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Due Process and Substantive Accountability: Thoughts Toward a Model of Just Decisionmaking

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DUE PROCESS AND SUBSTANTIVE ACCOUNTABILITY: THOUGHTS TOWARD A MODEL OF JUST DECISIONMAKING

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I. INTRODUCTION

The greatest benefit of law is the security it provides us from the wrongful conduct of those who have the power to affect adversely our liberty or property. That security results from the dual mission of the Anglo-American legal tradition: (1) to treat each individual who comes before the bar of justice fairly, and (2) to render that fair treatment similarly to all persons who are situated similarly. It was recently offered that "[t]o wield power is to exercise discretionary authority over events."[1] Accepting that formulation, it seems clear that the law can achieve its dual mission of equal justice and thus provide security from abuses of power by individuals or—as the Vietnam War, the civil rights revolution, and the Watergate scandal attest—by our Government, only if it can prevent or correct the unreasonable exercise of this discretionary authority.[2]

As study after study assails the arbitrariness of decisionmaking in the criminal justice system,[3] it is clear that continued toleration of such

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Many of the ideas expressed in this essay drew their inspiration from my two-year association with the finest constitutional lawyer I have ever witnessed in the courtroom, Joe J. Tritico. This article is dedicated to him in appreciation of his friendship and all that he taught me.

1. THE NEW YORKER, Feb. 21, 1977, at 27.

2. Accountability was a major concern even among the framers of the United States Constitution. As Alexander Hamilton characterized the problem while campaigning for the ratification of the document in New York:

> In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself.

THE FEDERALIST No. 51 (A. Hamilton).

3. *E.g.*, W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); D.

abuse is attributable to the inability of the system to exact any real accountability of its decisionmakers. Nowhere are decisionmakers within the legal system vested with as much discretion as they are in the criminal justice system and its most prominent analogue, the involuntary commitment process. The decisions to grant or deny parole, to determine the appropriate sentence, or to commit for mental illness necessarily require the exercise of discretion. When its exercise is unenlightened and insensitive, however, the broad discretion becomes a defense to review of the decision for correctness, no matter how unfair the results may be. The long term solution, clearly, is extensive revision of statutory decisional criteria and a narrowing of the margin for error. Until that occurs (if one seriously entertains its prospect), countless individuals will continue to be victimized daily by these decisions.

The intent here is to suggest that due process can be the basis for substantive review of these decisions for fairness. Briefly stated, the thesis here is that due process requires more than that a decision affecting a person's liberty or property be made in observance of procedural norms; fairness requires additionally that, where possible, the decision be justified on its merits. What follows is an examination of decisionmaking principally in the parole process and, briefly, in the sentencing and involuntary commitment processes. It is the intent of this essay to explore the application of substantive accountability through the due process clause of the fourteenth amendment to decisions made in these areas.

II. DECISIONMAKING AND ACCOUNTABILITY UNDER THE CONSTITUTION

A. A View of Legal Decisionmaking

The purposes of any legal system can be characterized as both substantive and procedural, that is, to provide substantive rules to govern social behavior and procedural vehicles to settle social conflict as it arises by applying the appropriate substantive rule to govern the dispute in a

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HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); J. NOONAN, PERSONS AND MASKS OF THE LAW (1976); D. STANLEY, PRISONERS AMONG US: THE PROBLEM OF PAROLE (1976); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). The frequent courtroom disruption of the last decade occasioned by the outbursts of frustrated criminal defendants, lawyers, and spectators has prompted the Association of the Bar of the City of New York to undertake a national survey to determine whether that disorder reflects a general disenchantment with the American legal process. The results of the survey were far more disturbing than its authors were willing to admit. *See* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1973). For a philosophical examination of the phenomenon, see ISSUES IN LAW AND MORALITY 53-82 (N. Care & T. Trelogan ed. 1973).

binding fashion.[4] These procedural vehicles of dispute settlement intersperse the system at various levels, or jurisdictions, that are characterized as either legislative, judicial, or administrative. Flowing into each is the input that is necessary for resolution of the dispute, such as evidence and legal and policy considerations (the "is" and the "ought" of potentially applicable rules). The contours of the process consist of procedural and substantive rules designed to secure the accurate resolution of factual questions, regulate the content of the input, order its presentation, and weigh its value.[5] Flowing from the process is the outcome: a decision that, owing to the settling power of the vehicle, becomes itself a substantive rule of social behavior susceptible of prospective application to similar disputes.

In nearly all Western legal systems, and most assuredly in the Anglo-American system, legal decisionmaking is predominantly the business of the judge,[6] and the judicial process within which it takes place is the most visible, if not the most frequent, arbiter of social disputes. It is beyond the scope of this essay to re-examine in detail judicial decisionmaking as an intellectual discipline.[7] It suffices here to note that nearly every view of judicial decisionmaking has come to regard it as consisting of two distinct but inseparable elements: (1) the finding of adjudicatory,

4. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 110-206 (tent. ed. 1958).

5. The mode of fact-determination may vary from process to process. For example, legislative fact-finding, which does not focus upon any particular private dispute, is not nearly so structured as judicial fact-finding, which is extensively circumscribed by rules of evidence. Administrative fact-finding, the process for which is often a hybrid of legislative and judicial processes, lies somewhere in between. Even within the judicial process, fact-finding varies depending on the particular jurisdiction of the court settling the dispute—*e.g.*, appellate courts, or courts of review, must commonly accept the facts found by the trial court, or court of original jurisdiction, unless egregiously in error.

6. Although civil law purists might cavil at the ascendant value placed on judicial decisionmaking, it is clear that, even in those civil law jurisdictions that traditionally deny the authority of the judge to "make law," rule-making seems an inevitable part of the judicial process. *See, e.g.*, J. MERRYMAN, THE CIVIL LAW TRADITION (1969); THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS (J. Dainow ed. 1974); Perrot, *The Judge: The Extent and Limit of His Role in Civil Matters*, 50 TUL. L. REV. 495 (1976); Rudden, *Courts and Codes in England, France, and Soviet Russia*, 48 TUL. L. REV. 1010 (1974); Zweigert & Puttfarken, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704 (1970).

7. For classic discussions of the judicial model of decisionmaking, see B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); H.M. HART & A. SACKS, *supra* note 4; E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); K. LLEWELLYN, THE BRAMBLE BUSH (1930); R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 48-71 (1922).

or material, facts[8] determined from the usually conflicting items of evidence presented by the parties, and (2) the application of appropriate substantive rules to the facts found, whether derived from statutes, jurisprudence, or administrative regulations, to dictate the outcome.

Viewed in terms of its elements, analysis of judicial decisionmaking must address two issues: (1) the procedural regularity of the means by which the factual issues were resolved, and (2) the substantive desirability of the outcome. Questions of procedural regularity are mechanical questions. Tinker with the process, disrupt or alter the flow within it, and the effect is quickly felt. If the new direction of the flow within the process does not promote more accurate fact-finding, it must once again be corrected by mechanical adjustment. Thus, the principal, if not sole, criterion by which procedures are evaluated is the extent to which accurate fact-finding results. A recent example is the pronouncement of the Supreme Court disallowing aggregation of damages in computing the jurisdictional amount necessary to support a class action in federal court based on diversity jurisdiction.[9] The effect of the ruling is to narrow dramatically the number and kind of class disputes that enter the federal judicial process,[10] presumably in the interest of promoting more tightly circumscribed fact-finding by limiting the range of issues to which evidence might be directed.

Although the evaluation of rule-application was once thought to be a mechanical matter as well,[11] it is now clear that the true indicium of successful rule-application lies in its substantive effects. The precise formula by which these effects are measured is perhaps a matter of some dispute.[12] However, it is generally assumed that some utilitarian, or cost-benefit, calculus—albeit a crude one, considering the state of the art—should serve as a measure of outcome desirability.

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8. "Adjudicatory facts" are properly regarded as those facts that are necessary for the adjudication of legal issues raised by the controversy, *i.e.*, that are considered by rules of evidence to be material and relevant to the controversy.

9. Zahn v. International Paper Co., 414 U.S. 291 (1973); *see also* Snyder v. Harris, 394 U.S. 332 (1969).

10. *See, e.g.*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 355-57 (3d ed. 1976); Theis, *Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89 (1974).

11. For the classic critique, see Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); *see also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); Rostow, *The Realist Tradition in American Law*, in PATHS OF AMERICAN THOUGHT 203-18 (A. Schlesinger & M. White ed. 1970).

12. *See generally* C. FRIED, AN ANATOMY OF VALUES (1970); J. RAWLS, A THEORY OF JUSTICE (1969).

The legitimacy of a judicial decision, or the outcome flowing from the judicial process, then, rests upon two inquiries: one mechanical, the other social. Stated another way, a judicial decision is legitimated both by its procedural regularity and its substantive quality. The next question, logically, is what legal requirements presently exist to determine whether a particular decision is both procedurally and substantively legitimate?

B. A View of Legal Accountability

In his recent study entitled *The American Judicial Tradition,* Edward White characterized one of the identifiable elements of that tradition as "a tension between independence and accountability."[13] Although White was referring to the historic concern for the appropriate institutional role of the judiciary, he might just as well have been describing the frustrated expectations that result when the measure of accountability—and justice—in judicial decisionmaking is seen to be its procedural regularity alone. Without adequate consideration of whether substantive justice has been served by a judicial decision, by some measure of the social utility of the outcome, the *raison d'etre* of the entire system of judicial review appears ignored.

The unfortunate idea that the substance of an outcome may be ignored if the method by which it was achieved is procedurally regular finds its source in the modern American constitutional tradition. Perhaps the most significant and fundamental concept in the Constitution, due process, epitomizes this. The fifth and fourteenth amendments provide that neither federal nor state governments may deprive a person of his life, liberty, or property "without due process of law." Traditional due process methodology consists of a three-fold inquiry. First, governmental action must be present to satisfy the requirement that the interest in question was deprived by the polity.[14] Second, the deprivation must be found to affect a liberty or property interest.[15] Finally, the legitimacy of the deprivation is tested by evaluating the adequacy of the procedures

13. G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 2 (1976).

14. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); *see generally* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

15. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972). For a discussion of what entitlements suffice to trigger due process, see *The Supreme Court, 1975 Term—Due Process*, 90 HARV. L. REV. 1, 86-104 (1976); *see also* Reich, *The New Property,* 73 YALE L.J. 733 (1964).

by which it was achieved.[16] This is usually done by "balancing the interests of the state in limiting procedures against the individual's interest in being afforded additional procedures."[17] The premise, clearly, is that procedural fairness assures substantive justice.

Beginning with the fundamental procedural elements of notice and hearing,[18] the Supreme Court first developed elaborate procedural requirements for the deprivation of liberty as a result of criminal conviction[19] and then, by expansion of the concept of "property,"[20] for the denial of tangible and intangible entitlements resulting from civil adjudi-

16. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970); *see generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

17. Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation*, 89 HARV. L. REV. 752, 769 (1976).

18. [C]oncepts of notice and hearing have been at the core of due process from the beginning; and adaptation of those concepts to varied circumstances has contributed greatly to the flexibility of procedural due process . . . .

G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 508 (9th ed. 1975); *see, e.g.*, *In re* Oliver, 333 U.S. 257, 273 (1948); Powell v. Alabama, 287 U.S. 45, 68 (1932).

19. The culmination of this can be found in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), where the Supreme Court held that the sixth and fourteenth amendments proscribe the states from imposing any jail sentence upon an indigent convicted of a crime unless he is represented by appointed counsel during the proceedings.

20. See note 15, *supra*. A characteristic of the post-World War II, procedurally-oriented constitutional jurisprudence has been its excessive abstraction and generalization, particularly under the due process clause of the fourteenth amendment. "[T]he tendency of precedent to extend itself along the lines of logical development," as Justice Cardozo described it (B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34 (1922)), is related to its abstraction and generality. The more abstract and general the concept, the greater its potential is for analogical application. Abstraction and generalization of the words "property" and "liberty" as used in section one of the fourteenth amendment have prompted the application of procedural due process safeguards to regulate the mode of governmental action affecting individual interests that a generation ago would have been considered too jejune to inspire constitutional inquiry. *See* cases cited in notes 22-27, *infra*.

Some observers have regarded this proliferation as something of a pollutant of constitutional theory and have been moved to rationalize its prolificacy. As Professor Henry P. Monaghan recently declared,

> a surprising amount of what passes as authoritative constitutional "interpretation" is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975). Hence, for example, the doctrinal masses prompted by the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), and the requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966), that certain warnings be given an accused are seen as something less than exegetically inspired.

cations.[21] All this was done to legitimate decisions in the name of "due process of law," and all without considering whether any requirements should be placed on the substantive correctness of a procedurally regular decision to, for example, revoke probation or parole,[22] commit for mental illness,[23] deny welfare benefits,[24] suspend from high school,[25] deny faculty tenure,[26] or similarly affect the significant interests of an individual.[27] When the Court has imparted any substantive value to due process, it has usually done so indirectly and incompletely by holding that the fourteenth amendment imposes upon the states certain parts of the Bill of Rights—the "cruel and unusual punishment" proscription of the eighth amendment,[28] for example, and the double jeopardy clause of the fifth amendment.[29] The modern Court has rarely ventured to determine whether due process imposes substantive limitations upon decisionmaking apart from these explicit provisions of the Bill of Rights.[30]

The irony is apparent. In its constitutional adjudication, the United States Supreme Court has exhibited great devotion to due process as synonymous with "fundamental principles of liberty and justice which lie at the base of the civil and political institutions,"[31] principles "basic in our

21. *E.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

22. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

23. O'Connor v. Donaldson, 422 U.S. 563 (1975).

24. Goldberg v. Kelly, 397 U.S. 254 (1970).

25. Goss v. Lopez, 419 U.S. 565 (1975).

26. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

27. *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (in-prison disciplinary proceedings); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (revocation of retail liquor license).

28. *E.g.*, Gardner v. Florida, 430 U.S. 349 (1977); Jurek v. Texas, 428 U.S. 262 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

29. Benton v. Maryland, 395 U.S. 784 (1969); *see also* Ashe v. Swenson, 397 U.S. 436 (1970).

30. This preference for proceduralism in due process adjudications has not gone without the express approval of some academic lawyers. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 233-34 (1962). For excellent studies of the role that lawyers have traditionally played in the avoidance of substantive outcome inquiry, see J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976), *reviewed by* Wyzanski, 90 HARV. L. REV. 283 (1976); M. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS (1975), *reviewed by* Barnett, 90 HARV. L. REV. 648 (1977).

31. Powell v. Alabama, 287 U.S. 45, 67 (1932).

system of jurisprudence,"[32] rights "essential to a fair trial,"[33] rights "fundamental to the American scheme of justice,"[34] or principles that are "of the very essence of a scheme of ordered liberty."[35] All of this is perhaps a more elegant way of saying that the Constitution demands that an individual be dealt with fairly by the legal process. But can any decision, even if procedurally regular, be considered fair when it is wrong?

One who is wrongfully convicted of a crime must find little solace in the fact that the trial that led to his conviction was procedurally regular in every respect. The same can be said for the student or teacher unjustly expelled, suspended, or discharged, the harmless mental patient erroneously committed as "dangerous," and the inmate whose parole is denied despite the favorable indication of empirically verified prediction tables. The belief that affording someone notice of intended punitive action, a hearing to contest it, and an attorney to assist at the hearing will necessarily prompt a correct disposition of the matter is tragically myopic.

To be sure, not all decisions are readily susceptible of substantive review for correctness. An obvious example is the decision of a jury on the guilt or innocence of a criminal defendant, which is almost purely a finding of fact without rule-application. But within the criminal justice system there are numerous decisions requiring rule-application that are made under conditions to which some form of substantive accountability lends itself—for example, the decisions to release on or to revoke parole, which can be viewed against empirically verified predictive criteria.[36] The Constitution, in requiring that individuals be dealt with fairly by decisions made within the legal process, surely requires some of those decisions to be right. The question remains to determine which ones.

C. Due Process and Substantive Accountability

The question of what process is, in fact, due an individual in adjudications affecting his liberty or property has not always been regarded as a predominantly procedural inquiry. The well-documented attempt by the Supreme Court to erect natural law principles as a barrier to social and economic reforms, particularly the redistribution of wealth, during the period spanning the turn of the century[37] to the New Deal[38] was an

32. *In re* Oliver, 333 U.S. 257, 273 (1948).
33. Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).
34. Duncan v. Louisiana, 391 U.S. 145, 149 (1965).
35. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
36. See notes 83-89, *infra*, and accompanying text.
37. The decision that signaled the coming of substantive due process in the Supreme

attempt to inject substantive values into due process. The Court at that time considered the natural law principles of liberty of contract and right of property as implicit in the due process clauses of the fifth and fourteenth amendments.[39] As a result, laws regulating conditions of employment, such as minimum wages and maximum hours or the participation in a labor union, were struck down as violating due process by infringing the employer's liberty to contract for favorable terms with his employees and his right to acquire property thereby in the form of increased profits.[40] Similarly, laws regulating—and thereby restraining—the conduct of business were struck down as violative of the natural rights of entrepreneurs.[41] Economic necessity finally prompted a retreat from the use of natural law as a model for due process, and the New Deal brought a different economic philosophy to the nation. "Substantive" due process in that form has not been seriously considered since.

Recent Supreme Court jurisprudence evinces a second, subtler effort to attribute substance to due process. The Court has coped less than satisfactorily with substantive constitutional challenges to legislation grounded in due process principles.[42] On the one hand, there is a per-

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Court was *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), is commonly taken to mark the fulfillment of that prophecy.

38. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Nebbia v. New York*, 291 U.S. 502 (1934), marked the demise of the natural law model of due process.

39. For a convenient outline of John Locke's natural law construct, see Monson, *Locke and His Interpreters*, in LIFE, LIBERTY, AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS 33, 43-46 (G. Schochet ed. 1971).

40. *E.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

41. *E.g.*, New State Ice Co. v. Liebman, 285 U.S. 262 (1932); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Adams v. Tanner, 244 U.S. 590 (1917).

42. These challenges have arisen both in the ordinary appellate process as well as in civil suits for redress of alleged constitutional deprivations. Section 1983 of title 42 of the United States Code provides a civil cause of action to any person who has suffered a deprivation of federally-protected rights at the hands of another who acted "under color" of state law. The available remedies include damages and equitable relief. *See generally Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977), and authorities cited therein. Generally, a plaintiff must establish four elements in order to prevail under section 1983: (1) an act or, less certainly, an omission, *cf.*, *e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976); Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976); (2) by a person acting "under color" of state law, *see, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (utilities company does not act "under color" of state law in terminating service to customer for nonpayment); *i.e.*, as an ostensible assertion of state authority by a person occupying a public office for which no immunity is recognized, *see, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Scheuer v. Rhodes, 416 U.S. 232 (1974) (executive officers); Pierson v. Ray, 386 U.S.

ceptible movement to extend traditional, procedurally-oriented due process analysis to matters of substance.[43] Thus, the Court has disapproved a single-family zoning ordinance that proscribed the occupancy of a dwelling by the children of more than one dependent child of the principal dweller,[44] a state law that made non-therapeutic abortion a crime,[45] and a state law that prohibited the use of contraceptive medicines and devices,[46] because each regulation invaded a substantive interest found to be protected by the due process clause of the fourteenth amendment.

On the other hand, each expansion of this "substantive" form of due process has been made warily, a characteristic of the Burger Court. Unlike its predecessor, which often seized upon a single decision to undertake creative revisions of constitutional doctrine,[47] each advance by the Burger Court seems curiously subject to its own form of Newton's theory holding that every action in nature is subject to an equal and opposite

547 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); (3) that results in the deprivation of a federal right of the party injured; and (4) was prompted by a positive desire of the public official to achieve that result. *See, e.g.*, Comment, *The Evolution of the State-of-Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973).

Usually, the third element concerns an alleged deprivation of due process or equal protection under the fourteenth amendment, since section 1983 has been considered designed to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . . ." Monroe v. Pape, 365 U.S. 167, 172 (1961). This has afforded those aggrieved by state action a vehicle to challenge that action in federal court as an ostensible violation of the litigant's fourteenth amendment rights. As a result, section 1983 litigation has occasioned numerous extensions of the fourteenth amendment to embrace previously unrecognized liberty and property interests. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); O'Connor v. Donaldson, 422 U.S. 563 (1975); Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978).

43. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 1932 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); *cf. The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 128-37 (1977).

44. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

45. Roe v. Wade, 410 U.S. 113 (1973).

46. Griswold v. Connecticut, 381 U.S. 479 (1965).

47. For example, the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which simply held that "segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities," *id.* at 493, ultimately prompted the Court's affirmative mandates on busing and redistricting, which were designed to equalize the racial proportions within the student bodies of public schools. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971). A similar phenomenon can be found in the Reapportionment Cases. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Wesbury v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

reaction. Thus, the recent ruling in *Moore v. City of East Cleveland*,[48] which struck down the zoning ordinance prohibiting the occupancy of single dwellings by extended families, is circumscribed by the earlier pronouncements in *Village of Belle Terre v. Boraas*,[49] which upheld a less restrictive single-family zoning ordinance that merely prohibited occupancy by persons unrelated to the principal dweller by blood, adoption, or marriage. Similarly, the refusal of *Roe v. Wade*[50] to permit state interference with a woman's decision to terminate pregnancy before the third trimester was not seen as requiring state and local governments to fund non-therapeutic abortions for indigents in *Maher v. Roe*[51] and *Poelker v. Doe*,[52] decided last term. In exception to the rule, however, the rationale of *Griswold v. Connecticut*,[53] which struck down a state law prohibiting the use of birth control, was extended in *Carey v. Population Services International*[54] to hold that state law may not require that only licensed pharmacists dispense non-hazardous contraceptives.

The decisions of a court as disinclined to doctrine as is the Burger Court are manifestly difficult to interrelate. One can only theorize whether the Court found in these decisions a single interest that it constitutionally insulated—be it characterized as a right of privacy[55] or a right to family life choices[56]—or whether it recognized in each decision a separate and distinct interest that warranted protection. It is not surprising, then, that appraisal of these and related decisions[57] has been sharply critical.[58]

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48. 431 U.S. 494 (1977).
49. 416 U.S. 1 (1974).
50. 410 U.S. 113 (1973).
51. 432 U.S. 464 (1977).
52. 432 U.S. 519 (1977).
53. 381 U.S. 479 (1965).
54. 431 U.S. 678 (1977).
55. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). Professor Gerald Gunther has taken certain decisions to mark the revival of substantive due process for the rights of "privacy and autonomy." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 616-56 (9th ed. 1975).
56. *E.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 128-37 (1977). In its most recent decision on the subject at this writing, the Court held that a component of the right to family life choices is the right to marry, which the state may not fetter by requiring court approval prior to its exercise by one who is under a court-imposed obligation of child support. Zablocki v. Redhail, 434 U.S. 374 (1978).
57. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
58. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE

It is obvious that the substantive recognition given certain interests in the name of due process and the resulting constitutional immunity they received from legislative impingement are not germane to the inquiry here, which addresses in general terms the right of an individual to have decisions that directly affect his liberty or property made correctly. It can safely be assumed that, under the Burger Court's construct of substantive due process, the laws governing parole, sentencing, and involuntary commitment do not invade a constitutionally-protected substantive interest in privacy or family life. The question here is whether decisions made pursuant to those laws have empirical legitimacy.

Perhaps the past and present difficulties with substantive due process account for the Court's disinclination to extend its use to exact substantive accountability for decisionmaking within the legal process. However, the traditional formulation defines due process as "the right of a person to be free from *arbitrary* governmental action,"[59] and there is no reason that the term "governmental action" should connote only legislation. Moreover, this formulation has a substantive lineage that can be traced to the early days of the Republic. The intention of the founding fathers[60] to impose some restriction upon decisionmaking by the new political order was evident: a central theme of the American Revolution was the revulsion for the distant, detached, and often arbitrary decisions

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L.J. 920 (1973); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). *But see* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973).

59. J. HALL, B. GEORGE & R. FORCE, CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE 737 (3d ed. 1976), *citing* Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME LAW. 389 (1945) (emphasis in original); *see* Tot v. United States, 319 U.S. 463 (1943); Curry v. McCanless, 307 U.S. 357 (1931).

60. The term "founding fathers" perhaps requires definition. It has been observed that

> [t]here are in American history two groups of founding fathers, one for the time of settlement in the seventeenth century and the other for the era of national independence in the late eighteenth century. In many ways the two groups have been treated as one . . . . For the first founders, in the seventeenth century, the belief in a mission was largely theological. For the second set of founders the belief in a mission was much more secular and political, though still dependent on a faith in the guiding hand of God. As heirs of a combined tradition, we still regard the more solemn moments of politics as a quasi-religious experience and consider religion in general as a cornerstone of the polity.

C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 170-71 (1969) (footnotes omitted). Clearly, the textual reference here is to the "second set of founders" that Miller describes.

of George III and the British Parliament affecting the colonists' liberty and property.[61] When Alexander Hamilton observed that, after enabling the new government to control the governed, the framers must then "oblige it to control itself,"[62] he contemplated substantive restrictions on the powers of government. Of course, the preoccupation of the time centered upon the mechanical restraint of abuses of power that is commonly termed the system of "checks and balances." Nonetheless, the idea that government should intervene in the private affairs of its citizens only when a rational and clearly articulated basis exists to legitimate that intervention is an obvious intellectual antecedent for substantive accountability in legal decisionmaking.[63] In the words of Willard Hurst, "[c]onstitutionalism [in this formative period] found expression in demands that *all* organized power be responsible by measures of utility and justice."[64]

Despite this, the control of governmental decisionmaking on the basis of its impingement of individual liberty and property interests via the fifth and fourteenth amendments is a modern phenomenon. As the late Robert G. McCloskey observed in *The Modern Supreme Court*,

> [t]he relative newness of civil rights as a constitutional issue is one of those obvious facts whose significance is easy to overlook. America has regarded itself as the land of the free since at least 1776, and the Constitution has been revered as the palladium of freedom since its inception. But although the literature of American democracy is rich in libertarian generalities, this rhetoric of individual rights had rarely been translated into concrete legislative prescriptions and ju-

61. Edmund S. Morgan has described this as the "first principle" to evolve from the struggle for independence. Morgan, *The American Revolution Considered As an Intellectual Movement*, in PATHS OF AMERICAN THOUGHT 11, 27 (A. Schlesinger & M. White ed. 1970).

62. THE FEDERALIST No. 51 (A. Hamilton).

63. *See generally* PATHS OF AMERICAN THOUGHT (A. Schlesinger & M. White ed. 1970); 1 & 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971); Hurst, *Legal Elements in United States History,* in LAW IN AMERICAN HISTORY 3 (D. Fleming & B. Bailyn ed. 1971).

Perhaps unintentionally, Chief Justice Hughes presaged the ideas proposed here when he observed in his history of the Supreme Court that

> [l]iberty embraces much more than immunity from physical restraint, or from criminal prosecutions in the absence of a prior valid definition of the offense, a proper charge, due notice and a reasonable opportunity to defend . . . . Liberty implies the absence of *arbitrary* restraint . . . .

C. HUGHES, THE SUPREME COURT OF THE UNITED STATES—ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 204-05 (1928) (footnotes omitted) (emphasis added).

64. Hurst, *supra* note 63, at 3 (emphasis in original).

> dicial doctrines in the nineteenth or even in the early twentieth century. The political and religious rights associated with the First Amendent had not become a matter of active judicial concern until the 1920's. Equal protection and due process rights had been almost entirely associated with economic activities until the very eve of the Stone Court. Thus the modern Supreme Court inherited only a few scattered and incomplete theoretical and doctrinal tools to handle the problems of civil and political rights with which the justices were now confronted.[65]

This suggests, first, that the preoccupation of the modern Court with procedural solutions to substantive problems lacks sound doctrinal and historical precedent and, second, that the presently misconceived jurisprudence is not intractable.

If there is to be substantive content to due process, and it is not to come from natural law, from what sources will it be derived? The definition, freedom from arbitrariness, suggests the source from which the new model can be drawn. The antidote for arbitrariness is reason—principled reason that requires rule-application to be justified by its tendency to further accepted social ends.[66] It is imperative that this tendency be empirically verified to the greatest extent possible, or one risks returning to legal fictions no better than natural law. Thus, for example, an inmate must not be denied parole when prediction tables, compiled from available social studies, indicate the great likelihood that he would adjust to freedom successfully; a teacher must not be discharged for any conduct that cannot demonstrably be shown to impede or compromise his ability to educate; a mental patient should not be committed unless he is likely to engage in conduct that threatens public security; and so on.

It may be important that procedural safeguards be afforded the parolee, the teacher, the mental patient, and others throughout the process of fact-finding, but it is critical that the application of legal rule to the facts found be rooted in an accurate appraisal of its utility. As a substantive guarantee against arbitrariness, due process requires that outcomes be reasoned from factual premises toward useful ends. A decision to deny parole benefits neither the parolee nor the public when there exist both the factual premise for success upon parole and the dual benefits of freeing the individual from restraints on his liberty and freeing the

65. R. McCLOSKEY, THE MODERN SUPREME COURT 4 (1972).

66. This sort of judicial inquiry is hardly unprecedented. For an excellent study of the general capacity of courts to make and implement social policy, see D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

public from fiscal responsibility for him while he is incarcerated.[67]

This also suggests which decisions the Constitution requires to be right. The idea of paternalism that pervades the criminal justice system, and functional analogues such as the involuntary commitment process, suggests that decisions to deprive an individual of his liberty or property be made ostensibly in his best interest. Thus, the decision to impose a sanction becomes nothing more than a prediction of how the individual can best profit from the sanction and thereafter conform his conduct to the norms of the system.

Leaving aside the validity of these norms of behavior, the correctness of the predictions that they prompt can often be tested empirically. When the prediction can be verified by reference to empirical data, any guarantee of fairness that ignores that verification is illusory. It follows that any decision, or prediction, that can be empirically verified should be subject to substantive review for correctness.

The obvious difficulty lies in determining whether sufficient empirical data exist to check a prediction for correctness. Like any other discipline, the state of knowledge in the field of social science is constantly changing with the compilation and evaluation of new data. Nonetheless, the state of knowledge can be given reasonable contours, and the reliability of certain premises made thereon can be established with some certainty. When that point is reached, the suppositions upon which decisionmakers hazard predictions that affect the liberty or property of individuals must be tested. It is these decisions that fundamental fairness requires to be right.

In this context, substantive due process for administrative and judicial decisionmaking might be seen as a functional equivalent of the equal protection clause for legislative decisionmaking, which requires, at a minimum, that legislative choices and classifications bear a reasonable relation to the achievement of a legitimate state objective or, where a "fundamental interest" is involved, be justified by a "compelling" state interest.[68] Equal protection analysis addresses the empirical basis for legislatively-drawn distinctions among classes.[69] Substantive due process analysis, as outlined here, addresses the empirical basis for adminis-

67. It should be obvious that the converse is true as well: a decision to release a likely recidivist on parole is equally unjustifiable.

68. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

69. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 511 (1975) (Brennan, J., dissenting); *see generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

trative and judicial distinctions among individuals. The only difference is that the legislature's decision is not directed to a single controversy, but rather attempts to settle a rule for all like controversies. The legislative decisionmaker is not free to distinguish among situations calling for rule-application without factual justification; equal protection requires that all persons similarly situated be similarly treated. Likewise, the administrative and judicial decisionmaker should not be free, in the name of parole expertise or sentencing or commitment discretion, to exercise his discretion and draw distinctions on a case-by-case basis without factual, or substantive, justification. Implicit in the due process guarantee, in addition to individual fairness, is the notion of similar treatment for similar situations.[70]

In undertaking substantive constitutional review of decisionmaking, the reviewing court is not free to substitute its own judgment for that of the paroling authority unless there exists an empirical basis therefor. Otherwise, the reviewing decision is just as constitutionally flawed as the original decision. This is what has occurred in the Supreme Court's review of decisions to impose the death penalty, where the Court has refused to consider whether the decisions were justified empirically.

In *Furman v. Georgia*,[71] the Supreme Court determined by a 5-4 vote that the administration of the death penalty in Georgia under a statute that permitted its discretionary imposition without a consideration of relevant facts to justify the extreme sanction violated the eighth and fourteenth amendments to the federal constitution. The failure of the majority to subscribe to a single rationale makes further generalization tenuous, but it is clear that the majority concluded that capital punishment, as then administered in Georgia, was not consistently imposed for similar offenses and was, therefore, fundamentally unfair. The *Furman* Court addressed the death penalty issue principally from a procedural perspective—whether the sentencing procedures in Georgia assured the accurate resolution of factual questions relative to the

70. Because of this functional similarity, due process and equal protection have been found to be substantially interrelated. As Chief Justice Warren once observed:

> The Fifth Amendment . . . does not contain an equal protection clause . . . . But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

71. 408 U.S. 238 (1972), *noted in* 47 TUL. L. REV. 1167 (1973).

sentencing decision. The substantive social justification for imposition of the death penalty was never addressed in empirical terms, even by those members of the Court who felt that it was "cruel and unusual" per se.

In *Jurek v. Texas*,[72] a majority of the Court approved the capital punishment scheme and procedures enacted by the Texas legislature after the *Furman* decision, declaring that,

> [b]y authorizing the defense to bring before the jury at [a] separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed it does not violate the Constitution.[73]

The Texas procedures which the *Jurek* Court approved provide for a post-trial sentencing hearing by the same jury that convicted the defendant. After that hearing, the jury must answer the question, *inter alia*, "whether [from the evidence adduced] there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . ."[74] If the jury answers yes to this and two other questions, which concern the severity and intent of the act, the death sentence is imposed. If not, the defendant is sentenced to life imprisonment.[75] If the death sentence is imposed, an expedited review of the decision by the Texas Court of Criminal Appeals is provided.[76]

The Court's approval of the Texas sentencing scheme again reflects its willingness to proceed on the erroneous assumption that procedural fairness assures substantive justice. The *Jurek* Court did not question whether a jury is capable of determining the probability of recidivism or, if so, what substantive criteria are sufficient to furnish a sound empirical basis for that life-or-death decision. Neither did the Court require the state at the sentencing hearing to provide a nexus between the evidence of aggravating circumstances it presents and the prediction the jury is

72. 428 U.S. 262 (1976).
73. *Id.* at 276 (citations omitted).
74. TEXAS CODE CRIM. PROC. art. 37.071(b)(2) (Supp. 1975 & 1976).
75. *Id.* art. 37.071(c), (e).
76. *Id.* art. 37.071(f).

asked to make—*i.e.*, whether the aggravating circumstances do, in fact, portend recidivism of a serious nature. In short, the Court did not require the jury's prediction to be right. One of the dangers inherent in the prediction of criminal behavior is the "false positive," an erroneous prediction that a person will commit crime when he, in fact, will not.[77] Given the dire consequences of a "false positive" prediction by a sentencing jury under the *Jurek* scheme, the case for substantive constitutional review of decisionmaking to achieve accuracy becomes compelling.

In *Gardner v. Florida*,[78] a Florida jury had found the defendant guilty of first-degree murder. After a post-trial sentence hearing much like that of Texas, the jury found evidence of mitigation and recommended a life sentence. Exercising the discretion granted him by Florida law,[79] the trial judge overruled the recommendation of the jury and sentenced the defendant to death. In so doing, the judge found evidence of aggravation, rather than mitigation, and recited in his findings that he relied in part upon a confidential pre-sentence investigative report furnished him by the state parole board.

The Supreme Court found this procedural mode of fact-finding to be too unreliable, given the interests at stake, to comport with the requirements of procedural due process, and, accordingly, it vacated the sentence. Once again the sentencing decision was reviewed from a procedural perspective alone, and the question of the legitimacy of the sentence was resolved in terms of the procedural regularity with which the decision was made. Had the *Gardner* jury concluded that the same evidence showed aggravating circumstances (with which the sentencing judge would have, of course, agreed), the death sentence would not have been reviewed by the Court; under present standards, its correctness is not subject to review.

The *Furman-Jurek-Gardner* construct[80] is indicative of just how deeply ingrained the judicial fetish for proceduralism is. In refusing to review the death sentence substantively, the Court has ignored whether an empirical justification exists for the most severe and irreversible penal sanction known to man. In view of the widespread public debate over

77. *See, e.g.*, A. VON HIRSCH, *supra* note 3, at 19-26.

78. 97 430 U.S. 349 (1977).

79. FLA. STAT. § 921.141 (Supp. 1976 & 1977).

80. *See also* Coker v. Georgia, 433 U.S. 584 (1977); Proffitt v. Florida, 428 U.S. 242 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). For a general review of the Supreme Court's decisions on the death penalty, see *Review of Supreme Court's Work: Decisions on Criminal Law*, 45 U.S.L.W. 3121 (1976).

the effectiveness of the death penalty as a deterrent and its appropriateness as a penal sanction under contemporary notions of rational justice, the refusal of the Court to address the substantive issue is a costly omission. There is no harder case for according substance to fundamental fairness.

The remainder of this essay does not propose to set forth a detailed and complete construct of this new form of substantive due process. Its goal is less ambitious: to demonstrate that substantive accountability can be exacted from legal decisionmaking in specific instances, particularly within the parole, sentencing, and commitment processes. It is hoped that the promise of due process will be made plainer and its application considered in other contexts where it may prove helpful to legal decisionmaking and thereby promote the ideals of equal justice.

III. THE PAROLE PROCESS

A. An Outline of Parole Decisionmaking

Although parole is by far the most common type of release from incarceration in the American criminal justice system, until comparatively recent times it was the subject of seemingly studied judicial neglect.[81] Viewing the criminal justice process on a temporal continuum from intake to discharge, judicial review centered first on procedures relating to the nucleus of the system, the trial, and then expanded backward in time to the earlier, "critical stages" of the prosecution.[82] The Supreme Court only recently turned its attention in any significant way to the post-conviction side of the process[83] when in 1972 it announced in

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81. As one study disclosed in 1967,

> The correctional apparatus to which guilty defendants are delivered is in every respect the most isolated part of the criminal justice system . . . . It is isolated in the sense that what it does with, to, or for the people under its supervision is seldom governed by any but the most broadly written statutes, and is almost never scrutinized by appellate courts.

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 11-12 (1967) [hereinafter cited as THE CHALLENGE OF CRIME]. *See also* Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915-19 (1962). For typical decisions of the period on parole, *see* Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); *In re* McLain, 55 Cal. 2d 78, 357 P. 2d 1080, 9 Cal. Rptr. 824 (1961).

82. The Court has undertaken a "critical stage" analysis to identify those points in the prosecution at which the right to counsel of the sixth amendment attaches. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); Mempa v. Rhay, 389 U.S. 128 (1967); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932).

83. *Compare* Williams v. New York, 337 U.S. 241 (1949) *with* Specht v. Patterson, 386 U.S. 605 (1967).

Morrissey v. Brewer[84] that the parole revocation process was to be clothed with many of the procedural due process amenities applicable to conventional criminal trials.[85]

The implications of this for parole become apparent upon examination of that process.[86] Parole has been described as comprised of two elements: (1) a decision—by constituted authority according to statute that an inmate serve a portion of his sentence outside of the institution in which he is incarcerated, and (2) a status—defined by the rules and regulations of the paroling authority, under which the parolee is to serve the remainder of his sentence in the community.[87] For completeness, a third element must be added to the description: (3) a second decision—by constituted authority according to statute that a parolee be taken from the community and returned to institutional incarceration for failing to observe the rules and regulations that define his status. The second decision, of course, does not always arise and is not ordinarily essential to a description of parole. However, the decision to revoke parole shares a common feature with the decision to release: neither, under the *Morrissey* standard of judicial review, is accountable for its result, only its procedural regularity.[88]

The decision to grant or deny parole is usually governed by a statute that provides at best only vague guidance to decisionmakers, as, for example, when it provides that parole is to be granted "when . . . there is reasonable probability that the prisoner can be released without detriment to the community or himself"[89] or when "there is reasonable probability that the prisoner is able and willing to fulfil the obligations of

84. 408 U.S. 471 (1972); *see, e.g.*, Comment, *An Endorsement of Due Process Reform in Parole Revocation: Morrissey v. Brewer*, 6 LOYOLA (L.A.) L. REV. 157 (1973); *see also* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

85. 408 U.S. at 482-89.

86. For general discussions of parole as a system, see 4 Attorney General's Survey of Release Procedures (1939); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 619-50 (2d ed. 1973); Comment, *The Parole System*, 120 U. PA. L. REV. 282 (1971).

87. AMERICAN CORRECTIONAL ASSOCIATION, CORRECTIONS—PAROLE—MDT—PROJECT 21 (1972).

88. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). The only substantive accountability presently exacted of parole decisions is the traditional, abuse-of-discretion standard, which requires the parolee to demonstrate that the decision complained of was arbitrary, capricious, and completely unreasonable. *See, e.g.*, Calabro v. United States Bd. of Parole, 525 F.2d 660 (5th Cir. 1975); King v. Florida Parole and Probation Comm'n, 306 So. 2d 506 (Fla. 1975); White v. New York State Bd. of Parole, 373 N.Y.S. 2d 397 (App. Div. 1975). *But cf.* Soloway v. Weger, 389 F. Supp. 409 (M.D. Pa. 1974).

89. Standard Probation and Parole Act § 18 (1955).

a law abiding citizen . . . ."[90] Clearly, the operative criterion for the release determination, no matter how phrased, is the probability of recidivism.[91] However, beyond a simple directive such as the paradigms offered here, the typical parole board is left to its own devices to formulate release criteria that are valid indicia of parole success.

The same dilemma confronts the decisionmakers when they decide whether to revoke the parole of one accused of violating the conditions of his release. The statutes on revocation offer somewhat more specific guidance, typically counselling that if the evidence adduced at the revocation hearing indicates that the parolee has breached a condition of his parole agreement by engaging in serious misconduct without justification, his parole may be revoked. This prompts a more factual and less judgmental inquiry by the board directed toward a simple determination of whether the conditions of the parole, specifically delineated in a "contract" signed by the parolee before his release,[92] were violated. However, the revocation inquiry, though more particularized, ignores completely the valid, though vague, criterion of the release decision: the probability of recidivism. Where the alleged violation does not consist of criminal conduct, the revocation decision is, in effect, simply another release decision, the inquiry being whether to endorse the previous release decision by not revoking parole. Hence, the criterion ought to be the same, although the parolee's possible failure to observe his parole conditions may not augur well for his avoidance of recidivism.

B. Parole Prediction

The problems generated by inadequate statutory release criteria have been exacerbated by the widespread unpreparedness of parole

90. *E.g.*, LA. R.S. 15:574.4(E) (Supp. 1977).

91. *See* Dawson, *The Decision To Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U.L.Q. 243, 265-66. The vagueness of the present release criterion has prompted several jurisdictions to undertake studies to identify more particularly the bases for release and revocation decisions made by their parole authorities. *See, e.g.*, Citizens' Inquiry on Parole and Criminal Justice, Prison Without Walls: Report on New York Parole (1975); Research Division of California Institute of Corrections, By the Standard of His Rehabilitation: Information, Decision, and Outcome in Terminations of Parole (1971).

92. For lists of parole conditions within various jurisdictions, see J. CANNON, F. DEVINE, J. PERAZICH, L. SCHWARTZ & D. TRUEBNER, LAW AND TACTICS IN SENTENCING 118 (1970) (federal parole conditions of 1970); Comment, *Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata?*, 10 SANTA CLARA LAW. 319, 320 n.6 (1970) (California parole conditions); Comment, *Parole in Louisiana: Theory and Practice*, 48 TUL. L. REV. 332, 359 n.229 (1974) (Louisiana parole conditions). *See generally* Note, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963).

boards for the difficult task of predicting the probability of recidivism, even when assisted by detailed and functional release criteria, much less the vague and unhelpful statutes that prevail.[93] Although it had long been apparent that the business of correctional prediction had to assume a more scientific character, the inadequacy of the "hunch-playing" predictive techniques of modern parole boards became embarrassingly apparent in 1963, when the recidivism rate of the nearly 1,200 prisoners released in Florida pursuant to the judgment of *Gideon v. Wainwright*[94] was almost the same as the recidivism rate among the prisoners released on parole within the state during the same period.[95]

Recent years have seen a plethora of corrections studies, nearly all of which engage to some degree in a search for valid criteria by which parole boards might accurately determine the probability of recidivism and gauge the release decision accordingly.[96] The focus of inquiry ranged from personal characteristics of inmates such as age, family life, offense, prior record, and peer judgments, to institutional influences such as the length of incarceration and intraprison group counselling and their effect on parole survival.[97] The result was the parole prediction table, which is a statistical compilation of various prisoner characteristics that are marked by high success rates on parole, success ordinarily being measured as the avoidance of recidivism. These profiles, to the extent used by parole decisionmakers, offer a marked improvement from the previously intuitive decisions.

However, the use of parole prediction tables is rarely required by statute,[98] and few state parole boards have mandated their use by exer-

93. "One has only to view the membership of parole boards to see the effects of patronage." Moreland, *Model Penal Code: Sentencing, Probation, and Parole*, 57 KY. L.J. 51, 76 (1968); *see also* THE CHALLENGE OF CRIME, *supra* note 81, at 12; Cole & Talarico, *Second Thoughts on Parole*, 63 A.B.A.J. 972 (1977).

94. 372 U.S. 335 (1963).

95. V. FOX, INTRODUCTION TO CORRECTIONS 266 (1972).

96. For a discussion of early studies, see F. LAUNE, PREDICTING CRIMINALITY: FORECASTING BEHAVIOR ON PAROLE 1-9 (1936).

97. *See* AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 87, at 192; D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 36-51 (1964) and authorities cited therein; G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT (1971); F. LAUNE, *supra* note 96.

98. *See, e.g.*, MO. REV. STAT. § 549.261 (Supp. 1973); MONT. REV. CODES ANN. § 94-9832 (Supp. 1969); N.M. STAT. ANN. § 41-17-24 (Supp. 1972); ORE. REV. STAT. § 144.240 (Supp. 1971). The Model Penal Code is inadequate as well, requiring only that the paroling authority consider, *inter alia*, whether "there is substantial risk that [the parolee] will not conform to the conditions of parole . . . ." MODEL PENAL CODE § 305.9(1) (Proposed Official Draft 1962).

cise of the rule-making power commonly given them to regulate hearing practices and procedures.[99] Hence, in many jurisdictions release and revocation decisions continue to be made without substantive guidance, and parole prediction might as well be a remote academic exercise. Although efforts at legislative and/or administrative implementation of predictive release criteria are to be encouraged, the disappointment of the present experience suggests that an alternative source for bringing substantive accountability to parole decisionmaking should be explored. That alternative source is logically the judiciary.

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99. The reluctance of parole boards to use statistical prediction devices is well-documented. *See, e.g.*, Evjen, *Current Thinking on Parole Prediction Tables*, 8 CRIME AND DELINQUENCY 215 (1962); Gottfredson, *et al.*, *Making Paroling Policy Explicit*, 21 CRIME AND DELINQUENCY 34 (1975); Hayner, *Why Do Parole Boards Lag in the Use of Prediction Scores?*, 1 PAC. SOC. REV. 73 (1958). *See also* Hoffman & Goldstein, *Do Experience Tables Matter?*, 64 J.C.L. & C. 339 (1973).

In exception to the established trend, the United States Parole Board has, pursuant to the mandate of 18 U.S.C. § 4203(a)(1) (Supp. 1977), promulgated "Guidelines for Decision-making" to govern its parole release and revocation decisions. *See* 28 C.F.R. §§ 2.20-2.21 (1976). (The relevant statutes and regulations are reprinted in B. UNDERWOOD, MATERIALS FOR A SEMINAR ON LAW AND THE CRYSTAL BALL 27-34 (tent. ed. 1977).) The guidelines indicate the appropriate length of incarceration before release for various combinations of offense and offender characteristics. The offense characteristics place all offenses according to severity in six categories, ranging from a "low" severity for such offenses as minor theft and immigration law violations to a "greatest" severity rating for willful homicide and aircraft hijacking. Obviously, the greater the severity of the offense, the greater the recommended length of incarceration.

The offense characteristics are matched against a second, more complex variable: offender characteristics. This variable is compiled in the form of a "Salient Factor Score," which assesses points for various offender characteristics such as prior record, age of first incarceration, drug dependence, education, and employability. For example, if the offender has no prior convictions, two points are added to his "Salient Factor Score." If he has had one prior conviction, only one point is awarded. If there is more than one prior conviction, no points are added to the score. Other offender characteristics are similarly graded. The higher the Salient Factor Score, the less time is recommended for pre-parole incarceration.

By cross-matching the offense and offender characteristics, one can then find in the Guidelines a recommended length of incarceration, which in turn suggests an appropriate release date. Similar "Guidelines" are available for reparole consideration after revocation of parole for subcriminal conduct. 28 C.F.R. § 2.21 (1976). While the decisionmaker is not bound by the Guidelines, some justification must be offered for any deviation from the recommendations contained there. *See generally* Note, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975), *reprinted partially in* B. UNDERWOOD, *supra* at 35-61. Logically, these guidelines should be revised if the parole board's experiences indicate that any of the various criteria employed are not predictive of recidivism. Nonetheless, the use of the guidelines is a move to legitimate parole decisionmaking from a substantive perspective and is, therefore, a laudable innovation.

C. *Present Standards of Judicial Review*

Judicial review of parole decisionmaking has generally centered on the revocation process, despite the arguments of "creative lawyers" for procedural rights in the parole granting process.[100] After 1967, when the Supreme Court declared in *United States v. Wade*[101] that the right to counsel found in the sixth amendment "guaranteed that [the accused] need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate [his] right to a fair trial,"[102] and in *Mempa v. Rhay*[103] that the "critical confrontations" with the prosecution contemplated by *Wade* and related decisions include a probation revocation hearing where a deferred sentence is imposed, it seemed clear that the parole process would not long escape similar constitutional scrutiny.[104]

The speculation was substantially resolved by two Supreme Court decisions, announced in the 1972 and 1973 terms. In *Morrissey v. Brewer,*[105] the Court determined that the loss of conditional liberty resulting from parole revocation was protected by the due process clause of the fourteenth amendment. Although it declined to liken the revocation process to a criminal prosecution in such a way as to require the full panoply of constitutional protections that attend that process or to regard the revocation as a "critical confrontation" within the prosecutorial scheme, the Court determined that the fundamental fairness implicit in due process required: (1) a preliminary hearing after the parolee's arrest, conducted by someone other than the supervising officer,[106] to determine whether reasonable grounds exist for the revocation of parole, and (2) a

100. F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATION FOR MANPOWER AND TRAINING 36 (1969); *see also* Comment, *Parole in Louisiana: Theory and Practice*, 48 TUL. L. REV. 332, 348-53 (1974).

101. 388 U.S. 218 (1967).

102. *Id.* at 226 (footnote omitted).

103. 389 U.S. 128 (1967). For a thorough discussion, see Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968).

104. Legal commentary at the time was almost unanimous in its analysis that constitutional protections should attach to the revocation process. *See, e.g.*, Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings,* 42 U. COLO. L. REV. 197 (1970); Van Dyke, *Parole Revocation Hearings in California: The Right To Counsel*, 59 CALIF. L. REV. 1215 (1971); Comment, *The Parole System,* 120 U. PA. L. REV. 282 (1971); Note, *Legal Representation at Parole Revocation: Proposed Resolution of a Developing Judicial Conflict*, 40 GEO. WASH. L. REV. 778 (1972).

105. 408 U.S. 471 (1972).

106. This independent officer need not be a judicial officer . . . . It will be sufficient, . . . in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such

revocation hearing held within a reasonable time after arrest,[107] at which time the parolee must be afforded

> (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 adversary witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body, such as the traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole.[108]

However, the *Morrissey* Court purposely evaded the issue of a parolee's right to the assistance of retained or appointed counsel at the revocation hearing.[109]

The next year, in *Gagnon v. Scarpelli*,[110] the Court applied the *Morrissey* directive to probation revocation hearings on the ground that "revocation of probation where sentence has been imposed previously [distinguishing *Mempa v. Rhay*[111]] is constitutionally indistinguishable from the revocation of parole."[112] Additionally, the Court addressed the right-to-counsel issue it had avoided in *Morrissey*. Recognizing that the effectiveness of the protections announced in *Morrissey* depends upon the ability of the probationer or parolee to present his or her version of disputed facts, but reluctant to require the presence of counsel at all revocation hearings because of the substantial administrative burden likely to result, the *Gagnon* Court attempted a compromise. Where the probationer or parolee either denies that he or she committed the probation or parole violation or, admitting the violation, alleges circumstances that, while difficult to prove, sufficiently mitigate or justify the violation to prevent revocation, the Court directed that a timely request for counsel should be honored or, if denied, the reasons for refusal recorded.[113]

From even the crudest cost-benefit calculus, the *Morrissey-Gagnon* construct leaves the parole process little better than it found it. Ostensi-

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> as a parol [sic] officer other than the one who has made the report of parole violations or has recommended revocation . . . .

Id. at 486.

107. "A lapse of two months . . . would not appear to be unreasonable." *Id.* at 488.

108. *Id.* at 489.

109. *Id.*

110. 411 U.S. 778 (1973).

111. 389 U.S. 128 (1967). See notes 100-04, *supra*, and accompanying text.

112. 411 U.S. at 782 n.3.

113. *Id.* at 790-91.

bly, the principal benefit of procedural safeguards is the assurance of an accurate factual assessment of the parolee's conduct that prompted the revocation proceedings. However, the vagueness of the *Gagnon* directive seems likely to prompt legislatures to provide counsel for all parolees at revocation hearings rather than risk a post-hearing determination that an unrepresented parolee was unable adequately to present his case for remaining free.[114] Assuming that resources permit assignment of a sufficient number of attorneys such that their caseloads permit the sort of idealistic and deliberate factual inquiry and evaluation upon which the *Gagnon* model rests (which is an unlikely prospect), the predictive accuracy of the revocation decision remains ignored. While it can be argued that factual accuracy will likely improve decisionmaking, the gain is probably inconsequential in view of the fact that there is little evidence that a substantial portion of decisions prior to *Morrissey* and *Gagnon* were premised on factual error.[115]

The costs of the present approach are more easily calculated. In addition to the continued neglect of decisional accuracy in favor of procedural amenities, the *Morrissey-Gagnon* response to the parole problem typifies the unrealistic and open-ended analogical method of the modern Court. The approach is unrealistic because it is premised on logical rather than functional notions. For example, in requiring that the preliminary hearing held after the parolee's arrest be conducted by an independent officer other than the arresting officer, the Court apparently assumes that this assures "neutral and detached" fairness, disregarding the equally apparent reality that this independent officer will probably be a colleague of the arresting officer, who, despite his good faith, will be under substantial peer pressure to confirm the findings of the arresting officer. Hence, the arrested parolee is hardly assured of an impartial preliminary hearing when the hearing officer's findings must either vindicate or refute his colleague's judgment in returning the parolee to custody.

The open-ended indeterminacy of the Court's reasoning is exemplified by its declaration that at the revocation hearing the parolee is enti-

114. The Indiana Supreme Court had such a suggestion for the parole administrators of that state. Russell v. Douthitt, 259 Ind. 667, 304 N.E.2d 793 (Ind. 1973). On the other hand, the Oregon legislature recently enacted a codified form of *Gagnon* and has been accused as a result of creating "a substantial risk of arbitrary decisionmaking" by administrators in deciding whether, in a particular case, counsel ought to be provided to a parolee. Comment, *Due Process for Parolees: Oregon's Response to Morrissey v. Brewer*, 53 ORE. L. REV. 57, 75 (1973). For an example of the difficulties of applying the *Gagnon* directive, see Baggert v. State, 350 So. 2d 652 (La. 1977).

115. Neither the *Morrissey* nor the *Gagnon* opinion makes any claim to that effect.

tled to, *inter alia*, "disclosure . . . of the evidence against him . . . ."[116] One might reason, quite consistently with the Court's analogical technique, that if a parolee is not entitled to the full panoply of constitutional protections that attend a criminal trial, and part of the "minimum" due process allowed him includes this right of discovery, then a constitutional right of discovery exists generally for all criminal defendants brought to trial. It is very doubtful that this was contemplated by the Burger Court.

The foregoing discussion demonstrates the costs of exacting accountability from a process within the legal system from a procedural perspective alone. The present jurisprudence fails to address directly the principal decision of the parole process, whether made pursuant to release or revocation hearing. The limited analogy of the revocation process to a criminal trial ignores the fact that parole violations that are crimes are resolved independently of the revocation process through conventional prosecution (leaving the parole board, upon a determination of the parolee's guilt, with only a mechanical application of parole revocation statutes), while subcriminal conduct alleged to be a violation of parole conditions is subjected to a less adversarial, predictive system that is sorely ill-equipped for its task. Hence, a decision whether to release or not is legitimated if made in conformity with a judicially-imposed minicode of criminal procedure. The extent to which the decision is motivated by an appropriate consideration of empirical facts that, by offering some degree of predictability of parole success, promote the interests of both the parolee (by preventing his release when, for a variety of reasons, he is unable to profit from it and is likely ultimately to be subjected to additional penal sanctions for recidivism) and the community (by its avoidance of recidivist crime) is presently not considered by a court.[117] An adjustment of perspective is clearly in order.

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116. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

117. *See, e.g.*, cases cited in note 81, *supra*. For a decision typical of the sentiment that parole decisionmaking is the business of administrators, not judges, see Woodmansee v. Stoneman, 133 Vt. 449, 344 A.2d 26 (Vt. 1975). For a decision confirming that *Morrissey* does not apply to conventional criminal prosecutions brought against parolees, see *In re* LaCroix, 12 Cal. 3d 146, 524 P.2d 816, 115 Cal. Rptr. 344, (1974); *cf. In re* Strum, 11 Cal.3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974) (parole board required procedurally to give a definitive statement of its reasons for denying parole, but no substantive accountability beyond abuse of discretion); Monks v. New Jersey Parole Board, 58 N.J. 238, 277 A.2d 193 (1971) (holding similar to *Strum*).

D. Requiring Parole Decisions to Be Right

Application of the substantive constitutional guarantee of freedom from arbitrariness to parole decisionmaking is a relatively simple task. As a prediction relative to recidivism, the decision to release on or revoke parole (or, put another way, the parole or reparole decision) must rest upon some substantive justification. That justification clearly requires that an individual be granted freedom on parole only if he possesses characteristics that demonstrate that upon his release he is reasonably likely to avoid criminal conduct that jeopardizes the person or property of others. Conversely, he should not be denied parole unless it can be shown that his release will jeopardize the person or property of others.

There are those who decry such attempts at prediction of criminal behavior.[118] The gravamen of this criticism is that the rehabilitative ideal—the belief that an individual can emerge from the American correctional system "rehabilitated" from his former propensity for criminal conduct—is a myth. Thus, the argument goes, it is folly to attempt to predict any length of incarceration from which the offender will benefit.

The response to this is that, absent wholesale revision of the correctional system to remove every paternalistic vestige of it premised upon rehabilitation (even the adjective "correctional" implies rehabilitation), it is irresponsible to ignore the predictive function of parole. The judge exercises his sentencing discretion, rightly or wrongly, with the psychological expectation that if his sentence is unduly harsh, its edges can be softened, and that if unduly lenient, the offender's premature re-entry onto the street can be subjected to some measure of control in the form of parole supervision. Police, support personnel, and the offender himself labor under similar expectations of flexibility. Until decisionmaking authority throughout the system is allocated otherwise, it is irresponsible to refuse to undertake a search for valid predictive criteria. As Grant Gilmore recently observed,

> the principal lesson to be drawn from our study [of law] is that the part of wisdom is to keep our theories open-ended, our assumptions tentative, our reactions flexible. We must act, we must decide, we must go this way or that. Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm—at all events it is the human condition from which we will not escape—so long as we do not delude our-

118. *See, e.g.*, A. VON HIRSCH, *supra* note 3; Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, in B. UNDERWOOD, *supra* note 99, at 21-26.

selves into thinking that we have finally seen our elephant whole.[119]

The word "accountability" suggests that a remedy exists for a particular substantive right. The remedy to enforce the right of substantive due process in parole decisionmaking is judicial review of the parole decision for correctness on its merits. Because the substantive accountability suggested here has a constitutional base, a decision cannot be legitimated by the broad "abuse of discretion" standard of review generally applicable to administrative decisions.[120] Rather, substantive accountability must require the careful review by a court of the various factors considered by the parole decisionmaker and the conformity of the decision with those factors. The parole decisionmaker must, therefore, assign reasons for his decision including: (1) findings of material fact upon which the decision rests,[121] and (2) a recitation of the substantive justification for the exercise of his decisionmaking authority.

Judicial review of the parole decision ought to rest upon the dual inquiry of procedural regularity and substantive correctness. Courts should not hesitate to disturb parole decisions that are found to lack a sound empirical basis. The parole decision must, absent a sounder basis for judgment, be viewed against available sociological data on parole prediction, however inadequate its detractors may find it. Ultimately every decisionmaking authority should be required to compile data based upon its own experiences as a constitutional requirement for the intelligent—and legitimate—exercise of its authority.

Obviously, the principle of substantive accountability transcends parole decisionmaking. The principle may be applied to review the correctness of decisions settling other disputes affecting a person's liberty or property. The two most apparent functional analogues of the parole decision are the sentence and commitment decisions.

IV. ANALOGUES: REQUIRING OTHER DECISIONS TO BE RIGHT

A. Sentencing

The most obvious parallel to parole decisionmaking is sentencing. Conventional sentencing schemes prevailing throughout this country

119. G. GILMORE, THE AGES OF AMERICAN LAW 110 (1977).

120. *See* cases cited in notes 81 & 117, *supra*. The colossal failure of the "abuse-of-discretion" standard to promote rational administrative decisionmaking is well-documented. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

121. The procedural safeguards given constitutional dignity in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), offer a limited guarantee of accurate fact-finding. An extended criticism of those decisions in that respect, however, is beyond the scope of this essay. See notes 114-16, *supra*, and accompanying text.

provide a minimum and maximum penalty for conviction of a particular offense, and allow the judge much discretion in fixing the particular penalty for each case.[122] The sentencing judge is, however, rarely offered any criteria for the exercise of his discretion. As a result, the criminal offender is largely left to the personal biases and caprice of the sentencing judge. This has prompted Willard Gaylin to conclude from his study of sentencing that "[t]he inequity of the current system is an affront to conscience made particularly offensive since it is part of a system called justice."[123] To compound matters, judicial review of sentencing addresses only two issues: (1) whether the procedures employed in the sentencing were fair,[124] and (2) whether the sentence was within the permissible range.[125]

The functional similarity between parole decisionmaking and sentencing is striking. The inquiry of the sentencing judge is identical to that of the parole decisionmaker: from what length of incarceration will the offender emerge least likely to recidivate? Like the parole decision, the sentence decision is a prediction, and, like the parole prediction, the sentence prediction need not be correct.

Fundamental fairness should require of sentencing, as of parole decisionmaking, that the decision rest upon some rational, empirical basis. At a minimum, each sentence prediction should be justified in empirical terms rather than arbitrarily chosen. Beyond that, fairness requires that any dissimilar predictions made for similar offenders be particularly well-justified. Given the evidence, for example, that many offenders become "institutionalized" while serving lengthy sentences (and thus become more likely to recidivate) and that offender characteristics once thought to be probative of the likelihood of recidivism are now known to be unrelated to criminal propensity, the sentence prediction, like its parole counterpart, should be tested by the simplest measure of substantive accountability: the question, "How do you know that?"[126]

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122. *See, e.g.*, W. GAYLIN, *supra* note 3, at 15-17; H. KERPER, AN INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 327-85 (1972); UNITED STATES ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS—CORRECTIONS REPORT 141-47 (1973); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915-29 (1962).

123. W. GAYLIN, *supra* note 3, at 195.

124. For a rare example of the vacation of a sentence for its imposition under procedurally unfair circumstances, see State v. Davalie, 313 So. 2d 587 (La. 1975).

125. *See, e.g.*, United States v. Tucker, 402 U.S. 443 (1972); Williams v. Oklahoma, 358 U.S. 576 (1959); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960); authorities cited in note 122, *supra*.

126. A. VON HIRSCH, *supra* note 3, at xxxiii. The fact that most sentences are the result of plea bargains only dramatizes the need for substantive accountability. In approving the

A second alternative to the conventional sentencing scheme attempts to narrow sentencing discretion by imposing statutory guidelines for its exercise. In its most recent legislative session, the Louisiana Legislature amended the Louisiana Code of Criminal Procedure to provide that a court "should impose a sentence of imprisonment" if it determines that: (1) there is an "undue risk" of recidivism without incarceration, (2) the offender "is in need of correctional treatment," or (3) a suspended sentence or probation "will deprecate the seriousness" of the offense.[127] The statute then lists eleven "grounds" to be considered by the court in determining whether one of the three factors is present. These grounds relate primarily to mitigating and aggravating circumstances surrounding the offense, the offender's character and attitude, his prior record, and the prospect of his rehabilitation.[128] Finally, the judge is directed to "state for the record the considerations taken into account and the factual basis therefor in imposing sentence."[129]

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bargain struck between the state and the defendant, the sentencing judge is even less attentive to the predictive nature of the sentencing decision than he is during conventional sentencing deliberations. *See* L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 71-86 (1977).

127. LA. CODE CRIM. P. art. 894.1, *added by* 1977 La. Acts, No. 635, § 1.

128. LA. CODE CRIM. P. art. 894.1(B) now provides:

> The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:
>
> (1) The defendant's criminal conduct neither caused nor threatened serious harm;
>
> (2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
>
> (3) The defendant acted under strong provocation;
>
> (4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (5) The victim of the defendant's criminal conduct induced or facilitated its commission;
>
> (6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
>
> (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;
>
> (8) The defendant's criminal conduct was the result of circumstances unlikely to recur;
>
> (9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;
>
> (10) The defendant is particularly likely to respond affirmatively to probationary treatment; and
>
> (11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

129. *Id.* art. 894.1(C).

The new statute is little more than an illusory attempt to narrow sentencing discretion. First, it only addresses the initial sentencing decision, whether or not to incarcerate the offender. The court retains full discretion to determine the appropriate length of incarceration. Moreover, if the sentencing judge determines that the offender poses an undue risk of recidivism, is in need of rehabilitation, or must be imprisoned to avoid deprecating the seriousness of his crime, there is no standard by which his decision can be reviewed. The eleven grounds provided to guide the decision are expressly made precatory rather than mandatory; in the words of the statute, the grounds, "while not controlling the discretion of the court, shall be accorded weight . . . ."

These limitations indicate that the Act was the product of political compromise rather than thoughtful study. Not surprisingly, then, it raises more questions than it answers. If the "grounds" do not control the court's discretion, just how much "weight" must they be accorded? How is an appellate court to determine that a sentencing judge did not accord them sufficient weight? If the sentencing judge determines to imprison an offender because he finds an undue risk of recidivism, must this prediction be right? Upon what facts must it be based? How are they to be found? By what standard is the prediction reviewed? Is the length of a sentence of incarceration reviewable?

Given the historical deference for sentencing discretion, the statute passed by the Louisiana Legislature does nothing to require that the sentencing prediction be fundamentally fair. If anything, it verifies the unequivocal lesson of American constitutional history that any meaningful guarantee of individual rights must be forged in constitutional adjudication, where it can derive a measure of permanence from the institutional constraints of stare decisis.[130]

The objection is sure to be raised that fettering sentencing discretion with the responsibility for substantive correctness is to ask the judge to become that which he is not trained or equipped to be—a social scientist. The responses to this are philosophical as well as pragmatic. If the lawyer (and every judge is, after all, a lawyer) has no appreciation for social science, then he ought to acquire it. Progress never comes through resignation that we are not what we ought to be. Law can no longer be

130. While there is undisputably a consensus that the judicial forum is most conducive to the protection of individual rights from invasion by the polity, there remains active debate over whether federal or state courts are more sensitive to the individual's supplications for relief. *Compare* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), *with* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

legitimated as a formalistic inquiry concerning the application of rules without any consideration of their social utility.[131]

As a practical matter, there is little question but that appellate courts, both state and federal, could through the sanction of review sensitize the sentencing judge to empirical considerations. The modern constitutional experience has demonstrated our capacity to ingest, assimilate, and comply with constitutional mandates of a far more radical character that have, for example, resulted in the reapportionment of our political districts,[132] the restructuring and refinancing of our educational systems,[133] and the complete redesign of the procedures by which we apprehend, convict, and punish criminal offenders.[134] Surely the proposal here offers less of a challenge to our resources and collective intellect.

B. Commitment of the Mentally Ill

Involuntary commitment of the mentally ill works a deprivation of liberty that is constitutionally indistinguishable from incarceration.[135] As the Supreme Court has declared, "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' "[136] The mental patient who is the subject of commitment proceedings has the same interest in his continued liberty that a criminal

131. *See, e.g.*, G. GILMORE, *supra* note 102; M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); K. LLEWELLYN, THE BRAMBLE BUSH (1930).

132. Baker v. Carr, 369 U.S. 186 (1962); *see also* Reynolds v. Sims, 377 U.S. 533 (1964); Wesbury v. Sanders, 376 U.S. 1 (1964).

133. Brown v. Board of Ed., 347 U.S. 483 (1954); *see generally* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 76-98 (1976); Comment, *Reform in Financing Public Education: An Examination of the Movement and Its Implications*, 47 TUL. L. REV. 117 (1972).

134. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972) (sixth and fourteenth amendments *held* to require the assistance of counsel for every defendant subject to jail sentence); Furman v. Georgia, 408 U.S. 238 (1972) (eighth and fourteenth amendments *held* to proscribe imposition of death sentence without procedural guarantees against arbitrariness); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth, sixth, and fourteenth amendments *held* to require detailed warning to an accused of his right to counsel and privilege against self-incrimination); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth and fourteenth amendments *held* to require exclusion of evidence unlawfully obtained). For a brief history, see W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY 1932-1968 at 285-309 (1970).

135. For general analyses of civil commitment, see S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW (1971); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 43-82 (1975), *reviewed by* Klein, 89 HARV. L. REV. 1271 (1976); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966).

136. *In re* Gault, 382 U.S. 1, 50 (1967).

defendant has.[137]

Like parole and sentencing, the core of commitment is a prediction, made usually by a judge, that a mentally ill person will present a danger to himself and/or others if not confined.[138] "[T]he generic concept of dangerousness has emerged as the paramount consideration in the law-mental health system."[139] However, despite its widespread use to justify the commitment decision, there exists no consensus on the definition of dangerousness.[140]

Not surprisingly, constitutional scrutiny of the commitment process, which has only recently begun,[141] has largely ignored the correctness of the prediction of dangerousness. The most exacting scrutiny of commitment to date has been the 1975 decision of the Supreme Court in *O'Connor v. Donaldson*.[142] The plaintiff there, admittedly non-dangerous, had sued the superintendent and staff of a state mental hospital in which he had been involuntarily confined for almost fifteen years by an order of civil commitment. Arguing that, absent proof of his dangerousness, the state had confined him in violation of the fourteenth amendment, the plaintiff sought damages under section 1983 of title 42 of the United States Code.[143] The defendants countered that state law permitted the plaintiff's commitment without a showing of dangerousness.

The *O'Connor* Court determined that

> [a] finding of mental illness alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that the term can be given a rea-

137. *See, e.g.*, McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); *cf.* J. HALL, B. GEORGE & R. FORCE, *supra* note 59, at 1103-19.

138. *See, e.g.*, 1955-1956 Fla. Laws Extra Sess., c. 31403, §§ 1, 62; LA. R.S. 28:53 (1950), *as amended by* 1976 La. Acts, No. 614, § 1; *see generally* S. BRAKEL & R. ROCK, *supra* note 135; *Civil Commitment Theories and Procedures*, *supra* note 135.

139. A. STONE, *supra* note 135, at 25.

140. *Id.* at 25-40 and authorities cited therein.

141. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975); McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); *In re* Gannon, 123 N.J. Super. 104, 301 A.2d 493 (N.J. Super. 1973); State v. Collman, 9 Or. App. 479, 497 P.2d 1233 (Or. App. 1972); Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (Wash. 1973).

142. 422 U.S. 563 (1975).

143. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1974). See note 42, *supra*.

> sonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom . . . . [T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.[144]

The Court then explored the permissible constitutional bases for commitment and held that the state may confine an individual by involuntary civil commitment only upon a showing that the individual is: (1) dangerous to others, or (2) incapable of caring for himself without friends or relatives to do so, and, therefore, dangerous to himself.

Viewed against the principles of substantive accountability proposed here, the inadequacy of the *O'Connor* rationale is apparent. Where a commitment is sought on the ground that the subject of the proceedings is dangerous, the committing judge must, as before, predict dangerousness. Typically, *O'Connor* does not require that prediction to be right. Nowhere is the decisionmaker required to justify his prediction by first reciting the facts he finds to be material to the prediction and then demonstrating that an empirical nexus exists between those facts and dangerous behavior.

Some have suggested that violence among the mentally ill is no more prevalent than among the general population.[145] If so, the general lay attitude that mental illness connotes a propensity for violence (and thus justifies commitment) cannot be tolerated as a basis for the commitment prediction. *O'Connor* simply requires that the judge address the issue of dangerousness; it does not require that he shed lay misconceptions and, in making the prediction of dangerousness, demonstrate that his decision is based on more than his intuitive belief that the mentally ill are dangerous.

If the harmless mentally ill are, in fairness, entitled to prefer their homes to an institution, they are entitled to be correctly identified as harmless. Like the parolee awaiting release and the defendant awaiting sentencing, the mental patient awaiting the commitment hearing is entitled to have decisions affecting his liberty made in an informed manner.

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144. 422 U.S. at 575.

145. As Dr. Alan Stone has observed,

> [t]he American Psychiatric Association has indicated that no more than 10 percent of hospitalized mentally ill are dangerous. This "guesstimate," arrived at by a committee, is itself grossly inflated. *The most thoughtful review . . . concluded that the base rate for violent behavior (except for suicide) by those labeled mentally ill is no different than the general population* . . . .

A. STONE, *supra* note 135, at 27 (footnotes omitted) (emphasis added).

Predictions should be rational calculations, not irrational, intuitive "hunches." The *O'Connor* decision makes no real distinction between the two.

V. CONCLUSION

What is proposed here should not be regarded as either radical or even markedly innovative. To echo Holmes,[146] the most elementary function of the lawyer is prediction: prediction of what courts will decide when confronted with a particular question. It is from this prediction that the lawyer formulates the counsel he daily offers his clients, and it is also from this that the socially conscious lawyer assesses the efficacy and fairness of the law in action.

Lawyers' predictions will be enhanced by rendering substantive accountability to decisionmaking processes within the legal system. If nothing else, requiring predictions to be based on a norm of previously observed characteristic behavior and a finding that particular facts underlying the prediction fall within that norm will assuage the acute schizophrenia suffered by those who defy convention and search for a nexus between the rule of law and social fact.

The only legitimacy of law is its social utility. That point is, it would seem, too obvious to dispute. However, lawyers and judges are too often satisfied that they have found the "correct" precedent to apply to a particular issue without pausing to question whether, in fact, the rule found in the precedent ought to apply. The result is, despite the strides made by Legal Realism,[147] an alarming disparity between application of the formal rule of law and rational criminal justice. The idea of this study, that substantive accountability in decisionmaking is an indispensable element of constitutionally required fairness, is intended to narrow that gap.

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146. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

147. *See* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 5 (1934); Rostow, *The Realist Tradition in American Law*, in PATHS OF AMERICAN THOUGHT 203 (A. Schlesinger & M. White ed. 1970).