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The Parole-Release Decision - Due Process and Discretion

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THE PAROLE-RELEASE DECISION—DUE PROCESS AND DISCRETION

Plaintiff, a federal prisoner, petitioned for parole.[1] His request was denied by the Board of Parole. Plaintiff then sought a declaratory judgment that the board had abused its discretion and denied him due process of law in making its decision. He alleged that the board had considered only his past criminal record without investigating other pertinent information as required by board regulations.[2] The district court dismissed

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length or style of a college student's hair is irrelevant to any legitimate college administrative interests and any such regulation creates an arbitrary classification of college students" and is, therefore, violative of both the equal protection and due process clauses of the fourteenth amendment. Reading further, one finds the court stating that their refusal to extend the per se rule of *Karr* to the college campus was "not because the college student has constitutional rights which his lesser-educated counterpart lacks, but because as a matter of law the college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of this liberty is reasonably related to fostering or encouragement of education. The *value of the liberty hasn't changed*, rather the setting in which it is to be exercised has." (Emphasis added.)

There is an inconsistency recurrent throughout *Lansdale* as Judge Clark states that "[t]oday's decision should not be read as modifying the rationale of the majority opinion in *Karr*. *Karr* unqualifiedly includes the right of citizens to choose their mode of personal hair grooming within the real host of liberties protected by the Fourteenth Amendment from arbitrary state action. *Karr* nevertheless concludes that regulation of that right . . . does not lack a *rational basis* in a high school setting and therefore does not deprive such students of due process of law." (Emphasis added.) Therefore, when the Fifth Circuit held that "the adult's constitutional right to wear his hair as he chooses supersedes the state's right to intrude," it contradicts the very reasoning upon which *Karr* was based.

This writer submits that *Lansdale* reached the correct result, but the decision leaves confusion in its wake. First, *Karr* was based on the premise that high school students had *no constitutionally protected right to wear long hair* while attending school. The court in *Lansdale* finds that such a right does exist, but does not discuss its origin in the Constitution. Second, in both the high school and college settings there would be a *rational basis* for hair regulations in accordance with traditional analysis in cases where that test can be employed. Although the court in *Lansdale* did not discuss the burden of proof, their reference to "unusual conditions" suggests that a "compelling interest" is needed. This test would be consistent with this writer's view that there is a "fundamental" right to wear one's hair as one chooses whether he is in a high school setting or on a college campus, and the Constitution requires a *compelling interest* rather than a *rational basis* to infringe on such a constitutionally protected right.

1. Scarpa had been sentenced under 18 U.S.C. § 4208(a)(2) (1970), which provides: "the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be eligible for parole at such time as the board of parole may determine."

Scarpa had been convicted of forging endorsements and uttering stolen United States Savings Bonds for which the maximum sentence is ten years. 18 U.S.C. § 495 (1970).

2. Parole board regulations concerning what the board should consider read as follows: "Decisions as to whether a parole shall be granted or denied shall be determined on the basis of the application, if any, submitted by the prisoner, together with the classification study and all reports assembled by all the services which shall have been active in the develop-

without requiring the board to answer the allegations. On rehearing, the Fifth Circuit Court of Appeals affirmed and *held* that "[d]ue process rights do not attach at [parole hearings]" and that "[i]n the absence of flagrant, unwarranted, or unauthorized action by the Board, it is not the function of the courts to review such proceedings." *Scarpa v. United States Board of Parole*, 477 F.2d 278, 283 (5th Cir. 1973).

The power to parole is a legislative power stemming from the power to define crimes and set penalties for offenses. At both the state and federal levels, this power has been delegated to parole boards by the various legislatures and by Congress. At the federal level, Congress has set bounds within which the board may exercise its delegated power, but, within these bounds, a board decision to grant or deny parole is purely discretionary.[3]

Traditionally, courts have taken a "hands-off" approach to parole cases. In *Escoe v. Zerbst*,[4] the Supreme Court held that *probation* is not a right, but merely an "act of grace" of the legislature to which no due process protections attach. Subsequently, other courts adopted this "right-privilege" approach

ment of the case. These reports may include the reports by the prosecuting officer and the sentencing judge, records from the Federal Bureau of Investigation, reports from the officials in each institution in which the applicant shall have been confined, all records of social agency contacts, and all correspondence and such other records as are necessary or appropriate for a complete presentation of the case. Before making a decision as to whether a parole should be granted or denied in any particular case, the Board will consider all available relevant and pertinent information concerning the case. In furtherance of that policy, the Board encourages the submission by interested persons of pertinent and relevant information to the Board either before or after a Board order has been issued." 28 C.F.R. § 2.14 (1962).

Plaintiff alleged as fact that the board had before it only a standard F.B.I. report, a pre-sentence investigation report, and a record of his arrests. He further alleged that no member of his family was interviewed though he supplied their names and addresses; that his potential residence if released was not investigated; that neither the person who pledged to employ him nor the people who agreed to act as his "parole advisors" were interviewed; that his records from previous places of confinement were not considered. Scarpa v. United States Bd. of Parole, 468 F.2d 31, 35 (5th Cir. 1972) (first rehearing).

3. "If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board *may in its discretion* authorize the release of such prisoner on parole." 18 U.S.C. § 4203(a) (1970). (Emphasis added.)

4. 295 U.S. 490 (1935).

in the *parole* area to similarly deny procedural protections.[5] Further, when the attack on a parole board decision was made on substantive grounds, *i.e.*, that the board reached an incorrect decision on the facts before it, the courts have pointed out that the judiciary has no authority to review board decisions.[6] Thus, in *Cagle v. Harris*, the court stated: "[T]he question of parole is by the statute made a matter entirely for the judgment and discretion of the Board of Parole. . . . The courts are without any authority to grant a parole."[7]

While there has apparently been no change in the courts' attitude toward substantive review of board decisions, recent holdings on the applicability of due process rights have vitiated much of the reasoning of the earlier parole cases. In *Goldberg v. Kelly*,[8] the Supreme Court, in holding that a welfare recipient had a right to a hearing before being removed from the welfare rolls, stated that due process rights were no longer to be denied merely because a privilege was involved.[9] Instead, the court adopted a more flexible approach to due process, holding that

> "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon

5. *See, e.g.*, United States v. Frederick, 405 F.2d 129 (3d Cir. 1968); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963); Lathem v. United States, 259 F.2d 393 (5th Cir. 1958).

6. *See, e.g.*, Thompkins v. United States Bd. of Parole, 427 F.2d 222 (5th Cir. 1970); United States v. Frederick, 405 F.2d 129 (3d Cir. 1968); Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967); Ott v. Ciccone, 326 F. Supp. 609 (W.D. Mo. 1970).

7. 349 F.2d 404, 405 (8th Cir. 1965). While this statement is typical, reasons given for this hands-off approach have been summarized elsewhere as follows: "(1) Release proceedings, because of their very nature, should be subjective and discretionary; (2) Parole is an act of grace or leniency rather than a matter of right; (3) An offender is entitled only to due process during prosecution not after he is in prison; (4) By requesting parole, the prisoner, in effect, enters into a contract with the state by which he forfeits certain rights; and (5) Providing due process guarantees in parole release proceedings would cause disruption and delay." Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 551 (1970).

Professor Davis is critical of the courts' refusal to concern themselves with problems within prisons. "The time has come for the courts to be concerned with injustice inside the prisons. The beginnings of such a movement are already discernible. The movement will spread. It should." K. DAVIS, ADMINISTRATIVE LAW TEXT 189 (3d ed. 1972).

8. 397 U.S. 254 (1970).

9. *Id.* at 262, *quoting from* Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969): "The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege and not a right.'" *See also* Graham v. Richardson, 403 U.S. 365, 374 (1971).

whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[10]

In *Morrissey v. Brewer*,[11] the applicability of due process rights was said to depend upon whether a grievous loss was involved and whether the nature of the individual's interest be "one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[12]

Applying this test in *Morrissey*, the Supreme Court held that certain due process rights attach at a parole-revocation hearing. The court determined that the parolee's rights were of such a nature as to include "many of the core values of unqualified liberty and its termination inflicts a 'grievous loss.' "[13] Thus, some orderly process was required, "however informal."[14]

But, despite this extension of due process protections in other areas, courts have continued to reject contentions that they apply in the parole decision-making process.[15] In *Menechino v.*

10. Goldberg v. Kelly, 397 U.S. 254, 263 (1970), *quoting from* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (concurring opinion).

11. 92 S. Ct. 2593 (1972).

12. *Id.* at 2600, *citing* Fuentes v. Shevin, 92 S. Ct. 1983 (1972). In *Fuentes*, the court said: "The right to a prior hearing . . . attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection." *Id.* at 1996.

13. 92 S. Ct. 2593, 2601 (1972).

14. In that case, the court held that upon revocation the parolee was entitled to: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.* at 2604.

The Supreme Court in *Morrissey* specifically reserved the question of whether the parolee is entitled to the assistance of retained or appointed counsel in a revocation proceeding. The courts of appeals are in disagreement on this issue. *See, e.g.*, Bearden v. South Carolina, 443 F.2d 1090 (4th Cir.), *cert. dismissed*, 405 U.S. 972 (1971) (states not required in every case to afford counsel to indigents); Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971) (entitled to assistance of counsel); Woods v. Texas, 440 F.2d 1347 (5th Cir. 1971) (sixth amendment right to counsel not applicable).

15. Buchanan v. Clark, 446 F.2d 1379 (5th Cir.), *cert. denied*, 404 U.S. 979 (1971); Barnes v. United States, 445 F.2d 260 (8th Cir. 1971); Schwartzberg v. United States Bd. of Parole, 399 F.2d 297 (10th Cir. 1968) (all holding, *inter alia*, that there is no constitutionally mandated right to counsel at

Oswald,[16] the petitioner asserted that constitutional due process granted him a right to counsel at a parole hearing. The Second Circuit concluded that the release hearing is not an adversary proceeding because the interest of the board and the prospective parolee are the same: his rehabilitation and successful reintegration into society. Since it is not an adversary proceeding, no due process rights are involved, and thus the petitioner has no right to counsel.[17] In *Barnes v. United States*,[18] the Eighth Circuit rejected a claim that the federal parole statute is unconstitutional because the information used to decide whether to parole is not available to the prisoner. And, in *Buchanan v. Clark*,[19] the Fifth Circuit likewise refused to accept a contention that failure to parole is itself violative of due process.[20]

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a parole hearing). *See also* Briguglio v. New York Bd. of Parole, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969), where the court stated: "In sum, we conclude that the parole release proceeding does not require an adversary hearing. The Federal courts have consistently held, and the Supreme Court has refused to rule otherwise, that parole hearings do not involve constitutional due process." *Id.* at 29, 246 N.E.2d at 517, 298 N.Y.S.2d at 710.

16. 430 F.2d 403 (2d Cir. 1970).

17. A strong dissenting opinion in *Menechino*, relying heavily on *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mempa v. Rhay*, 389 U.S. 128 (1967), argued that parole is a continuation of sentencing, that the procedure is virtually unfettered, that the gravity of consequences to the prisoner is great, and that the prisoner is unable to present his case effectively without a lawyer. Because of these factors, the dissent felt that minimum due process requires that the prisoner be allowed the assistance of counsel at a parole release hearing.

18. 445 F.2d 260 (8th Cir. 1971).

19. 446 F.2d 1379 (5th Cir.), *cert. denied*, 404 U.S. 979 (1971).

20. The appellant asserted that he had served one-third of his sentence, had obeyed the rules of the prison, and there was reasonable probability that he would not violate parole and would not be a detriment to society. He argued that the board was required to parole him in these circumstances and that failure to do so violated his due process rights.

In *Tyler v. Department of Public Welfare*, 19 Wis. 2d 166, 119 N.W.2d 460 (1963), a prisoner asserted he was denied *equal protection* under the law in that he was denied parole while others no more deserving had received favorable consideration. The Wisconsin court denied relief holding that a prisoner had no legal right to parole and that parole board decisions were not reviewable by the court.

The courts have, however, granted relief on non-due process grounds in several cases. In *United States v. Pate*, 401 F.2d 55 (7th Cir. 1968), a prisoner's parole hearing had been delayed for eleven months. The court held that it was a denial of equal protection to postpone his parole hearing without adequate reasons. In *Palermo v. Rockefeller*, 323 F. Supp. 428 (S.D.N.Y. 1971), defendant plead guilty in return for a promise of parole after serving 18 months. The promise was not kept. The court held that the board was not acting within the scope of its duties and could not expect deference from the courts in such a case. *But cf. Losieau v. Hunter*, 193 F.2d 41 (D.C. Cir. 1951), in which a two minute interview, without further hearing, was enough for denial of parole without constituting abuse of discretion. In *Monks v. New Jersey State Bd. of Parole*, 58 N.J. 238, 277 A.2d 193 (1971), the court held that parole board proceedings must be conducted

In the instant case the issue faced by the court was whether the plaintiff had stated a claim for which relief could be granted.[21] The resolution of this issue depended upon three underlying issues: first, whether any due process protections are required in the parole-release hearing;[22] second, if so, were they afforded in this case; and, third, even if due process protections are not applicable, whether the board had acted in such a manner that it had abused the discretion vested in it by Congress.[23]

The court held that due process rights do not attach at a parole-release hearing. Recent cases extending due process rights to other areas were acknowledged[24] but were distinguished. They involve instances where the person would suffer loss of "goods, rights, or privileges which *he already possesses*," and they require "a hearing *before* governmental action is initiated which might cause a deprivation."[25] The court took the view that

with fundamental fairness. The decision was based on general administrative law principles rather than on due process. The court also ruled that reasons must be furnished for denial of parole.

21. Since this case reached the Fifth Circuit on an appeal from a dismissal, the court recognized that it was bound to assume as true the allegations made by Scarpa. Conley v. Gibson, 355 U.S. 41 (1957); Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969).

The dissent felt that the majority recognized *Conley* in principle but did not in fact apply it. They opined that the majority had inadequately stated Scarpa's contentions and that those contentions, properly stated, constituted a cause of action. The dissent would have required the board to at least answer Scarpa's allegations before considering the case further.

22. On first rehearing Scarpa had contended that "he was entitled to be considered by the Board of Parole for parole eligibility and that, *when so considered*, the Board could not act in a manner that was completely lacking in basic concepts of due process." Scarpa v. United States Bd. of Parole, 468 F.2d 31, 33 (5th Cir. 1972) (first rehearing). "In the petition for [second] rehearing, Scarpa raised a number of contentions not presented previously. Appellant asserted that he was entitled to: (a) a hearing before an objective and impartial examiner; (b) adequate notice of that hearing; (c) an opportunity to confront and cross-examine witnesses; (d) a right to retained counsel; and (e) written findings of fact and conclusions of law." Scarpa v. United States Bd. of Parole, 477 F.2d 278, 280 n.7 (5th Cir. 1973).

23. "What this complaint asks this court to do is to hold that the rubic 'discretionary act' does not insulate the one exercising discretion from responding when it is charged that it has abused its discretion. He says that there is no greater immunization of the parole board's abuses of discretion, if they exist, than there is of a court's abuse of discretion. Scarpa v. United States Bd. of Parole, 468 F.2d 31, 33 (5th Cir. 1972) (first rehearing).

24. *See* text and accompanying notes 11-13 *supra*. *See also* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishment of wages); Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961) (termination of employment).

25. Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir. 1973).

parole is a change of "status" for the prisoner and that no due process protections attach for such a change because no deprivation of "goods, rights, or privileges" is involved.[26] The prospective parolee has already had his hearing at trial and possesses no rights which he can lose.

This reasoning was also used to distinguish the parole-revocation proceeding[27] from the parole-release hearing. When parole is revoked, the parolee loses the limited freedom he gained in being paroled, thus bringing due process into play. In the court's opinion, no such loss is at issue in the release hearing,[28] and therefore no specific procedural safeguards are required at the parole-release hearing. Thus, the board is free to deviate even from its own regulations.

As pointed out elsewhere, the distinction drawn by the court between cases involving an interest presently enjoyed and those in which no present interest may be lost is "essentially the right-privilege dichotomy in not-too-deceptive disguise."[29] Moreover, it is not fully determinative of the due process issue under the test set forth in *Goldberg* and *Morrissey*. Whether the prisoner suffers a "grievous" loss does not depend solely on whether he is or is not losing an interest presently enjoyed. In reality, the prisoner does have much to lose because his conditional freedom is at stake in the release proceeding.[30] The loss suf-

26. "The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protections attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status." Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir. 1973).

27. *See* text accompanying note 13 *supra*.

28. "Whether the Board grants parole is a clearly distinguishable exercise of discretion from revoking one's conditional freedom. The Fifth Amendment commands that the government shall not deprive one of his life, liberty or property without due process of law. Scarpa is a convicted felon currently incarcerated in prison for his past transgressions. This manifest deprivation of liberty is the result of a due process hearing. The sentencing judge mandated a possible confinement of eight years. Scarpa now attempts to equate the *possibility* of conditional freedom with the *right* to conditional freedom. We find such logic unacceptable.

"If the Board refuses to grant parole, Scarpa has suffered no deprivations. He continues the sentence originally imposed by the court." 477 F.2d at 282.

29. Comment, 120 U. PA. L. REV. 282, 363 (1971).

30. "This conception that the prisoner, unlike the parolee, has no present interest in his liberty bears little relation to reality. It is difficult to see why a movement from confinement to conditional liberty on parole is any

fered[31] by the prisoner is similar to that suffered by the parolee upon revocation in that both face denial of this limited freedom at their respective proceedings.

Furthermore, while the government has great interest in summary adjudication from an administrative point of view,[32] it also has an interest in seeing that a parole refusal is not based on erroneous information or lack of evaluation. The Supreme Court in *Morrissey* noted that there is a governmental and societal interest in "whatever may be the chance of restoring [the parolee] to normal and useful life within the law" and in the fact that "fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."[33] This same societal interest exists with regard to the prisoner. Thus, there is also governmental interest in fundamentally fair consideration of the prospective parolee's case. The requirement of some informal procedural protections would fulfill both the societal and prisoner interest in a fair hearing.[34]

The court also found that plaintiff's allegations were insufficient to warrant court action for abuse of discretion. Scarpa's contention that the board had considered only his past criminal record in making its decision was construed as a claim that the

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less dramatic a change in status than a movement in the reverse direction. Furthermore, while almost every prisoner has a chance for parole, many parolees are never accused of wrongdoing and hence do not face parole revocation. The process of release on parole thus occupies a position at least important, both statistically and substantially, as that of parole revocation, and should be treated identically insofar as the applicability of due process is concerned." Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 CAL. L. REV. 1518, 1539-40 (1972).

31. "Whether the convict is already paroled or still in prison, the real question is the enjoyment of freedom and community ties in the future. The enjoyment of this opportunity in the future is as important to the in-prison convict as it is to the already paroled convict." Comment, 120 U. PA. L. REV. 282, 367 (1971).

32. Because of the large number of parole cases heard by the board each year, any increase in procedural requirements would undoubtedly increase the administrative burden of the board.

33. Morrissey v. Brewer, 92 S. Ct. 2593, 2601-02 (1972).

34. *What* process is due depends on the nature of the proceeding involved: "not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* at 2600. For arguments that due process requires at least a hearing and the right to counsel in the parole-release proceeding see, Jacob & Sharma, *Justice after Trial: Prisoners' Need for Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 551-57 (1970); Comment, 54 IOWA L. REV. 497 (1968); Comment, 120 U. PA. L. REV. 282, 358-67 (1971).

board had failed to *fully* investigate his case.[35] The majority noted that under the criteria guiding the board in making its decision,[36] Scarpa's past criminal record was a significant factor and, in view of this record, it "was not unreasonable" for the board to deny him parole on this basis.[37] Thus, further investigation was not required. But, as the dissent viewed the allegations, the case was not one of failure to investigate fully, but rather of failure to truly investigate *at all.*[38] Particularly because this violated the board's own regulations, the dissent thought "a clear case of abuse of discretion . . ." had been alleged.[39]

Whether this case is viewed as a failure to investigate fully or as a failure to truly investigate at all, under the decision, the board is clearly not required to follow its own regulations. These regulations mandate that "the Board will consider all available and pertinent information concerning the case."[40] Neither is this holding limited to situations, as here, where one factor strongly indicates a need for further rehabilitation.[41] And while the court attempts to say only that a "full scale investigation" is not required, the decision actually requires only enough investigation to determine that parole should not be granted.

Ideally, the parole decision should be made after a complete review of each applicant's case. When a particular aspect of the prisoner's background indicates that he is not yet ready for parole, less investigation may be required. But the board

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35. "Scarpa alleges that the Board placed *undue emphasis* on his prior criminal convictions in denying his parole. Additionally he asserts that it did not investigate his marital situation or the job opportunities which would be available if granted parole." Scarpa v. United States Bd. of Parole, 477 F.2d 278, 281 (5th Cir. 1973). (Emphasis added.)

36. *See* note 3 *supra.*

37. "[E]ven assuming that Scarpa had a stable family and guaranteed employment, it was not unreasonable for the Board to base [its] ultimate decision denying Scarpa's parole on his extensive past criminal record." Scarpa v. United States Bd. of Parole, 477 F.2d 278, 281 (5th Cir. 1973).

38. *Id.* at 284. The dissent noted also that Scarpa alleged that he would "continue to be denied a hearing at which anything will be considered other than his past criminal record."

39. *Id.* at 286.

40. 28 C.F.R. § 2.14 (1962). *See* note 2 *supra.*

41. The language used by the court indicates no limitations: "We see no reason why the Board should be forced to make a full scale investigation of all the supportive facts used by the prisoner in applying for parole." Scarpa v. United States Bd. of Parole, 477 F.2d 278, 281 (5th Cir. 1973) (footnotes omitted).

should be required to have before it some other information about the prisoner so as not to give *undue* importance to any one factor through failure to consider others. To require this should impose no additional burden on the board since its regulations already require as much.

Peter Wilbert Arbour

Local Rule Enforcement by State District Courts

Plaintiffs in a wrongful death action were duly notified of a pre-trial conference scheduled by the trial judge pursuant to article 1551[1] of the Code of Civil Procedure. When plaintiffs' counsel failed to appear, the district court, on its own motion and in accordance with the local rules, entered a dismissal without prejudice. The Court of Appeal for the First Circuit *held*, the local rule which provided the sanction of dismissal for the failure of a party to appear at the pre-trial conference was invalid as a violation of Code of Civil Procedure article 1672.[2] *Boudreaux v. Yancey*, 256 So.2d 340 (La. App. 1st Cir. 1971).

Article 1551 of the Code of Civil Procedure, empowering the trial judge to order a pre-trial conference, enables the court to fashion in advance the course of a trial. Through this procedure it is intended that the parties, the witnesses, and the court will save time, effort, expense, and inconvenience. Article 1551, however, does not specify what sanctions, if any, may be imposed for the failure of a party to comply with the order.

Article 193 of the Code of Civil Procedure[3] gives state dis-

1. "In any civil action in a district court the court may in its discretion direct the attorneys for the parties to appear before it for a conference . . . .

"The court shall render an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matter considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

2. "A judgment dismissing an action shall be rendered upon application of any party, when the plaintiff fails to appear on the day set for trial. In such case the court shall determine whether the judgment of dismissal shall be with or without prejudice."

3. "A court may adopt rules for the conduct of judicial business before it, including those governing matters of practice and procedure which are not contrary to the rules provided by law . . . ." La. Const. art. IV § 4