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DUE PROCESS BEHIND BARS—THE INTRINSIC APPROACH

INTRODUCTION

In the movies of George Raft and James Cagney, prisoners rattled tin cups against the iron bars of their cells to attract the attention of their keepers. Unfortunately, this procedure may have to be revived for prisoners to be heard in the wake of the Supreme Court's decision in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*.¹ In *Greenholtz*, the Court held that parole release hearings do not necessarily have to meet due process standards,² despite previous holdings that guaranteed due process protection for prisoners in revocation and disciplinary hearings.³ The decision represents the most recent cutback of the individual's due process rights⁴ in the general area of new property entitlements, which extend due process "beyond the . . . common law core" of protected property and liberty interests,⁵ and a retrenchment in the specific area of prisoners' rights.⁶

1. 442 U.S. 1 (1979).

2. *Id.* at 7, 12.

3. See *Wolff v. McDonnell*, 418 U.S. 539 (1974) (disciplinary hearings); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation hearings); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation hearings).

4. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

5. L. Tribe, *American Constitutional Law* § 10-9, at 519 (1978); see, e.g., *Board of Curators v. Horowitz*, 435 U.S. 78, 86 n.3 (1978) (administrative hearing unnecessary to dismiss medical student for academic deficiency); *Smith v. Organization of Foster Families*, 431 U.S. 816, 855-56 (1977) (approving limited procedural requirements before removal of a foster child from foster parents); *Dixon v. Love*, 431 U.S. 105, 113 (1977) (summary suspension or revocation of drivers' licenses is constitutional if objective standard is shown); *Ingraham v. Wright*, 430 U.S. 651, 680 (1977) (no need for prior hearing in public school to impose disciplinary corporal punishment); *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976) (public employment may be terminated at will according to statute without a prior hearing); *Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (individuals have only a limited property interest in their reputation); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616-18 (1974) (limited procedural rights in attachment hearings); *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (untenured professor at a state university had no property interest in his continued employment). *But see* *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (customers of a municipal utility must be accorded procedural due process rights before termination of service). See generally L. Tribe, *supra*, §§ 10-10 to -11 (1978); *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 1, 95-114 (1976).

6. See, e.g., *Moody v. Daggett*, 429 U.S. 78, 87 (1976) (entitlement to a parole revocation hearing arises only after execution of a parole violation warrant, even if parolee is incarcerated for the commission of a crime); *Montanye v. Haymes*, 427 U.S. 236, 242-43 (1976) (unless created by state law, prisoner has no liberty interest in remaining in the same prison in which he was originally confined); *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976) (same); *Baxter v. Palmigiano*, 425 U.S. 308, 314-15 (1976) (inmate involved in a disciplinary hearing for an offense that is also a crime has no right to counsel or cross-examination during the prison proceeding). One commentator has alleged a correlation between the Supreme Court's pro-prisoners' rights stance of the early seventies and the 1971 Attica uprising, in which the inmate takeover of a prison yard resulted in the death of thirty-nine men. B. Fein, *Significant Decisions of the Supreme Court 1973-74 Term* 43 (1975). The Court's zeal to protect prisoners' rights seems to have declined conjunctively with the memory of the Attica tragedy.

Due process preserves the enjoyment of personal freedom and private ownership by delineating the constitutional limitations on arbitrary government actions.⁷ The determination of a prisoner's right to such protection involves a two-pronged inquiry⁸—whether due process protection applies to the particular individual,⁹ and, if so, what procedure must be granted.¹⁰ The application question depends on the existence of a liberty or property interest in the threatened benefit or opportunity.¹¹ The procedure inquiry focuses on the traditional criteria used to identify the process due any constitutionally based right.¹²

The two-pronged inquiry in *Greenholtz* resulted in a narrow confinement of the procedural due process rights of prisoners seeking parole release. The Court held that due process protection for potential parolees is not constitutionally mandated; rather, it must be explicitly provided for in the specific statute that created the parole system.¹³ The constitutional criterion to be used in determining if any process is due is the minimization of the risk of an erroneous decision.¹⁴ Because the Court has consistently held that due process is a flexible concept,¹⁵ any procedure that lessens the risk of error is constitutionally sound.¹⁶

The *Greenholtz* rationale allows government to control both prongs of the due process inquiry—creation of a liberty interest and establishment of the procedure to be followed. As applied to the prisoner, "he [becomes] little more than [a] slave."¹⁷ For example, if no statutory standards exist to govern

7. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908); P. Freund, A. Sutherland, M. Howe & E. Brown, *Constitutional Law* 994 (4th ed. 1977); L. Tribe, *supra* note 5, § 10-7, at 501.

8. *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 483-85 (1972); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510, 1510 (1975) [hereinafter cited as *Interest Balancing*]; see Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. Chi. L. Rev. 60, 76-77 (1976).

9. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

10. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12-13 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 558-59 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

11. L. Tribe, *supra* note 5, § 10-12, at 533; see *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

12. *Arnett v. Kennedy*, 416 U.S. 134, 151-58 (1974) (plurality opinion); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); L. Tribe, *supra* note 5, § 10-12, at 533.

13. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979).

14. *Id.* at 12-13; see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

15. *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring). In *McElroy*, the Court noted that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 367 U.S. at 895.

16. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979).

17. *Meachum v. Fano*, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting). In the nineteenth century, and into the twentieth, prisoners were viewed as being totally without rights and were used as slave labor by state prisons. See *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871); T. Wicker, *A Time to Die* 60-61 (1975). This view has been discredited by the application of the

interprison transfer, prisoners may be subject to transfer at the unrestricted discretion of prison officials.¹⁸ Furthermore, a classification system that controls prisoner access to beneficial work-release and furlough programs can operate free from procedural requirements that protect inmates from mistaken designations.¹⁹

This Comment proposes a unified approach to defining procedural due process rights for prisoners so that individual dignity may be protected. Although it may appear that this position would accord greater constitutional guarantees to prisoners responsible for their own incarceration than to citizens who have responsibly maintained their freedom, the need to protect prisoners' rights is justified by the paternalism inherent in the prison system.²⁰ Part I discusses the theories underlying the determination of entitlement to due process protection and will advocate the application of the intrinsic approach. Part II applies these theories to specific factual instances and establishes the benefits of the intrinsic approach. Part III contains an examination of the criteria necessary to determine the procedural prong of the inquiry, followed by a testing of specific procedures in Part IV.

I. INMATE ENTITLEMENT

Due process generally protects traditional interests such as the ownership of real and personal property,²¹ and freedom from arbitrary practices in the criminal justice system.²² An entitlement, however, is a property or liberty interest derived from the relationship between the government and the individual²³ that extends beyond the scope of these customary concerns.²⁴ Not to be found in the Constitution, entitlements are originated in and shaped by independent sources, such as state and federal statutes, or the mutual conduct

eighth amendment's prohibition of cruel and unusual punishment to the states, *Robinson v. California*, 370 U.S. 660 (1962); *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973), *modified*, 494 F.2d 85 (7th Cir. 1974) (en banc), and by the influence of the organized labor movement. T. Wicker, *supra*, at 61.

18. See, e.g., *Montanye v. Haymes*, 427 U.S. 236, 242-43 (1976); *Meachum v. Fano*, 427 U.S. 215, 228 (1976).

19. See, e.g., *Makris v. United States Bureau of Prisons*, 606 F.2d 575, 576 (5th Cir. 1979) (per curiam); *Solomon v. Benson*, 563 F.2d 339, 342 (7th Cir. 1977).

20. See *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963); *Rust v. State*, 582 P.2d 134 (Alaska 1978).

21. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (procedural due process is mandated in replevin proceedings involving state action); *United States v. Causby*, 328 U.S. 256, 261 (1946) (government infliction of servitude on private property constitutes a taking entitling the owners to due process protection); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (state statute allowing the destruction of private property to preserve property of greater public value complied with due process and was constitutional under the fourteenth amendment).

22. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (state defendants are entitled to jury trials for serious offenses); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (evidence from an illegal search and seizure cannot be used against a state defendant); *Rochin v. California*, 342 U.S. 165, 172 (1952) (physical invasion of the defendant's body violated due process).

23. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970); Reich, *The New Property*, 73 Yale L.J. 733, 733 (1964).

24. *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

and comprehension of government and citizen.²⁵ Such interests merit protection because individuals are totally reliant on the government as the sole source of entitlements.²⁶ In recognition of this dependence, the Supreme Court has placed entitlement interests within the safeguard and custody of the due process clauses.²⁷

The grant of due process protection for entitlement interests has eliminated imbalances inherent in the relationship between government and individuals that arise from government's dominant posture.²⁸ The right/privilege distinction, a derivative from monarchical times, is the major evil discredited.²⁹ Although a right was always entitled to due process protection, a privilege could be revoked without such protection because it was granted by government largesse.³⁰ The Supreme Court has vehemently rejected this distinction.³¹ Outmoded and outdated, the distinction, like its source, is no longer useful. The complex and expansive concepts of liberty and property cannot be neatly pigeonholed,³² and the Court's rejection of the right/privilege distinction represents a recognition of this reality.

The right/privilege distinction had a two-pronged analysis for an interest described as a privilege.³³ The recognition of the new property entitlements

25. *Id.* at 577.

26. Reich, *supra* note 23, at 737.

27. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (attendance at a public high school); *Wolff v. McDonnell*, 418 U.S. 539, 571-72 (1974) (prisoners' good time credit); *Arnett v. Kennedy*, 416 U.S. 134, 151-52 (1974) (plurality opinion) (federal employment under the Lloyd-LaFollette Act); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation); *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (government employment under a series of one year contracts); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (parole revocation); *Bell v. Burson*, 402 U.S. 535, 540 (1971) (possession of a driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) (welfare payments).

28. See Reich, *supra* note 23, at 749.

29. See *Rummel v. Estelle*, 587 F.2d 651, 667 (5th Cir. 1978) (Clark, C. J., dissenting), *aff'd*, 48 U.S.L.W. 4261 (U.S. Mar. 18, 1980) (No. 78-6386). This is especially true of parole, which, until recently, was considered "an act of grace, comparable to the pardoning power that was once the prerogative of the monarchy." J. Mitford, *Kind and Usual Punishment* 218 (1973).

30. Reich, *supra* note 23, at 740; see *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935) (probation).

31. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

32. "'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (quoting *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

33. See Reich, *supra* note 23, at 740. The first prong was the gratuity principle, which pronounced that the government could "withhold, grant, or revoke the largesse at its pleasure." *Id.* (footnote omitted). The procedural prong gave the government free rein in defining the terms and conditions of any grant of largesse. *Id.* The only check on the free-wielding government power to grant privileges was the requirement that government obey its own rules. See *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935); cf. *Finley v. Staton*, 542 F.2d 250 (5th Cir. 1976) (sex offender barred from access to work-release programs was denied due process when correctional board failed to follow its own rules for deciding access).

destroyed the need for such reasoning because an entitlement encompasses what was formerly denominated either a right or a privilege.³⁴ Nevertheless, a slight vestige of the right/privilege analysis presently remains. Although the government is not constitutionally mandated to bestow largesse on the citizenry, promoted grants and opportunities may not be withdrawn unless the government complies with procedural due process.³⁵ Rights granted prisoners, formerly characterized as privileges,³⁶ fall into the category of the new liberty interests.³⁷ The first prong of the entitlement due process analysis becomes how, if at all, has government exercised its largesse.

A. Theories Available to Prisoners to Attain Due Process Protection

1. Conditional Liberty Theory

An individual's present enjoyment of conditional liberty has been recognized as an entitlement, sufficient to trigger due process protection.³⁸ Conditional liberty has been defined as freedom subject to restrictions, the violation of which may result in termination of the granted freedom.³⁹ Although liberty is conditional, there is a sufficient retention of "core values of unqualified liberty,"⁴⁰ whereby termination of the conditional freedom would cause the individual to be "condemned to suffer grievous loss,"⁴¹ such as reincarceration after enjoying the benefits of a new job and reunion with one's family.⁴² Grievous loss is a touchstone concept in determining whether procedural due process safeguards are deserved.⁴³ Its application is visible in both core and new property situations.⁴⁴

34. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

35. *See Specht v. Patterson*, 386 U.S. 605 (1967); L. Tribe, *supra* note 5, § 10-9, at 516-17.

36. *See Escoe v. Zerbst*, 295 U.S. 490, 492 (1935).

37. *Compare Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation is an entitlement protected by due process) with *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) (probation is a privilege granted by government largesse).

38. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972).

39. *Morrissey v. Brewer*, 408 U.S. 471, 478-79 (1972). Acknowledgement of conditional liberty theory buries the concept of "constructive custody," in which the parolee, although outside prison walls, was still serving his sentence, and therefore, reincarceration was considered merely a continuation of that custody. J. Mitford, *supra* note 29, at 219; A. von Hirsch & K. Hanrahan, *The Question of Parole* 53 (1979).

40. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). The core liberty interests were described in *Meyer v. Nebraska*, 262 U.S. 390 (1923): "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Id.* at 399. *See also* *Paul v. Davis*, 424 U.S. 693, 722-23 (1976) (Brennan, J., dissenting); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). *See generally* L. Tribe, *supra* note 5, § 10-8.

41. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *cf.* S. 10, 96th Cong., 1st Sess. § 1 (1979) (proposing the intervention of the Attorney General to protect the rights of all institutionalized persons if state action causes "grievous harm" to the enjoyment of those rights).

42. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

43. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123-24 (1889).

44. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

Conditional liberty theory was developed in cases in which the asserted interest was presently enjoyed, for example, when a parolee was freed from confinement.⁴⁵ Several circuit courts extended due process protection to the prospective enjoyment of conditional liberty in parole release situations by asserting that the prisoner's liberty interest in his right to be considered for parole⁴⁶ is equivalent to the parolee's interest in remaining outside the prison walls.⁴⁷ Eligibility for parole subtly, yet significantly, changes the nature of the inmate's incarceration. A negative decision by a parole board, therefore, subjects a prisoner to continued restrictions on his liberty that are greater than the conditional restrictions of parole.⁴⁸ For example, a grievous loss may arise from the lost opportunity to enjoy the benefits of conditional liberty when a parole board is inattentive to data that would favorably influence the parole decision.⁴⁹ An adverse decision returns to a locked cell both the parolee subject to revocation and the prisoner subject to parole denial; the variation lies only in the method of reimprisonment. The difference in the grievous loss inherent in termination of either a prospective or present enjoyment is therefore only a matter of degree. The Supreme Court has noted that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake."⁵⁰ The natures of prospective and present enjoyment—conditional liberty—are identical, while the weights—lost opportunity as opposed to lost benefit—differ. Due process protection should therefore apply in both cases.

Some courts, however, have refuted the equivalence position.⁵¹ They hold

45. See *Gagnon v. Scarpelli*, 411 U.S. 778, 779-80 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 472-73 (1972).

46. *Christopher v. United States Bd. of Parole*, 589 F.2d 924, 927 n.8 (7th Cir. 1978); *Franklin v. Shields*, 569 F.2d 784, 788 n.4 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978). The right to be considered stems from statutorily-set dates that require a parole board to consider a prisoner for release. See, e.g., Alaska Stat. § 33.15.080 (Supp. 1980) (prisoner is eligible for parole after serving one-third of the sentenced period of confinement); Ariz. Rev. Stat. Ann. §§ 31-411, 41-1604.06 (Supp. 1979) (classification system determines eligibility, although passing through the system mandates release); Colo. Rev. Stat. § 17-1-204 (1973) (eligibility arises at the expiration of the inmate's minimum term as set by the sentencing court or by statute); Fla. Stat. Ann. § 947.16(1) (West Supp. 1978) (dates of eligibility are related to the committed offenses); N.Y. Exec. Law § 259-i(2)(a) (McKinney Supp. 1979) (eligibility arises one month before end of minimum term, and if parole is denied, a new date for eligibility must be set within two years).

47. *Williams v. Ward*, 556 F.2d 1143, 1159 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *United States ex rel. Richerson v. Wolff*, 525 F.2d 797, 799 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1278 (D.C. Cir. 1974); *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979) (citing *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979)).

48. *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1278 (D.C. Cir. 1974).

49. *Bradford v. Weinstein*, 519 F.2d 728, 732 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975) (per curiam).

50. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (emphasis in original).

51. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 9-10 (1979) (distinguishing parole release from parole revocation); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th

that no grievous loss is suffered by a prisoner from an adverse result in a parole hearing because there is no material change in the inmate's status, as he remains subject to the original terms and conditions of incarceration.⁵² Therefore, they do not equate the nature of the inmate's interest in a parole hearing with the parolee's interest in a revocation hearing. The nonequivalence view limits due process protection to "safeguard[ing] the security of interests that a person has already acquired in specific benefits."⁵³ Because the prisoner has not acquired the benefits of conditional liberty, the lost opportunity to do so is no more than an "abstract need or desire . . . a unilateral expectation."⁵⁴ Under this analysis, due process protection cannot attach because the prisoner subject to a parole release hearing holds only a prospective liberty interest.

In *Greenholtz*, the Court attempted to resolve the clash between these two positions.⁵⁵ Unfortunately, the resolution expressly limited conditional liberty theory to present enjoyment.⁵⁶ The decision fails to account for previous due

Cir. 1978) (expectancy of parole release is not a constitutionally protected liberty or property interest); *Craft v. Texas Bd. of Pardons & Paroles*, 550 F.2d 1054, 1056 (5th Cir.) (same), *cert. denied*, 434 U.S. 926 (1977); *Cruz v. Skelton*, 543 F.2d 86, 89 (5th Cir. 1976) (unlike parole revocation, denial of parole is not a grievous loss meriting procedural due process protection), *cert. denied*, 433 U.S. 911 (1977); *Brown v. Lundgren*, 528 F.2d 1050, 1052-53 (5th Cir.) (same), *cert. denied*, 429 U.S. 917 (1976); *Sexton v. Wise*, 494 F.2d 1176, 1178 (5th Cir. 1974) (rescission of parole granted before inmate was released from custody did not require compliance with constitutional safeguards mandated in parole revocation proceedings); *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 282 (5th Cir.) (en banc) (distinguishing parole release from parole revocation), *vacated and remanded to consider mootness*, 414 U.S. 809 (1973).

52. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 9 (1979); *Brown v. Lundgren*, 528 F.2d 1050, 1052-53 (5th Cir.), *cert. denied*, 429 U.S. 917 (1976); *accord*, *Farriss v. United States Bd. of Parole*, 484 F.2d 948, 949 (7th Cir. 1973); *Menechino v. Oswald*, 430 F.2d 403, 408 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

53. *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).

54. *Id.* at 577; *see United States ex rel. Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated and remanded with direction to dismiss as moot*, 404 U.S. 879 (1971); *Friendly*, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1296 (1975).

55. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 6 (1979).

56. The Nebraska inmates claimed that they had been unconstitutionally denied parole because procedural due process was lacking. *Id.* at 3-4. The prisoners were only eligible for discretionary parole, in which a full consideration of the risk of release may be deferred. *Id.* at 4. The discretionary parole investigation was divided into initial and final stages. The initial stage consisted of a review of records and an interview with the prisoner at which he could support his argument for release. An adverse decision at this stage mandated a statement of reasons pointing out the weaknesses in the inmate's position. *Id.* at 4-5. If the board decided to proceed to the final stage, notice was given by informing the inmate only of the month of the hearing; each inmate was required to check a bulletin board daily to see if his hearing was scheduled for that day. At the full hearing, the prisoner was allowed to present evidence and witnesses in his behalf, as well as to have the presence of counsel and a complete record of the proceeding. Cross-examination of adverse witnesses, however, was not permitted. Denial of parole at this stage also warranted a prompt statement of reasons. *Id.* at 5. The initial stage was challenged as constitutionally inadequate because the prisoners argued that they possessed both a conditional liberty interest and a protectible statutory interest in a parole release hearing that entitled prisoners in the initial stage to the same procedures accorded inmates in the final stage. *Id.* at 5-6. The Supreme Court's review of the granted procedures was based on statutory entitlement, *id.* at 12, because the

process analysis under which the Court did not distinguish between the new applicant and the current possessor when entitlement was created by the satisfaction of statutory eligibility standards.⁵⁷ If the inmate is eligible for parole,⁵⁸ he should enjoy the benefits of due process protection despite the discretion inherent in parole board decisions.⁵⁹ After *Greenholtz*, however, the potential parolee cannot rely on conditional liberty theory to secure due process protection.

2. Statutory Due Process Theory

The present theory of statutory due process, in the area of prisoners' rights, is derived mainly from the rationale of *Wolff v. McDonnell*.⁶⁰ A Nebraska statute created a system whereby the prisoner could earn "good time credits" and could be deprived of them only upon proof of serious misconduct.⁶¹ The Supreme Court held that the state's own recognition that deprivation was a sanction that altered the terms of imprisonment caused due process protection to apply to the state-created liberty interest.⁶² Unlike conditional liberty theory, which emphasizes the nature of the grant of largesse, statutory due process theory shifts the emphasis to the method of the grant. Both govern-

extension of conditional liberty entitlement to potential possessors was rejected as too tenuous. *Id.* at 10-11. The Court further found the procedures to be adequate because they maintained a reasonable accuracy, *id.* at 14-15, and did not cast the proceeding in an adversarial framework. *Id.* at 15-16.

57. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (eligibility for welfare payments); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102 (1963) (admission to the bar); *Speiser v. Randall*, 357 U.S. 513, 524-25 (1958) (right to tax exemption); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926) (right of CPA to practice before the board); *Friendly*, *supra* note 54, at 1304.

58. Parole is characterized as discretionary when the parole board may alone determine whether a prisoner will be released. A parole board's power to parole may be derived from a statute that explicitly describes the board's power as discretionary. *E.g.*, Conn. Gen. Stat. Ann. § 54-125 (West Supp. 1980); N.Y. Exec. Law § 259-i (2)(c) (McKinney Supp. 1979). Other statutes use language such as may release, Alaska Stat. § 33.15.080 (Supp. 1979); Ariz. Rev. Stat. Ann. § 31-412 (1976), or shall not release unless. Ill. Ann. Stat. ch. 38, §§ 1003-3-5(c)-(e) (Smith-Hurd Supp. 1979). These statutes have certain criteria to channel the power of discretion. In Illinois, the prisoner may be released if it is determined that he will successfully remain at liberty, and that the release would not create disrespect for the law or a disruption of prison discipline. *Id.* Arizona employs a more relaxed standard, which inquires into mere success if released. Ariz. Rev. Stat. Ann. § 31-412 (1976). Despite the criteria used, the prisoner who successfully meets those conditions is not guaranteed his freedom because the board's power is discretionary. Mandatory parole, however, guarantees the freedom of a successful prisoner. The parole board's power to release is limited by statutory language such as shall release. Cal. Penal Code §§ 3041(a)-(b) (West Supp. 1980); Fla. Stat. Ann. § 947.16(3) (West Supp. 1978). While mandatory parole statutes also employ certain criteria to determine whether an inmate should be released, *id.*, the parole board that determines that the criteria have been successfully met must release the qualified prisoner.

59. See *Bradford v. Weinstein*, 519 F.2d 728, 732 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975).

60. 418 U.S. 539 (1974).

61. *Id.* at 546-47.

62. *Id.* at 557.

ment creation of the right and recognition of the grievous loss caused by its deprivation⁶³ must exist for statutory due process protection to attach.

An expansive interpretation of this theory defines the two conditions broadly, requiring either an explicit⁶⁴ or implicit⁶⁵ creation of the right, coupled with a governmental realization of the legitimate expectations that have been engendered.⁶⁶ Under this view, due process protection logically applies to parole release hearings because the parole system, although not constitutionally mandated,⁶⁷ is deliberately created by government to promote an inmate's attainment of liberty, as well as to further the traditional penal goal of rehabilitation.⁶⁸ The system's operation creates a legitimate entitlement because the frequency with which parole is granted indicates governmental recognition that deprivation is a serious sanction.⁶⁹

63. See *Paul v. Davis*, 424 U.S. 693, 710-11 (1976). See also *Meachum v. Fano*, 427 U.S. 215 (1976). In *Paul*, Justice Brennan noted that "the content of 'liberty' in those [due process] Clauses [of the fifth and fourteenth amendments] has never been thought to depend on recognition of an interest by the State or Federal Government." 424 U.S. at 722 n.10 (Brennan, J., dissenting).

64. An explicit creation of entitlement is rooted in statute or other sources of rules and regulations. *E.g.*, *Drayton v. McCall*, 584 F.2d 1208 (2d Cir. 1978); *In re Davis*, 25 Cal. 3d 384, 599 P.2d 690, 158 Cal. Rptr. 384 (1979). In *Drayton*, the Second Circuit held that a person granted parole had a reasonable expectation of liberty because of the regulatory structure of the Federal Parole Commission. 584 F.2d at 1215. In *Davis*, rules promulgated by the California Director of the Department of Corrections gave the petitioners a liberty interest in not being segregated for disciplinary reasons without due process protection. 25 Cal. 3d at 390-91, 599 P.2d at 695, 158 Cal. Rptr. at 389.

65. An implied creation of entitlement stems from the particular conduct and understanding between the individual and government, as well as from policy rationales underlying broad statutory powers. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972). In *Perry*, a teacher in a state college had a legitimate claim of entitlement to job tenure, even though no explicitly created tenure system existed. The entitlement stemmed from the practice of the particular university. 408 U.S. at 602. In *Morrissey*, the parolee's entitlement to conditional liberty was partly based on an "implicit promise" between the parties that revocation of parole would occur only upon violation of the specified conditions. 408 U.S. at 482. See also *Board of Regents v. Roth*, 408 U.S. 564, 578 & n.16 (1972) (university teacher had only an abstract interest in being rehired, not a protected property interest rooted in statute or policy).

66. *Williams v. Missouri Bd. of Probation & Parole*, 585 F.2d 922, 924 (8th Cir. 1978), *vacated and remanded*, 442 U.S. 926 (1979).

67. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); see *Meachum v. Fano*, 427 U.S. 215 (1976); J. Palmer, *Constitutional Rights of Prisoners* § 9.2, at 127 (2d ed. 1977). The Supreme Court stated in *Meachum* that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." 427 U.S. at 224.

68. *Williams v. Missouri Bd. of Probation & Parole*, 585 F.2d 922, 923 (8th Cir. 1978), *vacated and remanded*, 442 U.S. 926 (1979); *Franklin v. Shields*, 569 F.2d 784, 788-89 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

69. The pervasive effect of parole on the prison system is obvious. More than half of the inmates in the United States are released on parole before the expiration of their sentenced term. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 30 n.10 (1979) (Marshall, J., dissenting in part); Morris & Hawkins, *Rehabilitation: Rhetoric and Reality*, in *Probation, Parole, and Community Corrections* 26, 35 (2d ed. R. Carter & L. Wilkins eds. 1976). There is, however, a wide disparity in the parole systems of the individual states. For example, 70% of the inmates in New York State are released in their first appearance before the

The Supreme Court, however, often takes a positivist view of statutory entitlements, which requires specific statutory authority to invoke due process protection.⁷⁰ This position is acutely reflected in prisoners' rights cases.⁷¹ Unless the relevant statute creates an entitlement, no protectible interest will be found.⁷² Despite the dependence on semantics of this narrow approach, rather than on the understandings or expectations that are fostered,⁷³ the Court has adopted the positivist view with respect to parole hearings. Each parole statute must specifically create an entitlement for due process protection to apply.⁷⁴

As implemented by the Supreme Court, the positivist view is merely a mutation of the right/privilege distinction, a revival in the guise of new

parole board. C. Silberman, *Criminal Violence, Criminal Justice* 296 (1978). In California, over 90% of prisoners are paroled. J. Mitford, *supra* note 29, at 217. Maine, however, has abolished parole. 1975 Me. Laws ch. 500, § 71 (repealing Me. Rev. Stat. Ann. tit. 34, §§ 1671-1679). In June, 1979, the Governor of Texas granted parole to only 21% of the inmates who the state parole board recommended for release. *Rummel v. Estelle*, 48 U.S.L.W. 4261, 4269 (U.S. Mar. 18, 1980) (No. 78-6386) (Powell, J., dissenting). This statistical data convinced the *Greenholtz* minority that the creation of a parole system was sufficient to entitle prisoners to due process protection. "[W]hen a State adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law whenever those standards are met." 442 U.S. at 19 (Powell, J., concurring in part and dissenting in part). Recently, the Second Circuit reiterated its rejected view that prisoners have a legitimate expectation of release because of the frequency of parole grants, thereby implicitly criticizing the *Greenholtz* majority. *Pugliese v. Nelson*, Nos. 79-2136, -2138, -2140, slip op. at 1608 (2d Cir. Mar. 4, 1980); *cf. Dumschat v. Board of Pardons*, Nos. 78-2124, -2125, slip op. at 1967-68 (2d Cir. Mar. 20, 1980) (frequency with which Connecticut Board of Pardons granted pardons created a reasonable expectation, rooted in state practice, for prisoners to be accorded due process protection).

70. L. Tribe, *supra* note 5, § 10-7, at 506; Rabin, *supra* note 8, at 80; *see, e.g., Bishop v. Wood*, 426 U.S. 341, 344 (1976) (entitlement to municipal employment can be determined by city ordinance); *Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (state law does not protect present enjoyment of reputation that has been damaged by government action).

71. Calhoun, *The Supreme Court and The Constitutional Rights of Prisoners: A Reappraisal*, 4 Hastings Const. L.Q. 219, 230 (1977); Comment, *Two Views of a Prisoner's Right to Due Process*: *Meachum v. Fano*, 12 Harv. C.R.-C.L. L. Rev. 405, 431 (1977) [hereinafter cited as *Two Views*]; *see, e.g., Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979) (parole statute created a justifiable expectation of release); *Meachum v. Fano*, 427 U.S. 215, 226 (1976) (state law does not create the right for a prisoner to remain in his initially assigned prison).

72. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979).

73. *See* note 65 *supra*.

74. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979). Subsequent lower court decisions have denied due process protection for potential parolees solely on the *Greenholtz* rationale. *See, e.g., Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980); *Sharp v. Leonard*, 611 F.2d 136 (6th Cir. 1979) (per curiam); *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979) (per curiam); *Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979); *Shirley v. Chestnut*, 603 F.2d 805 (10th Cir. 1979); *Austin v. Armstrong*, 473 F. Supp. 1114 (D. Nev. 1979); *Campbell v. Montana State Bd. of Pardons*, 470 F. Supp. 1301 (D. Mont. 1979); *accord, Shahid v. Crawford*, 599 F.2d 666, 670 n.5 (5th Cir. 1979); *Cicero v. Olgiati*, 473 F. Supp. 653 (S.D.N.Y. 1979).

property entitlement analysis.⁷⁵ A new property privilege is seen as a grant of largesse; government has not recognized deprivation of the privilege as a sanction because of the privilege's implicit nature in the policies and conduct underlying the statute's implementation.⁷⁶ The rejected two-pronged inquiry of privileges⁷⁷ has been revived because the Court has treated state law as dispositive in establishing that some property interests are not entitled to due process protection.⁷⁸ For example, in *Meachum v. Fano*,⁷⁹ the source of entitlement could have been either state law or prison practice,⁸⁰ but because the Massachusetts statute gave prison officials totally discretionary powers of transfer, a statutorily based entitlement could not exist.⁸¹ Furthermore, the prison practice of transfer for only serious misconduct did not create an entitlement because the same statutory authorization allowed transfer for other reasons.⁸² The Court focused on the potential exercise of power, rather than on the actual exercise of power.⁸³ The *Meachum* opinion demonstrates the Court's reluctance to find an entitlement in state practice or policy,⁸⁴ although the Court's own precedent points in the opposite direction.⁸⁵ As a result, the application inquiry becomes "not a question of which label . . . one attaches to the status of the [property or liberty] interest, but of *who does the labeling*."⁸⁶

The rebirth of the right/privilege distinction has had a deleterious effect on prisoners. Because the Supreme Court has "[left] to the state the identification of protectible liberty and property interests, prisoners have, for all practical purposes, no due process guarantees beyond those the state affords them."⁸⁷ The doctrine of unconstitutional conditions, which preserves privileges inextricably bound to protectible rights,⁸⁸ has effectively been used to circumvent

75. *Bishop v. Wood*, 426 U.S. 341, 353-54 n.4 (1976) (Brennan, J., dissenting) ("the Court's approach is a resurrection of the discredited rights/privileges distinction, for a State may now avoid all due process safeguards attendant upon the loss of even the necessities of life . . . merely by labeling them as not constituting 'property' "); see L. Tribe, *supra* note 5, § 10-10, at 524; Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke L.J. 89, 98-99.

76. See note 30 *supra* and accompanying text; see, e.g., *Meachum v. Fano*, 427 U.S. 215, 228 (1976) (government has unfettered discretion to transfer prisoners); *Eskridge v. Casson*, 471 F. Supp. 98, 101 (D. Del. 1979) (government has unfettered discretion to deny parole).

77. See notes 33-35 *supra* and accompanying text.

78. Rabin, *supra* note 8, at 69 n.37.

79. 427 U.S. 215 (1976).

80. *Id.* at 216.

81. *Id.* at 226-27.

82. *Id.* at 228.

83. *Id.* at 235 (Stevens, J., dissenting); see *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

84. *Meachum v. Fano*, 427 U.S. 215, 216, 228 (1976); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); see Rabin, *supra* note 8, at 69-70; cf. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845-46 (1977) (Court applied statutory law to determine the entitlement of foster parents and their foster child, rather than precedent normally governing family life).

85. See note 65 *supra*.

86. Rabin, *supra* note 8, at 72 (footnote omitted).

87. Calhoun, *supra* note 71, at 233 (footnote omitted).

88. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-49 (1968). The doctrine can be defined as "whatever an express

the original right/privilege distinction. This doctrine, however, is useless to the prisoner in obtaining due process protection because his liberty interest has no basis in the Constitution. The prisoner is left with the Court's approach, which is "too obscure to serve the purposes of protecting reliance on government, reducing helplessness, or enhancing accountability."⁸⁹

B. *A Suggested Alternative—The Intrinsic Theory of Due Process*

Because of the limitations placed on the conditional liberty and statutory due process theories, which leave the prisoner at the mercy of government, a new approach is necessary to ensure due process protection for a prisoner when a grievous loss is suffered. The intrinsic approach to due process resolves this problem by "[granting] to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons."⁹⁰ Even within the controlled environment of a prison, each inmate retains his basic human dignity to assist his reattainment of a status in life worthy of respect.⁹¹ Inmates cannot be seriously or arbitrarily deprived of this inherent quality because they are no longer considered "slave[s]" of the state.⁹² The protection afforded the inmate can be evidenced by the "re-

constitutional provision forbids government to do directly it equally forbids government to do indirectly." *Id.* at 1445-46. In *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), California withheld the privilege of public highway use, thereby subverting the right of the private carrier not to be converted into a common carrier. The Supreme Court accorded constitutional protection to the privilege by safeguarding the right. *Id.* at 592-94. Prisoners, however, do not have a liberty interest conditioned on a constitutional right to parole, *see* note 67 *supra* and accompanying text; the doctrine, therefore, is an impotent weapon for the potential parolee.

89. L. Tribe, *supra* note 5, § 10-10, at 525 (footnote omitted); *see, e.g.*, *Rummel v. Estelle*, 48 U.S.L.W. 4261 (U.S. Mar. 18, 1980) (No. 78-6386). In *Rummel*, the Supreme Court upheld the mandatory life sentence of a Texas felon whose crimes had netted him less than \$250. The Court found that this sentence was not "cruel and unusual punishment" under the eighth amendment because the possibility of parole made it unlikely that he would serve the full term. *Id.* at 4265. In light of the Court's holding in *Greenholtz*, this analysis becomes "cruelly ironic." *Id.* at 4269 (Powell, J., dissenting). Because the Texas inmate has neither a conditional liberty interest nor a statutory entitlement, *Craft v. Texas Bd. of Pardons & Paroles*, 550 F.2d 1054, 1056 (5th Cir.), *cert. denied*, 434 U.S. 926 (1977), the possibility of parole is no more than a "mere hope." Although the Court is willing to find this hope sufficient to defeat the inmate's eighth amendment claim, this hope is held insufficient to support his claim to due process protection. 48 U.S.L.W. at 4269 (Powell, J., dissenting).

90. L. Tribe, *supra* note 5, § 10-7, at 502 (footnote omitted); *see Goss v. Lopez*, 419 U.S. 565, 583-84 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 208 (8th Cir. 1974); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 50 (1976). The instrumental approach must be distinguished from the intrinsic approach; in the former, due process requirements are seen as "means of assuring that society's agreed-upon rules of conduct, and its rules for distributing various benefits, are in fact accurately and consistently followed." L. Tribe, *supra* note 5, § 10-7, at 503.

91. *Meachum v. Fano*, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting); *cf. Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) (welfare recipients).

92. *Meachum v. Fano*, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting); *see* note 17 *supra* and accompanying text.

siduum of constitutionally protected rights"⁹³ that the inmate retains despite the partial deprivation of his liberty.⁹⁴ With the assertion of personal dignity as the primary aim, due process becomes a means to achieve more than mere procedural accuracy and an end in itself.⁹⁵ Because the government has the power to change the status of the individual, the method used to effect change is important.⁹⁶ Procedural due process can be used to preserve the quality of the prisoner's status, thereby moderating the adverse change that may result from government action.

Two difficulties arise from the application of the intrinsic approach. Arguably, it is an extreme departure from the present position of state deference; nevertheless, the dominant posture of government over the lives of inmates makes it a necessity.⁹⁷ Second, the emphasis on personal dignity makes the intrinsic approach a "purely subjective standard of procedural due process."⁹⁸ Because personal dignity is manifested in the particular individual, the intrinsic approach needs an objective standard to judge whether a deprivation is serious or arbitrary. Inside prison walls, the necessary qualifying factor exists in a right to rehabilitation.⁹⁹ A grievous loss would be defined as any

93. *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973); see *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). The Supreme Court has steadfastly protected basic constitutional rights asserted by prisoners. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974) (freedom of speech); *Cruz v. Beto*, 405 U.S. 319, 321-22 (1972) (free exercise of religion); *Younger v. Gilmore*, 404 U.S. 15, 15 (1971) (per curiam) (access to the courts); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (per curiam) (equal protection).

94. *Montanye v. Haymes*, 427 U.S. 236, 244-45 (1976) (Stevens, J., dissenting); *Meachum v. Fano*, 427 U.S. 215, 229-30 (1976) (Stevens, J., dissenting); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Watson v. Whyte*, ___ W. Va. ___, ___, 245 S.E.2d 916, 918 (1978).

95. L. Tribe, *supra* note 5, § 10-10, at 525. Conversely, the instrumental approach merely implements existing rules of law. *Id.* § 10-7, at 503.

96. See *Meachum v. Fano*, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting).

97. Prison is "a human environment from which there is no escape and over which the inmate has no control." C. Silberman, *supra* note 69, at 378.

98. Mashaw, *supra* note 90, at 50.

99. *Meachum v. Fano*, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting). A "right to rehabilitation" has yet to be specifically stated by the courts. S. Rep. No. 96-416, 96th Cong., 1st Sess. 13 (1979) [hereinafter cited as S. Rep. No. 96-416]; D. Rudovsky, A. Bronstein & E. Koren, *The Rights of Prisoners* 89-91 (1977); Rothman, *Decarcerating Prisoners and Patients*, 1 Civ. Lib. Rev. 8, 21-22 (Fall 1973). Nevertheless, a "right to treatment" has been recognized for patients who have been civilly committed in state institutions. *Bowring v. Godwin*, 551 F.2d 44, 48 n.3 (4th Cir. 1977); *Welsch v. Likins*, 550 F.2d 1122, 1125, 1126 n.6 (8th Cir. 1977); *Scott v. Plante*, 532 F.2d 939, 947 (3d Cir. 1976); *Wyatt v. Aderholt*, 503 F.2d 1305, 1312-13 (5th Cir. 1974); *Eckerhart v. Hensley*, 475 F. Supp. 908, 914 (W.D. Mo. 1979). *But see O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975) (Court refused to decide whether civilly committed persons had a "right to treatment"). The permissible reasons for civil commitment are the dangers posed by the patient, either to the community or to himself, and the need of the patient for treatment and care. *Wyatt v. Aderholt*, 503 F.2d at 1312. The state's unquestioned power to confine people to state medical institutions stems from its police power, when the action is taken to protect the community, or from the state's role as *parens patriae*, when acting to treat the patient. The state is exercising both functions when commitment is based on self-imposed danger. *Donaldson v. O'Connor*, 493 F.2d 507, 520-21 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975);

deprivation of a liberty interest that detracts from the prisoner's dignity by seriously damaging the rehabilitative process.

Rehabilitation has become the expressed goal of the contemporary prison system,¹⁰⁰ and the "cornerstone of probation and parole."¹⁰¹ Although the

Eckerhart v. Hensley, 475 F. Supp. at 913 n.11. If treatment is the cause of civil commitment, denial of access to adequate care violates due process. Wyatt v. Aderholt, 503 F.2d at 1312. If the justifications are the protection of society and of the individual patient, treatment is the "quid pro quo" that society provides for infringing the liberty interests of the civilly institutionalized. *Id.* The justifications for criminal commitment parallel the rationales for civil commitment. The theories underlying the existence of the prison system are deterrence, restraint, retribution, and rehabilitation. See W. LaFave & A. Scott, Handbook on Criminal Law § 5, at 21-25 (1972). The deterrence factor justifies criminal commitment by the discouragement of the individual through punishment, and of the general population through the threat of punishment. H. Hart, Punishment and Responsibility 5, 22 (1968); W. LaFave & A. Scott, *supra*, § 5, at 22, 23. Deterrence alone, however, may breed hatred in the individual prisoner; its effect as a control on the general population is questionable. *Id.* Restraint merely isolates the prisoner from society, which has labelled him as harmful. *Id.* at 22. Restraint unaccompanied by beneficial programs is dangerous because most prisoners will eventually re-enter society. *Id.* The sole purpose of retribution is to punish the individual for the commission of an offense; allegedly, this will foster respect for the laws of society. This theory, however, has generally been discredited as a sole basis for criminal confinement. H. Hart, *supra*, at 1, 8; W. La Fave & A. Scott, *supra*, § 5, at 24. Conversely, rehabilitation attempts to effect a beneficial change in the incarcerated individual so that he may better fit into society. H. Hart, *supra*, at 26; W. LaFave & A. Scott, *supra*, § 5, at 23. Although each of these theories provides a permissible basis for criminal confinement, rehabilitation should be the prime function of incarceration; the other reasons then become more palatable. Rehabilitation mutes the deleterious effects of deterrence, disarms the dangerousness of restraint, and ameliorates the indefensibility of retribution. W. LaFave & A. Scott, *supra*, § 5, at 22-24. The first three policies for criminal commitment can be condensed into the societal protection rationale of civil commitment. Thus, a modified version of the "quid pro quo" rule of due process entitles the prisoner to rehabilitative programs. See Rust v. State, 582 P.2d 134, 140 (Alaska 1978). If the inmate is imprisoned to protect society as an exercise of the police power, treatment is what society offers to enable the individual to regain his liberty. If rehabilitation is recognized as the primary purpose of incarceration, denial of access to programs that will help the prisoner to recapture a proper place in society violates due process because government acts as *parens patriae* for the prisoner and for the institutionalized patient. See Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963). The striking similarities in the conditions of all confined persons reasonably justify the existence of a "right of rehabilitation." Further development of the "right to treatment" entitlement theory springs from the total dependence of the patient on the government for any opportunity of cure. Eckerhart v. Hensley, 475 F. Supp. at 914. The prisoner is also totally dependent on the institution for improvement through announced rehabilitative programs. If the prisoner is denied access to these programs by state action, he becomes a victim of the dangerous idleness inherent in prison life, and is unable to appeal to the outside world for similar help. See S. Rep. No. 96-416, *supra*, at 19; T. Wicker, *supra* note 17, at 61.

100. E. Wright, The Politics of Punishment 152-54 (1973); see Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979). Rehabilitation is the expressed goal of some state parole boards. See, e.g., Okla. Stat. Ann. tit. 57, § 7 app. (West Supp. 1979-80) (main purpose of the Oklahoma parole board is to reclaim and rehabilitate offenders); Pa. Stat. Ann. tit. 61, § 331.1 (Purdon 1964) (Pennsylvania's public policy as to parole is to assist and facilitate rehabilitation).

101. H. Abadinsky, Probation and Parole: Theory and Practice 12 (1977); see Morrissey v.

goal has been denounced as unrealistic, unworkable, and nonexistent,¹⁰² the theory remains the underlying premise for official prison practices and state statutes.¹⁰³ Prisoners' assertions of constitutional rights based on a deprivation of a liberty interest must be evaluated in light of this prominent penal objective.¹⁰⁴ Several courts, in ordering changes in the conditions of confinement, have found certain prison practices to be disruptive factors in rehabilitation.¹⁰⁵ "The absence of an affirmative program of . . . rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation."¹⁰⁶ By denying due process protection, courts may sanction arbitrary action by prison officials that makes rehabilitation difficult to achieve.¹⁰⁷ The intrinsic approach thus provides a proper balance between the interests of inmates and government because both have a stake in rehabilitation.¹⁰⁸ The prisoners are accorded due process protection for any grievous loss, while government, the grantor of the largesse, retains a voice in the definition of loss, although the ability to abuse that power is removed. The government is bound by its own words when it demonstrates respect for individual dignity by expressing the rehabilitative goal. By refusing or neglecting to adopt due process requirements, the prison system undermines its own strategy, and rehabilitation often becomes a self-defeating exercise.

Brewer, 408 U.S. 471, 477 (1972); *Williams v. New York*, 337 U.S. 241, 248 (1949); F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training* 29 (1969). *See also* J. Mitford, *supra* note 29, at 218.

102. H. Abadinsky, *supra* note 101, at 169; C. Silberman, *supra* note 69, at 416-17; Kastenmeier & Eglit, *Parole Release Decision Making: Rehabilitation, Expertise and the Demise of Mythology*, 22 Am. U. L. Rev. 477 (1973).

103. *See* note 100 *supra*.

104. *See* *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974).

105. *See, e.g.*, *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969) (inmates' religious beliefs are more important than prison dietary regulations); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (whipping of inmates is counterproductive to the goal of rehabilitation because of the hatred bred toward prison authorities); *Carothers v. Follette*, 314 F. Supp. 1014, 1025 (S.D.N.Y. 1970) (letter writing privileges protected because they did not inhibit the rehabilitative process). *See also* *Novak v. Beto*, 453 F.2d 661, 675 (5th Cir. 1971) (Tuttle, C.J., dissenting) (use of isolation cells should be discontinued because of adverse effect on rehabilitation), *cert. denied*, 409 U.S. 968 (1972); S. Rep. No. 96-416, *supra* note 99, at 12-14.

106. *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

107. *See* *Pugh v. Locke*, 406 F. Supp. 318, 328 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. State*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). *See generally* D. Rudovsky, A. Bronstein & E. Koren, *supra* note 99, at 91.

108. *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Williams v. Missouri Bd. of Probation & Parole*, 585 F.2d 922, 924 (8th Cir. 1978), *vacated and remanded*, 442 U.S. 926 (1979); *Zurak v. Regan*, 550 F.2d 86, 95 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977); *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963). The mutuality of interest is inherent in government's desire neither to release a potential danger to the community nor to incarcerate an inmate beyond the point of rehabilitation. The prisoner also wants to be freed and, once released, to survive adequately in the outside world.

II. THE APPROPRIATENESS OF THE INTRINSIC APPROACH IN SPECIFIC SITUATIONS

The use of the intrinsic approach depends on context, and it is therefore unlikely to reflect a methodology of factual ad hoc analysis.¹⁰⁹ The context of any prisoners' rights decision is the nature of the governmental deprivation involved, as weighed against the mutual goal of rehabilitation, rather than a narrow focus on statutory authorizations or grants of power. For example, the present application of due process protection in parole hearings is dependent on the wording of the individual state statutes.¹¹⁰ This approach, with its semantic base, will grant some parolees more due process protection than others. Yet the nature and purpose of parole remains the same despite the wording of any statute. The intrinsic approach would analyze the concept of parole hearings through the underlying rehabilitative rationale, thereby providing every prisoner eligible for parole with exactly the same due process protection.

Thus, while expanding the scope of due process application to encompass more than present enjoyment or statutory rights, the focus of the entitlement prong is narrowed to determining whether the inmate's grievous loss of a liberty interest retards rehabilitation. It is therefore necessary to establish a factual unity among three specific situations—discipline, release, and revocation—to determine how each fits within the rehabilitative mold so that the intrinsic approach can be uniformly applied.

A. Discipline

Discipline is an integral part of the rehabilitative process; it is not imposed for the pavlovian inducement of respect for society and good manners, but to maintain control within the prison.¹¹¹ Such control is necessary to create the proper and most effective atmosphere for rehabilitation,¹¹² and therefore,

109. L. Tribe, *supra* note 5, § 10-13, at 539.

110. See note 61 *supra* and accompanying text. State parole statutes vary greatly. See, e.g., Cal. Penal Code §§ 3041(a)-(b) (West Supp. 1980) (California parole board shall set a release date on which a prisoner becomes eligible for parole); Conn. Gen. Stat. Ann. § 54-125 (West Supp. 1980) (granting of parole is totally within the discretion of the Connecticut parole board); Ill. Ann. Stat. ch. 38, §§ 1003-3-5(c)-(e) (Smith-Hurd Supp. 1979) (Illinois parole board shall not release a prisoner if it decides that the release would be a bad risk, cause disrespect for the law, or disrupt institutional discipline; if a prisoner has served his maximum term less good time credit, however, he shall be released); Ind. Code Ann. § 11-1-1-9 (Burns Supp. 1979) (parole shall be granted only if the inmate satisfies certain criteria established both by statute and by the Indiana parole board); Neb. Rev. Stat. § 83-1,114 (1976) (Nebraska prisoners shall be granted parole unless a valid statutory objection can be found); Okla. Stat. Ann. tit. 57, §§ 332, 332.7 (West 1969) (although the governor of Oklahoma has the sole power to parole, the board, which makes the recommendations of release, has the duty to examine the potential parolee after he has served one third of his sentence); Pa. Stat. Ann. tit. 61, § 331.21 (Purdon Supp. 1979-80) (Pennsylvania board of parole has complete discretion in the granting of parole to eligible inmates).

111. H. Hoffman, *Prisoners' Rights—Treatment of Prisoners and Post-Conviction Remedies* 3-4 (1976).

112. "There can be no hope of reform, no chance of making prisons more decent and humane, unless order is restored. . . . [W]ork release programs, home furloughs . . . vocational training . . . are useless if inmates live in constant fear of being raped or 'piped.' Court guarantees

discipline is part of the intrinsic approach's context analysis. Judicial application of due process in prison settings, however, has been attacked as subversive of prison discipline.¹¹³ It has been argued that granting any procedure to uphold an inmate's rights implies that prison officials are fallible.¹¹⁴ Any vindication of prisoners' rights shifts the balance of prison power and provides a clarion call for rebellion.¹¹⁵ The extremism of this view of due process is apparent when it is noted that inmates do not shed their constitutional protections when they enter prison.¹¹⁶ Prison disciplinary proceedings must therefore be based on the "mutual accommodation between institutional needs and objectives" and basic constitutional rights.¹¹⁷ Basic liberty interests arise in four situations that should be analyzed under the intrinsic approach.

1. Work-Release Programs

Work-release is a statutorily created program¹¹⁸ in which a measure of freedom is granted to the prisoner. He is allowed to participate in community-based activities, such as employment and education, while still serving his sentence.¹¹⁹ Work-release programs, clearly rehabilitative in nature,¹²⁰ are one alternative to the traditional concept of incarceration.¹²¹

Disciplinary revocation of participation in work-release programs has been identified as a grievous loss meriting due process protection.¹²² One authority has suggested that the protection stems from conditional liberty theory because the nature of both work-release and parole revocation have similar impacts on rehabilitation, although the degree of loss varies.¹²³ Federal

of due process are irrelevant if inmates ask to be placed in segregation for their own protection " C. Silberman, *supra* note 69, at 416-17.

113. *Id.* at 406-07. The prison guards function as the first line of discipline in the prison hierarchy; they are supposed to control the inmate community. Informal bargains are often used to quiet the prison community, rather than strict enforcement of rules. *Id.* at 398-99.

114. *Id.* at 406.

115. *Id.* at 407.

116. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); see note 95 *supra* and accompanying text.

117. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

118. ABA Comm'n on Correctional Facilities & Services, & Council of State Gov'ts, Compendium of Model Correctional Legislation and Standards X-180-81 (2d ed. 1975) [hereinafter cited as Compendium]. Forty-eight states and the federal government have work-release statutes; only Utah and Wyoming lack statutory authorization, although both operate such programs. *Id.*

119. Zalba, *Work-Release—A Two-Pronged Effort*, in *Corrections: Problems and Prospects* 257 (D. Petersen & C. Thomas eds. 1975); see *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

120. National Advisory Comm'n on Criminal Justice Standards and Goals, *Corrections*, Standard 2.9, at 43 (1973) [hereinafter cited as *Corrections*]; Zalba, *supra* note 119, at 265.

121. C. Silberman, *supra* note 69, at 373.

122. See, e.g., *Durso v. Rowe*, 579 F.2d 1365, 1371 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979); *Tracy v. Salamack*, 440 F. Supp. 930, 934 (S.D.N.Y. 1977), *aff'd*, 572 F.2d 393 (2d Cir. 1978); *Crafton v. Luttrell*, 378 F. Supp. 521, 535 (M.D. Tenn. 1974); *Schumate v. New York*, 373 F. Supp. 1166, 1169 (S.D.N.Y. 1974).

123. *Corrections*, *supra* note 120, at 548. See also *Durso v. Rowe*, 579 F.2d 1365, 1371 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979); *Tracy v. Salamack*, 440 F. Supp. 930, 934 (S.D.N.Y. 1977), *aff'd*, 572 F.2d 393 (2d Cir. 1978).

courts, however, have adopted the expansive view of statutory due process, and have found entitlement in official prison policies, practices, and regulations.¹²⁴ In *Tracy v. Salamack*,¹²⁵ the government contended that participation in a work-release program was terminable at will because of the language of the applicable New York statute and of the form agreement that governed participation in the program.¹²⁶ The district court, however, rejected the positivist approach¹²⁷ in holding that entitlement is grounded in prison policy and practice because a reasonable expectation of entitlement must be based on the knowledge of the prisoner, not on a statute of which he is ignorant.¹²⁸ Furthermore, the language of the form agreement must be read in the context of existing prison practice, which militates against frivolous terminations of participation.¹²⁹

The intrinsic approach to due process would reach the same conclusion. Revocation of participation is a grievous loss of a liberty interest because arbitrary removal from a rehabilitative program would defeat its primary purpose. Even if removal is warranted, the lack of due process causes a second rehabilitative failure because the prisoner does not always understand the relationship between his conduct and the removal and may become confused as to how to guide his future behavior.¹³⁰ By providing procedural due process for a disciplinary action,¹³¹ prison officials can ameliorate any failures within the program and increase its effectiveness. Procedural due process becomes a component of the rehabilitative process.¹³²

2. Good Time Credit

Forfeiture of good time credit¹³³ is a common disciplinary action taken by prison officials to punish flagrant or serious misconduct. In *Wolff v. McDonnell*,¹³⁴ the Supreme Court held this forfeiture to be a grievous loss deserving of due process protection.¹³⁵ The existence of the good time system provides an

124. *Winsett v. McGinnes*, No. 74-210, slip op. at 17 (2d Cir. Mar. 24, 1980) (en banc); *Durso v. Rowe*, 579 F.2d 1365, 1369 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979); *Tracy v. Salamack*, 440 F. Supp. 930, 935 (S.D.N.Y. 1977), aff'd, 572 F.2d 393 (2d Cir. 1978); cf. *Walker v. Hughes*, 558 F.2d 1247 (6th Cir. 1977) (disciplinary hearings).

125. 440 F. Supp. 930 (S.D.N.Y. 1977), aff'd, 572 F.2d 393 (2d Cir. 1978).

126. *Id.* at 934.

127. See notes 70-75 *supra* and accompanying text.

128. 440 F. Supp. at 935.

129. *Id.*

130. See H. Hoffman, *supra* note 111, at 3-2.

131. See National Sheriffs' Ass'n, *Standards for Inmates' Legal Rights* § 8, in Compendium, *supra* note 118, at IV-63.

132. See, e.g., *Barrows v. Hogan*, 379 F. Supp. 314, 316 (M.D. Pa. 1974) (assault of officer); *Downes v. Norton*, 360 F. Supp. 1151, 1154 (D. Conn. 1973) (escape).

133. Good time credit may be defined as a reduction in the term of confinement because of the inmate's general good behavior and restraint from committing specific rule infractions. A. von Hirsch & K. Hanrahan, *supra* note 39, at 43; see Note, *Procedural Due Process in Parole Release Proceedings—Existing Rules, Recent Court Decisions, and Experience in the Prison*, 60 Minn. L. Rev. 341, 344 n.14 (1976).

134. 418 U.S. 539 (1974).

135. See *id.* at 558.

incentive for the prisoner to control his behavior.¹³⁶ Revocation alters the terms and conditions of confinement, thereby adversely affecting the rehabilitative process.¹³⁷ The lower courts, in determining entitlement, have focused on the existence of the system that creates a reasonable expectation of the shorter term of imprisonment that has been earned, rather than on the specific statutory language.¹³⁸ These decisions are a further rejection of the positivist view of due process.¹³⁹

A disciplinary board exercises discretion when it makes a factual determination that a prisoner has committed an act of serious misconduct. The standard for punishment is deliberately kept vague to facilitate the efficiency of the prison's operations.¹⁴⁰ For example, escape is considered an offense for which good time credit is automatically forfeited.¹⁴¹ Yet, if the escape occurred while the prisoner was participating in a work-release program or was free on furlough, mitigating circumstances might warrant a punishment other than revocation of good time credit.¹⁴² Prison authorities, however, may tailor the punishment to the individual inmate, thereby precluding the inmate population from anticipating the consequences of any violation.¹⁴³ Unclear disciplinary standards place the inmate in a position that exposes him to the arbitrary loss of good time credit.

The intrinsic approach would acknowledge that the creation of the good time system is a deliberate government act to manufacture a reward for rehabilitative progress. Any deprivation of this reward would inflict a grievous loss on the prisoner because altering his expectancy of release frustrates the rehabilitative process by further engendering tension, frustration, resentment, and despair.¹⁴⁴ Government recognition of the gravity of the sanction is

136. *See id.* at 563.

137. *Id.* at 571 n.19; *cf.* *Vitek v. Jones*, 48 U.S.L.W. 4317, 4320 (U.S. Mar. 25, 1980) (No. 78-1155) (transfer from penal institution to mental hospital alters the terms and conditions of confinement).

138. *Workman v. Mitchell*, 502 F.2d 1201, 1211 (9th Cir. 1974). In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court ruled that the loss of good time credits entitled prisoners to due process protection. Although the deprivation of good time credit seriously altered the term of confinement, *id.* at 547, 558-59, it was sanctioned and controlled by statute. *Id.* at 548, 557. Judicial interpretation of *Wolff* has seen the key factor underlying the finding of entitlement in the alteration of the nature of imprisonment as a result of prison discipline. *See, e.g., United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 584 (2d Cir. 1975) (isolation for possession of inflammatory and revolutionary papers); *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974) (out-of-state prison transfer for a "troublemaker"). This interpretation of *Wolff* has been asserted as being correct. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 25 (1979) (Marshall, J., dissenting in part). The Supreme Court, however, has adopted a positivist interpretation of *Wolff*, *see* notes 60-74 *supra* and accompanying text, focusing solely on statutory language. *See* 442 U.S. at 12.

139. *See* notes 124-29 *supra* and accompanying text.

140. *H. Hoffman*, *supra* note 111, at 3-2.

141. *Id.* at 9-21.

142. *Downes v. Norton*, 360 F. Supp. 1151, 1154 (D. Conn. 1973), *see Rankin v. Wainwright*, 351 F. Supp. 1306 (M.D. Fla. 1972).

143. *See H. Hoffman*, *supra* note 111, at 3-2.

144. *See Wolff v. McDonnell*, 418 U.S. 539, 562 (1974).

implicit in the magnitude of the reward. Against this context, the revocation of good time credit always merits due process protection even if the grant or revocation of the reward is within the discretion of the prison authorities.¹⁴⁵

3. Interprison Transfers

In *Meachum v. Fano*,¹⁴⁶ several inmates suspected of committing arson in the prison were transferred from a medium security prison to a maximum security facility.¹⁴⁷ The Supreme Court held that the interprison transfers did not constitute a grievous loss that entitled the inmates to due process protection because their convictions had sufficiently extinguished their liberty so as to permit the state to confine them in any of its prisons.¹⁴⁸ The absence of statutory recognition that transfer constitutes a grievous loss foreclosed the finding of a liberty interest.¹⁴⁹ Moreover, the discretionary power of prison officials negated any inmate expectation to remain in the medium security prison despite the possible existence of a prison policy that permits transfers for serious misconduct. The Court noted that transfer decisions are predictive, based on the evidence of benefits to the institution and the "safety and welfare of the inmate[s]."¹⁵⁰ The constitutional deprivation of liberty and the informed discretion of officials combined to make the entitlement of the prisoner "too ephemeral and insubstantial to trigger procedural due process protections."¹⁵¹ In the companion case, *Montanye v. Haymes*,¹⁵² the Court held that a transfer between institutions of equal security did not inflict a grievous loss on an inmate.¹⁵³ Again, the Court emphasized the broad discretionary powers granted by state law to the prison officials as the factor mitigating against a finding of entitlement.¹⁵⁴

Prior to *Meachum* and *Montanye*, lower courts made a variety of distinctions to discern procedural due process entitlement in prison transfers.¹⁵⁵

145. See, e.g., Alaska Stat. § 33.20.050 (1979) (revocation of good time credit is within the discretion of the commissioner of health and social services); Mass. Ann. Laws ch. 127, § 129 (Michie/Law. Co-op 1972) (good time credit may be revoked for any violation of prison rules); Mich. Comp. Laws Ann. § 800.33 (West 1968 & Supp. 1979-80) (same).

146. 427 U.S. 215 (1976).

147. *Id.* at 216-22.

148. *Id.* at 224, 228.

149. *Id.* at 226-27.

150. *Id.* at 225.

151. *Id.* at 228. *But see* *Vitek v. Jones*, 48 U.S.L.W. 4317 (U.S. Mar. 25, 1980) (No. 78-1155). In *Vitek*, the Supreme Court found that the language of the Nebraska statute allowing involuntary transfers of prisoners to mental hospitals created a reasonable expectation to remain in the originally assigned prison. *Id.* at 4320. Alternatively, the transfer to a mental institution deprived the inmate of a liberty interest because "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." *Id.* at 4321 (citations omitted).

152. 427 U.S. 236 (1976).

153. *Id.* at 242.

154. *Id.* at 243.

155. See, e.g., *Daigle v. Hall*, 387 F. Supp. 652, 659 (D. Mass. 1975) (any dire change in the conditions of confinement because of specific past misconduct invokes due process protection), *aff'd*, 564 F.2d 884 (1st Cir. 1977); *Robbins v. Kleindienst*, 383 F. Supp. 239, 248 (D.D.C. 1974) (interruption of rehabilitative programs sufficiently changes the terms of imprisonment to invoke

After *Meachum* and *Montanye*, although some courts follow their rationales unquestioningly,¹⁵⁶ others have attempted to distinguish the case by granting protection for transfers with a plainly evident disciplinary motive.¹⁵⁷ For example, one district court has determined that if the initial placement of a prisoner had to comply with due process procedures, any subsequent transfer must do the same.¹⁵⁸

In the reality of the contemporary prison system, transfers are mainly used for control and discipline, a procedure known as "bus therapy."¹⁵⁹ The impact of interprison transfers on prisoners is significant. Prison inmates are thoroughly aware of the variations throughout the prison system, as reflected in the differing severity and benefits of each institution.¹⁶⁰ Bus therapy may be the most effective weapon of prison officials if, for example, a minor infraction of the rules can have a California inmate sent from Chino, a quiet prison, to Folsom, a violent prison.¹⁶¹ Furthermore, prison officials can wield bus therapy in retaliation against prisoners who are considered "troublemakers," yet who do not violate any prison rules to merit a severe sanction.¹⁶² In *Montanye v. Haymes*,¹⁶³ a prisoner who circulated a petition to regain access to the prison law library was transferred, two days later, from one New York maximum security facility to another.¹⁶⁴ The transfer clearly

due process protection); *Jones v. Institutional Classification Comm.*, 374 F. Supp. 706, 710-11 (W.D. Va. 1974) (procedure preceding a prison transfer must be fair and impartial to comport with due process requirements); *Croom v. Manson*, 367 F. Supp. 586, 590 (D. Conn. 1973) (out-of-state prison transfer alters the conditions of confinement by disrupting the inmate's access to the courts).

156. *Cofone v. Manson*, 594 F.2d 934, 939 (2d Cir. 1979); see *Bowles v. Tennant*, 613 F.2d 776, 778-79 (9th Cir. 1980); *Boothe v. Hammock*, 605 F.2d 661, 663-64 (2d Cir. 1979).

157. *Aikens v. Lash*, 547 F.2d 372, 373 n.1 (7th Cir. 1976); *Bruce v. Wade*, 537 F.2d 850, 854 n.9 (5th Cir. 1976); *Lamb v. Hutto*, 467 F. Supp. 562, 566 (E.D. Va. 1979); *Hardwick v. Ault*, 447 F. Supp. 116, 123 (M.D. Ga. 1978). These cases relied on the Supreme Court's refusal to distinguish administrative transfers from disciplinary transfers. *Montanye v. Haymes*, 427 U.S. 236, 242-43 (1976). Their reasoning, however, seems correct in light of the recent ruling in *Bell v. Wolfish*, 441 U.S. 520 (1979), in which the Court held that prisoners may be legitimately subjected to restrictions and conditions of confinement, as long as the restrictions do not amount to punishment. Although interprison transfers may be a legitimate restriction on an inmate's liberty, a transfer coupled with segregation will be held unconstitutional. *Id.* at 537-39.

158. *Lavine v. Wright*, 423 F. Supp. 357, 361 (D. Utah 1976). See also *Watson v. Whyte*, ___ W. Va. ___, ___, 245 S.E.2d 916, 918 (1978).

159. J. Mitford, *supra* note 29, at 252; C. Silberman, *supra* note 69, at 397. "Bus therapy" was one suggested solution to the unrest brewing before the Attica riot, but was rejected by Russell G. Oswald, the New York State Commissioner of Correctional Services, as "too simplistic." T. Wicker, *supra* note 17, at 8.

160. M. Braly, *False Starts* 152 (1976). One ex-convict offered his impressions of the California prison system: "At one end was Chino, the first of the wall-less prisons, good food, good visits and the Man wasn't staring down your throat all day. At the other end stood Folsom, stuffed with psychos, knife artists and other varieties of hopeless cases. Killing was unknown at Chino, rare on the Quentin yard, but a commonplace at Folsom." *Id.*

161. J. Mitford, *supra* note 29, at 250.

162. See *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

163. 427 U.S. 236 (1976).

164. *Id.* at 237-38.

had a punitive motive, but the Supreme Court refused to accord due process protection.¹⁶⁵

In *Meachum v. Fano*,¹⁶⁶ the positivist view of statutory due process caused the Supreme Court to delve into the abstract to solve a concrete problem.¹⁶⁷ The grant of unfettered discretion can lead to the arbitrary action against which due process protects.¹⁶⁸ Under the *Meachum* rationale and its subsequent interpretation, due process depends on the superficial label attached to the action,¹⁶⁹ rather than on its true nature. A grant of discretion must not be allowed total freedom from the limitations imposed by due process. Generally, when a statute allows complete discretionary action, the authorization is construed to mean that the granted power will not be used until all the necessary information has been gathered fairly.¹⁷⁰ If discretion is to be characterized as informed,¹⁷¹ its exercise must comply with that procedure.

The intrinsic approach to due process would examine interprison transfers in the context of the surrounding circumstances. It would recognize bus therapy as a grievous loss which is noted by government through prison practices that entail the proper exercise of discretion. If the welfare of the prisoner is a consideration in making transfers, as the *Meachum* opinion suggests,¹⁷² the rehabilitative process becomes the controlling, qualifying factor in determining entitlement.¹⁷³

4. Classification

It was originally believed that the labeling of a prisoner with "special offender" status or "central monitoring classification"¹⁷⁴ must comply with

165. *Id.* at 242-43.

166. 427 U.S. 215 (1976).

167. See notes 79-83 *supra* and accompanying text.

168. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972). "When rules are broken, discipline shall be administered . . . in such a way as to conserve human values and dignity and to bring about desirable changes in attitude." J. Mitford, *supra* note 29, at 252 (quoting American Correctional Ass'n, Manual of Correctional Standards).

169. The government can defeat the inmate's entitlement to due process merely by labeling a disciplinary transfer as administrative. *Two Views*, *supra* note 71, at 430-31.

170. *Williams v. Ward*, 556 F.2d 1143, 1158-59 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 929-30 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979); *cf. Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926) (discretion in an administrative proceeding).

171. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 11-13 (1979); *Meachum v. Fano*, 427 U.S. 215, 228 (1976).

172. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

173. Bus therapy may be used as a reward by transferring a maximum security inmate to a medium or minimum security facility. It may also be used as a punishment that is effectively as severe as solitary confinement. Feelings of isolation may be fostered by destroying the prisoner's routine, thereby hindering the rehabilitative process. Under either view, bus therapy has a significant effect on the strategy of rehabilitation. C. Silberman, *supra* note 69, at 397-98. The prisoner on whom bus therapy is frequently inflicted is likely to spend more time in prison because of his reputation as a disciplinary problem. J. Mitford, *supra* note 29, at 252-53. See also *Two Views*, *supra* note 71, at 435-37.

174. "Special Offender" status is applied to "certain special categories of offenders who require greater case management supervision than the usual case." Bureau of Prisons, Policy Statement No. 7900.47, at 1 (Apr. 30, 1974). The Central Monitoring System, which supersedes

due process.¹⁷⁵ The classification can severely delay or preclude a prisoner's access to work-release programs, social furloughs, release to half-way houses, rewarding interprison transfers, and early parole.¹⁷⁶ Because nonclassified prisoners have automatic access to these programs,¹⁷⁷ the system alters the conditions of the special offender's imprisonment, thereby creating a grievous loss.¹⁷⁸ Therefore, a classification system that "[p]reclud[es] . . . access to those benefits entails [a] loss as grievous as that occasioned by their revocation, for the inmate's stake remains the same in each instance."¹⁷⁹

In *Moody v. Daggett*,¹⁸⁰ the Supreme Court renewed its focus on statutory due process to defeat the entitlement of a special offender. In referring to the prisoner classification system, the Court stated that "Congress has given federal prison officials full discretion to control these conditions of confinement . . . and [the prisoner] has no legitimate statutory or constitutional entitlement sufficient to invoke due process."¹⁸¹ Because the statutory grant of unfettered discretion to create the system is the justification for defeating the entitlement claims of classified prisoners,¹⁸² a prison policy of

the "Special Offender" category, was created by Bureau of Prisons, Policy Statement No. 7900.53, at 1 (Apr. 7, 1976), and revised by Bureau of Prisons, Policy Statement No. 7900.53A, at 2 (Dec. 1, 1977). The Bureau's power to create this classification system stems from 18 U.S.C. §§ 4042(1), 4081 (1976) (Bureau of Prisons may consider all factors to ensure the proper treatment, classification, and segregation of inmates in federal penal institutions).

175. *Polizzi v. Sigler*, 564 F.2d 792 (8th Cir. 1977); *Holmes v. United States Bd. of Parole*, 541 F.2d 1243 (7th Cir. 1976), *overruled in part*, *Solomon v. Benson*, 563 F.2d 339, 340 (7th Cir. 1977); *Cardaropoli v. Norton*, 523 F.2d 990 (2d Cir. 1975) (implicitly overruled in *Pugliese v. Nelson*, Nos. 79-2136, -2138, -2140 (2d Cir. Mar. 4, 1980)); *Raia v. Arnold*, 405 F. Supp. 766 (M.D. Pa. 1975); *Stassi v. Hogan*, 395 F. Supp. 141 (N.D. Ga. 1975), *overruled*, *Mayo v. Sigler*, 428 F. Supp. 1343, 1350 (N.D. Ga. 1977); *Catalano v. United States*, 383 F. Supp. 346 (D. Conn. 1974).

176. *Polizzi v. Sigler*, 564 F.2d 792, 796 (8th Cir. 1977); *Holmes v. United States Bd. of Parole*, 541 F.2d 1243, 1250 (7th Cir. 1976), *overruled in part*, *Solomon v. Benson*, 563 F.2d 339, 340 (7th Cir. 1977); *Cardaropoli v. Norton*, 523 F.2d 990, 995 (2d Cir. 1975) (implicitly overruled in *Pugliese v. Nelson*, Nos. 79-2136, -2138, -2140 (2d Cir. Mar. 4, 1980)); *Catalano v. United States*, 383 F. Supp. 346, 350 (D. Conn. 1974). *See also Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. 1974). In *Catalano*, the court noted that "[t]hese amenities are eagerly solicited and received by the inmates and obviously play a meaningful role in enhancing rehabilitation, reducing frustration, maintaining morale, and minimizing unrest in the prison setting." 383 F. Supp. at 351.

177. *Catalano v. United States*, 383 F. Supp. 346, 351 (D. Conn. 1974); 28 C.F.R. §§ 523.12-.15 (1979).

178. *Cardaropoli v. Norton*, 523 F.2d 990, 995 (2d Cir. 1975) (implicitly overruled in *Pugliese v. Nelson*, Nos. 79-2136, -2138, -2140 (2d Cir. Mar. 4, 1980)).

179. *Id.* at 995 n.11.

180. 429 U.S. 78 (1976).

181. *Id.* at 88 n.9; *see* 18 U.S.C. § 4081 (1976); 28 C.F.R. § 2.47 (1979).

182. *Pugliese v. Nelson*, Nos. 79-2136, -2138, -2140, slip op. at 1608-09 (2d Cir. Mar. 4, 1980); *Makris v. United States Bureau of Prisons*, 606 F.2d 575, 576 (5th Cir. 1979); *Jones v. Diamond*, 594 F.2d 997, 1015 (5th Cir.), *rehearing en banc granted*, 602 F.2d 1243 (5th Cir. 1979); *Solomon v. Benson*, 563 F.2d 339, 342 (7th Cir. 1977); *Marchesani v. McCune*, 531 F.2d 459, 462 (10th Cir.), *cert. denied*, 429 U.S. 846 (1976); *Smaldone v. United States*, 458 F. Supp. 1000, 1004 (D. Kan. 1978); *Mayo v. Sigler*, 428 F. Supp. 1343, 1349-50 (N.D. Ga. 1977); *cf. Altizer v. Paderick*, 569 F.2d 812 (4th Cir.) (state classification program, *cert. denied*, 435 U.S. 1009 (1978); *Newman v. Alabama*, 559 F.2d 283, 287 (5th Cir. 1977) (same), *cert. denied*, 438 U.S. 915 (1978). *See generally* G. Alpert, *Legal Rights of Prisoners* 139 (1978).

extension of such programs is insufficient,¹⁸³ and their rehabilitative effect is rendered insubstantial, for the purposes of due process.¹⁸⁴

The intrinsic approach to due process would concentrate on the stigmatization of classified prisoners who are deprived of access to rehabilitative programs. Although this effect has been noted,¹⁸⁵ it has not been stressed in granting due process protection. In *Paul v. Davis*,¹⁸⁶ the Supreme Court held that an individual's reputation alone is not an interest that merits due process protection.¹⁸⁷ Nevertheless, any government action that results in damage to an individual's reputation and subsequently deprives him of an independent liberty or property interest does entitle the individual to the benefits of due process;¹⁸⁸ this doctrine should scale prison walls and determine the rights of the special offender.

Within the context of the correctional community, official prisoner status is directly damaged by the classification system's attachment of "a badge of infamy"¹⁸⁹ through the designation of special offender status. This badge is actually placed on the inmate's prison file,¹⁹⁰ and the government recognizes the seriousness of the stigma through the extensive procedure that must be followed when a prisoner has successfully petitioned to be removed from the classification system.¹⁹¹ Neither the discretionary power of prison officials to classify, nor the limitations on the prospective enjoyment of benefits, deter a finding of entitlement because the grievous loss results from the lack of alternatives to the foreclosed programs.¹⁹² Because the inmate is precluded

183. *Solomon v. Benson*, 563 F.2d 339, 342 (7th Cir. 1977).

184. *Hicks v. United States Bd. of Parole & Pardons*, 550 F.2d 401, 404 (8th Cir. 1977).

185. *Polizzi v. Sigler*, 564 F.2d 792, 796 (8th Cir. 1977); *Holmes v. United States Bd. of Parole*, 541 F.2d 1243, 1248 (7th Cir. 1976), *overruled in part*, *Solomon v. Benson*, 563 F.2d 339, 340 (7th Cir. 1977).

186. 424 U.S. 693 (1976).

187. *Id.* at 711-12. The Court distinguished prior cases by noting that they had "deprived the individual of a right previously held under state law." *Id.* at 708.

188. *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971); *see Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 184-85 (1951) (Jackson, J., concurring); *United States v. Lovett*, 328 U.S. 303, 314 (1946); *cf. Vitek v. Jones*, 48 U.S.L.W. 4317, 4319, 4321 (U.S. Mar. 25, 1980) (No. 78-1155) (prisoner suffers "stigmatizing consequences" from involuntary transfer to mental hospital); *Parham v. J.R.*, 442 U.S. 584, 601 (1979) (child committed to a state institution by his parents has a protectible interest in not being stigmatized because of improper decision by medical board to accept the child). *But see Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

189. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

190. Bureau of Prisons, Policy Statement No. 7900.53A, at 5 (Dec. 1, 1977).

191. *Id.*

192. *See Polizzi v. Sigler*, 564 F.2d 792, 796 (8th Cir. 1977) (stigma of classification based on organized crime ties may last beyond incarceration); *Holmes v. United States Bd. of Parole*, 541 F.2d 1243, 1248 (7th Cir. 1976) (stigma of classification will affect an inmate's access to furlough and parole opportunities), *overruled in part*, *Solomon v. Benson*, 563 F.2d 339, 340 (7th Cir. 1977); *cf. Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (flyer of active shoplifters did not deprive the victim of a liberty or property interest); *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (disciplinary suspension sufficiently damaged the child's reputation to justify finding that he was deprived of

from participating in other rehabilitative programs, he should be entitled to due process protection.¹⁹³

B. Parole Release and Revocation

Although due process requirements apply to all parole revocation proceedings,¹⁹⁴ these requirements are not always guaranteed for parole release hearings.¹⁹⁵ In distinguishing parole release from parole revocation, the Supreme Court directed its attention to the nature of each decision.¹⁹⁶ The parole release decision was characterized as "more subtle and depend[ing] on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release."¹⁹⁷ Therefore, because no set fact pattern will guarantee a favorable decision,¹⁹⁸ and because of the absolute discretion of the board, any prisoner expectation of release cannot rise to the level of entitlement.

The Court's distinction, however, is inaccurate. The parole revocation decision contains a mixture of fact and discretion similar to that of the release decision. Although the first phase of the revocation decision is a wholly "retrospective factual question" of the existence of a violation of parole,¹⁹⁹ the second phase, which may result in revocation, is wholly discretionary and based on the expertise of the authority.²⁰⁰ Whereas a favorable decision is guaranteed when no violation is found, a violation will not automatically result in the return of the parolee to prison.²⁰¹ When the parole revocation process enters the second phase, the functions of the release and revocation bodies are identical. Because the decisions in both proceedings "hinge on predictive determinations, those assessments are necessarily predicated on findings of fact."²⁰²

The discretionary element in parole revocation led to arbitrary decisions, before the proceedings were required to meet due process standards.²⁰³ The same arbitrary decisions concerning the futures of prisoners are still being

his right to attend school); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (decision to release a nontenured professor did not inflict stigma that made other employment unavailable).

193. See notes 178-79 *supra* and accompanying text.

194. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

195. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979); see note 74 *supra* and accompanying text.

196. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 9-10 (1979).

197. *Id.*

198. *Id.*

199. *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

200. *Id.* at 480.

201. *Id.*

202. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 28 (1979) (Marshall, J., dissenting in part) (footnote omitted); *Williams v. Ward*, 556 F.2d 1143, 1158 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977).

203. J. Mitford, *supra* note 29, at 225; see T. Wicker, *supra* note 17, at 26-27. The Attica uprising provides a blatant example of the tragedy of uncontrolled proceedings. One inmate who was killed was a paroled check-forgery, reincarcerated for driving without a license. *Id.* at 26-27, 282.

made in the uncontrolled parole release cases.²⁰⁴ Moreover, a taint of arbitrariness remains in parole revocation situations. Difficulty occurs in attaching due process rights to a parolee involved in a revocation proceeding when the violation of parole is the commission of a crime. The parolee imprisoned for a criminal act is not entitled to an immediate parole revocation hearing because his incarceration does not depend on revocation.²⁰⁵ If "execution of the [parole violation] warrant and custody under that warrant [are] the operative event[s] triggering any loss of liberty attendant upon parole revocation,"²⁰⁶ the consequence is that a jailed parolee still enjoys conditional liberty. Nevertheless, showing the utmost deference to the states, the Supreme Court bases entitlement on procedures, not on the individual's interest. Only when the state executes the warrant and recognizes the loss as sufficiently grievous does the Court mandate due process protection.²⁰⁷ The actual restraint on the prisoner's liberty is seen as irrelevant. The rationale offered is the discretion of parole authorities in deciding the manner or probability of imprisonment for a parole violation while the inmate serves a sentence for a crime committed during the parole sentence.²⁰⁸ Discretion becomes a double-edged sword, defeating a claim of entitlement,²⁰⁹ yet assuaging any fears of prolonged imprisonment.²¹⁰ If discretion can reduce a reasonable expectation into a mere hope, however, its positive effects cannot be reasonably guaranteed to the prisoner when his period of incarceration depends on the possible execution of the parole revocation warrant, the timing of which is left to the whim of government.

The intrinsic approach would not accommodate such narrow logic. The

204. See *Sharp v. Leonard*, 611 F.2d 136 (6th Cir. 1979) (per curiam); *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979) (per curiam). A recent survey conducted by the Council of State Governments demonstrates that a majority of states have taken some legislative action to curtail parole boards' power because they are viewed as "arbitrary and capricious decisionmakers." N.Y. Times, Mar. 30, 1980, § 1, at 27, col. 1. A majority of states have enacted some form of mandatory sentencing laws for certain violent crimes so that the sentencing judge, rather than the parole board, determines the actual sentence served. *Id.*

205. *Moody v. Daggett*, 429 U.S. 78, 86 (1976); cf. *United States v. Jackson*, 590 F.2d 121, 123 (5th Cir.) (according to statute for probation revocation, the arrest must be for a violation, not for a criminal act, to be entitled to a hearing), *cert. denied*, 441 U.S. 912 (1979).

206. *Moody v. Daggett*, 429 U.S. 78, 87 (1976).

207. See *id.* at 88.

208. *Id.* at 87-88; *Farmer v. United States Parole Comm'n*, 588 F.2d 54, 56 (4th Cir. 1978), *cert. denied*, 442 U.S. 943 (1979); see *Northington v. United States Parole Comm'n*, 587 F.2d 2, 3 (6th Cir. 1978); *Hicks v. United States Bd. of Pardons & Paroles*, 550 F.2d 401, 404 (8th Cir. 1977).

209. See *Moody v. Daggett*, 429 U.S. 78, 83-84 (1976). Federal law concerning detainees has been changed. The Parole Commission must review a parole revocation warrant within 180 days of its issuance. 18 U.S.C. § 4214 (b)(1) (1976). Presently, the Parole Commission's preferred policy is for the term imposed for revocation to run consecutively with the sentence imposed for the subsequent offense. 28 C.F.R. § 2.47(c) (1979). The legislative and administrative changes, however, did not affect the Supreme Court's decision in *Moody*. The case is still demonstrative of the Court's reluctance to help prisoners and still provides precedent for state and federal courts to deny further due process protection to prisoners. See *State ex rel. Alvarez v. Lotter*, 91 Wis. 2d 329, 334-35, 283 N.W.2d 408, 410 (1979) (per curiam).

210. *Moody v. Daggett*, 429 U.S. 78, 87-88 (1976).

uncertainty of status has a recognized detrimental effect on rehabilitation.²¹¹ Because of the adversity involved, there is an added burden on caseworkers who try to aid the prisoner in the rehabilitative process.²¹² The impact on both the system and the inmate causes a grievous loss that must entitle the inmate to due process protection.

C. *The Common Bonds*

Two common themes exist in the present ad hoc approach to prisoners' due process rights. Rehabilitation is the affirmative theme. Each significant aspect of the prison system—discipline, release, and revocation—affects the rehabilitation of prisoners.²¹³ Release and revocation are intertwined, and both are determinative of the success of the rehabilitative process. Although revocation proceedings are presented with demonstrable and concrete proof,²¹⁴ the proof in a release hearing is more implicit because an element of prognostication is involved. Characterization is the only true difference,²¹⁵ and it should not erect a barrier between the two aspects. Discipline can either enhance rehabilitation by providing a proper medium for internal correctional programs, or damage it by using denial of access to such programs as punishment. Together, the three aspects of the prison system form a rehabilitative strategy that must be protected by fair procedures for proper implementation. Because the government creates the rehabilitative programs and encourages inmate participation, the prisoner has a reasonable expectation of due process protection.

The negative theme is the Court's focus on the discretionary powers of prison authorities to defeat inmate entitlement. The "full" discretion²¹⁶ of prison officials has become absolute because of judicial review. Presently, prisoners must somehow show a statutory limitation on the exercise of discretion to prove the existence of a liberty interest entitled to protection.²¹⁷ The total grant of discretion renews the old "hands-off" doctrine of judicial

211. "Because uncertainty as to status can have an adverse effect on our efforts to provide offenders with correctional services, we should encourage detaining authorities to dispose of pending untried charges against offenders in federal custody." Bureau of Prisons, Policy Statement No. 7500.14A, at 1 (Jan. 7, 1970); see *Moody v. Daggett*, 429 U.S. 78, 94-95 (1976) (Stevens, J., dissenting). In *Moody*, however, the Supreme Court again ignored policy and followed the positivist view of statutory due process. *Id.* at 84-85; see notes 70-71 *supra* and accompanying text; cf. *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979) (per curiam) (probationer entitled to due process protection because he was unduly prejudiced by significant delay between commission of probation violation and filing of petition to revoke).

212. Bureau of Prisons, Policy Statement No. 7500.14A, at 4 (Jan. 7, 1970); see *Moody v. Daggett*, 429 U.S. 78, 94 n.9 (1976).

213. See pts. II(A)-(B) *supra*.

214. See *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).

215. Compare *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 9-10 (1979) *with id.* at 27-28 (Marshall, J., dissenting in part).

216. See *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Farmer v. United States Parole Comm'n*, 588 F.2d 54, 56 (4th Cir. 1978), *cert. denied*, 442 U.S. 943 (1979).

217. *Arsberry v. Sielaff*, 586 F.2d 37, 46-47 (7th Cir. 1978); *Lombardo v. Meachum*, 548 F.2d 13, 14-15 (1st Cir. 1977).

intervention based on statutory interpretation.²¹⁸ As a result, the prisoner is helpless.

Discretion is inherently limited because it cannot be exercised in a vacuum. The parameters of any subjective evaluation are structured by a factual investigation mandated either by statute²¹⁹ or policy.²²⁰ Unless there is a framework for the discretionary action, it becomes arbitrary, thereby mandating due process protection.²²¹ The intrinsic approach would structure the use of discretion by examining the rehabilitative policy of the prison system and emphasizing the correctional factor in both fact-finding and subjective evaluations. This restriction on the use of discretion creates the entitlement on which prisoners may rely to guarantee due process protection.

These common bonds give context to any government deprivation inflicted on the inmate because they define the source and scope of the government's power and the individual inmate's interest. The weight of these bonds equalizes the interests of the disciplined inmate, the parolee, and the prospective parolee. Therefore, the determination of entitlement for all prisoners should be made under a unified analysis.

III. WHAT PROCESS IS DUE

In *Mathews v. Eldridge*,²²² the Supreme Court identified three factors that would delineate specific procedures to be followed in determining what process is due.

218. Under the old "hands-off" policy, prison procedures were outside the scope of judicial intervention. *H. Hoffman*, *supra* note 111, at 1-12. The policy's foundations were the complementary reasons of prisoner forfeiture of constitutional rights and noninterference with prison administration. *J. Mitford*, *supra* note 29, at 249. Although the first reason is no longer sustainable, *see* note 95 *supra* and accompanying text, the second has gained new credence when coupled with the positivist view of due process. For example, if parole is denied, judicial review is permissible only if sufficient facts are alleged, which if proved, would establish that the parole board's action was arbitrary, capricious, or an abuse of discretion. *Payne v. United States*, 539 F.2d 443 (5th Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1103 (1977); *Cunningham v. Estelle*, 536 F.2d 82 (5th Cir. 1976) (per curiam); *Buchanan v. Clark*, 446 F.2d 1379 (5th Cir.) (per curiam), *cert. denied*, 404 U.S. 979 (1971); *Tarlton v. Clark*, 441 F.2d 384 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971); *Thompkins v. United States Bd. of Parole*, 427 F.2d 222 (5th Cir. 1970) (per curiam). Such limited access to courts allows prisons to operate with a free hand. The new "hands-off" policy is only one part of the Supreme Court's general trend of limiting due process rights because of a fear that the new property concept originated in *Goldberg v. Kelly*, 397 U.S. 254 (1970), opened the floodgates to endless litigation. *Rabin*, *supra* note 8, at 70.

219. *See, e.g.*, *Williams v. Ward*, 556 F.2d 1143, 1158 (2d Cir.) (New York statute set parameters for the exercise of discretion in determining parole release), *cert. dismissed*, 434 U.S. 944 (1977); *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 929-30 (2d Cir.) (same), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979).

220. *See, e.g.*, *Winsett v. McGinnes*, No. 74-210, slip op. at 19, 21 (2d Cir. Mar. 24, 1980) (en banc) (exercise of discretion must be consistent with work-release policy, and parameters are defined by promulgated regulations); *Durso v. Rowe*, 579 F.2d 1365, 1371 (7th Cir. 1978) (prison practices and policies guide the discretionary revocation of work-release participation), *cert. denied*, 439 U.S. 1121 (1979); *Tracy v. Salamack*, 440 F. Supp. 930, 934-35 (S.D.N.Y. 1977) (same), *aff'd*, 572 F.2d 393 (2d Cir. 1978).

221. *Masiello v. Norton*, 364 F. Supp. 1133, 1136 (D. Conn. 1973).

222. 424 U.S. 319 (1976).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²²³

The *Mathews* test has been criticized for its utilitarian policy of attempting to realize the greatest good for the greatest number, at the expense of the traditional due process notions of decency and fairness for the individual.²²⁴ Inside prison walls, however, the intrinsic approach to due process strikes a delicate balance between the individual and the government, whereby individual treatment can be provided to the inmate population in all aspects of the rehabilitative process.

The first variable of private interest fluctuates under the conditional liberty or statutory due process theories because of factual circumstances, such as the magnitude of the interest²²⁵ or the specific dictates of the relevant statute.²²⁶ Under the intrinsic approach, this factor becomes a constant because the private interest will always be the rehabilitative process.²²⁷ The parolee in a revocation hearing would have the same interest as the inmate in a disciplinary hearing for the revocation of work-release participation.

The second *Mathews* factor is subject to much misinterpretation; the Court used it in *Greenholtz* to restrict available procedural safeguards. The majority evaluated the Nebraska statutory provisions exclusively in terms of minimizing the risk of error.²²⁸ The majority's analysis supposedly included the "probable value of additional or substitute safeguards" test of *Mathews*.²²⁹ The analysis, however, merely demonstrated circular reasoning because the "probable value" of the procedure was undercut by defining it as a back-up system for the additional elimination of error.²³⁰ The value of any additional safeguards should be weighed in relation to their contribution to the rehabilitative process;²³¹ in this respect, due process itself implements a rehabilitative strategy.²³² The certain procedures that the Supreme Court had established in *Morrissey v. Brewer*²³³ and *Wolff v. McDonnell*²³⁴ would be

223. *Id.* at 335.

224. Calhoun, *supra* note 71, at 230; Mashaw, *supra* note 90, at 48-49; *Interest Balancing*, *supra* note 8, at 1542-43.

225. Compare *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 9-11 (1979) (parole release as a prospective enjoyment of conditional liberty) with *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (parole revocation as a present enjoyment of conditional liberty).

226. Compare *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976) (prison transfers have no statutory limitations) with *Wolff v. McDonnell*, 418 U.S. 539, 552 (1974) (statute providing criteria for revocation of good time credit).

227. See note 108 *supra* and accompanying text.

228. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979).

229. *Id.* at 13-14; see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

230. See 442 U.S. at 32-33 (Marshall, J., dissenting in part).

231. See *Wolff v. McDonnell*, 418 U.S. 539, 562-63 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

232. See pt. IV *infra*.

233. 408 U.S. 471, 489 (1972).

234. 418 U.S. 539, 564-71 (1974).

more successful if used as safeguards of the prisoner's dignity under the intrinsic approach than as formulas for utilitarian precision.²³⁵ Although error-free decisions are an important element in the decent treatment of inmates, accuracy should not be the sole consideration.

The function of due process in maintaining administrative accuracy must be distinguished from its ability to prevent arbitrary decisions.²³⁶ Among the attributes of procedural due process is that no "better way [has] been found for generating the feeling . . . that justice has been done."²³⁷ Even though the individual may disagree with the result of a hearing, he can voice no dissatisfaction with the method used to reach the decision.²³⁸ The beneficial psychological effect of according procedural due process is especially important in the prison setting, for it can provide a safety valve for prisoner anger and resentment against a seemingly unsympathetic system.²³⁹ A fair and just procedure may help prison officials in maintaining internal control, as well as in making the prisoner more susceptible to rehabilitative efforts. Cosmetic fairness, however, is second to the genuine fairness that due process can provide by existing as a check against the arbitrary use of discretionary power.²⁴⁰ Although the proceeding may appear fair, the decision may still be arbitrary and capricious. Additional safeguards are insurance for genuine fairness by providing a means for an exterior check.²⁴¹ An abuse of power would only defeat the rehabilitative strategy. These positive values must be considered in determining what process is due inmates.

The third *Mathews* factor of government interest involves practical considerations of how procedural due process will effectuate official policy. Acceptance of the intrinsic approach would acknowledge that the government interest lies in the rehabilitation of inmates²⁴² and that administrative details

235. L. Tribe, *supra* note 5, § 10-15, at 554; Mashaw, *supra* note 90, at 48.

236. Rabin, *supra* note 8, at 77-78; *Interest Balancing*, *supra* note 8, at 1517 n.35.

237. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) (footnote omitted).

238. See *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 930 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979); *Interest Balancing*, *supra* note 8, at 1517 n.35.

239. See T. Wicker, *supra* note 17, at 3-18. The disciplining of problem prisoners by placing them in solitary confinement was the catalyst of the Attica uprising. That one of the "disciplined" prisoners was only marginally suspected of being involved in a shoving incident in the prison yard illustrates the potential for the abuse of discretion. *Id.* at 9-11. Almost a decade later, Attica is still permeated with an atmosphere of tension and imminent prisoner violence. *N.Y. Times*, Feb. 1, 1980, § B, at 1, col. 3. Although a grievance committee has been formed to solve prison problems such as abuse of disciplinary power, it has been criticized as a safety valve for tension because the prison administration maintains total control of the system. *N.Y. Times*, Feb. 23, 1980, at 1, col. 4. The manner in which problems are handled remains a source of prison unrest. See *id.*

240. *Stassi v. Hogan*, 395 F. Supp. 141, 145 (N.D. Ga. 1975), *overruled*, *Mayo v. Sigler*, 428 F. Supp. 1343 (N.D. Ga. 1977).

241. *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 930 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979); see note 218 *supra*.

242. See note 108 *supra* and accompanying text.

should not deter that motive unless the main goal would be totally defeated.²⁴³ For instance, a hearing that called for an impartial panel of judges from the circuit in which the prison is located would cause unreasonable delay and limit the number of possible hearings. The government function of rehabilitation must be analyzed in determining granted procedures.²⁴⁴ In all facets of the prison system, the authorities act after a determination of the success or failure of the rehabilitative process. For example, a parole revocation implies that the conditioned experiment in demonstrating that liberty can be properly used has failed. When parole is granted, the internal efforts to prepare the inmate for the outside world have initially succeeded.

Any mandated procedure must be workable or become self-defeating. The viability of the *Wolff* and *Morrissey* procedures have been proved through their use and adoption.²⁴⁵ Administrative agencies, such as parole boards, are usually authorized to act in accordance with the procedures normally associated with due process.²⁴⁶ If the use of these procedures is judicially or legislatively mandated and proved workable, the need for discretion to define the procedure due is minimal and no longer as important as some courts believe.²⁴⁷ Thus, discretion becomes merely a factor that should be exercised in extraordinary circumstances;²⁴⁸ it is a factor that is always subject to judicial review.²⁴⁹ Discretion can then be used to define the form of the

243. *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968); S. Rep. No. 96-416, *supra* note 99, at 15 ("It should be noted that many of the orders imposed on corrections administrators have involved neither excessive time nor money."); *cf.* *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) (the institutionalized should not be deprived of their due process rights because of costs).

244. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

245. While the *Morrissey* procedures have been codified, 18 U.S.C. §§ 4214(c)-(d) (1976); 28 C.F.R. § 2.50 (1979), the *Wolff* procedures have not been adopted. One commentator, however, has asserted that the *Wolff* procedures will continue to govern prison disciplinary hearings. J. Palmer, *supra* note 67, § 8.3, at 108-12. In *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979), the Nebraska parole authorities had actually adopted many of the procedures prescribed in *Wolff. Id.* at 4-5.

246. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Prison proceedings are considered more analogous to administrative hearings than to criminal trials. See *Corrections, supra* note 120, at 402.

247. See, e.g., *Franklin v. Shields*, 569 F.2d 800, 800 (4th Cir.) (en banc) (per curiam) (procedures involved in a parole release hearing depended on the exercise of discretion by the Virginia parole authorities), *cert. denied*, 435 U.S. 1003 (1978); *Young v. Duckworth*, ___ Ind. ___, 394 N.E.2d 123, 126 (1979) (Indiana courts will not review the statutory grant of discretion to the parole board to determine proper procedures for parole release hearings).

248. See, e.g., *United States ex rel. Carson v. Taylor*, 540 F.2d 1156, 1160, 1162 (2d Cir. 1976) (unusual circumstances lessen the demands of due process); *Meyers v. Alldredge*, 492 F.2d 296, 307 (3d Cir. 1974) (inmate work stoppages considered unusual circumstances); *Biagiarelli v. Sielaff*, 483 F.2d 508, 511-12 (3d Cir. 1973) (conspiracy to escape justified imposition of solitary confinement); *United States ex rel. Arzonica v. Scheipe*, 474 F.2d 720, 722 (3d Cir. 1973) (prison officials may exercise discretion in exigent circumstances).

249. *Calabro v. United States Bd. of Parole*, 525 F.2d 660, 661 (5th Cir. 1975); see *McGautha v. California*, 402 U.S. 183, 269 (1971) (Brennan, J., dissenting) ("due process forbids the States to adopt procedures that would defeat the institution of . . . judicial review").

mandated procedures, thereby preserving the needed flexibility inherent in due process.²⁵⁰

IV. PARAMETERS OF THE PROCESS DUE

A. *Minimum Criteria*

Although the intrinsic approach dictates a structure for procedural due process, the inherent elasticity in each element will preserve flexibility. Certain minimum criteria must be met to satisfy intrinsic due process and to fulfill the rehabilitative strategy.

1. Notice

Notice, a fundamental due process requirement,²⁵¹ is essential to inform the prisoner of the nature of the government action and to enable him to gather the facts that air his side of the story.²⁵² The notice must be reasonable in both time and manner.²⁵³ The standard of reasonableness inherent in the notice requirement maintains a certain amount of flexibility; lower courts, however, have attempted to define specific attributes of adequate notice.²⁵⁴ The basic format consists of a personally delivered written statement of facts that allows a reasonable time period for the inmate to prepare.²⁵⁵ The time factor is most important because unreasonable notice will nullify the prisoner's opportunity to be heard.²⁵⁶ The measure of time can vary,²⁵⁷ but as in the parole revocation cases,²⁵⁸ it must include the period in which information

250. See note 15 *supra* and accompanying text.

251. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *In re Gault*, 387 U.S. 1, 33-34 & n.54 (1967); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Friendly*, *supra* note 54, at 1280.

252. *Vitek v. Jones*, 48 U.S.L.W. 4317, 4321 (U.S. Mar. 25, 1980) (No. 78-1155); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 37-38 (1979) (Marshall, J., dissenting in part); *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972); *Franklin v. Shields*, 569 F.2d 784, 794 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978); J. Palmer, *supra* note 67, § 8.3.1, at 113.

253. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

254. *Sands v. Wainwright*, 357 F. Supp. 1062, 1085-86 (M.D. Fla.), *vacated on other grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974); *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971); *Sinclair v. Henderson*, 331 F. Supp. 1123, 1129 (E.D. La. 1971); *Morris v. Travisono*, 310 F. Supp. 857, 870 (D.R.I. 1970).

255. *Sands v. Wainwright*, 357 F. Supp. 1062, 1086 (M.D. Fla.), *vacated on other grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974).

256. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 21 (1979) (Powell, J., concurring in part and dissenting in part).

257. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 564 (1972) (24 hours); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 576 F.2d 1274, 1283 (8th Cir. 1978) (minimum of 72 hours), *rev'd and remanded*, 442 U.S. 1 (1979); *Cardaropoli v. Norton*, 523 F.2d 990, 996 (2d Cir. 1975) (minimum of 10 days notice) (implicitly overruled in *Pugliese v. Nelson*, Nos. 79-2136, -2138, -2140 (2d Cir. Mar. 4, 1980)).

258. See *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (inquiry should be speedily undertaken); *Hyser v. Reed*, 318 F.2d 225, 243-44 (D.C. Cir.) (en banc) (Burger, J.) (same), *cert. denied*, 375 U.S. 957 (1963). *But see* *Moody v. Daggett*, 429 U.S. 78, 87 (1976) (immediate hearing not required because prospect of future incarceration is uncertain).

is current and sources remain available.²⁵⁹ The inmate's ability to prepare adequately is the controlling factor in determining the time element.

Normally, the notice given to prisoners must be in writing because in practice, oral notice and the opportunity to be heard tend to blur together because the notice is given virtually contemporaneous with the hearing.²⁶⁰ The Third Circuit, however, has approved the adequacy of oral notice.²⁶¹ The court reasoned that prisoners gain a minimal benefit in the preparation of written notice because it does not alter the character of any prison proceeding.²⁶² Such an approach is a unilateral examination of the nature of notice. Oral notice should be restricted to emergency disciplinary situations in which control of the prison is imperative.²⁶³ In such cases, oral notice does not subvert the basic goal of rehabilitation, and it provides prison officials with the necessary discretion to run their prisons effectively. The notice requirement places only a minimal burden on the administration of prison proceedings.²⁶⁴

2. Disclosure by the Authorities of Evidence in Their Possession

In a disciplinary or revocation proceeding, the prisoner should be entitled to know the nature of the evidence that will be presented to enable him to rebut the charges or to show the existence of mitigating circumstances.²⁶⁵ In these situations, the procedure is an undisputed right in which discretion should play no part.²⁶⁶ In the parole release situation, however, this requirement should take the form of publishing the parole release criteria. "Articulation of criteria is crucial. . . . The notion of an inmate's participation in a program of change depends on an open information system. His sense of just treatment is inextricably bound with it."²⁶⁷ Disclosure would allow the inmate to marshal the facts for presentation to the parole board. Furthermore, it would also become a part of the rehabilitative strategy by informing the inmate of the panoply of criteria being used to shape his future. The intrinsic approach, because of the inherent emphasis on rehabilitation, would mandate this procedure.

259. *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); *Hyser v. Reed*, 318 F.2d 225, 243-44 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963).

260. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974).

261. *Braxton v. Carlson*, 483 F.2d 933, 941-42 (3d Cir. 1973).

262. *Id.*; see *Meyers v. Alldredge*, 492 F.2d 296, 307 & n.33 (3d Cir. 1974).

263. *Meyers v. Alldredge*, 492 F.2d 296, 307 (3d Cir. 1974); cf. *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) (school disciplinary action).

264. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

265. *Id.* at 563-64; see *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Nimmo v. Simpson*, 370 F. Supp. 103, 105 (E.D. Va. 1974).

266. Friendly, *supra* note 54, at 1283.

267. Corrections, *supra* note 120 at 397; see *Franklin v. Shields*, 569 F.2d 784, 793 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800, 800 (4th Cir.) (en banc) (per curiam) (approval of procedure based on prior practice, although not constitutionally mandated), *cert. denied*, 435 U.S. 1003 (1978); *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1284-85 (D.C. Cir. 1974); 28 C.F.R. §§ 2.18-.20 (1979). See also *Haymes v. Regan*, 525 F.2d 540, 543 (2d Cir. 1975); Note, *The Applicability of Due Process and State Freedom of Information Acts to Parole Release Hearings*, 27 Syracuse L. Rev. 1011, 1024 & n.69 (1976) [hereinafter cited as *Parole Release Hearings*].

Prior denials of parole criteria have been premised on the similarity between the functions of disclosure and of a written statement of reasons for denial.²⁶⁸ Because the written statement provides post facto protection of prisoners,²⁶⁹ it is argued that the publication of criteria becomes superfluous.²⁷⁰ This rationale is indicative of the cost benefit analysis of *Mathews*,²⁷¹ which ignores the additional correctional values of disclosure. A publication requirement would result in no substantial burden on the administration and no invasion of the parole board's discretionary powers.²⁷²

3. An Opportunity to be Heard

The prisoner's opportunity to be heard generally takes the form of a personal hearing,²⁷³ in which a factual determination is combined with the exercise of discretion.²⁷⁴ In mandating that this opportunity be provided, the Supreme Court's main concern has been that the correctional proceeding not become adversarial or akin to a formal criminal prosecution.²⁷⁵ Correctional proceedings have flexible rules so that unlike a formal trial, the proceeding can consider a broad range of information.²⁷⁶ The delaying tactics and other abuses of the criminal justice system are to be especially avoided.²⁷⁷ Moreover, the nature of an adversarial proceeding would defeat the rehabilitative strategy by creating tension between the government and the inmate.²⁷⁸ Allowing an inmate presentation, however, would not automatically create an adversarial proceeding because the nature of a correctional proceeding is to gather and evaluate information, a process in which the prisoner can assist.²⁷⁹ The intrinsic approach supports personal participation because it creates

268. See *Haymes v. Regan*, 525 F.2d 540, 543-44 (2d Cir. 1975). *But see Franklin v. Shields*, 569 F.2d 784, 792-93 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800, 800 (4th Cir.) (en banc) (per curiam) (disclosure mandated because a reasons requirement did not exist), *cert. denied*, 435 U.S. 1003 (1978).

269. See notes 311-12 *infra* and accompanying text.

270. *Haymes v. Regan*, 525 F.2d 540, 543-44 (2d Cir. 1975).

271. See notes 223-24 *supra* and accompanying text.

272. *Franklin v. Shields*, 569 F.2d 784, 793 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

273. See *J. Palmer*, *supra* note 67, § 8.3.2, at 114; *Franklin v. Shields*, 569 F.2d 784, 796 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

274. *J. Palmer*, *supra* note 67, § 8.3.2, at 114-16; see pt. II(B) *supra*.

275. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 14, 15-16 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 567 (1974).

276. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *J. Palmer*, *supra* note 67, § 9.4.3, at 141.

277. See pt. II(B) *supra*.

278. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13-14 (1979); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963). In reference to parole revocation hearings, Chief Justice Burger, then on the District of Columbia Circuit, characterized the relationship as "not . . . pursuer and quarry but a relationship partaking of *parens patriae*." *Id.* at 237.

279. *Zurak v. Regan*, 550 F.2d 86, 95 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977); *Corrections*, *supra* note 120, at 403; see *Mashaw*, *supra* note 90, at 50. *Contra*, *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 15 (1979).

dignity, self-respect, and a sense of fairness.²⁸⁰ Even if a hearing is characterized as discretionary, it can address the question of how the discretion should be exercised in the circumstances.²⁸¹ Although the prisoner may be challenging the board's authority, the proceeding would not become adversarial because the focus of the fact-finding function shifts to the board by examining how it arrived at the decision.²⁸²

In *Greenholtz*, the Supreme Court disputed the necessity of personal hearings in parole release proceedings because it felt that the factual issues are never so complex to necessitate inmate participation to minimize the risk of error.²⁸³ Even if some kind of hearing is granted, the allowance of a personal appearance would depend on "the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs."²⁸⁴ The Supreme Court's faith in the accuracy of data used by parole boards is unfounded;²⁸⁵ prisoner input would be valuable, at least in presenting the board with a chance to compare the inmate to their compilation of data. The alternative of written presentation is inflexible because the inmate must commit himself blindly without knowing the board's interests in making its decision. Furthermore, it is devoid of the benefits arising from the natural flow of conversation concerning specific issues and matters of importance that an uneducated prisoner can only ascertain through a personal appearance.²⁸⁶ The major objection to a personal hearing has been the expense involved.²⁸⁷ Under the intrinsic approach, cost should never be a consideration unless totally prohibitive.²⁸⁸

In stating his position, the prisoner should be allowed to present supporting

280. Mashaw, *supra* note 90, at 50; see Summers, *Evaluating and Improving Legal Process—A Plea for "Process Values"*, 60 Cornell L. Rev. 1, 23 (1974).

281. See L. Tribe, *supra* note 5, § 10-12, at 533 n.3.

282. See *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973).

283. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 14-15 (1979), see *Zurak v. Regan*, 550 F.2d 86, 95 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977).

284. Friendly, *supra* note 54, at 1281 (footnote omitted); see *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

285. See Note, *Prisoner Access to Parole Files: A Due Process Analysis*, 47 Fordham L. Rev. 260, 275 (1978); *Parole Release Hearings*, *supra* note 267, at 1027.

286. See S. Rep. No. 96-416, *supra* note 99, at 19. ("[M]any institutionalized persons . . . are intellectually and emotionally incapable of understanding the concept of legal rights, while others are conditioned to accept their institutional environments without question. Many are inarticulate, and most are uneducated."); cf. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (welfare recipients).

287. Friendly, *supra* note 54, at 1276 & n.54; see *Wheeler v. Montgomery*, 397 U.S. 280, 284 & n.3 (1970) (Burger, C.J., dissenting).

288. *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976) ("a state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget"), *aff'd and remanded sub nom. Newman v. State*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); see *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) (administrative costs cannot justify failure to accord constitutional procedures); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971) (same); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (same); note 243 *supra* and accompanying text.

witnesses and documentary evidence.²⁸⁹ Any hazards engendered by such presentation are considerably less than those attending a grant of the right of confrontation.²⁹⁰ This facet of the opportunity to be heard is especially helpful in discretionary decisions. A potential parolee could obtain evidence from a prospective employer about the type of work available, and from his family about the home to which he will return.²⁹¹ An inmate threatened with revocation of his work-release program could have his employer testify about the progress he has made on the job. A transferee could present his work from a prison educational program that would be disrupted.

Prison authorities have the discretion to exclude any prisoner evidence that is irrelevant, unnecessary, or hazardous.²⁹² Prison officials therefore have control over the subject matter of a proceeding. For example, a parole hearing is not an opportunity to relitigate an adverse decision in a disciplinary hearing.²⁹³ Redundant witnesses may be excluded as time wasting, or, if an unmanageable number of persons are called from the prison population, other witnesses may be excluded as security threats.²⁹⁴ A security threat may be a valid reason for the exercise of discretion because the lack of discipline or loss of control would undermine the rehabilitative process.²⁹⁵ A suggested mechanism to prevent the abuse of discretion, and to aid the hearing process, is the submission of written requests by prisoners to present witnesses, accompanied by a summary of their testimony. A denial should be included in the record with an explanation.²⁹⁶ Informal depositions may also be used to facilitate the proceeding and to preclude the abuse of discretion by prison authorities.²⁹⁷

4. Impartial Board

An impartial board is an imperative factor in all cases in which a hearing is required.²⁹⁸ Any correctional decision must be based exclusively on the facts

289. *Wolff v. McDonnell*, 418 U.S. 539, 567 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

290. *Franklin v. Shields*, 569 F.2d 784, 796 (4th Cir. 1977), *aff'd in part and rev'd in part*, F.2d 800 (4th Cir.) (en banc) 569 (per curiam), *cert. denied*, 435 U.S. 1003 (1978); *Workman v. Mitchell*, 502 F.2d 1201, 1210 (9th Cir. 1974); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 715 (7th Cir. 1973); *Murphy v. Wheaton*, 381 F. Supp. 1252, 1255 (N.D. Ill. 1974).

291. *Franklin v. Shields*, 569 F.2d 784, 796 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

292. *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

293. *Franklin v. Shields*, 569 F.2d 784 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

294. J. Palmer, *supra* note 67, § 8.3.4, at 117.

295. See notes 348-49 *infra* and accompanying text.

296. J. Palmer, *supra* note 67, § 8.3.4, at 117. The record may be a necessary tool for judicial review, especially in examining the exercise of discretion in shaping the procedural structure. See Friendly, *supra* note 54, at 1292. See also *Catalano v. United States*, 383 F. Supp. 346, 352 (D. Conn. 1974).

297. J. Palmer, *supra* note 67, § 8.3.4, at 117; see *Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 n.5 (1973); *United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 823 n.4 (7th Cir. 1977).

298. *Vitek v. Jones*, 48 U.S.L.W. 4317, 4321 (U.S. Mar. 25, 1980) (No. 78-1155); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Meyers v. Alldredge*, 492 F.2d 296, 305-06 (3d Cir. 1974); Friendly, *supra* note 54, at 1279-80; Harvard

presented to the board. Partiality can take two forms—factual or interest. Factual partiality involves a board member who contributes information to the fact-finding function of the board, in addition to evaluating his own information.²⁹⁹ Standards have been articulated to exclude prison personnel who have actively participated in the matter before any of the various prison authorities;³⁰⁰ these standards must be maintained to provide a prisoner with due process. For example, a member of a prison disciplinary hearing should not be a member of the board that hears the same prisoner's petition for parole.³⁰¹

Interest partiality or "command influence"³⁰² presents a more troublesome issue, because the involvement of a prison authority, such as a warden, biases the proceeding. Although it has been agreed that a predisposition of a proceeding is improper, most courts have refused to sustain challenges against the composition of the decisionmaking bodies,³⁰³ relying on their power to reverse blatantly arbitrary decisions.³⁰⁴ Consequently, the subtlety of interest partiality can escape the court if the predetermination is, nevertheless, backed by evidence. The subversive influence is camouflaged by the propriety of the decision. This is an example of cosmetic fairness.³⁰⁵ As in factual partiality, guidelines must be established. The initiator of an action or any of his subordinates should not be allowed to participate in a prison disciplinary hearing because of the temptation to abuse power.³⁰⁶ The intrinsic approach

Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. Crim. L.C. & P.S. 200, 210 (1972). See also *Ward v. Village of Monroe*, 409 U.S. 57, 61-62 (1972) (impartial judge); *In re Murchison*, 349 U.S. 133, 136 (1955) (same).

299. See, e.g., *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 208 (8th Cir. 1974); *Meyers v. Alldredge*, 492 F.2d 296, 305-07 (3d Cir. 1974); *Powell v. Ward*, 392 F. Supp. 628, 633 (S.D.N.Y. 1975), modified, 542 F.2d 101 (2d Cir. 1976); *Fife v. Crist*, 380 F. Supp. 901, 910-11 (D. Mont. 1974); *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971). *Contra*, *Russell v. Division of Corrections*, 392 F. Supp. 476, 477 (W.D. Va.), *aff'd mem.*, 530 F.2d 969 (4th Cir. 1975).

300. *Sands v. Wainwright*, 357 F. Supp. 1062, 1084 (M.D. Fla.), *vacated on other grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974); see, e.g., *United States ex rel. Neal v. Wolfe*, 346 F. Supp. 569, 575 (E.D. Pa. 1972); *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971). In *Sands*, the court stated: "[A] member of a disciplinary committee is disqualified from service thereon in any and every case in which (1) he has participated as an investigating or reviewing officer, or (2) he is a witness, or (3) he is a person charged with a subsequent review of the decision, or (4) he has any personal knowledge of any material fact, or (5) he has any prior material involvement, or (6) he has any personal interest in the outcome." 357 F. Supp. at 1084. Prison personnel should not be unilaterally excluded, however, because their experience qualifies them to serve, and the nature of their position does not always cause an inherent bias. *Id.* at 1085.

301. See J. Palmer, *supra* note 67, § 9.4.1, at 139.

302. *Collins v. Vitek*, 375 F. Supp. 856, 860 (D.N.H. 1974); see *Crooks v. Warne*, 516 F.2d 837, 839-40 (2d Cir. 1975).

303. *Crooks v. Warne*, 516 F.2d 837, 839-40 (2d Cir. 1975); *Collins v. Vitek*, 375 F. Supp. 856, 860 (D.N.H. 1974); *Nimmo v. Simpson*, 370 F. Supp. 103, 107 (E.D. Va. 1974); *Pearson v. Townsend*, 362 F. Supp. 207, 221 (D.S.C. 1973).

304. *Nimmo v. Simpson*, 370 F. Supp. 103, 107 (E.D. Va. 1974).

305. See notes 240-41 *supra* and accompanying text.

306. *Collins v. Vitek*, 375 F. Supp. 856, 860 (D.N.H. 1974); *Colligan v. United States*, 349 F. Supp. 1233, 1237 (E.D. Mich. 1972).

stresses prevention, rather than correction, because of the emphasis on human dignity.³⁰⁷

5. A Written Statement of Reasons for an Adverse Decision

A written statement of reasons is one of the most beneficial procedures available to the inmate because of the protection provided when preparation time is accorded.³⁰⁸ The content of the statement cannot be mere "boiler plate" language that is vague and meaningless to the average prisoner,³⁰⁹ but must supply general explanatory reasons and the basis in fact for the action.³¹⁰ "It does no good to tell a prisoner he is being denied parole because he is a danger to society unless he is told why he is so regarded, and whether there is anything he can do to convince the Board otherwise."³¹¹

As a check on the discretionary powers of a correctional board, the written statement serves two interrelated functions. First, by articulating its findings, the correctional board creates a powerful internal preventive against erroneous decisions.³¹² Because the board knows that it must commit itself on paper, the members are forced to examine all relevant information. Judicial review provides a further check on the board's powers after delivery of the

307. See note 90 *supra* and accompanying text.

308. Judge Friendly, in rating the importance of certain elements of procedural due process, classified a written statement of reasons as an "item close to the top . . . of the scale." Friendly, *supra* note 54, at 1292 (footnote omitted).

309. *Billiteri v. United States Bd. of Parole*, 385 F. Supp. 1217, 1220 (W.D.N.Y. 1974), *rev'd on other grounds*, 541 F.2d 938 (2d Cir. 1976); *Candarini v. Attorney Gen.*, 369 F. Supp. 1132 (E.D.N.Y. 1974). In *Candarini*, the rejected language was: "Your release at this time would depreciate the seriousness of the offense committed." *Id.* at 1137.

310. See, e.g., *Franklin v. Shields*, 569 F.2d 784, 797 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978); *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 934 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979). A reasonably detailed written statement of reasons has often been judged sufficient for due process and statutory requirements. *Shahid v. Crawford*, 599 F.2d 666, 671-72 (5th Cir. 1979); *Fronczak v. Warden*, 553 F.2d 1219, 1221 (10th Cir. 1977); *Hill v. Attorney Gen.*, 550 F.2d 901, 902 (3d Cir. 1977) (per curiam); *McGee v. Aaron*, 523 F.2d 825, 827 (7th Cir. 1975); *deVyver v. Warden*, 388 F. Supp. 1213, 1218-20 (M.D. Pa. 1974). In *Hill*, the following statement was judged sufficient: "Your offense behavior has been rated as greatest severity because dangerous explosives were employed to seriously and permanently damage an individual. . . . You have been in custody a total of 10 months. Guidelines . . . indicate a range of 36 or more months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted. . . . Therefore, the decision in your case has been based in part upon a comparison of the relative severity of your offense behavior with offense behavior listed in the very high severity category." 550 F.2d at 902; see *Robinson v. United States Bd. of Parole*, 403 F. Supp. 638, 640 (W.D.N.Y. 1975) (severity rating must be justified by the reasons offered for the denial of parole).

311. *Johnson, Federal Parole Procedures*, 25 Ad. L. Rev. 459, 485 (1973).

312. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974); *Dumschat v. Board of Pardons*, 593 F.2d 165, 166 (2d Cir.), *vacated and remanded*, 442 U.S. 926 (1979), *aff'd and remanded*, Nos. 78-2124, -2125 (2d Cir. Mar. 20, 1980).

statement, for it becomes a basis for a court to decide whether the decision followed the guidelines of established criteria and whether it was based on valid and relevant evidence.³¹³ As these documents are compiled, a pattern should develop; the written statement will either promote consistency of decision or will supply evidence of the board's arbitrariness.³¹⁴ The written statement, therefore, becomes the correctional board's conscience.

Furthermore, the rehabilitative strategy is greatly enhanced by the written statement. The statement, as a demonstration of a fairly reached decision, evidences respect for the prisoners' dignity, and may therefore relieve inmate frustration.³¹⁵ Especially in the area of parole release, the statement can show the prisoner his own weaknesses as a parole candidate, either as an internal disciplinary problem or as a probable failure as a parolee,³¹⁶ thereby allowing the prisoner to take action in self-improvement. Moreover, the inmate is presented with documentary evidence to present in any subsequent proceeding in which he may become involved.³¹⁷

In *Greenholtz*, the Court refused to accept this procedure as part of the due process to which parolees are entitled because it would convert the hearing into an adversarial proceeding by the issuance of a guilt determination.³¹⁸ Although the court had previously been concerned, in *Morrissey v. Brewer*³¹⁹ and *Wolff v. McDonnell*,³²⁰ with prison proceedings becoming full-fledged criminal trials,³²¹ the argument opposing written statements never arose, even though it might appear applicable in either a revocation or disciplinary hearing. In *Greenholtz*, the Court was merely concerned with the satisfaction of limited statutory requirements.³²² Obviously, the *Greenholtz* reasoning should carry no weight because its concern is form rather than substance, thereby ignoring the value of the written statement.

This procedure contains an administrative value because it would impose no additional burden on the system. The federal government and a majority of the states have voluntarily adopted the issuance of written statements³²³

313. *Franklin v. Shields*, 569 F.2d 784, 797 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978); *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 929 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979).

314. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 40 (1979) (Marshall, J., dissenting in part); Friendly, *supra* note 54, at 1292.

315. See *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 40 (1979) (Marshall, J., dissenting in part); *Childs v. United States Bd. of Parole*, 511 F.2d 1270, 1282 (D.C. Cir. 1974).

316. *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 932 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), *overruled*, *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979).

317. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

318. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 15-16 (1979).

319. 408 U.S. 471 (1972).

320. 418 U.S. 539 (1974).

321. See notes 275-78 *supra* and accompanying text.

322. 442 U.S. at 11-16.

323. V. O'Leary & K. Hanrahan, *Parole Systems in the United States* 41 (3d ed. 1976); see,

because the cost is minimal when weighed against its benefits.³²⁴ Moreover, the written statement poses no threat to a prison's internal security.³²⁵ To maintain the needed flexibility, however, an exception has been made. If, in the discretion of the board, divulgence of a reason would create a risk to the prison's security or an inmate's safety, the reason may properly be excluded.³²⁶ When such discretion is exercised, the written statement should properly indicate the omission.³²⁷

B. *When More Process is Due*

Additional procedures may be available to the inmate under the intrinsic approach only if a significant benefit accrues to the rehabilitative process. The Supreme Court has generally excluded both the right to counsel and the right to confrontation from prison proceedings.³²⁸ The intrinsic approach would require either limited forms of these rights or reasonable alternatives.

1. Right to Counsel

In *Gagnon v. Scarpelli*,³²⁹ the Supreme Court held that a parolee or probationer received a conditional right to counsel only if he had a colorable claim of innocence, a colorable claim of mitigation, or the incapacity to take advantage of the opportunity to be heard.³³⁰ Although prison authorities retained the power to refuse to allow the presence of an attorney, the Court required that the exercise of this discretion must be explained in the record.³³¹ Such a refusal then becomes subject to judicial review.³³²

The Court has not been so willing, however, to grant a prisoner's request for counsel. Inmates have been denied the presence of counsel during disci-

e.g., 28 C.F.R. § 2.13(c) (1979); Fla. Stat. Ann. § 947.174(6)(a) (West Supp. 1978); Ill. Ann. Stat. ch. 38, § 1003-3-5(f) (Smith-Hurd Supp. 1979); Md. Ann. Code art. 41, § 114d(3) (1957/1978); N.J. Stat. Ann. § 30:4-123.19 (West 1964); N.Y. Exec. Law § 259-i(2)(a) (McKinney Supp. 1979). *But see* S.D. Codified Laws Ann. § 24-13-7 (1979).

324. *Franklin v. Shields*, 569 F.2d 784, 797 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

325. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

326. *Id.*

327. *Id.*

328. *Baxter v. Palmigiano*, 425 U.S. 308, 315, 321-22 (1976) (access to counsel and right to cross-examine witnesses are not mandatory requirements of due process inside prison walls); *Wolff v. McDonnell*, 418 U.S. 539, 567, 570 (1974) (same). *But see Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973) (conditional right to counsel is permitted for probationers and parolees); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parolee has the right of confrontation in revocation hearings, subject to the discretion of the parole board).

329. 411 U.S. 778 (1973).

330. *Id.* at 790-91. An additional exception has been created to the general rule of not allowing counsel to be present at a prison hearing. If the prisoner is being transferred because of an alleged mental illness, counsel is permitted at the transfer hearing because of the great need of the mentally ill inmate for legal assistance. *Vitek v. Jones*, 48 U.S.L.W. 4317, 4322 (U.S. Mar. 25, 1980) (No. 78-1155). Under the intrinsic approach, it may be possible to extend this exception to all prison proceedings. *See* note 99 *supra*.

331. 411 U.S. at 791.

332. *See Daigle v. Helgemoe*, 399 F. Supp. 416, 420 (D.N.H. 1975) (prison disciplinary hearing).

plinary hearings on the ground that the intrusion of counsel would harm the rehabilitative strategy.³³³ Arguably, the introduction of counsel would create an adversarial system that the Court wishes to avoid.³³⁴ Present correctional proceedings have the purpose of ascertaining the truth; attorneys have the purpose of advancing their client's causes. The two functions are not always compatible. Unreasonable delays in processing cases may arise from the recognition of a mandatory right of counsel³³⁵ because while most prisons are in rural settings, attorneys work in urban centers.³³⁶ Moreover, attorneys would be unnecessary due to the relaxed evidentiary rules in prison hearings.³³⁷

One reasonable alternative is the counsel substitute who becomes available if the inmate is illiterate or if the complexity of the factual issues makes prisoner comprehension unlikely.³³⁸ Suggested counsel substitutes include prison staff members³³⁹ and "jailhouse lawyers,"³⁴⁰ whose function would be to help collect and present evidence to maximize the prisoner's opportunity to be heard.³⁴¹ The use of counsel substitutes, especially jailhouse lawyers, would be encouraged by the intrinsic approach and would assist the rehabilitative strategy by respecting the dignity of the inmate involved.³⁴²

Moreover, a valid argument exists for a wholesale adoption of the *Gagnon* criteria inside prison walls by using counsel substitutes. If a claim of innocence or mitigation is colorable,³⁴³ the use of a jailhouse lawyer would only increase the amount of information before the board without increasing the administrative burdens that would result from the presence of an attorney. The proceeding would remain primarily fact-finding in nature because the

333. *Wolff v. McDonnell*, 418 U.S. 539, 569-70 (1974) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973)).

334. *Id.* at 570; *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973); Friendly, *supra* note 54, at 1290.

335. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974); see *Meyers v. Alldredge*, 492 F.2d 296, 309 (3d Cir. 1974); G. Alpert, *supra* note 182, at 136.

336. See T. Wicker, *supra* note 17, at 34; cf. S. Rep. No. 96-416, *supra* note 99, at 19-20 (intrusion of federal government into state-run prison systems is necessary because few private attorneys will accept the burdens involved in representing the institutionalized).

337. *Meyers v. Alldredge*, 492 F.2d 296, 308 (3d Cir. 1974).

338. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974).

339. Staff members would include, for example, "caseworkers at federal institutions [who] are expected to assist offenders." Bureau of Prisons, Policy Statement No. 7500.14A, at 4 (Jan. 7, 1970).

340. The language of *Wolff* does not exclude such other substitutes as interns and paralegals, 418 U.S. at 570, but the same problems of availability and access would remain. Conversely, the Supreme Court approved the use of "jailhouse lawyers" in *Johnson v. Avery*, 393 U.S. 483, 490 (1969). A jailhouse lawyer has been defined as "any prisoner who provides legal assistance to another prisoner or who files legal papers in his own behalf." G. Alpert, *supra* note 182, at 4. Professor Alpert has suggested that prisoner involvement can be effective and useful. *Id.* at 8.

341. See 28 C.F.R. § 2.13(b) (1979) ("The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request.").

342. See note 100 *supra*.

343. Colorable is defined as "[t]hat which is in appearance only." Black's Law Dictionary 332 (4th ed. 1968).

determination to provide the substitute has its origins in the factual question. Although the prisoner involved in the disciplinary hearing could qualify in any of the *Gagnon* circumstances, the potential parolee could qualify only in the limited circumstances presented by *Wolff*.³⁴⁴ Thus, the intrinsic approach provides an alternative right to counsel for prisoners.

2. The Right to Confrontation

The right to confrontation and cross-examination of adverse witnesses has been limited to revocation hearings,³⁴⁵ with the qualification that a finding of good cause by the hearing officer can preempt the right.³⁴⁶ An exercise of the good cause power is subject to judicial review.³⁴⁷

The Supreme Court believes that good cause always exists inside prison walls.³⁴⁸ The right to confrontation might create a hazard to institutional and rehabilitative interests. "Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact . . . on the important aims of the correctional process."³⁴⁹ Participation in the hearing process would therefore frustrate the goal of rehabilitation by creating a security threat and would defeat the intrinsic approach. The opportunity to be heard sufficiently satisfies the requirement of the intrinsic approach that the inmate participate in the rehabilitative process.³⁵⁰ The predominant effect of recognizing a right to confrontation in these circumstances would be to convert the hearing into an adversarial proceeding.³⁵¹ One district court has suggested the use of an oath to replace the right to confrontation, noting positive effects from an oath requirement, such as the threat of legal sanction for the making of knowingly false statements, and the solemn nature of the swearing process.³⁵²

In his dissent in *Wolff v. McDonnell*,³⁵³ Justice Douglas fashioned a reasonable exception to the denial of mandatory confrontation rights. He

344. See note 338 *supra* and accompanying text.

345. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

346. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). Good cause has been defined as "a specific finding that, if disclosed, the witness would be subject to risk of harm." *Galante v. United States Parole Comm'n*, 466 F. Supp. 1266, 1269 n.6 (D. Conn. 1979); see *Birzon v. King*, 469 F.2d 1241, 1244-45 (2d Cir. 1972).

347. See *Galante v. United States Parole Comm'n*, 466 F. Supp. 1266, 1270 (D. Conn. 1979). See also *Birzon v. King*, 469 F.2d 1241, 1244 (2d Cir. 1972).

348. *Baxter v. Palmigiano*, 425 U.S. 308, 321-22 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 567-68 (1974). In *Baxter*, the Supreme Court refused to allow a prisoner to have either the right to counsel or the right to confrontation, even though the subject of the disciplinary hearing was a crime for which he could be tried. 425 U.S. at 315.

349. *Wolff v. McDonnell*, 418 U.S. 539, 562 (1974). Granting the right to confrontation would also inhibit other prisoners from furnishing information, thereby restricting the flow of information that allows prison authorities to maintain discipline efficiently. *Id.* at 568.

350. *Meyers v. Alldredge*, 492 F.2d 296, 308 (3d Cir. 1974).

351. *Franklin v. Shields*, 569 F.2d 784, 796 (4th Cir. 1977), *aff'd in part and rev'd in part*, 569 F.2d 800 (4th Cir.) (en banc) (per curiam), *cert. denied*, 435 U.S. 1003 (1978).

352. *Nimmo v. Simpson*, 370 F. Supp. 103, 106 (E.D. Va. 1974).

353. 418 U.S. 539 (1974).

analogized this denial to cases in which the government is heavily reliant on informants.³⁵⁴ If the government's only evidence at a prison proceeding is the testimony of an informer, the government must decide whether to use the testimony or to grant cross-examination.³⁵⁵ This exception provides enough flexibility to enable prison authorities to decide whether to proceed with the investigation and to protect the individual prisoner from unwarranted charges of his fellow inmates.³⁵⁶ The proper grant of discretion, coupled with the oath requirement and the informer exception, satisfies the intrinsic approach to due process by protecting all the parties involved.

CONCLUSION

If the rehabilitative process is to be truly effective, the policies underlying the method of revoking participation in beneficial programs, as well as denying access to them, must be consistent with the rationale for creating the programs and encouraging their use. An accord between prison practices and the expressed goal of rehabilitation can be realized by the adoption of the intrinsic approach to due process. The minimum procedures of the intrinsic approach, which are measured by their assistance to the rehabilitative strategy, facilitate the attainment of this accord. Only a uniform application of constitutional guarantees can consistently provide respect to the human dignity of prisoners, which is always an extremely valuable interest.

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354. *Id.* at 600 (Douglas, J., dissenting in part). The government's privilege to preserve the anonymity of an informer is rooted in the policy of encouraging citizens to reveal any information they possess about a crime. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The Supreme Court has held, however, that this privilege is qualified if the defendant establishes that he will be denied his sixth amendment right to a fair trial unless he is allowed to confront the informer. *Id.* at 60-61. The qualification may be invoked in situations in which "the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* To challenge the privilege successfully, the need for the informer's identity must have a strong factual basis. *See id.* at 64-65. The applicability of the *Roviaro* test had been limited to criminal trials in which guilt or innocence is determined. *McCray v. Illinois*, 386 U.S. 300, 309 (1967). Further expansion has occurred, however, whereby the test is applicable to all litigation in which ultimate liability is decided. *Hampton v. Hanrahan*, 600 F.2d 600, 637 & n.40 (7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3414 (U.S. Dec. 11, 1979) (No. 79-912); *In re United States*, 565 F.2d 19, 22-23 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). The *Roviaro* test has been used in prison proceedings. *Carver v. England*, 470 F. Supp. 900, 901 (E.D. Tenn. 1978) (mem.), *aff'd*, 599 F.2d 1055 (6th Cir. 1979). In *Carver*, the petitioner asserted that he was denied his sixth amendment rights because the identity of an informer was not revealed at his probation hearing. 470 F. Supp. at 901. The district court held that disclosure of the informer's identity was not helpful or necessary because his identity was a peripheral tissue in the case and the petitioner's assertion of need was based on conjecture as to the role of the informer in causing probation to be revoked. *Id.* at 902-03. The Douglas exception calls for the use of the *Roviaro* test behind prison walls when the informer's identity and information is the sole source of government action. This single piece of evidence may become central to just determination of an action. 418 U.S. at 600 (Douglas, J., dissenting in part).

355. 418 U.S. at 600 (Douglas, J., dissenting in part).

356. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 177 (1974)