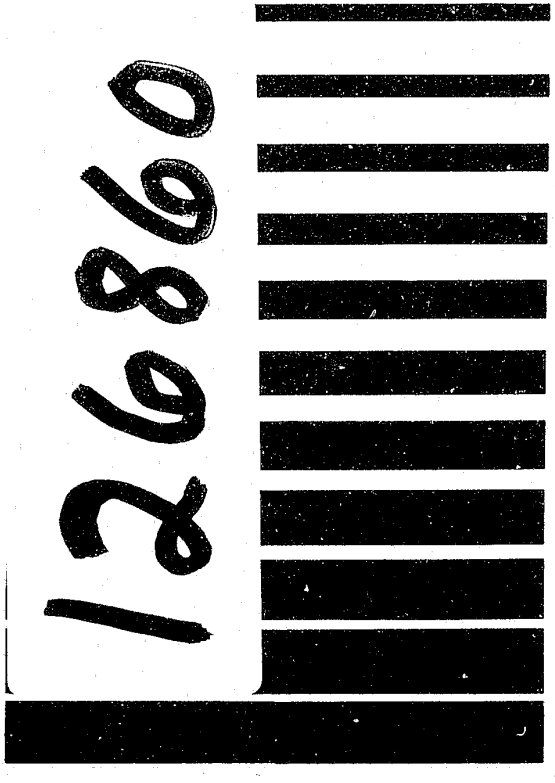
U.S. Department of Justice National Institute of Corrections

Civil Liabilities of Parole Personnel for Release, Non-Release, Supervision, and Revocation



CIVIL LIABILITIES OF PAROLE PERSONNEL FOR RELEASE, NON-RELEASE, SUPERVISION, AND REVOCATION

Rolando V. del Carmen, Professor

Paul T. Louis, Doctoral Fellow

Criminal Justice Center
Sam Houston State University
Huntsville, TX 77341

February 1988

This document was prepared under an award (TA # 87-G003) from the National Institute of Corrections, U.S. Department of Justice. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

NATIONAL INSTITUTE OF CORRECTIONS

Raymond C. Brown, Director

George M. Keiser, Chief
Community Corrections Division

Kermit Humphries, Project Monitor

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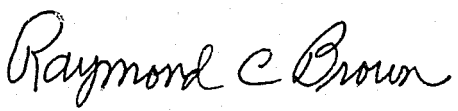
FOREWORD

In recent years there has been widespread concern about the legal liabilities of correctional officials and practitioners arising from the performance of their duties. Increasingly the Institute has heard from parole decisionmakers and administrators that current parole liability information is needed.

We have found little current or substantive practitioner-oriented written material on the subject of liability as it applies to parole personnel. The topic of parole-related liabilities is an emerging issue, both in legal arenas and in the environment of state and local parole decisionmaking.

It is our hope that information contained in this monograph will be especially helpful to parole decisionmakers and administrators who are analyzing current practices and their legal implications. The information may serve to initiate policy or process change within an organization that will benefit parole personnel while protecting the rights of offenders.



Raymond C. Brown, Director
National Institute of
Corrections

EXECUTIVE SUMMARY

This study has found that, based on a variety of reasons, most federal and state courts, as of now, do not impose liability in cases involving parole release, non-release, supervision, or revocation decisions. There are notable exceptions discussed in this monograph with which parole personnel must be familiar. The law in this field is still developing; hence, parole personnel must keep up with changes brought about by statutes or court decisions.

Parole personnel may face federal liability, primarily Civil Rights action based on Title 42, United States Code, Section 1983, and state liability for state tort law violations. Two legal defenses available in these liability cases are the official immunity defense and the good faith defense. Parole board members enjoy quasi-judicial immunity when performing "judge-like" functions, such as the decision to release an inmate on parole, and qualified immunity when performing other functions. Parole officers enjoy qualified immunity; they may be sued and held liable unless shielded by an appropriate legal defense, such as good faith. Officers can use the good faith defense if, at the time the act was committed, they did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

State tort law and Section 1983 cases reject liability, primarily based on quasi-judicial immunity (equivalent to absolute immunity) enjoyed by parole board members when performing "judge-like" functions and the "public duty doctrine." Arizona and New York, however, have either imposed or implied possible liability based on the release being "reckless or grossly or clearly negligent," or if the board's decision is not in accordance with statutorily mandated guidelines.

An inmate has no constitutional right to parole release, nor is an inmate entitled to constitutional rights in the decision-making process to release or not to release. An exception is if the state, by statute or administrative rule or regulation, creates a "liberty interest" for the inmate, in which case the inmate must be given the due process right to ensure that parole denial is not arbitrary or unfair. State created liberty interest means that when the state voluntarily places substantive limitations on how it may exercise otherwise broad discretionary powers, some form of due process is needed to assure that in a particular case the conditions the state has chosen to impose on itself do in fact exist.

Whether a state should have an explicit law or guidelines for parole release (that might create a liberty interest for the potential parolee) is a policy decision for the state to make. If discretion by the parole board is to be retained, the following might be considered:

1. Use the word "may" instead of "shall" in the guidelines.

2. Do not eliminate discretion completely. The guidelines can be so worded as to maintain discretion, such as in the following language: "Despite the foregoing, parole may be denied at the discretion of the board, if circumstances exist that, in the opinion of the board, justify parole denial because of community protection or the rehabilitation of the individual."

3. State clearly in the law or agency regulation that the law or guidelines are merely advisory instead of mandatory.

There is no United States Supreme Court case on the issue of liability for supervision of parolees and liability to a third-party for injuries caused by a parolee. Lower court cases, however, establish potential liability of parole officers for violent and

predatory crimes committed by parolees under their supervision and control, usually if a "special duty" has been created between the parole officer and an injured third party. "Special duty" generally means the presence of reasonably foreseeable risk to an identified individual or group of individuals and reliance on what an officer does or does not do. One court, however, implies possible liability based on reasonably foreseeable risk alone.

Liability for disclosure may come from a parolee who loses or fails to get a job because the officer disclosed that person's background. Liability in these cases is remote, unless such disclosure is prohibited by state law or agency regulation, or if the disclosure is made because of malice or ill will. In the absence of such factors, liability would be hard to establish because disclosure can be justified on the basis of the protection of society.

Liability for non-disclosure usually takes the form of liability for failure to warn. In general, a parole officer may be liable for failure to warn only if two elements are both present: reasonably foreseeable risk and reliance. Reasonably foreseeable risk exists when the circumstances suggest that the parolee may engage in criminal or antisocial behavior in light of the parolee's job, criminal background, and type of crime for which he or she was convicted. Reliance arises if the parole officer acts in a way that a third party would have reasons to rely on the officer's conduct or recommendation as indicative of a parolee's fitness for or competence at performing a job. If the parolee obtains the job on his or her own (eliminating the element of reliance), but is working in a place where there is reasonably foreseeable risk, agency policy on disclosure must be followed. If there is no agency policy, such policy ought to be drawn. A good policy to adopt is one patterned after the Guide to Judiciary Policies and Procedures: Probation Manual (the probation manual of the federal government) which, in essence, gives the officer the final decision to disclose or not to

disclose, based on the officer's evaluation of the circumstances.

Parole officers should consider the following suggestions to protect themselves against civil liability in supervision cases:

1. If you recommend a parolee for a job, it is best to disclose that parolee's background to the prospective employer. This should also be done if the parolee is to be placed in a foster home, as in the case of a juvenile, or in a halfway house run by private persons.

2. If the parolee obtains a job on his or her own, disclosure should be governed by agency policy.

3. If the agency has no disclosure policy, such policy ought to be created.

Liability may ensue in revocation situations, particularly if the constitutional rights of parolees are violated. Morrissey v. Brewer specifies the basic due process rights that must be afforded parolees prior to revocation. Only a few liability cases involve revocation, and in all these cases the courts have rejected liability. If parole is to be revoked, liability is best avoided if the parolee is afforded the basic rights given in Morrissey. Whether or not parole revocation without a hearing can be made based on new conviction has drawn conflicting answers from the courts. A Federal Court of Appeals says yes, but one State Supreme Court recently said that a revocation hearing must be provided.

CIVIL LIABILITIES OF PAROLE PERSONNEL FOR RELEASE, NON-RELEASE, SUPERVISION, AND REVOCATION

INTRODUCTION

Parole may be defined as a process whereby an inmate is released early so that the remainder of the sentence can be served in the community, subject to conditions imposed by the state and overseen by a parole officer. Any violation of the conditions imposed can lead to parole revocation and the recommitment of the parolee to prison to serve the remainder of the original sentence.

Statistics show that in 1975, 72 percent of prisoners were freed early by parole boards. Although by 1985 that figure had reportedly gone down to 43 percent,[1] the number of parolees remains high. In 1985, the United States had a total of 277,438 parolees, representing an increase of 3.9 percent over the previous year.[2]

One reason for the decline in the percentage of inmates placed on parole may be the fear by parole board members of being sued for their decision to release. Over the last few years many cases have been filed in court seeking monetary compensation from parole board members for the release of inmates who subsequently committed serious crimes. A more recent concern is possible liability for not releasing an inmate who should have been released. Since such release is usually based on a state-created liberty interest, it is important to know when and how such a right has been created. Parole supervision is another area of concern. While release officials are generally protected from liability for release through various legal defenses, field parole officers do not enjoy similar protections and are therefore more at risk. Although no major cases have as yet been litigated, the area of parole revocation should also be of concern to parole personnel because liability can attach in revocation decisions if parolees' rights are

violated. This monograph addresses these liability concerns using cases decided by the courts and relevant legislation.

OVERVIEW OF CIVIL LIABILITIES

Parole personnel may be exposed to legal liabilities that range from federal to state and from civil to criminal. These liabilities are in addition to probable administrative sanctions from the agency. Only the more widely used civil liability sources are discussed in this monograph, first on the federal and then on the state level.

Liability Under Federal Law

In the federal forum, plaintiffs most often invoke Title 42, United States Code, Section 1983, as their main form of legal redress. This lawsuit, popularly known as a Civil Rights action, is based on a law that provides as follows:

> 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 persons 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.

A Section 1983 (Civil Rights) lawsuit has two basic elements:

(1) The defendant must be acting under "color of law." This means the misuse of power possessed by virtue of state law and made possible only because the

wrongdoer is clothed with the authority of state law. Almost anything a public officer does in the performance of regular duties and during usual office hours is considered having been undertaken under color of state law, even if the act exceeds the officer's scope of authority or is clearly illegal. Conversely, what an officer does as a private citizen on or off the job falls outside the color of state law and therefore cannot be the basis of a Section 1983 lawsuit.

(2) There must be a violation of a constitutional or of a federally protected right. Under this requirement, the right violated must be one guaranteed by the United States Constitution or afforded the plaintiff by federal law. Rights given only by state law are not protected under Section 1983. Parole raises important questions: What rights do parolees have, and how many of those rights are violated by parole officers? These questions are difficult to answer authoritatively because only a few United States Supreme Court cases specify the rights of parolees under the federal Constitution or federal law. There are a number of lower court decisions on rights of parolees, but these decisions do not have nationwide applicability, and some of them are in conflict.

Liability Under State Law

Plaintiffs often file a civil action against public officers alleging state tort law violation. Because state tort law varies from one state to

another, this brief discussion is limited to general principles.

Tort is defined as a civil wrong, independent of a contract, in which the action of one person causes injury to the person or property of another in violation of a duty imposed by law. Tort law applies to wrongful acts that result in physical or non-physical injuries. The same act may be a crime against the state and a tort against an individual; thus, a criminal prosecution and a civil tort action may arise from the same act. For example, a person who drives while intoxicated and causes an accident, resulting in injury to another driver and car damage, may be guilty of the criminal offense of driving while intoxicated and held civilly liable for the injury inflicted on the other person and the damage to property.

DEFENSES IN CIVIL LIABILITY CASES

It is important to identify available defenses early in this monograph because the cases discussed hereafter are better understood if the reader is familiar with defenses often used by parole personnel in state tort and civil rights cases. In instances when an act has in fact been committed, or if an officer is negligent in not having done something, liability hinges on whether or not a type of legal defense is available or applies to the officer sued. Two of the various legal defenses available in state tort and Section 1983 cases will be discussed here: the official immunity defense and the good faith defense. Other defenses are available, but they are technical and would not be of interest to non-lawyers.

The Official Immunity Defense

Public officials have three kinds of immunity: absolute, quasi-judicial, and qualified.

Absolute Immunity

Absolute immunity means that a civil liability suit, if brought, is dismissed by the court without going into the merits of the plaintiff's claim. The need to encourage fearless decision making requires the recognition of an absolute immunity for some officials. Judges, prosecutors, and lawmakers enjoy absolute immunity.

Quasi-Judicial Immunity

Quasi-judicial immunity means that certain officers are immune when performing judicial-type functions but not when performing other functions connected with their office. Most jurisdictions hold that parole board members enjoy this type of immunity when making decisions to release or not to release an inmate, but not when making administrative decisions.

Qualified Immunity

The "qualified immunity" doctrine has two related meanings. The first says that the immunity defense applies to an official's discretionary (optional) acts, meaning those that require personal deliberation and judgment. The second and less complex meaning relates qualified immunity to the "good faith" defense discussed later.

Type of Immunity Enjoyed by Parole Board Members

Parole board members are officers of the executive branch of government and therefore, in general, enjoy only qualified immunity. Parole board members, however, differ from other executive officials in that most Federal Courts of Appeals have decided that parole board members fall under the same category as judges when performing "judge-like" functions and therefore enjoy quasi-judicial (absolute) immunity.

The determination whether to grant, deny, or revoke parole is considered a "judge-like" function by

most Courts of Appeals, therefore, parole board members in these jurisdictions enjoy the same immunity as judges for the consequences of their act (Sellars v. Procunier, 641 F.2d 1295 [9th Cir. 1981]; U.S. ex rel Powell v. Irving, 684 F.2d 494 [7th Cir. 1982]; Evans v. Dillahunty, 711 F.2d 828 [8th Cir. 1983]; Johnson v. Rhode Island Parole Board Members, 815 F.2d 5 [1st Cir. 1987]). The Ninth Circuit summarized the approach used by most courts when it said: "State Officials are, while employed in the processing of applications for parole, performing quasi-judicial functions . . . closely related to the operation of a state judicial and penal system" (Silver v. Dickson, 403 F.2d [9th Cir. 1968]).

The justification for quasi-judicial immunity is that parole board members, like judges, must be free from fear when making release decisions; otherwise, the integrity of the decision-making process may be compromised. The effect is that if a parolee commits a crime subsequent to release and parole board members are sued for negligent or improper release, most Federal Courts of Appeals would simply dismiss the lawsuit because of quasi-judicial immunity. As the discussion below indicates, however, this general rule appears to be eroding in tort cases. At least one state now imposes liability for release under specific circumstances.

Although most Federal Courts of Appeals have decided that parole board members enjoy the same immunity as judges when performing "judge-like" functions, the United States Supreme Court has not addressed the issue, so the final word has yet to be spoken. The closest the Supreme Court has come to deciding the issue was in Cleavinger v. Saxner, 106 S.Ct. 496 (1985), when the Court said that members of a prison disciplinary committee do not perform "judge-like" functions and therefore do not enjoy quasi-judicial immunity. The Court in that case added, however, that parole board officials are very different from members of a prison disciplinary committee in that prison disciplinary committees are

employees of the prison system and are direct subordinates of the warden who reviews their decision, while the parole board is a "neutral and detached" hearing body. Parole board members need to ascertain how their particular Federal Court of Appeals has ruled on the issue and be guided accordingly.

Most Federal Courts of Appeals hold that parole board members, when not performing "judge-like" responsibilities, enjoy only qualified immunity. For example, the Fifth Circuit Court of Appeals has held that state parole officials sued by a parolee alleging due process violations were protected by qualified immunity (Fowler v. Cross, 635 F.2d 476 [5th Cir. 1981]). Parole board members are also only protected by qualified immunity for the performance of administrative functions, such as decisions on personnel matters.

Parole agencies, as distinguished from board members, are state agencies and therefore cannot be sued under Section 1983 because of sovereign immunity, unless immunity is waived. Whether the parole board may be sued and held liable under state tort law varies from state to state. Although state parole boards may not be sued, however, board members do not enjoy sovereign immunity and therefore may be sued when not performing "judge-like" functions. Sovereign immunity does not protect state officials from possible liability.

Type of Immunity Enjoyed by Parole Officers

Field or institutional parole officers are members of the executive branch of government and enjoy only qualified immunity in the day to day performance of responsibilities. This means that the officer can be sued under state tort law or Section 1983.

In some states, lawsuits against parole officers are barred through immunity statutes that exempt parole officers from liability while performing official duties and as long as the officers act within

the scope of authority. An example is a California law which states that:

> Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.[3]

Immunity laws, such as this California statute, are valid against liability claims based on state tort law, but do not exempt the officer from liability based on Section 1983, a federal law. In other states, statutes provide that lawsuits may be brought against the state but not against the parole officer. Still other states allow lawsuits against parole officers but provide for state legal representation and indemnification if the officer is held liable while acting within the scope of responsibilities. It is clear, however, that if a parole officer can be sued, only qualified immunity applies by way of defense.

The "Good Faith" Defense

Good faith is perhaps the defense used most often in Section 1983 cases, although it is not as available in state tort lawsuits. For some time, the "good faith" defense in Section 1983 required proof of two elements: (1) a subjective test that the officer had acted sincerely and with a belief that what he or she was doing was lawful and (2) an objective test that the judge or jury be convinced that such belief was reasonable (Wood v. Strickland, 420 U.S. 308 [1975]). That changed when the Court decided in 1982 that "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (Harlow v. Fitzgerald, 457 U.S. 800 [1982]). Worded differently, there is liability only if the officer violated

a clearly established statutory or constitutional right of which a reasonable person would have known.

The burden of proof is on the plaintiff to establish that the officer "knew or should have known that he or she was violating the plaintiff's clearly established constitutional right of which a reasonable person would have known." When a right is "clearly established" is a matter of proof, usually based on whether such right has been given parolees in previously decided cases. For example, the right to a hearing prior to parole revocation is a clearly established right given to parolees by the Court in 1972 in Morrissey v. Brewer. But whether a parolee has a right to refuse a drug test if the parolee's offense is not related to drugs has not been clearly decided by the courts; hence, the right to refuse is not a clearly established constitutional right.

LIABILITY OF PAROLE BOARD MEMBERS FOR RELEASE ON PAROLE

Parole board members across the nation are understandably concerned about potential liability for releasing an inmate on parole. A possible scenario is this: The parole board releases an inmate on parole. The parolee commits a serious offense (such as rape, serious physical injury, or murder), and parole board members are sued by the victim or the victim's family alleging that the parole board was either negligent or exceeded its authority in ordering the release of a dangerous inmate. The assumption is that had the inmate not been released, the crime would not have occurred; hence, parole board members should be liable for the injury.

Current law on this important subject is clear: an overwhelming majority of states hold that parole board members have no liability either under state tort law or Section 1983 for releasing an inmate who subsequently commits an offense. Of late, however, a

few state courts have imposed liability or have indicated possible liability under certain circumstances. These will be discussed later, but first it is helpful to review some of the significant decisions involving parole boards where no liability was imposed for releasing prisoners and the rationales for these decisions.

Cases Imposing No Liability

State tort law and Section 1983 cases seeking civil liability of parole boards and parole board members for the release of parolees reveal a general pattern of no liability based on a variety of legal justifications. Some of the justifications used by courts in various cases are

(1) that parole boards enjoy absolute immunity when performing "judge-like" functions;

(2) that the decision to release is discretionary (optional) instead of ministerial (mandatory) -- hence no liability ensues from the decision to release;

(3) that the injury, if any, was too far in point of time or too removed from the actual release to be a consequence of the parole board's action;

(4) that immunity against liability has been given parole board members by state law;

(5) that the state has no constitutional duty to protect the public in general from such attacks; and

(6) that although the danger was foreseeable, there was no identifiable victim.

Perhaps the best known case on parole board liability for release is Martinez v. California, 444 U.S. 277 (1979). In that case, a 15-year-old girl was murdered by a parolee five months after he was released from prison, despite his history as a sex offender. The parents of the deceased girl brought action in a California court under state tort law and Section 1983 claiming that state officials, by their action in releasing the parolee, subjected the murder victim to a deprivation of life without due process. One of the defenses used by California officials was based on Section 845.8(a) of the California Government Code which provides that:

> Neither a public entity nor a public employee is liable for: Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

The state trial court dismissed the complaint. The case eventually reached the United States Supreme Court which held, among others, that the California immunity statute was constitutional when applied to defeat a tort claim arising under state law. The Court reasoned that whether one agrees or disagrees with California's decision to provide absolute immunity under state law for these cases, one cannot deny that the law rationally furthers a policy that reasonable lawmakers may favor. The Martinez case is strong precedent for upholding the constitutionality of any similar law passed by any state, at least for claims filed under state tort law.

On the allegation of liability under Section 1983, the Court held that the California parole board members were not liable under federal law because

(1) although the decision to release the parolee from prison was state action,

the parolee's action five months later cannot be considered as state action;

(2) under the particular circumstances where the parolee was in no sense an agent of the parole board, and the board was not aware that a particular person, as distinguished from the public at large, faced any special danger, that person's death was too remote a consequence of the parole board's action to hold the officers thereof responsible under Section 1983.

Claims under state law and Section 1983 were both denied by the United States Supreme Court. What the Court did not decide was whether a state statute exempting state officers from liability could be used to defeat a liability claim under Section 1983, a federal statute. A safe answer would be that state law cannot override a federal statute.

In a New York state tort case, Welch v. State, 424 N.Y.S. 2d 774 (1980), a parolee allegedly struck a 16-year-old girl with a piece of lumber and threw her into a river. The girl sustained permanent injuries and filed a claim against the parole board. The plaintiff alleged that the parolee had a history of violent, anti-social, and deviant behavior and had been previously imprisoned for viciously assaulting and raping young women. The New York statute on which the claim was based specified that "the action of the board of parole in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law." The court ruled that the parole board was immune from tort claim since no allegation of actions contrary to law had been made.

A case involving the rape and murder of a 12-year-old girl by a juvenile parolee, Larson v. Darnell, 448 N.E. 2d 249 (Ill. App. 3 Dist. 1983), resulted in a finding of immunity for the parole

board. Notably, the court ruled that such immunity existed even if the board's decisions as to whom to parole, when to parole, and where to place the parolee were performed negligently, willfully, and wantonly. Although the court noted that evidence of corrupt or malicious motives or abuse of power by the parole board might have resulted in a different finding, the decision again underscored the strong public policy interest in protecting discretionary decisions.

Hendricks v. State of Oregon, 678 P. 2d 759 (Or. App. 1984), involved a plaintiff seeking recovery damages for personal injuries sustained when she was kidnapped, raped, stabbed, and slashed by parolee Dwain Little. The plaintiff claimed that Little's attack was evidence of negligence by the parole board which released him. However, since the Oregon statute provided for discretionary function immunity for "every public body and its officers, employees and agents acting within the scope of their employment or duties," the court ruled the state parole board could not be held liable.

Beck v. Kansas Adult Authority and Williams v. Kansas Adult Authority, 735 P. 2d 222 (Kan. S.Ct. 1987), were filed jointly by heirs of two victims and one witness of an incident wherein a disturbed former prisoner and former mental patient entered a medical center emergency room and fired three shotgun blasts, killing two people. The Kansas Supreme Court held that state agencies were immune from suits seeking monetary damages under federal civil rights statute, and that the placing of the former prisoner on conditional release without imposing conditions was a discretionary act of the Adult Authority within the discretionary functions exemption of the Tort Claims Act. No liability was imposed despite a finding that the parolee had assaulted personnel at the same medical center some years before.

Janan v. Trammel, 785 F. 2d 557 (6th Cir. 1986), involved a suit brought by the family of an individual murdered by a parolee. The suit alleged that the

parole board was grossly negligent in releasing the parolee. The Sixth Circuit Court of Appeals held that action was not available against the parole board because of the absence of proof that there existed a special relationship between the killer and his victim or between the victim and the state.

The above cases illustrate how state courts consistently have refused to hold parole authorities liable for claims based on state law. The general rule bears repeating: based on a variety of justifications, no liability exists.

At the federal court level, parole board members are also protected from liability arising from Section 1983 actions. This protection results from the quasi-judicial discretion required of parole board members in the exercise of their official duties. In Pate v. Alabama Board of Pardons and Paroles, 409 F. Supp. 478 (1976), the federal district court said that "the function of the parole board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administrator." The Court added that it is essential to the proper administration of criminal justice that those who determine whether an individual shall remain incarcerated or set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will commit; in other words, that such officials should be able to exercise independent judgement without pressure of personal liability for acts of the subject of their deliberations. Pate affirmed immunity for the parole board on a theory of quasi-judicial immunity derived from an analysis of the responsibilities of parole board members.

Sellers v. Thompson, 452 S. 2d 460 (S.Ct. Ala. 1984), included a Section 1983 suit against the Alabama Board of Pardons and Paroles. In this case, two of three parole board members voted to release inmate Jones after reviewing his record. Jones was paroled on June 26, 1976, released from active parole

supervision on February 2, 1980, and, on September 14, 1981, charged with the robbery and murder of a store clerk. The deceased clerk's widow filed suit against the two parole board members who had voted to release Jones from prison. In reviewing the federal Section 1983 claim, the Alabama Supreme Court cited Pate and Martinez, noting that Pate extended the doctrine of official immunity to parole board members, and Martinez said that a five-month span of time between the parolee's release from prison and the victim's death was too remote a consequence of the parole officials' act to hold them responsible under a Section 1983 claim. Based on these precedents, the Alabama Supreme Court found no federal liability existed for the two parole board members.

Amos v. Lane, 605 F. Supp. 775 (ND Ill. 1985), resulted from a parolee's attack on a couple: the male was bound, cut, and stabbed, while his fiancee was bound and sexually assaulted. The Section 1983 suit against the Illinois Parole Board was dismissed by the federal district court on the basis of the Martinez case. The Court noted that Martinez was "a case with such similar facts that the opinion may well have been written for this case." The Illinois district court also castigated Amos' attorney for having filed such an "obviously groundless lawsuit."

Although the rationales varied in all of the above cases brought under state tort law or Section 1983, the decisions have one finding in common: none of the cases held the parole board or its members liable for a parolee's release. This has been and continues to be the law in a great majority of states. The legal justification for these decisions is the so-called "public duty doctrine" which holds that governmental functions, such as public safety, are owed to the general public and not to any specific individual. Where a duty is owed by the state (represented by the parole board) to the general public and not to a specific person, there is no cause of action or legal liability for failure to protect an individual injured by a third party, the parolee.

Cases Imposing Liability

Despite the pervasive general rule of no liability of parole board members for releasing an inmate, a few state courts have either imposed liability for injuries sustained by third parties from a parolee's subsequent behavior or have implied that liability can be imposed. Two cases deserve particular attention, one in Arizona and the other in New York.

By far, the most significant case imposing liability is Grimm v. Arizona Board of Pardons and Paroles, 564 P. 2d 1227 (Ariz. 1977). In Grimm, the Arizona Supreme Court ruled that the state parole board was liable for its decision to release Mitchell Blazak, a diagnosed, dangerous social psychopath who had served one-third of his sentence for armed robbery and assault with intent to kill. On December 15, 1973, while on parole, Blazak robbed a tavern in Tucson, Arizona and during the robbery fatally shot a certain John Grimm and the bartender. Blazak was later convicted and sentenced to death for the murders. Grimm's parents and others brought a wrongful death and personal injury suit against the Arizona Board of Pardons and Paroles, alleging that the Board members' grossly negligent and reckless release of inmate Blazak caused the harm for which the plaintiffs sought redress.

In response, the parole board invoked the absolute immunity defense. The Arizona Supreme Court rejected that defense, holding that the parole board members enjoyed only qualified immunity in the exercise of their discretionary functions. The court further noted:

> While leaving intact the absolute judicial immunity enjoyed by participants in judicial proceedings, we now abolish the absolute immunity previously granted to public officials in their discretionary functions. . . . While society may want

> and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives the more we need some sort of ultimate responsibility to be for their outrageous conduct. (Underscoring supplied).

The Arizona Supreme Court therefore expressly abolished the absolute immunity given to public officials (including parole board members) when exercising discretionary functions, of which the granting of parole is an example. It further said that in granting the release, the parole board had narrowed its duty in this case from one owed to the general public (for which there is no liability) to one owed to individuals (for which there may be liability) by assuming parole supervision over, or taking charge of, a person having dangerous tendencies. In short, the court rejected the public duty doctrine and held that a duty is owed to individual members of the public when a prisoner with a history of violence and dangerous conduct is released. The Grimm court relied heavily on Section 319 of the Restatement (Second) of Torts, which provides that

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.[4]

Given this standard, liability was then imposed based on a finding that the release was "reckless or grossly or clearly negligent." The court said that a decision to release would be grossly negligent or reckless if: (1) the entire record of the prisoner indicated

violent tendencies, and (2) there is no reasonable basis to believe that he or she has changed. No liability could be imposed when there was conflicting or contradictory evidence as would lead reasonable minds to differ. Finally, the Grimm court said that there is recovery only when it is shown that there was no reasonable basis for the board's action.

The Grimm case is important because it is the first case ever decided by any state court imposing liability on the parole board for prisoner release. It must be noted, however, that the standards imposed by the Grimm court for liability, as cited above, are narrow and stringent. Of immense significance is the court's statement that "there is recovery only when it is shown that there was no reasonable basis for the board's action." If the board's action did in fact have a reasonable basis, recovery for damages would have been precluded. The court did not discuss what is meant by "reasonable basis" for action; Arizona courts will decide that on a case-by-case basis.

A second case, Tarter v. State, 497 N.Y.S. 2d 910 (1986), involved a plaintiff who was shot by a parolee and rendered a paraplegic. The shooting occurred less than two months after the parolee was released from a New York State prison. The parolee had committed an almost identical crime four years earlier for which he was convicted and sentenced to concurrent terms of four to twelve years and was released on parole after serving the minimum term. The plaintiff brought action against parole officials, charging them, among others, with negligence in failing to follow the statutory criteria and the board's own guidelines and for not acting "in accordance with law." The Court of Claims ordered dismissal, but on appeal an appellate division of the Supreme Court reinstated the dismissed claims, hence affording the plaintiff the opportunity to prove the allegations.

The appellate court disagreed with the state's assertion that it had absolute immunity from lawsuit with respect to the decision to release a prisoner

after he served the minimum sentence. In order for the parole board determination to be immune from judicial review, said the court, it must be in accordance with statutory requirements and, if it be true that there was a deviation from the guidelines, the board had not acted in accordance with law. The court concluded that

> With respect to the decision by the parole board to release a prisoner, the statute directs that certain factors and criteria be considered, mandates that the parole board follow guidelines established for that purpose, and provides that any determination is deemed a judicial function and shall not be reviewable if done in accordance with law.

Given these standards, the court concluded that the decision to release amounted to a ministerial act necessitating direct adherence to a governing rule or standard with a compulsory result. Any release, therefore, that violates legal and self-imposed standards could result in liability.

The Grimm-Tarter cases are indicative of an erosion in the absolute immunity protection traditionally enjoyed by parole boards in the release of prisoners on parole. Grimm and Tarter hold that parole boards may be held liable for negligent release under certain circumstances. In Grimm, liability was based on a finding that the release was "reckless or grossly or clearly negligent." In Tarter, the implication is that liability might ensue if it can be established that the parole board's decision was not in accordance with statutory requirements and in fact deviated from the statutorily mandated guidelines. Whether other states will follow Grimm-Tarter rationales remains to be seen.

LIABILITY OF PAROLE BOARD MEMBERS FOR NOT RELEASING AN INMATE

Parole has traditionally been considered by the courts to be a privilege rather than a right. This means that it may generally be granted or withheld by the parole board and that the procedure for parole release is also left to parole board discretion. In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), the United States Supreme Court defined the legal status of parole as follows:

(1) There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence;

(2) The state may establish a parole system, but it has no constitutional obligation to do so;

(3) Parole revocation and parole release are not the same in that there is a crucial distinction between being deprived of a liberty one has when out on parole, and being denied constitutional liberty that one desires, as when release on parole is sought.

Clearly, therefore, an inmate does not have a constitutional right to be released on parole, nor does he or she enjoy any constitutional right in the parole release process. In more succinct language, the parole board can do just about anything it pleases, and whatever it says and does prevails because it enjoys immense discretion.

Parole Guidelines and the Concept of State-Created Liberty Interest

Despite parole being a discretionary function, there are instances when an inmate becomes entitled to the constitutional right to due process in the decision to release or not to release. In cases where a liberty interest has been created by the state, procedural guarantees must be followed to ensure that the decision making process is fundamentally fair. A proper understanding of when a liberty interest is created by the state is therefore important.

One writer provides the following explanation of state-created liberty interest:

> When government (by statute, rule, or policy. . .) voluntarily places substantive limitations on how it may exercise otherwise broad discretionary powers, some form of due process is needed in order to assure that in a particular case the conditions government has chosen to impose on itself do in fact exist.[5]

State-created liberty interest may also be defined as follows:

> Where the inmate has a 'justifiable expectation' under applicable law, rules, or policies that he or she will be released under certain circumstances or unless certain circumstances (which are specified in the rule) are found to be present, due process protections must be afforded to insure that parole is denied only when the circumstances contemplated do in fact exist.[6]

For example, if state law provides that an inmate shall be released on parole after serving one-third of the sentence imposed--unless that inmate had disciplinary problems while in prison--then that inmate is

entitled to certain due process rights (whether they consist of a hearing, witness confrontation, showing of prison record, or other relevant procedures) to ensure that parole is denied by the board because disciplinary problems did in fact exist. Liberty interest assures the potential parolee that the provisions of state law or regulations are complied with and that the parole board's decision to deny parole is not arbitrary.

If liberty interest has been created by the state and due process afforded the inmate by the parole board, is parole release automatic? The answer is no, particularly if factors providing for non-release (as a prison disciplinary record in the above example) are found to exist. If, however, non-release (or anti-release) factors do not exist, is the inmate then entitled to release, or is it sufficient that the inmate has been afforded due process regardless of the final decision?

The United States Supreme Court has not addressed this issue. The logical answer, however, would be that release must follow if anti-release factors do not in fact exist; otherwise, state law is circumvented and the constitutional right to due process created by state law becomes meaningless. The rights to a hearing, confrontation, notice, or any other procedural right under due process are subverted if final results are predetermined or if factual findings are disregarded and the decision becomes arbitrary. Nonetheless, how the Court will eventually decide that issue remains to be seen.

What specific rights the inmate is entitled to under due process, such as a hearing, confrontation of witnesses, notice of violation, counsel, and basis of parole denial, is not clear. Moreover, the question of whether or not potential parolees in a certain state enjoy liberty interests is decided on a case-by-case basis, using the indicators discussed below.

Liberty interests may be created by the state by statute or by administrative rule or regulation. Each deserves elaboration.

Liberty Interest Created by State Statute

The concept of a state created liberty interest first received extensive discussion by the United States Supreme Court in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). In Greenholtz, inmates of the Nebraska prison brought a class action under federal law against Nebraska officials claiming that Nebraska statutes and board procedure denied them procedural due process. The Court held that the presence of a parole system by itself creates no constitutionally protected liberty interest in parole release. The Court went on to add, however, that the Nebraska statute did in fact create an "expectation of parole" protected by the due process clause of the Constitution; hence, a liberty interest was created. The main provision of the Nebraska statute under question in Greenholtz is worded as follows:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (1) There is a substantial risk that he will not conform to the conditions of parole;
>
> (2) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (3) His release would have a substantially adverse effect on institutional discipline; or

(4) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

In addition to the above provision, the Nebraska law also lists 14 factors that the board must consider in reaching a decision, including a catch-all provision allowing the Nebraska board to consider other information it deems relevant.

The Court concluded that a constitutionally protected liberty interest had been created by the law because of its "unique structure and language." This meant that by its wording, the Nebraska statute gave inmates certain due process rights to which they were not otherwise constitutionally entitled. The Court did not say what those due process rights were, adding that "flexibility is necessary to gear the process to the particular need." The Court gave a broad hint, however, when it added that "the quantum and quality of the process due in a particular situation depends upon the need to serve the purpose of minimizing the risk of error." The concern is one of fundamental fairness, but the Court gave no specifics as to the rights that must be given to potential parolees. In the Greenholtz decision, the Court placed great weight on the use of the word "shall" in the statute as denoting mandatory language and the presumption that parole must be granted unless one of the four enumerated justifications (the anti-release factors) for deferring release is found.

In a more recent case, Board of Pardons v. Allen, 41 CrL 3258 (1987), the Court examined the Montana parole law to determine if it created a liberty interest in parole release. The Montana law provides, in part:

(1) Subject to the following restrictions, the board shall release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community.

(2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

After being denied parole, some prisoners filed a class action suit against Montana parole board officials alleging that the board denied them due process by failing to apply the statutorily mandated criteria in determining parole eligibility and failing to explain adequately the reasons for parole denial.

Relying heavily on Greenholtz, the Court decided that the Montana statute created a liberty interest protected by the Fourteenth Amendment due process clause, despite the subjective and predictive nature of the board's decision and the broad discretion the Montana parole board enjoys under the law. Once again the Court stated that the use in the statute of the word "shall" created a presumption that parole release will be granted when the designated findings are made. Clearly, therefore, the wording of a state's parole law, particularly the use of the word "shall," may create a liberty interest for potential parolees.

While the Nebraska law challenged in Greenholtz specifies that parole will be granted "unless" certain "anti-release" factors are present, such was not the case in Montana where the wording of the law is broad

and vague. Nonetheless, the Court held that liberty interest was created because of the following:

(1) The statute used the word "shall;"

(2) The statute was enacted in 1955 to replace a 1907 statute that granted absolute discretion to the board; and

(3) The new statute contained a provision for judicial review of the board's parole release decisions.

Significantly, the Court further said: "We reject the argument that a statute that mandates release 'unless' certain findings are made (as in the Greenholtz case) is different from a statute that mandates 'if,' 'when,' or 'subject to' such finding being made." Clearly, therefore, the wording of the statute does not have to be as specific as the words used in Greenholtz for liberty interest to be created by statute.

The Greenholtz and Allen decisions give some guidance as to what creates a liberty interest. Clearly, the use of the word "shall" raises a red flag with the Court and indicates that release is mandatory unless factors justifying non-release are present. State laws and regulations, however, vary tremendously, so the courts must make decisions on a case-by-case basis. Decisions of federal courts of appeals on the issue of liberty interests are sometimes difficult to reconcile. Lower court decisions indicate, however, that most state statutes on parole release have been so worded as not to have created any liberty interests; hence, no due process right need be given in the decision to release.

Liberty Interest Created by Agency Rule or Regulation

Agency rules or regulations are promulgated by governmental agencies in accordance with delegated authority from the state legislature. They may be so specific that they diminish discretion to release, making parole release virtually certain in some situations. In Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), Justice Brennan said that "respondents must show by reference to state regulation, administrative practice, contractual arrangements, or other mutual understanding--that particularized standards or criteria guide the State's decision makers." This underscores the possibility of liberty interest being created by agency rule or regulation.

Lower courts have followed this lead. In Dace v. Mickelson, 797 F.2d 574 (8th Cir. 1986), the Eighth Circuit Court of Appeals decided that although the use of the word "may" in the South Dakota parole statute did not sufficiently limit the board's discretion as to create a liberty interest, administrative regulations required that the board "shall consider" the prisoner's presentation, "shall review" all available inmate history and medical and psychological information, and "shall consider" treatment possibilities for him or her. The court concluded that the board must take a number of substantive criteria into account in determining whether to grant parole, thus curtailing discretion. Viewed in totality, the South Dakota administrative regulations require parole officials to take into account certain factors when deciding whether or not to grant parole, thus creating a liberty interest that requires due process. The ultimate test of liberty interest, said the court, is whether or not a consideration of criteria (statutory and administrative regulation) indicates a limitation on official discretion.

Another court says that "a claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually

explicit understanding" (Perry v. Sindermean, 408 U.S. 593 [1972]). The legal principle appears to be that if an agency, by rule or regulation, sets guidelines for its operations, that agency must be prepared to abide by those self-imposed guidelines; otherwise, constitutional due process rights are violated.

Although the issue is debatable, court decisions strongly indicate that provisions in state constitutions do not create liberty interests. As for accepted agency practices, such as paroling lifers or non-violent offenders who come up for parole the first time, the U.S. Supreme Court has said that a constitutional entitlement cannot be created "merely because a wholly and expressly discretionary state privilege has been granted generously in the past. . . . No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections . . ." (Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 [1981]).

Summary

Liberty interest is created when a state--by law, rule, or regulations--places limits on parole-release decisions where no constitutional limitation otherwise exists. It is therefore self-imposed, but once given, it creates a constitutional right to due process. What those due process rights are is unclear except that they must minimize the risk of error. Whether liberty interest has in fact been created or not is a decision made by the courts based on a case-by-case interpretation of state law or agency rules and regulations.

Should a State Have Explicit Guidelines for Parole Release?

Whether a state should have explicit guidelines for parole release is a policy decision for a state to make. As of 1983, 15 states had explicit release

guidelines, although nearly all states have laws that define general criteria for parole release.[7]

As the above discussion indicates, explicit guidelines can legally curtail parole board discretion by creating a liberty interest for potential parolees. On the other hand, guidelines diminish arbitrariness and uncertainty in the release process, making parole release decisions predictable and fair for potential parolees. If discretion is to be retained, legislators or parole policy makers might want to consider the following suggestions derived from decided cases:

(1) Use the word "may" instead of "shall" in the guidelines.

(2) Do not eliminate discretion completely. The guidelines can be so worded as to maintain discretion, such as in the following language: "Despite the foregoing, parole may be denied at the discretion of the board if circumstances exist that, in the opinion of the board, justify parole denial because of community protection or the rehabilitation of the individual."

(3) State clearly in the law or agency regulation that the guidelines are merely advisory instead of mandatory.

A final suggestion is in order: If you have guidelines, follow them. From a legal perspective, it is better not to have guidelines than to have guidelines that are not or cannot be followed.

LIABILITY FOR PAROLE SUPERVISION

Parole supervision is an integral part of the criminal justice and correctional processes and is one of the main justifications for parole. Recent court

decisions, however, indicate that the supervision task of parole field officers may be subjected to closer scrutiny by both the courts and the public. Fueled by successes in some states, liability suits under state tort law or Section 1983 against parole officers by victims or families of victims of paroled inmates' crimes have increased in recent years.

The Rieser Case

Perhaps the best known case on liability for parole supervision is Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977). The case provides examples of conduct and practices parole field officers should avoid when supervising parolees. The Rieser case is significant because it is one of the few cases to date in which a parole officer was found liable for negligent supervision, resulting in substantial monetary damages.

The facts of the case show that the plaintiff's daughter, Rebecca Rieser, was raped and murdered by a parolee, Thomas W. Whalen. Whalen had a long history of assaults on women, including the killing of an elderly woman whom he accused of "exciting him sexually" when he was 13 years old, and the later assault of a female cab driver. He was found guilty and served time, but was later paroled.

Whalen had been assisted by the District of Columbia Department of Corrections in finding employment at the apartment complex where the victim lived. Whalen was a suspect in two rape-murder cases at the time of parole and, during his employment at the apartment complex, became a suspect in a third murder of a young girl. Parole was not revoked, but the parole board did advise the parole officer to supervise Whalen closely.

The parole officer gave no warning to the employer of the potential risk posed by the parolee's presence. The police later warned the employer of the parolee's record and his status as a suspect in the

three murders, but the employer did not do anything. Shortly thereafter, the parolee entered the victim's room, then raped and strangled her.

A federal court jury awarded damages in the amount of $201,633 against the District of Columbia. On appeal, the United States Court of Appeals for the District of Columbia affirmed the award, stating that the parole officer had a duty to reveal the parolee's prior history of violent sex-related crimes against women to the management of the apartment complex, as the employer of the parolee, in order to prevent a specific and unreasonable risk of harm to the women tenants. The court stated that an actionable duty is generally owed to reasonably foreseeable plaintiffs subjected to an unreasonable risk of harm by the actor's (in this case the parole officer's) negligent conduct. Said the court:

> Abron's position as a parole officer vested in him a general duty to reveal to a potential employer Whalen's full prior history of violent sex-related crimes against women, and to ensure that adequate controls were placed on his work. Placement of Whalen at McLean Gardens put him in close proximity to the women tenants, with the opportunity to observe their habits, and gave him potential access to the keys to their apartments and dormitory room. . . .

Liability in the Rieser case was based on the following:

(1) There were reasonably foreseeable plaintiffs (the women in the apartment complex who were "at risk" because of the parolee's presence);

(2) The foreseeable plaintiffs were exposed to specific and unreasonable risk of harm;

(3) A "special duty" to warn the foreseeable plaintiffs was present; and

(4) The parole officer was negligent in failing to give that warning.

Other Parole Supervision Cases

An early parole liability case, Georgen v. State, 196 N.Y.S. 2d 455 (1959), resulted in a finding of liability against the New York Division of Parole for failure to disclose information on the violent nature and background of a parolee who assaulted the woman who had agreed to let him live and work on her farm. The New York Court of Claims concluded that the woman's reliance on the recommendation of the parole officer and her complete ignorance of the danger posed by the parolee were sufficient grounds to justify a duty to disclose the parolee's background. The court, in essence, said:

> Placement of a known vicious, perverted and assaultive parolee at home and on farm of 58-year-old woman living alone in remote rural area by parole officers where risk of danger to woman was known constituted a breach of duty of taking precautions against risks reasonably to be perceived and such failure led directly to and was actual cause of assault on woman by parolee and state was liable for injuries sustained.

Johnson v. State, 69 Cal. 2d 782 (1968), cited by the Rieser court, was an action brought by a foster parent against the state for an assault upon her by a youth placed in her home by the Youth Authority. The foster parent alleged that the parole officer in the case had been negligent in failing to warn her of the youth's homicidal tendencies and a background of violence and cruelty. On appeal, the California Supreme Court held that if the parole officer failed to warn the plaintiff of "foreseeable, latent danger" in

accepting the youth into her home, and the plaintiff's injury was a direct result of that failure, then the plaintiff should be entitled to recover damages from the state.

Reynolds v. State, 471 N.E. 2d 776 (1984), involved a liability suit brought by a rape-assault victim and her husband against the State of Ohio and the Division of Parole and Community Services for injuries the woman sustained in an attack by a convicted felon while he was on a work-release furlough. The woman claimed the state was liable for her injuries resulting from an attack in which the inmate raped her, then dragged her into the kitchen, where he placed her body, head first, in a gas oven and turned on the gas. The assault and subsequent oxygen deprivation suffered from the gas fumes resulted in the woman being almost completely paralyzed and confined to a hospital bed and requiring constant medical attention.

The Ohio Supreme Court held that the state's actions in the case constituted "negligence per se" in failing to confine the inmate to the work-release center where, according to Ohio law, he was assigned during nonworking periods. Ohio law permits the Ohio Adult Authority to grant furloughs to trustworthy inmates, but the same law also provides that a prisoner who is granted such furlough is required ". . . to be confined for any periods of time that he is not actually working at his approved employment or engaged in vocational training or other educational programs." The injury to the plaintiff took place at a time when the prisoner was supposed to be confined in prison; hence, there was a violation of Ohio law.

The Reynolds case involved negligent supervision of parole by correctional authorities, and not negligent release. The state's decision to release the inmate from prison to the work-release program was not subject to liability; however, once the decision to release the inmate was made, the failure of the state or its officers to foresee potential danger and their

failure to supervise him in accordance with the law, which required the inmate to be confined for any periods of time that he was not actually working, constituted actionable negligence. In short, the state was liable for the plaintiff's injuries because it failed to follow its own rules and regulations concerning supervision of inmates.

In Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986), the Alaska Supreme Court ruled that parolees and the state have a "special relationship" that requires the state to control any parolee with dangerous propensities and to protect anyone "foreseeably endangered by him." In this case a parolee killed his stepdaughter and her boyfriend, then raped, beat, and strangled another woman. Relatives of the victims brought action against state parole officials claiming that negligent supervision and release caused the deaths.

In a 3-2 decision remanding the case to the trial court for further proceedings, the Alaska Supreme Court held that the state owed a duty to protect the parolee's foreseeable victims. The court further concluded that the actions and inactions of the state's employees that formed the basis of the claims were, in large part, ministerial acts for which the state may be held liable.

In a statement that indicates possible liability, the Alaska Supreme Court said that where the state, through its negligence, allows a parolee to cause foreseeable harm to a third person, there is no reason to predicate liability wholly on the state's capacity to identify the victim. Thus, while most state courts impose liability for supervision only if (1) foreseeability of harm and (2) identifiability of victim are present, the Alaska Supreme Court appears to require foreseeability alone as the most important criterion for liability. This single standard broadens officer liability and sets a less stringent requirement for recovery of damages. Said the Alaska Supreme Court:

> Where the state, through its negligence, allows a parolee to cause foreseeable harm to a third person, we see no reason to predicate liability on the state's ability to predict the victim's name. A victim may be foreseeable without being specifically identifiable.

Doe v. Arguelles, 715 P.2d 279 (1985), is a Utah case in which the court held a public official potentially liable to the victim of a parolee. The plaintiff sued the superintendent of the Youth Development Center of Utah, the State of Utah, and other defendants on behalf of her 14-year-old ward who was raped, sodomized, and stabbed by Arguelles, a juvenile on parole from the Youth Development Center. The Utah Supreme Court held that the superintendent's decision to release Arguelles temporarily on parole was a discretionary function exempt from liability under the Utah Governmental Immunity Act. Significantly, however, the court went on to hold that if the plaintiff's injuries were the result of the superintendent's failure to properly monitor or supervise the conditions of Arguelles' parole, then the superintendent would not be immune from liability. Again, the strong implication is that liability could be imposed for improper supervision.

Summary of Law in Parole Supervision Liability

It is clear from the above that there is as yet no definitive Supreme Court ruling on the issues related to supervision of parolees and third-party liability. There are cases, however, at the state district and federal appeals court levels establishing potential liability of parole officers and other supervisory officials for violent and predatory crimes committed by parolees under their supervision and control. The Rieser case demonstrates that huge damage awards are possible in supervision liability cases. Recent case law indicates that parole officers may be liable for the crimes of their client-parolees,

usually under a narrow set of circumstances. The common element in these circumstances is the concept of a "special duty" on the part of the parole officer. Important as this concept is, the courts have not clearly defined it, preferring instead to infuse meaning on a case-by-case basis. Most courts say that two elements must be present for "special duty" to ensue: reasonably foreseeable risk and reasonably foreseeable plaintiffs, preferably identifiable. The Alaska Supreme Court, however, implies possible liability based on reasonably foreseeable risk alone, doing away with the "identifiability of victim" requirement.

LIABILITY FOR DISCLOSURE OR NON-DISCLOSURE OF PAROLEE BACKGROUND

There is widespread, justifiable concern among parole officers about possible liability in supervision arising from disclosure or non-disclosure of a parolee's record. Although technically an aspect of parole supervision, it deserves separate consideration because of its importance.

Possible liability for disclosure of records often comes from the parolee who may lose or fail to get a job because the officer disclosed his or her background to a present or prospective employer. Liability in these cases is remote unless such disclosure is prohibited by state law or agency regulation or the disclosure is made because of malice or ill will. In the absence of such factors, liability would be hard to establish because the disclosure can be justified on the basis of the protection of society, which is one of the main purposes of parole supervision.

Non-disclosure of a parolee's record presents a different and more difficult problem. Liability cases stemming from non-disclosure come under the concept of failure to warn. In general, a parole officer's failure to warn a third party of a parolee's background

leads to liability if two elements are both present: (1) reasonably foreseeable risk, and (2) reliance.

"Reasonably foreseeable risk" exists when the circumstances of the relationship between the parolee and a third party suggest that the parolee may engage in criminal or antisocial conduct related to his or her past conduct. This, in turn, results from a combination of three factors: (a) the parolee's job; (b) his or her prior criminal background and conduct; and (c) the type of crime for which he or she was convicted.[8] For example, it is reasonably foreseeable that a parolee convicted of child sexual assault would commit a similar act if employed in a child care center, but not if employed as a janitor on a college campus.

"Reliance," the second element for possible liability, arises if the parole officer acts in a way that a third party would have reasons to rely on the officer's conduct as indicative of a parolee's fitness for or competence at performing a job. This happens if the parolee has been recommended by the officer for the job, or if the officer fails to respond adequately to a request for information about the parolee from a third party, unless the release of information is prohibited by state law or agency policy. For example, if a parole officer requests an employer to employ a parolee as a janitor, the parole officer is in effect saying that the parolee is fit for and competent to do the job and that no danger comes from that placement. If, however, the parole officer knows that the parolee will be assigned to work as a janitor in a women's dormitory and the officer fails to disclose that the parolee was convicted for rape, then liability ensues if the parolee later rapes a resident of the women's dormitory. In this case, the elements of reasonably foreseeable risk and reliance are both present.

What if the parolee obtains the job on his or her own, thus eliminating reliance, but is working in a place where there is reasonably foreseeable risk? For

example, a parolee who is on parole for child molestation obtains a job in a child day care center without the officer's help or knowledge. Is there any responsibility on the part of the officer to disclose? The dilemma for the officer is obvious: if disclosure is made, the parolee might sue; if disclosure is not made and injury results, the employer or third party might sue.

In these cases, agency policy on disclosure must be followed. If the policy requires disclosure (even if there is no reliance because the officer did not help the parolee obtain the job), then disclosure should be made. Conversely, if agency policy prohibits disclosure, then that policy must be followed. If the officer follows agency policy (or state law, if any), there is no liability on the officer's part. Liability, if any, will be imposed on the agency or its policymakers, but not on the officer who is following agency rules.

If the agency has no policy on disclosure (many agencies do not have such policy), it is recommended that such a policy be drawn. A good policy to adopt is one patterned after the Guide to Judiciary Policies and Procedures: Probation Manual (the probation manual of the federal government), which provides as follows:[9]

Decisions Regarding Disclosure

(1) If the probation officer determines that no reasonably foreseeable risk exists, then no warning should be given.

(2) If the probation officer determines that a reasonably foreseeable risk exists, he or she shall decide, based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his or her rehabilitation,

whether to: (a) give no warning, but increase the probationer's supervision sufficiently to minimize the risk; (b) give no warning, but preclude the probationer from the employment; or (c) give a confidential warning to the specific third party sufficient to put the party on notice of the risk posed. When appropriate, the probationer may be permitted to make the disclosure with the understanding that the probation officer will verify the disclosure.

The above policy gives the officer the final decision to disclose or not to disclose based on the officer's evaluation of the circumstances. Since disclosure or non-disclosure, based on guidelines, is essentially for the officer to decide, chances are that no liability for disclosure or non-disclosure would ensue, at least in cases where the parolee obtained the job on his or her own, unless the officer acted in malice or with gross negligence.

In light of the complexity of the issues discussed here, the following suggestions are offered for the protection of parole officers in supervision cases:

(1) If you recommend a parolee for a job, it is best to disclose that parolee's background to the prospective employer. Disclosure is also necessary if the parolee is to be placed in a foster home, as in the case of a juvenile, or in a halfway house run by a private person.

(2) If the parolee obtains a job on his or her own, without officer intervention or recommendation and therefore with no reliance, disclosure should be governed by agency policy.

(3) If the agency has no disclosure policy, such policy must be drawn to guide and protect parole officers and the agency. A good policy to adopt is one patterned after the Guide to Judiciary Policies and Procedures: Probation Manual, the important provisions of which are quoted above.

LIABILITY FOR REVOCATION

Some parolees facing revocation or whose parole has been revoked challenge the process based either on procedural or constitutional grounds. Since such challenges create possible exposure to Section 1983 liability suits, it is important for parole officers to be aware of the leading decisions on parole revocation. Parolees have challenged some phases of the revocation process as procedurally or constitutionally unfair; therefore, a brief review of the legal principles governing parole revocation procedures and a survey of recent case law involving inmate or parolee challenges of revocation hearings is important and useful.

The Morrissey Decision

The most significant judicial decision related to parole revocation is Morrissey v. Brewer, 408 U.S. 471 (1972), in which the Supreme Court addressed the constitutional due process questions related to parole revocation hearings. The facts of the case are that Morrissey's parole had been revoked for technical violations of parole conditions. These violations included purchasing a car and obtaining credit under a false name, giving a false address to the police and to an insurance company following a minor accident, and not receiving his parole officer's permission to drive the car. The parole officer revoked Morrissey's

parole without a hearing, and Morrissey was returned to prison.

Morrissey filed a habeas corpus petition seeking release from prison, claiming he was denied constitutional due process because his parole was revoked without a hearing. Both the federal district court and the Eighth Circuit Court of Appeals denied Morrissey's petition. The United States Supreme Court, however, granted certiorari and reversed the lower court decisions. The Court said that before a parolee is revoked, he or she must be given the following rights:

(1) Right to a two-stage hearing, namely: (a) the preliminary hearing at the site of the alleged violation, and (b) the final hearing at the prison site;

(2) Some due process rights, namely:

a. Written notice of the alleged parole violations.
b. Disclosure to the parolee of the evidence of violation.
c. Opportunity to be heard in person and to present evidence as well as witnesses.
d. Right to confront and cross-examine adverse witnesses unless good cause can be shown for not allowing this confrontation.
e. Right to judgment by a detached and neutral hearing body.
f. Written statement of reasons for revoking parole, as well as of the evidence used in arriving at that decision.

In specifying the above procedures, the Supreme Court noted that it was not trying to create an "inflexible structure," but was saying that the actual details of parole revocation procedures are the

responsibility of the individual states. Consequently, a number of states have virtually done away with the two-stage hearings, merging these instead into what is essentially a single hearing wherein the six due process rights enumerated above are given.

Morrissey is the only major case decided thus far by the Supreme Court on parole revocation. It is, in fact, one of the few cases ever decided by the Court that specifies the constitutional rights of parolees. Morrissey is important as a legal liability issue because the rights given in Morrissey are constitutionally required; hence, their violation leads to liability under Section 1983. These same rights were later extended by the Court to probationers in probation revocation proceedings (Gagnon v. Scarpelli, 411 U.S. 778 [1973]).

Other Parole Revocation Cases

While many, if not most, revocation challenges have been based on due process grounds, as in Morrissey, some parolees have attempted to overturn revocation decisions by filing Section 1983 suits alleging violations of other constitutional rights. Although none has succeeded and they are commonly dismissed at the district and appellate court levels, some cases are worthy of examination.

Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981), involved a prisoner who filed a Section 1983 suit against the chairman of the California Adult Authority and other Authority officials, claiming they had conspired to deprive him of his civil rights by giving him a parole release date that required him to serve an excessively long prison sentence. The district court held that the parole board members are absolutely immune under the Civil Rights Act for actions taken when processing parole applications. The prisoner appealed and the 9th Circuit Court of Appeals held that state parole board officials are absolutely immune from suit for actions taken when processing parole applications, since parole board

officials perform functions comparable to judges when they decide to grant, deny, or revoke parole. Although the Sellars case referred to a parole board's release decision, the court noted that revocation decisions are of equal importance and are also worthy of absolute immunity.

Blackwell v. Commonwealth of Pennsylvania, 516 A.2d 856 (Pa. Cmwlth. 1986), involved a due process challenge to a revocation hearing filed because one of the members of the parole board that revoked Blackwell's parole was the author of the original violation report that led to the revocation being filed. The court held that the parolee was indeed denied a "neutral and detached" revocation hearing and thus vacated the original revocation order and remanded the case to the Pennsylvania Board of Probation and Parole. The case is important because it illustrates when a parolee's right to a detached or neutral hearing body is violated. The court noted in part:

> Parole revocation hearing was tainted by bias in violation of due process, where parole board member on hearing panel was parole officer at time of alleged parole violations, and member wrote violation report and addendum to it recommending that parolee be recommitted for unexpired term of his sentence; in essence, member was, via the reports, a witness against the parolee, and was involved in decision making process before he sat as member of panel. . . .

Piercy v. Black, 801 F.2d 1075 (8th Cir. 1986), involved a parolee who sought habeas corpus relief claiming he was denied bail in violation of the Eighth Amendment and was further denied due process when he was not provided with a prompt parole revocation hearing. Additionally, the parolee claimed he was denied due process under the Full Faith and Credit Clause, arguing that the time he had spent in a Nebraska prison serving an Iowa sentence should have been

credited toward the time he had to serve on pending Nebraska cases. The court denied the parolee relief on all counts, noting that the parolee had received ample due process in his parole revocation and subsequent related hearings.

Revocation Based on New Conviction Without a Hearing

May a parolee be revoked based on a new conviction while he or she is on parole? In U.S. v. Lustig, 555 F.2d 751 (1977), the Ninth Circuit Court of Appeals answered yes; revocation can be ordered based on a new conviction because a certified copy of the conviction alone is usually considered sufficient proof of violation.

In a recent Texas case, ex parte Mathis Carl Williams v. State,[10] (1987), however, the Texas Court of Criminal Appeals overturned a revocation order made without a final revocation hearing. The parolee had been convicted of the felony offense of unauthorized use of a motor vehicle. Texas parole board rules allowed for a revocation without a hearing when a parolee was convicted of a felony offense in a court of competent jurisdiction, resulting in a court sentence of incarceration to a penal institution. The Texas Court of Criminal Appeals held that, under Morrissey, parole cannot be revoked without a revocation hearing, saying that a parolee must have an opportunity to offer mitigating evidence and explain why a subsequent conviction should not result in parole revocation.

The case was appealed to the United States Supreme Court, which refused to hear the case on certiorari. The case is significant because some states have the same revocation rules as Texas did in revocation without hearing if a parolee is convicted of another offense. Until resolved by the U.S. Supreme Court, states will have to be guided by their own courts' decision on whether or not parole may be revoked without a hearing based on a new conviction.

Failure to Revoke or Initiate Revocation Proceedings

In most revocation cases, the allegation is that a parolee's constitutional rights have been violated because the procedures prescribed in Morrissey v. Brewer were not followed. There have been cases, however, where liability lawsuits have been filed against parole personnel by injured third parties alleging that the injury caused by a parolee would not have happened had the parolee been revoked and sent back to prison. Illustrative of this type of lawsuit is the case of Nelson v. Balazic, 802 F.2d 1077 (8th Cir. 1986).

In Nelson, the Missouri parole board members and a parole officer were sued for failure to revoke a parolee who had violated the conditions of his parole and subsequently kidnapped, raped and sodomized three women. The federal district court dismissed the case, and the plaintiffs appealed. The Eighth Circuit Court of Appeals upheld the lower court ruling, holding that the members of the parole board were entitled to absolute immunity and that the parole officer's actions did not fall outside the bounds of her qualified immunity.

The Eighth Circuit Court of Appeals concluded that although the plaintiffs in Nelson may have had a remedy in state court for negligent failure of the parole officer to warn them of the threat posed by the parolee, there did not exist, under Section 1983, a violation of their constitutional rights. Even assuming that a constitutional right was violated, an issue which the court did not decide, the court held that the parole officer would be immune from liability because such a right was not clearly established at the time. The Nelson case is important in that (1) the court extended the good faith defense to the parole officer in the case, stating that there was no liability because the constitutional right, if any existed, was not clearly established at the time the alleged violation took place (the essence of the good

faith defense), and (2) although parole board members might be deemed absolutely immune from liability for decisions to revoke because they are "judge-like" decisions, parole officers enjoy only qualified immunity in decisions to revoke.

Although not in the context of civil liability lawsuits, some courts have held that a state cannot unreasonably delay initiating a revocation proceeding; otherwise, due process rights might be violated (Jacobs v. U.S., 399 A. 2d [D.C. 1979]). These cases are filed by parolees who maintain that their status ought to be determined promptly instead of delayed while under custody. A number of states, by law or agency rules, specify the time within which a revocation hearing is to be initiated if the parolee is in custody. The problem, however, is that some courts consider this time limit mandatory, while others deem it discretionary. In either case, most states say that no constitutional right is violated by the delay (since conviction has already taken place, custody is justified), and if any remedy is available at all, it would most probably be a habeas corpus proceeding for release under state law.

What the above discussion says, in brief, is that while cases have been filed by third parties and parolees based on failure to revoke or initiate revocation proceedings, chances of liability are slim as long as the officer does not violate the plaintiff's clearly established constitutional rights, of which there are hardly any, except those given in Morrissey v. Brewer.

SUMMARY AND CONCLUSION

Because civil liabilities of parole personnel for release, non-release, supervision, and revocation are relatively new, case law is still in its developmental stage. A review of cases indicates that courts will impose liability in some cases, so parole personnel must be familiar with the growing law in this field.

In general, parole board members enjoy quasi-judicial immunity and are therefore not liable for injuries caused by parolees. Arizona and Alaska courts have indicated, however, that liability ensues under a narrow set of circumstances. Whether other jurisdictions will follow these leads remains to be seen.

Parole is not a constitutional right; therefore, potential parolees may or may not be released at the discretion of the parole board. There are instances, however, where the state, through statute or rules and regulations, imposes limitations on the broad discretion of parole boards, thereby creating liberty interest where nothing otherwise existed. When this happens, potential parolees become entitled to due process rights in the parole board's decision to release to ensure that the factors that preclude release are in fact present and that the decision is not arbitrary and in violation of law. Since due process is a constitutional right, its denial when liberty interest has been created by state law or rules leads to liability.

Liability for parole supervision has been imposed in a number of cases. Liability arises if a "special duty" exists between the parole officer and an injured third party. Such "special duty" is generally created if two elements are present: (1) reasonably foreseeable risk and (2) reasonably foreseeable plaintiffs, preferably identifiable. One state court, however, implies that liability may be imposed based on reasonably foreseeable risk alone despite the absence of identifiability.

An important aspect of supervision is disclosure or non-disclosure of parolee background to potential employers or the general public. Liability to the parolee emanating from disclosure of record is minimal, unless such is prohibited by state law or agency regulation or the disclosure is made because of malice or ill will. Non-disclosure may lead to liability for failure to warn a third party who may be injured by a

parolee's conduct. Again, most courts impose liability only if the twin elements of reasonably foreseeable risk and reliance are present. If the parolee obtains the job on his or her own, eliminating reliance, it is best to follow agency rules on disclosure. Such policy should be created if it does not already exist.

Liability for revocation may arise if a parolee's constitutional rights are violated. Those rights are enumerated by the United States Supreme Court in the seminal case of Morrissey v. Brewer. Other issues involving possible infringements of constitutional rights have arisen, but thus far no court has imposed liability based on a violation of constitutional rights at the revocation stage.

We live in a litigious society where the constitutional right of access to court has become an often-used, and sometimes abused, right. The number of liability lawsuits filed against criminal justice personnel at all levels has increased. Being sued has become an occupational hazard, particularly in corrections. Any public officer can be sued, but whether or not that lawsuit succeeds is a different matter. A great majority of lawsuits against parole officials do not succeed. This is no inducement for complacency, however. What it conveys instead is the message that if an official does his or her job right, chances of being held liable are minimal. What it further implies is that parole officials must be familiar and keep up with the developing law on legal liabilities. If this monograph encourages parole officials to do that, its main purpose will have been achieved.

ENDNOTES

1. U.S. News & World Report, April 27, 1987, p. 18.

2. "Probation and Parole, 1985," Bureau of Justice Bulletin, p. 1.

3. Section 845.8(a) of the California Government Code Annotated, West Supplement, 1979.

4. R.C. 2967.26.

5. Inmates' Legal Rights, National Sheriffs' Association, Revised Edition, 1987, p. 87.

6. Id.

7. "Setting Prison Terms," Bureau of Justice Bulletin, 1983, p. 4.

8. Guide to Judiciary Policies and Procedures: Probation Manual, Administrative Office of the United States Courts, 1985, p. 37.

9. Id.

10. Crime Prevention Newsletter, #69,732, February 11, 1987, Texas Attorney General, July 1987.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-050 /63010

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