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THE PAROLE BOARD'S DUTY OF SELF-REGULATION

When the state determines that it should deprive a citizen of his liberty by imprisonment, it undertakes a coordinate obligation to decide when and under what conditions he shall be released. In the majority of cases this release will take the form of a parole.¹ Most states place the ultimate parole decision in the hands of administrative tribunals² which operate within a framework of general constraints imposed by statutory powers³ and judicially imposed sentences.⁴

Although the details of the parole agency's operation may vary widely among jurisdictions,⁵ an element common to all is the vast amount of discretion exercised by agency members in performing their duties.⁶ There is growing concern over the legal rights of prisoners,⁷ including those rights affecting the decision whether to release on parole an individual prisoner.⁸ Nevertheless, this deci-

¹ Over 60 percent of all persons released from state prisons in 1964 were paroled. In Michigan the figure is nearly 90 percent. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 61 (1967) [hereinafter cited as TASK FORCE: CORRECTIONS].

² *Id.* at 65-67.

³ See R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 222-23 (1969).

⁴ See *id.* at 193-214.

⁵ See TASK FORCE: CORRECTIONS, *supra* note 1, at 65-67.

⁶ See K. DAVIS, DISCRETIONARY JUSTICE 126-33 (1969).

⁷ See generally Clements & Ferguson, *Judicial Responsibility for Prisoners: The Process That is Due*, 4 CREIGHTON L. REV. 47 (1970); Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970); Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227 (1970); Martin, *Administrative Fairness in Corrections*, 1969 WIS. L. REV. 587; Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Note, *Procedural Due Process in Peno-Correctional Administration: Progression and Regression*, 45 ST. JOHN'S L. REV. 468 (1971); Comment, *Federal Court Intervention in State Prison Internal Disciplinary Hearings to Guarantee Fourteenth Amendment Procedural Due Process*, 17 WAYNE L. REV. 931 (1971); Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971).

⁸ See, e.g., Kadish, *The Advocate and the Expert: Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 828-32 (1961); Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497 (1968).

The courts also have begun to apply the provisions of the fourteenth amendment to parole release determinations. See, e.g., *Campbell v. Pate*, 401 F.2d 55 (7th Cir. 1968) (equal protection violated by denial of parole consideration on basis of unreliable factual determination); *Monks v. New Jersey State Parole Bd.*, 58 N.J. 238, 277 A.2d 193 (1971) (in most cases the parole board must state reasons for denial of parole; not clear whether holding is based on constitutional doctrines).

sion is the result of a proceeding far removed from the model of adjudication applicable at other stages of the adversary system which incorporates elements of due process.

This article examines the Michigan Parole Board in terms of its structure, mode of operation, and certain legal issues raised by its procedures. The note argues that the Board's and the legislature's concept of professional, scientific decision-making is not an adequate substitute for the checks and balances which confine and control the discretion of other governmental agencies, and furthermore, that this concept is inconsistent with both the letter and spirit of the Michigan Administrative Procedures Act (MAPA or Act).⁹ Thereafter, an approach is suggested by which the Act can be used as a tool to legitimate and rationalize Parole Board procedures.

I. THE STRUCTURE OF THE PAROLE BOARD

The Michigan Department of Corrections was created in 1937.¹⁰ The Bureau of Pardons and Paroles was established within the Department and among its officers were the three members of the Parole Board. The new department was to be supervised by a Corrections Commission made up of five gubernatorial appointees serving fixed terms and receiving per diem compensation. They were to appoint the Director of Corrections, who in turn would appoint assistant directors. One of these, an assistant director in charge of pardons and paroles, was to serve as chairman of the Parole Board. The other two members of the Board were to be chosen for their "familiarity with the problems of penology."¹¹ They were all to be full-time employees who could be removed by the Commission only for cause after a hearing.

The power to grant or deny parole was given entirely to the Board. Release was to be granted solely on the initiative of its members, and their action in releasing a prisoner was not to be reviewable if in compliance with law.¹² The Board's authority in this respect was subject to the following limitations:

- (a) That no prisoner shall be given his liberty on parole until the board has reasonable assurance after consideration of all of the facts and circumstances, including the prisoner's men-

⁹MICH. COMP. LAWS ANN. §§ 24.201-.315 (Supp. 1972) (originally enacted as the Administrative Procedures Act of 1969, P.A. 1969, No. 306) [hereinafter cited as MAPA].

¹⁰ Mich. P.A. 1937, No. 255 (superseded 1947).

¹¹ *Id.* ch. III, § 2.

¹² *Id.* at § 4.

tal and social attitude, that he will not become a menace to society or to the public safety;

(b) That no parole shall be so granted to any prisoner until he has served the minimum term imposed by the court less such allowances for good time or special good time as he may be entitled to by statute: *Provided*, That prisoners shall be eligible for parole prior to the expiration of their minimum terms of imprisonment whenever the sentencing judge or his successor in office, and only upon the request of the parole board, shall give his written approval of the parole of such prisoner prior to the expiration of such minimum terms of imprisonment;

(c) That no prisoner shall be released on parole until the parole board shall have satisfactory evidence that arrangements have been made for such honorable and useful employment as he is capable of performing, or for his care if he is ill or incapacitated.¹³

The power to grant pardons and commutations remained with the Governor, but applications were to be submitted to and investigated by the Parole Board, and the Governor was to act after receiving the Board's recommendation.

The Parole Board's authority, along with the limitations and mandatory procedures governing that authority, have remained largely unchanged since 1937.¹⁴ The philosophy of the Board and the characteristics of its members have also been fairly consistent. From the time of its establishment the Department of Corrections has taken great pride in the "professionalism" of its Parole Board. The first report issued by the Department described the Parole Board as a

board of non-partisan membership [having] the facilities and purpose to confine its action for or against parole to accord with positive scientific parole principles entirely apart from the vexatious and malignant influences which justify adverse criticism of parole in several localities.¹⁵

The emphasis on professionalism has been maintained as the exact composition of the Board has varied,¹⁶ until today it consists of five civil service employees. They are the only officers in the Department of Corrections, aside from the Director, who are appointed by the Corrections Commission.

¹³ *Id.* at § 3.

¹⁴ See MICH. COMP. LAWS ANN. §§ 791.232, .233, .235 (1968).

¹⁵ MICHIGAN DEPARTMENT OF CORRECTIONS, FIRST BIENNIAL REPORT 69 (1938).

¹⁶ See Mich. P.A. 1947, 2d Ex. Sess., No. 4 § 30; Mich. P.A. 1948, 1st Ex. Sess., No. 35; Mich. P.A. 1953, No. 232 § 32; MICH. COMP. LAWS ANN. § 791.232 (1968).

In making its parole decisions, the Board must operate, of course, within the limits described by the minimum and maximum sentences imposed on the prisoners. For most offenses the maximum penalty is set by the legislature, and the sentencing court may pronounce a minimum of any length not exceeding two-thirds of the maximum.¹⁷ For a few very serious offenses¹⁸ the court has complete discretion to set both the minimum and the maximum or in some cases to pronounce a life sentence.¹⁹ For first degree murder the court must pronounce a life sentence, and the prisoner can never be paroled.²⁰

It seems likely that a significant change may soon be made in Michigan's indeterminate sentence laws. A bill²¹ which has already passed the Michigan House²² and is now being considered by the State Senate Committee on the Judiciary²³ would completely eliminate the court's authority to set a minimum term of imprisonment.²⁴ Once convicted and sentenced, a person's discharge from prison at any time short of the statutory maximum would be entirely a matter of administrative discretion.

Thus, the release decision has become the province of five experts who presumably have the training and experience necessary to make the most scientifically accurate judgment as to who should be freed from prison and under what conditions. The realities of the Parole Board's decision-making process, however, are not entirely consistent with its professional image. In eval-

¹⁷ *People v. Tanner*, 387 Mich. 683, 199 N.W.2d 202 (1972) (any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence statute).

¹⁸ These offenses include: armed assault with intent to rob, MICH. COMP. LAWS ANN. § 750.89 (1968); armed robbery, *id.* § 750.529; second degree murder, *id.* § 750.317; rape, *id.* § 750.520; conspiracy, *id.* § 750.157A; kidnapping, *id.* § 750.349; bank safe or vault robbery, *id.* § 750.531; assault with intent to commit murder, *id.* § 750.83; and enticing a child under fourteen years of age, *id.* § 750.350.

¹⁹ A person sentenced to life imprisonment or to a very long term for a crime other than first degree murder is eligible for parole after ten years, but he cannot be paroled if the sentencing court objects, and the parole board must conform to special procedural requirements designed to assure representation of the public interest. *See* MICH. COMP. LAWS ANN. § 791.234 (1968).

²⁰ MICH. COMP. LAWS ANN. § 750.316 (1968). Today the mandatory life sentence for first degree murder does not mean that everyone convicted of that crime spends the rest of his life in jail; it simply complicates the parole process by creating a need for executive clemency. The Parole Board's policy regarding a person serving a mandatory life sentence is to give him an interview after ten years and to review his record annually thereafter. Generally, the Board recommends executive clemency and the prisoner is eventually released. The average time served before release on a mandatory life sentence is twenty-four years. Interview with Leonard R. McConnell, member, Michigan Parole Board, in Lansing, Michigan, Oct., 1971.

²¹ Mich. H.B. 4004 (1971). This bill is an amended version of the Michigan Revised Penal Code published by a special committee of the State Bar in 1967.

²² MICHIGAN HOUSE JOURNAL, Feb. 29, 1972, at 758.

²³ MICHIGAN SENATE JOURNAL, Feb. 29, 1972, at 437.

²⁴ Mich. H.B. 4004 § 1401 (1971).

uating its variance from the ideal, it is necessary to consider more closely the procedures for making parole release decisions.²⁵

II. THE EXERCISE OF ADMINISTRATIVE AUTHORITY²⁶

The process of rational decision-making necessary for the Board to reach an optimal, or at least acceptable, resolution to each problem presented to it may be divided into three stages: (1) factual investigation, (2) evaluation and analysis, and (3) decision. In practice, of course, the dividing lines between these activities are neither clear nor rigid. Nonetheless, each represents a necessary step which must be performed in some manner if the result is in fact to be a rational decision.

The first two parts of the decision-making process, factual investigation and evaluation and analysis, together constitute what lawyers call factfinding. This consists of the gathering and meaningful assimilation of data (evidence) in order to reach conclusions of fact. In order to gather the appropriate data it is essential to determine what facts are relevant and necessary to making a parole release decision. Facts which are relevant but not very necessary might be ignored to save time and energy. It might be desirable to ignore even some very helpful facts if the ability of the factfinder to deal with them rationally is in doubt, or if other considerations (such as an individual's privacy) indicate that certain facts should not be considered. Evaluation of the data involves judgments as to the credibility of the sources and the reliability of the methods used in gathering the data. If there are conflicting data, reference will often be made to a system of presumptions in order to arrive at factual conclusions. Decision consists of applying to these factual determinations any relevant

²⁵ This note focuses primarily on the procedures employed in deciding when a person imprisoned under an indeterminate sentence is to be released. This includes determination of the conditions of parole and date of final discharge. MICH. COMP. LAWS ANN. §§ 791.233, .242 (1968). The Parole Board is also called upon to decide: (1) whether to release a prisoner before the expiration of his minimum term when the sentencing judge gives his approval (*id.* § 791.233 (b)); (2) when to release a prisoner who has received a very long minimum sentence or a life sentence for a crime other than first degree murder, and who has served at least ten years of his sentence (*id.* § 791.234); and (3) whether to order the reimprisonment of a parolee who has been returned for an alleged violation of his parole (*id.* § 791.248 (Supp. 1972)). The Board also serves as an investigatory and advisory agency to assist the Governor in the Exercise of his pardon and commutation powers (*id.* § 791.244).

²⁶ The data used in this part was obtained by observation of parole hearings at Jackson State Prison on Feb. 22, 1972; observation of an executive session of the Michigan Parole Board on Feb. 24, 1972; an interview with Mr. Leonard McConnell, member, Michigan Parole Board, in Lansing, Oct., 1971; and an interview with Messrs. Thurston, Buchko, and Fuller, members, Michigan Parole Board, in Lansing, Feb. 24, 1972.

policies or rules which have not yet entered the process, or whose applicability to the situation at hand has not yet been exhausted.

The actual mechanics of the Parole Board's operation are relatively simple. A brief explanation will aid the detailed analysis which follows. Each prisoner is considered for parole shortly before the expiration of his minimum term of imprisonment and at least once annually thereafter. One board member studies the prisoner's file and on that basis either defers to the judgment of the members who will conduct the hearing or votes for or against parole. If he votes against parole, he forwards the file to another board member who studies it and has the same options as the first member. Then a hearing with the prisoner is conducted by two members who have not studied the file in advance. At the close of the hearing, each of them either votes or moves for consideration by the entire Board. If at this point there are three votes either for or against parole, the decision is announced to the prisoner and entered in his file. Otherwise, the case is considered by the entire Board in executive session. It is very rare that more than thirty days elapse after a prisoner's hearing before he is informed of the Board's decision and given some brief explanation of the reasons for the decision.

A. Factual Investigation

A very broad range of data is considered relevant to the parole release decision. The Parole Board has a file on each prisoner which contains a wide range of documents.²⁷ Although some

²⁷The file contains the following documents:

- (1) the court order setting the limits on the prisoner's sentence;
- (2) the report of the presentence investigation;
- (3) a transcript of the court's remarks at the time of sentencing (if available);
- (4) a state police rap sheet (a record of all arrests and convictions);
- (5) the Reception Diagnostic Center rap sheet (mainly identification data);
- (6) the psychologist's intake report (IQ, predictive tests, personality tests);
- (7) the recommendation of the Reception Diagnostic Center Classification Committee concerning placement (a statement of the prisoner's problems and treatment needs, and the institution to which he should be confined);
- (8) reports of actions (security level, disciplinary assignments, etc.; reasons given) by the institution's classification committee;
- (9) the parole eligibility report (prepared by a prison counselor) containing a description of the prisoner's work experience while in prison and the quality of his work, educational and other programs and activities he has engaged in, his conduct, and his parole plans; also the counselor's evaluation of his parole-readiness);
- (10) evaluation by the psychiatric clinic (if available);
- (11) reports of past parole board actions (if any) and reasons;

board members have stated that they would like to have more information in these files, it is not clear what additional information the Board could use. One member has suggested that a transcript of the trial testimony could sometimes be helpful.

The range of items in the file discloses that not all of the documents are directly concerned with the factual basis for the parole release decision. The court order setting the limits of the prisoner's sentence, for example, serves only to define the Parole Board's jurisdiction in the case. But most of the material is regarded as factual, and the Board studies it carefully, before reaching a decision. Consideration of some of the material in the file seems to be essential before the Board can reach a decision. In one hearing which was observed, the board members found that the prisoner's file contained no presentence report. They immediately discontinued consideration of the case until a copy of the report could be obtained. In some cases the Board will not proceed to a decision until it has received a current evaluation from the prison's psychiatric clinic.

The Parole Board is required by statute to "cause each prisoner to be brought before it" at least one month before the first day on which he is eligible for parole.²⁸ In addition, the Director of Corrections has directed the Parole Board to interview at least once each year each prisoner who is in the Board's jurisdiction.²⁹ Although these interviews are referred to as "hearings," and the prisoner is usually told that he has a right to speak and ask questions, there is no indication that anyone has ever thought of them as "evidentiary hearings" within the meaning of the Administrative Procedures Act.³⁰ They do not offer an opportunity for the prisoner to present evidence and arguments to justify his release. Rather they provide a chance for the board members to observe the prisoner and thus gather evidence on their own.

(12) the parole agent's report (home and employment situation awaiting the prisoner if he is released);

(13) parole violation reports from previous periods of parole (if any);

(14) copies of warrants issued for parole violations (if any);

(15) the institution's report of action taken when the prisoner was returned for a parole violation (if any);

(16) copies of orders made by the parole board when the prisoner was returned for a parole violation (if any);

(17) any correspondence which has been received by the parole board concerning the prisoner; and

(18) parole board notations of any telephone calls or other oral communications received concerning the prisoner.

²⁸ MICH. COMP. LAWS ANN. § 791.235 (1968).

²⁹ Michigan Department of Corrections, Departmental Directive PPE-5, Feb. 22, 1972.

³⁰ See MAPA, *supra* note 9, §§ 24.203, 271-.306.

The hearing is conducted by two members of the Board. One acts as chairman, questioning the prisoner and answering his questions. The other studies the file and observes the prisoner. The length of the hearing ranges up to twenty minutes, depending on the difficulty of the case. So far as can be determined, the chief purpose of the hearing is to gather evidence concerning what the board members call "sincerity." A prisoner is sincere if his statements at the hearing are consistent with the information contained in his file, if he does not try to make excuses, and if he shows a willingness to accept the direction of corrections officials and counselors in handling his problems.

Since most members have worked for many years in the Department of Corrections, they are personally acquainted with many of the recidivist prisoners who come before them. Recollections of these acquaintances are considered relevant and helpful. Anyone who wishes may write or call the Parole Board or go to the Board's office and discuss the case of any prisoner. Such communications are entered in the prisoner's file and may be considered in making parole release decisions.

The Parole Board itself in fact gathers very little information. Most of the information it relies upon is contained in the prisoner's file and is gathered by probation officers, parole agents, prison counselors, and other corrections personnel. These persons are not under the Board's control, and it can use only what they supply. Moreover, the completeness of the information available may vary. Board members say that presentence reports from some counties are practically useless, while those from others are generally excellent. At least one member is very dissatisfied with the information-gathering services available to the Board; but because the Board has no control over those services, it can do very little to improve the situation.

The Parole Board does not positively exclude any evidence from its consideration unless such evidence is irrelevant, and nothing is irrelevant if it pertains in any way to the prisoner who is being considered for parole. The Board often uses hearsay evidence and other evidence from the prisoner's file that would not be admissible in a court of law. Insofar as they give the matter conscious attention, the Parole Board members seem to justify their unrestrained use of evidence by arguing that they are not adjudicating rights but rather evaluating rehabilitative progress and predicting behavior.

Whatever the merits of this position, several conclusions may be drawn about the Board's methods of fact determination. First,

the process is neither adversary nor inquisitorial in nature, but consists of a series of disjunctive investigations and reports without central control. Second, it clearly lacks the safeguards that are thought to insure fairness and reliability in judicial factfinding, and factfinding under the Administrative Procedures Act. Third, it nevertheless provides usable factual statements in each of the more than 7,000 parole release cases which the Board must consider each year. This is important when one considers that the Board cannot depend on settlement or stipulation to resolve any of the factual issues it faces, and that to employ a more rigorous procedure in resolving every such issue would entail burdensome costs in time, money, and manpower.

B. Evaluation and Analysis

1. Evaluating the Evidence—Since the Parole Board has no control over the people who gather the evidence which it uses in making decisions, it is not in a sound position to study the evidence critically. Because it lacks alternative sources the Board has no choice other than to use what evidence is offered. If anyone judges the credibility of the sources, it is the parole agents, probation officers, and counselors who collect the evidence. It seems that no one evaluates the reliability of the methods used in gathering the evidence. Some board members harbor serious doubts about the reliability of these methods, but they simply do not have an opportunity to scrutinize them.

Despite these reservations, there is a strong presumption in favor of the accuracy of the material contained in a prisoner's file. It would not be a significant exaggeration to say that the reports in the file are regarded collectively as a statement of the facts in the case rather than as evidence. This statement of facts can be supplemented but not contradicted by the board members' own observations. There is also a strong presumption that factual allegations made by the prisoner are unreliable; indeed, if there is any evidence that is so unreliable that it cannot be considered, it is the prisoner's statement of the facts of his case. The prisoner is there to be observed, not to present his case.

The evidence which the Board members themselves gather at Parole Board hearings and through other contacts with prisoners is subject to more extensive critical evaluation. Board members are very wary of being "taken in" by a prisoner. They believe that the most dangerous and least rehabilitated prisoners are often the most skilled at "putting up a front" to fool the Board. Therefore,

they make very cautious use of their own observations. Correspondence about prisoners is sporadically available and only occasionally useful. When it is used, it is not generally viewed as critically as are the observations of board members.

2. *Analyzing the Results* – The legislature has provided that

no prisoner shall be given his liberty on parole until the board has reasonable assurance after consideration of all the facts and circumstances, including the prisoner's mental and social attitude, that he will not become a menace to society or to the public safety. . . .³¹

This provision requires that the Parole Board predict how a prisoner will behave if he is released. Assuming that the Board can make such a prediction, the statute does not tell them when to release a prisoner; it simply defines the classes of those who must not be released and those who may be released at a particular time. In order to define the narrower class of those who ought to be released, the Board has developed further criteria.³² In addition to predicting the prisoner's behavior after release, the Board also attempts to evaluate his progress in rehabilitation. It is thought that each prisoner reaches a point when his reformation would be achieved more effectively if he were to be released. There also comes a point when further imprisonment is actually counterproductive in terms of rehabilitation. The determination of whether a particular prisoner has reached either of these points is considered relevant to the parole release decision.

To predict behavior and evaluate rehabilitative progress, the Board relies on scientific analysis of the data gathered about each prisoner. Part of this is performed by the probation officers, counselors, psychologists, and psychiatrists who gather the data, and part by the board members themselves. The analysis is heavily clinical as opposed to statistical. It appears that great reliance is placed on the trained intuition of the people who perform the analysis, and little disciplined study or thought is involved.

The members of the Board are much more willing to substitute their own analysis for that found in the prisoner's file than they are to substitute their own observations for those in the file. Although the people who write reports for the file are thought to have a better opportunity to observe the prisoner and gather data, they are not generally any more skilled at analysis than the board

³¹ MICH. COMP. LAWS ANN. § 791.233 (1968).

³² See Dawson, *The Decision to Grant or Deny Parole: Study of Parole Criteria in Law and Practice*, 1966 WASH. U.L.Q. 243.

members. The Board does show some deference to the findings of the specialists in the psychiatric clinic.

The conclusions reached as a result of this process are what a lawyer calls "expert facts." However, the process and its result differ from the way expert facts are derived in other contexts in at least three significant respects. First, little effort is made to separate the data from the analysis. The people who collect the data also perform the analysis, and they carry on both activities at the same time. The Board does not use any mechanism which would serve the purpose that hypothetical questions addressed to experts are supposed to serve at a trial. Second, the people who must consider the analysis (the Board) are among those who have performed it. This raises a danger that the analysis may be accepted uncritically and its conclusions given more weight than they deserve. Finally, the analysis is not subjected to any scrutiny like the cross-examination which occurs at a trial.

C. Decision on the Facts

Having discerned the facts and drawn out their implications, the Board must finally apply a system of norms and values which will produce a decision in the given case. The statute which governs the Board's decisions gives only the broadest sort of guidance.³³ The task is further complicated by the fact that in many cases the Board must balance competing social policies. Among the questions of public policy which the Board must resolve are these: What kinds of activity make a person a "menace to society"? What degree of certainty constitutes "reasonable assurance" that a prisoner will not be a menace to society if released? To what extent are considerations of economy relevant to parole release decisions? To what extent should parole be used as a reward for good conduct within the prison or withheld as a penalty for poor conduct? Should the Parole Board review the judicial determination of the degree of punishment appropriate for a particular crime?

The Board's procedure for making decisions of this nature is obscure and somewhat disorganized. It has not developed a comprehensive set of explicit rules, nor does it regularly use its prior decisions or study them to find the unifying principles or trends. The members often give a one- or two-sentence explanation of their decision in each case, but these statements are usually

³³ See text accompanying note 31 *supra*.

simple allegations of fact or conclusions concerning the prisoner's rehabilitative progress and dangerousness. Because the members of the Board regard themselves as behavioral specialists and place great emphasis on the maintenance of high professional standards in this respect, they do not discuss the normative rules or the policy considerations which guide the Board's action. The emphasis on a scientific or clinical approach seems to engender a certain confidence and a reluctance to acknowledge that the Board's decisions do involve normative principles and considerations of public policy.

III. RESTRICTING ADMINISTRATIVE DISCRETION

A. *The Need for Discipline*

The foregoing sketch of Parole Board procedure clearly illustrates the degree to which the process is unstructured and its bases unexamined. The factual data available to the Board is sometimes sparse and practically never testable. In the vast bulk of its work the Board operates without the assistance of advocates.³⁴ The Board does not make explicit findings of fact: it does not review the evidence, make known what is believed and what is doubted, and indicate factual conclusions. Nor does it clearly state the principles and reasoning on which its decision is based in each case.³⁵ Certainly such substantial violations of the ideal of due process cannot be easily justified for an agency which has such profound power to affect both human freedom and community safety.³⁶

³⁴ Counsel are excluded from parole release hearings. Mich. Dep't of Corrections R. 791.321(3) (1970). Although anyone, including a lawyer, may discuss a prisoner's case with members of the Board and may present "information or documents," very few prisoners retain lawyers to assist them in parole matters.

³⁵ Departmental Directive PPE-5, *supra* note 29, requires that

[I]n each case where there is a denial of parole, the Parole Board will place a statement in the inmate's central office file, with a copy to the institution officials, indicating the reason for the action.

The Parole Board complies with this requirement. Professor Dawson gives this example of a reason: "resents institutional authority, jail house lawyer, denies offense, has a bad temper, has a generally poor institutional adjustment." Dawson, *supra* note 32, at 256.

What one means by a "reason" depends on the purpose the reason is intended to serve. The statements made by the Parole Board to justify denials may be reasons in the sense that they tell the prisoner what changes might improve his parole chances and provide the prison administration with an explanation for calming dissatisfied prisoners, but they are not explications of the *ratio decidendi* which might be useful to a reviewing court or to a future board using the decision as precedent.

³⁶ To demand that discretion be disciplined is not to imply any personal criticism of the board members. Apparently they do as thorough a job as is generally expected of them. Moreover, the Board labors under the burden of an immense caseload. During 1971 the Board decided 10,541 cases; each case was considered by at least three members. The

Arguments calling for the application of due process concepts in the parole context are often met with the assertion that parole determinations are made by scientific professionals who have no need for legal techniques. Of course, science and law are not mutually exclusive fields of endeavor. When a behavioral scientist makes a decision which affects political values he has stepped into the legal domain, and he will find that the scientific method is of little help in solving many of the problems he faces. But even if we were to accept the contention that parole release decisions are not legal decisions, this would not dispose of the need for discipline in making the decisions. The Parole Board needs disciplined procedure in order to produce more reliable results.

B. The Means of Discipline—The Administrative Procedures Act

The Parole Board's discretionary powers and haphazard procedures would seem to be most vulnerable when attacked by the provisions of the Michigan Administrative Procedures Act.³⁷ There seems little doubt that the Act's provisions do in fact apply to the Parole Board. The Act's applicability is indicated not only by the words of the statute,³⁸ but also by extensive legislative history,³⁹ by judicial interpretations,⁴⁰ and even by the Board's

Board had only clerical assistance. MICHIGAN DEPARTMENT OF CORRECTIONS, CRIMINAL STATISTICS, 1971, Table D1. Assuming both that each board member spends 2,000 hours a year doing nothing but deciding cases and that no case is considered by more than three members, a simple calculation indicates that each member has less than twenty minutes to decide the average case. In fact, many cases are considered by the entire board, and the board members spend large amounts of time traveling to and from the various institutions.

³⁷ MAPA, *supra* note 9.

³⁸ The Act applies to every "agency." "Agency" is defined, in part, as:

[A] state board . . . created by . . . statute [but not] an agency in the legislative or judicial branches of state government, the governor, an agency having direct governing control over an institution of higher education, or the state civil service commission.

Id. § 24.203(2).

³⁹ MAPA was approved by the Governor on August 12, 1969, to be effective on July 1, 1970. MICHIGAN SENATE JOURNAL, 1969, at 2230. On September 18, 1969, the Governor created the Michigan Administrative Law Commission "to review, analyze and recommend changes in Public Act 306 (the new Michigan Administrative Procedures Act) which may be necessary to accommodate the specialized problems of specific agencies operating under this Act." MICHIGAN ADMINISTRATIVE LAW COMMISSION, REPORT TO THE GOVERNOR at 1 (1970). The Governor directed each department of state government to furnish the Commission with its comments on MAPA and to indicate whether it thought changes were warranted. He informed the departments that no changes would be supported by the Governor's office unless they had been considered by the Commission. Executive Directive No. 1969-1. The Department of Corrections did not respond to this directive. Minutes of the Commission, Dec. 11, 1969, and Dec. 18, 1969 (in the files of Solomon Bienenfeld, Secretary of the Commission, Office of the Attorney General, Lansing). On Jan. 6, 1970, the Commission held a public hearing. All state departments received notice of the hearing and were invited to send representatives to discuss the application of the Act. No

own rules.⁴¹ However, its impact on the Board's procedures is much less obvious and requires some careful consideration.

1. *The Board's Rulemaking Activities*—The statute creating the Department of Corrections gives rulemaking authority with reference to parole to the Corrections Commission, the Director of Corrections, and the Parole Board.⁴² Although the Commission and the Director have promulgated five pages of rules in accor-

representative of the Department of Corrections attended the hearing. Transcript of the hearing, at 3 (in Mr. Bienenfeld's files).

The Commission was under pressure to recommend exemption of some agencies or some agency functions from part or all of the MAPA. Nevertheless, the Commission reported to the Governor that:

[W]holesale exemptions of agencies or of an agency from the provisions of Act 306 are not in the public interest. The legislature had an opportunity to consider recommendations for such exclusions and in every case rejected them. No agency of government, however complex, should escape the discipline of providing minimum due process in its procedures.

REPORT, *supra* at 3.

The Commission recommended several amendments to the MAPA, all of which were enacted by the legislature and approved by the Governor on June 30, 1970, to take effect on July 1, 1970, the effective date of the Act. Mich. P.A. 1970, No. 40 §2.

Section 11 of the amendments proposed by the Commission and enacted by the legislature read, "This act shall not be construed to repeal additional requirements imposed by law." According to the Commission's explanation:

The clear intention of the legislature was to establish in Act 306 a basic pattern of procedural due process to which all agencies would be required to adhere. This pattern was intended to set minimum, not maximum, procedural due process. Unfortunately, as drafted, it left the door ajar to interpretation by some agencies that, if their specific statute provided extensive procedural requirements, they were exempt from the procedural requirements of Act 306. The proposed amendment is designed to eliminate the possibility of such an erroneous interpretation and to preserve the important public policy of establishing minimum due process in Act 306.

REPORT, *supra*, at 7.

⁴⁰ Two separate panels of the Court of Appeals have held that parole revocation hearings are governed by the MAPA's provisions regarding contested cases. *Feazel v. Department of Corrections*, 31 Mich. App. 425, 188 N.W.2d 59 (1971); *Crawford v. Parole Board*, 35 Mich. App. 185, 192 N.W.2d 358 (1971). *Parshay v. Warden of Marquette Prison*, 30 Mich. App. 556, 186 N.W.2d 859 (1971), held that a prison inmate can challenge the validity of prison rules by means of MAPA's declaratory judgment procedure for challenging agency rules.

⁴¹ Mich. Dep't of Corrections R. 791.332(4) (1970), regarding parole violation hearings provides:

Except as otherwise provided in these rules, Act No. 306 of the Public Acts of the 1969 MAPA being sections 24.201 to 24.313 of the Compiled Laws of 1948, will apply to the hearing.

⁴² MICH. COMP. LAWS ANN. §§ 791.233, .240(2) (Supp. 1968). The only rulemaking power explicitly given to the Parole Board relates to the conditions of parole. § 791.233. However, a Michigan agency has inherent power to adopt procedural rules to govern activities in which it engages. *See* MICH. OP. ATTY. GEN. No. 4601 (1967). Authority to issue legislative rules may be fairly implied from the powers granted the agency and the nature of its functions. *Coffman v. State Bd. of Examiners*, 331 Mich. 582, 50 N.W.2d 322 (1951); *Salowitz v. State Bd. of Registration*, 285 Mich. 214, 280 N.W. 737 (1938); *Ranke v. Corp. and Sec. Com'n*, 317 Mich. 304, 26 N.W.2d 898 (1947); *INSTITUTE OF CONTINUING LEGAL EDUCATION, THE NEW MICHIGAN ADMINISTRATIVE PROCEDURES 50-51* (R. Cramton & G. Holmes eds. 1970) [hereinafter cited as *CRAMTON*].

dance with the MAPA,⁴³ the Parole Board has promulgated none. The rules promulgated by the Commission and the Director are mostly interpretive or repetitive of the statutes governing parole procedure. They include no rules of evidence, and the only substantive rule governing parole release is a list of eight factors to be considered by the Board when making release decisions.⁴⁴ The factors are irrelevant to the Board's practice. Members of the Board do not refer to them when discussing cases; and to the limited extent that reasons are given for decisions, the reasons are not couched in terms of the factors.

This is not to say, however, that the Board's decisions are wholly arbitrary and capricious. In some cases the only communication among Board members before a particular decision is made consists of glances and nods. The ability to achieve an agreement after such minimal nonverbal communication can be explained only by assuming that there are certain internally understood generalizations which dictate a particular result in certain fact situations. Furthermore, the Board's case load simply does not allow a fresh determination of weighty and complex issues of personal rehabilitation and public safety in the time available for consideration of each separate case.⁴⁵

There must therefore be some standards upon which the Board

⁴³ Mich. Dep't of Corrections R. 791.301, .321-.329, .331-.334, .341-.343, .351 (1970). It is not known whether all of the MAPA's requirements were complied with in the promulgation of these rules, but because they antedate the effective date of the MAPA, they remain in effect until amended or rescinded. MICH. COMP. LAWS ANN. § 24.231 (Supp. 1972).

⁴⁴ Mich. Dep't of Corrections R. 791.322 (1970) provides the following factors to be considered in granting paroles:

- (2) The following factors relating to the prisoner are among those which may be considered by the parole board in a determination to grant or deny parole:
 - (a) Institutional work and conduct record, but this will be given only minimum consideration.
 - (b) Previous criminal record, nature and circumstances of the crime, and length of sentence.
 - (c) Previous industrial and social history.
 - (d) Character, physical and mental condition, record and achievements at the Institution, including general conduct, school and industrial records.
 - (e) Home or environment to which he plans to return.
 - (f) Nature and kind of employment or other program which has been secured. In case of illness or other physical incapacity, arrangements shall be made for suitable care.
 - (g) Mental and social attitudes and behavior with respect to the welfare of society and the public.
 - (h) Attitudes of the sentencing judge, prosecuting attorney, or their successors in office, and of the community from which the prisoner was sentenced, if known.

⁴⁵ It was estimated that each Board member probably has no more than twenty minutes, and possibly much less, in which to consider each case. See note 36 *supra*.

bases its decisions as to who should be released and under what conditions. Professor Dawson has identified seventeen of these unwritten criteria,⁴⁶ and observation of the Board's deliberations indicates that many of these are applied with some regularity. This would mean that the criteria reflected in the Board's decisions are not chosen arbitrarily, but in accordance with some ascertainable pattern. To the extent that such regularities are characteristic of the Board's decisions, they may be said to represent *norms* of decision-making.

MAPA defines a rule as:

[A]n agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency, including the amendment, suspension or decision thereof, but does not include the following:

....

- (f) A determination, decision or order in a contested case.
- (g) An intergovernmental, interagency or intra-agency memorandum, directive or communication which does not affect the rights of, or procedures and practices available to the public.
- (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.
- (i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.
- (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected thereby.⁴⁷

The Parole Board's norms of decision certainly seem to fit comfortably within this definition of a rule. Each of these norms is "an agency . . . standard [or] policy . . . of general applicability,

⁴⁶ Dawson, *supra* note 32, at 249-85. Based on a study of practices in Kansas, Michigan, and Wisconsin, the following factors were identified and illustrated: (1) psychological change, (2) participation in institutional programs, (3) institutional adjustment, (4) criminal record, (5) prior experience under community supervision, (6) parole plan, (7) circumstances of the offense, (8) seriousness of the anticipated violation, (9) nearness of the mandatory release date, (10) length of time served, (11) parole to a detainer, (12) reward for informant services, (13) brutality of the offense, (14) supporting institutional discipline, (15) minimum amount of time, (16) potential benefit to the inmate, and (17) avoidance of criticism of the parole system.

⁴⁷ MICH. COMP. LAWS ANN. § 24.207 (Supp. 1972). The omitted sections consist of exceptions related to specific matters outside the jurisdiction of the Parole Board.

which implements or applies law . . . administered by the agency, or which prescribes the . . . procedure or practice of the agency. . . .'⁴⁸

It seems fairly clear that what the Parole Board has done is to order its business of decision-making according to a set of norms which fall within MAPA's definition of rules but which have not been formally enacted and promulgated according to the procedures set out in the Act.⁴⁹ They have in large part been given no explicit recognition of any sort. Yet they are highly significant determinants of actual parole release decisions.

2. *The Legal Status and Effect of Unarticulated Rules*—An initial difficulty in assessing the Act's impact on unarticulated rules results from its failure to specify the exact consequences of a rule's existence. Although the Act details certain procedures which must be followed in order to process a rule,⁵⁰ it does not state that every rule must be processed.⁵¹ It does provide, however, that:

- (1) An agency shall promulgate rules describing its organization and stating the general course and method of its operations and may include therein forms with instructions
- (2) An agency shall promulgate rules prescribing its procedures available to the public and the methods by which the public may obtain information and submit requests.

⁴⁸ Subsections (f), (i), and (j) do not apply because the norms of the Parole Board are not decisions but rather guides for decision and practice; (g) does not apply because these norms do affect the rights of prisoners and the procedures available to prisoners, who presumably are members of the public; and (h) does not apply because the rules of the Board, being unarticulated, are not explanatory but do have the force and effect of law. The general effect of this definition is to include what may be classed as legislative and procedural rules within the Act, and to exclude purely descriptive or interpretive rules. CRAMTON, *supra* note 42, at 47-53, 56-58. It might seem superficially plausible to class the Board's rulemaking activities as purely descriptive or interpretive, on the grounds that they are merely expounding upon the general criteria for release found in the statute (MICH. COMP. LAWS ANN. § 791.233 (1968)). This argument loses its force, however, when it is remembered that, as previously noted (*see* text accompanying notes 31-32 *supra*), the statute does not say when a prisoner *should* be paroled, only when he *may not* be. And even these restrictions are so generally phrased that any rules implementing them cannot be said to follow in any meaningful sense from the statute alone. Finally, the statute itself apparently recognizes its vague and incomplete character by specifically authorizing the Board to formulate conditions for parole. *See also* MICH. COMP. LAWS ANN. § 791.235 (1968), which provides that "the parole board shall reach its own conclusions as to the desirability of releasing such prisoner on parole."

⁴⁹ MICH. COMP. LAWS ANN. §§ 24.231-.264 (Supp. 1972).

⁵⁰ *Id.* §§ 24.231-.264.

⁵¹ Several terms are to be distinguished. "Adoption of a rule" according to MAPA means "the formal action of an agency establishing a rule before its promulgation." *Id.* § 24.203(1). "Promulgation of a rule" is a further step which consists of filing it with the Secretary of State. *Id.* § 24.205(6). "Processing of a rule" means all of the procedures required or authorized by the Act, including adoption, which are to result in its eventual promulgation. *Id.* § 24.205(5).

- (3) An agency may promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.⁵²

Thus, the Act indicates certain rules that *must* be processed and certain rules that *may* be processed, but as to a number of rules the Act is silent. It says nothing about rules describing the specific, as opposed to general, course and methods of agency operations; it says nothing about substantive, as opposed to procedural, rules to be applied in contested cases. Even within the explicitly covered categories, applicability is not always clear. It is uncertain, for example, just how general the promulgated rules of operation may be and still satisfy the Act's requirements. Arguably, the very general rules promulgated by the Department of Corrections relating to parole and Parole Board activities⁵³ suffice. However, if this were so, the provisions of the Act would be of little practical importance in the parole setting. If in fact details of procedure and substance are required, then obviously the Parole Board's unarticulated norms are not in compliance with the Act.

Deciding on the applicability of the third subsection presents different interpretive difficulties. It is clear from that subsection that the promulgation of rules is optional if they are procedural rather than substantive and if they are used in the context of a "contested case." The Act defines a contested case as

a proceeding . . . in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for evidentiary hearing.⁵⁴

The procedure by which a decision to release is made does result in a determination of the rights, duties, or privileges of the prisoner; but it is not clear whether this determination is required by law to be made "after an opportunity for an evidentiary hearing." While the appearances of prisoners before the Parole Board are referred to colloquially as "hearings" by board members, the statute requiring such appearances⁵⁵ does not use the term "hearing" in that regard. Since "hearings" are explicitly required by statute before the Board can grant parole under certain special circumstances or before it can revoke parole,⁵⁶ the avoidance of

⁵² *Id.* § 24.233.

⁵³ See note 43 and accompanying text *supra*.

⁵⁴ MICH. COMP. LAWS ANN. § 24.203(3) (Supp. 1972).

⁵⁵ *Id.* § 791.235 (1968).

⁵⁶ *Id.* §§ 791.234, .240a (Supp. 1972).

the word "hearing" in the statute governing regular release decisions is probably intentional.

Thus, Parole Board appearances, because they are not "hearings," would seem not to fit MAPA's definition of "contested case." Perhaps the most telling argument for not considering board procedures to involve contested cases is that so doing, while making the promulgation of rules optional, would impose a whole new range of procedural requirements on the Board.⁵⁷ MAPA states, *inter alia*, that parties may, as of right, file written answers to the required agency notices of hearing,⁵⁸ may present written and oral arguments on issues of law and policy, may present evidence and argument on issues of fact,⁵⁹ and may cross-examine witnesses, including the author of any document used by the agency in making its determination.⁶⁰ This last would seem to require that a prisoner be able to examine every person who has contributed to his file. It is obvious that the Board does not treat its cases even remotely like this, nor could it, given the exigencies of its job and workload. Five men simply cannot comply with MAPA's procedure for adjudicating contested cases in each of 10,000 cases a year, and thus far the people and the legislature have not considered parole release important enough to justify an allocation of resources sufficient to support such procedures.

The explicit terms of the Act, then, are of little help in deciding whether the Parole Board is required to promulgate its unarticulated norms of decision-making. If appearances before the Board are "contested cases," then promulgation would be optional under Subsection 24.233(3), but the Board would then be guilty of violating the Act's procedural requirements for contested cases. If appearances before the Board are denied the status of contested cases, then Section 24.233 does not speak to the question of whether the Board must process its unarticulated rules.

Despite its silence on the issue, there are good reasons for viewing the Act as requiring the processing of all rules not specifically exempted by operation of Subsection 24.233(3). The problem of unarticulated norms which constitute rules has not been extensively considered. Most of the discussion of administrative rulemaking has been concerned with the question of whether an agency has the power to make rules, and the impor-

⁵⁷ *Id.* §§ 24.271-.292, specifying procedures for contested cases.

⁵⁸ *Id.* §§ 24.271, .272(2).

⁵⁹ *Id.* § 24.272(3).

⁶⁰ *Id.* § 24.272(4).

tant distinction has been that between a rule and an adjudication.⁶¹ Two major purposes of administrative procedure acts appear to have been to define those situations in which an agency *may* make rules and in which it *must* make rules. This problem is distinct from the question of status of rules which *are already made* and followed but not acknowledged. Because focus on this latter question is only now becoming explicit, it is not surprising that the Act is somewhat unclear. Nevertheless, the Act's structure and philosophy do offer some guidance in resolving this issue.

The Act provides a lengthy definition of rules⁶² and an elaborate set of procedures to be followed in processing and publishing rules.⁶³ Those procedures must be followed in adopting and promulgating a rule or it will be invalid and of no effect. For example, a hearing must be held prior to the adoption of a rule.⁶⁴ Failure to do so, even though all other steps may have been complied with, will render any rule so adopted a nullity.⁶⁵ It seems highly questionable that the drafters would have intended to allow an agency, in any situation not specified in Section 24.233, to avoid entirely these stringent safeguards merely by refusing to process a rule. This would give to the agency virtually complete power to determine which rules, if any, should be processed and which should not. It would make little sense to say that a rule promulgated without hearings is invalid, but that a rule adopted with neither a hearing nor promulgation is valid.

Such a result would severely cripple the Act's effectiveness. To maintain its viability, it is essential that it be read to require the processing of all norms which fall within its definition of a rule. In fact, this is the position adopted in Professor Cramton's hand-

⁶¹ See, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE §§2.01-.16, 5.01 (1958).

⁶² See note 47 and accompanying text *supra*.

⁶³ See generally MICH. COMP. LAWS ANN. §§ 24.231-.264 (Supp. 1972). The following are examples of the mandatory language to be found in these provisions:

§ 24.241(1) Before the adoption of a rule an agency shall give notice of a public hearing

§ 24.241(2) The agency shall transmit copies of the notice to the joint committee on administrative rules [and others].

§ 24.241(3) The public hearing shall comply with any applicable statute

§ 24.242 The agency shall publish the notice as prescribed

§ 24.245(2) [T]he agency shall transmit by letter copies of the rules . . . to the joint committee on administrative rules.

§ 24.245(6) On formal adoption of a rule, an agency, if requested to do so by an interested person . . . shall issue a concise written statement of the principal reasons for its actions.

§ 24.246(1) To promulgate a rule an agency shall file in the office of the Secretary of State 3 copies of the rule

⁶⁴ *Id.* § 24.241.

⁶⁵ *Id.* § 24.243(1). An exception is made for inadvertent failure to give one of the required notices.

book, *The New Michigan Administrative Procedures*,⁶⁶ which was prepared under the supervision of a special subcommittee of the State Bar of Michigan for seminars sponsored by the Institute for Continuing Legal Education and the Administrative Law Committee of the State Bar. Indeed, the authors seem to have assumed the mandatory invocation of the rule-processing procedures as a matter not even open to question. "If a matter comes within the definition of a rule it must be processed and published in accordance with the procedures [provided for in the Act]."⁶⁷

This rationale would apply even to those rules which have been publicly enunciated in a previous adjudication. If a decision in a particular matter, whether or not it is a "contested case," is derived solely from the facts of that case, it is not a rule within the meaning of the Act, for it is not of general applicability.⁶⁸ It represents an ad hoc determination applicable only in that specific and unique fact situation. If, however, that same determination were subsequently relied upon in the decision of another matter, or even if its content were repeated regularly, *i.e.*, "generally applied," it would then represent a principle or standard of general applicability because it would be extended beyond the confines of its generative fact situation, and it would thus fulfill the definition of a rule. For this reason, the Act's requirements for the processing of rules cannot be avoided merely by announcing them in the context of a given case.⁶⁹ Even though a decision may be couched in terms of that case's factual context, if the inference it

⁶⁶ CRAMTON, *supra* note 42.

⁶⁷ *Id.* at 41.

⁶⁸ See note 47 and accompanying text *supra*.

⁶⁹ Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), where the plurality opinion asserted that the rulemaking provision of the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1970) "may not be avoided by the process of making rules in the course of adjudicatory proceedings." 394 U.S. at 764. In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the NLRB had announced a norm of decision-making (referred to by the plurality and dissenting opinions in *Wyman-Gordon* as "the *Excelsior* rule") which it declined to apply to the parties in that case but which it would apply in future cases. The norm required that an employer supply the union with a list of its employees prior to a representation election. Later, the Board ordered *Wyman-Gordon* to supply such a list, citing *Excelsior* as authority. A majority of the Court (the plurality and the dissenters) held that the *Excelsior* norm was not a valid rule because it had not been enacted and promulgated in accordance with the rulemaking procedures of the Administrative Procedure Act. However, the plurality held that the Board's order to *Wyman-Gordon* was binding as an independent adjudication and did not need the support of a rule; the fact that the order was based on the *Excelsior* norm rather than a new norm derived from the facts of the *Wyman-Gordon* case was treated by the plurality as irrelevant. The two dissenters maintained that the plurality approach ignored the important public policies behind the rulemaking procedures and vitiated those procedures by making them practically unenforceable.

The exceptions in the MAPA definition of "rule" rather pointedly avoid exempting norms announced in adjudication to the extent that they have any prospective effect. MICH. COMP. LAWS ANN § 24.207(1) (Supp. 1972).

indicates proves not to be confined to circumstances peculiar to that case, it represents a norm of general applicability—that is, a rule. It must be formally processed before it may be applied in other cases.⁷⁰

Of course there are objections to this position. One is that the drafters were well aware of the problem of requiring extant but unprocessed rules to be formally adopted and promulgated, as evidenced by the provisions of Section 24.233, which mandate promulgation in two instances while making it optional in a third,⁷¹ and by language in other Sections, notably 24.231. This latter provision refers to “laws authorizing or directing an agency to promulgate rules,”⁷² implying that specific statutory grants of power outside the MAPA were to be the primary vehicles for deciding when rules must be promulgated. It is perhaps significant that under the statutes dealing specifically with the Parole Board the Board is authorized but not required to adopt rules and regulations.⁷³

A second objection is that it would be a rational and plausible interpretation of the Act to view it as providing primarily for those situations and those agencies in which there is a need and a desire formally to adopt explicit rules. The prescribed procedures would insure that this would be done fairly. This would fill a need quite different from that of making all rules go through the procedures of formal adoption and would by itself constitute a sufficient justification for the Act.

The difficulty with both of these views is that they would not only render much of the Act’s careful definition of rules merely gratuitous,⁷⁴ but more importantly, they would narrow its scope so severely as to reduce drastically the impact it seems clearly intended to have had.⁷⁵ According to the Cramton handbook the philosophy of the Act was to require the processing of all legislative and procedural rules.⁷⁶ This accords to the Act a significance

⁷⁰ Even if it were admitted that the Board could bypass the Act’s procedures for adoption and promulgation by announcing a rule in an adjudication, this would not render their present practices valid. The only “opinions” written by the Board are terse comments on the reasons for denying a particular parole, but none of these refer to or pretend to state rules of general applicability. Presumably the effective enunciation of a rule must be more explicit and complete than this.

⁷¹ See note 52 and accompanying text *supra*.

⁷² MICH. COMP. LAWS ANN. § 24.231(2) (Supp. 1972).

⁷³ *Id.* § 791.233. Note that if “adopt” in this statute is read in the technical sense of the MAPA definition (§ 24.203(1)), it would say nothing about making unarticulated rules, but only authorize the formal effectuation of rules.

⁷⁴ See notes 43, 47 and 49 and accompanying text *supra*.

⁷⁵ See generally CRAMTON, *supra* note 42.

⁷⁶ *Id.* at 56–58.

commensurate with its elaborate structure and perceived importance for Michigan administrative practices.

IV. SUMMARY AND CONCLUSION

The operation of the Parole Board is designed to reflect a conviction that both objectives of parole, effective rehabilitation of the prisoner and protection of the community from possibly dangerous persons, can best be achieved by a "scientific" determination of readiness for release and the proper conditions for release. Examination of the realities of the Board's decision-making processes reveals, however, that not only is the scientific method not applied and quite probably inapplicable, but in attempting to achieve this goal the state has eliminated nearly all due process restrictions on the arbitrary disposition of significant issues of human liberty. The result has been the unchecked development of unarticulated and consequently unexamined operative norms of decision by the Board. At the very least these norms should be made explicit, so that they might offer guidance to affected and potentially affected parties and so they might be publicly evaluated for their functional congruence with the general objectives of the institution of parole.

The mechanism most likely to achieve this goal is the Michigan Administrative Procedures Act, for it appears that the Parole Board is subject to the Act. In making a parole release decision the Board generally uses unwritten norms to govern the procedure and result in the case; these are not derived from the facts of each case but are rules of general applicability within the meaning of the Act. Since the Act requires that every rule must be adopted and promulgated in accordance with certain specified procedures and since these procedures have not been followed by the Board, its reliance upon norms which represent unprocessed rules would seem to be prohibited by the Act.

If the Parole Board is to provide equal justice under law, it must have rules of law. It does have such rules, but they are unarticulated, poorly organized, and incomplete. This article has proposed that the Board should and must begin putting its house in order by adopting and promulgating the rules it applies and by developing new rules which are needed to complete its system of law. Until the Board undertakes this task it cannot assure that similar cases are similarly decided, nor can it assure the public that it decides cases rationally.

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