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Fourteenth Amendment--Parole Release Determinations

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FOURTEENTH AMENDMENT—PAROLE RELEASE DETERMINATIONS

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 99 S. Ct. 2100 (1979).

In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,¹ the Supreme Court held that the due process clause of the fourteenth amendment applies to discretionary parole release determinations made by the Nebraska Board of Parole and that the Board's current procedures meet all such constitutional requirements. Although *Greenholtz* marked the first time that the Court applied the due process clause to parole proceedings, the Court found no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.² Instead, the Court declared that due process protection was triggered by the Nebraska statutory language³ which, through its specific requirements, created a protectible expectation of parole.

I

In 1971, inmates of the Nebraska Penal and Correctional Complex brought a class action under section 1983 of Title 42⁴ claiming due process violations as a result of unconstitutional denials of parole by the Nebraska Board of Parole. The pro-

¹ 99 S. Ct. 2100 (1979).

² *Id.* at 2104.

³ NEB. REV. STAT. § 83-1,114(1) (1976) provides:

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.

⁴ 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

cedures used by the Board to determine whether to grant or deny discretionary parole⁵ are based in part on statutory requirements and in part on the Board's practices. The inmates claimed that both the state statutes and the Board's administrative procedures denied them procedural due process in violation of the fourteenth amendment.

The procedures in question provide that at least once each year from the commencement of each prisoner's sentence, initial review hearings must be held for every inmate, regardless of parole eligibility.⁶ At the initial review hearing, the Board examines the inmate's entire preconfinement and postconfinement record. Following this examination, an informal hearing is held. No evidence is formally introduced, but the Board interviews each inmate and takes under advisement any letters or statements which the inmate wishes to be considered along with his claim for relief.⁷

If the Board should conclude after this informal hearing that the inmate is not a good risk for parole, parole is denied. The inmate is informed of the reasons for the denial along with any recommendations by the Board to improve his chances for future release. However, should the Board determine that an inmate demonstrates the proper characteristics for release, a final hearing is sched-

⁵ Discretionary parole must be distinguished from mandatory parole. Mandatory parole is automatic when an inmate has served his maximum term, less good-time credits. 99 S. Ct. at 2102. However, an inmate becomes eligible for discretionary parole when the minimum term, less good-time credits has been served. *Id.* Only discretionary parole is relevant to the *Greenholtz* case.

⁶ This requirement is found in NEB. REV. STAT. § 83-192(9) (1976), which provides that the Board of Parole shall:

Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record, his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and prospects for future parole

⁷ 99 S. Ct. at 2102.

uled. This hearing provides its own peculiar amalgam of procedural protections which can be summarized as follows. First, the Board notifies each inmate of the month in which the final hearing will be held. Notification of the exact day and time is not provided to each candidate until the day of the hearing when this information is posted on a bulletin board which is accessible to all inmates. Secondly, although not permitted to hear adverse testimony or to cross-examine adverse witnesses, each inmate may present evidence, call witnesses, and be represented by private counsel of his choice.⁸ Furthermore, a complete tape recording of the hearing is preserved. And finally, if parole is denied by the Board upon conclusion of this hearing, the Board must provide a written statement of the reasons for the denial within thirty days.⁹

In its order and memorandum opinion of October 21, 1977, the district court held that the procedures used by the Nebraska Parole Board did not satisfy due process. The court ordered that "[e]very inmate eligible for parole under Nebraska law must be afforded a formal parole hearing."¹⁰ The district court also concluded that to meet minimum due process requirements, the Board must provide at least seventy-two hour notice to each inmate of the exact date and time of the hearing along with a concise list of all factors which the Board may consider in evaluating an inmate for discretionary parole.¹¹ Each inmate also must be permitted to appear in person before the Board to present evidence unless prison security considerations would warrant otherwise.¹² However, the court did not provide inmates with the right to confront and cross-examine adverse witnesses. The

⁸ *Id.* Counsel must be provided for by the inmate himself and indigent prisoners are not entitled to appointed counsel.

⁹ This provision is also found in NEB. REV. STAT. § 83-1,111(2) (1976).

The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall include the opinion of the member who presided at the hearing. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

¹⁰ *Inmates of Neb. Penal & Correctional Complex v. Greenholtz*, 576 F.2d 1274, 1283 (8th Cir. 1978). The district court opinion was unpublished.

¹¹ *Id.*

¹² *Id.*

court required that a record of the parole proceedings be maintained.¹³ Finally, the district court held that not only must the Board provide an inmate reasons for the denial of parole within a reasonable time, but the Board must also supply the inmate a full and fair written explanation of the evidence upon which it relied in arriving at this decision.¹⁴

The court of appeals affirmed in part and reversed in part providing modifications to the district court's pronouncements.¹⁵ The court held that a prisoner in Nebraska has a statutory right to fair parole consideration and thus is entitled to the protection of the due process clause. In balancing "the interests of the inmates in their statutorily granted expectation of meaningful consideration for parole and the interests of the state and society in the orderly administration of the parole system,"¹⁶ the court found that a formal parole hearing was mandatory only when the inmate first became eligible for parole. Subsequent formal hearings were to be permitted only at the discretion of the Nebraska Parole Board.

Agreeing with the district court, the court of appeals determined that seventy-two hour notice of the exact time and date of the hearing was necessary to insure the inmate's adequate preparation. The court also decided that a list of criteria governing the Board's decisions should be provided to each inmate.¹⁷ Furthermore, the court proposed that a list of statutory criteria and guidelines used by the Board should be posted in a place which is accessible to all inmates. Again affirming the district court, the court of appeals held that inmates are entitled to appear before the Board and present evidence but are not entitled to confront and cross-examine adverse witnesses. The court similarly agreed that a record of the parole proceedings must be maintained, but concluded that the tape recordings presently retained by the Board were sufficient to meet constitutional requirements.

Finally, the appellate court agreed that when the Board denied parole to an inmate, a full explanation of the evidence relied upon, not just the reasons for denial, must be provided.¹⁸ In the opinion of the court, this additional information would facilitate judicial review by compelling all Board members to consider all relevant points in each

¹³ *Id.* at 1284.

¹⁴ *Id.*

¹⁵ *Id.* at 1277.

¹⁶ *Id.* at 1282.

¹⁷ *Id.* at 1283.

¹⁸ *Id.* at 1284.

individual case. Such comprehensive analysis would foster rehabilitation by instructing inmates on how to improve their chances for parole release and would promote consistency in parole release determinations by encouraging the development of a body of rules, principles, and precedent that present and future Board members could follow in their decisionmaking.¹⁹

The Supreme Court granted certiorari to determine whether due process requirements apply to parole release proceedings, and if they apply, exactly what procedural requirements are necessary.²⁰ In deciding whether due process considerations are applicable, the majority,²¹ in an opinion by Chief Justice Burger, concluded that prison inmates have no constitutional or inherent right to be conditionally released prior to the expiration of their sentences.²² States are permitted to establish parole systems but are under no constitutional duty to do so. Thus, the decision whether or not to release an inmate prior to the completion of the sentence raises no constitutional implications.

The Court, in a methodical opinion, presented and answered each of the inmates' claims for due process protection. Relying on *Morrissey v. Brewer*,²³ where the Court held that due process applied to parole revocation proceedings, respondent-inmates equated parole release and parole revocation and determined that the interest at stake underlying both of them was conditional liberty and thus, they should be accorded the same constitutional protection as accorded a parole revokee. The Court refused to adopt this reasoning, instead holding that "[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires."²⁴

The Court also found differences in the nature of the decision to be made in each case. It found the decision to revoke parole is based on the wholly retrospective factual question of whether the parolee in fact acted in violation of parole conditions. The Court determined that the parole release decision, however,

is more subtle and depends on an amalgam of elements, some of which are factual but many of

which are purely subjective appraisals by the board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual.²⁵

Agreeing with the respondents' contention that the Nebraska statutory language created a protectible expectation of parole,²⁶ the Court in turn found a legitimate expectation of release absent one of the statutory justifications for deferral. However, the Court emphasized that the relevant Nebraska statutory provision had a unique structure and language and thus the determination of whether due process entitlements are created by the statutes of other states must be made on a case-by-case basis.²⁷

The Court then turned to a determination of whether the additional procedures mandated by the court of appeals were necessary. Answering this question in the negative, the majority held that a formal hearing for every inmate would provide "at best a negligible decrease in the risk of errors."²⁸ The Court found that the inmates' opportunity to appear at the Board's initial hearing and present evidence in their own behalf adequately insured against serious errors and thus satisfied due process. The Court further held that due process did not require that the Board specify the evidence on which it rested its determination to deny release.²⁹ Fearful that such a requirement would transform the informal parole hearing into a full adversarial proceeding, the Court determined that the Constitution requires no more than that the Board must inform the inmate of the reasons for denial of parole.

Finally, the Court found that the Board's written notice in advance of the month during which the hearing would be held was constitutionally adequate.³⁰ This notice provided an ample opportunity for each inmate to secure any letters or statements that he wished to present at the hearing. Furthermore, no claim was made that the timing of the notice prejudiced the inmate's ability to prepare for the hearing. Thus, the majority reversed the holdings of the lower courts by determining that the Nebraska Parole Board's proce-

¹⁹ *Id.* at 1284-85.

²⁰ 99 S. Ct. at 2102.

²¹ The majority included Chief Justice Burger and Justices Blackmun, Stewart, Rehnquist, and White.

²² 99 S. Ct. at 2104.

²³ 408 U.S. 471 (1972).

²⁴ 99 S. Ct. at 2105.

²⁵ *Id.*

²⁶ See note 3 *supra* for text of statutory provision.

²⁷ 99 S. Ct. at 2106.

²⁸ *Id.* at 2107.

²⁹ *Id.* at 2108.

³⁰ *Id.* at 2107 n.6.

dural protections satisfied the minimum requirements of due process.

Justice Powell, concurring in part and dissenting in part, agreed with the Court that respondents had a right to due process in the consideration of their release on parole. However, he concluded that due process protections did not depend on the Nebraska statutory language but instead arose out of the presence of the parole system itself.³¹ By adopting a parole system, the state created a justifiable expectation among the inmates that parole will be granted whenever the standards of eligibility are met. Furthermore, Justice Powell dismissed the majority's distinction between parole release and revocation.

Release on parole marks the first time when the severe restrictions imposed on a prisoner's liberty by the prison regimen may be lifted, and his behavior in prison is often molded by his hope and expectation of securing parole at the earliest time permitted by law. Thus, the parole release determination may be as important to the prisoner as some later, and generally unanticipated, parole revocation decision.³²

Justice Powell also refused to accept the distinction between the nature of decisionmaking in parole release and revocation. Finding that the parole release decision, like the parole revocation decision, is based on retrospective factual findings of prisoner behavior, he found the release determination no more subjective than the parole revocation decision.

In his opinion, Justice Powell agreed with the majority that a formal hearing was not required for every inmate and that every parole denial need not include a statement of evidence relied on by the Board. However, he determined that the present notice afforded to inmates scheduled for final hearings was constitutionally inadequate.³³ In concluding that at least three days' notice before a final hearing was constitutionally mandated, Powell explained that any less protection would nullify any possibility that the inmate could be reviewed fairly and in accordance with due process.

The dissent, written by Justice Marshall and joined in by Justices Brennan and Stevens, concurred with Justice Powell's conclusion that all prisoners of states which have created parole systems have a liberty interest of which they may not

be deprived without due process, regardless of the specificity of the relevant parole statutes.³⁴ Reliance on government statistics³⁵ and experience in the federal judicial system provides inmates with a legitimate expectation of release whenever a parole system is established.

In agreement with Justice Powell, the dissenters found that any possible distinction between parole revocation and release did not merit constitutional inquiry. The dissenters dismissed the use of differential treatment between a freedom currently enjoyed and one that is rightfully anticipated, citing *Wolff v. McDonnell*,³⁶ and noted that in other contexts the Court has held that due process protects those liberty interests which are not currently enjoyed by individuals.³⁷ In similar fashion, the dissent explained that the nature of the decision in parole release and revocation proceedings is equally subjective.³⁸

In voting to modify the Nebraska Parole Board's procedural requirements, the dissenters would have held that the current practice of informal and formal hearings is constitutionally sufficient.³⁹

³⁴ *Id.* at 2111 (Marshall, Brennan, and Stevens, JJ., dissenting in part).

³⁵ NAT'L COUNCIL ON CRIME AND DELINQUENCY, UNIFORM PAROLE REPORTS, PAROLE IN THE UNITED STATES: 1976 AND 1977, at 55 (1978), cited in 99 S. Ct. at 2115 n.10 (Marshall, Brennan, and Stevens, JJ., dissenting in part) [hereinafter cited as UNIFORM PAROLE REPORTS]. Recent studies show that parole is the method of release for approximately 70 percent of all criminal offenders returned each year to the community.

³⁶ 418 U.S. 539 (1974). In *Wolff*, the Supreme Court held that the due process clause entitles a state prisoner to certain procedural protections when he is deprived of good-time credits because of serious misconduct. This deprivation results in a forfeiture of freedom at some time in the future and is an example of procedural protections for a loss of liberty not currently enjoyed.

³⁷ 99 S. Ct. at 2113 (Marshall, Brennan, and Stevens, JJ., dissenting in part). In support of this statement the dissenters cited *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Simmons v. United States*, 348 U.S. 397 (1955); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926). 99 S. Ct. at 2113 n.6 (Marshall, Brennan, and Stevens, JJ., dissenting in part).

³⁸ The dissent relied on *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972), where Chief Justice Burger and the majority had concluded that the revocation decision involves a two-step process. The first step involves the wholly retrospective factual question, but the second step involves a prediction by the Board members as to the ability of the inmate to return to society without committing antisocial acts.

³⁹ 99 S. Ct. at 2119 (Marshall, Brennan, and Stevens, JJ., dissenting in part).

³¹ *Id.* at 2110 (Powell, J., concurring in part and dissenting in part).

³² *Id.*

³³ *Id.*

However, emphasizing that adequate notice is a fundamental requirement of due process,⁴⁰ the dissent found that the Board's notification is inadequate. Similarly, the dissenters concluded that the inmates are entitled to a statement of the crucial evidence on which the Board relies in denying parole,⁴¹ following the same rationale as the court of appeals.⁴²

II

In order to understand the importance of the *Greenholtz* decision, a brief history of the inconsistencies and contradictions found in the circuit court decisions regarding parole release prior to *Greenholtz* is helpful. In *Menechino v. Oswald*,⁴³ the Second Circuit held that a prison inmate was not entitled to procedural due process when considered by the New York State Board of Parole for parole release. Concluding that since some of the essential conditions for requiring procedural due process as a matter of constitutional right are missing in this instance,⁴⁴ the court found that the administrative burden of providing these requirements would be enormous and incapacitating.

Similarly, in *Scarpa v. United States Board of Parole*,⁴⁵ the Fifth Circuit held that due process rights do not attach to parole board proceedings concerning the grant or denial of parole to prisoners.⁴⁶ In refusing to accept that the loss involved in a denial of parole is equal to that involved in parole revocation, the court explained that when the Board refused to grant parole the inmate suffers no deprivation since in reality, he serves no more time than the sentence originally imposed by the court.⁴⁷

⁴⁰ *Id.* (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1976)); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950)).

⁴¹ *Id.* at 2120.

⁴² *Id.* at 2120-21; see text accompanying note 19 *supra*.

⁴³ 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

⁴⁴ Among these missing conditions are lack of an adversarial proceeding since the Board has an interest in fostering each inmate's rehabilitation, and absence of an interest which is currently enjoyed by the inmate.

⁴⁵ 477 F.2d 278 (5th Cir.), *vacated as moot*, 414 U.S. 809 (1973).

⁴⁶ This decision was to be expected in light of the earlier decision of *Thompkins v. United States Bd. of Parole*, 427 F.2d 222 (5th Cir. 1970), which held that a federal prisoner was not entitled to parole as a matter of right on meeting conditions prescribed by statutes allowing parole to be granted when the prisoner has served one-third of his sentence.

⁴⁷ 477 F.2d at 282.

Continuing this trend in the Fifth Circuit, *Brown v. Lundgren*⁴⁸ held that the mere expectation of parole release by an inmate is not so vested as to result in a "grievous loss"⁴⁹ if denied by the Parole Board; thus, the court would not consider whether the parole board procedures violated due process.

The courts of the Second, Fourth, Seventh, and District of Columbia Circuits have taken the opposing view and held that some due process requirements are mandatory in parole release decisions. However, even in these circuits, the rationales and modicums of protection afforded prisoners were at variance prior to the Supreme Court decision in *Greenholtz*. In the Second Circuit case of *United States ex rel. Johnson v. Chairman of New York State Board of Parole*,⁵⁰ the court held that due process requires that an inmate who had been denied parole be given a statement of reasons for the denial which would be sufficient to enable a reviewing body to determine whether parole had been denied for an impermissible reason or for no reason at all and which would furnish the inmate both the grounds for the decision and the essential facts upon which the Parole Board's inferences were based. While distinguishing the *Menechino* case,⁵¹ the court found that the protection of one due process weapon, a statement of reasons, is crucial to fundamental fairness and spares each inmate from the "inhumanity of ignorance"⁵² of the reasons for which parole was denied.

Likewise in *Childs v. United States Board of Parole*,⁵³ the Court of Appeals for the District of Columbia held that due process requires that applicants for parole be given a written statement of the reasons for denial of parole. Quoting heavily from both

⁴⁸ 528 F.2d 1050 (5th Cir.), *cert. denied*, 429 U.S. 917 (1976).

⁴⁹ 528 F.2d at 1053. The court found that the threshold question to be answered regarding whether due process is required, is whether there is a "grievous loss" of a liberty or property interest. When the court finds no such loss, as here, the second question of whether the particular challenged procedure complies with fundamental fairness is never reached. *Id.*

⁵⁰ 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974).

⁵¹ See text accompanying note 43 *supra*. *Menechino* held that an inmate being considered for parole release was not entitled to the *full panoply* of due process rights; no decision was rendered on whether a simple statement of reasons for denial alone would be unconstitutional. 403 F.2d at 412.

⁵² 500 F.2d at 933.

⁵³ 511 F.2d 1270 (D.C. Cir. 1974).

*Morrissey v. Brewer*⁵⁴ and *Wolff v. McDonnell*,⁵⁵ the court found that as a result of the Parole Board's discretion, the inmate suffers a "grievous loss" or gains a conditional liberty. Accordingly, the inmate's interest is substantial and should be guided by minimal standards of due process of law.

A similar decision was reached by the Fourth Circuit in *Bradford v. Weinstein*,⁵⁶ which held that due process did apply to parole release proceedings. Unsure and unwilling to determine what process was "due," the court admitted that due process was a flexible concept and even if applicable does not carry with it a fixed panoply of rights or a fixed mode of procedure.⁵⁷

The Seventh Circuit presented its minimum definition of due process in *United States ex rel. Richerson v. Wolff*,⁵⁸ where the court held that reasons for denial of parole release must be given by the Illinois Parole Board.⁵⁹ Also, in *Franklin v. Shields*,⁶⁰ the Fourth Circuit held that due process requires the Board to furnish a written statement to the inmate of its reasons for denying parole. Relying on a statutory right to fair parole consideration, the court found that an arbitrary denial of parole to a prisoner who satisfies all the requirements for release is indeed a grievous loss.⁶¹ Furthermore, it is impossible for a court to ascertain whether refusal to grant parole release was arbitrary when the Board is not required to provide reasons for its denial.

These cases demonstrate an obvious confusion in the circuits regarding whether due process requirements apply to parole release proceedings. Even those courts which had determined that due process protections were applicable were reluctant to provide anything more than minimal protections (e.g., a statement of reasons).

Yet until the *Greenholtz* decision, the Supreme

⁵⁴ 408 U.S. 471 (1972), where the Supreme Court held that parole revocation proceedings were subject to due process requirements.

⁵⁵ 418 U.S. 539 (1974); see note 36 *supra*.

⁵⁶ 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975).

⁵⁷ 519 F.2d at 733.

⁵⁸ 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976).

⁵⁹ The court also concluded that the Board's statement that parole was being denied because to grant it would depreciate the seriousness of the offense was sufficient to satisfy minimum due process requirements. 525 F.2d at 804.

⁶⁰ 569 F.2d 784 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978).

⁶¹ 569 F.2d at 791.

Court had never granted certiorari in a case which would determine whether due process requirements apply to parole release proceedings. However, the Court *had* answered this question in the related fields of parole revocation and prisoner disciplinary proceedings. In *Morrissey v. Brewer*,⁶² the Supreme Court carefully developed a list of due process protections required in all parole revocation hearings. Finding that the due process clause mandated certain protections in each revocation proceeding regardless of the explicit statutory language, the Court required the following procedural guarantees:⁶³

- a) written notice of the claimed violations of parole;
- b) disclosure to the parolee of evidence against him;
- c) opportunity to be heard in person and to present witnesses and documentary evidence;
- d) the right to confront and cross-examine adverse witnesses . . . ;
- e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.⁶⁴

In *Wolff v. McDonnell*,⁶⁵ the Supreme Court threw additional light on due process requirements for proceedings involving prisoners. This case involved the validity of procedures applied by state prison authorities in serious disciplinary proceedings which might result in the loss of good-conduct time. The Court, in an opinion by Justice White, emphasized that prisoners do not lose their constitutional rights by virtue of their confinement.⁶⁶ The Court stated that "[t]here is no iron curtain drawn between the Constitution and the prisoners of this country."⁶⁷ Although deciding that the deprivation of good time was not the same immediate disaster for the prisoner that the revocation of parole is for the parolee,⁶⁸ the Court nonetheless extended two of the *Morrissey* procedural protections to prison disciplinary proceedings in order to fulfill what it saw as minimum due process require-

⁶² 408 U.S. 471 (1972).

⁶³ *Id.* at 489.

⁶⁴ Following the decision in *Morrissey*, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court held that requirements of due process established for parole revocation were applicable to probation revocation proceedings and even included the right to counsel where probationer makes a request and when specified criteria are met.

⁶⁵ 418 U.S. 539 (1974).

⁶⁶ *Id.* at 555-56.

⁶⁷ *Id.*

⁶⁸ *Id.* at 560-61.

ments. Therefore, the Court in *Wolff* required advance written notice of the claimed violation and a written statement by the factfinders as to the evidence upon which they relied and the reasons for the disciplinary action taken.⁶⁹

In 1976, the Supreme Court decided two more disciplinary action cases in *Meachum v. Fano*⁷⁰ and *Montanye v. Haymes*.⁷¹ These decisions were based on the Court's findings that the prisoners had no right to remain at any particular prison facility and had no justifiable expectation that they would not be transferred unless found guilty of misconduct. These cases can easily be distinguished from *Greenholtz* for, unlike the protections provided by Nebraska law, neither Massachusetts law in *Meachum* nor New York law in *Montanye* conferred any right on the prisoner to remain in the prison to which he was initially assigned.

III

Although *Greenholtz* seemingly puts an end to the confusion in the circuits, many of the distinctions the Court made are incapable of enduring careful scrutiny and analysis. The first area of concern is the Court's significant differentiation between parole release and revocation. Not all of the protections provided to inmates in parole revocation proceedings have been applied to parole release by the *Greenholtz* decision. Most notably missing are the right to confront and cross-examine adverse witnesses and the right to receive a written statement of the evidence relied on for denying parole.⁷² Yet the *Greenholtz* Court rationalizes this differential treatment through the dissimilarity it found between parole release and revocation.

First, the *Greenholtz* majority found a crucial difference between being deprived of a liberty one has, as in parole revocation, and being denied a conditional liberty that one desires, as in parole release.⁷³ However, the notion that the prisoner,

unlike the parolee, has no present interest in his liberty bears little relation to reality. It is difficult to see why a movement from imprisonment to conditional liberty on parole is any less dramatic a change in status than a movement in the reverse direction. The stakes are equally high in both situations. If parole is revoked, the parolee is returned to prison and often receives no credit for his time served on parole.⁷⁴ However, in the parole release decision, the inmate's conditional liberty is also at stake and the consequences of rejection are all the deprivations and penalties of our penal institutions.⁷⁵ It is difficult to comprehend how either of these two "grievous losses" can be so easily distinguished by the *Greenholtz* Court.

Similarly, the *Greenholtz* majority differentiates between the high degree of discretion involved in a parole release decision and the absence of this discretion in parole revocation proceedings.⁷⁶ However, as the dissenters in *Greenholtz* emphasize,⁷⁷ the parole revocation determination is not as factual as it first appears. As explained in *Morrissey*, once a parole violation is recognized, it is up to the Parole Board members in the exercise of their discretion to determine whether the violations are evidence of the parolee's incapacity to live in society without committing antisocial acts.⁷⁸ Thus, either decision is replete with the discretion of the members of the Parole Board and sharply calls into question the validity of the Court's theory.

In addition, the Nebraska notice requirement as affirmed by the *Greenholtz* Court is insufficient. Although summarily dismissed by the majority in a footnote,⁷⁹ the *Greenholtz* dissenters pose grave constitutional questions as to the requirement's legitimacy. Noting that the receipt of adequate notice is one of the fundamental prerequisites of due process,⁸⁰ the dissenters found that the lack of notification, prior to the day of the hearing, of the exact date and time violated due process standards. The Board currently informs inmates only that it will conduct an initial review or final parole hearing during a particular month within the current year.⁸¹ This indefinite notice forces an inmate to

⁶⁹ *Id.* at 564.

⁷⁰ 427 U.S. 215 (1976). Due process was held not to entitle a state prisoner to a factfinding hearing when he is transferred to a prison, the conditions of which are substantially less favorable to him, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other specified events.

⁷¹ 427 U.S. 236 (1976). The Court held, per Justice White, that the due process clause of the fourteenth amendment did not require a hearing in connection with the transfer of a state prisoner to another institution, where under state law the prisoner had no right to remain at any particular prison.

⁷² See text accompanying note 63 *supra*.

⁷³ See text accompanying note 24 *supra*.

⁷⁴ *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

⁷⁵ Note, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. C.R.-C.L. L. REV. 419, 448 (1973).

⁷⁶ See text accompanying note 25 *supra*.

⁷⁷ See note 38 *supra*.

⁷⁸ 408 U.S. at 480.

⁷⁹ See note 30 and accompanying text *supra*.

⁸⁰ 99 S. Ct. at 2119 (Marshall, Brennan, and Stevens, JJ., dissenting in part).

⁸¹ *Id.*

be fully prepared to present his case on each day of the specified month. Such a requirement is unnecessary and frustrating to all inmates and surely does not conform to the fundamental fairness criteria of due process. The seventy-two hour notice prescribed by the dissenters and court of appeals would alleviate much of this stress without greatly adding to the administrative burden of the Parole Board.

Finally, the Court's requirement of explicit statutory language to trigger due process protection in parole release proceedings sorely undercuts the importance of the opinion itself. The Court found that no expectation of liberty arises out of the state's actual creation of a parole system. Although it is true that a state is under no obligation to establish a parole system,⁸² once such a system is established, a presumption of future liberty prior to the completion of an inmate's sentence is realistically created. Statistics show that the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the pen system.⁸³ Therefore, it is not surprising to suspect that once prisoners are incarcerated, their expectation is that they will be released at a time prior to the expiration of their actual sentences. Thus, due process protections should arise from the parole system itself without the need for explicit statutory language. The denial of parole without proper procedural requirements is a deprivation of a liberty interest.

Hence, after completing an analysis of the *Greenholtz* decision and its inadequacies, one is drawn to the conclusion that in order to provide adequate procedural protections, the safeguards accorded parole revocation by the *Morrissey* opinion should be applied in all parole release proceedings. The distinctions between parole release and revocation made by the Supreme Court do not adequately

reflect the realities of the situation. The inmate, whose freedom or continued incarceration lies in the hands of the Parole Board, is at least entitled to all the procedural protections accorded in *Morrissey* so that he can fully present his case and thus enable the Board to make the fairest and most informed decision possible.

CONCLUSION

In *Greenholtz*, the Supreme Court finally presented an assertive statement about the due process requirements of parole release proceedings. However, although the decision appears to give prisoners specifically defined constitutional protections, the case is capable of being interpreted in a very narrow fashion. Although the Court found that due process applies to Nebraska parole release proceedings, it found the requisite liberty interest in the explicit language of the Nebraska statute and not implicit in the nature of the parole system itself. Thus in future cases, courts can still refuse to apply due process protections where no parole statutes exist or where the statutory language does not create the liberty interest.

The procedural rights granted by the Court to prisoners in parole release proceedings also can be narrowly construed. Now that minimum due process standards have been established, parole boards must provide inmates with only those protections prescribed in *Greenholtz* even if different factual situations, in the interest of fairness, justify additional safeguards.

The *Greenholtz* decision, thus, is a curious composite of the dual concerns of keeping a convicted offender in prison and recognition of the importance of an individual's liberty interest in due process.⁸⁴ The Court, in attempting to pacify both sides, instead formulated a decision which will satisfy few supporters of either position. As the case stands today, all *Greenholtz* indicates is that in some situations, parole release proceedings must meet certain minimum due process requirements. Only future litigation on this issue will demonstrate just how far the Court is willing to go to protect prison inmates from arbitrary denials of warranted parole.

⁸⁴ See generally Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1518 (1972).

⁸² 99 S. Ct. at 2104.

⁸³ See *id.* at 2115 n.10 (Marshall, Brennan, and Stevens, JJ., dissenting in part). These statistics prior to 1976 are similarly conclusive.

1965 ...	60.4%	1966 ..	59.9%	1967 ...	61.3%
1968 ...	61.6%	1969 ...	62.9%	1970 ...	62.4%
1971 ...	64.4%	1972 ...	66.0%	1973 ...	68.0%
1974 ...	67.0%	1975 ...	68.3%		

UNIFORM PAROLE REPORTS, *supra* note 35, at 55-56.