EQUAL PROTECTION AND THE USE OF PROTEST LETTERS IN PAROLE PROCEEDINGS: A PARTICULAR DILEMMA FOR BATTERED WOMEN INMATES

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This Article explores equal protection rights applicable to the use of letters submitted to state parole boards by crime victims, citizens, and trial officials protesting the parole of a particular inmate. Particular analysis is given to battered women inmates who are serving prison sentences for killing their batterer, who often receive these "protest letters" in the parole process. Because most states' parole statutes do not create a liberty interest in parole providing full due process protections, battered women inmates must rely on their equal protection rights for redress. This Article argues that the current methods for use of protest letters in some states violate the Equal Protection Clause of the United States Constitution. The author outlines the parole procedures and the use of protest letters in the states of California, Texas and New York, which have the largest prison populations in the United States. The author argues that those states that provide no investigation of the contents of protest letters in any form, and do not allow the inmate any access to such letters for inmate investigation and rebuttal, violate a battered woman inmate's constitutional rights, even in cases where state laws do not create a liberty interest in parole.

A number of sources indicate that many protest letters submitted in parole hearings are often unreliable or based on hearsay and, regardless of the source of the protest, have little or nothing to do with the factors that state parole boards are directed by state statutes to consider in making parole decisions. As a result, protest letters that are vindictive or the result of political pressure are relied upon as a basis for denying parole to otherwise qualified battered women inmates. The situation of battered women inmates provides the most striking example of the problems presented by unverified protest letters because incarcerated battered wo-

men face the traditional protest letters received in parole proceedings, plus letters submitted by the deceased batterers' family, who often deny that abuse occurred, and trial officials, who undervalued or rejected the self-defense claim at trial. This Article concludes that states should not use protest letters until appropriate procedures are in place that protect an inmate's equal protection rights and the integrity of the parole process. For many incarcerated battered women, parole may be their last recourse in a justice system that failed to recognize the legitimacy of their defense.

INTRODUCTION

In the spring of 1979, Sarah, a thirty-six year old woman, married Paul. Their years of marriage were marked by increasingly frequent and severe physical abuse by Paul that resulted in numerous injuries to Sarah. Paul was very proficient with weapons, including hatchets, and he began using them to terrorize Sarah. On several occasions, Paul held a gun against Sarah's head and threatened to kill both her and himself. Sarah was ashamed of the beatings and always hid the bruises under long sleeves and jackets.

On one evening in 1984, Paul and Sarah had been out drinking separately and both arrived home at around 2:00 A.M. Sarah changed into her bedclothes and left her purse and keys in the bedroom. When she rejoined Paul in the living room, they began arguing. Sarah fell over one of the family cats and put her hand through the top of Paul's styrofoam beer cooler, which always sat next to his living room chair. Paul was furious and began to beat Sarah, punching her in the stomach and threatening to break her neck. When Sarah said she was going to leave, Paul, standing between her and the door, told her that no one would leave the house alive. Believing his threat and knowing he was capable of killing her, Sarah picked up a gun, which was left on the end table due to burglaries in the area, pointed it at Paul, and said that she was going to leave and that they could talk about it in the morning. Paul was outraged that Sarah had pointed a gun at him and moved toward a claw hammer on the clothes dryer. Sarah shot Paul once, believing that he was going to use the hammer to kill her. Paul fell dead. Sarah called 911, was arrested, forced to sign a confession drafted by the police after hours of questioning, and, eventually, allowed to go to the emergency room for treatment for her injuries.

Prior to trial, the district attorney's office offered Sarah a plea bargain in which she would receive ten years probation if she would plead guilty to involuntary manslaughter, a felony offense.

Believing in her innocence and her right to self-defense, Sarah chose not to accept the plea bargain. Sarah had no previous criminal record. Although some evidence of the history of battering was admitted at trial, the jury found Sarah guilty of murder and sentenced her to forty years.

Sarah was incarcerated and began to serve her time. She availed herself of numerous educational and vocational programs, completing an associate's degree in computer science, and kicking an addiction to alcohol and Valium. Sarah also helped start a battered women's group at her prison. After thirteen years in prison and a clean discipline record, Sarah was denied parole after the district attorney submitted a protest letter stating that Sarah had killed before. In addition, Paul's family submitted a protest letter stating that Sarah was a bad mother, that Paul had never hit Sarah and that Sarah was actually the aggressor and had physically abused Paul. Sarah was not told that the letters existed nor was she given an opportunity to supply correct information. Although the parole board initially recommended parole for Sarah prior to receipt of the letters, the board, without any investigation as to the veracity of the letters, accepted the protest letters as true and denied Sarah parole.

This sketch of a fictitious battering victim[2] incarcerated for killing her batterer allows us to frame four fundamental questions: (1) why was Sarah not released on parole?; (2) why did the parole board not perform any type of investigation as to the veracity of the "protest letters?"; (3) of what use are inaccurate letters submitted to state parole boards by crime victims, citizens, and trial officials protesting the parole of an inmate?; and (4) why does the Constitution fail to prevent these types of injustices? Despite our basic notions that the criminal justice system in the United States is fair, unfortunately, this scenario is quite likely under the laws in effect in several states.

Having laid out these questions, the author will suggest some answers through an analysis of the Equal Protection Clause of the United States Constitution and an examination of laws related to the use of protest letters in the three states with the largest prison populations. In this Article, the author argues that the use of protest letters without any verification or opportunities for inmate rebuttal violates the Equal Protection Clause. Part I provides a

[2] The facts of this victim are loosely based on the situation of a *pro bono* client the author has represented. The names have been changed to protect client confidentiality.

general background on the use of protest letters in inmate parole proceedings, both in general and as applied to battered women inmates serving prison sentences for killing their batterers. Although victim's rights groups vehemently argue in favor of the use of protest letters in parole proceedings,[3] the information presented in many protest letters is often unreliable or based on hearsay and, regardless of the source, often has little or nothing to do with the statutory factors that state parole boards are directed to consider when making parole decisions.[4] As a result, protest letters "containing wrong information, that are vindictive, or that are the result of political pressure are considered and relied upon."[5]

The situation of battered women who are serving prison sentences for killing their batterers is the clearest example of problems with the current use of protest letters in some states. There is serious doubt whether the input of judges and prosecutors provides useful information to justify denial of parole of a battered woman in light of the documentation indicating that evidence of battering is often disregarded or undervalued during trial.[6] Likewise, it is not realistic to expect relatives or friends of a deceased batterer—the sources of protest letters in many cases—to provide accurate information about the physical abuse inflicted by their loved one.[7] Thus, protest letters from a decedent batterer's family may contain substantially inaccurate information based upon a denial that the abuse existed.

Part II examines the protections afforded by the Due Process Clause and the Equal Protection Clause of the United States Constitution. Because many state parole statutes do not create a liberty interest in parole, full due process guarantees are not often available and inmates generally must rely on their equal protection rights to seek redress for grievances related to parole procedures.

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3 *See generally* Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUST. 19, 19-21 (1990); Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 734-35 (1995).

4 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1218 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

5 *Id.*

6 *See* Joan H. Krause, *Unmerciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 669, 769-70 (1994); *see infra* Part I.B. and accompanying notes.

7 *See generally* Krause, *supra* note 6, at 702-03; Allison M. Madden, *Clemency for Battered Woman*, 4 HASTINGS WOMEN'S L.J. 1, 3-7 (1993); LISA SHEEHY ET AL., COMMUTATION FOR WOMEN WHO DEFENDED THEMSELVES AGAINST ABUSIVE PARTNERS: AN ADVOCACY MANUAL AND GUIDE TO LEGAL ISSUES C-4-6 (May 10, 1991) (on file with author); Hollace Weiner, *Family Woes Make Present Lonely after a Rough Past*, FORT WORTH STAR TELEGRAM, Aug. 30, 1992, at A21.

Rational basis scrutiny is applicable to inmate equal protection challenges, including challenges to the use of protest letters, because no fundamental right or suspect class is involved.[8] Rational basis scrutiny requires that a classification of inmates created by a state regulatory scheme be relevant to the achievement of a legitimate governmental objective.[9] A classification of inmates for equal protection analysis is created when inmates who receive protest letters are treated differently from inmates who do not.[10] The receipt of protest letters often is a significant contributing factor in the outcome of a parole board's decision of whether to grant parole.[11]

Part III reviews the statutes and regulations governing the use of protest letters in California, Texas, and New York. These states have the three largest prison populations and their regulations are demonstrative of the trichotomy existing in state usage of protest letters in inmate parole proceedings.[12] Furthermore, none of these states recognizes a due process liberty in parole.[13] Nevertheless, California provides a substantial amount of protection to guard against the use of inaccurate information contained in protest letters.[14] Texas provides the least amount of protection, arguably none, and some parole board members actually argue that there is nothing wrong with using inaccurate information.[15] Finally, New York is similar to a large number of states that fall somewhere between California and Texas, providing some limited protections and investigation on the use of protest letters.[16]

Finally, Part IV concludes that the current practice of using protest letters in parole determinations in some states, in combination with statutes protecting the confidentiality of such protest letters, violates the rights guaranteed to inmates by the Equal Protection Clause of the Fourteenth Amendment. Unless proper procedures are mandated, a parole board can often receive and consider protest letters without any guidance and prevent the inmate from learning of the existence of such letters and from reading and rebutting the letters' contents. It is irrational for a parole

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8 *See* Harris v. McRae, 448 U.S. 297, 322 (1980).

9 *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

10 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1218 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996); *see infra* Part II.B.2 and accompanying notes.

11 *See Johnson*, 910 F. Supp. at 1018-19.

12 *See infra* Part III and accompanying notes.

13 *See infra* Part III and accompanying notes.

14 *See infra* Part III.B and accompanying notes.

15 *See infra* Part III.C and accompanying notes.

16 *See infra* Part III.D and accompanying notes.

board making parole determinations to rely on unverified protest letters that likely contain inaccurate information.[17]

The plain function of the legal process is to minimize the risk of erroneous decisions.[18] Even where a parole statute does not confer a liberty interest in parole, it is arbitrary and capricious for a parole board to deny parole based on protest letters that are known to be inaccurate.[19] No state policy is served by decisions based on inaccurate information. Fundamental fairness and rationality inherent in the form and substance of a fair proceeding demand that state parole boards verify information contained in protest letters to minimize error and preserve the integrity of the parole process itself. The number of obvious, easy alternatives to the methods employed by some parole boards are evidence that the lack of regulation governing the use of protest letters can violate the Equal Protection Clause. The presence of these numerous alternatives indicates the unreasonableness of the reliance on unverified protest letters.

I. GENERAL BACKGROUND ON PROTEST LETTER USE

A. *Rationales for Use of Protest Letters*

It is crucial that victims of crimes be heard in parole proceedings.[20] The United States has experienced a "victim's rights" movement over the past few years, recognizing that crime victims have a vital role that must be protected throughout the criminal process.[21] The movement seeks to balance the rights of criminals against the rights of crime victims.[22] Legislative efforts in the United States have focused on shaping a criminal justice system that encourages citizen input.[23] In fact, many states have amended their state con-

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17 *See infra* Part IV and accompanying notes.

18 *See* Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 11-12 (1979).

19 *See* Monroe v. Thigpen, 932 F.2d 1437, 1441 (11th Cir. 1991).

20 *See* Erez, *supra* note 3, at 28-29; Mulholland, *supra* note 3, at 747. *See generally* National Victim Center, *National Victim Services Survey of Adult and Juvenile Corrections and Parole Agencies*, Final Report 12-15 (1991) [hereinafter *National Victim Survey*].

21 *See generally* Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring); President's Task Force on Victims of Crime, Final Report (Feb. 1982) [hereinafter President's Task Force]; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Erez, *supra* note 3, at 19-20; Mulholland, *supra* note 3, at 734.

22 *See id.*

23 *See generally* Stephen J. Schulhofer, *The Trouble With Trials; The Trouble With Us*, 105 YALE L.J. 825, 825-26 (1995) (victims have won rights to be kept informed of the process of the prosecution, to be heard at sentencing, and to participate in parole-release proceedings).

stitutions to specifically protect the rights of crime victims.[24] Thus, crime victims and their survivors have a vital role to play in helping the criminal justice system appreciate and respond to the effects of crime.[25]

The 1982 Final Report of the President's Task Force on Victims of Crime ("President's Task Force") set forth three key recommendations for paroling authorities to involve crime victims in the parole process, thus creating protections for both victims and society as a whole.[26] The recommendations stated that: (1) parole boards should notify victims of crimes and their families in advance of parole hearings; (2) parole boards should take whatever steps are necessary to ensure that parolees charged with a crime while on parole are immediately returned to custody and kept there until the case is adjudicated; and (3) parole boards should not apply the exclusionary rule to parole revocation hearings.[27]

The President's Task Force specifically recommended that "parole boards should allow victims of crime, their families, or their representatives to attend parole hearings and to make known the effect of the offenders' crime on them."[28] In response, a number of states have implemented legislation and procedures that provide for victim participation in the parole process.[29] In fact, the majority of states now allow crime victims some participation in parole determinations.[30] At least thirty-five states now have

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24 *See, e.g.*, ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 8.1; KY. CONST. art. XV, § 15; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; N.J. CONST. art. I, ¶ 22; N.M. CONST. art. II, § 24; OHIO CONST. art. I, § 10a; R.I. CONST. art. I, § 23; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m. *See also* S.J. Res. 52, 104th Cong. (1996) (introducing legislation for federal constitutional amendment); H.R.J. Res. 174, 104th Cong. (1996) (same).

25 *See id.*

26 *See generally* President's Task Force, *supra* note 21.

27 *See id.*

28 President's Task Force, *supra* note 21, at 83.

29 *See infra* Part III; *see also* Ill. Comp. Stat. 38/1401 (West 1991) (a crime victim may submit information to the prison review board for consideration); MICH. COMP. LAWS ANN. § 780.771 (West Supp. 1996) (allowing the use of protest letters in parole determinations); OHIO REV. CODE ANN. § 2967.12 (Banks-Baldwin 1992) (same); PA. STAT. ANN. tit. 61, § 331.19 (West Supp. 1996) (use of protest letters filed by trial judges), tit. 61, § 331.22a (West Supp. 1996) (use of victim protest letters); TEX. CODE CRIM. P. ANN. art. 42.18, § 8 (West 1996) (allowing use of protest letters); VA. CODE ANN. § 53.1-155 (Michie Supp. 1995) (victim may submit oral or written testimony to the parole board for review); VA. CODE ANN. § 53.1-160 (Michie Supp. 1995) (notice delivered to court, prosecuting attorney, and police officials prior to inmate's release on parole).

30 *See National Victim Survey*, *supra* note 20, at 12-15; *supra* note 29.

laws allowing victims to voice their input at parole release hearings through a written or oral statement.[31] Therefore, protest letters have come to play an important role in the parole decision-making process.[32] Due to the concern about the possibility of retaliation against citizens who submit protest letters,[33] a number of states have made protest letters completely confidential, so that the inmate has no access to the source or content of protest letters.[34]

B. Inaccuracies in Protest Letters

Protest letters are received in varying forms. Some simply oppose release, some express opinions that the inmate has not "done enough time," and others contain newspaper clippings or narratives describing the crime.[35] Protest letters often come from victims and their families describing the effects that the crime has had upon them, but some include information about the inmate, such as her criminal history, unadjudicated offenses, and family circumstances.[36] The motives for sending a protest letter vary widely from concern for public safety, personal dislike of an inmate, local polit-

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31 *See National Victim Survey*, *supra* note 20, at 16.

32 Although many citizens and victim's rights advocates stress the importance of the use of victim impact statements and parole protest letters, others dispute the issue. For a discussion of the impact of emotional pleas in criminal cases, see Bandes, *supra* note 21, at 393-410.

33 *See generally Witness Intimidation: Showdown in the Streets—Breakdown in the Courts: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994); U.S. Dep't of Justice, Office of the Attorney General, *Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice*, 55 (1992) ("Many victims of crime live with fear (often justified) that they may be victimized by the same offender again after release.").

34 *See, e.g.*, CAL. CODE REGS. tit. 15, § 2247 (1995) (an inmate has access to all information in her file except for confidential information, such as the name and address of the crime victim); ILL. ADMIN. CODE tit. 20, § 16.10.30 (1994) (inmates have access to protest letters filed by public officials and trial officials, but do not have access to materials forwarded to the parole board by crime victims or witnesses); N.Y. COMP. CODES R & REGS. tit. 9, § 8002.4 (1995) (a written victim impact statement or written report of an oral statement is maintained in confidence); Telephone Interview with Thomas Schneider, Executive Assistant to the Ohio Parole Board (June 14, 1996 and July 3, 1996) (victim information is passed on to the reviewing panel under strict confidentiality) (on file with author) [hereinafter Schneider Interviews]; PA. STAT. ANN. tit. 61, § 331.22a (West Supp. 1996) (victim protest letters are kept confidential upon victim request if the hearing officer concludes that non-confidentiality would endanger the victim's life); TEX. CRIM. CODE ANN. art. 42.18, § 18(a) (West 1996) ("All information, including victim protest letters or other correspondence . . . is confidential and privileged."); Telephone Interview with Michigan Parole Board (July 2, 1996) (protest letters submitted by a crime victim are automatically kept confidential) (on file with author).

35 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1216 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

36 *See id.*

ical considerations or the desire to obtain an advantage over the inmate.[37]

Unfortunately, protest letters may contain inaccurate information, be vindictive, or be the result of political pressure.[38] Protest letters containing no new information or simply repeating information given in other protests may result in the withdrawal of an otherwise favorable parole indication.[39] Furthermore, parole boards have based parole denials on protest letters containing erroneous information, such as references to the use of a weapon where the trial record contained no such reference; references to other offenses, where none existed on the record; statements that an offense was committed during the course of a robbery when the facts failed to support such a conclusion; and statements from trial officials clearly contradicting the testimony of the victim and prosecution witnesses at trial.[40] Parole boards have based parole denial on vindictive protest letters, such as protest letters filed by an attorney representing persons in a civil lawsuit connected with an inmate's case; grandparents seeking to improve their legal position in their case seeking custody of the inmate's children; a spouse, upon the request by the inmate for a divorce; and an attorney who the inmate sued for legal malpractice.[41] Furthermore, protest letters may be the result of political pressure due to public outcry and "form" protest letters solicited *en masse* by representatives of certain interest groups.[42] Protest letters contained within an inmate's files may also refer to unadjudicated offenses.[43]

C. *Dilemma for Battered Women Inmates*

It has been recognized that "our criminal justice system has been slow to respond to the victims of domestic violence" and holds those victims "to an unreasonable standard of justification when they try to assert the right to self-defense in court."[44] As a result, state criminal justice systems have jurisdiction over a

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37 *See id.*

38 *See id.* at 1220.

39 *See id.* at 1219.

40 *See Johnson*, 910 F. Supp. at 1219-20.

41 *See id.* at 1220 n.45.

42 *See id.* at 1220 n.46.

43 *See id.*

44 Tex. S. Con. Res. 26, 72d Leg. (1991). *See generally* Matthew Litsky, *Explaining the System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149 (1990); Letter from Jill Spector, National Clearinghouse for the Defense of Battered Women to Jennifer Bales (July 8, 1996) (on file with author) [hereinafter Spector Letter].

number of women "who have been doubly victimized first by their abusers and later by a criminal justice system that failed to recognize the legitimacy of their defense."[45] "These victims deserve an impartial review of their sentences so that their histories as victims of domestic violence are taken into account."[46]

In light of the shroud of silence with respect to the existence, extent, or duration of domestic abuse,[47] protest letters filed by trial officials, community members, and the family of a deceased batterer, in response to a parole request by a battering victim serving prison time, should be subject to a high level of scrutiny because such letters are not likely to be accurate. In fact, this is the most striking example of why state parole boards should carefully scrutinize the content of protest letters prior to granting any deference to the letter writer.

For instance, a protest letter written by the family of a deceased batterer may be inaccurate because the family is in a state of denial concerning the domestic abuse.[48] Although they are family members, they may have never seen the bruises and other results of the batterings or recognized the often hidden signs of abuse; therefore, they may conclude that domestic abuse did not occur.[49] The batterer's family may attempt to rationalize the batterer's behavior by claiming that the battered woman somehow was responsible for the violence,[50] rather than admitting that their loved one was abusive toward his wife or girlfriend. Thus, it is not likely that the deceased batterer's family members will provide an accurate portrayal of the battering that occurred or even acknowledge the existence of the abuse. Because of the existence of the familial relationship with the incarcerated battered woman, these individuals present a situation in sharp contrast to the writers of traditional protest letters. Additionally, the protest letter writer is likely in possession of irrelevant personal information and opinions, such as to the inmate's "character" or her qualities as a wife or mother; the writer may actually misinform the parole board, rather than aid in the fact-finding process.

Substantial evidence indicates that women are systematically

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45 *Id.*

46 *Id.*

47 *See generally* Litsky, *supra* note 44, at 151 (noting social forces permit and even encourage abuse); Spector Letter, *supra* note 44; *supra* note 7.

48 *See id.*

49 *See id.*

50 *See id.*

discriminated against in the courts.[51] The myths, biases, and stereotypes about women pervade the judicial decision-making process and often affect the outcome of cases.[52] As one commentator has noted with respect to clemency or parole hearings for battered women who killed their batterer, "whether the input of judges and prosecutors provide *useful* information is a different issue from whether it is politically advisable . . . . [a]s a practical matter we should expect judges, based on the information to which they have access, to arrive at the opposite conclusion."[53] Sexism is present in many of the rulings that judges make, such as excluding testimony about prior beatings, framing instructions so narrowly that juries are forced to convict, and refusing to allow expert testimony that is designed to overcome the biased attitudes present in many jurors.[54] Quite often, despite the evidence presented, a judge will rule that there was insufficient proof of self-defense to send the question to the jury.[55]

"It is even more of a mystery why the prosecutting attorney's recommendation would justify pardon" or parole for battered women.[56] The institutional pressure to obtain a conviction may have led the prosecutor during trial preparation to disregard or undervalue evidence of battering.[57] Some prosecutors have been known to make victim—blaming arguments and manipulate social stereotypes at trial to obtain a conviction.[58] A district attorney may have prosecuted a battered woman initially based upon an unreasonable fear that deciding not to prosecute the woman would lead to an unprecedented rash of husband-killing.[59] In fact, prosecutors have assailed the granting of clemencies to battered women as bestowing a "license to kill."[60] As a result, the prosecutor may have been likely to bring charges even if the prosecutor believed that the eq-

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51 *See* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 191 (1989); s*ee, e.g.*, Gender Bias Task Force of Texas (Final Report) (Feb. 1994) ("[W]omen litigants often experience hostile, demeaning, or condescending treatment, particularly from attorneys and sometimes from judges.").

52 *See id.;* Litsky, *supra* note 44, at 169-71.

53 Krause, *supra* note 6, at 769-70.

54 *See* GILLESPIE, *supra* note 51, at 192.

55 Krause, *supra* note 6, at 770.

56 *See id.;* Madden, *supra* note 7, at 14-15.

57 *See* GILLESPIE, *supra* note 51, at 192; Madden, *supra* note 7, at 14-16.

58 *See* Madden, *supra* note 7, at 14-16.

59 *Id.*; Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990 at A1 (the president of the Ohio Prosecuting Attorney's Association feared that, "Now, instead of going to the courts or getting a divorce, these women will think, 'Maybe I'll kill him.'").

60 *See* Madden, *supra* note 7, at 14-16.

uities favored a reduced sentence.[61] The pressure to continue to disregard evidence of battering may be intensified during clemency proceedings, where the very integrity of the conviction is questioned.[62] The effect in parole hearings can be expected to be the same for these inmates.

Because of the myths and misconceptions about domestic violence prevalent in our society, a parole board may actually be misinformed by the use of "secret," unverified protest letters and may tacitly perpetuate precisely the misconceptions about domestic abuse that hinder a fair parole decision based on the merits of the parolee. Parole boards are subject to institutional and social pressure against "second-guessing" the courts, especially jury verdicts. Incarcerated battered women, like all inmates, must be permitted to provide to the parole board all relevant evidence that supports their application for parole release, including information about the domestic abuse by the deceased and its relevance to the statements made in protest letters submitted to the parole board. This is especially important where little or no evidence of battering was presented at trial. Incarcerated battered women certainly must be able to protect themselves from explicit misinformation about battering and its effects set forth in protest letters; but they also need to protect themselves from the parole board's own misinterpretation of information in protest letters due to the board's own unconscious general misconceptions about battered women and domestic violence.

Parole is the last opportunity for justice for incarcerated battered women who have been punished "first, by their abusers and later by a criminal justice system that failed to recognize the legitimacy of their defense."[63] The parole system further punishes these women, making justice unobtainable if a parole board bases the parole release determination on unreliable, confidential protest letters submitted by trial officials and the deceased batterer's family.

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61 *See* Krause, *supra* note 6, at 770.

62 *See* TEX. S. CON. RES. 26, *supra* note 44.

63 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95-97 (1987) (right to marry); Hudson v. Palmer, 468 U.S. 517, 523 (1984) (rights compatible with objectives of incarceration); Bounds v. Smith, 430 U.S. 817, 821 (1977) (right of access to courts); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (right to due process subject to restrictions imposed by nature of penal system); Cruz v. Beto, 405 U.S. 319, 322 (1972) (limited First Amendment right to free exercise of religion); Lee v. Washington, 390 U.S. 333, 333-34 (1968) (right to equal protection). *See generally* Sarah Botz & Robert C. Scherer, *Prisoners' Rights*, 84 GEO. L.J. 1465 (1996).

II. CONSTITUTIONAL PROTECTIONS

A. *Due Process Clause*

Even though imprisonment deprives inmates of many rights, inmates nevertheless retain certain constitutional rights.[64] For instance, the Due Process Clauses contained in the Fifth and Fourteenth Amendments to the United States Constitution provide protections against arbitrary interference with personal movement or restraints on liberty without the due process of law.[65] Although the scope of liberty for free individuals is very broad, there are limits on the due process rights of inmates.[66] The due process analysis, however, must first question whether due process is required before examining how much due process is sufficient.[67] The Due Process Clause of the Constitution only applies when governmental action deprives a person of liberty or property.[68] The Supreme Court has looked to the nature of the interest at stake and concluded that to obtain a protectable right, a person must have more than an abstract need or desire for it.[69]

In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,[70] the Supreme Court held that there is no constitutional or inherent right requiring an inmate to be conditionally released before the expiration of her sentence. Although a state may establish a parole system, it does not have a duty to do so.[71] Thus, unless

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64 "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ." U.S. CONST. AMEND. V. The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. AMEND. XIV, § 1.

65 *See* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) ("a prisoner retains all the rights of an ordinary citizen, except those expressly or by necessary implication, taken away from him by law"); *see also* Deborah R. Stagner & Sandin V. Conner, *Redefining State Prisoner's Liberty Interests*, 74 N.C. L. REV. 1761 (1996).

66 *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("once it is determined that due process applies, the question remains what process is due"); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (an interest must fall under the Fourteenth Amendment's liberty or property protection in order to require due process).

67 *See* Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979).

68 *See id.*

69 442 U.S. 1 (1979). *Greenholtz* involved a class action brought by Nebraska inmates under § 1983 claiming unconstitutional denial of parole relief. *See id.* at 3-4. The inmates argued that the parole statutes and parole board's procedures did not afford them procedural due process. *See id.* at 4. The Court concluded that the particular language of the Nebraska statute created a presumption that parole release would be granted absent one of four justifications for deferral. *See id.* at 11-12. Procedural protection was required because the Nebraska statute used the words "shall" and "unless." *See id.* at 12.

70 *See id.* at 7.

71 *See id.* at 11-16.

the language of the state parole statute itself creates a protectable expectation of parole, an inmate is not entitled to full due process rights.[72] In the event that a state parole statute uses the words "shall," "unless," or similar language, a protectable expectation of parole may arise.[73] Whether a state statute provides a protectable entitlement must be decided on a case-by-case basis analyzing the structure and language of the state statute.[74]

In many cases, an inmate will not have a liberty interest in parole and full due process for parole determinations because the state statute does not create a liberty interest in parole.[75] Where no constitutionally protected right of due process exists, an inmate cannot state "a claim for either civil rights or habeas relief by his allegation that [s]he was denied due process [when seeking parole] because [s]he has no constitutionally protected expectancy of release."[76] Substantive due process rights (as well as equal protection rights), however, are implicated in parole determinations, even in the absence of liberty or property interests.[77] Thus, the grant of discretion to a parole board is not a "license for arbitrary procedure."[78] If a parole board bases a parole determination on a fact that is unrelated to the required statutory factors, it transgresses legitimate bounds of discretion.[79]

B. Equal Protection Clause

Where an inmate cannot pursue a claim for due process viola-

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72 *See id.* at 11-12.

73 *See id.* at 12.

74 *See, e.g.*, Gaston v. Taylor, 946 F.2d, 340, 344 (4th Cir. 1991) (inmates in Virginia do not have a liberty interest in parole); Vermouth v. Corrothers, 827 F.2d 599, 602 (9th Cir. 1987) (California does not recognize a liberty interest in parole); United States *ex. rel.* Scott v. Illinois Parole and Pardon Bd., 699 F.2d 1185, 1188 (7th Cir. 1982) (Illinois does not recognize a liberty interest in parole); Canales v. Gabry, 844 F. Supp. 1167 1171 (E.D. Mich. 1994) (Michigan inmates do not have a liberty interest in parole); McCrery v. Mark, 823 F. Supp. 288, 294 (E.D. Pa. 1993) (Pennsylvania statutes do not create expectancy of parole entitling inmates to full due process); Washington v. White, 805 F. Supp. 191, 193 (S.D.N.Y. 1992) (New York does not have a liberty interest in parole); State *ex. rel.* Seikbert v. Wilkinson, 633 N.E. 2d, 1128, 1130 (Ohio 1994) (Ohio statutes do not create an expectancy of parole or a constitutional liberty interest establishing a right to procedural due process).

75 Hilliard v. Board of Pardons and Paroles, 759 F.2d 1190, 1192 (5th Cir. 1985).

76 *See* Monroe v. Thigpen, 932 F.2d 1437, 1437 (11th Cir. 1991); Block v. Potter, 631 F.2d 233, 235 (3d Cir. 1980) (once a state decides to provide a discretionary parole system, there are constitutional limitations for making decisions even in the absence of a liberty interest).

77 *See generally* Kent v. United States, 383 U.S. 541 (1966).

78 *See, e.g., Block*, 631 F.2d at 237.

79 *See* Allison v. Kyle, 66 F.3d 71, 73 (5th Cir. 1995); Orellana v. Kyle, 65 F.3d 29, 31 (5th Cir. 1995).

tions resulting from inaccurate protest letters considered by a parole board because the relevant state parole law does not create a liberty interest in parole, the inmate can assert an equal protection claim in a civil rights suit.[80] The Fourteenth Amendment to the Constitution assures equal protection against all kinds of invidious state actions, including those discriminations that do not encroach on liberty or property.[81] Thus, equal protection is the right of an individual or group to be free from invidious discrimination in statutory classifications or other governmental activity.[82] An equal protection claim exists when an inmate "alleges that, without adequate justification, [s]he was treated unfairly compared to other prisoners who were similarly situated."[83] Equal protection is afforded even if differential treatment does not relate to a substantive constitutional right.[84]

1. Rational basis scrutiny is applicable because no fundamental right or suspect class is involved

Inmates are not a protected or "suspect" class for purposes of equal protection analysis.[85] Furthermore, no fundamental right appears to be implicated in the protest letter issue.[86] In those cases where no fundamental right or suspect class is involved, rational basis scrutiny is appropriate.[87] Where a statutory classification does not infringe upon a right or liberty protected by the Constitution, the classification is invalid if it "rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."[88] That is, in determining whether or not an inmate's guarantee of equal protection under the law was violated, a court must consider whether the unequal treatment is justified by a rational relation to a legitimate penal interest.[89]

Relevant factors in the evaluation of an inmate's equal protection claim often include: (1) whether there is a valid, rational connection between the prison regulation and the legitimate neutral

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80 *See* U.S. CONST. AMEND. XIV; JOHNSON V. PFEIFFER, 821 F.2D 1120, 1122-23 (5TH CIR. 1987).

81 *See* Harris v. McRae, 448 U.S. 297, 322 (1980).

82 Hilliard v. Board of Pardons and Paroles, 759 F.2d 1190, 1193 (5th Cir. 1985).

83 *See id.*

84 *See* Hilliard v. Ferguson, 30 F.3d 649, 652 (5th Cir. 1994).

85 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1221 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

86 *See Harris*, 448 U.S. at 322; *Johnson*, 910 F. Supp. at 1221.

87 McGowan v. Maryland, 366 U.S. 420, 425 (1961).

88 *See* Williams v. Lane, 851 F.2d 867, 881 (7th Cir. 1988).

89 *See* Turner v. Safley, 482 U.S. 78, 89-90 (1987).

governmental interest put forward to justify it; (2) whether there are alternative means of exercising the rights that remain open to prison inmates; (3) whether the accommodation of the asserted Constitutional right will have an impact on prison staff, on inmate's liberty, and on the allocation of prison resources generally; and (4) whether the regulation represents an "exaggerated response" to prison concerns, the existence of a ready alternative at a de minimis cost being evidence of the unreasonableness of the regulation.[90]

2. Inmates who receive protest letters are treated differently from inmates who do not

In order for an inmate to have an equal protection claim, the inmate must be part of a class of inmates that is treated unfairly compared to other inmates who are similarly situated.[91] It is permissible, however, to treat an inmate differently based upon the nature of her crime.[92] The use of protest letters may create an equal protection violation when inmates who receive protest letters of any kind are treated differently from those who do not, and where the unpredictability of the recipient or the contents of such letters leads to disparate results among inmates eligible for parole review, regardless of the crime committed.[93]

If similarly situated prisoners who do not have protest letters in their files are routinely granted parole, a classification exists for equal protection purposes because some inmates are forced to serve more time in prison as a result of the protest letters.[94] It is difficult to predict which inmates will receive protest letters.[95] Nevertheless, protest letters received by state parole boards regarding an inmate are a significant contributing factor in the outcome of many parole board decisions.[96] Often the information presented in a protest letter is unreliable or based on hearsay.[97] Regardless of the source of protest, many letters placed in the files of inmates have little or nothing to do with the statutory factors that parole

90 *See* Hilliard v. Board of Pardons and Paroles, 759 F.2d 1190, 1193 (5th Cir. 1985).

91 *See, e.g.*, Dickerson v. Latessa, 872 F.2d 1116, 1119 (5th Cir. 1989); United States v. Roy, 830 F.2d 628, 639 (7th. Cir. 1987).

92 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1226-27 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

93 *See id.* at 1218-20.

94 *See id.* at 1227-29.

95 *See id.* at 1217, 1219.

96 *See id.* at 1218.

97 *See Johnson*, 910 F. Supp. at 1227.

boards are supposed to consider when making parole decisions.[98] Protest letters "containing wrong information, that are vindictive, or that are the result of political pressure may be considered and relied upon."[99] As a result, a class of inmates exists who receive protest letters that are treated adversely to similarly situated inmates not receiving protest letters.

III. USE OF PROTEST LETTERS IN PAROLE DETERMINATIONS

The states with the largest prison populations, in descending order, are: California, Texas, New York, Florida, Ohio, Michigan, Illinois, Georgia, Pennsylvania, and Virginia.[100] This Article will discuss in detail the parole process[101] and the use of protest letters in the states of California, Texas and New York. In addition to being the three states with the largest prison populations, these three states also provide a useful example of the realm of parole review and protest letter statutes being employed in the United States. These three states also demonstrate the various extremes presented with such regulation, with California providing a substantial procedural framework for the use of protest letters, Texas providing no procedure, and New York providing some limited inmate protection with respect to use of protest letters.

A. *Parole or Clemency?*

It might be argued that battered women inmates should not have to await a favorable parole decision; rather, they should apply for early release pursuant to executive clemency. There are several forms of clemency: amnesty, commutations, pardons, remission of fines and forfeitures and reprieves.[102] The governor, as chief executive of a state, is the administrator of the clemency power.[103] The purpose of clemency is to "afford relief from undue harshness or a mistake in the operation or enforcement of the criminal law."[104]

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98 *Id.* at 1218.

99 *See* WORLD ALMANAC AND BOOK OF FACTS 1996, 959-60 (1995).

100 For a discussion of the parole process in general, see Victoria J. Palacios, *Go and Sin No More, Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567 (1994).

101 *See* Linda L. Ammons, *Discretionary Justice, a Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 24 (1994). Amnesty is an act of forgiveness. *See id.* A commutation reduces the original sentence to a lessor degree of punishment. *See id.* A pardon can be either absolute or conditional. *See id.* The remission of fines and forfeitures releases an individual from debt. *See id.* Finally, a reprieve operates to postpone an execution. *See id.*

102 *See id.*

103 *Ex Parte* Grossman, 267 U.S. 87, 120 (1925).

104 *Id.* at 120-21.

The Supreme Court has stated:

> The administration of justice by courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments . . . to vest in some other authority than the court's powers to ameliorate or avoid particular criminal judgments.[105]

Apparently agreeing with a premise set forth in *Ex Parte Grossman*, the governors of several states have released more than forty women serving prison sentences for killing their abusers.[106] In fact, in Texas, the Texas Counsel of Family Violence ("TCFV") and other women's rights groups successfully advocated for the passage of Senate Concurrent Resolution 26 ("SCR 26") that called upon the Texas Board of Pardons and Paroles to review the sentences of women, men, and children convicted of murder or manslaughter whose offenses were directly related to family violence victimization.[107] Unfortunately, although numerous women, men, and children were identified in Texas as candidates for review of the circumstances in which their offenses occurred to determine if executive clemency for acting in self-defense should be granted, Texas has failed to release even one domestic violence victim.[108] The State of California has an equally dismal record, despite legislative efforts and more than thirty-four clemency petitions forwarded to Governor Pete Wilson.[109] Despite calls in New York for the governor to investigate the cases of women convicted of murder or other felonies that were directly related to domestic vio-

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105 *See Florida Considers Clemency*, USA TODAY, Sept. 13, 1991, at 3A. Former Ohio Governor Richard Celeste released 26 battered women from prison in 1990. *See id.* The governors of Maryland, Illinois, New Hampshire, Louisiana, New Jersey, Tennessee, and Washington have freed an additional 17 women. *See id.*

106 *See* TEX. S. CON. RES. 26, 72d Leg. (1991).

107 *See* Krause, *supra* note 6, at 738. In connection with the Texas parole board's investigation of SCR 26 candidates, the parole board seeks input from trial officials and relatives of the deceased batterer. *See* Implementation Procedures to TEX. S. CON. RES. 26, Texas Board of Pardons and Paroles (adopted Aug. 29, 1991). After receipt of these notices, many of the recipients send letters to the parole board protesting any clemency. Identical to the parole protest letters, these letters are kept completely confidential by the parole board. TCFV, SCR 26 applicants and their attorneys are not informed as to the source or content of the protest letters. In most instances, they are not even told that a protest has been received and is the basis for denial of their SCR 26 application. In fact, TCFV, SCR 26 applicants and their attorneys are precluded from seeing any information contained within the SCR 26 files. Thus, a battered woman has no way of knowing if her file contains incorrect information.

108 *See* Krause, *supra* note 6, at 738-40 (providing a summary of the clemency efforts already taken place in the State of California).

109 *See id.* at 741.

lence, only one woman had been released by the end of 1992.[110]

Incarcerated battered women who have defended themselves by striking back at their abusers should receive special consideration for clemency.[111] Despite the advocacy efforts of individuals and organizations urging clemency for battered women in prison for killing their abusers, the vast majority of these women inmates have not received favorable clemency consideration. The clemency power exercised by state governors, however, has been used too sparingly. Therefore, the parole process provides battered women the only real hope for early release from an unjustified sentence.

B. Discussion of California Parole Procedures[112]

In California, parole is a matter of administrative discretion.[113] Therefore, California does not recognize a liberty interest in parole protected by full procedural due process.[114] California statutes, however, direct the parole board to consider certain criteria and guidelines when determining the suitability for parole of a particular inmate.[115] A prisoner is unsuitable for parole if, in the judgment of the parole board, the prisoner will pose an unreasonable risk of danger to society if released from prison.[116] The parole board is directed to consider all relevant, reliable information available in determining suitability for parole.[117] California also specifies certain circumstances tending to show unsuitability for release, including the manner in which the offense was committed,[118] the previous record in violence,[119] unstable social history,[120]

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110 *See* Ammons, *supra* note 102, at 53-55.

111 Only inmates in prison for life terms appear before a parole board prior to being released on parole. All other inmates are under a determinate sentencing system and are released in accordance with California statute.

112 *See* Vermouth v. Corrothers, 827 F.2d 599, 602 (9th Cir. 1987).

113 *See id.*

114 *See* CAL. CODE OF REGS. tit. 15, § 2280 (1995).

115 *See id.* § 2281(a).

116 *See id.* § 2281(b). Such information includes the circumstances of the inmate's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct that is reliably documented; the base and other commitment of senses, including behavior before, during, and after the crime; past and present attitude toward the crime; conditions of treatment or control, including the use of special conditions under which the inmate may be safely released to the community; and other information bearing on suitability for release. *See id.*

117 *See id.* § 2281(c)(1). The factors to be considered include: multiple victims being attacked, injured, or killed in the same or separate incidents; whether the offense is carried out in a dispassionate and calculated manner; and whether the victim was abused, defiled or mutilated during or after the offense. *See id.*

118 *See id.* § 2281(c)(2). This factor examines whether, on previous occasions the

sadistic sexual offenses,[121] psychological factors,[122] and unfavorable institutional behavior.[123] Furthermore, California also sets forth certain circumstances tending to show suitability, including: the absence of a juvenile record, the presence of a stable social history, signs of remorse, motivation for the crime, lack of previous criminal history, age of the prisoner, understanding and plans for the future, and favorable institutional behavior.[124]

The State of California provides hearings as part of parole determinations.[125] In connection with all hearings to review parole suitability, the following rules apply: (1) the inmate must be permitted to review her file and enter a written response to any material at least ten days prior to any hearing; (2) the inmate must be permitted to be present, ask and answer questions, and speak on her own behalf; (3) a person designated by the Department of Corrections must be present to ensure that all facts relevant to the parole decision are presented to the parole board; and (4) the inmate must be permitted to request and receive a stenographic record of all proceedings.[126] In the event that the parole board denies parole, the parole board must prepare a written statement setting forth the basis for the refusal and suggest beneficial activities in which the inmate may participate.[127]

California has comprehensive procedures for using protest letters in parole hearings.[128] Upon request, the notice of any hearing to consider parole suitability must be sent to a crime victim or the victim's next of kin.[129] The victim, next of kin, or two family members have the right to appear personally or through counsel and express their views on the parole to the parole board.[130] Further-

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inmate has inflicted or intended to inflict serious injury on a victim, particularly if demonstrated at an early age.

119 *See* CAL. CODE REGS. tit. 15, § 2281(c)(3) (1990).

120 *See id.* § 2281(4).

121 *See id.* § 2281(5). This factor requires a lengthy history of severe mental problems related to the offense. *See id.*

122 *See id.* § 2281(c)(6). This factor examines whether the inmate has engaged in serious misconduct while in prison or jail. *See id.*

123 *See* CAL. CODE REGS. tit. 15, § 2281(d) (1990).

124 *See* CAL. PENAL CODE § 3041.5 (West Supp. 1996).

125 *See id.*

126 *See id.*

127 *See* CAL. CODE REGS. tit. 15, § 3901 (1994) (providing for parole hearings and appeals of any adverse decision of the parole hearings division); Telephone Interview with Ted Rich, Executive Officer, California State Board of Prison Terms (July 2, 1996) (on file with author) [hereinafter Rich Interview].

128 *See* CAL. PENAL CODE § 3043.5 (West Supp. 1996).

129 *See id.*

130 *See id.* § 3043.2.

more, a victim may provide written, audio-taped, or videotaped statements in lieu of a personal appearance.[131] In fact, under California law, any person can submit a written statement in support of or against an inmate's release on parole.[132] The parole board must review the information to ensure that it receives adequate consideration.[133] If a parole board member has a concern about particular accusations in a protest letter, the hearing panel may continue the hearing for up to ninety days during which the staff is instructed to obtain any specific information needed.[134]

In California, an inmate has access to all information in her file except for confidential information, such as the name and address of the crime victim.[135] In the event that an inmate is dissatisfied with the disclosure provided in her file, the inmate may appeal pursuant to department procedures.[136] The prisoner is entitled to review any additional information obtained due to a continuance of a parole hearing at least ten days before any rescheduled hearing.[137]

California requires a record to be made of all parole hearings.[138] The record of the hearing must include or incorporate by reference the evidence considered, the evidence relied on, and the findings of the parole hearing panel with supporting reasons.[139] The prisoner is entitled to a copy of the record of the hearing upon request.[140] Furthermore, every prisoner and her attorney, if represented by counsel, must receive a copy of the parole decision specifying the decision, the information considered and the reasons for the decision.[141]

Any information used in parole decisions must be disclosed to the inmate.[142] If such information is confidential, then the parole board must explain to the inmate that it used confidential information in its decisions.[143] Before the parole board can use confidential information, however, it must make a finding of reliability.[144]

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131 *See* Rich Interview, *supra* note 128.
132 *See* CAL. PENAL CODE § 3043.5 (West Supp. 1996).
133 *See* CAL. CODE REGS. tit. 15, § 2238 (1995).
134 *See id.* § 2247.
135 *See id.*
136 *See id.*
137 *See id.* § 2254.
138 *See* CAL. CODE REGS. tit. 15 § 2254 (1995).
139 *See id.*
140 *See id.* § 2255.
141 *See* CAL. CODE REGS. tit. 15, § 2235 (1990); Rich Interview, *supra* note 128.
142 *See* CAL. CODE REGS. tit. 15 § 2235 (1990).
143 *See id.*
144 *See* Rich Interview, *supra* note 128.

In addition, California has a standard policy that if there is no evidence, no formal charge, or no conviction supporting an accusation of a crime in a protest letter, then the information may not form the basis for denying parole.[145]

C. *Discussion of Texas Parole Procedures*

In Texas, release on parole is a privilege, not a right, with the parole board vested with complete discretion to grant or deny parole release.[146] Therefore, Texas law does not create a liberty interest in parole, but merely creates nothing more than a hope of parole.[147] Texas law mandates that the parole board consider two factors in parole decisions: the seriousness of the offense and the likelihood of a favorable parole outcome.[148] Texas law provides that there are no mandatory rules or guidelines for analysis or parole release criteria because "each inmate is unique."[149] Nevertheless, an inmate is considered for parole when she becomes statutorily eligible, has not had a major disciplinary misconduct in a six-month period prior to parole review, and meets certain other criteria related to inmate classification.[150] To assist the parole board in considering release, the board adopted "standard" parole guidelines, setting forth non-exclusive criteria upon which parole decisions may be made, including: a current offense or offenses; the amount of time served; the risk to public safety; institutional adjustment; criminal history; official information supplied by trial officials, including victim impact statements; and other information in support of parole.[151]

Texas does not provide hearings as a matter of right in connection with parole determinations.[152] Most inmates are reviewed for parole consideration by a panel of three parole board members.[153] The first panel member often, but not always, interviews the inmate at his or her institution of incarceration and prepares a summary of the interview for inclusion in the inmate's parole

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145 *See* 37 TEX. ADMIN. CODE ANN. § 145.3 (West 1996).

146 *See* Creel v. Keene, 928 F.2d 707, 712 (5th Cir. 1991); Williams v. Briscoe, 641 F.2d 274, 277 (5th Cir. 1981).

147 *See* TEX. CRIM. CODE ANN. art. 42.18, § 8(f)(5) (West Supp. 1996); 37 TEX. ADMIN. CODE § 145.3(1)(C) (West 1996).

148 *See id.* § 145.3(1)(b).

149 *See id.* § 145.3(2) (1996).

150 *See id.* § 145.2(b) (1996).

151 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1227-28 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

152 *See id.* at 1216.

153 *See id.*

file.[154] The first parole board member then indicates on the docket sheet whether he or she favors release on parole for the inmate.[155] The second parole board member then receives the file and votes in favor or opposes the release on parole.[156] If the first two parole board members disagree, then the file will be given to the third parole board member for a dispositive vote.[157] If the first two panel members agree, the case does not go to the third member.[158] If the parole board denies parole, the inmate is notified in writing with the reasons given for the decision.[159]

In connection with the panel's consideration of an inmate's parole, the parole board sends a notice to certain individuals entitled to receive notice pursuant to Texas statute.[160] Specifically, the Texas *Adult Parole and Mandatory Supervision Law* requires notification to the victims or their representatives, trial officials, and the sheriff of an impending release or parole of an inmate.[161] The victim, guardian of a victim, close relative of a deceased victim or a representative of a victim has the right to submit a written statement to the parole board.[162] The three member parole panel must review the information and consider the statements provided in protest letters.[163] Furthermore, the parole board:

> may not disclose to any person the name or address of a victim or other person entitled to notice . . . unless a victim or that person approves the disclosure or the board or department is ordered to disclose the information by a court of competent jurisdiction after the court determines that there is good cause for disclosure.[164]

The *Crime Victim's Rights Law* also provides a crime victim, guardian of a victim, or a close relative of a deceased victim the right to be informed of parole procedures and to provide the parole board with information for inclusion in the inmate's file when considered by the parole board prior to the parole of the

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154 *See id.*

155 *See id.*

156 *See Johnson*, 910 F. Supp. at 1216.

157 *See id.*

158 *See* 37 TEX. ADMIN. CODE § 145.6 (West Supp. 1996).

159 *See* TEX. CRIM. CODE ANN. art. 42.18, § 8(f)(2), (3) (West Supp. 1996).

160 *See id.* § 8(e).

161 *See id.* The parole board must consider the statements set forth in protest letters in determining whether or not to recommend parole. *See id.*

162 *See id.* § 8(f)(2).

163 *Id.* § 8(f)(4).

164 *See* TEX. CRIM. CODE ANN. art. 56.02 (West Supp. 1996).

inmate.[165]

The State of Texas does not verify the contents of protest letters and has no written procedures governing their use.[166] The information contained in protest letters is simply assumed to be correct.[167] Furthermore, "[a]ll information, including victim protest letters or other correspondence . . . is confidential and privileged."[168] In fact, Texas law specifically provides that the parole board may withdraw a previously favorable parole indication upon receipt of a protest letter.[169]

D. Discussion of New York Parole Procedures

New York parole release proceedings are not subject to due process requirements because, in New York, inmates do not have a liberty interest in parole.[170] New York sets forth procedures for the conduct of the State Parole Board.[171] New York favors discretionary release if there is a reasonable probability that the inmate will remain at liberty without violating the law, that release is not incompatible with society, and that release will not depreciate the seriousness of the crime or undermine respect for the law.[172] The parole board must consider: the inmate's institutional record; the inmate's performance during any temporary release; the inmate's plans after release; any deportation orders; and any statement by the victim or the victim's representative.[173]

At least one month prior to a date when an inmate may be paroled, a parole board member must personally interview the inmate and determine whether she should be paroled.[174] New York provides inmates with access to most materials in their files prior to a scheduled appearance before the parole board, prior to a scheduled appearance before an authorized hearing officer of the parole board, and prior to the timely perfecting of an administrative appeal of a filed decision of the parole board.[175] An inmate is not

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165 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1219 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

166 *See id.*

167 TEX. CRIM. CODE ANN. art. 42.18, § 18 (West Supp. 1996).

168 *See* 37 TEX. ADMIN. CODE § 145.16 (West 1996).

169 *See* Washington v. White, 805 F. Supp. 191, 193 (S.D.N.Y. 1992); Labbe v. Russi, 601 N.Y.S.2d 643, 645 (Sup. Ct. 1993).

170 *See* N.Y. EXEC. LAW § 259-I (McKinney Supp. 1993).

171 *See id.*

172 *See id.*

173 *See id.*

174 *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.5(C) (1995).

175 *See id.*

given access to any information that, if disclosed, might result in harm, physical or otherwise, to any person.[176] If parole is denied, the inmate must receive a detailed account of the reasons in writing within two weeks.[177] The reasons for parole denial must be given in detail and the parole board cannot state conclusory terms.[178]

The State of New York allows some consideration of protest letters in parole determinations.[179] New York, recognizing that "crime victims are an integral part of the criminal justice process, and that they should be treated with fairness, sensitivity, and dignity at all times," allows victims of serious crimes the opportunity to make either a written or oral statement to a member of the parole board in a confidential and non-threatening setting.[180] An oral statement by the victim may not simply repeat the circumstances of the crime, however, but must actually describe the impact of the crime on the victim or the victim's representative.[181] The parole board member conducting a personal meeting with a victim must prepare a written report of the oral statement.[182] A copy of the report is sent to the facility to be included in the inmate's parole folder so that it is available for the parole board at the time of the inmate's board appearance.[183] A written victim impact statement or written report of an oral statement is maintained in confidence.[184] The parole board will consider the written or oral statements submitted or made by a crime victim, or the victim's representative, prior to rendering a decision granting or denying parole release.[185] Because New York interviews the inmate, the parole board has an opportunity to question the inmate about information contained in protest letters.[186]

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176 *See id.*

177 *See id.*

178 *See* N.Y. CRIM. PROC. LAW § 440.50 (McKinney 1994) (victim may submit statement to parole board or meet with board).

179 *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.4 (1995).

180 *See id.*

181 *See id.*

182 *See id.*

183 *See id.*

184 *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.4 (1995).

185 *See* N.Y. EXEC. LAW § 259-c (McKinney 1993); N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 1993).

186 910 F. Supp. 1208 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

IV. PROTEST LETTER USAGE IS UNCONSTITUTIONAL WHERE NO INVESTIGATION OR REBUTTAL IS PROVIDED BY STATE STATUTE

A. *Johnson v. Texas Department of Criminal Justice*

In *Johnson v. Texas Department of Criminal Justice*,[187] Daniel Johnson, on behalf of a class of inmates in the Texas prison system, asserted causes of action based on the violation of constitutional rights under United States and Texas Constitutions and rights protected by 42 U.S.C. § 1983.[188] One such cause of action was based on Johnson's claim that the Texas parole board's practice of using protest letters in parole determinations is violative of inmates' equal protection rights.[189] The inmates' challenge directly involved the Texas Code of Criminal Procedure, Articles 42.18, § 8 and 42.18, § 18, *Adult Parole and Mandatory Supervision Law*, and Article 56.02, and *Crime Victim's Rights* discussed above.[190]

The district court determined that Texas's implementation of these statutes, in combination, allowed the parole board to receive and consider protest letters without established procedures, prevented the inmate from learning of the existence of such letters, and from reading and rebutting the letters' contents, thus violating the equal protection rights of the inmates guaranteed by the Fourteenth Amendment.[191] The court noted that the Texas parole board routinely denied parole to those inmates receiving protest letters.[192] The court enjoined the parole board from accepting or considering victim letters and other protests when making parole decisions until it adopted appropriate regulations governing the use of such letters in a manner that did not violate an inmate's constitutional rights.[193] The court expressed concern with an "end-run" around disliked statutory mandates (parole) through the use of "secret and unverified protest statements."[194]

The court, however, offered an alternative remedy requiring the parole board to verify the contents of protest letters.[195] Texas asserted that the parole board *would not* develop a system to review and verify protest letters because it would be "impractical, costly

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187 *See id.*
188 *See Johnson*, 910 F. Supp. at 1210, 11.
189 *See supra* Part III.C and accompanying notes.
190 *See Johnson*, 910 F. Supp. at 1228-29.
191 *See id.* at 1229.
192 *See id.*
193 *See id.*
194 *See id.* at 1228.
195 *Johnson*, 910 F. Supp. at 1228 n.72.

and unfair to victims."[196] Regardless of the source of protest letters, almost all have little or nothing to do with the statutory factors the parole board is to consider when making parole decisions and, moreover, the unbalanced procedures virtually guarantee that false information will be used. Texas, nevertheless, argued that investigation would simply show that protest letter information is reliable and relevant.[197] Texas also argued that a formal system is unnecessary and impractical due to the relatively infrequent denial of parole due to protest letters.[198] In light of Texas's argument, the court did not consider this alternative remedy available to it.[199]

B. Other Case Precedents

The Seventh Circuit noted that "the danger posed to a parole candidate by the risk that his or her records contain inaccurate information is clearly not insignificant."[200] The Supreme Court stated that the decision to grant or deny parole "is one that must be made largely on the basis of the inmate's files."[201] In *Greenholtz*, the Supreme Court stated that "[t]he function of the legal process, as that concept is embodied in the Constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions."[202] Justice Marshall noted that "researchers and courts have discovered many substantial inaccuracies" in prison records.[203]

In *Solomon v. Elsea*,[204] the Seventh Circuit addressed a federal prisoner's due process claim that he was improperly denied parole based on erroneous information contained in his pre-sentence investigation report. The court acknowledged that "[i]n relying on information that has not been proved in an adversary setting, the [parole board] runs the risk of relying on inaccurate informa-

196 *See id.* at 1227-28.

197 *See id.* at 1228 n.72.

198 *See id.*

199 Walker v. Prisoner Review Bd., 694 F.2d 499, 503 (7th Cir. 1982).

200 Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 15 (1979).

201 *Id.* at 13.

202 *Id.* at 33 (Marshall, J., dissenting); *see, e.g.*, Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); Leonard v. Mississippi State Probation and Parole Bd., 373 F. Supp. 699 (N.D. Miss.), *rev'd*, 509 F.2d 820 (5th Cir. 1974) (prisoner denied parole on basis of illegal disciplinary action); *In re* Rodriguez, 537 P.2d 384 (Cal. 1975) (factually incorrect material in file led parole officers to believe that prisoner had violent tendencies and that his family rejected him); State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960) (files erroneously showed that prisoner was under a life sentence in another jurisdiction).

203 676 F.2d 282, 288 (7th Cir. 1982).

204 *Id.*

tion."[205] The court noted, however, that the federal parole statute at issue allowed the prisoner access to materials used in making the parole determination and afforded the prisoner an opportunity to respond to the information that the parole board considered.[206] In the event that a prisoner disputes the accuracy of the information presented, such dispute is resolved by application of the preponderance of the evidence standard.[207] Although *Solomon* involved due process rights not present in many state parole statutes, it supports the proposition that reliance on inaccurate information, without verification or response, does not fulfill a legitimate state objective.

In *Monroe v. Thigpen*,[208] the Eleventh Circuit held that although Alabama's parole statute did not confer a liberty interest in parole, the Alabama Board of Pardons and Parole did not have discretion to rely on admittedly false information in determining whether to grant parole. In *Monroe*, an inmate claimed he was deprived of due process because erroneous information in his prison file was used to deny him fair consideration for parole and "minimum" custody status.[209] The court stated that Alabama does not confer a liberty interest in parole that is protected by the Due Process Clause and that federal courts should not interfere with the discretionary decisions of the parole board "absent flagrant or unauthorized action" by the board.[210] The state argued that because the Alabama parole statute did not confer a liberty interest in parole, the board could rely on admittedly false information in denying parole without offending the Due Process Clause.[211] The

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205 *See id.*

206 *See id.* at 288-89.

207 932 F.2d 1437 (11th Cir. 1991).

208 *See id.* at 1439-40.

209 *See id.* at 1441.

210 *See id.* at 1441-42.

211 *See id.* at 1442; s*ee also* Lowrance v. Coughlin, 862 F. Supp. 1090, 1099 (S.D.N.Y. 1994) (in response to inmate's contention that his prison records contained inaccurate information regarding misbehavior reports that had been expunged or dismissed, as well as mis-typed transfer codes, the court stated that an inmate has a clearly established constitutional right to have accurate information in his prison file once such information is relied on in a parole hearing); James v. Robinson, 863 F. Supp. 275, 278 (E.D. Va. 1994) (the use of admittedly false information to deny parole is arbitrary and capricious); Azeez v. Klincar, No. 84 C 10832, 1990 WL 6632 (N.D. Ill. Jan. 5, 1991) (an inmate's right to due process was not violated when a parole board considered protest letters filed by the state's attorney when the inmate appeared personally before at least one board member and had an opportunity to refute any alleged erroneous information before the board met *en banc* to review the parole request). *See generally* United States v. Klincar, 678 F. Supp. 198 (N.D. Ill. 1988) (an arguable denial of due process resulting from an inmate's lack of access to state

Eleventh Circuit disagreed and held that discretion is not unlimited and a board cannot treat an inmate arbitrarily and capriciously in violation of due process.[212]

C. *Legitimate State Goals Are Undermined by Reliance on Inaccurate Protest Letters.*

1. Use of protest letters can be related to legitimate state goals

In order to pass equal protection rational basis scrutiny, the use of protest letters in a manner that adversely affects a class of inmates, compared to other inmates who are similarly situated, must be related to the achievement of a legitimate governmental objective.[213] Because protest letters have come to play an important role in the parole decision-making process, legitimate state goals appear to exist for the use of accurate, verified protest letters. States consider protest letters as part of a recognition that crime victims have a role in the criminal process.[214] Protest letters also aid in the fact-finding process and encourage citizen input.[215] Furthermore, some level of confidentiality is reasonable because states have a legitimate interest in protecting crime victims from the possibility of retaliation by inmates due to the submission of a protest letter.[216] In light of the variances among state statutes, however, there appears to be a point at which the failure to employ proper procedures encourages the use of inaccurate protest letters of the type discussed in *Johnson* that are not related to any legitimate state goals.

Each of the three states discussed in this Article considers protest letters in a different manner. Because of a wide variance in the use of protest letters in California, Texas, and New York, these states are certainly representative of the range of possibilities that are likely to be present in protest letter usage in other states. Because the legitimacy of the state goals with respect to reliance on protest letters is related to the fact-finding objectives, it is necessary to examine the procedures employed by states to guard against inaccurate "facts" presented in protest letters. Those states that provide a significant amount of protest letter investigation by the

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attorney's protest letters prior to an initial parole hearing was cured by subsequent access to letters before the next scheduled parole hearing).

212 *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

213 *See supra* notes 20-25 and accompanying text.

214 *See supra* notes 20-25 and accompanying text.

215 *See supra* notes 33-34 and accompanying text.

216 *See supra* notes 125, 126, 135 and accompanying text.

parole board and rebuttal by inmates on the use of protest letters are most likely to survive rational basis scrutiny under the Equal Protection Clause because there appear to be legitimate state goals related to the fact-finding process employed by parole boards.

Because California, and states having similar statutes, provides numerous procedures to aid in fact-finding and to reduce the risk of inaccurate information presented to the parole board, California can likely make a valid classification of inmates, surviving rational basis scrutiny. For instance, California provides for inmate parole hearings and inmate review of most file information, excluding victim names and addresses.[217] Both hearings and access to file information provide an inmate with an opportunity to rebut inaccurate information contained in protest letters, unless kept confidential.[218] Furthermore, because California holds hearings, the parole board has an opportunity to question the inmate about both confidential and non-confidential information contained in protest letters.[219] California also provides a significant amount of investigation on protest letters and limits their use. For instance, the parole board has an opportunity to continue the hearings to investigate uncertainties; it must make a finding of reliability prior to use of confidential information and the parole board may not base parole denial on unadjudicated offenses. If there is no evidence, no formal charge or conviction supporting an accusation of a crime described in a protest letter, the information cannot be the basis for parole denial.[220]

Although state statutes similar to those in New York provide less investigation and rebuttal than the California statute, these types of regulations also likely meet rational basis scrutiny for equal protection purposes. For instance, New York does *require* a personal interview where a parole board member is able to question an inmate about information contained in protest letters.[221] Furthermore, New York protects victim confidentiality, but also limits the information that can be presented in a protest letter.[222] The protest letters cannot simply repeat the circumstances of the crime,

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217 *See generally In re* Sinka, 599 P.2d 1275, 1282 (Wash. 1979) (allowing an inmate to inspect her file allows her the opportunity to rebut or explain adverse file information).

218 *See supra* notes 125-26 and accompanying text.

219 *See supra* notes 134, 142-45 and accompanying text.

220 *See supra* note 173 and accompanying text.

221 *See supra* notes 178-85 and accompanying text.

222 *See supra* notes 178-85 and accompanying text.

but must actually describe the impact of the crime on the victim.[223] This limitation on the content of protest letters discourages the type of vindictiveness mentioned in *Johnson*.[224] The reason state statutes similar to those present in New York likely meet rational basis scrutiny is that the state has limited the possibility of inaccurate protest letters by limiting the contents of protest letters and mandating a personal interview. Nevertheless, because of the lack of complete investigation as to the veracity of protest letters, even this type of statute raises questions as to constitutionality under a rational basis test.

State statutes, such as those present in Texas, that allow protest statements to be received and considered by a state parole board with no investigation as to the veracity of the letters and mandate that an inmate's parole file be kept completely confidential fail rational basis scrutiny and are unconstitutional.[225] Where neither the inmate nor anyone representing the inmate under consideration for parole may have direct access to any information in the parole board's files, including protest letters, it is not possible to verify, add to, or rebut the information presented. Furthermore, Texas does not require either parole hearings or interviews during which investigation and rebuttal are possible.[226] This lack of process, coupled with complete lack of verification by the parole board, leads to serious questions about the fairness and rationality of the procedures involved in making parole decisions.[227] The risk of an erroneous decision weighed against the strength of the government's justifications for not providing verification point toward requiring verification as a minimum requirement.[228]

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223 *See generally* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1218 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

224 *See id.* at 1228-29.

225 *See supra* notes 152-58 and accompanying text.

226 For a discussion of the benefits of guidelines in parole determinations, see Palacios, *supra* note 101, at 582-84.

227 *See generally* Steven A. Fennell & William N. Hull, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1639 (1980).

228 *See* Williams v. Lynaugh, 814 F.2d 205, 208 (5th Cir. 1987); James v. Robinson, 863 F. Supp. 175, 278 (E.D. Va. 1994) (admittedly false information intentionally used to deny parole may cause federal jurisdiction to be available to prevent arbitrary and capricious actions); Lowrance v. Coughlin, 862 F. Supp. 1090, 1119 (S.D.N.Y. 1994) (inmates have a right to accurate information in their prison files when the parole board uses that information in making its decisions).

2. It is irrational and arbitrary and capricious to rely on unverified protest letters that likely contain inaccurate information in parole hearings

Although the Fifth Circuit has observed that states have "a strong interest in insuring that all relevant evidence" is available, no court has held that states have an interest in relying on information that is likely to be inaccurate.[229] The issue of whether to disclose to an inmate the content of protest letters in her file is difficult, but constitutional considerations weigh in favor of, at a minimum, states verifying information included in protest letters that could form the basis for a parole denial. There must be a valid, rational connection between the regulation and a legitimate governmental interest.[230] A regulation cannot be sustained if the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.[231]

At least two critical functions related to fundamental fairness are implicated by an inmate's request for verification of information contained in protest letters: minimizing error and preserving the integrity of the parole process itself.[232] It is essential to both the form and substance of a fair proceeding that the parole board verify information. The accuracy and sufficiency of information presented to the parole board can have a decisive effect in parole.[233] Errors are not unknown, particularly when the criminal justice system is pressed to deal with ever-increasing numbers of criminal defendants. Information is made confidential to ensure that the information regarding the inmates is not withheld by court officials or victims because of fear of inmate retaliation.[234]

To permit parole and clemency decisions for any prisoner, and especially for battered women, to be based on unverified, "secret" protest letters offends all senses of justice and fair play. Such a process prevents the prisoner from presenting all relevant information and deprives the decision-maker of the full, complete, and accurate information it needs to make a fair decision. Such a process may thwart the search for truth and lead to grossly unfair de-

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229 *See* Turner v. Salfey, 482 U.S. 78, 89 (1987).

230 *See id.* at 89-90.

231 *See* Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 909-10 (Utah 1993); *see also* Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 11-12 (1979); Palacios, *supra* note 100, at 611.

232 *See generally* Palacios, *supra* note 100, at 582-84.

233 *See supra* notes 33-34 and accompanying text.

234 *See* Johnson v. Texas Dep't of Criminal Justice, 910 F. Supp. 1208, 1219 (W.D. Tex. 1995), *appeal filed*, No. Civ. A. A-85-CA-094 (5th Cir. 1996).

terminations. When protest letters are submitted in opposition to prisoners' parole and clemency petitions, the parole board must investigate the contents of such letters.

States cannot provide any acceptable rationalization, however, for the failure to verify information. In *Johnson*, no parole board member or employee at trial was able to cite any policy served by decisions based upon inaccurate information.[235] The *Johnson* court found that the parole board had based parole decisions upon protest letters that contained inaccurate information, were vindictive, were the result of political pressure, and referred to unadjudicated offenses.[236] As the court noted, the use of confidential protest letters, coupled with a lack of verification, will result in the likelihood that inaccurate information will be used.[237]

As described by Justice Marshall in *Greenholtz*:

> [T]his Court has stressed the importance of adopting procedures that preserve the appearance of fairness and the confidence of inmates in the decision making process. The Chief Justice recognized in *Morrissey* that "fair treatment in parole revocations will enhance the chance of rehabilitation by voiding reactions to arbitrariness," . . . a view shared by legislatures, courts and the American Bar Association and other commentators.[238]

The interests of both society and inmates are best served when fairness and accuracy are assured at all stages of the sentencing and correctional process.[239] Accurate parole decisions further society's interest in insuring that inmates are returned to society neither sooner nor later than is appropriate. Parole decisions based on inaccurate protest letters, however, are irrational and do not further societal or penal interests.

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235 *See id.* at 1219-20.

236 *See id.* at 1227.

237 Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 34 (1979) (Marshall, J., dissenting).

238 *See generally* Morales v. California Dep't of Corrections, 16 F.3d 1001, 1005 (9th Cir. 1994) (evidence supporting parole decision must be reliable and inmate must be able to present evidence to the parole board), *rev'd*, 115 S. Ct. 1597, on remand, 56 F.3d 46 (1995); Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 911 (Utah 1993) (accuracy and fairness in decision-making process); *In re* Sinka, 599 P.2d 1275, 1279 (Wash. 1978) (concept of fairness and equity).

239 *See Johnson*, 910 F. Supp. at 1218.

3. The effect on the prison system of requiring verification of protest letters or allowing limited inmate access requires only the use of state resources that should already be in place

States may generally characterize a procedure of verification of protest letters as "unnecessary, costly and impractical" and unfair to the victims.[240] Of course, states clearly have the option of incurring the cost of some verification procedures, at least to the extent provided in New York, or allowing the inmate some access to the letters to prepare a rebuttal, or both.[241] Furthermore, there are reasonable alternatives to the decision-making process, as is abundantly clear by the range of procedures regarding the use of protest letters adopted in the states described in Part III. Although this might add administrative burdens to the limited staff of parole boards, to the extent that the parole board functions as a sentencing entity, it must have the resources and support staff to perform its function properly.[242]

4. The use of unverified protest letters fails rational basis scrutiny because alternatives are available

The existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns.[243] The Supreme Court stated that "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at a de minimis cost to the valid state penal interest, a court may consider as evidence that the regulation does not satisfy the reasonable relationship standard."[244] As stated in *Johnson*, there are clearly two ready alternatives to the use of unverified, confidential protest letters.[245] First, states may verify the protest letters.[246] Second, states may choose not to use protest letters until appropriate, constitutionally sufficient procedures are in place.[247] As shown by the numerous procedures employed in Cali-

240 *See id.* at 1228 n.72.
241 *See generally Labrum*, 870 P.2d at 911.
242 *See* Turner v. Salfey, 482 U.S. 78, 90 (1987).
243 *Id.* at 91.
244 *See Johnson*, 910 F. Supp. at 1228-29.
245 *See id.* at 1228.
246 *See id.* at 1229.
247 There is no constitutional requirement that each inmate receive a personal hearing, access to files, or be allowed to call witnesses. Franklin v. Shields, 569 F.2d 784, 800 (4th Cir. 1977). The use of protest letters, however, requires states to formulate some procedures to verify the accuracy of such letters and to support a legitimate state objective.

fornia such as inmate parole hearings, access to files, findings of reliability, and policies concerning unadjudicated offenses,[248] reasonable alternatives are clearly available. Furthermore, victim safety and confidentiality can be protected by withholding the victim's name and address, as is done in California, or by summarizing the information. States have the option of (1) not using protest letters, which will not affect the general prison resources or inmate liberties; or (2) establishing some set of procedures. Other than the financial cost of promulgating such procedures for either investigation or rebuttal, it is difficult to see how a state would incur more than a de minimis cost.

V. CONCLUSION

This Article has reviewed case law, policy, and both social and political concerns raised in the use of protest letters by state parole boards. Although the issues require a balancing of the rights of victims and inmates, the substantive due process and equal protection rights present in the United States Constitution do not permit state parole boards to use unverified, inaccurate, and unrebutted protest letters as a basis for parole denial. States that desire to further the fact-finding process and ensure crime victims a "voice" in the parole process should promulgate procedures that provide for investigation of the veracity of statements contained in protest letters and allow some rebuttal of information by inmates. Of course, confidentiality of the identity of crime victims is paramount. Federal courts presented with inmate equal protection claims must examine the nature of the state's statute at issue and, more specifically, whether it provides for such investigation and rebuttal. The courts should narrowly tailor class relief to inmates who are treated differently from other similarly situated inmates when the basis of such treatment is likely based on an inaccurate protest letter. Such is the case in those states like Texas, which provide little or no investigation and rebuttal.

This approach will enable state parole boards to establish protest letter review procedures that forward legitimate state goals and public policies, yet safeguard an inmate's substantive due process and equal protection rights. This is necessary to minimize error and preserve the integrity of the parole process itself. Policy arguments advocating the form and substance of a fair proceeding require that state parole boards establish procedures on the use of protest letters. This is especially true in light of the rising number

248 *See* Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 910 (Utah 1993).

of inmates in state prisons and the difficulties maintaining accurate inmate files. Because adversarial information contained in protest letters has not been proved in an adversary setting, procedures are necessary to lessen the risk of reliance on inaccurate information. Even in the absence of a liberty interest in parole, state parole boards cannot arbitrarily and capriciously rely on known inaccurate information.

Battered women are often forced to defend themselves against the threat of serious bodily harm or deadly injury. Afterwards, a battered woman may have to defend herself from criminal charges of homicide or assault brought by a prosecutor's office. If the battered woman's claims of self-defense are unsuccessful, she will be incarcerated and required to serve time in prison. For these women, applications for parole or clemency are the last hope in the criminal justice system. The system further punishes these battered women inmates when a parole board bases a denial of parole release on an inaccurate, confidential protest letter, making it impossible for battered women to receive justice. Therefore, states that fail to provide protections should be enjoined from using protest letters in parole determinations and directed to promulgate rules governing the investigation of protest letters.

The myths and false perceptions about domestic violence persist and often make it impossible for a battered woman to receive either a fair trial or a fair consideration of her request for parole or clemency. These myths and misconceptions arise and are expressed in a myriad of ways, both blatantly and subtly, and can cause both judges and jurors to erroneously reject the self-defense claims of battered women. The misconceptions about domestic violence often operate against battered women who are serving time in state prisons and disadvantage them during the parole process. It is imperative that an incarcerated battered woman, like all inmates, be afforded the opportunity to respond effectively to vindictive or inaccurate protest letters submitted in parole proceedings, particularly in light of the general denial of battering prevalent in the criminal justice system, the community, and the families of deceased batterers.

The analysis set forth in the preceding text presents alternatives that serve the battered woman inmate, the crime victim, and society. The recommendations are conservative because they recommend full protection of crime victims and they are fair in giving battered women inmates the autonomy and voice that our criminal justice system has so often rejected, silenced, and disadvantaged.