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## COUNSEL IN PAROLE HEARINGS

FRANK L. CALDWELL\*

Imprisonment may follow a legal trial. Imprisonment may follow an administrative hearing. If the former, there will have been forceful assertions by legally trained counsellors professionally committed to prevail by argument over opposition. Ideally, the counsellors will have been of comparable capabilities, ethical and adequately enabled by resources. This adversary system of determining guilt or innocence has earned a long standing reputation of considerable reliability. Administrative agencies while firmly established are not traditional and their procedures are not yet absolute. Accountants, psychiatrists and others sometimes act as counsel in administrative proceedings. Legal counsel may or may not be present and may appear in a more or less restricted capacity depending upon function of the agency and the nature of the inquiry.

Contemplations of a parole board, an administrative agency, leave some observers intolerant of the absence of counsel from its administrative hearings. Those so persuaded contend for legalistic parole procedures with hearings at the site of violations, legal counsel, notice, pleadings, subpoena power, confrontation, cross-examination, judicial review of each of the foregoing and all the other adjective legal protections of liberty. They have concluded that such is preferable to finality of fair decisions by an administrative parole board which probably includes lawyers along with other impartial, able and experienced people from other disciplines. In New York State on an average of the years between 1959 and 1970, such a board annually released to parole supervision 63.3% of those eligible and on an annual average returned as violators 12.8% of those under active supervision during all or part of a calendar year, while an annual average of 1.5% were returned by courts with new sentences. Reference may be made to the statistical table which follows.

Parolees are a minority group. Their backgrounds are often disadvantaged and they are generally of limited resources. Parolees comprise other minority groups. They are people in need. They are vulnerable to discriminatory acts and attitudes. General good will be promoted by supplying them every reasonable protection. However, identification of

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the exact protection that will flow from legal counsel at parole hearings to parolees and to society seems less than crystal clear.

Counsel, whether legally trained or otherwise possessed of sufficient legal know-how renders various services relative to parole hearings. Counselling by various disciplines has always been the keystone of parole services. Counsellors influence human behavior and help other people live acceptably and productively. Counsel enlightens parolees and prevents them from misunderstanding and misinterpreting. Many parolees have language difficulties. Legal counsel might explain parolees' actions, conditions, positions or attitudes in a manner never heretofore done. Legal counsel could define legal implications and explain legal responsibilities to parolees. Such counsel's abilities, in organizing and implementing parolees' evidence, would be of value. Cultural gaps might be discovered by counsel. Counsel's persuasiveness could operate. Those who contend for more legalistic parole hearings say that attributes such as the foregoing are valuable to parolees and to society. They seem to say these betterments will flow from legal counsel's presence. They seem to assert that enhancements by legal counsel will be proportionate to their costs measured timewise, moneywise and otherwise.

One wonders! Do legally trained counsel have special resources enabling effective performance of these and other similar services? Is such capacity an inherency of legal training? Can lawyers normally be expected to perform these and other services valuable to parole truth searches better than persons of other disciplines? Must those performing these services function in parole hearings? Is it likely that private counsel, on a case-by-case basis, will perform these services better than they are now being rendered in parole processes? Is the public likely to be better protected by another trial-type hearing than by the more informal, more personal inquiry into a person's feelings and attitudes in a setting where his sensitivities are not insulated by counsel? If public funds are not available to provide counsel for all parolees, will society be bettered by allowing counsel for some? Will trial-type restraints produce better parole decisions; or put another way, is it more productive of truth to disregard the statement of an apparently loving mother to a parole officer: "I've never seen real proof of this, but I know my son is using heroin"; or put still another way, shall we submit mom and the parole officer to cross-examination; or from another frame of reference, must we say: "Inspector, since your information is from an informant you won't identify, we won't confine the parolee while we verify his conduct even though he said he'd commit the robbery

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tonight"; or, finally, is it likely the inspector will supply such information if he and his informant are subject to cross-examination? Is it best to limit the flexibility and dispatch that permit development and further evaluation of the doctrine that correctional programs are most promisingly viewed as "levels of custody?" Is it community protection to assure parolees that they cannot be returned to prison quickly? Is it improvement to postpone finality of fair decisions by judicial review? Is an adversary proceeding likely to improve above quoted New York percentages? Is it not difficult to answer questions in this paragraph: "Yes?"

Will lawyers be as subject as others are subject to becoming possessed of ingrained and insensitive attitudes; or rephrased, do lawyers develop fixated attitudes like other people? Is one indispensable essential of adversary truth finding, freedom of counsel to refuse to represent a client in whose cause he does not believe? Do the next two considerations mitigate against regular legal representation of parolees by a staff attorney or by groups of lawyers like Legal Aid? Are others not only as able to draw logical conclusions, but like medics, able also to draw professional conclusions from the same facts? If we want better decisions, would it be better to introduce into parole proceedings psychologists, psychiatrists, anthropologists or sociologists instead of lawyers? Do man's feelings direct his actions? Are one's feelings likely to be more exposed and measurable without counsel at a parole hearing? Parole is embryonic when compared to courts: parole decisions relate to predictive risks: does not a dose of counsel further inhibit parole's maturation as a publicly acceptable imperfect predictor? Has parole's performance been sufficiently reliable when compared with courts to merit avoidance of this inhibition? Is there likelihood that if counsel enters parole hearings, that parole releases must, in reason, be reduced in number because there will be a doubt whether a parolee, who becomes recognizable as a potential violator, can be returned in time to prevent more injurious behavior? Will only a few parolees benefit from counsel at parole hearings? Will this further disadvantage the bulk of parolees? Do organized criminals probably want lawyers in parole proceedings? Is it not difficult to convince yourself the answer to the questions in this paragraph is: "No"?

In a 4-3 decision, the New York State Court of Appeals decided in 1971, that procedural due process under both the United States Constitution and the New York Constitution requires that parolees have entitlement to the assistance of legal counsel in parole revocation hearings. This decision is entitled the *People ex rel. Joseph Menechino*, Appellant,

*v. Warden, Green Haven State Prison*, Respondent. It is recorded 27 NY 2nd 376, and will be hereinafter referred to as *Menechino*.

This decision says: "... the right to the assistance of an attorney at the hearing is constitutionally mandated . . ." A revocation hearing is "... an accusatory proceeding . . . The outcome is dependent upon the board's factual determination as to the truth of specific allegations . . ." Counsel is valuable "... in developing and probing factual and legal situations which may determine . . ." imprisonment. Counsel may "... analyze and question the accuracy of the parole supervisor's report . . .," and "... educe and marshall the positive facts necessary to refute the technical and rather ambiguous charge . . ." He may introduce "... evidence of mitigating circumstances and in general aid and assist defendant to present his case . . ."

Participation by counsel need be no greater than is required to assure, to the board as well as to the parolee, that the board is, insofar as the parolee is concerned, accurately informed of the facts before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for that same purpose. Meeting these requirements will not . . . occasion the slightest relaxation of supervisory control over parolees. It is the board alone which is to ascertain the facts and decide their ultimate importance . . .

The decision speaks against undue delay. It directs the Board of Parole to conduct a hearing at which the alleged violator shall be entitled to the assistance of counsel and permitted to call witnesses.

This decision may be the precursor of a series of decisions holding that procedural due process requires all the elements of the legalistic adversary truth search. The decision makes this reference to language in a related case "... had parole revocation been at issue rather than parole release, fundamental fairness might dictate that the prisoner be accorded constitutional due process at a trial-type hearing including the right to legal counsel . . ." The Court indicates that the search for truth "... is not to be sacrificed to administrative speed and convenience . . . the presence of counsel . . . constitutes the bedrock characteristic of our system of administrative justice . . ." Maybe bail, confrontation, cross-examination and the rest will all be required in future. Such was not required by the court in this pronouncement. This decision may be within the trend of judicial decisions toward greater review of administrative justice. This decision is innovative. It may be an opening wedge into parole; or, it may be a total intendment.

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Language in *Menechino* is absolutely clear in restricting its rule to parole revocation hearings. Counsel's allowance into revocation hearings seems a clear probability of counsel's entry into release hearings. If counsel's protections are needed by parolees at all, there is greater need to insure fairness to an individual in releases than there is to insure fair returns by an agency already having demonstrated enough confidence in an individual to have freed him from prison. On this basis, much which follows refers to implication of the *Menechino* rule upon parole board decisions generally, releases as well as revocations.

Parole is in a transitional stage. In New York, it has been affected by mandatory and conditional releases as well as by a major governmental reorganization. It presently seems that the primary responsibilities of the New York State Parole Board are to fairly control the passage of transgressors between facilities and communities; restoration of rights and privileges and rendition of advisory services. Its sphere of influence and responsibility has been substantially reduced. Yet, there still remains its critical power over freedom which always has been its essence and basic responsibility.

This power to imprison is awesome. But, more definitive in terms of interpreting this decision and more productive in terms of performance of all parole duties is the advisability that all parole authorities assume attitudes and postures consistent with duties and responsibilities. Theirs should not be a power orientation. They should be most attentive to their duties to fairly protect communities from undue risk at the same time they perform their duty of fairly protecting individual liberties. All parole power revolves around this duality of fairness in performing duties. Such is the inherent nature and purpose of all parole procedures, hearings and decisions. The broad duties to promote community security and to enable further generation of individual development by opening the door for people to benefit from community-based social casework techniques which may include bodily restraint seem most significant in meaningfully applying this decision.

The parole function is so sensitive as to demand examination of prospective parolees by board members beyond the form orientation of usual adversary proceedings. Parole includes a duty to prevent anticipated difficulties as well as a duty to treat proven transgressions. In performing their part of these duties, parole board members, at parole hearings, seek factual truth. Throughout parole's history, true descriptions of past occurrences have been provided reliably by a professional parole staff.

On facts so described, 69.2% of those eligible for parole were released in 1970 in New York State, and of those under active supervision during all or part of 1970 only 16.3% were returned as violators by the Parole Board and 1.8% were returned by the courts as new commitments. Liberty has turned and does partly turn on factual determinations. Parole decisions are partly decisions of fact. Insofar as disputed factual situations are involved, a trial-type hearing is not inappropriate. But one can hardly argue that a parole board performs its entire duty in decision making if it acts solely as a jury acts. It is, by the statute of which it is a creature, required to do much more.

Before reaching New York's Parole Board for final determination, a factual decision has been acted upon by the parole officer who supervised the parolee, by the senior parole officer who participated in such supervision in an advisory capacity, and most often by a supervising parole officer, a higher functionary in the administrative chain. The critical duty of parole boards is to predict behavior. Trial-type procedures tend to inhibit exposure of indicators such as feelings, attitudes and sensitivities of prospective parolees. During parole board hearings, board members look not only for factual truth but they want and try to look at and evaluate true and real reactions of prospective parolees who often are experienced, hardened people. Often these reactions can best be produced by questions which are in law called, and appreciated by parole boards as, indefinite, general, suggestive, complex, or even argumentative. Boards may use hearsay to create a genuine reaction. Reactions to the high stress level in parole hearings is an indicator of what reaction to societal stress may be if the prospective parolee is paroled. Responses are predictive tools. They may show the existence of strength indicated by a case history to be needed for successful adjustment. A show of genuine anger in response to imposition may be just what a parole board wants to see in a previously submissive, easily led person. Observation of the anger will be more predictive than a lukewarm, low key presentation under counsel's tutelage. If the board creates the impetus for the anger, there is little room for suspicion that is, a staged, "phony" or theatrical reaction.

The question which would be legally objectionable in a trial need not seek an answer of probative value to be the only effective kind of probe in existence to induce a measurable reaction. A surgeon need not be truthful with a patient to render an accurate diagnosis. The patient had better be truthful with his surgeon for a successful operation to be probable. Sometimes it is best for patients that surgeons not disclose facts. Parole boards

are greatly enabled to accurately predict by evaluation of true expressions of parole applicant's attitudes. The expression may be antisocial, hostile or otherwise offensive. But true manifestations of applicant's feelings are of greater predictive value than all that legal formulary can reasonably be expected to produce. Of greatest value are true expressions of the parolee's opinion and his conception of truth. Such may be inaccurate, even unsound, but if they are true, they are of great value. An experienced parole board member is likely to be better able to discover and interpret true offerings of today's offender than are lawyers. Lawyers are oriented by training and experience to advocate, to be committed to the single view of the advocacy, to argue and to sell: yes, even to camouflage. Truth is distilled at a trial from the adversity of competing conceptions of truth. Neither parole boards nor parole staffs are against parolees. All parolees at revocation hearings have enjoyed the undeniable confidence and support of parole staff and parole boards. Such staff reports enabled boards to set them free.

It is meaningful in respect to whether homicide, assault, theft and/or rape may be anticipated to be committed *in futuro* that parole boards accurately measure in terms of the challenges of today the reactive strengths and weaknesses of prospective parolees. The parole hearing is the fulcrum of parole board measurement of these risks. It is of minimal meaningfulness in respect to whether crime may be anticipated to conform permitted expressions of prospective parolees to the parole board at parole hearings to the precedent legal forms originating in antiquity. For such conformation to be newly required is creative of risk. Let us be certain, absolutely so, that the anticipated betterment merits the risk. Might we not again, now, refer to the foregoing percentages? Are judicial performances comparable? Will betterment accompany counsel into parole hearings?

Intervention between parole board members and prospective parolees which insulates one from the other parole hearings by allegiances, dependencies or otherwise is defeative of performance of the duty of boards to decide. Attorneys insulate in trials. Defendant's right to stand mute is absolute. How now, with counsel in parole hearings, may counsel speak absolutely for prospective parolees? What otherwise is counsel to be there for, if not to direct presentation? Must parole boards predict parolee behavior only from what counsel chooses to offer?

Lawyers' influence on parolees will be transitory. Lawyers restrict legal imposition to incidents of proven misconduct in isolated form. They are rarely responsible for future conduct of clients. Parole boards are.



Objectivity of systems results from fixed standards. Behavior prediction seems not yet sufficiently standardized as to accommodate legalistic proceedings. This is not to say all parole releases are entirely subjective. Releases are according to law to follow formation of the opinion that parolees ". . . will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society . . . ." New York Correction Law, section 213. To the extent that this and similar statutory standards require subjectivity, there must be such in the exercise of parole decision making.

Maybe there will be developed by man standards by which to define accurately behavioral predictors. We may look forward with desire to the psychical sciences. Realistically viewed, past experience seems to show that man's best effort will probably continue for some time to be the use of human opinion, honestly developed, with all its frailty. To impose legalistic inhibition without predictive standards is likely to produce mostly confusion. Of the predictive sciences one thinks of psychiatry. There are a dozen or so schools of thought or schools of psychiatric theory having mutually exclusive predictive standards. There are various kinds of psychiatrists. Some have predominantly psychoanalytic outlook. Some follow one or another psychologic theory of mental illness and personality deterioration. Some seem to believe that psychopathologic problems are the result of faulty learning processes. Some seem to believe human behavior is beyond control of the individual. Most seem to be treatment oriented but fewer seem to be outcome oriented. An overview allows the opinion that even standards of psychiatrists are closely akin to subjectivity disguised in the robe of solemn objectivity underguarded with psychiatric terminology. If the law cannot look to psychiatry for standards of behavior, then care should be exercised before looking away from the quoted parole percentages. Are psychiatrists' percentages better? A psychiatrist who is useful in parole decision making and in predicting the behavioral outcome of a parolee will probably not apply psychiatric standards which are generally middle class. He will probably apply the same experiential standards traditionally applied by parole board members. He will not be bound by legal form when he questions patients to form his prognosis.

Whether man will come to define standards may be argued at length. Today, people whose only single conviction is for use of LSD have flashbacks and commit violent homicide. Standards for predicting such behavior are not now known and probably will be developed, if at all, under

a system enabling observation with freer release and return. Sentences are now much shorter in New York. Some say arrest quotas in New York City produce unfair drug law enforcement. To those who have no lawyer, parole boards have always been "courts of last resort." Prisoners' minds should be more attentive to the somewhat limited rehabilitative programs and less distracted by anxiety about appeals and judicial decisions concerning technical legal rules if society is to be protected.

Parole is not alone in being changed—almost all things and relationships are being altered. Precision is yet a valid governmental goal in programming, but moreover there must be an accepting sensitivity to change with a feel for allowable momentum. It seems today that tomorrow is now. Judicial mandates must be performed, and in so doing parole functionaries must utilize all available skills to interpret judicial directions in relation to parole's overall purpose and to direct its application of judicial directions toward maintaining positive societal influences.

Many people are able to use logic and reason and objectively interpret and interrelate judicial precedent. Few are able to relate to the intrinsic nature of parole. The entire correctional function is of low governmental priority. The prevailing tendency is to brush corrections under the rug and to pretend their challenging problems don't exist.

Appropriation of resources for corrections has never approached what has been needed. In New York, fiscal appropriations have been generous to parole and for narcotics control. Whether there is public commitment to be sustained, liberal financing of corrections is yet to be learned. Broadly speaking, ordinariness is built into correctional systems by the overburden of people with problems the correctional program cannot solve. Penuriousness builds in ordinariness. Narcotics addicts and alcoholics have medical or social maladies which are largely unaffected by prison sentences. These and others similarly afflicted are a growing group. Less, not more, money for governmental purposes seems reasonably expectable.

Sometimes the most descriptive way to picture a low priority is to describe the opposite. Let's look at involvements of a high priority governmental activity also having as its purpose protection of communities and development of people. Let's glance at defense. The *Center Magazine*, a publication of the Center for the Study of Democratic Institutions, P. O. Box 4068, Santa Barbara, California 93103, in its January, 1970, issue said the Department of Defense

. . . furnishes one out of every nine jobs in the United States. The eighty billion dollar Defense budget accounts for half the total annual

expenditures of the national government. If one adds to this the cost of past wars (in veterans' pensions, military hospitals, etc.), the military receive seventy cents from every dollar of taxes levied on the American people . . . a summary of General Accounting Office studies covering the period from May, 1963, to May, 1964 (revealed), ascertainable waste of five hundred million dollars in a five percent sample of procurements . . . the world spent approximately one hundred and seventy-three billion dollars for military purposes in 1968 . . . .

Corrections exist at the level of low priority. *Menechino* promises an increase in parole costs.

What follows is not offered as a model of technically absolute legal writ. It is an expression of impressions and inclinations. It is intended to discourage continuation of a trend toward imposing legalistics upon parole or at least to retard timing within the trend.

Due process is not always synonymous with judicial process.

Due process of law is a constitutional guaranty of fundamental fairness and justice in proceedings against life, liberty or property. The procedural aspect of due process mandates notice and an orderly proceeding adapted to the nature of the involvements in issues being decided. Rules governing such proceedings must be established and must be of general application. The rules need not disregard preservation of group interests involved in issues being decided. Hearings must be before a competent, impartial and fair functionary empowered to hear and determine the issues presented.

Due process is not only satisfied by traditional past practices, but may be satisfied by new, fair procedures. Administrative agencies regulate matters from licenses to jail. Due process does not require all administrative processes to be alike. Fairness seems to be the essence of the guaranty of procedural due process. Fairness may be variously formed. Nothing in law requires parole officials unfairly to disregard their duty to protect public safety by adopting procedures which diminish the effectiveness of their direct and intimate probe into individuals according to case history mandates before their release into communities and, if necessary, before return to imprisonment.

The New York Court of Appeals has created a new type parole hearing characterized by limited participation by counsel. Counsel is similarly limited by rules of other administrative agencies and also at some stages in legal trials, such as at a sentencing procedure. This decision is a bode-ment of ill only if administrators fail to apply it in a manner improving

decision making. In my judgment, there is minimal affectation to be expected from counsel's presence at hearings in assistance of parolees. Harm may result if counsel functions beyond the limits which grow out of the inherent nature of parole hearings. Education is not only what is learned but also who it is learned with. So also is parole not alone fair decisions, but also the interplay of attitudes like mutual confidence between decision makers and those whose liberty is decided. This confidence has markedly and positively contributed to order in prisons. If lawyers do more than accurately inform of facts as parolees see them, then lawyers will not enhance these attitudes; they will then interfere by intercession. If the presence of lawyers facilitates parolees considering parole boards their antagonists, then the presence of lawyers to that extent, will have harmed correctional processes.

New York's parole board must apply the *Menechino* decision. Other boards will have to apply comparable decisions. Ever constant are judicial determinations purposed upon correlating individual and group interests. The judicial decisions will vary according to values, areas, attitudes, experiences and circumstances. Interpretations will differ according to attitudes, experiences and composition of boards. Many fair parole procedures conceivably flow from *Menechino*. The search is for a procedure which does not violate either *Menechino* or parole relationships.

The court's intention seems to be embodied in its following language "... participation by counsel need be no greater than is required to assure, to the board as well as to the parolee, that the board is, insofar as the parolee is concerned, accurately informed of the facts before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for that same purpose." The clause "... insofar as parolee is concerned . . ." is the court's limitation upon counsel's function. He is to assist in presenting the thrust of parolee's position. He may analyze, question and persuade against reported charges. He is to assist the government of checks and balances—this may prove to be a balance of value. The court clearly repeats the Correction law and adds: "It is apparent, therefore, that the board is vested with unfettered discretion in deciding whether or not a parole violation has occurred and, if it has, whether or not parolees should be returned to prison . . ."

Counsel should not be permitted discovery of material which is presented for the board's consideration in support of specific charges. Certainly, information submitted by professional parole staff because of its confidential relationships should not be disclosed. To disclose would

mitigate against community interests. Confidentiality should not be limited to sensitive material, for parole staffs should be permitted to exercise their professions without the deterrent of cross-examination by counsel in parole hearings. Such would unproductively consume their time; as is attested to, by police testimony in courts. Such would place them unnecessarily in a position openly adverse to parolees. To extend this decision beyond its letter would seem to tend to sacrifice the public equity in preservation of the board's exercise of discretion and staff's professional, custodial effectiveness. A parole officer must not only be a peace officer, but also benefactor, in order to make citizens' homes more secure. His privilege to practice his profession is equal to lawyers' professional privileges.

Crime is caused by many factors. The causal relationships are complex. There are at least two groups of causes: those having to do with individual attitudes, qualities and values, and those related to externals operating upon individuals. Correctional offerings may produce individual change, but societal influences are far less responsive to reformative effort. Transformation of an individual from an offender into abidance occurs if the correctional experience develops strength with which to cope with himself in the environment to be experienced.

The most effective correctional system will be one which requires the shortest incarceration and earliest reintroduction into communities. The probability is that the system enabling more facile passage between prison and community will minimize injury from faulty release and (or) return judgment, and thus will provide greatest societal protection.

The following procedures would seem to accord due process under *Menechino* and protect against inept presentations by parolees of facts in their interest. Administrative rule changes would be needed to establish the procedures.

## I

Notify technical parole violators, and no others, of their right to acquire counsel to render them assistance. Technical violators are violators other than those absconding and those convicted of crime while on parole. Where there has been an intervening judicial conviction or where parolee has absconded, counsel should not be allowed.

## II

Provide counsel with clear and definitive statements of how parole is alleged to have been violated. Provide counsel with no information about

supporting material in parole reports. Staff recommendations and supporting materials are often not only fact, but fact intermingled with behavioral evaluation and prediction. They are professional products. Thus combined, such may necessarily be inexact and subject to interpretation. For these and other reasons, many varied backgrounds are included among members of parole boards. These boards, as groups, are probably more aware of the numerous possible interpretations than lone counsel can supply from parolee's position. This inexactitude is clearly recognized by parole boards as they ponder men's fates, and it long has been recognized without counsel's intervention.

In those states where the parole board is an independent body not responsible for overseeing supervisory staff, it is in a position permitting less reason to question its impartiality. It is not unreasonable to continue assignment to it the responsibility of protecting confidences, screening hearsay and fairly treating individual liberty. The *Menechino* decision does not reassign these duties.

Some observers of parole thrust the challenge that parole boards do not uniformly apply clearly defined standards of parole selection. Other observers answer that the standards applied by jurors after being judicially charged are no less obscure than the standards of parole board members functioning within the polarities of the rule permitting releases which are compatible with societal welfare and only upon reasonable probability that if released, the person will live and remain at liberty without violating the law.

The evaluative decisions of a parole board reflect the experience and values of its member deciders. The following might be meaningfully indicative of the considerations of a parole board member in deciding whether it is probable that a given person will live normally if released, or whether after release a person's condition or conduct requires restraint of liberty.

1. To understand the parole candidate's intentions. In this area the decider might be strongly influenced by reported opinions of others, particularly of parole staff, about the candidate's apparent attitudes and manifested motivations; and
2. To visualize the environmental and attitudinal influences likely to have confronted him before and during the alleged violative behavior; and
3. To balance against (1) and (2) the candidate's strengths and weaknesses likely to bear upon his control of his own behavior. In this area the decider probably will rely more upon his own judgment; i.e.,

his personal experience and values, than upon others' reports. In drawing this balance, how the parole candidate genuinely *feels about things* will be quite a valuable indicator.

4. To project what parole supervision or institution offers in terms of the candidate's needs as the decider views both the needs and the offerings. The decider will probably, at this point, formulate his idea of how he considers the candidate might respond to offered supervisory suggestion and control.

The foregoing tends toward development of an attitudinal inclination in the decider's thinking. With this inclination decider might weigh past acts and environmental promises and arrive at his decision to release or to re-imprison. This individual decision adjusted by other individual decisions of the board (or panel of board members) has been permitted as an imperfect finality with productive results.

At a parole revocation hearing the parolee may be returned to parole supervision in the community rather than continued in prison. The revocation hearing panel must decide factually whether there was a violation. It must also decide what are parolee's attitude and motivation. May he continue toward social readjustment at home? Is he so prompted toward misconduct as to require imprisonment? What is the matter? Will his maladjustment most effectively be corrected; will his needs best be met in the prison or in the community? Underlying all else are the same basic questions as are basic in a release hearing; namely, will he live and remain at liberty without violating the law; is release compatible with the welfare of society?

Many kinds of questions become involved in parole revocation hearings. The scope of inquiry is broad and diverse when considered generally. Yet in particular cases often there appears a simple and precise need to cause an alleged violator to discuss an intimate matter for evaluative consideration. The examination to determine whether there has been a violation is closely interrelated with the examination to evaluate predictive indicators. It will be difficult to separate the two examinations. Under *Menechino*, the factual examination promises to be legalistically rigid. *Menechino* does not expressly alter the attitudinal examination.

Elements which control deciders' judgments in one decision may not be significant factors in another decision involving a person whose history presents a dissimilar risk. Deciders will use personal experiences and values to establish what weight to give case factors and how to assess relationships. Many such experiential standards are almost reflexive from

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case stimuli. Of these, deciders may have no cognitive state of consciousness to permit later measurement. This seems to be the same posture of a juror. Exact identification of these personal standards promises to be a tedious endeavor. Some may doubt the value of such. Such identification might be an avoidable attraction to others having a different experiential persuasion to attempt mechanically to apply the identified standards to the detriment of an otherwise more reliable decision by a group of deciders.

## III

Counsel should not be permitted to subpoena parole staff. Field and supervisory staff should continue to be completely excluded from violation hearings. Charges of violations grow out of the application of professional training and experience. These charges should be treated as *prima facie* proof of their content casting upon counsel the burden of going forward, but not entitling him to the right to discover, nor to confront, nor to cross-examine staff or its sources. If parole budgets and proven past performances of professional parole staffs are worthy, let them be worth a presumption of validity. These staff people enable creation of parolees from prisoners by their influence and reports. Upon what basis should it be functionally assumed without proof that they would deny the status to which they elevated a person without valid reason? Please again refer to the oft quoted percentages.

Argument likely to abound from questions about sufficiency of legal specificity will tend to disengage evaluative mental processes of parole board deciders. Their duty is to predict behavior and not to debate language extents and preferences. Counsel's duty should be limited to helping the parolee say whatever he wants to say. If parole is to be attacked as a system, let such follow a showing of failure or unfairness. Destructive disengagement by interdisciplinary permeation should be prevented.

Correction law, section 218, now 212, subdivision 7, does not say parolees are entitled to "defend against" charged violations; it does not express this entitlement in language ordinarily applied to trial. It provides that at a revocation hearing parolees shall have opportunity to "... explain the alleged violation. . . ." Is not the use of the word "explain" a tacit legislative assumption of validity of the charge? That word must be strained to convert it into a license to launch a full probe into staff standards at each parole revocation proceeding. To introduce this repetitive addendum into parolee proceeding by administrative interpretation would



be of questionable fiscal advisability. Such introduction would be legally questionable. A balance should be maintained between the benefit of the unobstructed exercise of professional social casework with the probable expectation of value from legalistic imposition.

#### IV

At revocation hearings counsel shall enjoy the broadest reasonable latitude in presenting parolee's explanation. The last four words in *Menechino* say that the parolee shall be ". . . permitted to call witnesses . . ." at the revocation hearing. These words of grant stand singularly alone. No direct reference is made to them elsewhere in the opinion. There must be administrative interpretation of their meaning. The decision does not specify the manner in which witnesses may be called upon, but leaves that to administrative determination. A witness is one whose testimony is desired, including all persons from whom testimony is to be extracted; i.e., deponents, affiants and people delivering oral testimony. To call is to bring forth or produce after procurement.

It would seem that the court's mandate will have been satisfied if the parolee is permitted to introduce into the revocation hearing whatever testimony he and his counsel wish in written form. The decision does not expressly say the board must hear oral testimony. Oral testimony suggests recording and reproducing what has been said, subpoena power over parole staff, subpoena of other prisoners, even mentally ill prisoners, expert witnesses and the like. More legal knowledge will be required of board members if oral testimony is involved. Evidentiary rulings and extent of cross-examination will become problematical. Who will pay witnesses' travel expenses? Delays, travel, schedules, motions and appeals accompany oral testimony.

Parole boards have little need for witnesses to be present. They need not rely upon cross-examination of a witness to render a decision. A board would probably prefer to have parole staff investigate and interview people about points raised by counsel and also about matters ancillary to such newly presented points upon the basis of which the witness may have formed his opinion. A board of parole does not perform its duty by deciding only upon facts presented to it at a hearing. Its duty is not only to function as a jury. It has an overriding duty to find the truth. It must send staff to search and verify. Whatever interest it has in confrontation of witnesses at a hearing may be waived by it in favor of its professional

staff's verification and evaluation. Nothing in *Menechino* prohibits this waiver. Since oral testimony is not expressly required, it should not be permitted administratively by extending the *Menechino* rule.

Oral testimony should be excluded. Witnesses should not appear at parole hearings. Counsel should be permitted to produce relevant testimony and introduce it in written form. Such is how all facts and opinions have always been submitted by all others than parolees in all New York parole hearings. This is more convenient for witnesses.

Law provides for depositions and commissions to take testimony. Such procedure enables presentation of testimony in written form and entitles the testimony to the same force and effect as if orally presented in a trial. It seems an analogous exercise if an administrative agency decides written form to be the usual form and the form most suitable to the performance of its function.

The percentages show that about two-thirds of eligibles are released. The percentages do not show inordinate returns. Parole has always been fairly administered. Since unfairness has not been shown, there is no indication that these four words (. . . permitted to call witnesses . . .) were intended to convert what has been a productive, administrative interview or hearing into a trial.

## V

Following counsel's presentation and as a part of the revocation hearing the board may interview parolee exactly as has been done from parole's beginning until now. While counsel is entitled to be present during this interview portion of the revocation hearing, counsel should neither participate nor intervene in this interview in even the slightest manner. He should not by gesture, voice, movement, inflection or otherwise distract nor impede its conduct or participation in same and for so doing counsel should be removable from the hearing. This interview should occur whenever the board or hearing panel deems such necessary to perform its continuing, unfettered duty to decide. It is not a mandatory part of every revocation hearing because the board may consider itself sufficiently informed by counsel's presentation without an interview. This interview may vary in length and coverage as now. The board may require further information to be supplied by staff with or without an interview. In any event, it is not necessary that there be direct contact between staff, its sources of information and counsel at the hearing.

VI

In the absence of counsel, the board shall ascertain findings of facts and cause to be issued to counsel a written statement of the findings.

VII

In the absence of counsel, the board shall enter a determination whether, and if so, how much additional time shall be served by the returned parolee. This should be tentative at the time of entry and should not then be communicated to either counsel or parolee.

VIII

Counsel shall be granted a fixed period of time to file a written brief refuting matters raised in the interview and attacking the findings of fact. Fairness requires that counsel be enabled to argue against coverage of the interview. Counsel was excluded from participation in such. He must be able to attack its content.

If no brief is filed within the time fixed, the time to be served, established according to paragraph VII, shall no longer be tentative, but shall become binding on the date fixed for submission of briefs.

If such brief is filed by counsel, the board (or hearing panel) shall consider the brief, reconsider its findings of fact and notify counsel in writing of the facts thereafter finally ascertained, which will be binding when so established. Parolee shall be informed of the additional time he shall serve as soon as practicable after the decree becomes binding.

Release and return decisions should not now be treated as just other casework decisions. Imprisonment and release to freedom are viewed by society in a way as to be best served by these decisions being rendered by functionaries apart from supervisory continuum. Human liberty is an elevated status in public opinion. Once corrections and parole enjoy greater public acceptance, perhaps decisions to release and return may be treated ordinarily. They are extraordinary now, in the public eye, and their demotion would be a premature invitation to an avoidable attack on a developing facet of the correctional process.

The foregoing procedures seem to me best to meet the demands made upon a parole board with large volumes of serious decisions to be rendered in an assertive jurisdiction. Many procedures different from those enumerated also could satisfy the inclinations of other parole board members, while also satisfying the stated rule in the *Menechino* decision.

A commanding wariness accompanies me in two of its major areas.

I hope the proportion of our current parole releases to today's volume of crime continues to be acceptable as community assets. The unstated rule in the *Menechino* decision is unsettling. That unstated rule is that excellent parole agency performance is inadequate to meet the requirements of legal frames of reference. It is clearly insufficient to function with excellence. Additionally, it is required to anticipate degrees of changes in law and to function acceptably therewithin.

Parole authorities must re-examine their rules, regulations, prohibitions and allowances. Such must be re-evaluated in terms of today's pandemic—the social revolution. Both substance and procedure invite consideration for adjustment. It may be unacceptable, as vague, to require a parolee to perform his promise to obey the reasonable direction of a parole officer. Rules prohibiting parolees from attending questionable resorts, or from associating with evil companions may be reasonably understood and supportable in reason, but these rules may not be acceptable as obscure and unenforceable. It may be unacceptable as unreasonable to restrain parolees from obtaining automobile operator's licenses. Modes of quick travel are commonly available—maybe it will be unacceptable to require parolees to obtain permission before leaving the community into which parole was granted. There is good reason to protect against some parolees changing residence or employment without prior approval of a parole officer. Others possess sufficient stability for the community to be protected if they have freedom to change residence and employment and later inform parole officers. It may become unacceptable to require prior notices by all parolees. Acceptability may depend upon the paroling authority deciding which people must give prior notice. If parole officers make the decision, acceptability may depend upon confidence between them and parolees. It may be unacceptable to deny parolees' rights to work where alcohol is sold: liquor regulator's rules may fall. How much protection flows to communities from denial of voting privileges to parolees?

There is no parole rule against the enforcement of which protest cannot be imagined. Parole administrators can take no comfort from severe changes without proof of shortcomings. Then there is the fact that a single questionable parole release can jeopardize an entire parole system. Today is characterized by permissiveness. But parole administrators who release liberally while markedly relaxing regulations may be trying to mix oil and water. The judicial pendulum constantly swings defining preponderances between group and individual protections. Under *Menechino*, *supra*, administrators of sensitive parole programs tend to be

deprived of necessary exactness in the fundamental law which defines their public duties. The *Menechino, supra*, decision promises the uncertainty of subjugation to judicial appeals where formerly there were clear, certain and positive duties to decide finally. The uncertainties which accompany the unstated rule in the *Menechino, supra*, decision are legion. There is reason to sincerely hope that parole uncertainties will be increased only to satisfy a clear and compelling need.

Some changes may be best if by administrative initiation, others if by legislation, and still others if judicially decreed. The best changes will probably follow knowledgeable interchanges of ideas. The legal profession does not involve itself sufficiently in corrections for its ideas to be impressed on operations of the parole system except by judicial decree. A creative service can be rendered to corrections by lawyers through professional associations and otherwise without case by case intervention.

I rememebr a jury trial of a man who signed a confession which supported the first degree robbery charge for which he was being tried. His defense was that he had been the recipient of a gift. The story he told in court sounded as believable as did the content of his written statement. I doubt whether anyone but him and the alleged donor knows whether he told the truth orally or in writing. Guilt or innocence was decided upon what was presented. There was a compromise verdict, guilty of petit larceny. The district attorney relied upon the confession. Defense counsel was young, broke and court assigned before the days of separate proceedings to test voluntariness of confessions. Defense counsel seemed surprised when the confession first appeared. Maybe accused did not tell him about it.

I enjoyed the give and take of criminal trials. I will personally enjoy the give and take of lawyers in parole hearings. I quit criminal practice because my clients were broke. I do not think lawyers will bring better decisions to parole. I do not think more people will become parolees. I do not think introduction of lawyers into parole is progressive. I hope the mingling of lawyers and parole officers will make parole more acceptable. I am reluctantly willing to order a long, black robe, if I must.

Since 1959 it has been my privilege to be a member of New York's Board of Parole which, during my tenure has been composed of men of various strains including Polish, Dutch, German, Puerto Rican, Negro and probably others; Jewish, Catholic and Protestant are religious faiths of its members. Presently, three lawyers are one-fourth of its membership, two other of its lawyers were recently promoted. Primary life experiences

of its members also include teaching, law enforcement and sea captaincy: four members, including the Chairman, are from parole staff ranks.

Quite often I look at a man before us and think, "There, but for the grace of God go I." Others with whom I work say they do also. Quite often I look into Criminal Courts and I read about Civil Court calendar jams and delayed justice. Before I commenced writing these offerings, I asked myself if I were in the chair of judgment in parole, would I prefer my liberty being dependent upon a decision like those resulting from plea bargaining in courts today, or from our board. I decided I would rather take a chance with plea bargaining justice, for most likely I would want freedom regardless of other considerations. I then asked —, which is best for my community? I decided it is probably best to let the poor man's criminal court of last resort be a highly carefully selected board having members with varying points of view, experiences and backgrounds acting fairly with finality, with appellate courts functioning to prevent abuse.

Much is yet unknown about how to redirect men's lives. Much remains to be done to achieve uniformity of criminal sentences. Legal practices sorely need modernizing. Now seems not the time to further overburden a developing parole system with the limitations of another overburdened entity. Now seems not the time to return to an overburdened judiciary what was put under administrative aegis because of need for expertise and unmanageable volume. There is greater complexity and larger volume today.

Lawyers promise to bring a more rigid form to parole hearings with minimal addition to substance because fairness already characterizes parole. Has parole's performance been less efficient than courts? Are parole decisions more irregular or less uniform than are courts' sentences? Neither seems answerable: "yes." The introduction of legalistics risks retrogression.

There are some who say they believe that because judges are elected and juries represent popular prejudices, minority groups cannot get fair criminal trials. These would be likely to feel that return of parole to courts would be discriminatory. Is now the time to restrain a board with a record of the foregoing percentages? Hopefully not! Some states have parole boards which were selected with sensitivity, not only of functional capacities, but also of the need for group representation. Restraint of those boards by the return of the paroling power to courts can be interpreted as retrogression.

Release hearings must be meaningful in terms of the candidate's weak-

nesses and evaluative of changes in their personal equations. Changes in attitudes are therein tested. Responses to interview pressures may be related to environmental pressures. A skillful interviewer gains valuable impressions of the candidate's likely response to social and emotional demands after release. Faced with histories of impulsivity, poor judgment, inadequacy or temper, tolerances may be estimated. A board member's interview often is an avenue of testing controls according to reported capacities and an opportunity to evaluate expressions of social awareness. I can think of only slight assistances counsel might render to board's exercise of the above evaluative duties. On the contrary, their presence will likely tend to transmit pressures of the interview from candidates to board members who may not be legally trained. Counsel may even be a means of disguising real assertions by candidates. Counsel insulates the real candidate from the board. Counsel then leaves the candidate after the hearing to his own devices and to the resources of the system he imagines protected him against during a hearing.

Parole's effectiveness is directly proportional to its capacity to be viewed by prison populations, as merciful, as just. I submit that it is so viewed and offer as proof the comparatively few requests for counsel in the face of their allowance into the federal systems in Michigan, Maryland and in New York up to the time of this writing.

Ongoing is the dilemma. Some say parole is granted too liberally. They can be answered by reference to the recent creation of conditional and mandatory releases. Others charge that parole boards are too restrictive. Those may be answered by reference to crime frequency data, the within statistical record of New York's board and to *Menechino*.

Some regard parole boards as expressors of community tolerances and restrictions within correctional systems. One parole board error in judgment can jeopardize an entire parole function. Parole board members must keep attuned to community allowances. This is made more difficult when parole's legal foundation shifts to create benefits which seem obscure.

I urge that this and similar decisions not be extended by administrative interpretation. It is my hope that time of extensions be quite cautious and remain absolutely judicial. The best in parole, the best in correction, is yet to be. There is much to be explored, much to be learned, much to be developed. Do not lengthen the stay of some in prison houses of our system by further inhibiting the development of free release and return in parole processes.

## COUNSEL IN PAROLE HEARINGS

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## STATISTICAL TABLES

Year	Parole Board Hearings in State Institutions	Parole Board Hearings to Set Minimum Dates and Minimum Periods of Imprisonment	Individuals Eligible for Release from State Institutions Appearing At Parole Board Hearings	Individuals Approved By Parole Board for Release to Parole Supervision	Per Cent Released	Individuals Under Supervision All or Part of Year
1959	11,318		7,904	5,414	68.5	14,661
1960	11,643		7,587	4,882	64.3	15,016
1961	11,204		7,453	4,596	61.6	14,293
1962	11,117		7,920	4,851	61.2	14,610
1963	11,976		8,282	4,936	59.1	14,984
1964	12,220	2,510	8,571	5,173	60.4	15,071
1965	12,187	2,568	8,662	5,267	60.8	15,364
1966	12,019	2,868	8,590	5,404	62.9	15,749
1967	11,512	2,188	8,106	5,253	64.8	16,451
1968	10,377	2,497	7,090	4,563	64.3	16,422
1969	9,704	3,214	6,627	4,156	62.7	15,411
1970	8,651	3,767	5,741	3,970	69.2	14,637

Individuals Declared Delinquent	Per Cent Declared Delinquent	Individuals Returned As Violators of Parole Board	Per Cent Returned By Parole Board	Individuals Returned By Courts As New Committments	Per Cent Returned By Courts
2,173	14.8	1,581	10.8	256	1.7
2,420	16.1	1,807	12.0	274	1.8
2,154	15.1	1,715	12.0	209	1.5
2,280	15.6	1,764	12.1	222	1.5
2,493	16.6	1,923	12.8	256	1.7
2,569	17.0	1,979	13.1	251	1.7
2,600	16.9	1,973	12.8	212	1.4
2,551	16.2	1,938	12.3	205	1.3
2,626	16.0	1,903	11.6	219	1.3
3,216	19.6	2,189	13.3	184	1.1
3,192	20.7	2,299	14.9	254	1.6
3,086	21.1	2,391	16.3	264	1.8

In addition the Parole Board held hearings and made decisions for inmates of local correctional institutions to the extent of 1,177 in 1967; 5,335 in 1968; 5,463 in 1969 and 5,458 in 1970.