. Parratt, 535 F.2d 450 (C.A. 8, 1976)).

It is important to note that the timeliness requirement for a pre-rev hearing is triggered by the execution of an arrest warrant issued by the paroling authority (Moody v. Daggett, supra). The timeliness requirement is not triggered by the issuance of a warrant by a court, or when the parolee is held without bail pending trial on new charges (D'Amato v. U.S. Parole Commission; Stabile v. U.S. Parole Commission; and Moore v. U.S. Parole Commission, 837 F.2d 72 (C.A. 2, 1988)). It is the action of the parole board depriving a parolee of his or her liberty that triggers the timeliness count for parole violation purposes. The timeliness requirement for the prerevocation hearing rests in part on the parolee's liberty interest. By analogy, that interest is similar to the interest of a newly accused defendant in having minimal disruption in his life and to having his case tried speedily. Moreover, a speedy hearing means that best evidence will be available immediately after the alleged violation takes place.

Rules in most jurisdictions establish that a reasonable time between arrest and the pre-revocation hearing is somewhere between four and twenty days. Generally, courts will balance the reason for the delay against the harm caused by the delay in determining whether a parolee's right has been violated (Kartmann, supra). In Corn. V. Marchesano, 544 A.2d 1333 (Pa. Cmwlth., 1988), the court cited two reasons for the timeliness requirement: Avoiding unnecessary deprivation of liberty and ensuring the reliability of evidence. Acknowledging "technical prejudice," the court denied relief absent a showing by the parolee of "actual prejudice." The Seventh Circuit considered a case in which the parole revocation was held 66 days from the pre-rev when the parole commission's regulation established a 60-day deadline. Because the defendant failed to demonstrate the delay prevented his bringing favorable evidence or witnesses, the court denied relief for the untimely hearing holding that no prejudice was shown (Perry v. U.S. Parole Com'n, supra). Utilizing similar analysis, the U.S. District Court in Illinois determined that six months between the pre-rev and final hearing was permissible because three separate hearings had been scheduled based on the parolee's requests for continuances (Johnson v. U.S. Parole Com'n, 696 F. Supp. 395 (N.D. Ill.,. 1988)).

As in the case of the pre-rev, the time to the final revocation hearing is established by statute or policy in each jurisdiction. Certainly, Morrissey offers guidance which is far from specific. There the court indicated that the revocation hearing must be held in a 'reasonable time" and that two months was not unreasonable. In Corn. v. Moore, 531 A.2d 805 (Pa. Super., 1987), the court interpreted state Rule 1409 requiring revocation hearings to be held within a time "reasonable under the circumstances of the specified case." Applying the analysis of Barker v. Wingo, 407 U.S. 514 (1972), the court looked at the length of the delay, the reasons for the delay and the prejudice resulting to the defendant Although parties may request a continuance without violating the timeliness concept, Dennis v. Corn.. Pennsylvania Bd. of Probation and Parole, 532 A.2d 1230 (Pa. Cmwlth., 1987) makes it clear that the parole board's record should contain evidence of the parolee's request for a continuance.

Right to Counsel -- Gagnon v. Scarpelli

In 1967, the U.S. Supreme Court held that due process gave a probationer the right to counsel at a revocation hearing involving suspension of a sentence. The court said that an attorney is required at criminal proceedings "where substantial rights of a criminal accused may be affected" (Memoa v. Rhay, 389 U.S. 128 (1967)). Morrissey in 1972 held due process applied to parole revocations, but did not decide whether the parolee was entitled to counsel.

In 1973, Gagnon v. Scarpelli, supra, established a flexible, if somewhat convoluted, rule for determining when counsel must be provided. The court observed that it would be neither prudent not possible to attempt to formulate a precise and detailed set of guidelines to determine when it is necessary to provide counsel. Rather, it is proclaimed that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim that he has not committed the alleged violation of the conditions upon which he is at liberty, or, even if the violation is a matter of record or uncontested, there are substantial reasons which justified or mitigated the violation and make the revocation improper and that the reasons are complex or otherwise difficult to develop or present. In any event, counsel should be provided when an offender appears to be incapable of speaking effectively for himself.

A "colorable claim" suggests that in such matters as routine new convictions a request for an attorney might be legally denied. When a request for representation is denied, the reasons for the denial should be written. The right to have appointed counsel evolves from the Equal Protection Clause. When a jurisdiction grants a right to counsel at revocation hearings, it is mandatory that the parolee be given notice of that right. When counsel is required by Gagnon, lack of funds to pay counsel does not excuse failure to secure counsel (Rhodes v. Wainwright, 378 F. supp. 329 (M.D. Fla., 1974)). Appointment of counsel, when required, must be made far enough in advance of the hearing to allow preparation. In Butenhoff v. Oberguell, 603 P.2d 1277 (Wash. App., 1979), the state court of appeals held that a parolee had been denied effective counsel because his lawyer was appointed only two days before his final revocation hearing.

Gagnon is significant for another reason as well. It extended the due process requirements for revocation enunciated in Morrissey to violation of probation. This is the primary reason for drawing so many parallels between parole and probation caselaw.

Practices of boards vary widely regarding the appointment of counsel for parolees. On one end of the spectrum is the jurisdiction that appoints counsel rarely, and then only in cases of unusual complexity or where there is doubt about the parolee's competence to proceed. On the other end of the spectrum is the jurisdiction which contracts with a law firm, the members of which interview each alleged violator prior to the hearing and represent him or her at the revocation hearing. The practice of a particular jurisdiction is often a function of the size of the parole violation workload, the resources available for the revocation process, the complexity of the proceedings, and statutory mandates. Where counsel is available for the bulk of revocation hearings, the benefits are many: a reduction in delays, more

tailored re-parole arrangements for difficult to place parolees, fewer evidentiary hearings, and higher due process standards in the revocation proceedings.

Notice

The notice requirement has several purposes. The most obvious is that fairness demands that a parolee know the charges against him so that he can prepare a defense. Another benefit from this requirement is that it provides an opportunity for the parties to clarify the issues. Often, if the parties understand the precise points of departure, they will be able to agree to stipulations and focus the presentation of evidence on the real issues of fact. This makes for fairer, more efficient parole hearings.

The method of giving notice is sometimes in controversy. In civil law, the standard is "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action" (Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)). Actual notice is required by many states (e.g., Delaware) and may be effectively accomplished by parole officers via personal service because the parolee is in custody. U.S. mail may be used, but it won't be upheld where the paroling authority knew the parolee was no longer at that address.

Written notice is preferred over oral notice. Though oral may be adequate, it presents proof problems which are easily avoided by giving written notice to parolees.

The content of the notice, as provided by Morrissey, includes the place, time, and date of the hearing, the purpose of the hearing, the allegations against the parolee, and the rights he or she has at the hearing. Additionally, in Raines v. U.S. Parole Commission, 829 F.2d 840 (1987), the Ninth Circuit established that the federal statute in question required a parolee be given notice of the charges and the possible consequences of violation. Because the parolee was not told that his street time was subject to forfeiture, the court of appeals reversed the order forfeiting the parolee's street time. By contrast, the Arizona Supreme Court found that the state's statutory provision specifying that the violator may forfeit street time was sufficient to uphold the denial of credit for three years (Kelly v. Ariz. Bd. of Pardons & Paroles, 762 P.2d 121 (Ariz. App., 1988)). In doing so, it compared forfeiture of street time with the loss of freedom upon revocation of parole.

Evidence

A parole revocation proceeding is not a criminal trial. All that is required is that evidence and facts reasonably demonstrate that the parolee's conduct has not been as good as required by the terms of parole (Mack v. McCune, 551 F.2d 251 (C.A. 10, 1977)).

As indicated in earlier discussion, most states adopt the preponderance of the evidence standard (Lewis v. State, 749 S.W.2d 672 (Ark., 1988)). The federal standard of reasonable certainty is a lesser standard than preponderance of the evidence (U.S. v. Crawley, 837 F.2d 291 (C.A. 7, 1988)). The standard in New Mexico, however, is beyond a reasonable doubt in children's court (State v. Lynn C., 748 P.2d 978 (N.M. App., 1987)).

The admissibility of evidence at pre-revocation and revocation hearings often places parole boards in a quandary. In Gagnon "the informal nature of the parole violation proceedings and the absence of technical rules of procedure of evidence" were noted. The person conducting the hearing is given considerable latitude in deciding what evidence to admit. Though the Supreme Court has not ruled directly on the matter, in dicta it has indicated that probationers and parolees may on occasion be compelled to give testimony in revocation hearings without violating the Fifth Amendment's proscription against self-incrimination (Minnesota v. Murphy, 465 U.S. 420 (1984)). Likely, responses may be compelled if they result in revocation but not if they pose a threat of incrimination in a separate criminal proceeding.

Neither Morrissey nor Gagnon makes a direct-pronouncement about the exclusionary rule, but there are hints that it may not be applicable. Courts have taken varying approaches. The rule does not apply to revocations according to U.S. ex rel. Soerling v. Fitzpatrick, 426 F.2d 1161 (C.A. 2, 1970), State v. Simms, 516 P.2d 1088 (Wash. App., 1973), and State ex rel. Struzik v. Dept. of Health and Social Services, 252 N.W.2d 660 (Wis., 1977) (distinguishing a parole revocation hearing from an adversarial criminal proceeding).

On the other hand, the exclusionary rule has been applied in specific and significant situations. Where police harassment is evident in the parole revocation proceeding, it is likely that evidence would be excluded (U.S. v. Farmer, 512 F.2d 160 (C.A. 6, 1975)). In State v. Shirley, 570 P.2d 1278 (Ariz. App., 1977), the court applied the exclusionary rule where the police officer who conducted the search under a defective warrant was aware that the defendant was on probation. Further, an officer admitted he knew the offender had had guns for a long time before he arrested him. The officer had held off, hoping for a more serious offense. People v. Ressin, 620 P.2d 717 (Colo., 1980), applied the exclusionary rule based on judicial integrity. Conduct which is particularly egregious would be excluded. Finally, in State v. Fields, 621 P.2d 651 (Or. App., 1980); and State v. Smith, 542 P.2d 1115 (Ariz., 1975), courts applied the exclusionary rule to confessions coerced in the sense that the Miranda warning was not given.

Though hearsay is not prohibited, it is wise if not necessary to support hearsay with corroboration before revoking. U.S. v. Warner, 830 F.2d 651 (C.A. 7, 1987), sustained a probation revocation based solely on hearsay because rules of evidence were not applicable, the probation officer's testimony was demonstrably reliable, and the offender didn't challenge its accuracy. Also, Fenton v. Corn., Pennsylvania Bd. of Probation and Parole, 532 A.2d 1223 (Pa. Cmwlth., 1987), held that hearsay is admissible to revoke parole where there is a good cause finding as to why it should be admitted so long as there was corroboration of the hearsay (see Wallace v. Corn., Pennsylvania Bd. of Probation and Parole, 548 A.2d 1291 (Pa. Cmwlth., 1988) (witness deceased)). Further, parole records, including those of a compacting state, qualify as exceptions to the hearsay rule. For example, in Carter v. Corn., Pennsylvania Bd. of Probation and Parole, 544 A.2d 107 (Pa. Cmwlth., 1988), violation was established with arrest reports, commitment reports, and other documents which proved a new conviction. The parolee claimed this was hearsay which denied him the right to confront and cross-examine witnesses. The court found the documents admissible so long as there was "good cause" for the state's failure to call witnesses. Cause in this case was that the

witnesses were out of state and not subject to the Board's subpoena power. Also, the court noted the documents bore sufficient indicia of authenticity.

The finality of the hearing officer's findings in pre-revocation and revocation hearings is a question of considerable interest. In Moore v. Dubois, 848 F.2d 1115 (C.A. 10, 1988), the hearing officer at the pre-rev found no probable cause for the allegation of sexual assault, but found probable cause for a lesser charge. The same evidence was presented at the revocation hearing. The hearing officer there recommended to the parole commission that the offender's parole not be revoked. The commission, nonetheless, found the parolee guilty of sexual assault and the Tenth Circuit upheld that finding. The Commission, said the court, is able to reject the hearing officer's determination regarding the credibility of the witnesses.

ASSERTING JURISDICTION

A court cannot revoke an offender who was never on probation. However basic that concept appears to be, it was the subject of litigation in Harris v. State, 378 So.2d 37 (Fla. App., 1979). That this probation case was litigated underscores the importance of a parole board's being certain that it has jurisdiction before acting.

For boards which have the authority to issue arrest warrants, there are a number of items which should be routinely checked. Some requirements may be statute-specific; others simply amount to common sense. Violation of either may result in liability in certain instances. Examples include the identity of the parolee, whether his or her sentence has expired or terminated, the presence of a signed parole agreement, whether the warrant request is certified, and the calculation of time tolled for absconsion.

The unsigned or undelivered parole agreement raises special concerns. In Page v. State, 517 N.E.2d 427 (Ind. App. 1 Dist., 1988), the court rejected the parolee's argument that the agreement is unenforceable without his signature. The revocation was possible because the parolee admitted knowing the terms of release, receiving the benefits of parole and finally, violating the terms as he understood them. Actual notice, it would appear, is more significant than the document; however, without the document, insurmountable proof problems may defeat a revocation effort. In Interest of R.E.M., Jr., 514 N.E.2d 593 (Ill. App. 4 Dist., 1987), a revocation based on the violation of a new condition was upheld where the offender had actual notice of the condition though the written document had not been served on him (see also Hightower v. State, 529 So.2d 726 (Fla. App. 2 Dist., 1988)).

REMEDY

The court may order an offender's release pending the revocation hearing, order the hearing to be held and, if there was prejudice, order release. One court has held that dismissal of the allegation is not necessarily the remedy for an untimely prerevocation hearing in a probation matter (Gawron v. Roberts, 743 P.2d 983 (Idaho App., 1987)). In some instances, the court pays careful attention to the relative fault of the parties (People ex rel. Brown v. N.Y. State Div. of Parole and Citro v. Sullivan, 516 N.E. 2d 194 (N.Y., 1987)). Finally, People v. Mosley, 244 Cal, Reptr. 264 (1988), held that the addition of an allegation of alcohol consumption in the violation proceeding without notice was error. Though it

was the only ground for revocation, the parolee was not entitled to release but rather he was entitled to further proceedings to correct the error.

Section 5

TERMINATIONS

In most jurisdictions, termination from parole and sentence (also called "discharge") must occur when a prisoner's service of the sentence in prison and on parole equals the time fixed by the sentencing authority. That period may be affected by revocations, particularly when a statute requires termination after a specific violation-free period of parole.

Whether early termination interferes with the authority to pardon vested in another body is the subject of debate. State ex rel. Oliver v. Hunt, 247 S.W.Ed 969 (Mo., 1952) upheld the legislature's power to legislate regarding an offender's discharge from parole. Francis v. Amrine, 133 P.2d 124 (Kan., 1943) held that an action by a judge terminating parole was not subject to appellate review. Early termination requires some affirmative, formal action from the board though the issuance of certificates is not required. A promise by the board to terminate at some future date cannot bind the state (People ex rel. Richardson v. Ragen, 79 N.E.2d 479, (Ill., 1948)).

Section 6

CONDITIONS OF PAROLE

A parole board's ability to set conditions of parole rests on the fact that parole is a matter of grace and not a matter of right (Mellinger v. Idaho Dept. of Corrections, 757 P.2d 1213 (Idaho App., 1988), upholding that state's Intensive Supervision Program (ISP)).

It is widely held that the conditions of parole must relate to the purposes of parole. In Morrissey v. Brewer, the U.S. Supreme Court cited two purposes for parole: First, prohibiting behavior which is deemed dangerous to the restoration of the individual to normal society; and, second, providing the parole officer with information about the parolee and an opportunity to advise him. These two conditions, public safety and offender rehabilitation, are in fact the most common articulated by courts, though sometimes restitution to the victim is added as another purpose. Some jurisdictions specifically articulate the purposes of parole in their statutes.

Aside from the requirement that conditions reasonably relate to the purposes of parole (U.S. v. Marshall, 485 F.2d 1062 (D.C. Cir., 1973)), the parameters of permissible conditions are broad, (Vrieze v. Turner, 419 P.2d 769 (Utah, 1966)). Conditions may not be immoral, illegal, or impossible to perform. Nor may they be arbitrary or unreasonable (Preston v. Piggman, 496 F.2d 270 (C.A. 6, 1974) (disagreed with on other grounds by the U.S. Sup. Ct.)). Pratt v. State, 516 So.2d 328 (Fla. App. 2 Dist., 1987) held it was improper for a court to prohibit an attorney convicted of theft from "being affiliated" with the legal profession because it was not reasonably related to the offense or rehabilitation. The court also agreed with the parolee's argument that the condition was unconstitutionally vague.

Courts have refused to enforce conditions relating to morals imposed by overzealous boards and judges. In Thomas v. State, 519 So.Ed 1113 (Fla., 1988), the court struck down a condition that a probationer not become pregnant for the duration of her probation unless she was married. In light of Ms. Thomas's being convicted of theft and battery, the court found the condition "grossly erroneous" because it bore no relationship to her crime and addressed conduct which was not itself criminal. Naturally, parole conditions must be within constitutional limitations (People v. Hernandez, 40 Cal. Reptr. 100 (1964)), particularly the limitation against overbreadth. A condition is not overbroad if the language provides fair warning that certain conduct is prohibited and the boundaries of the prohibited activities are reasonably comprehensible. In Bobo v. State, 757 S.W.2d 58 (Tex. Ct. App., 1988), the offender was prohibited from trespassing, demonstrating or picketing at an abortion clinic. The court amended the condition observing that state statute allowed conditions that offender not violate law, but that picketing and demonstrating are not violations of law per se. By contrast, Crabb v. State, 754 S.W.Ed 742 (Tex. Ct. App., 1988), decided in the same jurisdiction, upheld a prohibition against picketing or demonstrating at the clinic at which he had committed the trespass for which he was under supervision.

In determining whether a condition is impermissibly vague, the court will utilize the "common intelligence" test. That test requires that a condition be stated with sufficient clarity to inform a person of ordinary intelligence of the conduct which is prohibited (Birzon v. King, 469 F.2d 1241 (C.A. 2, 1972)).

Additionally, conditions may not extend beyond the expiration of the parolee's sentence (In re Prout, 86 P 275 (Ida., 1906)). It is clear that parole boards may subject parolees to restrictions which are not applicable to other citizens (Morrissev and People v. Salvador, 539 P.2d 1273 (Cola., 1975)). However, when a special condition is found to be impermissible, the board may be able to reconsider its decision to parole the offender if it considers the condition important enough to treat it as a pre-requisite to liberty. In Gauntlett v. Kelly 849 F.2d 213 (C.A. 6, 1988), an offender successfully challenged a probation condition requiring him to take Depo-Provera. Upon learning it could not permissibly require the offender to take Depo-Provera, the court imposed the original sentence of prison on the offender instead of allowing him probation.

Obviously, a parolee must be aware of the conditions at least by the time he is released on parole so that he may accept or reject the terms of his release (State ex rel. Crosby v. White, 456 P.2d 845 (Mont., 1969)). Fundamental fairness is not violated, however, when the offender is not told in advance of his release conditions of his parole (U.S. v. Rich, 518 F.2d 980 (C.A. 8, 1975)). People v. LaFrance, 519 N.Y.S.2d 893 (N.Y.A.D. 4 Dept., 1987), required that a probationer must be personally present when conditions are amended unless they eliminate or relax conditions. In People v. Jackson, 424 N.W.Ed 38 (Mich. App., 1988), an ex parte change in probation conditions which created a fundamental change in the probationer's liberty interest was held to be a violation of due process under the state constitution. A basic rule of construction applied to interpreting conditions of parole is to construe the condition in the manner most beneficial to the offender and most strongly against the state (Crooks v. Sanders, 115 S.E. 760 (S.C., 1923)).

DELEGATION

The power to prescribe conditions of parole is generally held exclusively and closely by the paroling authority. However, legislatures may mandate special treatment including conditions of parole for all or a portion of the parolee population (People v. Nowak, 55 N.E.2d 63 (Ill., 1944)). In anticipation of the time when an offender will have served his period of incarceration, courts may recommend conditions of parole, but parole boards are free to accept or reject those recommendations (Owens v. State, 308 So.2d 171 (Fla., App. 1 Dist., 1975)). Attempts to delegate the authority to establish conditions are viewed skeptically by courts. In In re Collvar, 476 P.2d 354 (Okl. Cr., 1970), the state supreme court struck a delegation to the Department of Corrections. Nevertheless, it has been held that a delegation of the specific task of collecting data and determining the correct amount of restitution owed to a victim is a permissible delegation to a department of corrections. State v. Stinson, 424 A.2d 327 (Me., 1981), approved such a delegation because it did not give discretion, but rather mandated that the department ascertain the exact amount of the loss sustained by the victim. Analysis by the court in Mellinger v. Idaho Dept. of Corrections, supra, distinguished the roles of the paroling authority and correction.

Corrections, it observed, has supervisory duties, while the parole commission determined eligibility and set conditions of parole.

Clearly, wholesale delegations to the parole officer are impermissible, (People v. Cassidy, 250 N.Y.S.Ed 743 (1964)). In Morales v. State, 518 So.Ed 964 (Fla., 1988), the court's general admonition that the offender follow his probation officer's instruction was insufficient to support revocation when the offender refused to attend therapy ordered by the probation officer. Where boards chose to utilize a condition requiring the parolee to follow the instructions of his parole officer, several caveats apply. First, the parole officer may not instruct contrary to any other of the board's conditions. Second, the parole officer may not instruct in a manner inconsistent with the purpose of parole. Finally, the parole officer may not instruct in a manner which violates parolee's constitutional rights.

In People v. McDonald, 519 N.Y.S.2d 628 (I987), a probationer was convicted of attempted sexual abuse and ordered into mental health treatment. His probation officer ordered alcohol therapy after the probationer reported he'd developed an alcohol problem. The court declined to enforce the condition that the offender attend alcohol therapy on two grounds. It held that the condition was not sufficiently specific to advise the probationer of what was required of him and that an enforceable condition may not be set by a probation officer but rather by the body authorized to do so.

PARTICULAR CONDITIONS GENERALLY APPROVED

Obey The Law

Among the specific conditions commonly approved by courts is the condition that the parolee obey the law. Violations of this condition may be pursued as a parole revocation or a new crime (U.S. v. Stout, 601 F.2d 325 (C.A. 7, 1979), cert denied). If the base sentence for which the offender is on parole expires after the expiration date of the new criminal behavior, revoking parole may serve to enhance public safety by allowing the board a longer period of supervision. Allegations of failure to obey the law take one of two forms: "having been convicted of X crime" and "having committed X crime" (State v. Christopher, 583 P.2d 638 (Wash. App., 1978)). Thus, where the parolee pleads guilty to "having been convicted" of a particular offense, any revocation consequent to that plea must be reexamined if the second conviction is overturned. On the other hand, standard use of the "having committed" language may increase the number of evidentiary hearings a board is required to conduct.

Searches

Submission to searches appears almost universally as a condition of parole. Usually it extends to just the parole officer but it sometimes includes law enforcement officers as well. The condition empowers certain officers to conduct warrantless searches of the person, dwelling, auto and property of the parolee. Though searches performed by the authority of these conditions are frequently challenged, they are usually upheld (Himmage v. State, 496 P.2d 763 (Nev., 1972) and State v. Scholosser, 202 N.W.2d 136 (N.D., 1972)).

Courts may apply standards to these warrantless searches. In State v. Johnson, 748 P.2d 1069 (Utah, 1987), the court cited State v. Velasquez, 672 P2d 1254 (Utah, 1983), for the proposition that a parole officer may conduct a lawful search of a parolee's apartment without a search warrant if the parole officer had "reasonable grounds for investigating whether a parolee has violated the terms of his parole or committed a crime." There must be evidence that: (1) the parole officer had reasonable suspicion that the parolee has committed a violation or crime, and (2) the search is reasonably related to the parole officer's duty.

U.S. v. Duff, 831 F.2d 176 (C.A. 9, 1987), considered urinalysis as a search. Where neither conditions of probation nor instruction of the probation officer require submission to urinalysis, the Ninth Circuit upheld the revocation based on a positive urine as (1) an exercise of the officer's search power because the intrusion was reasonable and he had probable cause to believe the probationer had been using drugs, and (2) a legitimate instruction finding that the probationer had sufficient notice that use of drugs on probation was prohibited.

Weapons

Parolees are generally prohibited to use or possess weapons. Often this condition refers to other terms such as firearms, dangerous weapons, ammunition and destructive devices. Very broad statements of this condition prohibit purchase, control, and ownership of weapons. Even if no such condition appears on the parole agreement, there may be an independent state' law which restricts the offender's access to weapons. For example, Utah Code Annotated, Section 76-10-503 (2) (a), provides that a parolee may not possess or control dangerous weapons (anomolously, subsection 512 of the same chapter makes the provision inapplicable to licensed hunters). A common difficulty is defining "weapon." In Ackerman v. Commonwealth, 531 A.2d 834 (1987), it was held that a sock, weighted at one end with sand and swung with strong force, is a deadly weapon.

Inform Against Another

Occasionally, a parolee will be required as a condition of parole to give information about the criminal activity of others. In Kaplan v. U.S., 234 F.2d 345 (C.A. 8, 1956), the court interpreted a judge's verbal directive to appear and testify before a grand jury as a condition of probation. The only legal limitation to such requirements is whether there is a conflict with the statutorily expressed purpose of probation or parole. Informing may or may not promote rehabilitation. Willingness to assist law enforcement may be a relevant consideration in determining whether rehabilitation will succeed (Roberts v. U.S., 445 U.S. 552 (1980) and U.S. v. Bradford, 645 F.2d 115 (C.A. 2 1981)).

Most parole authorities do not encourage parolees to act as informants. Some include a prohibition against undercover informant activities as a standard condition of parole for all offenders." In some jurisdictions, the condition may violate a statutory requirement that conditions be related to crime of conviction. State v. Asher, 595 P.2d 839 (Or. App., 1979), involved a probationer convicted of unauthorized use of an automobile who was ordered to cooperate with narcotics agents. The condition was invalidated because it wasn't reasonably related to the original crime of auto theft. The condition

may be invalidated as unreasonable (overbreadth) or because it causes hardship to offender (State v. Lanaford, 529 P.2d 839 (Wash. App., 1974)).

Most often, however, the condition to inform on others fails to receive the approval of boards and commentators because of the impact of the parolee/informant. Gobert and Cohen write:

> "Irrespective of the legality of a condition requiring disclosure of information about activities of other persons, the wisdom of such a condition must be considered. In noting that the moral principles of some persons would be compromised by having to provide information about the behavior of others, Judge Wyzanski observed:
>
> > It cannot but give pause to any sensitive man to be required to report the misconduct of others, especially if he knows them, even if they are not his formal partners, his social friends, or his blood relatives. A court should move slowly to impose such a requirement. It ought to remember that it offends a man's conscience," citing U.S. v. Worcester, 190 F. Supp 548 (D. Mass., 1960).

When a parolee is required to inform on others, he may be drawn back into the environment which supported his criminal activity in the past, he may be prevented from establishing new, pro-social attachments in the community, and when early release and other considerations are used to reward him, his old notion of manipulating the system to his own ends may be reinforced.

Inform Against Self

Of course, the offender may be required to provide many kinds of information about himself and his activities as a condition of parole. If, however, the information regards information which is criminal in nature, the offender may seek the protection of the Fifth Amendment right against selfincrimination. Nevertheless, if the information is to be used only in a revocation hearing, the claim is usually rejected (State v. Evans, 252 N.W.Ed 664 (Wis., 1977) and State v. Fogarty, 610 P,2d 140 (Mont., 1980)).

Substances

Drugs and alcohol are among those substances which parolees are routinely forbidden to use (U.S. v. Miller, 549 F.2d 105 (C.A. 9, 1976)). Drugs are always forbidden (standard conditions), but alcohol is usually prohibited only where the record shows its use is likely to lead the parolee astray (special conditions) (People v. Burton, 172 Cal. Reptr. 632 (1981)). Often the ground cited for upholding these conditions is public safety. Possession as well as use of substances may be prohibited. Where urinalysis indicates the presence of a controlled substance in the parolee's bloodstream, that has been held sufficient to demonstrate possession of illegal drug (Moore v. Corn.. Pennsylvania Bd. of Probation and Parole, 530 A.2d 1011 (Pa. Cmwlth., 1987)).

Travel

Permission to leave the state is upheld as a condition because the parole officer must be able to locate the parolee in order to supervise him (State ex rel. Cutler v. Schmid, 244 N.W.2d 230 (Wis., 1976)). Similarly, a parolee may be prohibited from entering a given locality if sufficient reason exists for limiting his or her freedom of movement. A prohibition against entering a specific location related to crime is routinely upheld. Petition of Dunn, 488 P.2d 902 (Mont., 1971), prohibited an offender convicted of selling drugs from being in the vicinity of schools. A related concept is that of banishment from the jurisdiction which, without sufficient justification, is stricken as against public policy. It is not related to an accepted purpose of parole (neither rehabilitation nor protection of the public). Further, it is against public policy to allow one jurisdiction to dump its criminal population on another (certainly, retaliation may be promoted). Finally, such banishment may be violative of state or federal constitutional rights, although in one case such a condition was upheld because the parolee asked for it (McBride v. State, 484 S.W.2d 480 (Mo., 1972)).

Association

The rationale underlying prohibitions from associating with other felons is that a criminal environment is said to foster further crime. The U.S. Supreme Court has noted "the contaminating influence of association with hardened or veteran criminals" (U.S. v. Murray, 275 U.S. 347 (1928)). The primary problem caused by this particular condition of parole is the meaning of "association." U.S. v. Furukawa, 596 F.2d 921 (C.A. 9, 1979), distinguished between planned, prolonged contact, and a chance or casual meeting. But, Arciniega v. Freeman, 404 U.S. 4 (1971), held that it didn't include "incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer."

The condition poses other interpretation problems as well. Often, there are problems with the meaning of "criminal record" or whatever other term is used to designate the prohibited group (Birzon v. King, supra). There is even greater difficulty in determining whether a parolee knew of the criminal record of his associate. Cohen and Gobert recommend the "known to him" language in statutes.

Courts have upheld no-association conditions and other kinds of prohibitions even when they operate to restrict family association because the state's interest is greater than that of the offender (Moore v. City of East Cleveland, 431 U.S. 494 (1977)). Even no-association clauses which keep spouses apart have been upheld (again, conditional upon meeting legitimate state ends) (In Re Peeler, 72 Cal. Reptr. 254 (1968)). In Mitchell v. State, 516 So.Ed 1120 (Fla. App. 1 Dist., 1987), the court upheld a condition prohibiting contact with the offender's boyfriend who was the father of her child because she was convicted of aiding his escape. The court observed that the condition need not restrict his contact with the child, only with the offender.

No Contact

No contact clauses are permissible if they are rationally related to legitimate state interests (U.S. v. Consuelo-Gonzalez, 521 F.2d 259 (C.A. 9, 1975)) . A Florida offender convicted of molesting a g-year-old step-daughter was prohibited from contacting the victim or any member of her family, including her 4-year-old half-sister, the offender's own daughter. The court found the condition reasonably related to the offender's rehabilitation (Russ v. State, 519 So.Ed 715 (Fla. App. 1 Dist., 1988)).

Payment

Generally, payment of restitution and fines. are permissible conditions of parole where they attach to the crime for which the offender is being paroled. Restitution for crimes other than the crime of commitment may not be allowable. From a practical standpoint there are considerable concerns about proof problems and the criminal justice system becoming a collection agency.

Proving a violation of parole board's order to pay restitution or a fine requires a showing that the parolee has not made sufficient effort to pay and perhaps that other adequate alternative forms of punishment do not exist. In Bearden v. Georgia, 461 U.S. 660 (1983), the Supreme Court reversed the revocation of a probationer because it found he was unable to meet the condition through no fault of his own. In Jones v. State, 513 So.2d 732 (Fla. App. 5 Dist., 1987), it was held that there must be a finding of indigent's ability to pay fines prior to revoking him for failure to pay it.

The U.S. Supreme Court has determined that a defendant's status as a Chapter 11 debtor in possession does not of itself discharge nor suspend his obligation so as to automatically prevent revocation for failure to pay restitution (Kelly v. Robinson, 497 U.S. 36 (1986)).

Snarks v. State, 745 P.2d 751 (Okl. Cr., 1987), held that a board cannot revoke one for failure to pay restitution when that person is making a good-faith effort to pay. In State v. Rodriguez, 745 P.2d 811 (Oreg. App., 1987), it was held to be illegal for a judge to order restitution for full damages where the insurance company had settled for $207 less in its negotiations with the offender. Reasoning: The court could not order restitution not recoverable in a civil action. But, in State v. Belfry, 416 N.W.Ed 811 (Minn. APP., 1987), the court upheld a restitution order for victims of dismissed crimes despite settlement agreements to the contrary. The court noted that the purpose of civil law is to restore, but the purpose of criminal law is to punish. In Kelly v. State, 744 S.W.2d 345 (Tex. Ct. App., 1988), a parolee accused of non-payment of restitution has the duty to go forward with evidence and prove by preponderance that she is unable to pay. Indigent parolees may even be assessed supervision fees so long as the state doesn't attempt to collect until such persons have the means to pay (U.S. v. Rivera-Velez, 839 F.2d 8 (C.A. 1, 1988)). Florida allows for the imposition of restitution to the state for the cost of representation a public defender at a hearing (Little v. State, 519 So.2d 1139 (Fla. App. 2 Dist., 1988)). On the other hand, a New York court has held an offender cannot be required to donate to a shelter for battered women as a condition of parole on an assault because the institution was not the victim (People v. Appel and People v. Sullivan, 529 N.Y.S.2d 311 (N.Y.A.D. 1 Dept., 1988)).

Failure to pay restitution and fines raises the practical and public policy considerations in enforcing the conditions. The criminal population is one in which financial problems abound. Many offenders struggle to support families and, if they can't, they are accruing debts they must eventually repay to the state welfare system for supporting their families. Typically, the population is undereducated and unskilled. They may suffer from poor work histories because of dependence on substances. Reincarcerating such an individual for failure to pay must teach a very valuable lesson to offset the costs to the system. Alternatives to reincarceration are often more appropriate.

Therapy

Conditions promoting the physical and mental well-being of the offender are upheld if they enhance the likelihood of his or her successful integration into the community. They are, in fact, seldom challenged. In particular, psychiatric care is upheld where advisable (People v. Ainsworth, 302 N.Y.S.2d 308 (N.Y.A.D. 2 Dept., 1969)). Courts generally support revocation of an offender's parole where he has abandoned counseling altogether without consent of the board (People v. Demma, 415 N.E.Ed 1244 (Ill. App., 1980)). A practice which requires the parole officer to submit the therapist's letter stating the offender will no longer profit from continued therapy does much to keep a board informed and shift liability from the parole officer to the board. Availability of therapeutic resources is frequently an issue. A court refused to revoke a probationer for failure to get substance abuse therapy where he had been on the waiting list the entirety of his probation period and was in fact tenth from the top at the time of his arrest (People v. Carter, 518 N.E. Id 1068 (Ill., 1988)).

SUMMARY AND CONCLUSIONS

Every parole board member would do well to acquaint himself or herself with the basics of parole law. The task is not an easy one, particularly for paroling authorities whose time is already over-subscribed.

From the moment an offender enters a board's jurisdiction, opportunities for legal error exist. In most jurisdictions, public policy decisions have constructed rules of liability which do not require perfection from mere humans. But, in jurisdictions such as Arizona, where immunity has been abolished entirely, members have a greater incentive to understand the legal implications of their actions.

Regardless of the standards applicable to liability, one should keep in mind that the rules of law, no matter how convoluted, are efforts to accomplish simple purposes: fair play and public protection. Courts, legislatures, and boards are struggling to articulate the legal rights that change as one changes from a citizen to an offender and back. An ordinary citizen has liberty which cannot be taken away without elaborate attention to due process. When convicted, he or she maintains some of those rights and loses others. Even though he or she retains a right, the safety considerations of the prison environment may allow restrictions on that right. As the offender moves through the system, he or she regains rights slowly. On parole, he or she again has a liberty interest protected by due process but that protection is not nearly as extensive that of an ordinary citizen. Keeping the purposes of fair play and public protection in mind can help guide judgement.

Finally, a parole board has considerable power to affect the rules that govern it. It's own rule-making ability is sometimes underutilized. Like it or not, political alliances with supportive legislators are important and can lead to legislation which enables a board to do its job better. An open, professional relationship with the press can encourage coverage of the broad range of board activities, not just the embarrassing, sensational case. Coverage of the more routing cases helps the public to understand the complexity and difficulty of the board's task.

APPENDIX
Additional Research Sources

Legal encyclopedias

Corpus Juris Secondum (C.J.S.)
American Jurisprudence (Am. Jur.)

N. Cohen and J. **Gobert, The Law of Probation and 'Parole, 1983, Cum. Supp. 1988,** McGraw-Hill.

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1. For brief history of parole, see P. McGarry, Handbook for New Parole Board Members, NIC Research Monograph, 1989.

2. The right to Due Process is guaranteed by the Fourteenth Amendment to the Constitution which states in relevant part, "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." The requirements of Due Process are fluid and may differ greatly from one context to the next. Specifics are discussed in the text.

3. This statute remains in effect as of January 1991.

4. For a thorough treatment of liabilities issues, see R. del Carmen and P. T. Louis, Civil Liabilities of Parole Personnel for Release, Non-Release, Supervision, and Revocation, NIC Research Monograph, 1987.

5. See Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 83 (1943) which stated, "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

6. As examples, "Offender presents a risk to community" might be too general, while it might be unnecessarily specific to state, "Drs. Smith and Jones conducted evaluations on 7/8/88 and 7/25/88 respectively and they both indicated that a score of 88 on the plethysmograph and only 23 points per day in behavior modification were insufficient...." A more appropriate statement of reasons for denial in this case would be "Reports from therapists together with the inmate's long history of sex crimes suggests that he is likely to reoffend."

7. It is not a violation of protection against double jeopardy to accumulate consecutive sentences for determining parole eligibility (Goode v. Markley 603 F.2d 972, cert denied (C.A. D.C., 1970)).

8. See R. Hood and R. Sparks, Issues in Criminology 180 (1970) correlating criminal history with recidivism.

9. See D. Anderson, Curbing the Abuses of Inmate Litigation, ACA (1986).

10. The aftermath of Fain I is worth noting. After rescinding the 1976 parole date the board established a new parole date, ultimately established to be in 1982. Renewed outcry in 1981 led to another rescission which was successfully challenged because it purported to be based on public opinion alone (In Re Fain, 188 Cal. Rptr. 653, 655 (1983)). Thereafter, Governor Deukmejian purported to rescind Fain's parole date by executive order. The move was unprecedented. The California Supreme Court struck down the Governor's rescission because the Governor's power under the statute was no greater than that of the board (In Re Fain, 193 Cal. Rptr. 483 (1983)). Since the board was not empowered to rescind based on public opinion alone, neither could the governor. California's Determinate Sentencing Law became effective in 1977 but many felons continue to fall within reach of the old Indeterminate Sentencing Law.

11. Informal telephone survey of parole boards by author in 1988.