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THE IRON CURTAIN: ALABAMA'S PRACTICE OF EXCLUDING INMATES FROM PAROLE RELEASE HEARINGS AND ITS FLAWED UNDERPINNINGS

Erin Lange Ramamurthy*

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I. INTRODUCTION

In 1974, Justice Byron White stated in *Wolff v. McDonnell*, "There is no iron curtain drawn between the Constitution and the prisons of this country."[1] In 1979, however, the U.S. Supreme Court held that such a curtain could be drawn between Fourteenth Amendment due process and a

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[1] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

prisoner's discretionary parole release hearing.[2] For roughly the past three decades, the Court's decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex* has given state parole boards unbridled discretion to release or reject inmates that seek grants of discretionary parole release.[3] It has even permitted some states, such as Alabama, to exclude inmates from their hearings altogether.

The actual costs of excluding inmates in this fashion remains unknown. But in a recent study involving Israeli judges, researchers concluded that judicial rulings—and in the case of the study, parole decisions—can be greatly influenced by external factors such as how recently a judge took a break to eat.[4] Remarkably, the study showed that the percentage of favorable rulings drops gradually from roughly 65% to nearly zero within each decision session and returns abruptly to roughly 65% after a break.[5] These findings raise intriguing questions about the factors that affect parole decisions across the globe.

In the United States, "[p]arole is a period of conditional supervised release in the community following a prison term."[6] Unlike in Israel, where parole decisions are made by judges, panels of Americans appointed to administrative agencies, such as state parole boards, make parole release decisions.[7] U.S. parole board members do not necessarily have any legal training.[8]

Perhaps the most critical determination made by a parole board is the likelihood that an inmate will reoffend if released, or in other words, how significantly his criminal ways have been rehabilitated.[9] In order to conduct this recidivism analysis during the discretionary parole release process, a long list of states, including Missouri, Texas, Arizona, Indiana, Kansas, Montana, and Illinois, provide an inmate with the opportunity to appear before at least one member of a parole board in a hearing or an interview.[10]

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[2] *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 11 (1979).

[3] *See id.* (holding that the possibility of parole release does not warrant Fourteenth Amendment due process protection).

[4] *See* Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889, 6889 (2011).

[5] *See id.*

[6] LAURA M. MARUSCHAK & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2011, at 2 (2012).

[7] *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 87 (2003).

[8] *See id.*

[9] *See* Dan Bernhardt et al., *Rehabilitated or Not: An Informational Theory of Parole Decisions*, 28 J.L. ECON. & ORG. 186, 187 (2012).

[10] *See, e.g.*, MO. ANN. STAT. § 217.690(2) (West 2004) ("[T]he board shall have the offender appear before a hearing panel and shall conduct a personal interview with him, unless

Not every state parole board, however, permits inmates to speak on their own behalf at parole release hearings. In fact, policies employed by some state parole boards, such as the Alabama Board of Pardons and Paroles (the Board), make this geographically impossible. Specifically, the Board currently holds all parole hearings in Montgomery, Alabama,[11] yet an inmate could be incarcerated hours away from Montgomery by car. Therefore, to attend his hearing in person, the inmate would need to be transferred to Montgomery by the Alabama Department of Corrections (DOC). Responding to a request for information about Board policies filed under Alabama's open records law, Board representatives maintained that "[t]o transport inmates to the Board for their parole hearing would create an added financial responsibility for the Department of Corrections."[12] While Board representatives insist that there is no formal policy concerning inmates' hearing attendance,[13] the system is structured so that there may be no other practical effect than to exclude the inmates from the very process that could secure their freedom.[14]

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waived by the offender."); TEX. GOV'T CODE ANN. § 508.141(c) (West 2012) ("Before releasing an inmate on parole, a parole panel may have the inmate appear before the panel and interview the inmate."); ARIZ. REV. STAT. ANN. § 31-411(B) (2002) (West) ("A prisoner who is eligible for parole or absolute discharge from imprisonment shall be given an opportunity to be heard either before a hearing officer designated by the board or the board itself, at the discretion of the board."); IND. CODE ANN. § 11-13-3-3(i)(3) (West 2004) ("[T]he person being considered may appear, speak in the person's own behalf, and present documentary evidence."); KAN. STAT. ANN. § 22-3717(j)(1) (West 2007) ("Before ordering the parole of any inmate, the prisoner review board shall have the inmate appear either in person or via a video conferencing format and shall interview the inmate unless impractical because of the inmate's physical or mental condition or absence from the institution."); Newbury v. Prisoner Review Bd., 791 F.2d 81, 87 (7th Cir. 1986) (finding the Due Process Clause satisfied where an inmate appeared before a single member of the Illinois state parole board); Sage v. Gamble, 929 P.2d 822, 827 (Mont. 1996) (finding a due process violation where the Montana state parole board prevented an inmate from appearing at his parole hearing).

[11] *See* E-mail from Ala. Bd. of Pardons & Paroles to author (Oct. 31, 2012, 04:20 CST) (on file with author) [hereinafter October 2012 Board E-mail].

[12] Letter from Eddie Cook, Jr., Assistant Exec. Dir., Ala. Bd. of Pardons & Paroles, to author (July 17, 2013) (on file with author) [hereinafter July 2013 Board Letter]; *see also* October 2012 Board E-mail, *supra* note 11. This correspondence indicated that parole hearings were previously held at each Alabama correctional facility, which allowed the inmates to easily access the hearings. *See* E-mail from Ala. Bd. of Pardons & Paroles to author (Nov. 2, 2012, 11:50 CST) (on file with author) [hereinafter November 2012 Board E-mail]. Reportedly, no one then employed by the Alabama Board of Pardons and Paroles remembered when the practice of holding hearings in Montgomery began. *Id.*

[13] *See* October 2012 Board E-mail, *supra* note 11.

[14] One also questions the contention that there is no formal policy regarding inmates' attendance when Board representatives have also noted that "[i]nmates that are on work release and are able to attend their hearings are prohibited by Department of Correction[s] rules." July 2013 Board Letter, *supra* note 12.

Regardless of the formality of the policy, however, it is quite clear that, "[i]n Alabama, inmates do not attend parole hearings."[15] This Comment contends that this practice violates Fourteenth Amendment procedural due process. In so arguing, this Comment seeks to reject the reasoning underlying the U.S. Supreme Court case of *Greenholtz*, which held that Fourteenth Amendment due process does not apply to parole release hearings.[16]

II. BACKGROUND

A. HISTORY AND IMPORTANCE OF PAROLE RELEASE DECISIONS

Since the nineteenth century, parole release has been an integral part of our criminal justice system. Today, it is still part of an ongoing dialogue concerning the release and rehabilitation of the offender population. The earliest example of parole in this country was a program implemented in 1876 at a youth facility in New York.[17] New York formally adopted a parole system in 1907 and was the first state to do so.[18] All states and the federal government had a parole system in place by 1942.[19]

State and federal parole systems have created two distinct categories of parole release: discretionary and mandatory parole. Discretionary parole consists of indeterminate sentences, a specific system for granting release, and post-release supervision.[20] Mandatory parole, on the other hand, can be described as "a matter of bookkeeping: one calculates the amount of time served plus good time and subtracts it from the prison sentence imposed."[21] In other words, once an inmate has served a certain amount of his sentence, parole release is mandatory by state law.

Time spent on parole release is vastly different from time spent in a correctional facility—the obvious difference being that a parolee is not confined within prison walls. Nonetheless, the life of a parolee is far different from that of an ordinary citizen. Once released on parole, inmates are placed under supervision for a period of one to three years in most states, although parole supervision can be as long as ten to twenty years in some states, such as Texas.[22] This supervision typically consists of check-

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[15] *Id.*

[16] *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 11 (1979).

[17] *See* PETERSILIA, *supra* note 7, at 58.

[18] *See id.*

[19] *Id*.

[20] *Id.*

[21] *Id.* at 59.

[22] *See id.*; COMM. ON CMTY. SUPERVISION & DESISTANCE FROM CRIME, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY

ins as well as field contacts by parole agents,[23] whose responsibilities include "drug testing, monitoring curfews, and collecting restitution."[24]

Despite the fact that serving time on parole still requires individuals to abide by strict guidelines, discretionary parole remains controversial. Many feel that discretionary parole release permits unnecessary leniency for convicted criminals and contributes to high recidivism rates.[25] Others argue that abolishing discretionary parole will lead to "greater honesty in sentencing decisions."[26] In fact, many states and the federal government abolished discretionary parole.[27]

Even though discretionary parole release has fallen out of favor with many states and the federal government, it is far from irrelevant. For example, the Supreme Court recently held in *Miller v. Alabama* that state sentencing laws could no longer dictate mandatory life imprisonment *without the possibility of parole* for individuals who were under the age of eighteen when they committed their crimes.[28] This decision is important not only because it demonstrates that parole release is still relevant, but also because it highlights the inescapable connection between an inmate's sentence and his possibility of obtaining discretionary parole.[29] As this Comment discusses in Part III, this connection strengthens the justification for providing greater constitutional protection to the parole release process.

In addition, state parole systems unquestionably affect a large number of individuals across the United States. In 2009, 5,018,900 individuals were supervised on either parole or probation.[30] In 2011, roughly 1.1 million people moved through the parole system while "the state parole population increased by 1.1%."[31] Given these statistics, questions of when to incarcerate, when to release, and how to rehabilitate the offender population are critical.

In fact, many states and the federal government have recently allocated additional resources to rehabilitate criminal offenders. For example, several

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INTEGRATION 9 (2007) [hereinafter DESISTANCE FROM CRIME].

[23] *See* DESISTANCE FROM CRIME, *supra* note 22, at 33.

[24] PETERSILIA, *supra* note 7, at 88.

[25] *See id.* at 158.

[26] Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 480 (1999).

[27] *See id*.

[28] *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

[29] This Comment will discuss how this connection strengthens the justification for providing greater constitutional protection to the parole release process in Part III.

[30] LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 3 tbl.1 (2011).

[31] MARUSCHAK & PARKS, *supra* note 6, at 1, 7.

states, including New York, Maryland, and Michigan, have created special committees, task forces, or initiatives designed to deal specifically with prisoner reentry.[32] Additionally, many states now have formal reentry programs run by both state and federal courts in which voluntary participants are able to seek help and guidance in the process of reintegrating into society after incarceration.[33]

The process of rehabilitating an offender, however, sometimes begins with a determination that he is ready to be released into society through the vehicle of parole release. The underpinnings of the release process, therefore, deserve attention—particularly in states such as Alabama where the Board has absolute discretion to either grant or deny an inmate's parole at the conclusion of a parole release hearing.

B. CURRENT PRACTICES OF THE ALABAMA BOARD OF PARDONS AND PAROLES

In light of recent concerns regarding the size of the offender population,[34] one might expect state parole boards to be more amenable to granting discretionary parole in an effort to reduce the number of incarcerated individuals. This has not been the case, however, in Alabama. According to annual reports released by the Board each fiscal year, the denial rate has increased from 56.6% in 2007–2008[35] to 58.6% in 2008–2009,[36] and from 60.4% in 2009–2010[37] to 69.5% in 2010–2011.[38] This statistic rose even higher in the 2011–2012 report, which disclosed that 70.6% of inmates were denied parole in the that fiscal year.[39]

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[32] *See* Randy E. Davidson, *Resources on Collateral Consequences of Criminal Convictions*, MICH. B.J. 52, 52 (2008); Hon. Susan K. Gauvey & Katerina M. Georgiev, *Reform in Ex-offender Reentry: Building Bridges and Shattering Silos*, MD. B.J. 14, 16 (2011); Seymour W. James, Jr., *A Fair Chance*, N.Y. ST. B. ASS'N. J. 5, 5 (2012).

[33] *See* Hon. Joan Gottschall & Molly Armour, *Second Chance: Establishing a Reentry Program in the Northern District of Illinois*, 5 DEPAUL J. SOC. JUST. 31, 35, 43 (2011).

[34] *See* Brown v. Plata, 131 S. Ct. 1910, 1923 (2011) (upholding the decision of a three-judge panel of the United States District Court for the Northern District of California to enter a prisoner release order aimed at reducing the California prison population in light of Eighth Amendment violations).

[35] ALA. BD. OF PARDONS & PAROLES, FISCAL 2007–2008 ANNUAL REPORT 27 (4,163 paroles denied of 7,356 considered).

[36] ALA. BD. OF PARDONS & PAROLES, ANNUAL REPORT FISCAL 2008–2009, at 34 (4,644 paroles denied of 7,924 considered).

[37] ALA. BD. OF PARDONS & PAROLES, ANNUAL REPORT FISCAL 2009–2010, at 27 (4,098 paroles denied of 6,788 considered).

[38] ALA. BD. OF PARDONS & PAROLES, ANNUAL REPORT FISCAL 2010–2011, at 28 (4,774 paroles denied of 6,871 considered).

[39] ALA. BD. OF PARDONS & PAROLES, ANNUAL REPORT FISCAL 2011–2012, at 30 (5,228 paroles denied of 7,406 considered) [hereinafter 2011–2012 REPORT].

The Alabama statistics confirm a nationwide trend. Since the late 1970s, the percentage of inmates released on discretionary parole in the United States has declined steadily from 72% in 1977 to just 24% in 1999.[40] Yet as states like Alabama continue to provide for discretionary parole but deny it to the vast majority of inmates, a closer look at discretionary parole is warranted.

Under current state law, the Alabama governor has the power to appoint members to the Board, while the state senate must approve his selections.[41] These Board positions are full-time and are compensated by the state; members are appointed for six-year terms.[42] An Alabama inmate is not eligible for parole consideration until he has served either one-third or ten years of his sentence, whichever is lesser.[43] The Board releases inmates on parole, "only if . . . there is reasonable probability that . . . he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society."[44]

The Board has the power to create additional rules, so long as those rules do not infringe on certain rights:

> The Board of Pardons and Paroles may adopt and promulgate rules and regulations, not inconsistent with the provisions of this article . . . provided . . . that *no rule or regulation* adopted and promulgated by such board *shall have the effect of denying* to any person whose application for parole . . . is being considered by said board from having the *benefit of counsel or witnesses upon said hearing*.[45]

Interestingly, the Alabama statute protects an inmate's right to have counsel and witnesses at his parole hearing but does not protect the right of the inmate to be present at the hearing.[46] Aside from requiring notice and specifying the standard under which an inmate may be released, Alabama law does not provide any other express rights, privileges, or protections for the inmates who face the parole release process.[47]

The lack of protection for inmates' rights in the parole release process under Alabama law is worth comparing to the protections afforded to victims during this same process. For example, depending on the nature of the offender's conviction, some victims or their family members have an absolute right to thirty days' notice prior to an inmate's hearing, as well as a

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40 PETERSILIA, *supra* note 7, at 88.
41 *See* ALA. CODE § 15-22-20(b) (LexisNexis 1975).
42 *Id.* § 15-22-20(c), (g)-(h).
43 *Id.* § 15-22-28(e).
44 *Id.* § 15-22-26.
45 *Id.* § 15-22-37 (emphasis added).
46 *See generally id*. §§ 15–22.
47 *See id.*

right to "present his or her views to the board in person or in writing."[48] While inmates enjoy a similar right to notice,[49] any right to present their views to the Board is severely limited, if not barred altogether, by the fact that they cannot attend their own hearings.[50]

The choice to protect the rights of victims over the rights of inmates in the discretionary parole release process admittedly seems justified.[51] After all, victims of crimes are likely to be affected by the incarceration or release of individuals who committed offenses against them or their loved ones.[52] Nonetheless, an inmate himself has a tremendous amount at stake at a release hearing as well—namely, his freedom from incarceration. Additionally, the Supreme Court has noted that "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."[53] In other words, "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[54] Among many other rights, inmates have the rights to receive medical care and to be housed in conditions consistent with the Eighth Amendment,[55] the right to substantial religious freedoms,[56] the right not to be discriminated against under the Equal Protection Clause,[57] and the right not to be deprived of life, liberty, or property without due process of law.[58] Simply because an individual is housed in a correctional facility does not prevent the Constitution from governing how that individual is treated by our judicial and administrative systems, which have the potential to significantly impact

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[48] *Id.* § 15-22-36(e)(1), (3)(i).

[49] *See id.* § 15-22-36(d).

[50] Additionally, Board representatives claim that allowing inmates to attend their hearings "could create a security issue for the Board," because victims could potentially be in the same room as the inmate and the inmate's family. *See* July 2013 Board Letter, *supra* note 12. This argument emphasizes the clear choice Alabama has made to protect the rights of victims at the expense of the rights of inmates.

[51] *But see* Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 347 (2009) (finding that victim input during the parole process is inconsistent with sound correctional principles or principles of fundamental justice).

[52] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 11 (1982).

[53] *See* Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

[54] *Id.* at 555–56

[55] *See* Brown v. Plata, 131 S. Ct. 1910, 1923 (2011).

[56] *See* Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam); Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam).

[57] *See* Johnson v. California, 543 U.S. 499, 506–07 (2005).

[58] *See* Sandin v. Conner, 515 U.S. 472, 486–87 (1995) (suggesting that a prison regulation can create a protectable liberty interest under the Fourteenth Amendment if it imposes an atypical and significant hardship on the inmate); Screws v. United States, 325 U.S. 91, 117 (1945).

his life, liberty, and property. And the possibility of parole release—i.e., freedom from incarceration—certainly implicates inmates' liberty in an important way.

Nevertheless, Alabama law permits—and the practices of the Board create and enforce—a system of inmate exclusion from the discretionary parole release process.[59] This system excludes inmates from the Board's decisionmaking process, which potentially gives the Board greater flexibility to make the kind of arbitrary determinations about the inmate's freedom that were exposed in the Israeli research study.[60] Additionally, recent research shows that the particular manner in which inmates communicate with a parole board may affect the outcome of their hearings.[61] Given that Alabama's policy deviates from policies employed by other states,[62] and given that the Board is increasingly reluctant to grant parole to inmates[63] at a time when concerns about the prison population are paramount, this policy of inmate exclusion from parole release hearings merits close examination.

C. THE CONTEXT OF *GREENHOLTZ:* SUPREME COURT DECISIONS DEFINING CONSTITUTIONAL PROTECTIONS IN PAROLE RELEASE AND REVOCATION

The extent to which a liberty interest exists during a parole release determination is governed by the 1979 U.S. Supreme Court decision in *Greenholtz*.[64] Furthermore, the holding in *Greenholtz* is best understood in the context of the Court's decisions in *Morrissey v. Brewer* in 1972 and *Gagnon v. Scarpelli* in 1973—both of which addressed the constitutional protection of the parole revocation process.[65]

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[59] *See* ALA. CODE § 15-22-23 (LexisNexis 1975) (providing no right for an inmate to appear in person at his or her parole release hearing). *See also* 2011–2012 REPORT, *supra* note 39, at 23–26 (detailing the Board's policies regarding hearings and providing no express right of the inmate to appear in person); October 2012 Board E-mail, *supra* note 11 (indicating that it is practically impossible for inmates to attend their hearings).

[60] *See* Danziger, *supra* note 4.

[61] *See* Richard Tewksbury & David Patrick Connor, *Predicting the Outcome of Parole Hearings*, CORRECTIONS TODAY, June/July 2012, at 54, 56.

[62] See the authorities and accompanying text in *supra* note 10.

[63] *See supra* notes 35–39.

[64] Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979). The term "liberty interest" is used to refer to the rights conferred on an individual by the Fifth and Fourteenth Amendment Due Process Clauses. *See* Legal Information Institute, Cornell University Law School, http://www.law.cornell.edu/wex/liberty_interest (last visited Aug. 20, 2013).

[65] *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). Parole revocation is the process by which an inmate is accused of violating his parole, and a decisionmaking entity determines whether the parolee's release should be

The Court's holding in *Greenholtz* was twofold. First, the Court held that inmates do not enjoy a constitutionally conferred liberty interest at a parole release hearing merely because a state has provided for "the *possibility* of parole."[66] In other words, the Constitution does not confer Fourteenth Amendment due process protection on parole release proceedings.[67] Second, the Court held that although the Constitution does not confer a liberty interest at an inmate's parole release hearing, such an interest might be conferred by state statute, depending on the statute's wording.[68]

Interestingly, the U.S. Supreme Court decided *Greenholtz* at a time when approval of discretionary parole was in a general decline. Indeed, as research suggests, "some states began to question the very foundation of parole."[69] This sentiment surfaced after decades in which the percentage of inmates released on discretionary parole steadily increased from 44% in 1940 to 72% in 1977.[70] These statistics arose amidst the backdrop of a nation prepared to be tough on crime,[71] as Richard Nixon's 1968 presidential campaign had promised. Therefore, the *Greenholtz* decision and its limiting effect on the rights of inmates during discretionary parole release perhaps demonstrates the Supreme Court's sensitivity to relevant social pressures.

1. Morrissey v. Brewer *and* Gagnon v. Scarpelli

The Supreme Court's holding in *Greenholtz* is best understood by examining the Court's holdings in *Morrissey* and *Gagnon*. In *Morrissey*, the Court considered whether a liberty interest, and therefore due process protection, extended to a parole revocation hearing.[72] The Court in *Gagnon* then considered whether the right to counsel extended to a parole revocation proceeding.[73]

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revoked, in which case the inmate would spend the rest of his sentence in prison. PETERSILIA, *supra* note 7, at 87.

[66] *Greenholtz*, 442 U.S. at 11.

[67] *Id*.

[68] *Id.* at 12.

[69] PETERSILIA, *supra* note 7, at 59.

[70] *Id.* at 58. The percentage of inmates released on discretionary parole has been in steady decline since 1977. *See id.*

[71] *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 13 (1999) (noting that Richard Nixon's 1968 presidential campaign solidified the law and order movement on a national scale).

[72] *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[73] *See* Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973).

In *Morrissey*, the petitioner was an Iowa inmate released on discretionary parole in June 1968.[74] Seven months after his release, the petitioner's parole was revoked without a formal hearing.[75] He challenged his parole revocation in a federal habeas petition, alleging that the lack of a formal revocation hearing violated his Fourteenth Amendment due process rights.[76] The Supreme Court held that there is a conditional liberty interest present at a parole revocation hearing.[77] While the Court characterized the interest at revocation as "conditional,"[78] it still concluded that some amount of due process protection was warranted:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[79]

In addition to the constitutional protection given to parole in *Morrissey*, the Supreme Court in *Gagnon* gave further constitutional protection to parolees during the revocation process. The *Gagnon* Court considered whether the lack of legal counsel during the probation revocation process violated due process.[80] As in *Morrissey*, the Court considered the issue in the context of a federal habeas petition contesting the legality of an inmate's detention on the grounds that the inmate was not given a probation revocation hearing or the benefit of legal counsel.[81] The Court concluded that, consistent with *Morrissey*, the denial of a probation revocation hearing was a denial of due process.[82] On the question of whether legal counsel was necessary during the revocation process, the Court declined to create a blanket rule establishing a right to legal counsel at a revocation hearing.[83] However, the Court noted that while legal counsel was not necessary at every parole or probation revocation proceeding, "there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide

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[74] *Morrissey*, 408 U.S. at 472.
[75] *Id*.
[76] *Id*. at 474.
[77] *See id*. at 482.
[78] *Id.* at 480.
[79] *Id*. at 482.
[80] *See* Gagnon v. Scarpelli, 411 U.S. 778, 790–91 (1973).
[81] *See id*. at 779–80.
[82] *See id.* at 782.
[83] *Id.* at 790.

at its expense counsel for indigent probationers or parolees."[84] In other words, the Court determined that the question of whether states must provide counsel to individuals facing parole or probation revocation is answered on a "case-by-case" basis.[85] Nonetheless, the *Gagnon* holding recognizes that situations exist in which prisoners have the right to counsel during parole revocation, which supplements the constitutional protection of parole revocation in addition to the recognition of a due process right.

While the combination of *Morrissey* and *Gagnon* do not amount to full due process protection of parole revocation proceedings, the constitutional protections provided at those proceedings far surpass those afforded during parole release. The Court announced this constitutionally significant distinction between parole revocation and parole release in *Greenholtz* when it held that parole release is not protected by Fourteenth Amendment due process.[86]

2. Greenholtz

In *Greenholtz*, Nebraska inmates filed a § 1983 class action lawsuit in federal court against the individual members of the Board of Parole, alleging the unconstitutional denial of their parole.[87] Among other claims, the inmates alleged that the Nebraska parole statutes and the Board's policies failed to uphold procedural due process.[88] The United States District Court for the District of Nebraska held that the same "conditional liberty interest" present at the parole revocation process that the Court recognized in *Morrissey* was also present in *Greenholtz* with respect to discretionary parole release.[89] The district court also suggested procedures which, in the court's opinion, satisfied this due process protection.[90] The Court of Appeals for the Eighth Circuit affirmed the district court's holding, although it made changes to the district court's suggested procedures.[91]

In a majority opinion written by Chief Justice Warren Burger, the Supreme Court reversed the Eighth Circuit decision relating to the existence of a constitutionally conferred liberty interest at parole release.[92] Justices

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[84] *Id.*

[85] *Id.* at 788.

[86] *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 11 (1979).

[87] *See id.* at 3–4.

[88] *See id.* at 4.

[89] *See id.* at 5.

[90] *See* Inmates of the Neb. Penal & Corr. Complex v. Greenholtz, 576 F.2d 1274, 1282–83 (8th Cir. 1978) (quoting the district court).

[91] *See id.* at 1285.

[92] *See Greenholtz*, 442 U.S. at 16.

Lewis Powell, Thurgood Marshall, William Brennan, and John Paul Stevens dissented on this point.[93]

Despite the Supreme Court's due process holding, in the second prong of its analysis, the Court nevertheless found that the Nebraska statute at issue *did* confer a liberty interest—and therefore due process protections—on the parole release process by the nature of the statute's wording.[94] The Nebraska statute at issue in *Greenholtz* read:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for the law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.[95]

The inmates in *Greenholtz* argued that the structure of the statute, as well as the use of the word "shall," created a "presumption" or "legitimate expectation" of parole release, and therefore the inmates' releases were subject to due process constraints.[96] The Court agreed.[97] Nevertheless, the Court found that the particular policies challenged by the Nebraska inmates satisfied due process requirements.[98] Specifically, the Court noted:

> At the Board's initial interview hearing, the inmate is permitted to appear before the Board and present letters and statements on his own behalf. He is thereby provided with an effective opportunity first, to insure that the records before the Board are in fact the records relating to his case; and second, to present any special considerations demonstrating why he is an appropriate candidate for parole. Since the decision is one that must be made largely on the basis of the inmate's files, this procedure adequately safeguards against serious risks of error and thus satisfies due process.[99]

It is noteworthy that the *Greenholtz* Court specifically cited the inmate's ability to appear before the parole board as a reason for holding

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[93] *See id.* at 18–22 (Powell, J., concurring in part and dissenting in part); *id.* at 22–41 (Marshall, J., dissenting in part).

[94] *See id.* at 15–16.

[95] NEB. REV. STAT. ANN. §§ 83-1, 114(1) (West 1976).

[96] *Greenholtz*, 442 U.S. at 11–12.

[97] *See id.* at 15–16.

[98] *Id.*

[99] *Id.* at 15.

that the parole procedures satisfied the statutory due process right. Such an acknowledgment presents interesting questions about whether the Alabama policy of inmate exclusion would pass constitutional muster if the Court were to overturn *Greenholtz* and hold that a Fourteenth Amendment due process right *does* exist during parole release.

The task of demonstrating that *Greenholtz* should indeed be overturned involves highlighting the pitfalls of the majority's opinion. The dissenting opinions in *Greenholtz* certainly achieve this feat. On the question of whether the Constitution afforded the parole release process inherent due process protections, Justices Powell, Marshall, Brennan, and Stevens dissented.[100] In a separate opinion, Justice Powell noted, "A substantial liberty from legal restraint is at stake when the State makes decisions regarding parole or probation."[101] He further argued that this liberty interest should be protected under the Constitution if and when a state provides for discretionary parole.[102] He reasoned that "[n]othing in the Constitution requires a State to provide for probation or parole. But when a State adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law whenever those standards are met."[103]

Justice Marshall's dissenting opinion centered on the majority's departure from *Morrissey*, which extended some due process protections to the parole revocation process.[104] As Justice Marshall's dissent highlighted, the *Greenholtz* Court broke with previous precedent regarding parole revocation in finding that due process protection did not extend to parole release decisions.[105]

III. DISCUSSION

This Comment challenges the holding of *Greenholtz*, and in turn, the exclusionary policy of the Alabama Board of Pardons and Paroles in three ways. First, Part III.A asserts that the first prong of *Greenholtz* was incorrectly decided due to the Court's failure to recognize the similarities between parole *release* and parole *revocation* decisions, as well as the Court's flawed contention that a parole release decision is dissimilar from a judicial decision. Second, Part III.B argues that the reasoning adopted in

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[100] *See id.* at 18–22 (Powell, J., concurring in part and dissenting in part); *id.* at 22–41 (Marshall, J., dissenting in part).

[101] *Id.* at 18.

[102] *See id.* at 19.

[103] *Id.*

[104] *See id.* at 22 (Marshall, J., dissenting in part).

[105] *Id.* at 11.

the second prong of *Greenholtz*—which allows due process protection of parole release only when conferred by statute—has been eroded by the Court's recent holding in *Sandin v. Conner*. Finally, Part III.C concludes by arguing that assuming a constitutional due process right *does* exist during parole release, the Alabama practice of excluding inmates from their hearings violates due process.

A. THE FIRST PRONG OF *GREENHOLTZ* WAS INCORRECTLY DECIDED

This Part challenges the first prong of the Court's holding in *Greenholtz* in two ways. First, it argues that the holding was flawed because the Court ignored the similarity between parole revocation and parole release and therefore declined to extend the *Morrissey* decision to parole release in error. Second, it contends that the Court incorrectly overlooked the similarity between parole release and judicial sentencing decisions.

1. *Based on the similarities between parole revocation and parole release, the* Greenholtz *holding should have been driven by the logic in* Morrissey

The *Greenholtz* Court did not extend the protections due at parole revocation to parole release on the basis that the two processes were dissimilar.[106] Had the Court recognized the two processes as substantially similar, it would have been bound by its previous decisions in *Morrissey*—which held that some due process protections apply to parole revocation[107]—and in *Gagnon*—which held that the right to counsel applies to the revocation process on a case-by-case basis.[108]

The Court's holding in *Morrissey* specified that because of the conditional liberty interest at stake, a parolee facing revocation must be provided with a preliminary hearing to determine probable cause, as well as a final hearing at which the decision of whether to revoke parole must be made.[109] At both hearings, the Court indicated the parolee should be entitled to notice of the alleged violations, an opportunity to be heard *in person*, and an opportunity to present and confront witnesses.[110] Finally, the *Morrissey* Court mandated that this adjudication take place in front of a "'neutral and detached' hearing body."[111]

[106] *See id.* at 9.
[107] *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972).
[108] *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).
[109] *See Morrissey*, 408 U.S. at 485–89.
[110] *See id.*
[111] *Id.*

The *Greenholtz* Court should have extended similar protections to the parole release process, because parole revocation and parole release are more similar than they are distinct. A parole revocation proceeding occurs when an individual who has been released on parole has allegedly violated the terms of his parole, either through the commission of a new crime or a technical violation.[112] In the face of these allegations, a parolee is subject to proceedings to determine whether he should remain on parole or serve the rest of his sentence in a correctional facility.[113] Simply put, a parole revocation decision involves tremendous discretion on the part of the decisionmaker. For example, the entity reviewing a parolee's case may decide that the parolee is still fit to remain in society *even if* a parole violation occurred.[114]

In comparison, during the parole release process, a parole board must determine whether an inmate is sufficiently rehabilitated to be released into society.[115] The core determination in each proceeding is essentially the same: whether, in the decisionmakers' discretion, they believe an offender is fit to live freely in society based on the steps he has taken—or not taken—to reform his criminal ways. In Alabama, in fact, the Alabama Board of Pardons and Paroles makes both parole release and revocation decisions.[116]

Despite these substantial similarities, the *Greenholtz* Court found flawed ways to distinguish parole revocation from parole release and avoided extending the *Morrissey* protections to parole release in the process. The Court distinguished the processes in two important ways: first, because of the incarceration status of the individuals involved,[117] and second, because of the distinct nature of the decision at stake in each process.[118]

The Court held that the liberty interests at stake in each process were fundamentally different because of the incarceration statuses of the individuals facing the respective hearings.[119] Specifically, the Court said:

> There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be

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[112] PETERSILIA, *supra* note 7, at 87.
[113] *Id.*
[114] *Id.* at 148.
[115] Bernhardt et al., *supra* note 9, at 187.
[116] 2011–2012 REPORT, *supra* note 39, at 7.
[117] *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9 (1979).
[118] *Id.*
[119] *Id.*

> released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right.[120]

The Court went on to say that because an inmate's liberty was "extinguished" with his conviction, the liberty interest in parole release was merely an object of the inmate's desire.[121] In other words, an inmate who is incarcerated only "desires" to be paroled, whereas an individual living freely in society—i.e., an individual facing parole revocation—has a protectable right to remain free. Justice Marshall criticized this argument in his dissent, in which he noted that such a measurement was "unrelated to the nature or gravity of the interest affected in parole release proceedings."[122] Indeed, if one removes the characterization of "desiring" to be free versus remaining free,[123] the core interest in both cases is the same: freedom through an orderly and fair process.

In addition to distinguishing the parole revocation and release processes based on an inmate's incarceration status, the *Greenholtz* majority defended its doctrinal departure from *Morrissey* and *Gagnon* by contending that the "nature of the decision" in the parole revocation process is fundamentally different than in the parole release process.[124] The Court noted that this "important difference between discretionary parole *release* from confinement and *termination* of parole lies in the nature of the decision that must be made in each case."[125] Specifically, the Court noted that at a parole revocation hearing, the parole board must determine two things: first, whether an inmate committed a violation, and second, "whether the parolee should be recommitted either for his or society's benefit."[126] While it is arguably true that determining whether an inmate has committed a parole violation is a more objective determination, the *Greenholtz* majority did not address the fact that the second question posed by a parole revocation hearing is just as discretionary as the question at stake in a parole release hearing. Both determinations require assessing

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[120] *Id.* at 7.

[121] *See id.*

[122] *Id.* at 26–27.

[123] Providing an example of the difference between the liberty interests at stake in parole release compared to parole revocation, the Court in *Greenholtz* stated that the inmate's interest at a parole hearing "is no more substantial than [his] hope that he will not be transferred to another prison, a hope which is not protected by due process." *Id.* at 11. However, in *Wilkinson v. Austin*, the Court held that the right not to be assigned to a "supermax" prison facility *was* protected by due process. 545 U.S. 209, 213 (2005). This suggests that the law defining the distinction between the object of inmates' "desires" and their due process "rights" is in flux.

[124] *Greenholtz*, 442 U.S. at 9.

[125] *Id.*

[126] *Id.*

whether society would be better served by the individual being free or incarcerated. To characterize this core determination as anything but discretionary would be to ignore the meaning of the term.

Given that the core determination in both parole revocation and parole release is largely the same—i.e., whether society would be better served by an individual's freedom or incarceration—both processes should merit similar constitutional protections. Therefore, the distinctions between parole revocation and parole release on which the *Greenholtz* Court relied to prevent the extension of *Morrissey* are ill-supported.

2. *The* Greenholtz *Court incorrectly concluded that a parole release decision is dissimilar from a judicial decision*

The *Greenholtz* Court erroneously held that a parole release decision was dissimilar from a judicial decision and that constitutional protections therefore afforded to the latter need not apply to the former. The Court concluded instead that a parole release decision was most similar to an Executive Branch decision, which "do[es] not automatically invoke due process protection."[127] The Court noted:

> In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.[128]

The Court provided no further explanation as to why a parole release decision was dissimilar from a judicial decision.

A parole release decision, however, is very similar to a judicial decision—particularly a judicial decision at sentencing. The *Greenholtz* majority characterized a parole release decision as one in which the decisionmaker determines "what is best both for the individual inmate and for the community."[129] This highly discretionary decision is analogous to a decision made at judicial sentencing, wherein a sentencing judge is permitted to use "wide discretion" and encouraged to consider "any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."[130]

Additionally, the similarity between parole and sentencing decisions has long been recognized at the federal level. For example, the federal government has two distinct methods for categorizing offenders for both sentencing and parole purposes, respectively called the Criminal History

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[127] *Id.* at 7.

[128] *Id.* at 8.

[129] *Id.*

[130] Wasman v. United States, 468 U.S. 559, 563 (1984).

Category (CHC) and the Salient Factor Score (SFS).[131] In a 2005 report by the United States Sentencing Commission, the Commission noted the overlap between the CHC and the SFS, finding that both target "the same underlying concepts,"[132] with the primary difference being that the SFS assesses the likelihood of recidivism, while the CHC attempts to capture both recidivism and culpability.[133]

Because parole release and judicial sentencing decisions are similar, it follows that they should enjoy similar constitutional protections. This is not the case, however. Judicial sentencing decisions invoke constitutional protections[134] that are not applicable to parole release under *Greenholtz*.[135] In *Gardner v. Florida*, the Supreme Court held in a plurality opinion that the sentencing decisions must satisfy the requirements of the Due Process Clause.[136] Even though the Court has yet to recognize full due process protection for sentencing in a majority opinion, the sentencing process still enjoys a higher level of constitutional protection than does parole release.[137] Specifically, the Supreme Court has recognized that sentencing is a critical stage of the criminal process at which assistance of counsel is required.[138] Additionally, according to the American Bar Association's (ABA) standards for sentencing hearings, "[S]entencing proceedings should be conducted openly and formally with due regard for the essential elements of due process in our adversary system of justice."[139] The ABA standards go on to specify a right to counsel and a right of allocution—or a right to be heard—for the defendant.[140]

In addition to the similarity between the sentencing and parole release processes, evidence also suggests that sentencing judges consider the possibility of parole release when issuing sentences. In the recent case of *Reiger v. State*, the Court of Special Appeals of Maryland considered whether it was proper for a sentencing judge to consider parole in issuing an

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[131] *See* U.S. SENTENCING COMM'N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE 1, 4 (2005).

[132] *Id.* at 6.

[133] *See id.* at 1–2.

[134] *See* Gardner v. Florida, 430 U.S. 349, 358 (1977); Mempa v. Rhay, 389 U.S. 128, 137 (1967) (holding that individuals should be afforded a lawyer at probation proceedings in which a judicial sentence is issued).

[135] *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 11 (1979).

[136] *See Gardner*, 430 U.S. at 358.

[137] *See id.*; *Mempa*, 389 U.S. at 137.

[138] *Mempa*, 389 U.S. at 137.

[139] ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-5.17 (3d ed. 1994) [hereinafter ABA SENTENCING STANDARDS].

[140] *See id.*

offender's sentence.[141] The court held that such consideration was proper, noting that "[a] defendant's parole eligibility date is relevant, without regard to whether parole will ever be granted, because it allows the court to determine the defendant's minimum period of incarceration."[142] The court continued: "Assessing what length of time a defendant should be incarcerated for the crime he committed lies at the very heart of the court's constitutional duty to sentence."[143] Other state and federal courts have also recognized interdependence between the sentencing and parole release processes.[144]

The reality that sentencing judges regularly consider parole release when determining appropriate sentences for offenders is critical for determining whether a liberty interest exists at the parole release stage. The *Greenholtz* Court overlooked this consideration by routinely characterizing parole release as the object of an inmate's "desire" rather than something that could be reasonably expected. However, since sentencing judges consider parole release when issuing sentences, it follows that judges and inmates see the possibility of parole release not as an added benefit that the inmate "desires," but rather as part of the offenders' sentences and a process they expect to comport with fairness.[145]

Given the close connection between sentencing and parole release, the constitutional protections required at sentencing should also apply to parole release. While this may mean that parole release is not given the full force of due process protection, the Alabama practice of excluding inmates from parole release hearings would still be unconstitutional, as this Comment discusses more fully in Part III.C.

B. THE SECOND PRONG OF *GREENHOLTZ* IS MISGUIDED UNDER *SANDIN V. CONNER*

The second prong of *Greenholtz* held that a liberty interest in a parole hearing could be conferred by state statute, depending on the statute's

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[141] Reiger v. State, 908 A.2d 124, 125 (Md. Ct. Spec. App. 2006).

[142] *Id.* at 130.

[143] *Id.*

[144] *See* Block v. Potter, 631 F.2d 233, 240 n.8 (3d Cir. 1980) (noting that "[s]entencing judges also consider parole practices before setting a term of confinement"); State v. Scherzer, 694 A.2d 196, 264 (N.J. Super. Ct. App. Div. 1997) (holding that it is appropriate for a sentencing judge to consider the parole consequences of a sentence); State v. Lohnes, 344 N.W.2d 686, 689 (S.D. 1984) (restating that it is permissible for a sentencing judge to consider parole eligibility in sentencing).

[145] The dissenting Justices in *Greenholtz* raised a similar argument. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 30 (1979) (Marshall, J., dissenting in part).

language.[146] While the *Greenholtz* Court held that the Nebraska statute conferred such an interest, other federal courts have reached the opposite conclusion with respect to state parole statutes.[147] Concerning Alabama's parole statute, the Eleventh Circuit held just a few years after *Greenholtz* that the Alabama parole statute did *not* confer a liberty interest during the parole release process.[148] This means that there is no requirement of "orderly process"[149] simply because the state has provided for the possibility of discretionary parole release. In essence, the state of Alabama can provide for the opportunity for parole release by statute yet fashion the process to obtain such release in any way it sees fit. Under this reading of *Greenholtz*, the state of Alabama could provide for the possibility of parole release, and as long as the statute did not confer a liberty interest on the process, the state could allow the Board to flip a coin in making its decisions about whom to reject or release.

When one considers the difference between the Alabama statute, which the Eleventh Circuit held did not create a liberty interest in parole,[150] and the Nebraska statute, which the Supreme Court held *did* confer a liberty interest,[151] it is easy to see the semantic distinction between the two. The Nebraska statute at issue in *Greenholtz* reads: "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred."[152] The most important statutory language in the Nebraska statute, in the eyes of the *Greenholtz* Court, was that the board "*shall* order his release *unless* it is of the opinion that his release should be deferred."[153] In contrast, the Alabama parole statute states that a prisoner may be released "*only if* the Board of Pardons and Paroles is of the opinion

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[146] *Id.* at 12.

[147] *See* Gale v. Moore, 763 F.2d 341, 343 (8th Cir. 1985) (finding no liberty interest in revised Missouri parole statute); Parker v. Corrothers, 750 F.2d 653, 656–57 (8th Cir. 1984) (finding no liberty interest in Arkansas parole statute); Irving v. Thigpen, 732 F.2d 1215, 1217–18 (5th Cir. 1984) (holding that the Mississippi parole statute does not create a constitutionally protected liberty interest during the parole release process); Williams v. Briscoe, 641 F.2d 274, 276–77 (5th Cir. 1981), *cert. denied*, 454 U.S. 854 (1981) (finding no liberty interest under Texas parole statute); Wagner v. Gilligan, 609 F.2d 866, 867 (6th Cir. 1979) (finding no liberty interest in Ohio parole statute).

[148] Thomas v. Sellers, 691 F.2d 487, 489 (11th Cir. 1982). *But see* Ellard v. Alabama Bd. of Pardons & Paroles, 824 F.2d 937, 944–45 (11th Cir. 1987) (holding that the Alabama Parole Board's grant of parole to an inmate created a constitutionally protected liberty interest).

[149] Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

[150] *Sellers*, 691 F.2d at 489.

[151] *Greenholtz*, 442 U.S. at 12.

[152] NEB. REV. STAT. ANN. § 83-1, 114(1) (West 1976).

[153] *Id.* (emphasis added).

that there is reasonable probability that if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society."[154]

Thus, the most significant difference between these two statutes is that the Nebraska statute mandates that parole be granted "unless" certain conditions are met, whereas the Alabama statute reads that parole will be granted "only if" certain conditions are satisfied. The *Greenholtz* Court examined the words in the Nebraska statute carefully and determined that they created a "statutory expectation" of parole and therefore warranted due process protection.[155]

This semantically focused approach, however, does not necessarily align with the Court's reasoning in *Sandin*, which shifts the focus of a due process analysis from the mandatory language of a statute or regulation to an assessment of the potential deprivation of liberty at stake.[156] In *Sandin*, a Hawaii inmate challenged the procedures relating to the imposition of correctional segregation as a disciplinary action for misconduct.[157] In reaching a decision on whether the procedures comported with due process, the *Sandin* Court discussed the aftermath of *Greenholtz*, stating that following *Greenholtz*, the Court "ceased to examine the 'nature' of the interest with respect to interests allegedly created by the State."[158] The *Sandin* Court went on to say that one of the undesirable effects of this approach was that "[s]tates may avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."[159] The Court further held that the proper analysis was to look at the "nature of the deprivation," rather than "the language of a particular regulation."[160] In other words, the *Sandin* decision challenges the Court's previous conception of what warrants close examination for the purposes of relying on the wording of a statute or regulation to dictate whether a liberty interest exists.

Applying the reasoning in *Sandin* to the facts of *Greenholtz*, the Court today would likely focus on the "nature of the deprivation" at a parole release hearing rather than on whether the language of the particular parole statute was sufficiently mandatory. The "nature of the deprivation" at stake in a parole release hearing is as follows: if an inmate is denied release, he is

[154] ALA. CODE § 15-22-26 (West 1975) (emphasis added).
[155] *See Greenholtz*, 442 U.S. at 12–14.
[156] *See* Sandin v. Conner, 515 U.S. 472, 480 (1995).
[157] *Id.* at 475–76.
[158] *Id.* at 480.
[159] *Id.* at 482.
[160] *Id.* at 481.

denied freedom from incarceration. Therefore, if his rights are violated during the release process, such a violation has an enormous impact on his freedom. Given the nature of this liberty and the effect of its deprivation, if the Court were to reconsider *Greenholtz*, it would likely reach a different decision about the presence of a liberty interest during the parole release process. Thus, the second prong of *Greenholtz*, with its rigid focus on the language of the Nebraska parole statute, represents an outdated due process analysis and should be abandoned accordingly.

C. ASSUMING A PROTECTED LIBERTY INTEREST EXISTS AT PAROLE RELEASE, ALABAMA'S POLICY OF INMATE EXCLUSION IS A VIOLATION OF DUE PROCESS

If the holding pertaining to parole release in *Greenholtz* was overturned, as this Comment advocates, Alabama's practice of inmate exclusion from parole release hearings before the Board is a violation of due process.

1. *Inmate presence at parole release hearings matters*

Inmates should be present at their own parole release hearings. The need for an inmate to be present at his parole release hearing can be illustrated through the following three situations, all of which describe true events.[161]

In the fall of 2010, an advocate for an inmate appeared before the Board. At the time of the hearing, the inmate was serving a life sentence for a nonviolent offense, yet he was not permitted to attend his own parole hearing due to the Board's policies. He suffered from an illness that was, in all likelihood, fatal. During the hearing, the Board especially focused on discussing the inmate's medical prognosis. Unable to examine or obtain the inmate's medical records, the advocate admitted that she did not know the inmate's precise prognosis and current condition. If the inmate himself had been able to attend, he could likely have answered the Board's questions about his health more accurately. He could have served as his own advocate on his journey to be free from incarceration.

In the spring of 2011, the same advocate appeared before the Board on behalf of an inmate who was also serving a life sentence. Having served ten years of her sentence, the inmate sought a grant of discretionary parole. The Board had previously denied the inmate parole three years before.

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[161] These scenarios are based on the personal experiences of the author through her work advocating on behalf of Alabama inmates during their parole release hearings. The author advocated on behalf of four inmates over the course of one year. Certain facts have been omitted or altered to protect the anonymity of the individuals involved.

During the hearing, the advocate pleaded with the Board on behalf of the absent inmate to consider all of the steps the inmate had taken to rehabilitate herself during her incarceration. Despite repeatedly expressing concern about the inmate's potential for reoffending, the Board granted the inmate release. Given its strong expression of concern about releasing the inmate, it is unclear whether the Board would have reached the same decision had no advocate been present.

About a month later, the advocate returned to the Board on behalf of an inmate who had served nearly his entire sentence for a crime that he maintains he did not commit. He was actively involved in many prison programs and even had the support of prison employees for his release. The advocate urged the Board to consider the inmate's advanced age and deteriorating health, which the advocate asserted made him less likely to reoffend. Without inquiring further about the inmate's health and without seeing the inmate's visible frailties in person, however, the Board denied the inmate parole. This scenario begs the question: Would the Board have considered the health of the inmate to a greater degree had the inmate himself been present at the hearing?

The fact that inmates' presence might affect parole release hearing outcomes is not only demonstrated through these situations but was also confirmed in a recent study. This study, led by Richard Tewksbury and David Patrick Connor, found that inmates participating in parole hearings face-to-face with parole officials "were more likely to receive a parole recommendation."[162] Additionally, the study found that inmates participating in video parole hearings "were less likely to receive a parole recommendation."[163] The researchers hypothesized that this disparity could be explained, because "hearings conducted through video conferencing have less intimate interactions, resulting in reduced exchanges of information and decreased interpersonal connections."[164] While Tewksbury and Connor did not specifically study or compare the outcomes of hearings in which the inmate was absent entirely, the fact that they found a significant change in outcomes based simply on whether the inmate was present physically as opposed to appearing via videoconference is a good indicator of what research may show in the former scenario. It seems that the results of "less intimate interactions" and "decreased interpersonal connections" would be exacerbated further in a situation in which the inmate could not appear before the Board at all.

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[162] Tewksbury & Connor, *supra* note 61, at 56.

[163] *Id.*

[164] *Id.*

The researchers' conclusions are not surprising. Other studies involving videoconferencing indicate such communication can be vastly different than face-to-face communication. In a recent study examining the effects of various media interactions on "team trust," researchers noted that:

> [F]ace-to-face is the richest media because non-verbal cues and information regarding the social context are available during the process of communication. . . . [V]ideoconference is not as rich as face-to-face due to technological constraints, such as lack of synchronization between vision and sound, difficulty in making eye contact, fewer non-verbal cues than face-to-face . . . .[165]

Furthermore, it is well accepted that "greater parole board discretion makes additional information more valuable."[166] By excluding an inmate from his parole hearing, the Board does nothing but perpetuate the "reduced exchanges of information" described by Tewksbury and Connor as significant contributors to the outcome of the process. If greater information leads to a more informed decision on the part of the Board, then it seems detrimental to eliminate a source of information that is extremely relevant to the ultimate outcome: the inmate himself.

The fact that inmate presence at a parole release hearing is likely to have an effect on that hearing's outcome only strengthens the argument that the nature of the liberty at stake in a parole release hearing and the potential for its deprivation is sufficient to warrant due process protection by the Fourteenth Amendment.

2. *Supreme Court, federal, and state case law support the contention that when a liberty interest exists during parole release, preventing an inmate from attending his parole release hearing is a violation of due process*

When the *Greenholtz* Court decided that the Nebraska statute conferred a liberty interest in parole release, the Court then analyzed the processes of the Nebraska Board of Parole to determine whether these procedures met due process demands.[167] In finding that these processes comported with due process, the Court noted that "[a]t the Board's initial interview hearing, the inmate is permitted to appear before the Board and present letters and statements on his own behalf."[168] The Court went on to say that "[t]he Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short

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[165] Vicente Peñarroja et al., *The Effects of Virtuality Level on Task-Related Collaborative Behaviors: The Mediating Role of Team Trust*, 29 COMPUTERS HUM. BEHAV. 967, 968 (2013).

[166] Bernhardt et al., *supra* note 9, at 186.

[167] Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979).

[168] *Id.* at 15.

of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more."[169]

The key part of the Court's opinion is the recognized importance of the inmate appearing physically before the Board and having an opportunity to "be heard."[170] Other state and federal courts have also found inmate presence at parole release hearings to be a significant factor in determining whether parole release procedures satisfy due process. In *Sage v. Gamble*, the Montana Supreme Court specifically held that an inmate who was denied the opportunity to appear personally at his parole hearing was denied due process.[171] Relying on the *Greenholtz* Court's treatment of an inmate's right to appear, the Montana Supreme Court concluded:

> While it is true that the Court in *Greenholtz* did not directly address the issue of whether due process requires an opportunity to personally appear before the Board, its approval of the procedure provided in Nebraska was couched almost exclusively in terms of the parole applicant's opportunity to personally appear.[172]

Similarly, in *Newbury v. Prisoner Review Board*, the Seventh Circuit considered whether due process required all three Prisoner Review Board (PRB) members to be present for an inmate's parole hearing.[173] In concluding that it was not a violation of due process to allow just one PRB member to be present for the hearing, the court concluded:

> The Review Board's procedure for providing the inmate with the opportunity to appear personally before at least one member of the panel of the Review Board to insure that the Board is considering his records and to present any special considerations demonstrating why he is an appropriate candidate for parole satisfies the requirements of the Due Process Clause of the United States Constitution.[174]

Like the U.S. Supreme Court and the Montana Supreme Court, the Seventh Circuit also noted that the opportunity to appear *personally* before a member of the parole board was a significant part of the equation for determining whether due process rights were satisfied during the parole release process.[175] Given the importance of inmate presence demonstrated by social science research, as well as the prominence of the issue in both state and federal cases concerning parole release decisions, a policy that effectively excludes an inmate from the parole release process altogether should be seriously questioned. In short, if due process applies to the

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[169] *Id.* at 16.
[170] Id. at 15–16.
[171] Sage v. Gamble, 929 P.2d 822, 827 (Mont. 1996).
[172] *Id.* at 825.
[173] *See* Newbury v. Prisoner Review Bd., 791 F.2d 81, 87 (7th Cir. 1986).
[174] *Id.*
[175] *See id.*

procedures of the Alabama Board of Pardons and Paroles—which prior discussion indicates it should—then the Board's unofficial policy of inmate exclusion is unconstitutional and impermissible.

IV. CONCLUSION

As the Alabama Board of Pardons and Paroles operates today, inmates facing the parole release process have no opportunity to truly be heard by the group of people deciding their fate.[176] This is because the Board perpetuates a practice of prohibiting inmates from attending these hearings. The 1979 Supreme Court decision in *Greenholtz* allows such policies to exist by holding that inmates do not enjoy any constitutionally conferred due process protections during parole release hearings.[177] This decision represented a break with precedent—*Morrissey* and *Gagnon*—and was based on then-flawed and now-outdated reasoning after *Sandin* in 1995. If the Supreme Court overturns *Greenholtz* and decides that the Fourteenth Amendment confers some amount of due process protection to parole release decisions, as this Comment posits, then the policy of excluding Alabama inmates from their own parole hearings would violate the excluded inmates' due process rights.

Finding such exclusion to be unconstitutional would certainly frustrate Alabama's current system of holding all parole hearings in Montgomery while refusing to transport inmates from their individual facilities. But the state might consider a number of solutions. One possible solution to the problem is to have the Alabama Department of Corrections agree to pay for the inmates' transportation. This solution would likely be met with a fair amount of resistance, as Board representatives have noted that "[t]o transport inmates to the Board for their parole hearing would create an added financial responsibility for the Department of Corrections."[178]

Another potential solution is to return to a system under which parole hearings were held at the individual facilities, allowing the inmates a chance to attend the hearings without having to pay for their transportation to another city.[179] Such a shift would, however, admittedly require an overhaul of the institutional process to which the Board has grown accustomed. Still another solution would be to allow inmates to at least

[176] ALA. CODE § 15-22 (West 1975) (providing no right for an inmate to appear in person at his or her parole release hearing).

[177] Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 11 (1979).

[178] July 2013 Board Letter, *supra* note 12.

[179] Board representatives have alluded to this prior system, although it is unclear when Montgomery became the exclusive site for parole hearings. *See* November 2012 Board E-mail, *supra* note 12.

appear before the Board via videoconference—an opportunity that a number of states provide in lieu of allowing the inmate to appear in person.[180]

There are, indeed, alternatives to the current practice of excluding inmates from attending their own parole release hearings in Alabama, notwithstanding the logistical changes that may be necessary to execute these alternatives. Just as there is no "iron curtain drawn between the Constitution and the prisons of this country,"[181] neither should one be drawn between inmates and a state-provided opportunity to be free from the confinement of prison.

[180] *See* Tewksbury and Connor, *supra* note 61, at 56 (referencing the difference in outcomes between inmates who appeared before the Board via videoconference and those that appeared before the board physically); *see also* KAN. STAT. ANN. § 22-3717(j)(1) (West 2007) ("Before ordering the parole of any inmate, the prisoner review board shall have the inmate appear either in person or via a video conferencing format and shall interview the inmate unless impractical because of the inmate's physical or mental condition or absence from the institution."); *Parole Hearings via Video*, ARK. PAROLE BOARD, http://paroleboard.arkansas.gov/MeetingInfo/Pages/VideoHearings.aspx (last visited Aug. 20, 2013) (indicating that "[w]hile the Board will normally conduct hearings in person, there may be circumstances where the use of video conferencing is appropriate and/or necessary to facilitate an effective and efficient hearing"); NEV. BOARD OF PAROLE COMMISSIONERS, http://www.parole.nv.gov/node/1 (last visited Aug. 20, 2013) ("Parole hearings are conducted via video conference from the offices of the Parole Board to the institution where the inmate is housed.").

[181] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).