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Searching for a Liberty Interest: The Prisoner's Right to Due Process: *Connecticut Board of Pardons v. Dumschat*, 101 S. Ct. 2460 (1981)

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Note

Searching for a Liberty Interest: The Prisoner's Right to Due Process

Connecticut Board of Pardons v. Dumschat, 101 S. Ct. 2460 (1981).

I. INTRODUCTION

The decade of the 1960s saw the apparent demise of the federal courts' "hands off" policy[1] regarding actions brought by inmates incarcerated throughout the nation's prisons.[2] In the last ten years

1. The "hands off" policy was a judicially self-imposed limit on federal review of prisoner grievances which was based on deference to prison authorities. Procunier v. Martinez, 416 U.S. 396 (1974). The rationale for this reluctance to intervene in prison administration was the assumption that courts lacked the expertise and administrative capacity required to improve prison conditions and that court intervention would subvert and undermine prison discipline. *Id.* The subsequent result would be the irreparable damage to the prison system. *Id.* Because this policy operated as a jurisdictional bar to prisoners' complaints, it enabled federal courts to avoid any constitutional review of prison administrative decisions. Referring to the policy, Justice Powell observed:

> Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.

Id. at 404-05 (footnotes omitted). For a good discussion of the rationale and effect of the hands-off policy, see Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

2. The Supreme Court appeared to abandon the hands-off policy in Cooper v.

an explosion[3] of claims have been filed in federal courts by prisoners seeking relief for a wide range of grievances.[4] The courts have addressed important questions regarding prisoners' rights protected by the United States Constitution.[5] In *Connecticut Board of*

Pate, 378 U.S. 546 (1964), when it indicated that it would subject prison administrative decisions to constitutional constraints. In *Cooper*, a prisoner alleged that he had been denied permission to purchase certain religious publications solely because of his religious beliefs. The Court reversed the lower court decisions that had dismissed the prisoner's complaint based on the view that federal courts had no business supervising prison officials. *See* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS L.Q. 219, 220-24 (1977). *See also* Cruz v. Beto, 405 U.S. 319, 321 (1972).

3. Petitions filed by state and federal prisoners represent a substantial portion of the workload of federal courts. In recent years, cases dealing with prisoner grievances have accounted for as much as 18% of all civil filings. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE DIRECTOR 93-95 (1976). For example, filings by state prisoners rose from around 200 in fiscal year 1966 to nearly 7,000 in fiscal year 1976, an increase of over 3000% in only 10 years. THE UNITED STATES COURTS: A PICTORIAL SUMMARY 4 (1976). In 1974, state and federal prisoners filed 18,410 petitions of various types in the district courts. Of this total, state prisoner civil rights suits accounted for 5,236. ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 42-45 (1974). Justice Brennan, in Rhodes v. Chapman, 101 S. Ct. 2392 (1981), noted that there are currently pending over 8,000 cases filed by prisoners challenging prison conditions. *Id.* at 2402 (Brennan, J., concurring).

   Prisoners challenge the conditions of their confinement in state prisons in the federal courts either by habeas corpus actions under 28 U.S.C. § 2254 (1976) or by civil rights actions under 42 U.S.C. § 1983 (1976). A petitioner seeking a writ of habeas corpus must first exhaust state remedies. *See* Note, *Prisoners, 1983, and the Federal Judge as Warden*, 9 TOL. L. REV. 873, 890 (1978). A complaint filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1976) must allege specific conduct by state officials acting under color of state law which violates some constitutional right of the prisoner. Frequently these complaints contain allegations attacking prison disciplinary procedures, censorship, medical care, etc. and are brought by the inmates against wardens, prison directors, and guards. *See* cases cited *infra* notes 4-5; Alper, *Due Process Behind Bars*, 49 FLA. B.J. 240 (1975).

4. Claims have run the gamut from the serious to the absurd. *See, e.g.*, Sparks v. Fuller, 506 F.2d 1238 (1st Cir. 1974) (inmates complained about the eviction of their pet cats that had been obtained without official consent); Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974) (prisoner claimed to have been denied access to specialized treatment after he had contracted tuberculosis from his cellmate); Stubblefield v. Henderson, 475 F.2d 26 (5th Cir. 1973) (prisoner filed a petition demanding that he be allowed access to a typewriter for his correspondence); Anderson v. Redman, 429 F. Supp. 1105, 1113 (D. Del. 1977) (allegation that insufficient staff led to an "increase in theft, assault, and homosexual rape").

5. Answers to some issues addressed include: United States v. Bailey, 444 U.S. 394 (1980) (poor prison conditions do not justify escape from prison); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (inmates do not have a constitutional right to parole); Bell v. Wolfish, 441 U.S. 520 (1979) (body cavity

Pardons v. Dumschat,[6] the United States Supreme Court, reversing the lower court decisions, found that inmates who were denied commutation of their sentences by the Connecticut Board of Pardons without any explanation possessed no liberty interest protected by the due process provision of the Constitution.[7]

Over twenty years ago the Court noted that due process is an "elusive concept,"[8] whose "exact boundaries are undefinable."[9]

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searches of pretrial detainees do not violate their fourth amendment rights); Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference to serious and essential medical needs of prisoners constitutes cruel and unusual punishment violative of the eighth amendment); Meachum v. Fano, 427 U.S. 215 (1976) (prisoner who is arbitrarily transferred to another prison has no due process protection against such transfer); Baxter v. Palmigiano, 425 U.S. 308 (1976) (permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceeding is not, on its face, an invalid practice); Wolff v. McDonnell, 418 U.S. 539 (1974) (state-created prisoner right to good-time credits cannot be forfeited without due process); Pell v. Procunier, 417 U.S. 817 (1974) (prisoners have no first amendment right to face-to-face interviews with journalists); Procunier v. Martinez, 416 U.S. 396 (1974) (interest of prisoners in uncensored mail is a liberty interest protected by the United States Constitution); Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee is entitled to a preliminary hearing by someone not directly involved in his case); Younger v. Gilmore, 404 U.S. 15 (1971) (state must furnish prison inmates with access to extensive law libraries). At the lower court level, prisoners' claims for redress have often been effective. "In fact, individual prisons or entire prison systems in at least 24 states have been declared unconstitutional under the Eighth and Fourteenth Amendments." Rhodes v. Chapman, 101 S. Ct. 2392, 2402 (1981) (Brennen, J., concurring).

6. 101 S. Ct. 2460 (1981).
7. Procedural due process requirements apply to the deprivation of interests encompassed by the 14th amendment's protection of "liberty" and "property." This amendment provides that no state shall deprive any person "of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.
8. Hannah v. Larche, 363 U.S. 420, 442 (1960).
9. *Id.* The Court in *Hannah* further observed that "due process embodies the differing rules of fair play" which through the years have become associated with different types of proceedings. *Id.* Whether the Constitution requires that a particular right be available in a specific proceeding depends upon several factors including the "nature of the alleged right involved," the "nature of the proceeding," and the "possible burden on that proceeding." *Id.* This language became the basis for the due process test put forth by the Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For the substance of this test, see note 51 *infra*.

The Court has since indicated that when determining whether an interest merits due process protection, it will focus on the "nature of the interest at stake," not its "weight." Board of Regents v. Roth, 408 U.S. 564, 571 (1972). In addition, the Court will look at whether the deprivation of the interest will force the individual to suffer a "grievous loss." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The Court has observed "that due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* Many controversies have arisen regarding the cryptic and abstract wording of the due process clause, but the Court has been relatively consistent in finding

Nowhere is this fact more evident than in the series of Supreme Court decisions, culminating with *Dumschat*,[10] which attempt to address the question, "What constitutes a valid liberty interest for prison inmates?"[11] In order to facilitate an understanding of the current state of prisoners' protected rights, this Note will first discuss the historical development of those rights. It will then examine the *Dumschat* opinion in light of the Court's previous decisions regarding prisoners' due process rights. Finally, this Note will discuss *Dumschat's* role in the Court's continued narrowing of the threshold criteria required for prisoners to establish liberty interests worthy of constitutional protection.

II HISTORICAL RIGHTS OF PRISONERS

"It is hardly earth-shattering to observe that prisons are not Brownie Camps."[12] The American judiciary initially viewed the convicted criminal as having, "as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in humanity accords to him. He is for the time being the slave of the state."[13] This harsh view generally prevailed well into the twentieth century when federal courts began to acknowledge that a prisoner retained at least *some* rights,[14] including the

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that, at a minimum, these words require that deprivation of life, liberty, or property by adjudication cannot occur without notice and an opportunity to be heard. These two elements are the mainstays of due process protection. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950).

10. The series includes: Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460 (1981); Vitek v. Jones, 445 U.S. 480 (1980); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Meachum v. Fano, 427 U.S. 215 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

11. Due process generally protects traditional interests such as the ownership of real and personal property as well as providing protection from arbitrary practices in the criminal justice system. *See* Hannah v. Larche, 363 U.S. 420 (1960). A "liberty interest" or "entitlement" is an interest derived from the relationship between the individual and government that extends beyond the scope of these customary concerns. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972). *See* Note, *Due Process Behind Bars—The Intrinsic Approach*, 48 FORDHAM L. REV. 1067 (1980). Constitutional liberty interests originate from such sources as state and federal statutes, administrative practices, contractual arrangements, and mutual understandings, conduct, and comprehension of government and citizen.

12. People v. Lovercamp, 43 Cal. App. 3d 823, 826, 118 Cal. Rptr. 110, 111 (1975).

13. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

14. The change in attitude was reflected by the court's statement in Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944):

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude

right of access to a federal forum.[15] The Supreme Court decided that a prisoner had a right to review by writ of habeas corpus to challenge the legal and constitutional merits of his confinement.[16] Even though the Court held that prisoners had no due process protections in their discretionary transfers from one prison to another prison which was "less agreeable,"[17] the Court decreed that an in-

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and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion.

Id. at 445.

15. *See, e.g.*, Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965), where the court ruled that the tradition of judicial abstention from review of prison matters could not justify the court's failure to protect inmates' access to the court. *Id.* at 690-91. In *Talley*, prisoners who had testified about bad conditions at the prison farm had been beaten, and the farm administration had refused to forward prisoners' petitions to the court. *Id.* at 687-89. The due process right of access to the courts was first enunciated at the Supreme Court level in Johnson v. Avery, 393 U.S. 483 (1969). In *Johnson*, the Court held that prohibiting so-called "jailhouse lawyers" (inmates with legal skills who helped other inmates with paper work) from assisting other prisoners prevented, for all practical purposes, illiterate inmates from having their claims heard. *Id.* at 487. More recently the Supreme Court held that "the fundamental constitutional right of access to the courts" requires prison authorities to help inmates prepare and file meaningful legal papers by providing them with adequate law libraries or adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 828 (1977). For an informative discussion of the prisoner's right to access, see Potuto, *The Right of Prisoner Access: Does Bounds have Bounds?*, 53 IND. L.J. 207 (1978). Other federal court decisions have established that prisoners have various rights. *See, e.g.*, Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) (the right to reasonable psychiatric and psychological treatment); Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) (the right to fire protection); Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972) (the right to adequate heat); Jordan v. Arnold, 408 F. Supp. 869 (M.D. Pa 1976) (the right to adequate light and ventilation); Spain v. Procunier, 408 F. Supp. 534 (N.D. Cal. 1976) (the right to physical exercise); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (the right to nutritious food three times a day that is prepared under sanitary conditions); Murphy v. Wheaton, 381 F. Supp. 1252 (N.D. Ill. 1974) (the right to adequate sanitation); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (prisoners' right to go to sleep without having their throats cut during the night). For an interesting discussion of prison conditions in Arkansas prisons in the 1960s, see Comment, *Prison Reform in the Federal Courts*, 27 BUFFALO L. REV. 99 (1978).

16. Fay v. Noia, 372 U.S. 391 (1963).

17. Meachum v. Fano, 427 U.S. 215 (1976). The Court held that the transfer of state inmates to a prison where living conditions were "substantially more burdensome" than at the first prison did not constitute a deprivation of a liberty interest protected by due process in the absence of a state statute or practice conditioning transfers on serious misconduct. *Id.* at 224-27. In a majority opinion by Justice White, the Court refuted the notion that *any* grievous loss sustained by a person at the hands of the state is sufficient to trigger due process. *Id.* at 224. The court also dismissed the view that "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner" was enough to require 14th amendment protection. *Id.* (emphasis

mate imprisoned for the commission of a crime could not be involuntarily transferred to a mental hospital for psychiatric treatment without first being afforded additional due process protections.[18] The Court also held that a state-created prisoner's right to good-time credits,[19] which could only be forfeited for serious misbehavior, constituted a liberty interest protected by the due process clause.[20] Prisoners were afforded the right to enjoy substantial religious freedom[21] and protected against racial discrimination.[22] Further, deliberate indifference to prisoners' serious medical needs was held to constitute "unnecessary and wanton infliction of pain" and, hence, was prohibited.[23] The Court also established

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in original). As a result, the Court found that discretionary decisions by prison authorities need not be subjected to due process constraints because those decisions do not infringe on any protected right. *Id.*

18. Vitek v. Jones, 445 U.S. 480 (1980). Appellee Jones was convicted of robbery and sentenced to three to nine years at the Nebraska Penal and Correctional Complex. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1976), Jones was involuntarily transferred to the security unit of a state mental institution without notice or opportunity to oppose the transfer. 445 U.S. at 480. The Court asserted:

> None of our decisions holds [sic] that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of a crime.

Id. at 493. The Court observed that it was "indisputable that commitment to a mental hospital can engender adverse social consequences to the individual" including probable social "stigma," *id.* at 492, and that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment . . . constitutes the kind of deprivations of liberty that requires procedural protections." *Id.* at 494. The Court decided that such a "grievous loss" by the prisoner required a due process hearing. *Id.* at 488.

19. Good-time credits against a sentence serve as a reward for good behavior in prison. If an inmate does not violate the rules for a stated length of time, he is entitled to have his sentence reduced. Ordinarily seven to ten days are subtracted for each month of time served without misbehavior. *See* Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227 (1970).
20. Wolff v. McDonnell, 418 U.S. 539 (1974). In *Wolff*, the Court considered an inmate's constitutional challenge to administrative decisions affecting prison conditions and discipline and noted that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime." *Id.* at 555. The Court held that since prisoners in Nebraska could only lose good-time credits if they were guilty of serious misconduct, the procedure for determining whether such misconduct had occurred must observe minimal due process requirements. *Id.* at 557. *See* notes 83-85 & accompanying text *infra* & note 95 *infra*.
21. Cruz v. Beto, 405 U.S. 319 (1972).
22. Lee v. Washington, 390 U.S. 333 (1968).
23. Estelle v. Gamble, 429 U.S. 97 (1976). In *Estelle*, the Court adopted the standard of "deliberate indifference" to apply to cases involving eighth amendment claims. *Id.* at 104. The Court did not choose the most liberal standard

that prisoners had the right to send and receive mail without censorship[24] and possess and read materials that did not interfere with prison administration.[25]

These strides forward in the area of prisoners' rights represented a modern trend that recognized that prisoners were still human beings,[26] yet avoided the result of coddling the criminal.

The problem of how best to balance the interests of society against the interests of the individual prisoner has continued to perplex all parties concerned.[27] Traditionally, the public interest

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available. For example, mere negligence would not be actionable. *Id.* at 105-06. *See* Klein, *Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause*, 7 FORDHAM URB. L.J. 1 (1978).

24. Procunier v. Martinez, 416 U.S. 396 (1974). The Court struck down rules propounded by the California Department of Corrections that had directed inmates not to write letters which "unduly complain" or "magnify grievances" and prohibited "contraband writings expressing inflammatory political, racial, religious or other views or beliefs." *Id.* at 399. The Court ruled that "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance[s] of imprisonment." *Id.* at 418.

25. Lash v. Aikens, 425 U.S. 947 (1976).

26. In his concurring opinion in Procunier v. Martinez, Justice Marshall asserted:

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment.

416 U.S. 396, 428 (1974) (Marshall, J., concurring).

In the landmark decision of People v. Lovercamp, 43 Cal. App. 3d 823, 826, 118 Cal. Rptr. 110, 111 (1974), the court outlined criteria that would afford prisoners a limited defense for prison escape if the escape were based on duress and necessity, and further stated:

> When our culture abandoned such unpleasantries as torture, dismemberment, maiming and flogging as punishment for antisocial behavior and substituted in their place loss of liberty, certain problems immediately presented themselves. As a "civilized" people, we demanded that incarceration be under reasonably safe and humane conditions. On the other hand, we recognized that the institutional authorities must be afforded a certain firmness of program by which the malefactors could be kept where sentenced for the allotted period of time.

27. In Moody v. Daggett, the Supreme Court referred to the "parallel interests" of society and the parolee. 429 U.S. 78, 86 (1976). This "parallel interest" concept can be applied to many situations involving prisoners. The need for a mutual accommodation between the institutional (societal) needs and objectives in maintaining discipline and the constitutional provisions that sometimes extend to prisoners was discussed in Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considera-

was deemed to outweigh the individual prisoner's rights.[28] One accepted view was that constitutional protection turned upon whether a governmental benefit was characterized as a "right" or as a "privilege." Although a right was entitled to due process protection, a privilege could be revoked without such protection because it was granted by the state's generosity.[29] The Court firmly rejected this so-called right/privilege distinction over ten years ago.[30] Certain prisoners' rights that were formerly characterized as privileges have now been recognized as protected liberty interests.[31] Yet confusion about the role of the courts in determining how far to extend prisoners' rights remains. For example, our nation's highest Court declared: "Federal courts sit not to supervise

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tions underlying our penal system." Price v. Johnson, 334 U.S. 266, 285 (1948). "But though his rights may be diminished by the needs and exigencies of institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). The Court in Pell v. Procunier, 417 U.S. 817 (1974), perhaps best summed up society's interest in the corrections process:

> An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.

Id. at 822-23.

28. People v. Lovercamp, 43 Cal. App. 3d 823, 826, 118 Cal. Rptr. 110 112 (1974).
29. *See* Reich, *The New Property*, 73 YALE L.J. 733, 740 (1964). *See also* Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935).
30. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971), where Justice Blackmun stated: "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" The distinction was considered outdated and no longer useful. The complex and expansive concepts of liberty and property cannot be "neatly pigeonholed" and the Court's rejection of the right/privilege distinction represented recognition of this reality. *See* Note, *supra* note 11, at 1070. *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).
31. *See* Procunier v. Martinez, 416 U.S. 396, 399 n.1 (1974) (argument that sending and receiving mail was a privilege rather than a liberty interest was rejected). *Compare* Escoe v. Zerbst, 295 U.S. 490, 492 (1935) (probation as privilege) *with* Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973) (probationer can no longer be denied due process based on *Zerbst* right/privilege distinction).

prisons. . . . We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs."[32] Yet, in almost the same breath the Court stated that it *does* sit "to enforce the constitutional rights of all 'persons,' including prisoners."[33] These two statements made in the same paragraph indicate the complexity and ambiguity that pervades the area of prisoners' rights litigation today. It was through this enigmatic lens that the Court focused on the facts of *Dumschat*.

III. THE *DUMSCHAT* DECISION

A. Lower Court Opinions

In 1964, David Dumschat was sentenced to life imprisonment for the murders of his former wife and the doctor for whom she worked.[34] Under Connecticut law, Dumschat was ineligible for parole until December of 1983,[35] unless the Connecticut Board of Pardons commuted his sentence. The Board of Pardons was empowered to commute sentences of life inmates; the form of relief it most frequently granted was the commutation of an inmate's minimum sentence to time served.[36] This consequently acceler-

32. Cruz v. Beto, 405 U.S. 319, 321 (1972).
33. *Id.* at 321. *See* Comment, *Confronting the Conditions of Confinement: An Expanded Role in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977).
34. Dumschat v. Board of Pardons, 432 F. Supp. 1310, 1311 (D. Conn. 1977), *rev'd*, 101 S. Ct. 2460 (1981); Brief for Respondents at 9, Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460 (1981).
35. Until 1971, CONN. GEN. STAT. § 54-121 (1958) (repealed 1971) provided: "[W]hen any person is sentenced to the state prison, otherwise than for life or in connection with a sentence of execution for a capital offense, the court imposing the sentence shall establish a maximum and minimum term for which such convict may be held in such a prison." Under Connecticut law, only prisoners who have served their minimum terms of imprisonment are eligible for parole. *Id.* § 54-125 (1972). However, persons sentenced to life incarceration, like Dumschat, have no minimum terms and become eligible for parole only after having served 20 to 25 years in prison, depending upon the good time which they have earned. *Id.* In 1971, the Connecticut legislature enacted a new statute, CONN. GEN. STAT. § 53a-35 (1977), which required sentencing judges to affix minimum terms of from 10 to 25 years to life sentences. Thus, if Dumschat had been sentenced under the new penal code, he might have become eligible for parole. *See* Brief for Respondents at 2, Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460 (1981).
36. The authority for the Connecticut Board of Pardons is contained in CONN. GEN. STAT. § 18-26 (Supp. 1981) which provides:

> (a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
> (b) Said board shall have authority to grant pardons, conditioned or

ated the inmate's eligibility for parole.[37] Once eligible for parole, a separate state body, the Connecticut Board of Parole, determined whether the inmate should be released on parole.[38]

Dumschat applied for commutation of his sentence on several occasions; however, the Board of Pardons rejected each application without explanation.[39] In February of 1976, Dumschat instituted an action in federal court claiming that he had been deprived of a federally protected right within the purview of 42 U.S.C. § 1983.[40] He based his claim on the fact that the Board of Pardons had consistently denied him a pardon without providing him a statement of reasons and asserted that he was entitled to such a statement under the due process clause of the fourteenth amendment.[41]

After hearing testimony from officials of both the Board of Pardons and the Board of Parole, the trial judge concluded that due process attached to the denial of a pardon to an inmate like Dumschat who had served nearly two-thirds of his minimum term.[42] Thus, the court held that under the fourteenth amendment the Board of Pardons was required to provide Dumschat a written statement of reasons and facts it relied on in denying his pardon request.[43]

In reaching this result, the court rejected the contention that due process might be denied in parole proceedings on the ground that parole was a "privilege" rather than a "right."[44] The court

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absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

Id. The Connecticut Board of Pardons is a state agency established pursuant to CONN. GEN. STAT. § 18-24a (1977), which provides that the Board consist of five members: two attorneys, one person skilled in the social sciences, one physician, and a Justice of the Connecticut Supreme Court. Brief for Respondents at 3.

37. 101 S. Ct. at 2462.
38. Brief for Petitioners at 11. The usual process includes three determinations: the judge imposes a life sentence, the Board of Pardons commutes the sentence, and finally the Board of Parole discharges the prisoner from custody. *See* Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460, 2467-68 (1981) (Stevens, J., dissenting).
39. Brief for Petitioners at 3.
40. *Id.*
41. *Id.*
42. 432 F. Supp. at 1315 n.17.
43. *Id.* at 1315.
44. *Id.* The court relied on several factors and followed the rationale behind the holding in United States *ex rel.* Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925, 927-28 (2d Cir.), *vacated sub nom*, Regan v. Johnson, 419 U.S. 1015 (1974), which interpreted the Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972). *Morrissey* held that parole was to be treated as a conditional liberty representing an interest entitled to due process protections. The *Morrissey* Court outlined minimum safeguards:

found unacceptable the Board of Pardon's argument that it was sometimes difficult to articulate reasons for denial, especially in instances where the inmate was felt to be hopelessly incorrigible.[45] Instead, the court relied on the showing that at least seventy-five percent of all life inmates received favorable action from the Board of Pardons prior to completing their minimum sentences and that virtually all the pardoned prisoners were promptly paroled.[46] Thus, the court reasoned, the long-term inmate's expectation of a pardon was "rooted in state practice"[47] and was justifiable.[48] The court further noted that the possibility of arbitrary action by the Board of Pardons was not unreal and that the articulation of reasons would help ensure that a decision had some basis in the record before the board.[49] Finally, the court declared that a statement

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

Id. at 489. In following the *Morrissey* decision, the court in United States *ex. rel.* Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated sub nom*, Regan v. Johnson, 419 U.S. 1015 (1974), noted:

> A prisoner's interest in prospective parole, or 'conditional entitlement,' must be treated in like fashion [as a conditional liberty entitled to due process protection]. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration.

500 F.2d at 928. The *Dumschat* district court observed that the same factors which led the court in *Johnson* to find a liberty interest in an inmate's expectation of parole applied in the case of the denial of a pardon by the Connecticut Board of Pardons. Dumschat v. Connecticut Bd. of Pardons, 432 F. Supp. 1310, 1313 (D. Conn. 1977), *rev'd*, 101 S. Ct. 2460 (1981).

45. 432 F. Supp. at 1315.

46. *Id.* at 1314-15. Mr. Gates, Chairman of the Connecticut Board of Parole, stated that based on his 35 years of experience with the Connecticut correctional system, "at least 75 percent of all lifers received some favorable action from the pardon board prior to completing their minimum sentences." *Id.* at 1314. Gates testified: " '[I]n the vast majority of cases, I would say 90 percent of the cases at least, a commutation by the Pardons Board results in parole by the Parole Board.' " *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1315. The court explained:

> The board hears some 60 petitions in a given sitting. After the completion of the evidence in the cases heard during the day, the board goes into executive session. Typically, the secretary to the board reads the name of the applicant. . . . If all members remain silent, the petition is denied. There is no assurance that each of the mem-

of reasons would serve a rehabilitative function by informing the prisoner what his application lacked as well as suggesting how he might better himself in order to obtain a pardon in the future.[50]

Referring to the procedural due process test in *Mathews v. Eldridge*,[51] the trial court compared the nature of the inmate's interest and the need for procedural safeguards with the public's interest in maintaining the existing procedures and asserted, "I think its [sic] plain that the balance tips decidedly in favor of the inmate and the articulation of a statement of reasons."[52] Responding to post-judgment motions, the court allowed other inmates to intervene and certified the suit as a class action.[53]

The United States Court of Appeals for the Second Circuit affirmed the trial court's decision.[54] The Board of Pardons then petitioned the United States Supreme Court for a writ of certiorari which was granted on June 11, 1979.[55] The Court ordered that the judgment be vacated and the case remanded[56] to the court of appeals for further consideration in light of the Court's decision in *Greenholtz v. Nebraska Penal Inmates.*[57] In *Greenholtz*, the Court

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bers has actually considered all the information contained in the file or that the members are applying a consistent set of criteria.

Id.

50. *Id.*

51. 424 U.S. 319 (1976). In *Mathews*, the Court stated that due process was neither a technical conception with a fixed content unrelated to time, place, and circumstances nor was it inflexible. *Id.* at 334. It instead calls for such procedural protections as the particular situation demands. *Id.* The Court set forth a test to help identify when administrative procedures are constitutionally sufficient:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

52. Dumschat v. Connecticut Bd. of Pardons, 432 F. Supp. 1310, 1315 (1977), *rev'd*, 101 S. Ct. 2460 (1981).

53. 432 F. Supp. at 1315. On the day that the court entered its declaratory judgment, the Board commuted Dumschat's sentence to time served and granted him immediate release. The Board then moved to dismiss the suit as moot. The court denied the Board's motion and permitted three other inmates to intervene. Those inmates, like Dumschat, were also serving life terms for murder and had been denied commutation without any explanation. Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460, 2462 n.5 (1981).

54. 593 F.2d 165 (2d Cir.), *cert. granted*, 442 U.S. 926 (1979).

55. *Id.*

56. Dumschat v. Connecticut Bd. of Pardons, 442 U.S. 926 (1979).

57. 442 U.S. 1 (1979).

held that a prisoner had no inherent or constitutional right to parole because it was impossible for him to maintain a liberty interest in parole prior to his actual release once he had been duly convicted.[58] On remand of *Dumschat*, the court of appeals reaffirmed its original decision.[59] The Connecticut Board of Pardons again petitioned the Court for a writ of certiorari which was granted on October 14, 1980.[60]

B. Supreme Court Decision

The United States Supreme Court reversed the lower court decisions and held that the mere existence of the Connecticut Board of Pardons' power to commute a lawfully imposed sentence created no right or entitlement in the inmates beyond the right to

58. *Id.* The Court compared a prisoner's hope for freedom as being "no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process." *Id.* at 11. The Court did hold that, because Nebraska had statutorily created the required liberty interest in its parole process, Nebraska's inmates were protected by due process protections. *Id.* The Court was careful to observe that the Nebraska statute had a "unique" structure and that the determination of whether any other statute created a liberty interest in parole would have to be determined on a case-by-case basis. *Id.* at 12. The Nebraska statute provides that the Board of Parole "shall" order an inmate's release "unless" the Board concludes that his release should be deferred for at least one of four specified reasons. NEB. REV. STAT. § 83-1,114(1) (1976). These reasons are:

> (a) There is a substantial risk that he will not conform to the conditions of parole;
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
> (c) His release would have a substantially diverse effect on institutional discipline; or
> (d) 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.

Id. See Note, *Constitutional Law—Due Process in Parole Release Hearings—Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 28 KAN. L. REV. 635 (1980); Note, *Constitutional Law—Due Process—State Procedures for Granting Discretionary Parole Held to Comport with Requirements of Procedural Due Process*, 63 MARQ. L. REV. 665 (1980).

59. 618 F.2d 216 (2d Cir. 1980), *rev'd*, 101 S. Ct. 2460 (1981). The Second Circuit observed:

> Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons.

618 F.2d at 217.

60. Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 266 (1980).

seek commutation.[61]

The respondents argued that the Board's consistent practice of granting commutations to most life inmates had evolved into an "unwritten common law of sentence commutation and parole acceleration"[62] for Connecticut life inmates and thus was sufficient to create a protectible liberty interest.[63] The respondents asserted: "Through its consistent policy and practice of reducing the minimum terms of life inmates, the State Board has encouraged these prisoners to rehabilitate themselves, to maintain exemplary institutional conduct records and to expect that meritorious commutation petitions will be fairly considered and granted."[64] The respondents further claimed that the expectation of sentence commutation was *not* unilateral because the state had generated within the inmates a well-founded belief that they would be released if they controlled their institutional behavior.[65] As a result, an unspoken understanding existed between the state and the inmates which held out mutual benefits for both sides.[66] The terms of the understanding were simple: "If the inmate cooperate[d] with the State, the State [would] exercise its parole power on the inmate's behalf."[67] The respondents asserted that both the state and the inmate recognized these terms, with each expecting the other to abide by them.[68] As a result of this understanding, the State of Connecticut benefitted by diminished tensions within the prison system and savings in both manpower hours and other resources, while the inmates supposedly received favorable action regarding their commutation requests.[69]

Maintaining that the Court had consistently looked to the practices of state agencies in determining whether the state had created a legitimate expectation entitled to due process protection, the respondents urged the Court to embrace its opinion in *Perry v. Sinderman*.[70] In that case, the Court emphasized that mutually explicit understandings need *not* have a basis in written docu-

61. Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460, 2465 (1981).
62. *Id.* at 2464.
63. *Id.*
64. Brief for Respondents at 17.
65. *Id.* at 18.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* The respondents further asserted that "an atmosphere of cooperation is thereby engendered [when prisoners conform to institutional policies] at the state's penal institutions which makes it easier for the State to attract and retain competent employees." *Id.* And further that the state benefitted when inmates cooperated and volunteered their services to the state when they were not legally bound to do so. *Id.*
70. 408 U.S. 593 (1972). *See* Brief for Respondents at 16.

ments to create a legitimate claim of entitlement.[71] The Court in *Perry* analogized the circumstances which generate such understandings to implied contracts and to unwritten common law, adding that they may also be based on the policies and practices of an institution.[72]

In an opinion written by Chief Justice Burger and joined by six justices, the Court flatly rejected the respondents' arguments, stating: "Our language in *Greenholtz* leaves no room for doubt."[73] The Court agreed with the petitioners' contention that the requirement of written explanations of adverse pardon decisions would encumber, for no good reason, those states where the authority to pardon was liberally used.[74] Describing an inmate's petition for a pardon as merely an appeal for clemency, the Court compared an inmate's expectation that a lawfully imposed sentence would be commuted with an inmate's expectation that he would not be transferred to

71. 408 U.S. at 601, 603. The Court in *Perry* observed: " '[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' " *Id.* at 601 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). The respondents in *Dumschat* observed that the Court had never recognized a difference between liberty and property interests as far as the creation of legitimate claims of entitlement were concerned, citing the Court's decision in Lynch v. Household Finance Corp., 405 U.S. 533, 542 (1972). In *Lynch*, the Court held that it had "never adopted the distinction between personal liberty and proprietary rights" with respect to jurisdiction conferred on the district courts by 28 U.S.C. § 1343 (1976), one of the provisions enacted to enforce the fourteenth amendment. 405 U.S. at 542. The Court in *Lynch* went on to say:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Id. at 552.

72. 408 U.S. at 601-03.

73. Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460, 2463 (1981). The Court asserted:

> There is *no constitutional or inherent* right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'

Id. (emphasis in original) (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979)).

74. *See* Brief for Petitioners at 9.

another prison, stating: "[I]t is simply a unilateral hope."[75]

The Court acknowledged that the State of Connecticut had conferred "unfettered discretion"[76] on its Board of Pardons and stressed that a state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.[77] The Court further declared: "A constitutional entitlement cannot 'be created' merely because a wholly and *expressly* discretionary state *privilege* has been granted generously in the past."[78] Chief Justice Burger emphasized that the ground for a constitutional claim must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency, and that the frequency of past grantings or the statistical probability of future grantings generated no constitutional protections.[79]

The Court also discussed the "critical difference" between the denial of a prisoner's request for initial release on parole and the revocation of a parolee's conditional liberty, comparing the subjective nature of the commutation decision with the objective aspects of parole revocation.[80] At this juncture, Chief Justice Burger reiterated the Court's holding in *Greenholtz* that an inmate has no constitutional or inherent right to commutation of his sentence.[81]

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75. 101 S. Ct. at 2464.

76. *Id.* at 2465. The Court observed that the court of appeals had "correctly recognized" that Connecticut had conferred "unfettered discretion" on its Board of Pardons, but had, paradoxically, then proceeded to "fetter" the Board with the "halter" of constitutional "entitlement." *Id. See* Dumschat v. Board of Pardons, 618 F.2d 216, 219 (2d Cir. 1980), *rev'd*, 101 S. Ct. 2460 (1981).

77. 101 S. Ct. at 2465. For the Board of Pardons' statutory authority, see note 36 & accompanying text *supra*.

78. 101 S. Ct. at 2464 (emphasis in original) (quoting Leis v. Flynt, 439 U.S. 438, 444 n.5 (1979)).

79. 101 S. Ct. at 2460. The *Dumschat* Court contrasted Connecticut's pardoning procedure with Nebraska's statutory procedures which the Court had addressed in *Greenholtz*. *Id.* at 2465. The *Dumschat* Court referred to the unique structure and language of the Nebraska statute which provided for mandatory parole in certain circumstances. For the Nebraska parole procedures, see note 58 *supra*. In Connecticut there were no such "explicit standards" set forth by way of statutes or regulations. 101 S. Ct. at 2465. Further, the petitioners pointed out the Connecticut Supreme Court's interpretation of Connecticut's parole statute, CONN. GEN. STAT. § 54-125 (1972), in Taylor v. Robinson, 171 Conn. 691, 372 A.2d 102 (1976). *See* Brief for Petitioners at 11. In *Taylor*, the court held that the statute simply provided that an inmate who has served his minimum sentence may be paroled at the discretion of the board of parole, but that there was no statutory requirement that the board actually consider the eligibility of any inmate for parole. 171 Conn. at 697, 372 A.2d at 106. The court further stated that the statute did not vest an inmate with the "right to demand parole" and that there was no statutory provision which even permitted an inmate to apply for parole. *Id.* at 697, 372 A.2d at 106.

80. 101 S. Ct. at 2464.

81. *Id.*

IV. ANALYSIS

"There is no iron curtain drawn between the Constitution and the prisons of this country."[82] This language is from the landmark decision of *Wolff v. McDonnell*,[83] in which the Court held that due process protections are necessary when an inmate is deprived of "good-time" credits.[84] Although acknowledging that the Constitution itself did not guarantee good-time credits for satisfactory behavior while in prison, the Court concluded that because the state had statutorily provided this right, a prisoner's interest in maintaining his good-time credits had real substance and was embraced within fourteenth amendment liberty.[85]

In searching for a liberty interest that is relevant to the "very different situation"[86] present in prison, it is necessary to compare several factors discussed in *Dumschat* with prior Court holdings. Close scrutiny of the *Dumschat* opinion reveals questionable reasoning when compared to earlier Court decisions.

A. The Critical Difference

It is important to note the *Dumschat* Court's choice of words. The Court referred to Connecticut's pardon process as a " 'discretionary state privilege . . . granted generously in the past.' "[87] Such language is difficult to reconcile with the Court's opinion in *Graham v. Richardson*,[88] where it rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or as a privilege. The *Dumschat* language appears to indicate the Court's willingness to rekindle the supposedly refuted right/privilege distinction in a "not-too-deceptive

82. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).
83. 418 U.S. 539 (1974).
84. In *Wolff*, Nebraska inmates brought a claim for damages and injunctive relief under 42 U.S.C. § 1983 (1976). They alleged, among other things, that certain disciplinary proceedings at the penitentiary had violated due process. The Court held that because Nebraska's disciplinary scheme permitted good-time credits to be withheld or forfeited *only* as a consequence of an inmate's serious misconduct, the procedure for determining whether such misconduct had occurred was required to observe certain minimal due process safeguards (though not the full range mandated in other Court holdings for parole and probation revocation hearings). 418 U.S. at 556-72. *See* notes 19-20 *supra*.
85. 418 U.S. at 557.
86. *Id.* at 560. The *Wolff* Court stated: "[I]t is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison." *Id.*
87. 101 S. Ct. at 2464 (quoting Leis v. Flynt, 439 U.S. 438, 444 n.5 (1979)).
88. 403 U.S. 365 (1971). For a discussion of *Graham*, see note 30 *supra*.

disguise."[89]

The *Dumschat* Court enthusiastically embraced the restrictive language of *Greenholtz*, in which the Court differentiated between parole release and parole revocation because of the *nature* of the decision in each instance.[90] While a parole-revocation decision often involves a wholly retrospective factual question and thus is objective, the parole-release decision is more subtle and depends on an "amalgam of elements,"[91] some factual, but many more purely subjective appraisals based on parole board members' experience.[92] Justice Marshall, in his dissent in *Greenholtz*, criticized the Court's conclusion that an important difference of constitutional dimension exists between a deprivation of liberty one *has* and a denial of liberty one *desires*.[93] Justice Marshall fur-

89. United States *ex rel.* Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925, 927-28 n.2 (2d Cir.), *vacated sub nom*, Regan v. Johnson, 419 U.S. 1015 (1974). For a discussion of the rejection of the right/privilege distinction, see note 30 & accompanying text *supra*.

90. 442 U.S. 1, 9-11 (1979).

91. *Id.* at 9-10.

92. *Id.* Justice Powell, concurring in part and dissenting in part to the *Greenholtz* decision, reacted to the Court's narrow distinction between parole release and parole revocation, stating: "I am unpersuaded that this difference, if indeed it exists at all, is as significant as the Court implies." *Id.* at 19. (Powell, J., concurring in part, dissenting in part). In addressing the Court's conclusion that parole release and parole revocation were different because there is a "difference between losing what one has and not getting what one wants," *id.* at 9-10, Justice Powell asserted that if there was any systematic difference between the factual inquiries relevant to release and revocation determinations, this difference would be "too slight to bear" on the existence of a liberty interest protected by the due process clause. *Id.* at 20.

93. *Id.* at 27 (Marshall, J., dissenting in part). Justice Marshall stated that "*Morrissey* afforded constitutional recognition to a parolee's interest because his freedom on parole includes 'many of the core values of unqualified liberty.'" *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972)). Justice Marshall asserted: "This proposition is true regardless of whether the inmate is presently on parole *or seeking parole release*. 442 U.S. at 27. (emphasis added). He further stated: "Contrary to the Court's assertion that the decision to revoke parole is predominantly a 'retrospective factual question,' *Morrissey* recognized that only the first step in the revocation decision can be so characterized. . . . *Morrissey* thus makes clear that the parole revocation decision includes a decisive subjective component." *Id.* at 28.

Following the decision in *Morrissey*, the Court held that the requirements of due process established for parole revocation were also applicable to probation revocation proceedings. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Court added to the required minimum procedures established in *Morrissey* the right to counsel under certain circumstances. *Id.* at 790. Quoting from *Morrissey*, the Court discussed the conditional nature of parole, stating: "[T]he revocation of parole is not a part of a criminal prosecution. 'Parole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly

ther asserted that the Court's holding in *Wolff v. McDonnell*[94] had acknowledged that a prisoner could implicate a liberty interest in good-time credits, even though the forfeiture of the credits only deprived the prisoner of freedom he expected to obtain sometime in the future.[95]

In the *Dumschat* opinion, Chief Justice Burger described the petition for a pardon, in each case, as nothing more than an appeal for clemency.[96] He stated that the case did not involve parole.[97] This conclusion is questionable at best, given the close interrelationship existing between the Board of Pardons and the Board of Parole. In reality, at least for a large number of inmates, the request for a pardon was the *required first step* in Connecticut's parole process.[98] The *Dumschat* Court's attempt to draw fine distinctions between complex issues perhaps indicates a hesitancy on the Court's part to refute its landmark decision in *Morrissey v. Brewer*[99] in which it observed the important role of parole in modern society:

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. . . . It also serves to alleviate the costs to society of keeping an individual in prison.[100]

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dependent on observance of special parole restrictions.' " *Id.* at 781. (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

94. 418 U.S. 539 (1974).

95. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 25 (1979) (Marshall, J., dissenting in part). Justice Marshall further asserted: "[T]his Court has repeatedly concluded that the Due Process Clause protects liberty interests that individuals do not currently enjoy." *Id.* The Court in Wolff v. McDonnell had stated:

> For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance.

418 U.S. 539, 560-61 (1974). In his dissent in *Greenholtz*, Justice Marshall stated: "Whether an individual currently enjoys a particular freedom has no bearing on whether he possesses a protected interest in securing and maintaining that liberty." 442 U.S. 1, 26 (1979) (Marshall, J., dissenting in part).

96. 101 S. Ct. at 2464.

97. *Id.*

98. *See* notes 35-38 & accompanying text *supra*.

99. 408 U.S. 471 (1972).

100. *Id.* at 477.

In *Morrissey*, the Court held that parole revocation required due process and further observed that even though a parolee's liberty interest was conditional rather than absolute, the parolee nevertheless retained significant freedoms.[101] The Court also asserted that a parolee's liberty included "many of the core values of unqualified liberty"[102] and that attempts to revoke those values must be accompanied by fourteenth amendment safeguards.[103] Thus, despite the fact that an individual's parole was merely conditional and did not interrupt the state's legal custody,[104] a protectible liberty interest existed.

Whether it be the disallowance of good time, the revocation of parole, or the "arbitrary" denial of a pardon,[105] each action has the same effect of postponing the prisoner's reappropriation of his liberty. As a result, the liberty interests in each situation are essentially the same. The Court in *Dumschat* chose to ignore those similarities.

B. A Unilateral Hope

The *Dumschat* Court's propensity to draw fine distinctions, as evidenced in its discussion of the differences between the parole and pardon processes is consistent with the Court's analysis of appropriate sources of liberty interests. The Court observed that the ground for a constitutional claim must be found in statutes or other rules defining the obligations of authority, and it rejected the respondents' argument that the Court had, in the past, looked at *other* criteria to decide if liberty interests were present.[106] This finding conflicts with the Court's earlier language in *Wolff v. McDonnell*,[107] where the Court stated: "The liberty that is worthy of constitutional protection is not merely 'a statutory creation of the

101. *Id.* at 480-82.
102. *Id.* at 480.
103. *Id.* at 482.
104. Meachum v. Fano, 427 U.S. 215, 232 (1976) (Stevens, J., dissenting).
105. The dissent in Jago v. Van Curen, 102 S. Ct. 31 (1981), referred to *Dumschat* as holding that the "arbitrary denial of an application for commutation of a life sentence is permissible." *Id.* at 33 n.1 (Stevens, J., dissenting).
106. 101 S. Ct. at 2464. The constitutional claim or "entitlement" must meet the threshold requirement: the existence of a legal right defined by independent norms or rules. *See* notes 11, 71 & accompanying text *supra*. These independent norms and rules are both determinate and autonomous. The norms are determinate in the sense that they provide courts with reasonably precise standards to follow which serve to constrain judicial discretion. They are autonomous in that they are actually "legal" norms promulgated by reasonable authorities and are distinguishable from norms of prudence, morals, or customs. Comment, *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano*, 12 HARV. C.R.-C.L. L. REV. 405, 412 (1977).
107. 418 U.S. 539 (1974).

State.' "[108] It should be noted that both concurring opinions in *Dumschat* stressed that prior Court decisions had *not* suggested that state law was the *only* source of a prisoner's liberty interest worthy of constitutional protection, with Justice Brennan referring to *other* eligible criteria in addition to state statutes, such as administrative practice, contractual arrangements, or mutual understandings.[109] In an earlier decision, *Perry v. Sindermann*,[110] the Court emphasized that mutually explicit understandings need not have a basis in a written document to create a legitimate claim of entitlement. And in *Board of Regents v. Roth*,[111] the Court stated that to determine whether due process requirements applied, one had to look not to the weight but to the *nature* of the interest at stake. The *Roth* Court viewed the words "liberty" and "property" as "broad and majestic terms" that were purposely left to gather meaning from experience, and it further asserted that the Court had fully and finally rejected the "wooden distinction" between rights and privileges that once seemed to govern the applicability of due process rights.[112]

In deciding when due process protections would be warranted, the *Roth* Court observed that a person clearly needed more than just an abstract desire or a one-sided, unilateral expectation of a benefit.[113] The Court used similar language in *Meachum v. Fano*[114]

108. *Id.* at 558.

109. 101 S. Ct. 2460, 2465-66 (1981) (Brennan & White, JJ., concurring). Justice White noted: "But neither *Wolff* nor *Meachum* is fairly characterized as suggesting that all liberty interests entitled to constitutional protection must be found in state law." *Id.* at 2466 (White, J., concurring). The dissent in *Dumschat* was considerably less subtle, stating: "Surely the Court stumbles when it states that liberty 'must be found in statutes or other rules defining the obligations of authority' . . . , or when it implies that liberty has 'its roots in State law.' " *Id.* at 2466 (Stevens, J., dissenting). These assertions by Justice Stevens are similar to those in his dissent in Meachum v. Fano, 427 U.S. 215 (1976), where he stated:

> [N]either the Bill of Rights nor the laws of sovereign states create the liberty which the Due Process Clause protects. . . . The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

Id. at 230 (Stevens, J., dissenting).

110. 408 U.S. 593, 601, 603 (1972).

111. 408 U.S. 564, 571 (1972).

112. *Id.* at 571. The Court continued: " '[These words] relate to the whole domain of social and economic fact, and the statesmen who founded this nation knew too well that only a stagnant society remains unchanged.' " *Id.* (quoting National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

113. *Id.* at 577.

114. 427 U.S. 215 (1976). In *Meachum*, prisoners filed an action under 42 U.S.C.

when it described a prisoner's expectation in not being arbitrarily transferred to another prison, asserting that such an expectation was too insubstantial to trigger procedural due process protections.[115] It was this language that Chief Justice Burger incorporated into the *Dumschat* opinion when he referred to a Connecticut felon's expectation of a pardon as simply "a unilateral hope."[116] However, that finding ignored the reality of the underlying situation in *Dumschat* and the two-sided, mutual nature of Connecticut's system. Further, the benefit to the State of Connecticut from the unwritten compact with its prisoners was of a type previously recognized by the Court. In *Morrissey v. Brewer*,[117] the Court acknowledged that its decision to require procedural protections for parolees was based as much on the interests of society as those of the prisoner. Chief Justice Burger stated:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to a normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole given the breach of parole conditions . . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[118]

Significantly, the *Morrissey* Court noted that a parolee based his claim for due process protections upon his reliance on an implicit promise from the state that his parole would be revoked *only* if he failed to satisfy the parole conditions.[119] In a like manner, if over a

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§ 1983 (1976) alleging that they had been deprived of liberty without due process of law because the prison authorities had ordered them transferred to a less favorable institution without an adequate factfinding hearing. 427 U.S. at 222. The Court observed: "That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." *Id.* at 225. The Court asserted that to hold that such arrangements [prisoner transfers] are within the reach of due process clause protections would "place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." Id. at 228-29. If the individual states wished to follow a more liberal course, "whether by statute, by rule or regulation or by interpretation of their own constitutions," the Court stated that the decision was theirs to make. *Id.* at 229.

115. *Id.* at 228.

116. 101 S. Ct. at 2464.

117. 408 U.S. 471 (1972).

118. *Id.* at 484. Referring to the parolee's liberty interest, Chief Justice Burger observed that it was no longer useful to try to deal with this issue in terms of whether the parolee's liberty was a "right" or a "privilege," concluding: "By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482.

119. *Id.* at 482.

period of years, seventy-five percent of a class receive favorable treatment for performing in a prescribed manner, it is difficult to dismiss their expectations of continued like treatment as unilateral solely because the longstanding terms of the implicit promises are not set forth in writing. Nevertheless, the *Dumschat* Court concluded that a state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.[120] In other words, if a state sets down no rules, it is not required to explain its actions.

C. Encumber For No Good Reason

" 'There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.' "[121] It is important to recall what precipitated the *Dumschat* litigation.[122] Dumschat simply felt that he deserved to know why the Board of Pardons rejected his application for commutation of his prison sentence while continuing to consistently grant seventy-five to ninety percent of the applications of his peers. Dumschat wanted to know if his denial of a pardon could have been based on procedural error[123] and, if it was not, what action he might take to improve his chances for obtaining release. The respondents assured the courts that voluminous, detailed explanations were neither necessary nor being sought.[124]

Of course, the *Dumschat* Court's determination that there was no liberty interest giving rise to due process protections foreclosed consideration of the above procedural concerns. In light of the vol-

120. 101 S. Ct. at 2465.

121. Wolff v. McDonnell, 418 U.S. 539, 589 (1974) (Marshall, J., concurring in part, dissenting in part) (quoting Palmigiano v. Baxter, 487 F.2d 1280, 1283 (1st Cir. 1973)). Marshall also recalled Chief Justice Burger's language in *Morrissey*, noting that "fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 484 (1972)).

122. In his original complaint, Dumschat sought not only a statement of reasons from the board, but also access to all information available to the board in its consideration of his applications. This additional relief was not granted by the district court. The claim to access was dropped in the class action suit and was not an issue before the Court. Dumschat v. Board of Pardons, 618 F.2d 216, 221 n.8 (2d Cir. 1980), *rev'd*, 101 S. Ct. 2460 (1981).

123. It should be noted that the district court found that the possibility of arbitrary action by the Board of Pardons was real, given the procedural process involved. *See* note 49 & accompanying text *supra*.

124. Brief for Respondents at 30. "Respondents ask only that they be told why they have been denied a sentence commutation when others who have compiled no better institutional records and committed crimes no less serious have received commutations." *Id.*

atile atmosphere present in many prison situations,[125] perhaps addressing these concerns, by finding due process requirements applicable, would be wise from a policy standpoint.

The Supreme Court has articulated three factors relevant in determining what process is due.[126] However, the *Dumschat* Court chose not to apply these factors. The first factor requires examining the private interest that will be affected by the official action.[127] In *Dumschat* this interest related to the postponing of the prisoner's reappropriation of his liberty and was essentially the same type of interest the Court found worthy of due process protection in prior decisions.[128] The second factor relates to the risk of an erroneous deprivation of the interest as a result of the procedure(s) used.[129] The trial court found that there was such a potential risk in the Board of Pardons' procedure for review.[130] The third factor looks at the government's interest in the process, including the fiscal and administrative burdens imposed on the government as a result of additional or substitute procedural requirements.[131] Here, the *Dumschat* Court adopted the State of Connecticut's argument that requiring its Board of Pardons to explain its rationale for denying an inmate a pardon would "encumber for no good reason" the pardon process.[132] Yet the Chairman of the Board of Pardons testified that no significant fiscal or administrative burdens would be imposed upon the Board if the agency were required to furnish life inmates with reasons for denial of sentence commutations.[133] He also conceded that if the Board furnished a short statement of reasons for denial it would not limit the Board's consideration of prison petitions or result in fewer sessions.[134] Previous court decisions have indicated that even though some administrative inconvenience might result if a brief summation of reasons underlying a decision were required, this factor could not justify the denial of a written statement of reasons.[135] Further, the inability to provide any reasons might suggest that

125. *See* Potuto, *Prison Disciplinary Procedures and Judicial Review Under the Nebraska Administrative Procedure Act*, 61 NEB. L. REV. 1, 15 (1982).
126. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). For a discussion of *Mathews*, see note 51 *supra*.
127. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
128. *See* notes 83-105 & accompanying text *supra*.
129. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
130. *See* note 49 & accompanying text *supra*.
131. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
132. 101 S. Ct. 2460, 2464-65 (1981). *See* Brief for Petitioners at 9.
133. Brief for Respondents at 30 (citing the Joint Appendix at 71).
134. *Id.* at 30-31 (citing the Joint Appendix at 71).
135. *See* Wolff v. McDonnell, 418 U.S. 539, 563-65 (1974); Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973); Morrissey v. Brewer, 408 U.S. 471, 489 (1971).

the decision was, in fact, arbitrary.[136]

Perhaps a policy argument which can be made against requiring reasons for parole or pardon denial is that furnishing reasons could lead to anger, unrest, and violence within the prison system. Some inmates, told that parole denial was due to factors beyond their control,[137] might lose the incentive to stay out of trouble or might vent their frustrations on others. Thus to avoid this result, it is better to keep *all* inmates uninformed. However, such a policy sacrifices the valuable rehabilitative function[138] which could be served by informing inmates of the shortcomings in their applications so that they could better themselves for future parole or pardon consideration. The *Dumschat* Court failed to examine this potential positive result of affording due process.

V. CONCLUSION

Although the Supreme Court was apparently once willing to lend a sympathetic ear to prisoners with constitutional grievances,[139] it has, in the last five years, only occasionally chosen not to defer to state government conduct with respect to prisoners' rights questions.[140] As a result, many determinations regarding prisoners' rights are left to the expertise of prison administrators or to the will of state legislatures. Whether this may be viewed as a good or bad result depends upon several factors. If the problems which initially warranted federal court intervention into state prison operations no longer exist,[141] then giving decision-making power back to the state courts, legislatures, and prison officials would be appropriate. If, on the other hand, the same problems continue to exist in state prisons, then the *Dumschat* and *Greenholtz* opinions signal hard times ahead for prisoners seeking help with their grievances. Other recent cases,[142] coupled with a tre-

136. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 40 (1979) (Marshall, J., dissenting in part).

137. *See* Dumschat v. Connecticut Bd. of Pardons, 432 F. Supp. 1310, 1315 (D. Conn. 1977), *rev'd*, 101 S. Ct. 2460 (1981). *See also* Joint Appendix at 49-52.

138. *See* text accompanying note 50 *supra*.

139. *See* Calhoun, *supra* note 2.

140. For an example of when the Supreme Court did not defer to state authorities, see note 18 *supra*.

141. *See* notes 12-26 & accompanying text *supra*.

142. The Court recently upheld a 40-year prison sentence imposed on a Virginia man for the distribution of nine ounces of marijuana worth about $200. The Court observed that declaring the duration of prison sentences was a matter of legislative prerogative. Hutto v. Davis, 102 S. Ct. 703 (1982). The Court in *Hutto* based its ruling on a 1980 decision, Rummel v. Estelle, 445 U.S. 263 (1980), where the Court upheld the constitutionality of a life sentence imposed on a Texas man who had committed three minor felonies over a nine year period. In 1964 Rummel was convicted of presenting a credit card with

mendous increase in prison population figures,[143] do not present an optimistic outlook for those persons ostracized for their sins against society. New liberty interests for prisoners not on parole or probation will be difficult to assert, absent an express grant from the state. Unless one receives a life sentence for an overtime parking violation,[144] the Court may very well look the other way. The *Dumschat* decision indicates the Court's willingness to continue to tighten up threshold criteria for prisoners claiming violations of their constitutional rights. The present Court may be sending a message to prisoners in response to the swelling federal docket.[145] Perhaps the message is that while prisoners may have access to the courts, their efforts may well be an exercise in futility.

The Court's deference[146] to Connecticut's power to choose its own direction and mechanism for meting out justice represents an

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intent to defraud another of approximately $80. In 1969 he was convicted of passing a forged check with a face value of $28.36. In 1973 Rummel accepted payment of $120.75 in return for his promise to repair an air conditioner. He never repaired it and was charged with obtaining the money under false pretenses. He was also charged with being a habitual offender under the Texas habitual offender statute, TEX. PENAL CODE ANN. § 12.42 (1974), which provides a mandatory life sentence for any person convicted of three felonies. The Court held that the mandatory life sentence imposed on Rummel did not constitute cruel and unusual punishment under the 8th and 14th amendments and that Texas was entitled to make its own judgment as to the line dividing felony theft from petty larceny. The Court noted that the Texas recidivist statute was nothing more than a societal decision that applied to a person in Rummel's position who commits a third felony. After committing the third offense, he is subjected to the serious penalty of life imprisonment, subject only to the state's judgment as to whether to grant him parole. *Id.*

In Jago v. Van Curen, 102 S. Ct. 31 (1981), the Court, citing *Dumschat*, rejected the theory that a sort of "industrial common law" could give rise to a liberty interest in the prisoner parole setting and reiterated that a constitutional claim must be based on firmer ground than mere "unspoken understandings" between the state and inmates. *Id.* at 34. *See* Rhodes v. Chapman, 101 S. Ct. 2392 (1981) (Court upheld double celling made necessary by unanticipated increase in prison population); Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981) (court upheld prisoner's placement in solitary confinement for three months due to lack of space).

143. In an address given at the University of Nebraska at Lincoln, Chief Justice Burger cited an increase in the prison population of the United States of approximately 150,000 in the last ten years alone (from 200,000 to 350,000). Address by Chief Justice Burger, More Warehouses, or Factories with Fences? (Dec. 16, 1981); *See* DeTar Newbert, Chief Justice Burger Gives Major Address on Prison Reform, The Neb. Transcript, Dec. 1981, at 16-17.

144. In the *Rummel* opinion, Justice Rehnquist stated that successful challenges to prison sentences on the basis of undue harshness should be "exceedingly rare" and offered the example of a life sentence for "overtime parking." Rummel v. Estelle, 445 U.S. 263, 272, 274 n.11 (1980).

145. *See* note 3 *supra*.

146. The Court observed: "The Connecticut commutation statute, having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or

important step back towards a revival of the "hands off" doctrine.[147] A quote by Justice Harlan, made over twenty years ago in his dissent in *Mapp v. Ohio*,[148] perhaps best sums up the apparent attitude of the Court that decided *Dumschat*:

> For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another . . . . [T]his Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.[149]

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constitutional entitlement." Connecticut Bd. of Pardons v. Dumschat, 101 S. Ct. 2460, 2465 (1981).

147. *See* note 1 *supra*.

148. 367 U.S. 643 (1961).

149. *Id.* at 681 (Harlan, J., dissenting).