STATEMENT OF REASONS FOR DENIAL OF PAROLE

*United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974)**

In March 1973, the New York State Board of Parole refused petitioner's application for parole[1] and did not provide him with a statement of the reasons for the decision.[2] Petitioner filed a *pro se* petition seeking an order compelling the board to furnish him a statement of reasons,[3] and the district court found that, as a matter of due process, he was entitled to such a statement.[4] The Second Circuit Court of Appeals affirmed and *held*: The due process clause of the fourteenth amendment

* *After this issue went to press, the United States Supreme Court vacated the judgment in* Johnson *and remanded the case to the district court with instructions to dismiss the cause as moot.* Regan v. Johnson, 95 S. Ct. 488 (1974) (mem.).

1. Petitioner was imprisoned in 1966 in Auburn Correctional Facility, Auburn, New York, under a 15- to 16-year sentence as a second-felony offender. He was notified of the parole denial on March 13, 1973. The effect of such a denial is generally that the inmate must wait a year before receiving another interview with the parole board. Petitioner was eventually released on parole on May 6, 1974, but the circuit court opinion was not delivered until June 13, 1974. Neither the attorneys nor the court learned of his release prior to the decision. *See* United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 926 (2d Cir. 1974).

2. In New York it is standard procedure not to give a prisoner a statement of the reasons for denial of parole. After the parole board panel has left the institution, denials are communicated to inmates on a form which gives neither reasons nor suggestions. CITIZENS INQUIRY ON PAROLE AND CRIMINAL JUSTICE, REPORT ON NEW YORK PAROLE 78-90 (1973). For discussion of parole board practices in other jurisdictions see Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U.L.Q. 243; O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651 (1973) [hereinafter cited as O'Leary & Nuffield]; Comment, *The Parole System*, 120 U. PA. L. REV. 282 (1971).

3. The prior litigation in this case is set out in the circuit court opinion, United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 926 (2d Cir. 1974). It is worthwhile to note that the court treated petitioner's suit as one for injunctive relief in the nature of a writ of mandamus, properly brought under 42 U.S.C. § 1983 (1970), rather than for actual release from custody, the relief offered by a writ of habeas corpus under 28 U.S.C. § 2254 (1970). For a discussion of the difference, see Priesser v. Rodriguez, 411 U.S. 475 (1973); Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam). *See also* 40 BROOKLYN L. REV. 1116 (1974); 42 FORDHAM L. REV. 878, 880-81 n.31 (1974). Actions brought under § 1983 are not subject to the requirement that state remedies be exhausted. Damico v. California, 389 U.S. 416 (1967) (per curiam); McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1962); Monroe v. Pape, 365 U.S. 167, 180-83 (1960); *see* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoner's Rights Litigation*, 23 STAN. L. REV. 473, 503-07 (1971).

4. United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 363 F. Supp. 416 (E.D.N.Y. 1973).

requires that a state parole board furnish prisoners a statement of the reasons for denial of parole.[5]

In recent years, there has been a noticeable trend toward extending the principles of procedural due process to many areas previously thought beyond the pale of constitutional protection.[6] While the sixth amendment has traditionally provided safeguards in criminal prosecutions,[7] recent cases in the postconviction area have been decided under the due process clause. Determinations involving sentencing,[8] probation revocation,[9] prison discipline,[10] and parole revocation[11] are now viewed as

5. United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 934 (2d Cir. 1974).

6. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (revocation of welfare benefits); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (admission to the bar); Greene v. McElroy, 360 U.S. 474 (1959) (revocation of security clearance of civilian engineer); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (expulsion of student from tax-supported college). *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

7. The sixth amendment was applied to the states through the fourteenth amendment in Miranda v. Arizona, 384 U.S. 436 (1966), Escobedo v. Illinois, 378 U.S. 478 (1964), and Gideon v. Wainwright, 372 U.S. 335 (1963). The fourteenth amendment due process clause has provided the basis for requiring procedural safeguards in proceedings analogous to criminal prosecutions. *See In re* Gault, 387 U.S. 1 (1967) (juvenile court trials); Specht v. Patterson, 386 U.S. 605 (1967) (Colorado sex offender proceedings). For an explanation of the distinction between sixth amendment procedural claims and fourteenth amendment due process claims, see 49 TEXAS L. REV. 798, 799-800 (1971).

8. Townsend v. Burke, 334 U.S. 736 (1948). *See generally* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

9. Mempa v. Rhay, 389 U.S. 128 (1967). It is unclear how much weight the *Mempa* Court placed on the fact that, in the state of Washington, sentencing took place at the same hearing in which probation was revoked. The Court stated: "[A] lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." *Id.* at 137. Subsequent cases have relied on the sixth amendment, *see* Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Ashworth v. United States, 391 F.2d 245 (6th Cir. 1968) (per curiam), and on the fourteenth amendment, *see* Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970), *cert. denied*, 402 U.S. 933 (1971). *See* Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 CALIF. L. REV. 1518, 1530-31 n.65 (1972) [hereinafter cited as Parsons-Lewis]; 49 TEXAS L. REV. 798, 799-800 (1971).

10. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 196-98 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (transfer into segregated confinement); Carothers v. LaFollette, 314 F. Supp. 1014, 1026-27 (S.D.N.Y. 1970) (revocation of prisoner's accumulated good time). Because of the variety of prison disciplinary techniques, due process protection has been extended on a case-by-case basis. *See generally* Parsons-Lewis 1520 n.13 (cases cited); Turner, *supra* note 3; Note, *supra* note 8, at 864-77.

11. Morrissey v. Brewer, 408 U.S. 471 (1972). Prior to the Supreme Court's deci-

involving substantial interests[12] deserving procedural protection.[13] Tak-

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sion in *Morrissey*, the circuit courts faced with this issue had generally refused to find the due process clause applicable. *See* Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971); Allen v. Perini, 424 F.2d 134 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969); Eason v. Dickson, 390 F.2d 585 (9th Cir.), *cert. denied*, 392 U.S. 914 (1968); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Richardson v. Markley, 339 F.2d 967 (7th Cir.), *cert. denied*, 382 U.S. 851 (1965); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). *But see* Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971); United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971); Menechino v. Oswald, 430 F.2d 403, 409 (2d Cir. 1970) (dictum), *cert. denied*, 400 U.S. 1023 (1971); Hahn v. Burke, 430 F.2d 100, 105 n.5 (7th Cir. 1970) (dictum). Various courts have characterized parole as a "privilege" rather than a "right," Hyser v. Reed, *supra* at 237, as a mere transfer of custody, Rose v. Haskins, *supra* at 95; Menechino v. Oswald, *supra* at 406, or as a bargained-for benefit in a contractual sense, Rose v. Haskins, *supra* at 93. The *Morrissey* opinion rejected these characterizations but created a new difficulty in cases dealing with parole release. *See* notes 52-53 *infra* and accompanying text.

12. The due process clause applies to government action which deprives persons, *see* notes 52-53 *infra* and accompanying text, of interests within the meaning of the "liberty or property" language of the fourteenth amendment. Fuentes v. Shevin, 407 U.S. 67 (1972) (seizure of goods before hearing). It is necessary to resolve the threshold issue, whether "due process" is required *at all*, before determining *which* particular procedural safeguards must be provided. This threshold issue turns on the nature of the interest involved, *see id.* at 84-85; Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1966) [hereinafter cited as Kadish], and, in some courts, on the "weight" or "gravity" of the interest, *see* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss' "). The latter criterion, however, more properly relates to the determination of what procedures constitute due process. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) ("The extent to which procedural due process must be afforded . . . is influenced by the extent to which he may be 'condemned to suffer grievous loss' "); Parsons-Lewis 1546 n.150; note 13 *infra*.

13. "Once it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). What procedures are required depends on a "complexity of factors," including "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding . . . ." Hannah v. Larche, 363 U.S. 420, 442 (1960); *see* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961). A particular procedure is required by due process if "the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

For a discussion of "procedural requirements" see Parsons-Lewis 1549. "There are a staggering number and variety of arguably applicable incidents of due process. They fall within the four general categories of notice, hearing, counsel, and decision." *Id.* (footnotes omitted). *See* Clutchette v. Procunier, 328 F. Supp. 767, 781-84 (N.D. Cal. 1971); Tobriner, *Procedural Due Process in the Post-Conviction Period*, in 4A CALIFORNIA FORMS OF PLEADING AND PRACTICE 1, 7-9 (1971); Note, *Decency and Fairness: An*

ing a similar view, the court in *United States ex rel. Johnson v. Chairman of New York State Board of Parole* extended the principles of procedural due process to parole release proceedings.

The parole board[14] and dissent[15] in *Johnson* argued that a previous Second Circuit decision, *Menechino v. Oswald*,[16] was controlling authority and mandated dismissal. The majority disagreed.[17] While petitioner,[18] like Menechino,[19] sought a statement of reasons, the court stated that Menechino viewed the statement only as a part of the "full panoply" of "formal trial-type due process rights"[20] which he sought as a "pack-

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Emerging Judicial Role in Prison Reform, 57 VA. L. REV. 841, 871-77 (1971). Procedural requirements may stem from a statute or administrative rules as well as the Constitution. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1970). *See also* King v. United States, 492 F.2d 1337 (7th Cir. 1974) (5 U.S.C. § 555(e) (1970) requires Federal Parole Board to provide statement of reasons).

14. Brief for Appellant at 2, United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974). *See also* Petitioner's Brief for Certiorari at 9, New York State Bd. of Parole v. Johnson, — U.S. — (1974).

15. 500 F.2d at 935.

16. 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). Menechino was a New York state prisoner who argued that the parole board's decision denying him parole was "'a denial of liberty, without . . . the minimum requirements of procedural due process.'" *Id.* at 404. The district court dismissed the complaint, 311 F. Supp. 319 (S.D.N.Y. 1970), and the Second Circuit affirmed.

One court has construed *Menechino* as having denied the right to a statement of reasons in parole release proceedings. Lewis v. Rockefeller, 431 F.2d 368 (2d Cir. 1970). Other courts and authorities have construed *Menechino* as having denied the right to any due process in parole release proceedings. *See, e.g.*, Bridwell v. Ciccone, 490 F.2d 310 (8th Cir. 1973); Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282-83 (5th Cir. 1973); Candarini v. Attorney General of the United States, 369 F. Supp. 1132, 1135 (E.D.N.Y. 1974); Bradford v. Weinstein, 357 F. Supp. 1127 (E.D.N.C. 1973); Klotz v. Ohio Adult Parole Authority, 330 F. Supp. 665, 667 (N.D. Ohio 1971); Parsons-Lewis 1520. A third group of courts have construed *Menechino* as denying only the right to counsel at parole release hearings. *See, e.g.*, Walker v. Oswald, 449 F.2d 481, 484 (2d Cir. 1971); Barnes v. United States, 445 F.2d 260, 261 (8th Cir. 1971); Heezen v. Daggett, 442 F.2d 1002, 1004 (8th Cir. 1971); Sanchez v. Schmidt, 352 F. Supp. 628, 632 (W.D. Wis. 1973). Probably the best discussion of *Menechino* is found in 49 TEXAS L. REV. 798 (1971) (paraphrased extensively by Judge Mansfield in his opinion in *Johnson*). *See also* 1971 WASH. U.L.Q. 502.

17. 500 F.2d at 926.

18. Brief for Appellee at 1, United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974).

19. *See* note 22 *infra*.

20. 500 F.2d at 926-27. In *Menechino*, appellant sought

> "(i) notice of charges, including a substantial summary of the evidence and reports before the Board, (ii) a fair hearing, including the right of counsel, to cross-examination and confrontation and to present favorable evidence and

age."[21] Thus, Menechino's request for a statement of reasons was subordinated to his interest in obtaining the right to counsel.[22] The *Johnson* majority construed *Menechino* as holding that the "package" of procedural rights was inappropriate for a nonadversary parole release hearing.[23] Noting the disclosure purpose of a statement of reasons, the court found the *Menechino* denial of a statement of reasons distinguishable.[24]

The court then reasoned that a prisoner's interest in prospective parole was within the meaning of "liberty" as used in the due process clause.[25] The majority concluded[26] that the intervening Supreme Court decision in *Morrissey v. Brewer*,[27] holding that due process required a hearing upon revocation of parole,[28] had superseded the *Menechino* reasoning

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compel the attendance of favorable witnesses, and (iii) a specification of the grounds and underlying facts upon which the determination is based . . . ." 430 F.2d at 405.

21. 500 F.2d at 926-27; *see* 49 TEXAS L. REV. 798 (1971). The interrelation of the procedures sought suggests that Menechino viewed them "as a package." *See* note 22 *infra*.

22. Both the majority and dissenting opinions in *Menechino* focused on the right to counsel. 430 F.2d at 412, 419. It appears that on oral argument, Menechino either subordinated his other claims to the right to counsel, or the other claims were "withdrawn or waived." *Id.* at 419 (Feinberg, J., dissenting). *See generally* 49 TEXAS L. REV. 798 (1971).

While Menechino sought only the right to have retained counsel present, the court noted that unfairness would result if counsel were not provided to indigent prisoners. 430 F.2d at 410; *cf.* 49 TEXAS L. REV. 798, 799 (1971) (footnotes omitted):

> [C]ourts frequently assert that whenever the right to counsel attaches, the duty to provide counsel for the indigent inexorably follows under equal protection doctrines. . . . [C]ourts have predictably labored to avoid mandating counsel at postconviction stages.

23. 500 F.2d at 926-27. The *Menechino* court stated that "the Board of Parole is not [the inmate's] adversary. On the contrary the Board has an identity of interest with him . . . ." 430 F.2d at 407. *See* Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); Palmero v. Rockefeller, 323 F. Supp. 478, 484 (S.D.N.Y. 1971). *See also* note 41 *infra*. While, as the *Johnson* dissent argued, *see* 500 F.2d at 935, partial relief could have been granted in *Menechino*, *see* FED. R. CIV. P. 54(c), there is no indication that it was considered by the *Menechino* court. *See* 49 TEXAS L. REV. 798 (1971).

24. 500 F.2d at 926.

25. *Id.* at 927-28; *see* notes 12 & 13 *supra*.

26. 500 F.2d at 927.

27. 408 U.S. 471 (1972). *Morrissey* dealt with a parolee whose parole had been revoked without a hearing. The Court reasoned that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . . . [T]he liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482. *But see* notes 52-58 *infra* and accompanying text.

28. Specifically, the *Morrissey* Court found that procedural due process required both a preliminary and a final hearing. The minimal requirements at the final hearing

that an inmate lacked "a private interest . . . of the type qualifying for due process protection."[29] The court saw no qualitative difference between an inmate's interest in prospective parole and a parolee's interest in the present enjoyment of "conditional liberty."[30] Since "the stakes are the same[,] conditional freedom versus incarceration," to distinguish the proceedings would "create a distinction too gossamer-thin to stand close analysis."[31]

The *Johnson* dissent viewed *Morrissey* as having extended the due process requirements only to interests presently enjoyed.[32] If *Morrissey* was so limited, it did not supersede *Menechino* but rather strengthened its mandate for dismissal.[33] Significantly, neither the *Morrissey* Court

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include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (e) a "neutral and detached" hearing body . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489.

29. Menechino v. Oswald, 430 F.2d 403, 408 (2d Cir. 1970). *Compare* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate . . . is valuable, and must be seen as within the protection of the Fourteenth Amendment"), *with* Menechino v. Oswald, *supra* at 408 ("Another essential element missing is the existence of a private interest enjoyed by appellant, or to which he is entitled, of the type qualifying for due process protection").

30. 500 F.2d at 928.

31. *Id.* The majority reasoned that such a distinction would be "a reincarnation of the right-privilege dichotomy in a not-too-deceptive disguise." *Id.* at 927-28 n.2. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972): "It is hardly useful any longer to try to deal with this problem in terms of . . . a 'right' or a 'privilege.'" The right-privilege distinction has been attacked by commentators and all but discarded by the courts. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

32. 500 F.2d at 936 (Hays, J., dissenting): "To insure that the holding of the case would not be extended to those still incarcerated the Court [in *Morrissey v. Brewer*] quoted . . . from the decision . . . in United States ex rel. Bey v. Connecticut State Board of Parole, 443 F.2d 1079, 1086 (2d Cir.), vacated as moot, 404 U.S. 879 . . . (1971) . . . ."

33. 500 F.2d at 936. *Compare* Menechino v. Oswald, 430 F.2d 403, 408 (2d Cir. 1970) ("The type of interest protected by procedural due process . . . is usually one presently enjoyed"), *with* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("[A parolee's] condition is very different from that of confinement in a prison"). *See also* United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971), *quoted with approval in* Morrissey v. Brewer, *supra* at 482 n.8.

nor the *Johnson* dissent relied on the word "deprive," as used in the due process clause,[34] as the basis for the "presently enjoyed" distinction. Even without explicit reference, it can be concluded that the *Johnson* dissent would require deprivation as a prerequisite to due process protection. The *Johnson* majority, however, found government action affecting "liberty" sufficient.[35]

Having concluded that "some degree of due process attaches to parole release proceedings," the court found a statement of reasons "within the process that is due an inmate . . . ."[36] The court balanced[37] the inmate's "enormous"[38] interest against the "apparently unfettered discretion"[39] exercised by the parole board. A statement of reasons would impose an administrative burden, but the court showed little concern over increasing the amount of time taken by the parole board to reach a decision.[40] A statement of reasons would facilitate judicial review[41] of decisions that were arbitrary or based on impermissible criteria, while not

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34. U.S. CONST. amend. XIV, § 1; *see* notes 52-53 *infra.*

35. 500 F.2d at 928.

36. *Id.*

37. *Id.* at 928-29. In using the "weighing" test, the court cited the cases and phrases listed in note 13 *supra.*

38. *Id.* at 929: "For [the inmate] the Board's decision represents the difference between incarceration and conditional liberty."

39. *Id.*:

> [T]he 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.

See N.Y. CORREC. LAW § 213 (McKinney Supp. 1973):

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only 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.

These extremely vague standards are representative of statutes in other states. *See* Dawson, *supra* note 2; O'Leary & Nuffield 658.

40. *See* 500 F.2d at 931-33. The average time spent by the parole board in making decisions is less than six minutes. *Id.* at 931. On appeal, the state made no attempt to show that the giving of a statement of reasons would impose any significant burden on the parole board. The court noted, *id.* at 933-34, that a great number of state parole authorities provided reasons. *See* O'Leary & Nuffield 658.

41. The primary function of a statement of reasons is to disclose sufficient information about the decision to permit judicial review. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). In the absence of a statement of reasons for the decision, judicial review is virtually impossible. *See* Tyler v. State Dep't of Pub. Welfare, 19 Wis. 2d 166, 174, 199 N.W.2d 460, 466 (1963); Parsons-Lewis 1553-54; Comment, *The Parole System*, 120 U. PA. L. REV. 282, 368 (1971).

disturbing the parole board's discretion to make subjective judgments or establish permissible criteria.[42] The court felt that by enforcing the proper limits of parole board discretion, aiding the decision-making process,[43] and providing a basis for critical appraisal of parole release criteria,[44] a statement of reasons would offer some minimal protection to an inmate's interest in prospective parole.

To the *Johnson* court, a statement of reasons had to be extensive enough to be meaningful, while not being so extensive as to create an intolerable burden on the parole board. To satisfy the requirements of minimal due process, the 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."[45] The statement need not include "detailed findings of fact";[46] only the grounds for the decision[47]

42. 500 F.2d at 930: "We recognize that parole decision-making should involve difficult and sensitive diagnosis and prognosis . . . based on application and weighing of numerous factors of varying relevance." Though willing to respect the proper exercise of administrative discretion, the court felt that review should be available if the parole board followed a policy of denying parole "in so-called 'sensitive' cases where, despite the Board's finding that the prisoner was sufficiently rehabilitated . . . release would stir up unfavorable publicity," or where "because of the type of offense . . . the prisoner has not yet served an 'appropriate period' . . . ." *Id.* at 931. *See* Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 517-19 (1973). It is probable that such abuses are frequent. *See* D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 111-12 (1959); REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 97 (1972). Curbing abuses such as these would still leave the parole board free to exercise its discretion within its proper scope.

43. 500 F.2d at 931-33. For a discussion of the manner in which a statement of reasons "promotes thoughts by the decider," and compels him to "eschew irrelevancies" and "cover the relevant points," see M. FRANKEL, CRIMINAL SENTENCES 40-41 (1973). The effect of this requirement may simply be to force the parole board to come to grips with standards it may now unconsciously be employing. 500 F.2d at 930 n.4.

44. The results of such an appraisal would aid both reformers and "judges who exercise their power to set minimum sentences . . . ." 500 F.2d at 933. *See* Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 419, 440-41 (1973).

45. 500 F.2d at 934.

46. *Id.* By not requiring such detailed findings of fact, the court avoided altering the parole board's current practice of relying on materials supplied to it by prison authorities. *See* CITIZENS INQUIRY ON PAROLE AND CRIMINAL JUSTICE, REPORT ON NEW YORK PAROLE (1973). This significantly reduced the "burden" element to be weighed in evaluating whether due process requires a particular procedural safeguard. *See* note 13 *supra*.

47. 500 F.2d at 934. As an example, the court gave the following: "[T]hat in its view the prisoner would, if released, probably engage in criminal activity . . . ." *Id.*

and "the essential facts upon which the Board's inferences are based"[48] are required.

The *Johnson* opinion is commendable for the clarity of its analysis. The majority opinion adequately distinguished *Menechino*.[49] It recognized the crucial importance of parole to an inmate, and properly emphasized the inmate's "stake" by declaring his interest to be within the meaning of "liberty" as used in the due process clause. The court discussed only a statement of reasons, avoiding suggestive dicta about other protective procedures.[50] In finding that minimum due process requires a statement of reasons, the court recognized the subjective, nonadversarial qualities of parole board decision making. A statement of reasons could be required because it was a procedure particularly appropriate for determinations of this type. Finally, the court took care to define the required statement in terms of the judicial review of parole board discretion that it is intended to permit.

The weakness of the *Johnson* opinion lies in its superficial discussion of the "presently enjoyed" distinction. As Judge Mansfield wrote in *Menechino*, "[t]he type of interest protected by procedural due process . . . is usually one presently enjoyed . . . ."[51] The fourteenth amendment speaks of deprivation, not denial,[52] and the weight of auth-

48. *Id.* For example, "the prisoner's long record, prior experience on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing, and his drug addiction . . . ." *Id.*

49. Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970).

50. Having determined that "some degree of due process attaches to parole release proceedings," the court immediately proceeded to discuss the narrow issue of whether a statement of reasons is within the process due an inmate. *See* 500 F.2d at 928. The only discussion of other procedural rights was the court's explicit statement that *Menechino* had not been overruled, an indication that those procedures appropriate only in an adversarial determination (*e.g.*, counsel, specificiation of charges, cross-examination) will not be held to be constitutionally required in parole release hearings.

Future litigation, at least in the Second Circuit, will probably focus on other procedures which facilitate judicial review, such as prompt notice of decision, more detailed statement of reasons, access to files, and definition of "arbitrary" exercise of discretion and "impermissible" criteria. This is evident from the substantial litigation concerning procedural rights which followed the decision in Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971) (statement of reasons required). *See, e.g.*, Beckworth v. New Jersey State Parole Bd., 62 N.J. 348, 301 A.2d 727 (1973) (consolidation of several hundred appeals).

51. 430 F.2d at 408.

52. U.S. CONST. amend. XIV, § 1 (emphasis added): "[N]or shall any State *deprive* any person of life, liberty, or property, without due process of law . . . ."

ority has interpreted this to mean the loss of an interest.[53] *Morrissey v. Brewer* dealt with the rights of one already paroled, and held that government action which would deprive him of the "enduring attachments of normal life" must comply with minimum due process.[54]

Application of the "presently enjoyed" reasoning, however, limits what some authorities believe is the broad purpose of the due process clause: to protect individuals against arbitrary or impermissible government action that detrimentally affects them. A parole board's denial of release on parole is detrimental to an inmate, and sufficiently so that some guarantee of fairness should be required in the procedures. A prisoner's continued incarceration withholds his liberty and the opportunity to develop the "attachments" spoken of in *Morrissey*.[55] Presently enjoyed freedom may be a more substantial interest than freedom merely anticipated, but the latter is no less deserving of appropriate protection from arbitrary or impermissible government action. Variations in the nature of government determinations are sufficient reason to require different procedural safeguards, but not to deny them altogether. To the extent that the *Johnson* decision curtails arbitrary or impermissible de-

53. "The Constitution contains no definition of the word 'deprive,' as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection." Munn v. Illinois, 94 U.S. 113, 123 (1877). "Deprive" has been construed to include temporary loss, McDonald v. McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974); Lee v. Thornton, 370 F. Supp. 312 (D. Vt. 1974), but not denial in its strict sense. In Menechino v. Oswald, 430 F.2d 403, 407 (2d Cir. 1970) (emphasis added), the court made this point: "[A] fundamental condition for requiring constitutional . . . due process is . . . an *existing* private interest." *See* Coppedge v. United States, 369 U.S. 438, 449 (1962) ("[w]hen society acts to deprive"). A violation of the due process clause depends on "deprivation." Haines v. Askew, 368 F. Supp. 363, 372 (M.D. Fla. 1973), *aff'd*, 417 U.S. 901 (1974); *see* Sturm v. California Adult Authority, 395 F.2d 446, 450 (9th Cir. 1967) (Browning, J., concurring), *cert. denied*, 395 U.S. 947 (1969); Manos v. City of Green Bay, 372 F. Supp. 40 (E.D. Wis. 1974). *See generally* Kadish, *supra* note 12; O'Leary & Nuffield 621-22; Parsons-Lewis 1518; Reich, *supra* note 6; Van Alstyne, *supra* note 31.

54. 408 U.S. 471, 482 n.8 (1972). The Supreme Court quoted language from United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971), in which the circuit court stated that conditional freedom is of greater importance than the "mere anticipation or hope of freedom." But as Judge Mansfield argued in *Johnson*, 500 F.2d at 927-28 & n.2, one inference which can be drawn from that observation is not that parole release procedures fall entirely beyond the reach of due process, but rather that different procedures will satisfy the due process requirement. *See also* Childs v. United States Bd. of Parole, 371 F. Supp. 1246 (D.D.C. 1973).

55. 408 U.S. at 482.

nials of parole, the result is laudable and sensible; to the extent that it ignored the word "deprive" in the fourteenth amendment, the *Johnson* opinion is subject to criticism.

By treating the "presently enjoyed" distinction more extensively, the Second Circuit could thus have strengthened its opinion. Nonetheless, the decision can be expected to lend support to two arguments: that parole release proceedings must conform to the principles of procedural due process,[56] and that procedures other than a statement of reasons are also required.[57] While the decision is not a total solution to the shortcomings of parole release decision making, its impact on parole authorities should be appreciable. The infusion of due process represented by *Johnson* is a significant step in the extension of the principles of procedural due process.

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56. In Cummings v. Regan, 45 App. Div. 2d 222, 357 N.Y.S.2d 260 (1974), the court held that "due process considerations as well as the public policy of this State require that a meaningful statement of reasons be furnished . . . ." *Id.* at —, 357 N.Y.S.2d at 263 (citing district court opinion in *Johnson*).

57. *See* note 13 *supra*.