PAROLE—PROCEDURAL FAIRNESS CROSSES THE THRESHOLD—*Monks v. New Jersey State Parole Bd.*, 58 N.J. 238, 277 A.2d 193 (1971).

In 1957, William Monks, age 15, was adjudged to be a juvenile delinquent[1] for offenses which, if committed by an adult, would have constituted first degree murder, robbery, and atrocious assault and battery. He was sentenced to Bordentown Reformatory for an indeterminate period of time, not to exceed the maximum provided by law with respect to an adult. Due to disciplinary problems at Bordentown, Monks was transferred to the New Jersey State Prison where, after four months, the Parole Board held an initial hearing at which his parole was denied. A subsequent hearing was held two years later and parole was again denied.[2] In each instance, the Parole Board had failed to disclose any reasons for the denial of parole, simply presenting Monks with a printed form containing a check mark next to the statement:

> "[P]arole has been denied regardless of the availability of a suitable parole plan."[3]

Contending that it was necessary for his future rehabilitation, Monks and his attorneys requested a statement from the Parole Board specifying the reasons for the denial of his parole. These requests were rejected with the explanation that "as a matter of policy," the Board does not give reasons for its decisions denying parole.[4]

Monks' appeal from the Parole Board's decision was dismissed by the Superior Court, Appellate Division,[5] but thereafter the New Jersey Supreme Court granted certification.[6] On the issue of petitioner's right to be given reasons for a denial of parole, the supreme court held that

> fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons. That course as a general matter

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1 Juvenile delinquency is defined in N.J. STAT. ANN. § 2A:4-14 (Supp. 1971-72).

2 Monks v. New Jersey State Parole Bd., 58 N.J. 238, 240, 277 A.2d 193, 193-94 (1971).

3 *Id.* at 240, 277 A.2d at 194 (quoting from New Jersey State Parole Board, Notice of Decision No. 45305 (Sept. 16, 1969)).

4 *Id.* at 241, 277 A.2d at 194.

5 N.J.R. 2:4-1(b) (1971) provides that:

> Appeals from final decisions or actions of state administrative agencies or officers . . . shall be taken within 45 days from the date of service of the decision or notice of the action taken.

The appellate division dismissed the appeal reasoning that the 45 day period commenced on the date parole was denied and therefore the appeal was not timely. It rejected the appellant's contention that the appeal was not taken from the denial of parole, but from the denial of the request for reasons. 58 N.J. at 242, 227 A.2d at 195.

6 57 N.J. 292, 271 A.2d 717 (1970).

would serve the acknowledged interests of procedural fairness and would also serve as a suitable and significant discipline on the Board's exercise of its wide powers.[7]

Parole does not involve any constitutional right[8] and has traditionally been considered "a bestowal *ex gratia* on the part of the sovereign state."[9] It has been characterized, throughout the nation, as an act of leniency,[10] and is governed by state constitutions and state statutes.[11]

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7 58 N.J. at 249, 277 A.2d at 199. The court gave great weight to the opinion of Justice Frankfurter in SEC v. Chenery Corp., 318 U.S. 80 (1943), wherein he stated:

> [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.

Id. at 94.

8 Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935); Jones v. Rivers, 338 F.2d 862, 874 (4th Cir. 1964); Fleming v. Tate, 156 F.2d 848, 849 (D.C. Cir. 1946); Zink v. Lear, 28 N.J. Super. 515, 524, 101 A.2d 72, 77 (App. Div. 1953); Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 26, 246 N.E.2d 512, 515, 298 N.Y.S.2d 704, 708 (1969); *But see* Goolsby v. Gagnon, 322 F. Supp. 460, 464 (E.D. Wis. 1971) (court abrogated right-privilege distinction and required counsel and hearing be accorded to parolees before revocation of parole).

9 *In re* Adinolfi, 43 N.J. Super. 262, 264, 128 A.2d 513, 514 (L. Div. 1957); *accord, In re* Tucker, 5 Cal.3d 171, 178-79, 486 P.2d 657, 660-61, 95 Cal. Rptr. 761, 764-65 (1971); State *ex rel.* Kincaid v. State Parole Bd., 53 N.J. Super. 526, 530, 147 A.2d 817, 819 (App. Div. 1959).

10 United States v. Frederick, 405 F.2d 129, 133 (3d Cir. 1968); Folks v. Patterson, 159 Colo. 403, 408, 412 P.2d 214, 217 (1966); State v. Smith, 206 Kan. 744, 745, 481 P.2d 995, 997 (1971); Still v. State, 256 A.2d 670, 672 (Me. Sup. Jud. Ct. 1969); Sneed v. Cox, 74 N.M. 659, 662, 397 P.2d 308, 310 (1964); Walls v. Haskins, 53 Ohio Op. 2d 20, 21, 263 N.E.2d 311, 312 (Sup. Ct. 1970); Goldsworthy v. Hannifin, 468 P.2d 350, 353 (Nev. Sup. Ct. 1970).

11 ALA. CONST. amend. XXXVIII (Supp. 1969), ALA. CODE tit. 42, §§ 1 to 18(9), 27, 28 (1959); ALASKA STAT. §§ 33.15.010 *et seq.* (1962); ARIZ. REV. STAT. ANN. §§ 31-401 *et seq.* (1956); ARK. STAT. ANN. §§ 43-2801 *et seq.* (1964); CAL. PENAL CODE §§ 3040 *et seq.* (West 1970); COLO. REV. STAT. ANN. §§ 39-17-1 *et seq.* (Supp. 1969); CONN. GEN. STAT. ANN. §§ 54-125 to 133, 138a (Supp. 1971-72); DEL. CODE ANN. tit. 11, §§ 4341 *et seq.* (Cum. Supp. 1970); FLA. CONST. art. 4, § 8c; FLA. STAT. ANN. §§ 947.01 to 947.27, 949.01 to 949.08 (1944); GA. CODE ANN. §§ 77-501 *et seq.* (1964); HAWAII REV. STAT. §§ 353-61 *et seq.* (1968); IDAHO CONST. art. 10, § 5, IDAHO CODE §§ 20-201 to 20-245, 20-301 (1948); ILL. ANN. STAT. ch. 38, §§ 123-1 *et seq.* (Smith-Hurd 1964); IND. ANN. STAT. §§ 13-1527 to 13-1546 (1956); IOWA CODE ANN. §§ 247.1 *et seq.* (1969); KAN. STAT. ANN. §§ 62-2226 to 62-2255 (1964); KY. REV. STAT. §§ 439.010 *et seq.* (1962); LA. REV. STAT. §§ 15:574.2 *et seq.* (Supp. 1970); ME. REV. STAT. ANN. tit. 34, §§ 1501 *et seq.* (1965); MD. ANN. CODE art. 41, §§ 107 to 131 (Repl. 1971); MASS. ANN. LAWS ch. 127, §§ 128 *et seq.* (Supp. 1971); MICH. CONST. art. 5, § 28, MICH. COMP. LAWS §§ 791.231 *et seq.* (Supp. 1961); MINN. STAT. ANN. §§ 243.01 *et seq.* (Supp. 1971); MISS. CODE ANN. §§ 4004 *et seq.* (1957); MO. REV. STAT. §§ 549.010 *et seq.* (1959); MONT. REV. CODES ANN. §§ 94-9822 *et seq.* (Repl. 1969); NEB. REV. STAT. §§ 29-2223 to 2239 (Repl. 1964), 83-187 to 1,125 (Supp. 1969); NEV. REV. STAT. §§ 213.107 *et seq.* (1969); N.H. REV. STAT. ANN. §§ 607:31 *et seq.* (1955); N.M. STAT. ANN. §§ 41-17-12 to 41-17-34 (1964); N.Y. CORREC. LAW §§ 210 *et seq.* (McKinney 1968); N.C. GEN. STAT. §§ 148-51.1 *et seq.* (Repl. 1964); N.D. CENT. CODE §§ 12-55-01 to 12-55-23 (1960); OHIO REV. CODE ANN. §§ 2965.01 *et seq.* (Baldwin 1964); OKLA. CONST. art. 6, § 10, OKLA. STAT. ANN. tit. 57, §§ 332 *et seq.* (1969); ORE. REV. STAT. §§ 144.005 *et seq.* (Repl. 1969); PA. STAT. ANN. tit. 61, §§ 331.1 *et seq.* (1964); R.I. GEN. LAWS ANN. §§ 13-8-1 *et seq.* (1956); S.C. CONST

Statutory provisions[12] for parole in New Jersey were enacted pursuant to the constitutional mandate that "[a] system for the granting of parole shall be provided by law."[13]

The parole system is intended

> to be a means of restoring offenders who are good social risks to society and to afford to a prisoner deemed fit to return to community living another opportunity.[14]

Consistent with this purpose, the standard by which parole is granted is the reasonable probability that the prisoner will assume his rightful place in society and that his release is not incompatible with society's interest.[15] This criterion is extremely broad, allowing for the exercise of a great deal of discretion by the Parole Board in forecasting the future behavior of an inmate.

The courts have been unwilling to tamper with the Parole Board's discretion and have generally given quick approval to its decisions.[16] Even though there exists the same right of judicial review from the Board's decisions as from the decisions of other administrative agencies,[17] a de facto "hands-off" policy has existed, which is readily demonstrated by the fact that only two reported New Jersey cases have reversed a decision of the Parole Board.[18] The prevalent view of the courts has been that:

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art. 4, § 11, S.C. CODE ANN. §§ 55-611 *et seq.* (1962); S.D. CONST. art. IV, § 5, S.D. COMPILED LAWS ANN. §§ 23-57-1 *et seq.*, 23-58-1 *et seq.*, 23-60-1 *et seq.*, 23-61-1 *et seq.* (1967); TENN. CODE ANN. §§ 40-3601 *et seq.* (1955); TEX. CODE CRIM. PROC. ANN. art. 42.12 *et seq.*, art. 48.01 *et seq.* (1966); UTAH CODE ANN. § 77-62-1 (1953); VT. STAT. ANN. tit. 28, §§ 1001 *et seq.* (1970); VA. CODE ANN. §§ 53-230 *et seq.* (1950); WASH. REV. CODE §§ 9.95.010 *et seq.* (1952); W. VA. CODE ANN. §§ 62-12-12 to 62-12-21 (1966); WIS. STAT. ANN. §§ 57.06 to 57.14 (1957); WYO. STAT. ANN. § 7-324 (1957).

12 N.J. STAT. ANN. §§ 30:4-106 *et seq.* (1964).

13 N.J. CONST. art. 5, § 2, par. 2.

14 *In re* Macejka, 10 N.J. Super. 393, 399, 76 A.2d 843, 847 (Mercer County Ct. 1950); *accord*, Zerbst v. Kidwell, 304 U.S. 359, 363 (1938).

15 N.J. STAT. ANN. § 30:4-123.14 (1964).

16 State v. Lavelle, 54 N.J. 315, 325, 255 A.2d 223, 228 (1969) (great weight is to be given to the expertise of the Parole Board and courts are not to intervene unless it clearly and convincingly appears that the Board abused its discretion); Mastriana v. New Jersey Parole Bd., 95 N.J. Super. 351, 356-57, 231 A.2d 236, 239 (App. Div. 1967) (court found that its power to review Board's decision was severely limited in absence of specific statutory authority).

17 N.J.R. 2:2-3 (1971) provides in part:

> Except as otherwise provided by R. 2:2-1 (a) (3) . . . appeals may be taken to the Appellate Division as of right . . . (2) to review final decisions or actions of any state administrative agency or officer except those governed by R. 4:74-1 (workmen's compensation appeals) and R. 4:74-8 (Wage Collection Section appeals) . . . .

18 Bonomo v. New Jersey State Parole Bd., 104 N.J. Super. 226, 249 A.2d 611 (App. Div. 1969) (Parole Board decision which held that prisoner forfeited his "street time" due

> Judicial review of an action such as that before us here [appeal from denial of parole] is limited essentially to a determination whether it was taken within the statutory powers of the parole authority . . . .[19]

Prior to *Monks*, the Parole Board had been able to exercise unbridled discretion in determining a grant or denial of parole. It had, up to that time, been able to effectively conceal the reasons for its decision by taking refuge behind a self-promulgated administrative rule,[20] which provided in part that:

> The Board will not state in said notice, or otherwise reveal, the basis for the grant or denial of parole.[21]

It is questionable whether, while this rule was in existence, an adequate review of the Parole Board's decision could have been conducted. Since the Board gave no reasons for its decision, the courts had no means for determining whether that decision was based upon substantial evidence,[22] and judicial inquiry was thereby limited to whether the Board ostensibly acted within its statutory authority.[23] Therefore, it was conceivable that the Board might reach a proper decision based upon wrong reasons, an improper decision based upon right reasons, or an improper decision based upon wrong reasons; and the court,

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to conviction of a crime reversed on ground that disorderly person offense is not a "crime"); State v. Hildebrand, 25 N.J. Super. 82, 95 A.2d 488 (App. Div. 1953) (invalidated Parole Board's ruling that a prisoner serving a life term under a commuted death sentence was not entitled to be paroled). *See also* State v. Holmes, 109 N.J. Super. 180, 262 A.2d 725 (L. Div. 1970) (court remanded prisoner's action for post-conviction relief to Parole Board for a hearing to determine if notice of revocation hearing was given in accordance with statute and constitutional requirements).

19 White v. Parole Bd., 17 N.J. Super. 580, 586, 86 A.2d 422, 425 (App. Div. 1952); *accord*, Mastriana v. New Jersey Parole Bd., 95 N.J. Super. 351, 356, 231 A.2d 236, 239 (App. Div. 1967).

20 N.J. STAT. ANN. § 30:4-123.6 (1964) provides in pertinent part:

> The board is empowered and authorized to promulgate reasonable rules and regulations which shall establish the general conditions under which parole shall be granted and revoked and shall have authority to adopt special rules to govern particular cases.

21 NEW JERSEY STATE PAROLE BOARD RULE 11:70-54 (1969).

22 Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Mead Johnson & Co. v. South Plainfield, 95 N.J. Super. 455, 466, 231 A.2d 816, 821-22 (App. Div. 1967). In reviewing a decision of the Parole Board prior to *Monks*, the court did not have before it a statement of reasons or other evidence which indicated the basis of the Board's decision. Therefore, it is apparent that there was no effective way to decide whether adequate evidence existed to support the Board's conclusion.

23 Cases cited note 19 *supra; see* Schwartz, *Legislative Oversight: Control of Administrative Agencies*, 43 A.B.A.J. 19 (1957).

without an adequate record to review, could uphold the decision on entirely different grounds than those relied upon by the Board.

Prior to *Monks*, the Parole Board rule had been unsuccessfully challenged in *Mastriana v. New Jersey Parole Board*[24] and *Madden v. New Jersey State Parole Board*.[25] In both cases, petitioners alleged that the denials of their requests for parole were arbitrary and capricious and resulted from the bias and prejudice of the Parole Board.[26] The *Mastriana* court, in denying petitioner's motion seeking to ascertain reasons for the Board's denial of parole, commented that he cited "no authority mandating such action, and we find none."[27] In this regard, it is interesting to note that the court, itself, failed to provide authority for denying petitioner's request for reasons, and instead relied upon the established philosophy that parole is a creature of the legislature, which may "affix such conditions and provide such administration in the field of parole as it will."[28] Since the Legislature did not direct that reasons be given, the petitioner was found to have no right to them. Shortly thereafter, when the federal court of appeals was confronted with the same issue in *Madden*, it disposed of the case by citing *Mastriana* and stating: "It is settled New Jersey law that the Parole Board is not required to state its reasons for such denial."[29]

In an attempt to gain some effective control over the actions of the Parole Board and to accord potential parolees the basic requisites of procedural fairness, the court in *Monks* invalidated the Parole Board rule. Through what may be termed "judicial legislation," it directed the Board to replace their prior rule by

> [a] carefully prepared rule designed generally towards affording statements of reasons on parole denials, while providing for such reasonable exceptions as may be essential to rehabilitations and the sound administration of the parole system.[30]

Though this decision marks a significant break from the prior nonintervention policy, its holding, giving prisoners the right to have reasons for a denial of parole, is insignificant in terms of the result achieved. An examination of the limitations of *Monks* will clearly demonstrate that whether the desired results, procedural fairness and meaningful

24 95 N.J. Super. 351, 231 A.2d 236 (App. Div. 1967).
25 438 F.2d 1189 (3d Cir. 1971).
26 *Id.*; 95 N.J. Super. at 354, 231 A.2d at 238.
27 95 N.J. Super. at 356, 231 A.2d at 239.
28 *Id.*
29 438 F.2d at 1189-90.
30 58 N.J. at 249-50, 277 A.2d at 199.

control over the Board's actions, will materialize is dependent, not on the *Monks* decision, but on the future developments implementing its purpose and philosophy.

Due to the theory that parole is a gift bestowed by the sovereign,[31] the parole hearing is unlike the traditional adversary proceeding. The present administrative procedure for considering a request for parole is ex parte in nature, with the potential parolee playing a generally passive role. At the hearing, the prisoner is not given the right to have counsel in attendance;[32] instead, the decision of the Board is based on several investigatory reports submitted to it and on the testimony of any witnesses it may call.[33] The prisoner is given no opportunity to refute damaging evidence since he does not possess the right to administer to the witnesses, and authors of the reports, the truth serum of our jurisprudential system—cross-examination.[34]

A consideration of the decision in *Monks*, in light of the above, causes skepticism to arise concerning the efficacy of a statement of reasons as the means of according procedural fairness to a prisoner and affording to the judiciary minimal control over the Board's decisions. *Monks* has merely required the Board to reveal the reasons for its ac-

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31 *See* cases cited note 9 *supra*.

32 N.J. STAT. ANN. § 30:4-123.25 (1964) provides in pertinent part:

> When it becomes necessary for a prisoner to appear before the board, either for the purpose of determining his fitness for parole or to afford him an opportunity to be heard as to revocation of parole, such hearing shall be conducted in accordance with the rules and regulations of the board, but the prisoner shall have the right to consult legal counsel of his own selection, if he feels that his legal rights are invaded, and subject to the consent of the board to submit in writing a brief or other legal argument on his behalf to the parole board . . . .

NEW JERSEY STATE PAROLE BOARD RULE 11:70-13 (1969) provides in pertinent part:

> The Board shall not be bound by the ordinary rules of evidence or judicial procedure, nor shall attorneys be entitled to appear before it at hearings or meetings. Attorneys may, upon written permission of the Board, submit a brief in triplicate on behalf of an inmate. Attorneys, relatives and other interested persons desiring to submit letters or other documents pertinent to any case shall forward them to the Board's office.

The court has qualified the above statutory provisions by interpreting the phrase "his legal rights are invaded" as meaning "invasions which caused or contributed to his wrongful conviction or detention." Puchalski v. New Jersey State Parole Bd., 104 N.J. Super. 294, 299, 250 A.2d 19, 21 (App. Div.), *aff'd* 55 N.J. 113, 259 A.2d 713, *cert. denied*, 398 U.S. 938 (1969).

33 N.J. STAT. ANN. §§ 30:4-123.18, -123.25 (1964).

34 "The statute makes no provision for a hearing by the Board to give the inmate an opportunity to challenge the accuracy of the data." White v. Parole Bd., 17 N.J. Super. 580, 586, 86 A.2d 422, 425 (App. Div. 1952). *Cf.* State v. Horne, 56 N.J. 372, 267 A.2d 1 (1970), which gave a convicted sex offender the right to challenge, subsequent to conviction and prior to sentencing, any material aspect of the diagnostic center's report by offering evidence and cross-examination of the witness who has confronted him. A similar opportunity should be afforded the prisoner on parole release hearings.

tion. It does not require a detailed opinion, a declaration of the evidence relied upon, or even a statement of the Board's findings of fact. The court only required that a statement of reasons be given and under this decision, it seems that a short statement of the Board's conclusion will suffice.[35]

Since one of the purposes for requiring a statement of reasons was the commencement of some minimal control over the Board's decisions,[36] the court apparently envisioned increased judicial review of parole denials. However, this poses a problem as to the scope of such review. Consider the prisoner who has been denied parole, finds the reasons baseless, and appeals to the courts for review of the Board's decision. In these circumstances, must the court make a determination based solely on the face of the statement of reasons, or can it look behind the reasons at the actual facts? Since there is no record of the parole hearing, if the court were to look behind the statement of reasons, where would it obtain the facts?

If the court were to adopt the more limited scope of review, it could render a decision based solely on a consideration of the Board's reasons in relation to the standard which the Board was required to apply in granting or denying parole. Using this approach, the function of the court would be to determine whether the reasons given are correlated to the future conduct of the prisoner in society. Certain reasons, on their face, would be found to have no correlation, whereas others might be deemed highly pertinent in forecasting the inmate's future social performance. However, the difficulties with this approach are: (1) although the reasons appear valid as they relate to the applicable standard, they may be invalid when applied to the particular individual; and (2) after several appeals by prisoners, the Board may begin to confine itself to stating those reasons for parole denial which have already been sustained in other cases, and the courts would be constrained to uphold the Board's decision.

Besides the difficulty presented by the scope of judicial review, there exists the related problem of what relief is to be given to the prisoner if the court finds the reasons for the denial of parole invalid. Is the case to be remanded to the Parole Board for further consideration, or should the court make its own factual determination of whether the prisoner should be granted or denied parole? In view of the present state of the law in New Jersey, it seems that the former remedy is the

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35 58 N.J. at 249-50, 277 A.2d at 199.

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

only one available. It is well settled that there is no such thing as "judicial parole," even though there is a wrongful denial of it by the Parole Board.[37] Therefore, unless *Monks* has changed this by implication, it appears that the only remedy which the prisoner can hope to obtain is a remand of his case to the Parole Board for re-evaluation, resulting in either a grant of parole or a statement of valid reasons for its denial.[38] If parole is again denied, a series of appeals can be envisioned until the Board finds the "right" reasons. If the courts continue to find the Board's reasons invalid, they could, in effect, force the Board to grant parole.

A major question left undecided by *Monks* is whether the decision is to receive prospective or retrospective application. The United States Supreme Court has recognized that there is no distinction between civil and criminal litigation with regard to the general principles of prospective and retrospective application[39] of its decision and that the Constitution does not forbid or compel retrospective application of decisions in any particular situation.[40] Consequently, in every case the decision is left entirely to the courts. There are four alternatives the courts must choose from: full retrospectivity; limited retrospectivity; limited prospectivity; or, pure prospectivity.[41]

New Jersey courts have generally followed the traditional view[42]

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37 Faas v. Zink, 48 N.J. Super. 309, 137 A.2d 575 (App. Div. 1957), *aff'd* 25 N.J. 500 (1958); *In re* Clover, 34 N.J. Super. 181, 187, 111 A.2d 910, 913 (App. Div. 1955) (cases cited therein); *In re* Mahoney, 17 N.J. Super. 99, 108, 85 A.2d 338, 343 (Mercer County Ct. 1951), *aff'd*, 10 N.J. 269, 90 A.2d 8, *appeal dismissed*, 344 U.S. 871-72 (1952); *see In re* Smigelski, 185 F. Supp. 283, 286 (D.N.J. 1960).

38 *Cf.* Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971) (court of appeals sustained a request by a non-tenure teacher, who had not been rehired, for a statement of reasons though it found no constitutional ground for additional relief).

39 Linkletter v. Walker, 381 U.S. 618, 627 (1965).

40 Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 410 (1966); Linkletter v. Walker, 381 U.S. 618, 629 (1965); Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

41 Note, *Retroactivity of Criminal Procedure Decisions*, 55 IOWA L. REV. 1309, 1316 (1970). Full retroactivity applies the holding of the new case to all past, present and future cases, whereas limited retroactivity makes the holding applicable only to litigants at the bar and cases not final at the time of the decision. Limited prospectivity encompasses the parties before the court and cases commencing after the date of the decision, whereas pure prospectivity applies the new holding only to those cases which commence after the date of the decision, thus not even affording the parties before the court benefit of its ruling.

42 Darrow v. Hanover Twp., 58 N.J. 410, 412-13, 278 A.2d 200, 201-02 (1971); *see* State v. Lanzo, 44 N.J. 560, 561-62, 210 A.2d 613, 615 (1965); Wangler v. Harvey, 41 N.J. 277, 286-87, 196 A.2d 513, 518 (1963); State v. Smith, 37 N.J. 481, 488-89, 181 A.2d 761, 765, *cert. denied*, 374 U.S. 835 (1962); Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 25-27, 141 A.2d 273, 274-75 (1958); Arrow Builders Supply Corp. v. Hudson Terrace Apt., 16 N.J. 47, 106 A.2d 271 (1954); Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476,

that overruled judicial decisions are retrospective, unless there are special circumstances warranting the denial of retrospective application, or unless the court has indicated otherwise.[43] In considering the effect of *Monks*, pure prospectivity can be disregarded since the court afforded him specific relief by directing the Board to furnish a statement of reasons.[44] Limited retrospectivity, applying the rule only to present parole litigants whose cases are pending, would have limited effect because of the quick disposition of parole requests subsequent to release hearings[45] and the relatively few number of appeals taken from parole denials.

Accordingly, it is clear that the option is limited to either full retrospectivity or limited prospectivity. The inevitable inequality in the treatment of prisoners that would result from limited prospectivity is evidenced in *Madden*, where the prisoner was denied a statement of reasons only two months prior to the *Monks* decision.[46] Since the maximum period between rehearings is two years,[47] Madden will have to wait twenty-two months before obtaining a statement of reasons.

As the Board's policy is to grant rehearings within two years after the initial hearing, full retrospective application would reach all the prisoners who may have been adversely affected by the old rule. Obtaining a statement of reasons for the previous denial would greatly enhance the prospects of rectifying the situation before the next hearing. Although the number of denials over that two year period may be so numerous that requiring a statement of reasons for everyone would hinder the administration of parole, "the individual's interest outweighs the interest in efficiency."[48]

485-86, 164 A.2d 773, 779 (App. Div. 1960); Terracciona v. Magee, 53 N.J. Super. 557, 565, 148 A.2d 68, 72 (L. Div. 1959). *But see* State v. Johnson, 43 N.J. 572, 580-82, 206 A.2d 737, 741-42 (1965); Fox v. Snow, 6 N.J. 12, 14, 76 A.2d 877, 877-78 (1950).

43 Annot., 10 A.L.R.3d 1371, 1384-85 (1966); *See also* Note, *Prospective-Only Doctrine—Juveniles' Right to Jury Trial*, 1 SETON HALL L. REV. 179 (1970).

44 58 N.J. at 250, 277 A.2d at 199.

45 In accordance with N.J. STAT. ANN. § 30:4-123.19 (1964), prisoners are notified "promptly" of the Board's decision. Since a vote is all that is required to determine the prisoner's status, there are no apparent reasons in the majority of parole hearings why the prisoner would not be notified within a week.

46 *Madden* was decided on March 9, 1971. *Monks* was decided on May 10, 1971.

47 Telephone interview in Newark with Rev. J. Wendell Mapson, Chairman of the New Jersey State Parole Board, Nov. 6, 1971. The Parole Board deals with each individual separately with respect to rehearings. However, rehearings are generally granted between six months and a year, and never more than two years, after the initial hearing. It is the opinion of the Board that rehearings are to be held within a year, and since Oct. 13, 1970 (the date Chairman Mapson was sworn into office) no prisoner has had to wait more than two years for a rehearing. *Id.*

48 Note, *Collateral Attack of Pre-Mapp v. Ohio, Convictions Based on Illegally Obtained Evidence in State Courts*, 16 RUTGERS L. REV. 587, 593 (1962).

In the past, the Board was not required to provide the prisoner with reasons sustaining the denial of parole. Therefore, if the Board formulated such reasons, and recorded them, then only clerical work would be required to notify the prisoners of why they were denied parole. However, if the Board did not record their reasons, or did not even clearly formulate them, full retrospective application becomes a necessity. Without full retrospective application, the prisoner previously denied a statement of reasons would be precluded from both review of the validity of the those reasons and from a just evaluation of his progress upon rehearing.

Arbitrary and capricious conduct naturally flows from a system free from scrutiny of any kind. Since court decisions on the question of retrospectivity have been substantially influenced by society's interest in personal liberty and freedom,[49] the possibility that the Board acted arbitrarily in denying the prisoners personal liberty mandates the total retrospective application of *Monks*.

In directing the Board to promulgate a new rule to replace the old one which it invalidated, the court cited several rules of other jurisdictions, which provide exceptions to the practice of granting statements to prisoners with psychiatric problems.[50] However, upon close scrutiny of this recommendation, a flaw appears to exist. If the practice is to issue statements except if the prisoner has a psychiatric problem, failure to issue a statement leads to only one conclusion—the prisoner is subtly informed that he has a psychiatric problem, but is completely unaware of what that problem is. Consequently, a denial of reasons could be more damaging than a well-explained statement.[51] The Parole Board must have considered this, for it provides no such exception in its new rule.[52]

One of the most important questions raised by the decision is

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49 Note, *supra* note 41, at 1314.

50 58 N.J. at 246-48, 277 A.2d at 196-98. *See generally* Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U.L.Q. 243 (1966); THE PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 64 (1967).

51 *See generally* J. MACDONALD, PSYCHIATRY AND THE CRIMINAL (1958).

52 NEW JERSEY STATE PAROLE BOARD RULE 11:70-54 (1971):

> NOTICE OF DECISION: The Board will notify, in writing, each prisoner of the decision reached in his case as soon as possible after the hearing. The Board will state in said notice, the basis for the denial of parole. In case of a denial of parole, the notice will include the date the case will again be considered if the decision orders other than the service of the maximum sentence. Two copies of the notice will be sent to the Chief Executive Officer of the institution, one to be delivered to the inmate and the other to the Institutional Parole Office. A third copy will be furnished the District Parole Office.

whether it will lead to a recognition of the right to counsel at parole release hearings in order to insure procedural fairness.[53] What is required is an evaluation of the nature and extent of the individual's interest involved.[54] Parole release and revocation hearings are two of the few administrative proceedings in which the personal liberty of the individual virtually hangs in the balance.[55] At issue in each is whether the parolee's or prospective parolee's conduct warrants action by the Board. Through dictum, the court in *Puchalski* said:

> [I]n revocation proceedings . . . there are usually specific factual allegations concerning the conduct of the . . . parolee said to constitute a violation of . . . parole. *An attorney could prove most useful, even essential, in defending against such allegations of misconduct* —presenting contrary evidence or cross-examining adverse witnesses if necessary.[56]

Since the issues of both proceedings are the same, namely good or bad conduct, the same reasoning as put forth in *Puchalski* logically applies to parole release hearings.

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[53] The policy denying the attendance of counsel at parole release hearings has been left virtually untouched by the majority of the jurisdictions. Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497 (1968); *cf.* Schawartzberg v. United States Bd. of Parole, 399 F.2d 297, 298 (10th Cir. 1968); *In re* Schoengarth 66 Cal. 2d 295, 304, 425 P.2d 200, 206, 57 Cal. Rptr. 600, 606 (1967); Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 29, 246 N.E.2d 512, 517, 298 N.Y.S.2d 704, 710 (1969). The courts have held that due process does not require it: Lewis v. Rockefeller, 305 F. Supp. 258, 259 (S.D.N.Y. 1969); Sorensen v. Young, 282 F. Supp. 1009, 1010 (D. Minn. 1968); nor is there any other constitutional or statutory right: Schwartzberg v. Oswald, 8 App. Div. 2d 570, 183 N.Y.S.2d 521 (Sup. Ct. 1959). *See also* Kadish, *The Advocate and the Expert: Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

In New Jersey an indigent has been denied the assignment of a public defender as counsel for parole release hearing, Puchalski v. New Jersey State Parole Bd., 104 N.J. Super, 294, 250 A.2d 19, *aff'd* 55 N.J. 113, 259 A.2d 713 (App. Div.), *cert. denied*, 398 U.S. 938 (1969), and the advice of assigned counsel was sufficient compliance with the statute, Mastriana v. New Jersey Parole Bd., 95 N.J. Super. 351, 231 A.2d 236 (App. Div. 1967).

[54] Comment, *supra* note 53, at 501.

[55] *Id.* at 503.

[56] 104 N.J. Super. at 301, 250 A.2d at 22-23 (emphasis added). *See* Note, *Administrative Law—Party Access to Hearer's Report—Procedural Due Process Defects To Be Remedied by the Administrative Agency*, 11 RUTGERS L. REV. 764, 765-66 (1957), wherein it is concluded that the process in New Jersey with regard to administrative action is that parties have the right to know all that is in a record and have the right to have the decision exclusively rooted in that record. *Id.* at 765-66. *See also* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493 (1970):

> The presence of counsel in such hearings can neutralize the "low-visibility" [to the public] of the process, insuring that decisions will be made in accordance with some sense of principle and order with regard to procedural regularity and concepts of basic fairness.

Id. at 536.

The attitude of "[p]ut them away and forget them,"[57] which seems to pervade the nation's penal system, may be at the crossroads of its existence. The court's recognition of the broad powers entrusted to the Board and the need for "fairness" must be closely examined. In the past, courts have chosen a narrow path upon which review of Parole Board decisions could be made. The court's demand for procedural fairness in *Monks* may signal a widening of the road the judiciary intends to travel in reviewing parole denials. However, *Monks* only provides one of the instruments necessary to bring fairness to parole proceedings and to further their rehabilitative function. The future implementation of an equitable parole release hearing and the institution of the right to counsel are well within the realm of consideration, for they would clearly provide the tools necessary for a just review.[58]

C. Clinton Cooper

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[57] Jiudice, *State Prisons and the "Free" Community*, 41 N.Y.S.B.J. 672 (1969). Criticism of parole is best directed toward those aspects of the system which inhibit rehabilitation.

Id. at 711. *See also* Jacob & Sharma, *supra* note 56.

[58] *See* Jacob & Sharma, *supra* note 56.