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Case Note: Criminal Law - Parole - State Board of Parole Must Issue Statement of Reasons for Denial of Parole. United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974)

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CRIMINAL LAW—Parole—State Board of Parole Must Issue Statement of Reasons for Denial of Parole. *United States ex rel. Johnson v. Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir. 1974).

Thomas Johnson had served nearly seven years of his fifteen to sixteen year sentence as a second felony offender[1] when he was denied parole in March, 1973. The New York State Board of Parole, in continuing his imprisonment for at least another year, failed to provide Johnson with any statement detailing the reasons for its decision. He petitioned pro se for a writ of habeas corpus in the United States District Court for the Eastern District of New York, which liberally construed it as an application for injunctive relief.[2] The court found that due process considerations required the Board to issue a statement giving its reasons for denial of parole,[3] both as a guide for the prisoner's rehabilitative efforts and as an enduring record for possible appellate review.[4]

The Court of Appeals for the Second Circuit affirmed,[5] holding that a statement of reasons for denial of parole was a constitutional necessity.[6] The majority argued that however great the legislative grant of power to the Board may be, there nonetheless existed a need to preserve a prisoner's access to judicial review.[7] This right could be effectively exercised only if the Board were required to keep a record of the rationale employed in making its decision.[8]

To reach this point, the court had to deal with its ruling in

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1. Prior to 1967, when a New York court sentenced a second or third felony offender it could either suspend sentence or impose an indeterminate sentence with a minimum length of time not less than one half of the statutory maximum and a maximum double the statutory maximum. *See* N.Y. PENAL LAW OF 1909, § 1941(1) (McKinney 1967), *as amended*, N.Y. PENAL LAW § 70.06 (McKinney Supp. 1974).

2. United States *ex rel.* Johnson v. Chairman, New York State Bd. of Parole, 363 F. Supp. 416, 417 (E.D.N.Y. 1973), *aff'd*, 500 F.2d 925 (2d Cir. 1974).

3. *Id.* at 418.

4. *Id.* at 419.

5. United States *ex rel.* Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), *aff'g* 363 F. Supp. 416 (E.D.N.Y. 1973).

6. 500 F.2d at 929.

7. *Id.* at 930-31.

8. *Id.* at 934.

Menechino v. Oswald,[9] which held that due process rights did not attach to the parole release hearing.[10] Menechino was paroled from prison in 1963, declared delinquent, and returned to prison. After an unsuccessful challenge of the constitutionality of the revocation hearing,[11] he was denied parole in a new release hearing. Menechino then sought a declaratory judgment that in a release hearing he was entitled, under the due process clause of the fourteenth amendment, to counsel, notice of charges, a fair hearing, the right to call witnesses in his own behalf, cross-examination, and finally, a statement of reasons for denial.[12] The court denied his claim on two grounds: (1) a parole release hearing was not an adversarial proceeding of the nature that would require observance of the rights of an accused;[13] and (2) since plaintiff did not presently enjoy any liberty, and since the parole board possessed "absolute and exclusive" discretion as to the matter of his release, he lacked sufficient interest to entitle him to procedural due process.[14] The decision in *Menechino* had been mirrored in at least two other circuits,[15] and

9. 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

10. 430 F.2d at 407-08.

11. Menechino v. Division of Parole, 32 App. Div. 2d 761, 762, 301 N.Y.S.2d 350, 352 (1st Dep't 1969). Menechino based his claim upon the absence of counsel at the revocation hearing. He had also attacked a later release hearing as cruel and unusual punishment under the eighth amendment. Both claims were dismissed. *Id.* at 762, 301 N.Y.S.2d at 352-53.

12. 430 F.2d at 404-05.

13. *Id.* at 407. Further, the court found that an actual "identity of interest" existed between the prisoner and the Board "to the extent that it [the Board] is seeking to encourage and foster his [the prisoner's] rehabilitation and readjustment to society." *Id.*

14. *Id.* at 408-09.

15. In Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir. 1973) (en banc), *remanded for consideration of mootness*, 414 U.S. 809 (1974), a federal prisoner alleged that the Board denied him due process in a parole release proceeding. The court, prefacing its opinion with a statement as to the "absolute discretion" of the Board, dismissed the claim, stating: "Scarpa now attempts to equate the *possibility* of conditional freedom with the *right* to conditional freedom. We find such logic unacceptable." *Id.* at 282 (footnote omitted). The Third Circuit had already dealt with the parole release question in Madden v. New Jersey State Parole Bd., 438 F.2d 1189 (3d Cir. 1971) and Mosley v. Ashby, 459 F.2d 477 (3d Cir. 1972). Both cases maintained that the summary release

thus presented a formidable obstacle to the final result in *Johnson*.

One method of overcoming the *Menechino* reasoning was suggested by the Supreme Court in *Morrissey v. Brewer*,[16] where the due process clause of the fourteenth amendment was extended to a parole revocation hearing. Chief Justice Burger stated that procedural protections should not depend upon whether a governmental benefit is characterized as a "right" or "privilege," but rather should be based upon the presence or absence of grievous loss on the part of the individual.[17] Finding such a loss on the part of the parolee, the Court then ruled the resulting interest to be within the "liberty or property" wording of the fourteenth amendment.[18] Hence, due process applied, but this did not mean that the full array of rights available to the accused in a criminal proceeding were also available in a parole revocation hearing.[19] Due process, noted the Court, is a flexible concept, and can be molded to fit the particular situation.[20] Here, the parolee was entitled to a hearing, a notice of alleged violations, disclosure of damaging evidence, the right to appear in person before the Board, the right to cross-examine, plus a written statement by the fact-finder as to evidence

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proceeding violated no federal rights of the prisoner, although *Mosley* noted that New Jersey state law had recently required the Board to issue a statement of reasons for denial. *See* Note, *The Parole Release Decision—Due Process and Discretion*, 33 LA. L. REV. 708 (1973); text accompanying note 48 *infra*.

16. 408 U.S. 471 (1972).

17. *Id.* at 481. This was hardly a novel issue; the Court had taken this position several times before. Fuentes v. Shevin, 407 U.S. 67, 86 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).

18. 408 U.S. at 482.

19. *Id.* at 489.

20. *Id.* at 481. "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); *accord*, FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275-76 (1949); *see* Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708-09 (1884).

relied upon and reasons for revocation.[21]

Prior to *Morrissey*, parole had long been considered a matter of privilege and discretion,[22] an "act of grace"[23] almost beyond judicial review. *Morrissey* destroyed this concept, not through a direct attack on the power of the parole boards, but rather through a constitutionally based assertion of the parolee's rights.[24] It should be noted, however, that *Morrissey* is not precisely on point, insofar as it applied only to parole revocation hearings.[25] The Court actually indicated that the result might well be different in a parole release situation.[26]

This was the state of the law[27] that confronted the court of appeals

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21. 408 U.S. at 488-89.

22. Cagle v. Harris, 349 F.2d 404, 404-05 (8th Cir. 1965); Berry v. State Bd. of Parole, 148 Colo. 547, 548, 367 P.2d 338, 339 (1961), *cert. denied*, 370 U.S. 927 (1962). Sometimes called the "hands off" approach, the theory is buttressed by several different reasons, including the belief that parole is a privilege, not a right, that prisoners have no rights after trial, that release proceedings, because of their very nature, should be discretionary and subjective, that applying for parole is akin to making a contract with the state, and finally, that to do otherwise would cause disruption and unnecessary delay. For a discussion of these factors, see Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 U. KAN. L. REV. 493, 550-51 (1970).

23. Escoe v. Zerbst, 295 U.S. 490, 492 (1935).

24. At any rate, the power of the parole boards could no longer be considered as completely absolute. The Second Circuit, after *Menechino*, indicated that it no longer considered the "act of grace" theory tenable when it was offered to counter due process. United States *ex rel.* Bey v. Connecticut Bd. of Parole, 443 F.2d 1079, 1085-86 (2d Cir. 1971).

25. Judge Hays, dissenting in *Johnson*, noted that a parolee has his conditional freedom, a present interest that is protected by the fourteenth amendment under *Morrissey*. An inmate applying for parole, it can be argued, does not have his freedom, but only an expectancy, and thus due process would not attach. 500 F.2d at 936-37 (Hays, J., dissenting).

26. 408 U.S. at 482 n.8.

27. Favoring a statement of reasons were Childs v. United States Bd. of Parole, 371 F. Supp. 1246 (D.D.C. 1973) and Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973). *See* 50 N.D.L. REV. 503 (1974). United States *ex rel.* Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973) also required such a statement. Farries v. United States Bd. of Parole, 484 F.2d 948 (7th Cir. 1973) and Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974) ruled against the statement of reasons requirement.

as it considered the case of Thomas Johnson. *Menechino* had determined that due process did not attach to the parole release proceeding, and, since *Morrissey* was not controlling,[28] might well have been allowed to stand. Still, one of the twin pillars upon which *Menechino* had rested had been removed by the Supreme Court. It could no longer be claimed that the prisoner's potential liberty was an insufficient interest,[29] and thus not subject to the protection of the fourteenth amendment. The new measure was to be the amount of loss the individual would suffer as the result of government action,[30] rather than any classification of the interest as a right or privilege. Writing for the majority in *Johnson*, Judge Mansfield seized upon *Morrissey*'s finding of such a loss on the part of the parolee, and applied the same reasoning in finding that the prisoner has a very definite stake in the outcome of the parole release proceeding.[31] Calling the prospect of parole a "conditional entitlement"[32] to freedom, he concluded that "some degree of due process attaches to parole release proceedings."[33] This being established, the vindication of these procedural safeguards requires access to

28. There was a technical ground of distinction. *See* note 25 *supra*.

29. 408 U.S. at 482.

30. *Id.* at 481.

31. 500 F.2d at 928.

32. *Id.* This phrase was borrowed from the opinion of the trial court, 363 F. Supp. at 418, and is meant to convey the idea that the right matures as the statutory prescriptions are met. *See* Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970). One noted commentator, speaking with regard to welfare benefits, has described the idea of entitlement as "simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965). This entitlement may be preserved through constitutional restraints on state power, regardless of whether the entitlement is referred to as a right or privilege. Bell v. Burson, 402 U.S. 535, 539 (1971). This concept has successfully been applied to the possessory interest of the buyer under a conditional sales contract, Fuentes v. Shevin, 407 U.S. 67 (1972), unemployment compensation, Sherbert v. Verner, 374 U.S. 398 (1963), tax exemptions, Speiser v. Randall, 357 U.S. 513 (1958), and public employment, Slochower v. Board of Educ., 350 U.S. 551 (1956).

33. 500 F.2d at 928.

judicial review, which, in turn, necessitates a statement of reasons for denial of parole.[34]

Despite this, the court did not overrule *Menechino*,[35] noting that "[a] determination that an inmate being considered for release on parole is entitled to one due process weapon (*e.g.*, a statement of reasons) would not necessarily entitle him to the full panoply."[36] This statement is apparently in accord with *Morrissey*'s view that different process may be due in different situations.[37]

Judge Hays dissented in *Johnson*[38] on the ground that *Menechino* still controlled.[39] Pointing to *Morrissey*'s explicit distinction between the parolee's present freedom and the actual inmate's mere hope of freedom, he argued that the majority had extended that case's holding beyond its proper bounds.[40] The majority, however, met this objection,[41] citing authority to the effect that the process due a particular individual will turn upon the extent to which he is

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34. *Id.* at 929.
35. *Id.* at 928.
36. *Id.*
37. 408 U.S. at 481.
38. 500 F.2d at 935 (Hays, J., dissenting).
39. *Id.* at 936.
40. Judge Hays stated: "The opinion in *Menechino* provides no basis for the position that its reasoning, which logically applies to all the relief requested by plaintiff there, was not intended to apply to requests for statements of reasons." *Id.* (Hays, J., dissenting). This interpretation of *Morrissey* is not without textual support. *See* notes 24 & 27 *supra*.
41. The *Johnson* majority recognized the statement made in *Morrissey* as to the possible differing results in a parole release hearing, but went on to say that "this hardly indicates that due process is to be applied to parole revocation merely because the conditional freedom was presently being enjoyed, which would be nothing more than a reincarnation of the right-privilege dichotomy in a not-too-deceptive disguise." 500 F.2d at 927-28 n.2. The footnote continues: "The Court was simply reinforcing its point that conditional liberty permits much greater freedom of action by the parolee than does confinement in prison." *Id.* Similar disposal of *Morrissey*'s distinction was made in Craft v. Attorney General, 379 F. Supp. 538 (M.D. Pa. 1974), where the court argued that since the pertinent part of *Morrissey* had been based upon *Menechino*, a Second Circuit case, then *Johnson* should cast doubt upon its continued viability. *Id.* at 540. This case went on to quote *Johnson* favorably and hold "that the Due Process Clause of the Federal Constitution is applicable to parole hearings . . . ." *Id.* at 539.

threatened with grievous loss.[42] This is the measure which the court then used in determining the prisoner's interest.[43] The holding in *Menechino* was not that the prisoner lacked an interest because of the ephemeral nature of his anticipated freedom. Rather, *Menechino* stood for the proposition that since New York's legislature had given such great power to the Board of Parole, the prisoner had no "right" subject to the protection of the fourteenth amendment.[44] This was a mere restatement of the old "act of grace"[45] theory of parole which had been obviated by *Morrissey*.[46] The majority in *Johnson* is not equating the parole release and revocation hearings; to the contrary, it has adopted *Morrissey*'s claim that due process is flexible,[47] and used this statement as a touchstone for its inquiry into the need for a statement of reasons.

This being understood, *Johnson*'s analysis can serve as a model in future court tests of the parole release hearing. Investigation will be necessary to determine exactly what elements of due process are required. *Menechino* maintains, and quite correctly, that the due process protections available to an accused are not necessary. *Johnson* merely requires a statement of reasons. Future litigation will probably explore the gray area between the two cases until the procedure most nearly consonant with the release proceeding has been defined.

Several other courts, albeit for varying reasons, have concluded that a statement of reasons is necessary in a parole hearing. The leading jurisdiction in this regard has been New Jersey. The New Jersey State Parole Board had long followed a policy of refusing to reveal the reasons behind its decisions,[48] and the state courts had

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42. 500 F.2d at 928.

43. *Id.* at 929.

44. The court in *Menechino* stated: "The Board's exercise of this discretionary power has been held by New York's highest court to be absolute and beyond court review as long as the Board violates no positive statutory requirement." 430 F.2d at 406.

45. *See* note 22 *supra* and text accompanying notes 22-23 *supra*.

46. The Court in *Morrissey* stated: "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' " 408 U.S. at 482.

47. 500 F.2d at 928.

48. Monks v. New Jersey State Parole Bd., 58 N.J. 238, 241, 277 A.2d 193, 194 (1971).

long upheld this policy.[49] In *Monks v. New Jersey State Board of Parole*,[50] however, the state supreme court held that although the Board possessed broad and discretionary powers,[51] the furnishing of a statement of reasons was demanded by " 'considerations of simple fairness.' "[52] The case has resulted in some confusion as to the rationale of its holding,[53] but the result seems to have been the first of its kind in this area. Later, the Third Circuit[54] acknowledged *Monks* as the law of New Jersey and added that "[a] claim of denial of such a statement, minimally at least, can be construed on this record as setting forth a denial of the equal protection of the laws."[55] This extended the foundation of the possible right to such a statement beyond the "fairness" of *Monks* and put it on the level of a constitutional protection, much as had *Johnson*.

Nevertheless, several jurisdictions refused to follow the lead of the Third Circuit. In *Childs v. United States Board of Parole*,[56] the District Court for the District of Columbia ruled that it was the due process clause that required the Board to issue a statement of reasons.[57] The rationale employed was similar to that later seen in *Johnson*, as the court pointed out that the inherent flexibility of due process would allow it to extend to the parole release proceeding.[58] Alternate grounds for a similar decision were found in *King v. United States*,[59] where it was held that a statement of reasons was required of the United States Board of Parole under the provisions

49. *See, e.g.*, Puchalski v. New Jersey State Parole Bd., 104 N.J. Super. 294, 250 A.2d 19 (App. Div.), *aff'd*, 55 N.J. 113, 259 A.2d 713 (1969), *cert. denied*, 398 U.S. 938 (1970); Mastriana v. New Jersey State Parole Bd., 95 N.J. Super. 351, 231 A.2d 236 (App. Div. 1967). *See also* Madden v. New Jersey State Parole Bd., 438 F.2d 1189 (3d Cir. 1971).

50. 58 N.J. 238, 277 A.2d 193 (1971).

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

52. *Id., quoting* Appellate Division Judge (later U.S. Supreme Court Justice) Brennan in White v. New Jersey State Parole Bd., 17 N.J. Super. 580, 586, 86 A.2d 422, 425 (App. Div. 1952).

53. *See* 33 OHIO ST. L.J. 219 (1972).

54. Fischer v. Cahill, 474 F.2d 991 (3d Cir. 1973).

55. *Id.* at 993.

56. 371 F. Supp. 1246 (D.D.C. 1973).

57. *Id.* at 1247.

58. *Id.*

59. 492 F.2d 1337 (7th Cir. 1974).

of the Administrative Procedure Act.[60]

The conclusion of many courts, therefore, was that a statement was and should be required. Disagreement existed only in the question of what the best route to this result might be.

Similar developments have been taking place in some state courts. The Supreme Court of California, in *In re Sturm*,[61] has concluded that the state's Adult Authority "in the absence of a definitive written statement of its reasons for denying parole at a regularly scheduled parole hearing . . . deprives the inmate of procedural due process of law."[62] In the course of its opinion the court reviewed the usual procedure[63] employed by the Authority. Each hearing lasted no more than ten minutes. While one member of the board interviewed the prisoner before it, the other would be busily reading the file of the next prisoner. Significantly, the two members seldom disagreed in their vote. While minutes were taken of these meetings and provided to the inmate's correctional counselor, they were generally uninformative. Indeed, in this case the minutes were "entirely cryptic"[64] and insufficient to satisfy the constitutional requirements.[65]

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60. *Id.* at 1345. Although mention was made of *Menechino* and *Morrissey*, the court stated that it did not have to reach the constitutional arguments. *Id.* at 1343. The court then went on to rule that the U.S. Parole Board was not exempt from the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1970), *as amended*, 5 U.S.C. §§ 552-53 (Supp. III, 1973), explaining that "[t]he Administrative Procedure Act (APA) applies to each 'agency' which means 'each authority of the Government of the United States.' " 492 F.2d at 1343. Since Congress created the United States Parole Board in the Department of Justice, consisting of "eight members to be appointed by the President, by and with the advise and consent of the Senate," under 18 U.S.C. § 4201 (1970), and since there was no explicit exemption of the Board from the APA, it follows that 5 U.S.C. § 555(e) (1970) is controlling. 492 F.2d at 1345. It provides: "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 any agency proceedings. 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." 5 U.S.C. § 555(e) (1970).

61. 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974) (en banc).

62. *Id.* at 272, 521 P.2d at 107, 113 Cal. Rptr. at 371.

63. *Id.* at 262, 521 P.2d at 99, 113 Cal. Rptr. at 363.

64. *Id.* at 263, 521 P.2d at 100, 113 Cal. Rptr. at 364.

65. *Id.* at 272, 521 P.2d at 107, 113 Cal. Rptr. at 371.

New York's lower courts have been undertaking a cautious shift in the direction of cases like *In re Sturm*. As late as 1969, the New York Court of Appeals had held the state's Board of Parole to be practically exempt from judicial review.[66] Despite this, several lower courts have clearly been influenced by the decisions in *Johnson* and *Monks*.[67] As of this writing, however, resistance to the reasons re-

66. Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 29, 246 N.E.2d 512, 517, 298 N.Y.S.2d 704, 710 (1969). *See also* Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974).

67. Cummings v. Regan, 76 Misc. 2d 137, 350 N.Y.S.2d 119 (Sup. Ct. 1973), cited the district court's opinion in *Johnson* and ruled that a reasons requirement existed in New York. Four days later, in a different case of the same name, Cummings v. Regan, 76 Misc. 2d 357, 350 N.Y.S.2d 842 (Sup. Ct. 1973), the same court said: "This does not mean that the Parole Board must make findings of fact, and must comment on every item in the prisoner's file and relate it to the standards of the statute governing parole. It does mean that the Board must, however briefly, state the ultimate ground of its decision denying parole with sufficient particularity to enable the prisoner to understand how he is expected to regulate his behavior and to enable a reviewing court to determine whether inadmissible factors have influenced the decision, and to determine whether discretion has been abused." *Id.* at 360, 350 N.Y.S.2d at 847. This language outlines a type of statement implied in Beckworth v. New Jersey State Parole Bd., 62 N.J. 348, 301 A.2d 727 (1973), and explicitly required in *Sturm*. An oral statement will apparently suffice in New York courts. Hamm v. Regan, 43 App. Div. 2d 344, 351 N.Y.S.2d 742 (3d Dep't 1974). After rejection of his application for parole, Hamm was told: " 'One thing that the Statute says to us is we must consider the community into which the guy has been paroled and the prevailing attitude there into which he will go. It was felt by the parole board that it would be a negative community reaction to your release and that was the reason for the change in the decision. It was believed that it would be better for us to come to you and say that to you face to face so you will have an opportunity to respond to and that's what I have done.' " *Id.* at 345, 351 N.Y.S.2d at 744. The court noted that nothing in N.Y. CORREC. LAW §§ 213, 214 (McKinney 1968), *as amended*, (McKinney Supp. 1974) required a statement of reasons to be given for denial. The district court's decision in *Johnson* was mentioned, but the court then went on to say that they did not have to rule on the reasons requirement since here a reason had in fact been given (*i.e.*, negative community reaction). 43 App. Div. 2d at 347, 351 N.Y.S.2d at 745-46. Judge Cook's dissent pointed out that "negative community reaction" did not equal incompatibility with the welfare of society, a reason enunciated in section 213. *Id.* at 349, 351 N.Y.S.2d at 748 (Cooke, J., dissenting). It may be argued that

quirement has once again reasserted itself.[68] Of course, *Johnson*, in providing the prisoner with a federal forum and an authoritative precedent, will remove most of the impetus for any change in New York law.

It can readily be seen that the right established by *Johnson* could be effectively crippled by permitting the Board to issue a mere pro forma statement. Several courts have thus directed their attention to the content of the statement of reasons. The Supreme Court of New Jersey faced this question in *Beckworth v. New Jersey State Parole Board.*[69] After *Monks*, the Board issued "terse" statements of reasons,[70] apparently designed with an eye towards minimal compliance with the new ruling. These statements were of course promptly challenged on grounds of insufficiency.[71] Faced with this flood of litigation, the Board agreed to review its former denials and issue new statements.[72] The plaintiff in *Beckworth* was again denied parole following this review, so he renewed his challenge on grounds that the statement was still insufficient.

Beckworth had been imprisoned for murder after he had killed his friend's wife following an argument. The statement of reasons listed such factors as his attempted suicide, his recurring bouts with alcoholism, his longstanding hostility towards women, and his attempted escape as contributing toward the Board's doubts that he could function outside of prison.[73] This statement was ruled acceptable.[74]

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this case not only ignored the clear trend of such cases as *Johnson* and *Monks*, but also caused an injustice to the prisoner. What action could an inmate take on his own behalf to allay the apprehension of the community? The reason was bad, and the statement resultantly inadequate. The most recent New York decision enunciating a reasons requirement is Solari v. Vincent, 77 Misc. 2d 54, 353 N.Y.S.2d 639 (Sup. Ct. 1974), which held that since section 213 of the New York Correction Law set forth reasons for granting parole "logic, reason, and basic fairness dictate that reasons should also be stated for parole denial." *Id.* at 56-57, 353 N.Y.S.2d at 642.

68. *See* Cummings v. Regan, 45 App. Div. 2d 415, 358 N.Y.S.2d 556 (3d Dep't 1974), *rev'g* 76 Misc. 2d 357, 350 N.Y.S.2d 842 (Sup. Ct. 1973).

69. 62 N.J. 348, 301 A.2d 727 (1973).

70. *Id.* at 350, 301 A.2d at 728.

71. *Id.*

72. *Id.* at 351, 301 A.2d at 728.

73. *Id.* at 353, 301 A.2d at 730.

74. *Id.*

Two federal cases have made a *Beckworth*-type analysis of the adequacy of such a statement. *Candarini v. Attorney General*[75] held that "explicit reasons for denial"[76] are needed, while *Application of Wilkerson*[77] approved a format that contained substantially less.[78] *Candarini* noted with favor the format used by the New Jersey Board in *Beckworth*, saying:

> What is required is that the Board set forth sufficient facts and reasons to enable a reviewing court to ascertain whether an abuse of discretion has been committed and to enable the inmate to know why he has been denied parole and what he can do to better regulate his future conduct.[79]

The United States Board of Parole now requires the issuance of a statement of reasons.[80] It also uses a table of guidelines[81] designed to promote fairer and more consistent exercise of discretion.[82] Problems, however, arise when the offense being considered is not one that has been included on the table[83] or when a statement is issued

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75. 369 F. Supp. 1132 (E.D.N.Y. 1974).

76. *Id.* at 1137.

77. 371 F. Supp. 123 (E.D.N.Y. 1973). In an opinion written by Judge Dooling, who had written for the majority in *Johnson* when that case was in the district court, the court approved the following statement: "1. Your release at this time would depreciate the seriousness of the offense committed and it is thus incompatible with the welfare of society. 2. You need additional institutional treatments, specifically academic, vocational and correctional counselling to enhance your capacity to lead a law abiding life." *Id.* at 123-24. It is difficult to reconcile the above statement with the example set forth in *Beckworth* and the criteria adopted by the district court in the earlier *Candarini* case. *See* text accompanying note 64 *supra*.

78. 371 F. Supp. at 124.

79. 369 F. Supp. at 1137.

80. 28 C.F.R. § 2.13 (1974).

81. 28 C.F.R. § 2.20 at 68-73 (1974), *as amended*, 39 Fed. Reg. 45226 (1974).

82. *Id.*

83. This was the situation in Battle v. Norton, 365 F. Supp. 925 (D. Conn. 1973). The prisoner's offense, a failure to appear before the Board, was not on the table. Still, the court inferred that the table had been used. *Id.* at 930. The prisoner maintained that reasons other than those on the table must be listed in the statement. The court replied that neither the Board's procedure nor the Constitution required a statement of all reasons simply because it chooses to list some. *Id.* at 931.

that is based only on the table.[84] These new regulations are a step in the right direction, but it is clear that application of the reasoning of *Beckworth* and *Candarini* will be needed to prevent the emasculation of the statement of reasons.

Johnson might well become the prototype case for those many jurisdictions where the nature of parole is, at best, a source of confusion, and at worst, a source of injustice. Its artful disarming of *Menechino* will attract attention in those states that are presently bound by similar decisions. Once *Johnson* and its contention that a prisoner has a constitutionally protected interest in the outcome of a parole release proceeding is accepted, the courts can then proceed to delineate the bounds of the process required to protect this interest.[85]

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84. *See* Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974).

85. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court held that before a prisoner could be stripped of his "good time" credits he was entitled to a modicum of due process, the amount to be determined through a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.* at 556. Under the above formula, the prisoner here was entitled to a) advance written notice of charges, no less than 24 hours before the hearing; b) a written statement by the fact finder as to reasons relied upon; and c) the right to call witnesses and introduce evidence. But the Court noted the possible havoc cross-examination of fellow prisoners could wreak and therefore held it not required and further stated that the prisoner had no right to counsel in this type of hearing. *Id.* at 567-69. The situations in *Wolff* and *Johnson* are somewhat similar, the only possible grounds of distinction being the present versus potential possession distinction which *Johnson* has discredited. The protections afforded in *Wolff*, however, might be subject to one further limitation. If a procedure becomes too time-consuming and affects the speedy dispatch of parole applications, a court might well refuse to require the process of *Wolff* in the parole release hearing. It is submitted that allowing the prisoner to call witnesses and present evidence would have such an effect, and should thus not be required. On the basis of this reasoning, the statement of reasons might well be the outer limit of due process in the parole release hearing.