North Carolina Central Law Review

Volume 6
Number 2 *Volume 6, Number 2*

Article 15

4-1-1975

A Right to Reasons When Denied Parole

Dorothy C. Bernholz

Although prescribed contraceptives to minors without parental consent are illegal in North Carolina, as a parental matter, there is widespread use of all contraception by minors in North Carolina. The efforts of the State to keep birth control from minors would be very costly, futile, and inefficient.

For all the above reasons, a change in present North Carolina law would be a good step. Three bills prepared by the Institute of Government at Chapel Hill concerning minors' rights to medical treatment (including birth control) without parental consent will be presented to the 1975 North Carolina General Assembly for study.[40] Passage of one of these bills would serve the interest of North Carolina and minors.

DONALD M. WRIGHT

A Right to Reasons When Denied Parole

Throughout the twentieth century, Americans have supported a penal system founded on the principle of rehabilitation rather than retribution.[1] It follows that the administration of parole, an integral part of the criminal justice system, has as its object the rehabilitation of persons convicted of crime and the protection of the community.[2] But recently a federal prisoner, when denied parole, was heard to complain:

> One cannot improve or correct the reasons for denial if he is not aware of that reason. What sureness is there, that one year or one month from this time he will be any different. Why was he denied; there is all the cause in the world for him to become bitter when one is being denied justice.[3]

---

and thus make the number above a low estimate. The data above was compiled by the author from records of the N.C. State Board of Health in October of 1974 with the Aid of Mr. Paul Johnson of the N.C. State Board of Health in Raleigh.

40. One bill pertains only to birth control for minors, the other two bills refer to the allowance of all medical treatment without parental consent to be given to minors. These proposed bills were written by Mr. David Warren who was the head of health affairs at the Institute of Government at the time these proposed bills were written in 1974.

1. *See* D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 75 (1969).

2. *See* 67 C.J.S. *Pardons*, § 17 (Cum. Ann. Pocket Part 1974). The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. *Morrisey v. Brewer*, 408 U.S. 471, 477 (1971).

3. King v. United States, 492 F.2d 1337 (7th Cir. 1974). Charles King, Jr. in his *pro se* complaint at 1338.

Experts in the field of administrative law have been dissatisfied with Parole Board procedure in this regard and Professor Kenneth Culp Davis has long maintained that "(w)ithholding reasons (for parole denial) is likely to harm the rehabilitation process."[4]

Two recent U.S. circuit court decisions, *King v. United States*[5] and *United States ex rel. Johnson v. Chairman, New York State Board of Parole*,[6] establish that parole boards must now provide reasons when denying release on parole. The Seventh Circuit, in the *King* decision, relied on the Administrative Procedure Act which obligates federal administrative agencies to give "(p)rompt notice . . . of denial . . . of a written application . . . accompanied by a brief statement of the grounds for denial."[7] The Second Circuit, in *Johnson*, found that the prisoner's interest in prospective parole is entitled to due process protection. That court established the requirement that an inmate who has been denied parole be given a statement of reasons sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all.

These two decisions, following separate legal paths, together serve as a major step toward the ultimate goal of prisoner rehabilitation. This note will present an analysis of the court's reasoning in each decision and the impact of those decisions on the rehabilitation process.

A. The Parole Decision

Parole, as Mr. Justice Douglas has noted, "while originally conceived as a judicial function, has become largely an administrative matter (with) parole boards (having) broad discretion in formulating and imposing parole conditions."[8] As the *Johnson* court found, the parole board

> is an extraordinarily powerful administrative body, possessing vast discretionary authority. It not only decides whether and when a prisoner will be released on parole; it also decides in most cases when he will become eligible for parole and, if parole is granted, the conditions of that parole.[9]

Parole decisions depend on the application of expertise by an administrative body in resolving underlying issues of fact.

> Parole boards face the problem of integrating intimate knowledge of the characteristics of a particular prisoner with general knowledge

4. K. Davis, Discretionary Justice: A Preliminary Inquiry 128, 131 (1969) (hereinafter cited as Davis).
5. 492 F.2d 1337 (7th Cir. 1974).
6. 500 F.2d 925 (2d Cir. 1974).
7. 5 U.S.C. § 555e (1970).
8. 408 U.S. at 496 (Douglas, J., dissenting in part).
9. 500 F.2d at 929.

> concerning broad categories of offenders: one of the most persistently perplexing difficulties of judicial and correctional decision making.[10]

And yet experiments with groups of parole decision-makers have shown little agreement as to which items in a case file are most useful to consider first when pressed to make a decision.[11]

Both the Federal Parole Board, in *King* and the New York State Board of Parole, in *Johnson*, were guided in making their crucial decisions by statutory standards that are extremely vague.

> Discretionary release on parole shall . . . be granted if the board of parole is of opinion that there is reasonable probability that if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society.[12]

The language is identical to that found in the federal statutes, 18 U.S.C. § 4203.[13]

Professor Kenneth Culp Davis recognizes the reality "that justice to individual parties is administered more outside courts than in them, and (that) we have to penetrate the unpleasant areas of discretionary determinations by police and prosecutors and other administrators, where huge concentrations of injustice invite drastic reforms."[14] Noting the relatively low quality of justice in the administration of parole, Davis states:

> In granting or denying parole, the parole board makes no attempt to structure its discretionary power through rules, policy statements or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents; the degree of openness of proceedings and records is about the least possible . . . administrative check of board decisions is almost non-existent. The Board makes no attempt to evolve principles through case to case adjudication. It does not select specific cases raising basic questions of policy for especially intensive consideration with a view to creating a useful precedent. Because no one ever knows the reasons for any decision of the Board, no prisoner is ever told why the Board has denied parole.[15]

Parole boards traditionally defend by claiming that the decision whether or not to grant parole is a very complicated one, pointing out that

---

10. GLASER-DANIEL, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM, 198-199 (1969).
11. *See*, WILKINS, INFORMATION OVERLOAD, 64 J. OF CRIM. L. & CRIMINOLOGY 190, (1973).
12. N.Y. CORR. LAW § 213 (McKinney's Supp. 1973).
13. 492 F.2d at 1338.
14. DAVIS, ADMINISTRATIVE LAW TREATISE, 91, 92 (3rd Ed. 1972).
15. DAVIS at 126, 128.

only that agency possesses the expertise and experience to evaluate correctly the different situation of each applicant.[16]

The result is bewildered and frustrated prisoners who, like Charles King, Jr. and Thomas Johnson, can only guess at the Board's reasoning. An unexplained denial of parole fails to aid the prisoner who seeks to improve his behavior, but rather appears arbitrary, further shaking his faith in the legal institutions of society.[17] Observers in the field of administrative law are aware that it is the freedom to decide without giving reasons which gives rise to the opportunity for abuse of discretionary power. Requiring a statement of reasons would make it possible to check abuse or error.[18]

B. Judicial Control of Abuses

It has been stated that the availability of judicial review is by far the most significant safeguard against administrative abuses which can be contrived.[19] It is the major mode of dealing with abuse of discretion. However, judicial review of decisions of the United States Parole Board has been extremely limited.

> The federal courts have consistently refused to interfere with the discretion of the Board to grant or deny parole, and they have usually accompanied this refusal with statements to the effect that such decisions are left to the absolute discretion of the Parole Board.[20]

Courts have traditionally justified noninterference by noting that parole is not a right but merely a matter of grace. The courts have avoided scrutiny of parole decision-making criteria from a constitutional perspective and refuse to overturn a denial of parole on the basis of the standard review formula of "whim, caprice or arbitrariness."[21]

Thus, it is against this background of a general absence of cases requiring that reasons be given where there is a denial of parole that the *King* and *Johnson* decisions are contrasted.

---

16. Bronstein, *Rules for Playing God*, 1 The Civ. Lib. Rev. 3, 118 (Summer, 1974) [hereinafter cited as Bronstein].

17. Comment, *Curbing Abuse in the Decision To Grant or Deny Parole*, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 419, 458 (1973).

18. Johnson, *Federal Parole Procedure*, 25 Ad. L. Rev. 459, 484 (Fall, 1973) [hereinafter cited as Johnson].

19. Gardner, The Administrative Process, Legal Institutions Today And Tomorrow 108, 138 (Paulsen ed. 1959).

20. *Supra* note 17, at 477. *See, e.g.*, Juelich v. U.S. Board of Parole, 437 F.2d 1147 (7th Cir. 1971); Thompkins v. Board of Parole, 427 F.2d 222 (5th Cir. 1970); U.S. v. Frederick, 405 F.2d 129 (3rd Cir. 1968); Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967).

21. *See* R. Dawson, Sentencing 387 (1969).

C. KING V. UNITED STATES

Charles Joseph King, Jr., a federal prisoner, brought an action against the United States, the Attorney General, the Director of the Bureau of Prisons and the Chairman of the United States Board of Parole for a declaratory judgment that he was entitled to be given reasons for the refusal of the Board of Parole to grant him parole. Upon the defendant's motion the action was transferred from the District of Columbia to the Southern District of Indiana where King was a prisoner in the U.S. Penitentiary at Terre Haute, Indiana.[22]

The plaintiff King alleged in his *pro se* complaint that he had begun serving his fifteen year sentence on November 7, 1969 and that after appearing before the U.S. Board of Parole he was "sent off for two years without cause or reasons."[23] King prayed that court "issue a show cause order to the U.S. Board of Parole to show why at this time "he cannot be released on parole and otherwise declare his rights."[24]

The district court dismissed the complaint upon the defendant's motion to dismiss for failure to state a claim upon which relief could be granted. It concluded that "this Court will not review the decision of the Parole Board, nor will it repass on the credibility of reports and information received by the Board in making its determination."[25] The district court relied upon the precedent that had been established in the 8th circuit decision of *Brest v. Ciccone* which concluded that "(t)he courts have no jurisdiction and no power to . . . review or control the discretion of the Board of Parole in the exercise of its duties under 18 U.S.C. § 4203."[26]

The Seventh Circuit heard the *King* appeal and granted leave to a University of Indiana Law School professor as *amicus curiae* to file a brief and present oral argument on behalf of the plaintiff, noting a "reasonably creditable but discursive brief"[27] filed by King. As did King, the *amicus* brief argued that "(1) the fifth Amendment forbids denial of parole without a stated reason and (2) the Administrative Procedure Act requires the Parole Board to state its reasons for denying parole."[28]

The court began its opinion with a discussion of the reviewability of the Parole Board's discretion and noted the divergent views taken by public bodies. The President's Commission on Law Enforcement and Administration of Justice's own Task Force on Corrections has recom-

22. 492 F.2d at 1338 (the court noted 28 U.S.C. § 1404(a)); Young v. United States Bureau of Prisons, 367 F.2d 331 (D.C. Cir. 1966).
23. 492 F.2d at 1338.
24. *Id.*
25. *Id.*
26. 371 F.2d 981 (8th Cir. 1967).
27. 492 F.2d at 1338.
28. *Id.*

mended that reasons for the board's decision be given so that meaningful judicial review could be undertaken. The Task Force Report: Corrections 86 (1967) noted that "even if courts assumed the power to review parole decisions on the merits, reversals on the ground of an abuse of discretion would be rare." In seeming contradiction to this earlier recommendation in 1971, the Proposed New Federal Criminal Code of the National Commission on Reform of Federal Criminal Laws would require that "discretionary action of the Board of Parole is an administrative decision not subject to judicial review on its merits."[29] Under the Proposed Code federal courts will lack jurisdiction to review or set aside the discretionary action of the Board of Parole except for the denial of constitutional rights or procedural rights conferred by statute, regulation or rule.[30]

The *King* court felt no need to reach the problems of abuse of discretion since King had argued only the constitutional or procedural denial of rights conferred statutorily. The court found that it did have jurisdiction "to consider at least the plaintiff's statutory claim that the Board had disobeyed a nondiscretionary command that it provide reasons for its determination after exercising its discretion."[31] The court cited *Christian v. New York State Department of Labor*[32] and 28 U.S.C. § 1361 as its authority. The *Christian* court had found that "the fact that the employing agency's decision is not statutorily subject to judicial review (did) not preclude review of the agency's procedure used to reach that determination."[33] 28 U.S.C. § 1361 provides for original jurisdiction in mandamus actions to compel an officer or employee of the U.S. or any agency thereof to perform a duty owed to the plaintiff.

The court next turned to a discussion and review of recent administrative developments. If first presented the recommendations adopted by the Administrative Conference of the United States. In 1972 the Conference adopted (and the *King* court noted) the following recommendation:

> A statement of reasons for the deferral or denial or parole should in all instances be given the prisoner. In some cases the Board can simply adopt as its own decision the examiners recommendations. The cases where this is not appropriate may well be so voluminous as to require the use of a check-list form, such as that with which the Board is now experimenting, but there should in each such case be

29. *Id.*

30. FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: PROPOSED NEW FEDERAL CRIMINAL CODE § 3406 AND COMMENT, at 303-304 (1971).

31. 492 F.2d at 1339.

32. 414 U.S. 614 (1974).

33. *Id.* at 622.

added at least a sentence or two of individualized explanation.[34]

The court also noted the Conference recommendations that reasoned decisions would promote administrative efficiency where there are recurrent fact situations and that such decisions should be open to public inspection.[35]

Interestingly, the Court listed the 27 unweighted factors the U. S. Parole Board utilizes to guide its decision whether to grant or deny parole, nevertheless pointing out the Conference belief that a "more specific formulation of the standards" is desirable. The court also indicated three pitfalls to be avoided in giving reasons, as outlined by Professor Johnson for the Conference: (1) avoid any further delay with regard to parole decision making (*e.g.*, do not keep the prisoner in suspense); (2) give written reasons that are a "fair and candid statement of why he is being paroled, and not merely to satisfy the courts;" and (3) give reasons that are "reasonably specific."[36] The court concluded its review of recent administrative developments by noting Professor Davis' dissatisfaction with the refusal to give reasons for denial and that several states "have instituted judicially or legislatively inspired requirements of reasons for the denial of parole." It cited the outstanding *Monks v. New Jersey State Board of Parole*[37] which stressed that the orderly process of judicial review requires that the grounds for administrative action be clearly disclosed. The *King* court stated that although the administrative trend is toward greater procedural safeguards (including the statement of reasons for denial), the plaintiff King can succeed only if such statement is constitutionally or statutorily mandated.

The court also undertook a discussion of the demise of the privilege distinction, noting that the "categorization of rights as opposed to privileges or acts of grace or clemency has ceased being a touchstone."[38] Dismissing the necessity "to draw a hard and fast line between affording the full panoply of procedural due process or giving none,"[39] the court turned to an analysis of what procedural due process does attach to parole release proceedings. The court noted the landmark case of *Morrisey v. Brewer*[40] that has established the benchmarks for parole revocation. *Morrisey* found,

34. 492 F.2d at 1340.
35. *Id.*
36. *Id.* at 1341.
37. 58 N.J. 238, 277 A.2d 193 (1971). The New Jersey constitution provides for judicial review of parole board arbitrariness.
38. 492 F.2d at 1342.
39. *Id.*
40. 408 U.S. 471 (1972). Parole revocation is distinguished from parole denial in that it can occur only after the initial parole has been granted.

> . . . that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant . . . does not apply . . . ; due process is flexible and calls for such procedural protections as the particular situation demands, which included a written statement of the reasons revoking parole.[41]

The *King* court, commenting that the circuit courts are "now entering the area of what, if any, due process is required in parole release hearings,"[42] reviewed circuit decisions. It also noted the *Johnson* decision, which at that time had not yet reached the Second Circuit Court of Appeals.[43]

The *King* court, relying on *Morrisey v. Brewer* in its belief "that modicum of due process should attend the denial . . . of parole," avoided deciding that constitutional challenge by finding that the administrative Procedure Act requires the Parole Board to state its reasons for denying parole.[44] The court noted that the A.P.A. applies to each "agency" which means "each authority of the Government of the United States" (5 U.S.C. § 5551(1) and that Congress created the U.S. Board of Parole within the Justice Department 18 U.S.C. § 4201).[45] Finding no specific language in the A.P.A. exempting the Parole Board from its application, the court cited several cases which have held that exemptions from the A.P.A. are not lightly presumed.[46]

The *King* court distinguished *Hyser v. Reed*[47] in which Chief Justice (then Judge) Burger wrote the *en banc* opinion holding that § 554 of the A.P.A. (5 USCA § 554 a) did not apply to parole revocation proceedings inasmuch as that section applies by its terms in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. The *Hyser* court had found that the Board does not adjudicate nor is required to hold hearings within the definition set out in the A.P.A.[48] The court noted that the *Hyser* court had not considered section 555(e) and that the application of that section to parole release hearings has not been squarely adjudicated.[49]

41. *Id.* at 480-482.

42. 492 F.2d at 1343.

43. United States *ex rel.* Johnson v. Chairman of the New York State Board of Parole, 363 F. Supp. 416 (E.D.N.Y. 1973).

44. 492 F.2d at 1338.

45. *Id.* at 1343.

46. *Id.*

47. 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

48. 492 F.2d at 1344.

49. *Id.* at 1344-1345.

> The few opinions dealing with the applicability of the A.P.A. . . . have either denied the application to parole release hearings of the judicial review sections (5 U.S.C. § 701-706), Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1949), *aff'd by equally divided court*, 340 U.S. 880 (1950), or have approved such application, Hurley v. Reed, 288 F.2d 844, 845-846 (D.C. Cir. 1961); Sobell v. Reed, 327 F. Supp. 1294, 1301-1302 (S.D.N.Y. 1971).

Thus, for the first time, in the *King* decision, a circuit court has held that section 555(e) of the Administrative Procedure Act does apply to parole release hearings and requires "a brief statement of the grounds for denial.[50] Section 555(e) provides as follows:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with an agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.[51]

Indicating that, as an administrative practice, a prisoner must make a written application in order to be considered for parole, the court went on to find a parole release hearing or interview an "agency proceeding" within the Congressional intent. It found that the term "agency proceeding" is broader than the "adjudication after hearing" considered in *Hyser*.

> Agency proceeding is defined to include rulemaking, licensing and adjudication. Adjudication is defined as "agency process for the formulation of an order." 5 U.S.C. §551(5), (1), (9), and (12). If, as we hold, the Board is an agency as defined in §555(1), we think the statutory definitions of "adjudication" and "order" lead inescapably to the conclusion that a parole release hearing is an agency proceeding.[52]

The court looked further into the Congressional intent:

> This subsection affords the parties in any agency proceeding, *whether or not formal or upon hearing*, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefore. The latter should in any case be sufficient to appraise the party of the basis of the denial.[53]

The court concluded its decision by reversing the district court's order of dismissal and remanded the case for the district court to determine whether or not King's application for parole was in writing. If so, the district court was ordered to take further proceedings consistent with the opinion.

D. U.S. EX REL JOHNSON V. CHAIRMAN, NEW YORK STATE BOARD OF PAROLE

The facts of this case are that Thomas Johnson, imprisoned in the Auburn (N.Y.) Correctional Facility under a 15 to 16 year sentence imposed upon him in 1966 as a second felony offender, appeared be-

50. 492 F.2d at 1345.
51. 5 U.S.C. § 555e (1970).
52. 492 F.2d at 1344.
53. *Id.* citing S. Doc. No. 248, 79th Cong., 2d Sess. 206, 265 (1946).

fore the New York State Board of Parole. On March 13, 1973, the Board denied him parole and continued his imprisonment for another year without giving him any statement of the reasons for their decision. Johnson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he did not seek actual release from custody but rather a statement of reasons for the denial of his parole. In construing Johnson's *pro se* petition liberally, the district court cited *Haines v. Kerner*[54] and treated it as an application for injunctive relief under 42 U.S.C. § 1983. The District Court found for the petitioner, holding "that as a minimum safeguard against arbitrary action, the due process clause of the 14th Amendment required the Parole Board to state the reasons for denying Johnson release on parole."[55]

In affirming the judgment of the district court, the Court of Appeals disagreed with the appellants' contention that its decision in *Menchino v. Osweld*[56] was controlling. Noting that the issue presented in *Menchino* was not the narrower one on appeal, the court stated that "(f)rom the outset the petitioner in *Menchino* made it clear that his principal interest was in obtaining the right to be represented by counsel and to cross-examine witnesses."[57] The critical issue on appeal in *Johnson* (a right to reasons for denial) had been presented in *Menchino* as a request for specification of the Parole Board's election and was "at all times subordinated to these primary demands."[58] The court concluded that in *Menchino* no consideration to partial relief was given (*e.g.*, less than the full panoply of procedural due process rights).

The court went on to note that in *Menchino* the petitioner had lacked a "sufficient interest" to entitle him to procedural due process in a parole release hearing, a view the Second Circuit now feels has been superseded by the Supreme Court's Circuit's rejection of similar reasoning in its more decent decision in *Morrisey v. Brewer*.[59] *Morrisey* held that in a parole revocation proceeding the Board must, as a matter of minimum due process, provide the parolee with a hearing. The *Johnson* court concluded that the *Morrisey* decision had "rejected the concept that due process might be denied in parole proceedings on the ground that parole was a "privilege rather than a right."[60] The court went on to note:

> A prisoner's interest in prospective parole or "conditional entitlement," must be treated in like fashion. To hold otherwise would be

54. 404 U.S. 519 (1972).
55. 500 F.2d at 926.
56. 430 F.2d 402 (2d Cir. 1970), *cert. denied* 400 U.S. 1023 (1971).
57. 500 F.2d at 927.
58. *Id.*
59. 408 U.S. 471 (1972).
60. *Id.*

> to create a distinction too gossamer thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration.[61]

It is through this reasoning that the court was able to conclude that entitling a prisoner to "one due process weapon (*e.g.*, a statement of reasons) would not necessarily entitle him to a full panoply."[62] The court then went on to consider whether a statement of reasons for denial of parole is within the process that is due an inmate.

The court, citing *Goldberg v. Kelly*,[63] looked to see whether the recipient's interest in avoiding his loss outweighed the governmental interest. It found the prisoner petitioning for parole to have an enormous interest, in that,

> . . . a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations.[64]

The court found it imperative that judicial review be available where:

> (1) the Board has arrogated to itself decisions made only by the legislature, (2) when the Board's decision . . . is inconsistent with statutory directives, (3) when improper criteria are used, or (4) when its decision has no basis in the prisoner's file.[65]

The court concluded that the broad statutory powers given the Board did not relieve it from the duty of observing meaningful criteria for determining in each case when a prisoner's release is not incompatible with the Welfare of society. While expressing a desire not to interfere with the Board's ability to exercise discretion, the *Johnson* court nevertheless noted that it was their judicial duty to determine whether the criteria used by the Board in denying parole are consistent with the legislative purpose as expressed by statute.[66]

As did the *King* court, this court went on to detail the inefficient and inconsistent process by which parole decisions are made and noted the "needless hatred, cynicism, . . . disrespect for governmental institutions . . . , feelings of hopelessness and despondency" which are generated by the Board's failure to give reasons. Recognizing that a reasons requirement would impose additional administrative burdens, the court pointed out that 34 states already give either oral or written rea-

61. 500 F.2d at 928.
62. *Id.*
63. 397 U.S. 254 (1970).
64. 500 F.2d at 929.
65. *Id.* at 930.
66. *Id.*

sons and concluded that effective judicial administration of criminal justice demands an awareness of the decision making process.[67]

The court was careful to outline precisely what it considered "a statement of reasons" encompassed in order to satisfy minimum due process requirements. Stating that detailed findings of fact are not required, the court felt that such a statement "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."[68]

Basing its decisions upon consideration of all relevant factors, parole boards should, in the words of the court,

> furnish to the inmate both the grounds for the decision (*e.g.*, that in its view the prisoner would, if released, probably engage in criminal activity) and the essential facts upon which the Board inferences are based (*e.g.*, the prisoner's long record, prior experiences on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing, and his drug addiction).[69]

In concluding that due process does require the New York State Parole Board to furnish state prisoners a written statement of reasons when release on parole is denied, the *Johnson* court noted the King decision and that courts' recognition of the *Morrisey* precedent that "some modicum of due process should attend the denial of expectation of conditional freedom."[70]

E. Implications Beyond the King and Johnson Decisions

In the past courts have concluded that the A.P.A. does not apply to the Parole Board, assuming either that the A.P.A. was inapplicable in its entirety (or not at all) or holding the A.P.A. not applicable to those sections actually put in controversy. As a consequence of the *King* decision, the Parole Board now is clearly "an agency" as defined by the Act. It will be left to the court to decide exactly what is contemplated by the statutory language, "a brief statement of the grounds for denial." It is hoped that parole boards will keep the goal of rehabilitation in mind and attempt to provide the applicant with adequate information that he can understand.

As Professor Davis has indicated, the mere knowledge of the opportunity for judicial scrutiny can provide "new incentives for better administrative behavior"[71] among parole officials. The scope of the

67. *Id.* at 933.
68. *Id.* at 934.
69. *Id.*
70. 308 U.S. 471 (1972).
71. Davis at 133.

A.P.A. is broad and every agency possesses all authority necessary to comply with its requirements.

Both Professors Johnson and Davis argue that Section 555(b) relating to the "right to counsel" should also apply to parole hearings and the *King* decisions might be relied upon by future courts for such a holding. Section 555(b) permits a person "compelled to appear in person before an agency" to be accompanied, represented and advised by counsel" and permits "a party to appear by or with counsel in an agency proceeding." Arguing that a prisoner wishing parole is obviously under a degree of compulsion to appear, they note a Department of Justice regulation (2 CFR § 2.15) utilizing such language as "*shall* appear in person (emphasis added)."[72]

The ultimate effect of the *King* decision is yet to be felt but it is certain it will change the administration of parole at the federal level and the state level in those states having acts modeled after the federal A.P.A.[73] The final result may be the creation of a legal presumption in favor of a parole, unless the parole board can give specific reasons for denial.[74]

The *Johnson* decision extends to the prospective parolee limited due process protection. In the decision it is clear that there is considerable judicial reluctance to extend to such prisoners "the full trappings of adversary trial type hearings."[75] However, as did the *Morrisey* court, future decisions may conclude that summary process in the pre-parole hearing" does not serve any reasonable function in controlling the prison population" and "a simple factual hearing will not interfere with the exercise of discretion."[76]

Judge Feinberg, dissenting in *Menchino*, was careful to point out that permitting counsel to appear at the parole release hearing does not necessarily mean that all aspects of criminal proceeding must come with him.[77] Future courts may agree in light of the *Johnson* decision.

Although *Morrisey* found that the right to confront and question witnesses is appropriate where the government's decision rests on fact-

72. *See* DAVIS at 376; Johnson at 481.

73. GELLHORN AND BYSE, ADMINISTRATIVE LAW: CASE AND COMMENTS 1123 (6th ed. 1974).

The Revised Model State Administrative Procedure Act . . . provides in Section 12 that each decision must contain separately stated "findings of fact and conclusions of law" and that the findings of fact "shall be accomplished by a concise and explicit statement of the underlying facts supporting the findings."

74. *See* CALIFORNIA ASSEMBLY SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, PAROLE BOARD REFORM IN CALIFORNIA: ORDER CHAOS 15 (1970).

75. 500 F.2d at 485. Beckworth v. New Jersey State Board of Parole, 62 N.J. 348, 301 A.2d at 727 (1973), *cf.* Medical Committee for Human Rights v. S.E.C., 432 F.2d 659, 668 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

76. Bronstein at 446.

77. 430 F.2d at 416.

finding and the consequences of its action seriously injure the individual,[78] the tone of the *Johnson* decision, following its reasoning in *Menchino*[79] and *U.S. ex rel Bey v. Connecticut*[80] would not seem to indicate the court's intention to go that far. The Second Circuit appears to cling to the view that the "parole board has an identity of interest with the inmate, at least to the extent of granting release where it will aid in the prisoner's rehabilitation and adjustment to society without presenting an undue risk of further anti-social activity."[81]

F. Conclusions

Society, supporting a criminal justice system geared to releasing the majority of prisoners eventually, has a vital interest in insuring that the system of parole is open and fair. The *King* and *Johnson* requirements that a prisoner be told why he is being denied parole will not only prevent arbitrary administrative denials of liberty, but will also aid in a more rational determination of an appropriate time for release.

Stated reasons for denial of parole should be prompt and with specificity. It would indeed be cruel and inhuman to do otherwise; specific reasons for denial would be something tangible and real for the prisoner to cope with in seeking to rehabilitate himself.

Parole boards should develop and maintain a system of open precedents. As Professor Davis has stated, "the main difference between what we call case law and what we call discretion lies in the presence or absence of an expectation that the tribunal will strive for consistency."

> (T)he ideal of equal justice under law . . . requires the conclusion that what is justice in any particular case may not be determined by considering only the one case but must be determined in the light of what is done in comparable cases. . .
>
> The discretionary power to be lenient has a deceptive quality that is dangerous to justice. The discretionary power to be lenient is an impossibility without the concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate.[82]

Past decisions could be utilized as a vehicle for dealing with recurring situations. When a decision to grant (or deny) reflects agreement on a question of policy on an issue of recurring importance, it should be-

78. 408 U.S. at 482-84.
79. 430 F.2d 402 (2d Cir. 1970), *cert. denied* 400 U.S. 1023 (1971).
80. 443 F.2d 1079, 1086 (2d Cir. 1971), *vacated as moot*, 404 U.S. 879 (1971).
81. 500 F.2d at 927.
82. Davis at 167-170.

come an open board policy so that prisoners and those assisting them could be aware and benefit.

"Every prisoner's liberty is of course circumscribed by the very fact of his confinement but his interest in limited liberty left to him is then only more substantial."[83] The Second and Seventh Circuits have now provided the prisoner with a long over-due protection. Prisoners might at last have an opportunity to understand the nature of their misdeeds and be truely able to rehabilitate themselves.

DOROTHY C. BERNHOLZ

Menard v. Saxbe: Real or Imagined Remedy?

The recent decision in *Menard v. Saxbe*[1] upheld the right of Dale Menard to have the record of his 1965 arrest in California removed from the criminal identification files of the Federal Bureau of Investigation. Since his arrest, Menard had sought relief from what was termed the unjustified burden that the record posed to him and to his future. Even though he had been able to show that his arrest was deemed a detention only, that no crime had been committed, nor charges brought against him, Menard had been unable to have his record cancelled through administrative means. Neither the F.B.I., when apprised of the change in status, *i.e.* a dentention rather than an arrest, nor the local California authorities would act to grant Menard the relief sought, without court order.

The arrest itself was lawful. The circumstances as related by the court show Menard to have been 19, a student, visiting in Los Angeles in August of 1965. Late at night in a local park, police acting on a report of a prowler in the area, picked up Menard under seemingly suspicious circumstances, *i.e.*, on a park bench near the area of the prowler warning. He was held two days without charges filed. Subsequently, after explanations and when the officials were satisfied that there was no connection with Menard and any report of crime, he was released. Menard was routinely fingerprinted and under California procedure, his fingerprints and a record of his arrest and release were

83. Wolff v. McDonnell, — U.S. —, 94 S. Ct. 2963 (1974) (Douglas, J., dissenting).

1. 498 F.2d 1017 (D.C. Cir. 1974), *rev'g sub nom.*, Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971).