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INTRODUCTION

In a line of cases beginning with *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex,* the United States Supreme Court has adopted a policy against federal judicial review of state parole-release decisions. This policy is based on the nature of the parole-release determination, essentially a predictive judgment, based on appraisals of numerous factors by experienced behavioral experts. This subjective determination differs from judicial decision-making and cannot necessarily be articulated in detailed judicial findings. Therefore, the parole-release decision is generally not an appropriate subject for judicial review.

*Greenholtz* held that the mere existence of a parole system does not create a constitutionally protected liberty interest. Moreover, where the unique wording of a state statute does create a legitimate expectation of parole, the inmate is entitled to only minimal procedural protection.

2. *Greenholtz,* 442 U.S. at 8.
3. “Our system of federalism encourages this state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole.” *Id.* at 13.
4. A state is under no constitutional obligation to establish a parole system. Moreover, a conviction extinguishes an inmate’s liberty interest to release; therefore, a parole candidate possesses no constitutional or inherent right to conditional release before the expiration of a valid sentence. *Id.* at 7. “[A] prisoner is not [however] wholly stripped of constitutional protections when he is imprisoned for crime.” *Wolff v. McDonnell, 418 U.S. 539, 555 (1974).* See, e.g., *Cruz v. Beto, 450 U.S. 319 (1972)* (religious freedom under first and fourteenth amendments); *Younger v. Gilmore, 404 U.S. 15 (1971)* (right of access to courts); *Haines v. Kerner, 404 U.S. 519 (1972)* (due process regarding solitary confinement); *Wilwording v. Swenson, 404 U.S. 249 (1971)* (due process regarding certain conditions of confinement).
5. Because no inherent constitutional protection for parole determination proceedings exists, courts must look to the parole statute to determine what role, if any, constitutional protections might play in the parole process. Most parole-release statutes provide inmates with a “mere hope” or “unilateral expectation” of parole, which does not amount to a protectible liberty interest. Only where the unique statutory language creates a legitimate
decisions have continued to limit the role constitutional due process plays in parole-release decision-making.\textsuperscript{6}

In contrast to the Court's clear policy of deference to state parole-release decisions, federal courts in Illinois have strained to become involved in reviewing parole denials by the Illinois Prisoner Review Board.\textsuperscript{7} This note will evaluate the impact of a series of federal cases which have progressively expanded due process protection afforded Illinois parole candidates, thereby imposing federal judicial review of Illinois Prisoner Review Board decisions. It will first discuss the non-interventionist policy expressed by \textit{Greenholtz} and its progeny. Next, the note will examine state parole-release statutes as interpreted by lower courts following \textit{Greenholtz}. Finally, it will critically examine the analytical approach of the federal courts in Illinois as they expand the scope of judicial review of Illinois parole denial decisions.

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\textsuperscript{6} See infra text accompanying notes 30-44.


Two amendments are of particular significance. Effective January 1, 1973, the legislature amended the entire statute to change and clarify various sections. Most importantly, the present § 1003-3-5 clarifies the former broad charge to the Board to determine "whether [the offender] is capable again of become a law-abiding citizen" by delineating criteria against which the offender should be evaluated. Pusateri & Scott, \textit{Illinois' New Unified Code of Corrections}, 61 ILL. B.J. 62, 63 (1972). See also Fields, \textit{Illinois Parole and Pardon Board Adult Parole Decisions}, 62 ILL. B.J. 20 (1973). Compare ILL. REV. STAT. ch. 38, § 808a (1963) with ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1982).

BACKGROUND

Greenholtz and Its Progeny:
An Inmate’s Liberty Interest in Parole-Release

The fourteenth amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” Procedural due process analysis involves a two-step inquiry: first, is there an interest deserving of constitutional protection, and second, what degree of process is required to protect that interest. Application of this analysis to parole-release decisions involves two questions: first, whether a parole candidate has a legitimate expectation of parole-release sufficient to constitute a liberty interest, and second, if so, what specific procedural protections are required to assure due process of law.

In Greenholtz v. Inmates of the Nebraska Penal Correctional Complex, the United States Supreme Court observed that due process protection under the Constitution rests upon a legitimate claim of entitlement. The Court then rejected any claim of con-

Study Group 1979).


stitutional entitlement to parole, or any form of conditional release, because a valid conviction, with all its procedural safeguards, extinguishes an inmate’s liberty right.13

According to the Court, the Constitution does not require the states to establish a parole system.14 The existence of a state parole system merely provides the inmate with a unilateral expectation that parole-release will be granted.15 A uniquely-worded state statute, however, may create a legitimate expectation of parole-release warranting constitutional protection.16

The Nebraska parole-release statute at issue in Greenholtz involved discretionary parole.17 The statutory language mandates that upon Board determination of parole eligibility, the inmate’s release “shall” be granted “unless” one of the four designated reasons to deny parole exists.18 The Court held that the “shall/unless” formula created a presumptive expectancy of parole-

14. Id.
15. Id. at 9. In support of a constitutionally protected interest in parole, the inmates attempted to analogize the parole-release determination with Board decisions to revoke both parole and probation, which the Court previously held required due process protection. See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1982). The inmates argued that because a conditional liberty interest was at stake in both release and revocation decisions, the two decisions should be accorded the same constitutional protections.

The Court firmly rejected this argument, citing two inherent differences between revocation and release. A confined inmate who applies for parole possesses a mere hope of freedom, and if parole is subsequently denied, remains incarcerated. An inmate who has been granted parole, however, already enjoys a conditional liberty interest, and therefore, possesses a legitimate expectation of retaining his conditional freedom if he abides by the conditions of his release. See Greenholtz, 442 U.S. at 9. The Court quoted Judge Friendly’s observation that “there is a human difference between losing what one has and not getting what one wants.” Id. at 10 (quoting Friendly, “Some Kind of Hearing”, 123 U. Pa. L. Rev. 1267, 1296 (1975)).

The second distinction the Court noted between parole-release and parole revocation was in the nature of the decision-making. The decision to revoke parole is based upon a retrospective factual question: whether the parolee actually violated his parole agreement. By contrast, the parole-release decision rests on mostly subjective appraisals, and unlike the revocation decision, no specific facts mandate conditional freedom. Id. at 9-10.

Cf. id. at 19-20 (Powell, J., concurring in part and dissenting in part); and id. at 26-29 (Marshall, J., dissenting).
17. Nebraska law provides for both mandatory and discretionary parole. After serving the minimum term, less good-time credits, an inmate is eligible for discretionary parole. Upon serving the maximum term, less good-time credits, an inmate is entitled to discretionary parole. Greenholtz involved the discretionary parole-release statute. 442 U.S. at 4.
18. The Nebraska parole-release provision analyzed in Greenholtz reads as follows:
release, which entitles the inmate to some measure of constitutional protection. The Court emphasized, however, that its decision was based on the "unique" structure and language of the Nebraska statute.\footnote{19}

Upon concluding that the Nebraska legislature created a statutory entitlement subject to due process protection, the Court proceeded to determine whether the procedures of the Nebraska statute met minimum due process.\footnote{20} The Court rejected the contention that the Constitution required the parole board to summarize or specify particular evidence on which it based its decision to deny parole.\footnote{21} The inherent subjectivity of the parole-release decision, based upon a combination of psychological factors, facts, and experienced predictive judgments, precludes a traditional statement of findings.\footnote{22} Although discretionary judgments

Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it \textit{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 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.

\textit{Id.} at 11 (quoting NEB. REV. STAT. § 83-1, 114(1) (1976) (emphasis added)).

\footnote{19} \textit{Id.} at 12.

\footnote{20} "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.' " \textit{Id.} (quoting \textit{Morrissey v. Brewer}, 408 U.S. at 481).

\footnote{21} The Court's opinion addressed three procedures imposed by the Eighth Circuit and challenged by the Nebraska Board of Parole. The Court first held that the Board's practice of granting the inmate an initial personal interview sufficiently met minimum due process guarantees; consequently, a full formal hearing for eligible inmates was constitutionally unnecessary. \textit{Id.} at 14-15. In addition, the Court held that due process does not require the Board to submit "a full explanation, in writing, of the facts relied on and reasons for the Board's action denying parole." \textit{Id.} at 6. \textit{See infra} notes 22-26 and accompanying text. The Court also rejected the court of appeals' order requiring the Board to provide written notice of the precise time of the hearing, reasonably in advance, together with a list of factors that might be considered. The Board's own notice procedure informed the inmate in advance of the month during which the interview would be held, thereby allowing time to secure letters or statements, and provided the exact time of the hearing on the day it was held. The Court found this notice procedure constitutionally sufficient. \textit{Greenholtz}, 442 at 14 n.6.

\footnote{22} \textit{Greenholtz}, 442 U.S. at 8, 13.
are subject to some margin of error, the Constitution does not ensure error-free standards of review. Flexible due process provides the procedural safeguards necessary to minimize the risk of erroneous decision-making. According to Greenholtz, the Nebraska procedures, which provided inmates with a preprinted denial form on which general reasons for parole denial were checked off, sufficiently met minimum due process requirements.

In a vigorous dissent, Justice Marshall observed that the parole statutes of many jurisdictions are patterned after the Model Penal Code and include the application of similarly enumerated criteria in parole-release determinations. He suggested that under the majority’s analysis, the inclusion of any such factor necessarily creates a protectible expectation of release, regardless of the particular statutory wording. Despite Marshall’s

23. Id. at 13.
24. “Because of the broad spectrum of concerns to which [due process] must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.” Id.
25. Id.
26. Id. at 40 n.23 (Marshall, J., dissenting).
27. The Board had followed Nebraska’s statutory procedure by supplying inmates with a denial form containing a printed list of reasons for denying parole. In addition to a set of general explanations for parole denial, the Board checked off a general list of recommendations for corrective behavior. The Court held that “nothing in the due process concepts as they have thus far evolved . . . requires the Parole Board to specify the particular ‘evidence’ in the inmate’s file or at his interview on which it rests the discretionary determination that an inmate is not ready for condition release.” Id. at 15.

The Board’s procedure of supplying the inmate with general reasons and behavior recommendations satisfied due process. The Court cautioned that requiring the Board to provide a summary of the evidence would make the discretionary system of parole tantamount to an adversary proceeding. The parole-release decision and traditional judicial decision-making constitute inherently different functions in the administration of justice and do not require the same degree of due process. Therefore, parole-release decisions are rarely proper subjects of judicial review. Id. at 8; see also Dumschat, 452 U.S. at 464.

Another factor in the decision to afford only a modicum of due process protection to parole-release candidates was the Court’s concern that burdensome procedural requirements might dissuade states from offering parole. The Court preferred to encourage experimental state parole systems. Id.

The Court rejected the stricter due process protections required in decisions to revoke parole, probation and good-time credits. Revocation procedures are primarily designed to elicit specific facts, whereas the parole-release decisions rest on subjective predictive determinations within the Board’s discretion. Therefore, parole-release decisions require less constitutional protection than revocation procedures. Id. at 9-10, 14. See supra note 15.

29. Justices Brennan and Stevens joined in Justice Marshall’s partial dissenting opin-
emphasis on the explicit standards contained in the parole statutes of forty-seven states, the *Greenholtz* majority rejected such an expansive interpretation of an inmate's liberty interest in parole.

In *Connecticut Board of Pardons v. Dumschat*, the Supreme Court stressed the narrowness of its holding in *Greenholtz* and restricted the factors federal courts may take into account in determining whether a state's conditional release statute creates a constitutional entitlement. Life-term inmates in *Dumschat* argued that the Board of Pardons' practice of granting approximately seventy-five percent of the applications for commutation of life sentences created a legitimate expectation of release, thereby requiring the Board to explain its reasons for denial. The Court rejected the establishment of constitutional protections based on the statistical likelihood of obtaining release, and

-ion. Despite the dissenters' criticism, the Court consistently emphasized its reliance on the unique "shall/unless" mandate and de-emphasized the criteria applied in the parole decision in establishing the basis for affording Nebraska inmates constitutional protection. *Id.* at 22, 30 (Marshall, J., dissenting in part). *But see id.* at 12; *Dumschat*, 452 U.S. at 463, 466.

In a partially concurring and dissenting opinion, Justice Powell also disagreed with the majority's conclusion that the application of the due process clause to parole-release determinations depends upon the particular wording of the statute which governs the deliberations of the Parole Board. He would have held that the mere existence of a parole system sufficiently invokes constitutional protections of the due process clause. *Greenholtz*, 442 U.S. at 18-19 (Powell, J., concurring in part and dissenting in part).


31. The Connecticut Board of Pardons has the power to commute the sentences of life inmates by shortening the minimum prison term, which consequently expedites parole eligibility. This authority is derived from the following statute, which reads in pertinent part:

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

*Id.* at 460 (quoting CONN. GEN. STAT. § 18-26 (1981)).

The inmates sought a declaratory judgment that the Board's failure to provide a written statement of reasons for denying commutation violated their rights guaranteed by the due process clause. The Court rejected all three of the inmates' arguments, holding first, that inmates possessed no constitutional right to commutation; second, the Board's consistent practice of granting commutations to most life inmates did not create a legitimate entitlement; and, third, the language of the Connecticut statute created no liberty interest.

32. This case involved denials of commutations, not parole. Parole determinations are made by the Board of Parole, a separate body. *Id.* at 460 n.3.

33. The inmates argued that the Board had created an "unwritten common law" by consistently granting commutations to most life inmates, which sufficiently created a protectible liberty interest. The Court disagreed, stating that "statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would triv-
held that the constitutional entitlement can derive only from statutes or other rules which explicitly define the duties of the decision-making body.\textsuperscript{34} The Court reiterated that in \textit{Greenholtz}, the unique “shall/unless” wording of the Nebraska parole statute, mandating release absent a specific finding, was what had created a protectible right.\textsuperscript{35} By contrast, the Connecticut commutation statute empowered the Board with absolute discretion, and consequently did not provide a state-created liberty interest worthy of constitutional protection.\textsuperscript{36}

The Supreme Court articulated a further limitation on the source of a prisoner’s claimed liberty interest in \textit{Jago v. Van Curen},\textsuperscript{37} when it reversed the Sixth Circuit’s decision that an inmate’s reliance on “mutually explicit understandings,” could create a constitutionally protected liberty interest.\textsuperscript{38} Although “mutually explicit understandings” may determine the existence of a constitutionally protected property interest based on principles of contract law, such principles are not relevant to the existence of a liberty interest in the context of prisoner parole.\textsuperscript{39} The Court based its decision on the broad discretion and flexibility

\textsuperscript{34} Id.

\textsuperscript{35} Id. at 465.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Under the law in effect when Jago was convicted, he would have become eligible for parole in March 1976. In 1974, the state enacted a “shock parole” statute which made first offenders who had served more than six months in prison for non-violent crimes eligible for early parole. Jago was approved for “shock parole,” completed prison pre-release classes and was measured for civilian clothes. Before his conditional release, the Board rescinded its early decision to grant “shock parole,” because it discovered that Jago had misrepresented material facts in his interview and in his parole plan. Jago alleged that he was constitutionally entitled to a hearing to explain his false statements. Id. at 14-15.

\textsuperscript{39} The concept of “mutually explicit understandings” arose in the context of the fourteenth amendment’s protection of property interests in \textit{Perry v. Sindermann}, 408 U.S. 593 (1972). Although a \textit{property} interest in employment may be created by implied contract (see, e.g., \textit{Jago v. Van Curen}, 408 U.S. 593 (1972), \textit{Dumschat} holding that no unwritten common law could create a liberty interest, the Court determined that the general law of contracts, including “mutually explicit
necessary in the administration of penal systems, which would be rendered ineffective if any decision regarding an individual inmate could result in an implied contract thereby necessitating due process protection.\textsuperscript{40}

The \textit{Greenholtz—Dumschat—Jago} trilogy illustrates the Supreme Court's determination to prevent federal judicial review of most discretionary decisions made by state penal authorities. The Court limited the constitutional protection afforded parole-release decisions at both stages of the due process analysis.\textsuperscript{41} With regard to the question of whether state action sufficiently implicates the due process clause, the Court limited the sources of constitutionally protected liberty interests. Beginning with the principle that no inmate possesses a constitutional right to early release, \textit{Greenholtz} restricted the finding of a protectible expectation of parole to uniquely-worded legislation which provides prisoners with a statutory presumption of release.\textsuperscript{42} \textit{Dumschat} limited the finding of a protectible liberty interest to state statutes and rules, holding that statistical probabilities of early release do not create a liberty interest. In addition \textit{Dumschat} re-emphasized the unique "shall/unless" statutory language which created a liberty interest in \textit{Greenholtz}.\textsuperscript{43} \textit{Jago} further restricted the source of a protectible right to parole-release: mutually explicit understandings do not create a legitimate expectation of release.\textsuperscript{44}

In addition to limiting the sources creating a liberty interest, the Court demonstrated its federal non-interventionist policy with regard to parole-release determinations by the degree of procedural protection required under the fourteenth amendment. If a state-created liberty interest in parole-release does exist, a modicum of procedural protection is necessary. The rationale under \textit{Greenholtz}, \textit{Dumschat} and \textit{Jago} is clear: the reasons underlying most discretionary decisions of experienced penal administrators need not be justified to the federal courts.

\footnotesize{understandings," played no part in the creation of protectible liberty interests. 454 U.S. at 18-20.

\textsuperscript{40} "[T]o hold as we are urged to do that any substantial deprivation imposed by prison authorities triggers the protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." \textit{Id.} at 19 (quoting \textit{Meachum v. Fano}, 427 U.S. 215, 225 (1976)) (emphasis in original).

\textsuperscript{41} See supra notes 9-10 and accompanying text.

\textsuperscript{42} See supra notes 11-26 and accompanying text.

\textsuperscript{43} See supra notes 27-35 and accompanying text.

\textsuperscript{44} See supra notes 36-39 and accompanying text.}
In *Greenholtz*, the Supreme Court explicitly stated that the applicability of due process to each state's parole statute must be determined on a "case-by-case" basis. The Nebraska statute analyzed in *Greenholtz* is unique in its "shall/unless" formula. Other state parole-release statutes analyzed by courts following *Greenholtz* are of three distinct types.

One group of parole-release statutes vests the Board with broad discretion. These statutes establish the mere possibility
of parole and do not require the granting of parole upon a showing of any particular facts. The statutory language includes the permissive auxiliary "may." Typically, the Board's sole statutory guidance in determining parole eligibility is that it act in the public interest. Courts construing this type of parole-release statute have unanimously held that such language creates no liberty interest on which prisoners may ground due process claims.\(^4\)

A second class of parole-release statutes includes the words "when" and "shall" in the statutory framework. Three courts have held that their respective statutes create no protectible entitlement to parole;\(^4\) one jurisdiction reached a contrary result, discerning sufficient similarity with the *Greenholtz* statute to find a legitimate expectation of release.\(^4\) That court's analogy

\(^{47}\) \("[T]he Colorado parole statute gives the Board broad discretion and does not require the granting of parole upon a showing of any particular facts."\) Scheumann v. Colorado State Bd. of Adult Parole, 624 F.2d at 175; "Nebraska's 'shall... unless' system appears to be quite unusual... New Mexico's parole system contains no 'shall... unless' directive to the parole board." Candelaria v. Griffin, 641 F.2d at 869, 870; "Unlike the Nebraska statute...[the Ohio] statute does not mandate a presumption of parole release..." Wagner v. Gilligan, 609 F.2d at 867. "The absence of mandated state-law standards—both for release eligibility as well as for eligibility to be considered for parole release—does set Oklahoma apart from Nebraska..." Phillips v. Williams, 608 P.2d at 1135.

\(^{48}\) \("A parole... shall be ordered only for the best of society... when the Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen...[with the approval of the Governor]."\) (Emphasis added.) Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980), following Indiana law as interpreted in Murphy v. Indiana Parole Bd., 397 N.E.2d 259 (Ind. 1979), construed IND. CODE § 11-1-9 (1979), which reads in relevant part: "A prisoner shall be placed on parole... only when the Indiana parole board believes that he is able and willing to fulfill the obligations of a law-abiding citizen... [with the approval of the Governor]." (Emphasis added.)

\(^{49}\) \("A prisoner... shall release on parole... any [eligible] person... when in its opinion there is reasonable possibility that the prisoner can be released without detriment to himself or to the community."\) Campbell v. Montana State Bd. of Pardons, 470 F. Supp. 1301 (D. Mont. 1979), construed MONT. CODE ANN. § 46-23-201 (1) (1978), which provides in pertinent part: "[T]he board shall release on parole... any [eligible] person... when in its opinion there is reasonable possibility that the prisoner can be released without detriment to himself or to the community." (Emphasis added.)

\(^{49}\) See Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697 (8th Cir. 1981), cert. denied, 102 S. Ct. 1621 (1982), construing MO. REV. STAT. § 549.261 (1979), which
appears justified given the statutory mandate that the Board “shall release” the inmate when detailed regulatory guidelines are met.\(^5\)

The third category of parole-release statutes contains negative mandatory language.\(^5\) Rather than provide for presumptive re-

reads in relevant part: “When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release [him] on parole . . . .” (Emphasis added.)

In addition to the statutory guidelines, the Missouri Board adopted detailed guidelines to aid in its parole-release decisions. See 13 C.S.R. § 80-2.010(5) (1980). The court of appeals thus concluded that the Missouri law providing that when the statutory and regulatory guidelines are met the inmate shall be released on parole gives rise to the same protectible entitlement as the Nebraska scheme, providing that the prisoner shall be paroled unless certain findings are made.

50. See supra note 49.

51. See Slocum v. Georgia State Bd. of Pardons & Paroles, 678 F.2d 940 (11th Cir. 1982); accord Jackson v. Reese, 606 F.2d 159 (5th Cir. 1979); Houser v. Morris, 518 F. Supp. 873 (N.D. Ga. 1981) construing GA CODE § 42-9-42 (1979), which reads in pertinent part: “No prisoner shall be . . . placed on parole until and unless the board shall find that there is a reasonable possibility that . . . his release will be compatible with his own welfare and society.” (Emphasis added.)

Staton v. Wainwright, 665 F.2d 686 (5th Cir.), cert. denied, 102 S. Ct. 1757 (1982), cited with approval in Hunter v. Florida Parole & Probation Comm’n, 674 F.2d 847 (11th Cir. 1982), construing FLA. STAT. § 947.18 (1981), which provides in relevant part:

No inmate shall be placed on parole until and unless the commission shall find that there is a reasonable probability that, if he is placed on parole, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and society. (Emphasis added.)

Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979), construed N.Y. Exec. Law § 259-i2(c) (McKinney 1978), which reads in relevant part:

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate 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 and will not so deprecate the seriousness of his crime as to undermine respect for the law.

(Emphasis added.) In addition, the New York Parole Board supplemented the parole statute with written guidelines governing its parole decisions. See N.Y. EXEC. LAW § 259-c, 1 (McKinney 1978).


No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board . . . is of the opinion that . . . his release is not incompatible with the welfare of society.

No prisoner shall be released on parole except by a majority vote of the board, nor unless the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge if so released.

(Emphasis added.)
lease, such statutes direct the Board of Parole not to grant parole unless certain determinations are made by the Board. Except for the Seventh Circuit's construction of the Illinois parole-release statute, each court analyzing its respective state statute distinguished the "release . . . shall not be granted . . . but . . . if" or "no prisoner shall be released . . . until and unless" language from the unique "shall order . . . release unless" directive contained in the Nebraska statute analyzed in Greenholtz.

Scott: Section 1003-3-5(c) Creates a Liberty Interest in Parole-Release

Prior to Greenholtz, the Seventh Circuit had held that the mere existence of a state parole system invoked the protection of the fourteenth amendment. In addition, that court held that minimum due process required that Illinois parole candidates be given specific reasons for denial of parole-release. Greenholtz explicitly rejected both holdings.

United States ex rel. Scott v. Illinois Parole and Pardon Board provided the Seventh Circuit with the opportunity to reconsider the Illinois parole-release statute in light of Greenholtz. Scott had served eleven years of a twenty-five to forty year sentence for murder. He appealed the district court's denial of habeas cor-

52. See infra notes 57-65 and accompanying text.

53. "While many of the provisions structuring the [Georgia] board's exercise of its discretion include mandatory language [sections omitted]—there is a critical distinction between 'a scheme that requires release 'unless' adverse findings based on [specific] criteria are made' [and] a scheme that simply obligates the board to consider such criteria in exercising its discretion." Slocum v. Georgia State Bd. of Pardons & Paroles, 678 F.2d at 941; "The 'shall/unless' formula was decisive for the Court. It is apparent that New York's parole provisions, unlike Nebraska's, do not establish a scheme whereby parole shall be ordered unless specified conditions are found to exist." Boothe v. Hammock, 605 F.2d at 664; "The Alabama statutes, as the Texas and Georgia parole statutes, do not contain any language similar to that in the Nebraska statute, which mandates parole unless one of the four exceptions arises." Johnston v. Alabama Pardon & Parole Bd., 530 F. Supp. at 590.


55. Id. at 804.

56. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained." 442 U.S. at 11 (emphasis in original). [W]e find nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular "evidence" in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release. Id. at 15.

57. 669 F.2d 1185 (7th Cir.) (per curiam), cert. denied, 103 S. Ct. 468 (1982).
pus, alleging that the Illinois Parole and Pardon Board had pro-
vided him with a constitutionally deficient statement of reasons
for his denial of parole. In order to determine whether Scott could
claim procedural protection under the due process clause, the cir-
cuit court looked to the language and structure of the statute
itself to decide whether it provided Illinois inmates with a legiti-
mate expectation of release.\textsuperscript{58} Section 1003-3-5(c)\textsuperscript{59} of the Illinois
parole statute reads as follows:

\begin{quote}
The Board \textit{shall not parole} a person eligible for parole \textit{if} it
determines that:
(1) there is a substantial risk that he will not conform to
reasonable conditions of parole; or
(2) his release at the time would deprecate the seriousness
of his offense or promote disrespect for the law; or
(3) his release would have a substantially adverse effect
on institutional discipline.\textsuperscript{60}
\end{quote}

Comparing the language of section 1003-3-5(c) with the Ne-
braska statute's “shall/unless” language,\textsuperscript{61} the Seventh Circuit
construed the “shall not/if” wording as stating the Nebraska
rule in the negative, similarly requiring the Board to grant
parole in the absence of specified reasons, thereby creating a le-
gitimate expectation of parole-release.\textsuperscript{62} The court acknowledged
that the “shall not/if” language could reasonably be read as list-
ing the circumstances under which the Board must deny parole,
leaving it free to exercise discretion in the absence of those cir-
umstances. Under that construction Illinois inmates would pos-
sess no legitimate expectation of parole-release and therefore no
due process protection would be required.\textsuperscript{63} Despite Illinois and
federal cases to the contrary,\textsuperscript{64} the Seventh Circuit interpreted
the statute, Council Commentary, and Board rules as creating
the same legitimate right to parole as that granted by the unique

\begin{footnotes}
58. \textit{Scott}, 669 F.2d at 1188.
59. ILL. REV. STAT. ch. 38, § 1003-3-5-(c) (1982).
60. \textit{Id.} (Emphasis added.)
61. \textit{Compare supra} note 18 with \textit{supra} text accompanying note 60.
62. The court viewed the Illinois parole-release statute as “practically a mirror image
of the Nebraska statute.” 669 F.2d at 1188.
63. \textit{Id.} at 1189.
64. \textit{See infra} notes 90-92 and accompanying text for Illinois cases. \textit{See supra} notes
51-53 and accompanying text for federal cases.
\end{footnotes}
mandate of the *Greenholtz* statute.\(^{65}\)

Having concluded that the Illinois parole-release statute afforded prisoners a constitutionally protected liberty interest, the court next determined whether the Board's statement of reasons accompanying Scott's parole denial sufficiently satisfied the requirements of due process.\(^{66}\) Scott had received the following reasons for the Board's denial of parole:

The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted namely, Murder, receiving a 25-40 year sentence. Accordingly, your minimum sentence of 25 years, does not make you eligible to be provided with a release date under the new law.\(^{67}\)

*Scott* held that these reasons were constitutionally inadequate. The court reinstated the test of constitutional sufficiency it previously adopted prior to *Greenholtz*,\(^{68}\) requiring the Board to

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\(^{65}\) The Illinois Prisoner Review Board is obligated to promulgate rules pursuant to ILL. REV. STAT. ch. 38, § 1003-3-2(d) (1981). Rule V, entitled "Basis for Denying Parole," provides a list of factors the Board should consider as a basis for parole denial under § 1003-3-5. See *Scott*, 669 F.2d at 1189 n.6. The court reasoned that such factors were intended to be all-inclusive, and consequently required the Board to grant parole-release unless one of the enumerated factors underlied its decision to deny parole. *Id.* at 1189.

In addition to Board Rules, *Scott* construed the following Council Commentary accompanying § 1003-3-5(c) as providing additional support for its conclusion that the Board must grant parole-release in the absence of the statutory criteria:

Subparagraph (c) expands the vague charge to the Board to determine "whether [the offender] is capable again of becoming a law-abiding citizen." Section 203 (repealed). The Board should state one or more of the reasons listed in subparagraph (c) as a basis for its decision denying parole as required by subparagraph (f). Additional reasons may also be stated.

ILL. REV. STAT. ch. 38, § 1003-3-5(c) (Council Commentary) (Smith-Hurd 1982). According to the court, the language of the Commentary suggests that reasons given for parole denial other than those specified in the statute are in addition to, and not in place of, the statutory reasons relied upon by the Board. Thus, if the Board fails to provide a statutory reason for parole denial, the court concluded, § 1003-3-5 mandates parole-release. 669 F.2d at 1190.

\(^{66}\) 669 F.2d at 1190.

\(^{67}\) *Id.*

\(^{68}\) In *Richerson*, 525 F.2d at 804, the Seventh Circuit had adopted the test articulated by the Second Circuit in *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 934 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974):

To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision
inform an inmate "what in his record was felt by the Board to warrant his denial and why." Consequently, the Seventh Circuit held the Board's general statement of reasons constitutionally deficient.

**DISCUSSION AND ANALYSIS**

*Does Section 1003-3-5(c) Create a Protectible Liberty Interest in Parole?*

The *Scott* decision represents a significant departure from the Supreme Court's policy of minimal federal judicial intervention in state parole-release decision-making. Acknowledging that the Illinois parole-release statute "can be read" as either creating or not creating a legitimate expectancy of release in parole, the Seventh Circuit strained to infer a protectible liberty interest, despite the plain language of the statute, legislative intent, Illinois case law, and the policy expressed by *Greenholtz* and its progeny.

Moreover, the vital connection between Nebraska's "shall/unless" mandate and the *Greenholtz* Court's finding of a liberty interest had previously been recognized by the Seventh Circuit itself. By analogizing the Nebraska and Illinois parole statutes, *Scott* ignored the substantial difference between "shall release unless" and "shall not release if" and placed undue emphasis on the parallel criteria of the statutes, thus evidencing reliance on Justice Marshall's dissenting opinion in *Greenholtz* rather than the opinion of the Court.

In order to bypass the plain import of the Illinois statute's

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is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision... and the essential facts upon which the Board's inferences are based.

69. *Scott*, 669 F.2d at 1191.

70. The court reasoned as follows: "[I]f the Board does grant parole to some inmates whose commitment offense is murder, then its refusal to do so here, unless it is completely arbitrary, must be for some other reason that the fact Scott was convicted of murder." *Id.*

71. *Id.* at 1189.

72. In Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980), the Seventh Circuit followed the Indiana Supreme Court's holding that the state's parole-release statute created no protectible interest. See *supra* note 48 for the Indiana statute in pertinent part. The court of appeals distinguished the *Greenholtz* finding of a state-created liberty interest in parole: "The Court identified as crucial the language of the statute which mandated that the Nebraska Parole Board *shall* grant parole to an inmate *unless* one of the four enumerated negative determinations are made." 618 F.2d at 481 (emphasis in original).
“shall not” language, Scott “simply” inverted the decisive language preceding the factors requiring parole denial. There is, however, a material difference between Nebraska’s statutory scheme in which “the structure of the provision together with the use of the word ‘shall’ binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found,” and the Illinois legislature’s contrary requirement that the Board “shall not” order parole if certain conditions are met. The Nebraska statute provides for presumptive parole-release; in contrast, the Illinois statute provides for presumptive parole denial. The Seventh Circuit’s expansive interpretation of the Illinois parole-release provisions permits unwarranted federal judicial scrutiny of the highly subjective parole-release decision, a decision the Illinois legislature has entrusted to the experience and skill of the administrative body best equipped to render “an ‘equity’ type judgment that cannot always be articulated in traditional [judicial] findings.”

In the course of construing section 1003-3-5(c), the court purported to rely on the Council Commentary which explained the

73. 669 F.2d at 1188.
74. Greenholtz, 442 U.S. at 11-12 (emphasis added).
75. In support of its determination that the Illinois parole-release statute sufficiently approximated the Nebraska statute to provide a state-created liberty interest, the court noted that “[e]ven the specified conditions under which release is to be deferred are the same, except for the fact that the Nebraska statute includes an additional reason for deferral which Illinois’ does not.” Scott, 669 F.2d at 1188. The relevance of this point is unclear. The Seventh Circuit seems to follow Justice Marshall’s dissent by focusing on the common criteria, rather than on the contrary statutory language which was decisive for the Greenholtz majority. See supra notes 27-29 and accompanying text. The Seventh Circuit appears to have been straining to return its rejected Richerson holding. The court could have readily concluded that a statutory mandate directing that the Board “shall order [an eligible inmate’s] release” differs from a legislative command requiring that the Board “shall not parole” a person eligible for parole. Compare supra note 18 with text accompanying note 60. There was no need for the court to look for further guidance from the Council Commentary and the Board’s own Rules Governing Parole. See People v. Robinson, 89 Ill. 2d 469, 475, 433 N.E.2d 674, 677 (1982) (judicial construction of legislative intent).
76. The ten members of the Illinois Prisoner Review Board are required to have had at least 5 years of actual experience in the fields of penology, corrections work, law enforcement, sociology, law, education, social work, medicine, psychology, other behavioral sciences, or a combination thereof. At least 5 members so appointed [by the Governor with the advice and consent of the Senate] must have had at least 3 years experience in the field of juvenile matters.
77. Greenholtz, 442 U.S. at 8.
78. See supra note 65.
legislative intent. The court, however, failed to address the implications of the commentary's first sentence which indicates that section 1003-3-5(c) was enacted to clarify the factors previously used by the Board in its discretionary parole-release decision. Thus, the discretion exercised by the Board in its decision-making was retained, not restricted, by the addition of section 1003-3-5(c). The new section merely codified general criteria in order to make the parole-release decision less mysterious to the eligible inmate and the general public. The first sentence of the Council Commentary supporting legislative preservation of Board discretion in parole decision-making, in conjunction with the plain meaning of the “shall not” language of section 1003-3-5(c), illustrates that the legislature intended to provide presumptive parole denial, rather than presumptive parole-release.

Illinois case law provides further support that the legislature retained and clarified the Board’s discretion in parole-release determinations when it set forth the criteria contained in section 1003-3-5. The Illinois Supreme Court has classified parole as a matter of grace and clemency, rather than of legislative entitlement. The court has clearly stated that “parole is [not] mandatory because the eligibility-requirements are met.” Referring specifically to section 1003-3-5(c), an Illinois appellate court described the Board’s great discretion as limited only by the statutory directive that “the Board must not parole a person eligible” if one of the three statutory criteria exists. Thus, Illinois courts

79. Id.

80. Senator Londrigan twice explained the purpose behind the Senate amendment eventually enacted as § 1003-3-5: “This is just language clarifying interpreting the language of the new Bill which in itself seeks to clarify language of the Code of Correction.” House concurs in Senate amendment: Hearings on H.B. 1086, “House Bill 1086 . . . clarifies . . . further the language of the Code of Corrections. The original purpose of the legislation was to clarify the Code of Corrections.” The House motion to accept the Governor’s recommendation for change prevailed, Hearings on H.B. 1086, P.A. 939, 78th Ill. Gen. Ass. amending ch. 38, § 1003-3-5, effective January 1, 1973.

See Fields, Illinois Parole and Pardon Board Adult Parole Decisions, 62 Ill. B.J. 20, 21 (1973) (where Theodore P. Fields, past Chairman of the Parole and Pardon Board (Jan. 1971 to Aug., 1972) wrote: “This statute sets forth the general criteria for denying the parole that have been followed by the Board for some time.”) See also supra note 7.

81. See Fields, supra note 80, at 23.


84. People ex rel. Tucker v. Kotios, 42 Ill. App. 3d 812, 818, 356 N.E.2d 798, 804 (1976) (emphasis added). The court noted that an evaluation based on these criteria involves
have consistently described the Board’s authority in parole-release determinations as discretionary.85

Scott dismissed Illinois case law as inconclusive because it was not directly on point.86 Although the state courts’ discussion of the Illinois parole statute does constitute dicta with regard to the precise issue raised in Scott, the Illinois judiciary’s interpretation of parole presents persuasive authority against finding a state-created liberty interest in parole-release.87

Before the Seventh Circuit decided Scott, federal district courts had held that the Illinois parole-release statute did not create a liberty interest, following the analysis of Greenholtz.88 In 1980, the District Court for the Central District of Illinois addressed an attack on the constitutional sufficiency of the Board’s stated reason for an inmate’s parole denial.89 That court recognized a critical distinction between the “shall/unless” language of Greenholtz’s Nebraska statute and the “shall not/if” wording contained in section 1003-3-5(c). According to the district court, the “unique structure” of the Nebraska statute directly vested in a prisoner a right to parole; the Illinois statute did not.90 Without a state-created right to parole, the district court held that an Illinois prisoner possessed no protectible liberty interest that can be violated by the state’s denial of parole.91

In a brief footnote, Scott dismissed the district court’s reliance on the precise “shall/unless” language of the Nebraska statute as a “narrow reading of Greenholtz.”92 The Seventh Circuit thus ignored the fact that Greenholtz invites a narrow reading,93 and

86. 669 F.2d at 1189 n.4.
90. Id. at 370.
91. Id.
92. 669 F.2d at 1188 n.3.
93. “[W]e emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a
that subsequent Supreme Court cases have reinforced the limited scope of that decision.\textsuperscript{94}

\textit{Scott: What Process Is Due?}

Having construed the Illinois parole statute to confer a liberty interest upon an eligible inmate, the Seventh Circuit's next task in \textit{Scott} was to decide what procedural protection of that interest the Constitution required. Ignoring \textit{Greenholtz}'s explicit holding that due process does not require the Parole Board to "specify the particular 'evidence' in the inmate's file or at his interview" on which it based a parole-release decision,\textsuperscript{95} the Seventh Circuit returned to its controlling law prior to \textit{Greenholtz}. That law required that each decision denying release be accompanied by "both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based."\textsuperscript{96} \textit{Scott} held the statement of reasons given by the Parole Board\textsuperscript{97} constitutionally insufficient because the statement failed to indicate that the Board actually considered the inmate's specific conduct, and not just the statutory offense for which the inmate was convicted. The court recognized that "\textit{Greenholtz} makes clear" that due process does not require the Parole Board to specify the particular "evidence" it relied upon in its discretionary determination.\textsuperscript{98} Nevertheless, the Seventh Circuit required the Illinois Prisoner Review Board to inform the inmate "what in his record was felt by the Board to warrant his denial and why," thereby affording inmates the exact procedure \textit{Greenholtz} held constitutionally unnecessary.\textsuperscript{99} Unlike the Supreme Court, the Seventh Circuit neglected to consider the likelihood of an erroneous decision in terms of the entire system of procedural safeguards currently employed by the Board.\textsuperscript{100} Rather, the Seventh Circuit reformulated its own perception of minimum due process requirements: "We think any reason for denial necessarily assumes some facts or facts about the inmate's case. It is this fact or facts
that the Board should include in its statement of reasons.”


In 1981, the Seventh Circuit further expanded the procedural protections afforded Illinois prisoners in parole-denial determinations contrary to the Supreme Court’s policy of minimal judicial intervention. In *Walker v. Irving*, the court held that the due process clause of the fourteenth amendment requires the Prisoner Review Board to grant inmates the opportunity to review the entire file considered in the decision to deny parole-release. The Seventh Circuit based its holding on a Board rule entitling parole candidates access to all documents considered in the parole-release decision. The court reasoned that the Board’s rule “creates for parole candidates a justified expectation of access, and that it specifies precisely an element of due process.” In addition, the court stated that “we need not determine on our own what due process requires [because] the requirements of Rule IV-C recognize and implement the Board’s constitutional obligation to accord parole candidates due process in connection with denials of parole.”

Two difficulties are presented by the approach taken in *Walker*. First, the opinion appears to confuse the two separate steps of due process analysis. The court looked to Board rules to determine the amount of procedural protection constitutionally required without analyzing whether the Illinois procedures already available to the parole candidate sufficiently minimized the risk of erroneous decision making. *Greenholtz* identified this inquiry as critical to determining the amount of procedural protection constitutionally required in a particular situation. Instead, *Walker* focused solely upon the Board’s rule as creating a “justi-

101. *Scott*, 669 F.2d at 1191 n.7.
102. 694 F.2d 499 (7th Cir. 1982).
103. *Id.* at 503.
104. Rule IV-C reads in pertinent part: “A parole candidate shall have access to all documents which the Board considers in denying parole or setting a release date.” Ill. Admin. Reg., vol. II, no. 44.
105. 694 F.2d at 503.
106. “The function of legal process, as that concept is embodied in the Constitution, and in the realm of fact finding, is to minimize the risk of erroneous decision.” *Greenholtz*, 442 U.S. at 13. See also supra note 25.
107. 442 U.S. at 12.
fied expectation of access,"108 in a manner similar to the Supreme Court's initial determination of whether a state parole statute provides a justified expectation of early release.109

In essence, the court asserted an inmate's abstract interest in insuring that his file contains accurate information, without analyzing whether the claim of access was constitutionally necessary in light of Illinois' available procedural protections.110 In addition, the opinion failed to determine whether the requirement imposes an undue burden on the parole authority or whether the state has a legitimate interest against allowing such parole candidate access to all the information contained in his file.111 By not addressing the appropriate inquiry, the federal court imposed the Rule of Access as a procedural safeguard onto discretionary state parole determinations without evaluating whether it was constitutionally required.

This imposition raises a second problem with the Walker analysis: whether the Seventh Circuit determined that the Board's Rule of Access, which the Board decided not to follow in this particular situation, was constitutionally mandated is unclear. At one point, the court stated it need not decide the issue,112 yet it later stated that the Rule fulfilled the state's "due process obligations" to parole candidates.113 If the court of appeals was defining the scope of due process by state legislation, that suggests that if the Board abrogated its Rule, fulfillment of

108. 694 F.2d at 503.
109. See, e.g., Ill. Rev. Stat. ch. 38, §§ 1003-3-4, -3-5 (1982). As support for the proposition that Illinois parole candidates incur a sufficient risk of parole denial based on erroneous information contained in inmates' files, the Seventh Circuit referred to Justice Marshall's dissent in Greenholtz: "[O]n occasion, 'researchers and courts have discovered many substantial inaccuracies' in prisoner records." Walker, 694 F.2d at 503. Although the court correctly stated that "[t]he relevant [due process] inquiry is whether . . . the combination of procedures available to the parole candidate is sufficient to minimize the risk that a decision will be based on incorrect information," it did not even mention other procedures available to Illinois parole candidates. Id. Cf. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (procedural due process need not be so comprehensive as to preclude the possibility of error). See also Greenholtz, 442 U.S. at 12-13 (the scope of protection required by the fourteen amendment depends upon the risk of erroneous decision-making that results from protections currently in existence).
110. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (discussion of the considerations in determining the process due in the penal context: "[T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.").
111. Walker, 694 F.2d at 503.
112. Id.
113. Id. at 504.
its provisions would no longer be constitutionally required. On the other hand, if Walker determined that the Board merely promulgated a Rule of Access in recognition of a constitutional due process requirement, the court did not address the appropriate inquiry. Other than making a general statement that the danger of inaccurate information existing in parole candidates’ records is “not significant,” the court never discussed whether current Illinois procedures sufficiently minimized that risk of error.

The Seventh Circuit’s analysis of the constitutional sufficiency of the statement of reasons accompanying Walker’s parole denial is also troublesome in light of Scott. The statement of reasons accompanying Scott’s notice of parole denial was held constitutionally deficient because of the court’s inability to determine whether his release at that time would deprecate the severity of his offense. In Walker, the Board’s statement referred to the three offenses of rape, armed robbery, and attempted murder, and their concomitant sentences. The court held this statement constitutionally sufficient due to the combination of the three offenses, from which the Board “could well have concluded” that the inmate’s release would deprecate the seriousness of the offense or promote disrespect for the law. Thus, denial of parole based on the stated reason that the conviction was for murder was held constitutionally inadequate, whereas denial of parole based on conviction for three lesser offenses met due process. In effect, the court held a recitation of the statutory com-

114. In addition, Walker criticized, as ad hoc determinations, three circuit court opinions which refused to impose a constitutional right of access because the procedures available under the respective parole systems sufficiently minimized the risk of error. Walker, 694 F.2d at 503. See Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172 (10th Cir. 1980); Dye v. United States Parole Comm’n, 558 F.2d 1376 (10th Cir. 1977) (per curiam); Billateri v. United States Parole Bd. 541 F.2d 938 (2d Cir. 1976). The court, however, failed to discuss the reasoning underlying any of these decisions.
115. See supra note 109.
116. Walker received the following statement of reasons for denial of parole:
   The above action is taken based on the Board’s feeling that parole at this time
   would deprecate the seriousness of the crime for which you were convicted and
   would promote disrespect for the law. This is [based] on the crimes of Rapes,
   Armed Robbery and Attempted Murder, for which you received sentences rang-
   ing from 100-150 years [minimum], you do not qualify for a release under the
   provisions of the new law.
Walker, 694 F.2d at 501.
117. Id.
118. Id. at 502.
mitment offense is constitutionally insufficient if the inmate has been convicted of only one offense, but constitutionally sufficient if the prisoner has been convicted of more than one offense. Moreover, that rule applies when the commitment offense is murder, and the other offenses constitute less serious crimes.

The Ex Post Facto Clause and Illinois Inmates’ Protectible Liberty Interest in Parole-Release

In 1973, the Illinois legislature amended section 1003-3-5(c) of the Illinois parole statute, providing explicit general criteria for the Board’s determination of parole-release. The second criterion prohibits the Board from granting parole-release if it determines that “his release would deprecate the seriousness of his offense or promote disrespect for the law.”

In Welsh v. Mizell, the Seventh Circuit held that the Board violated the ex post facto clause of the Constitution when it relied solely on the second criterion to deny parole to an inmate incarcerated under the prior statutory provision. According to the court in Welsh, the parole-release provision in effect before the 1973 amendment did not permit the Board to consider principles of general deterrence in its parole-release decision. The inmate in Welsh had committed his offense in 1962, but had been subsequently denied parole solely upon the new criterion. The court held that Welsh was disadvantaged by this retrospective application of the additional criterion and remanded the

119. See supra note 7.
120. ILL. REV. STAT. ch. 38, § 1003-3-5(c)(2) (1982).
121. 668 F.2d 328 (7th Cir.), cert. denied, 103 S. Ct. 235 (1982).
122. “No state shall... pass any... ex post facto law.” U.S. CONST. art. I, § 10, cl. 1.
123. “The severity of the offense committed and society’s concern with sufficient punishment did not enter directly into the Parole Board’s decision.” 668 F.2d at 330. Despite persuasive authority to the contrary, the court in Welsh stated that in its 1973 amendment, the Illinois legislature enacted “new” parole criteria based on the Model Code. But cf. supra note 80. Although beyond the scope of this article, a strong argument can be made that the Seventh Circuit also expanded due process protections in Welsh by erroneously concluding that § 1003-3-5(c)(2) was more onerous than the law in effect at the time of Welsh’s conviction. See ILL. REV. STAT. ch. 38, § 808(a) (1963), reprinted in ILL. REV. STAT. ch. 108, § 206 (1965).
124. Because § 1003-3-5(c)(2) “could not have had decisive weight under the Board’s 1962 procedures... the change in the law has worked a substantial harm to Welsh [because] at the time of his offense, exemplary conduct during his imprisonment might
case to the Board to consider Welsh’s case by the guidelines in effect in 1962.125

In Horton v. Irving,126 the District Court for the Northern District of Illinois consolidated two habeas corpus petitions to determine whether denial of the petitioners’ applications for parole-release deprived them of their constitutional rights. Both petitioners had committed murder prior to the enactment of section 1003-3-5(c)(2). Each alleged the Board denied parole on the basis of his “release at this time would deprecate the seriousness of (his) offense and promote disrespect of the law.127 Each candidate claimed that the Board’s statement of reasons denied him minimum due process and violated the ex post facto prohibition.128 In response to petitioners’ due process claims, the Board pointed out that the Scott opinion had analyzed the 1973 amendment to section 1003-3-5(c) in its determination that the current statute created a constitutionally protectible liberty interest in parole.129 Because Welsh required the Board to treat the Horton petitioners in accordance with the statute in effect at the time they committed their respective crimes, the Board argued that the court must examine the language of the old statute to determine whether due process applied.130 The broad 1970 statutory criteria the Board had applied to petitioners’ applications for release lacked the mandatory language necessary to create a constitutional liberty interest in parole-release.131 Thus, according to Greenholtz, the inmates possessed no constitutional right to due process safeguards under the old statute.

The district court rejected the Board’s analysis, holding that

well have resulted in parole.” 668 F.2d at 331.
125. The court remanded Welsh’s case to the Prisoner Review Board for reconsideration under the relevant guidelines. Id. at 331-32.
126. 553 F. Supp. 213 (N.D. Ill. 1982).
127. Id. at 214, 215. The Board gave the following reason for parole denial:
The Board, considering all factors in your case, is denying parole at this time because of the following reasons:
The Board has heard your case and rendered its decision in accordance with the statute in effect at the time of your offense.
The Board, having given full consideration to all the facts and circumstances in this case, is of the opinion that the risks involved in granting parole outweigh the factors in favor of granting parole.
Id. at 215.
128. Id. at 217.
129. Scott, 669 F.2d at 1188.
131. Id.
the Welsh decision "does not foreclose" the Board from applying the present parole statute to prisoners who committed offenses prior to 1973, but only prohibits exclusive application of factors based on general deterrence. To support its argument, the court relied on a recent decision in which the Supreme Court directed the proper procedures for remedying an ex post facto violation. The Supreme Court directed that the case be remanded "to permit the state court to apply, if possible, the law in the place where his crime occurred." In addition, the court noted "that only the ex post facto portion of the new law is void as to petitioner, and, therefore, any severable provisions which are not ex post facto may still be applied to him."

The Horton court ignored the first sentence requiring on remand the application, "if possible," of the law in effect at the time of the offense. Instead, the district court quoted from the second sentence, in which the Court explained that constitutionally sound provisions of the new law "may" be applied to the inmate. From this predicate, the court concluded that the Board "must" consider the Horton petitioners under sections 1003-3-5(c)(1) and (3) without reference to the second criterion, because that criterion contravenes the ex post facto clause. This approach enabled the court to follow Scott, affording petitioners a liberty interest in parole with its concomitant procedural protections, thereby avoiding a due process analysis of the old provision.

After determining that petitioners had a protectible liberty interest, the court next proceeded to determine whether the Board's stated reasons for parole denial were constitutionally sufficient. Horton concluded that the Board's statement of reasons did not comport with minimum due process requirements because "it [did] not state the essential facts on the basis of which it denied parole [and pointed] to no specific facts, circumstances of risks." The petitioners' cases were remanded for a new hearing in compliance with Scott and Welsh.

132. Id.
134. Id. at 36-37 n.22 (citations omitted).
135. Id. at 37.
137. Id.
138. Id. (quoting Ware v. Kaufman, No. 80-3209, slip op. at 2-3 (N.D. Ill. June 3, 1982).
The district court in *Horton* interpreted the Supreme Court's alternative form of ex post facto relief as a constitutional requisite. The Supreme Court had stated that severable provisions of a new law which are not ex post facto "may" be applied to a state prisoner. Without articulating any support for its conclusion, the court transformed an optional remedy into a constitutional mandate, concluding that the Board "must" apply section 1003-3-5(c) to the parole candidates, without giving the second criterion any effect.

Consequently, this unjustified analytical leap enabled the district court to avoid a constitutional inquiry into the statute in effect at the time of the inmates' offenses which, in fact, was the statute the Board applied to the inmates' application for release.\(^\text{140}\) That statute contained no unique mandatory language providing for presumptive parole-release. Under a *Greenholtz* analysis, therefore, the court should not have found that the old parole-release provision created a protectible liberty interest.


The Illinois parole-release statute applies to a diminishing number of eligible inmates. Only individuals convicted and sentenced before 1977 are considered for parole-release; the system of "good-time" credits instituted in 1977 applies to inmates who committed their offense after the 1977 amendment.\(^\text{141}\) Nevertheless, the federal courts' expansion of due process protections afforded Illinois parole candidates has a significant impact on the Board with respect to the remaining prisoners eligible for parole.

In 1980, a class action suit on behalf of all Illinois inmates in custody as a result of sentences imposed for offenses committed prior to 1973 was instituted in the Northern District of Illinois. In *Burbank v. Director, Department of Correction*,\(^\text{142}\) the certified class of between 600 and 900 prisoners sought an injunction or issuance of a conditional writ of habeas corpus\(^\text{143}\) directing the

\[^{140}\text{See ILL REV. STAT. ch. 38, §§ 208, 204, 206 (1965).}\]
\[^{141}\text{See supra note 7.}\]
\[^{142}\text{No. 80-3325, slip op. (N.D. Ill. Sept. 9, 1982) (memorandum opinion granting plaintiff's motion to certify case as class action).}\]
\[^{143}\text{Amendment to First Amended Complaint at 1, Burbank v. Director, Dep't of Correction, No. 80-3325 (N.D. Ill. 1982).}\]
Board to adopt explicit criteria to guide the decision-making process in the post-Welsh hearings accorded to the members of the class. Burbank asserted that the adoption of explicit criteria is constitutionally required to ensure that the Board does not continue to deny parole based on general deterrence criteria, in violation of Welsh. The Board had reconsidered each class member for parole and had denied release for the stated reason that “the risks associated with his parole out-weigh the benefits” of granting release.

In his motion for class certification, Burbank alleged the following question of law common to the class: “whether the procedures which will be followed and the decision-making criteria which the Prisoner Review Board will apply in these parole considerations [conducted pursuant to Welsh] will comport with due process standards.” In granting the plaintiff’s motion, the court gratuitously interjected the application of Scott: “While plaintiff does not explicitly cite it, we think United States ex rel. Scott v. Illinois Pardon and Parole Board, is also relevant to plaintiff’s claim. . . . Plaintiff’s claim that the criteria employed by the Board are unduly vague may sound under Scott as well as Welsh.”

The district court’s interjection of Scott is unwarranted. The issue in Burbank is whether Welsh or due process compels the Board to issue specific criteria for parole-release decisions. Without any justification, the court has equated general application of due process to parole-release decision-making with the Scott holding. The class in Burbank seeks reconsideration under the Board’s pre-1973 standards, whereas Scott addressed due process with regard to the criteria in effect after 1973. In Burbank, the court erroneously assumed that the due process protection afforded by Scott applies to inmates affected by Welsh. No

144. Each inmate of the class received a new hearing due to the Board’s violation of the ex post facto clause by stating § 1003-3-5(c)(2) as a reason for parole denial. Pursuant to Welsh, their cases were reconsidered “under the relevant guidelines.” Welsh, 668 F.2d at 332-33.
145. Burbank, No. 80-3325, slip op. at 3.
146. Id., slip op. at 2-3.
147. See FED. R. CIV. P. 23(b)(2).
148. First Amended Complaint at 8, Burbank v. Director, Dep’t of Correction, No. 80-3325 (N.D. Ill. 1982).
149. Burbank, No. 80-3325, slip op. at 3 (citation omitted).
150. Horton, 553 F. Supp. at 216.
support exists for that conclusion.

If the class in *Burbank* ultimately prevails on the merits, the Illinois Prisoner Review Board will be required to supply each of the 600 to 900 inmates entitled to new hearings under *Welsh* with a statement of reasons for parole denial, incorporating particular facts from each individual file. Moreover, the basis for such an unwieldy requirement would be the district court’s sua sponte suggestion, without any reasoned analysis, as to whether such procedural protection is constitutionally necessary.

*Heirens: Federal Court Acts as Super-Parole Board*

The highly publicized and controversial case of William George Heirens\textsuperscript{151} exemplifies the serious impact of federal court intervention in Illinois parole-release decision-making. In 1946, to avoid the electric chair,\textsuperscript{152} Heirens pleaded guilty to the dismemberment murder of six-year-old Suzanne Degnan, the brutal slayings of two other women, and twenty-six other felonies, including burglaries, robberies and assaults.\textsuperscript{153} He was sen-


\textsuperscript{153} People v. Heirens, 4 Ill. 2d at 133, 122 N.E.2d at 233. See generally supra note 151.

At the time of the murders, Heirens was a 17-year-old freshman at the University of Chicago. In one murder victim’s apartment, the following message was scrawled in lipstick: “For heavens sake, catch me before I kill more. I cannot control myself.” L. FREEMAN, *supra* note 151, at 23. See also *supra* note 151. Upon questioning while under the influence of sodium pentothal, Heirens recounted each of the murders with particularity, but attributed them to the fictive persona of “George,” a man whom he described as himself. In a subsequent confession, Heirens described the sexual gratification he derived in committing burglaries; the three brutal murders were committed during the course of separate burglaries. 4 Ill. 2d at 136, 122 N.E.2d at 235. Heirens also re-enacted the murders at the scenes of the crimes. A comprehensive psychiatric report found Heirens “has a deep sexual perversion and is emotionally insensitive and unstable . . . hysterically unpredictable, and most of his actions can be swayed from time to time by suggestions coming from his environment.” Id. at 139, 122 N.E.2d at 236. In addition to his detailed confessions, Heirens was convicted on the basis of handwriting analysis and fingerprints he had left on a ransom note to the Degnan family after Suzanne had been
tenced to three consecutive life terms in prison. The trial judge recommended that Heirens "never be admitted to parole and that he spend the balance of his life in the Illinois State Penitentiary." 154

Incarcerated approximately thirty-seven years, Heirens has been repeatedly denied parole by the Illinois Prisoner Review Board. 155 Prior to the 1982 Welsh decision, the Board's accompanying rationale that Heirens's release "would deprecate the seriousness of his offense or promote disrespect for the law" provided a sound legal basis for parole denial. 156 Pursuant to Welsh, however, parole denial based solely upon this "general deterrence" criterion of section 1003-3-5(c) violates the ex post facto clause. 157 Hence, upon Heirens's petition for a writ of habeas corpus, a magistrate 158 of the Southern District of Illinois remanded the case to the Illinois Prisoner Review Board with orders to apply "special deterrence" criteria. 159 The court found that the record suggested the Board considered Heirens completely rehabilitated; 160 therefore, if it considered Heirens unre-
habilitated and consequently ineligible for release, the magistrate required the Board to “state this finding with particularity and with reference to the existing record.”

The Board subsequently denied parole to Heirens, because the bizarre and brutal nature of his crimes made the “risk of further nonconforming conduct too great to allow . . . release at this time.” Although he acknowledged that the Board’s rationale properly focused on “special deterrence,” the magistrate held it legally insufficient because it did not include any information in the ‘existing record’ indicating lack of rehabilitation.”

release) (hereinafter cited as Heirens II).

161. Heirens I, slip op. at 8. Magistrate Cohn provided the Board with the following alternatives on remand:

(1) They could determine that although parole had been denied in recent years solely on the basis of now-acceptable “general deterrence” criteria, that in fact the Board has never considered Heirens to be rehabilitated, and that they simply never bothered to state this explicitly. We did stress, however, that such a determination would have to be explained “with particularity and with reference to the existing record.”

(2) The second option on remand permitted the Board to admit that, in 1979, Mr. Heirens was considered rehabilitated as the record suggests - but to show that events since 1979 justified a denial of parole.

(3) The Board could grant parole, finding that Heirens is rehabilitated and no longer susceptible to continued incarceration based on “general deterrence” criteria because of Welsh.

Heirens II, slip op. at 9.

Magistrate Cohn implicitly assumed lack of rehabilitation to be the only legally acceptable basis for parole denial. But see § 1003-3-5(c)(3) providing for parole denial if the inmate’s release “would have a substantially adverse effect on institutional discipline.” Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(3) (1981). Welsh held that this criterion does not violate the ex post facto clause because, along with § 1003-3-5(c)(1), it “invite[s] the Parole Board to look at many of the same factors as under the previous law.” Welsh, 668 F.2d at 331.

The Board chose option (1), and provided an “Amended Rationale” supplementing its decision to deny parole to Heirens. See infra text accompanying notes 162-65.

162. Heirens II, slip. op. at 9.

163. Id. Inexplicably, Magistrate Cohn appears to consider the facts of Heirens’s brutal crimes not part of the ‘existing record’ to be considered by the Board. According to Welsh, prior to the 1973 amendment

[i]the severity of the offense committed and society’s concern with sufficient punishment did not enter directly into the Parole Board’s decision. Those factors had already determined the minimum and maximum prison terms imposed by the sentencing judge. The minimum sentence was intended to satisfy society’s desire for adequate punishment; the maximum sentence was a rough indicator of when rehabilitation could be presumed. The function of parole was to mediate between the two extremes.


If Magistrate Cohn relied on Welsh in his assumption that the Board cannot consider
Board explained that despite Heirens's excellent institutional adjustment, his behavior would be difficult to predict in an unstructured environment. The magistrate, who had never personally interviewed Heirens, challenged that finding based on Heirens's successful record in a work-release program.

Having found the Board's amended rationale legally inadequate, the magistrate again remanded Heirens's case to the Board to justify its position that Heirens was not a suitable parole risk. Once again, the Board denied parole to Heirens, emphasizing its concern over his ability to perform adequately in an unstructured situation, based upon "consider[ation of] many and varied factors among which [were Heirens's] personal representations, the many documents in [his] file, the Program considerations, [his] institutional adjustment ..." Once again, the court

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Heirens's brutal crimes as part of the existing record, then his analysis is flawed. Welsh did not state that the crimes for which the inmate was committed could not influence the Board's decision, merely that the severity of the offense did not enter "directly" into the parole-release determination. In point of fact, Heirens was sentenced to three consecutive life terms, with the sentencing judge's recommendation that he never be eligible for parole. See supra text accompanying note 154. In addition, "[i]t is permissible to consider the relationship of the crimes committed to the likelihood of rehabilitation." Sayles v. Welborn, No. 82-32109 (S.D. Ill. Jan. 18, 1983) (Cohn, Mag.)

164. Heirens II, slip op. at 11. The following comments made by Board members after personally interviewing Heirens reflect concern over the danger posed to society by Heirens's release, based on the psycho-sexual nature of his crimes and his failure to admit to the crimes and show remorse for his acts. Conclusion by Board member Moore, Jan. 4, 1973:

In the interview, the subject presents himself extremely well. It becomes obvious immediately that his presentation in the interview is "colored" to get him a parole, and he says and does what he thinks will attain that end. He comes across as an unfeeling, self-centered individual who is well controlled in the prison community or any tightly controlled community, but what would happen in a free situation would be markedly different.

Conclusion by Board member Dohm, Nov. 29, 1973:

The inmate denied that he committed the three murders in question. He did admit to all but two of the burglaries ... [He] had no recall regarding [previous] statements, "Since I know I would probably go back to the same thing, it's better that I am here." "If God wanted me not to do these things he would have helped me—He didn't."

Brief and Argument for Respondents-Appellants at 5-6, Heirens v. Mizell, No. 83-1748 (7th Cir. filed June 17, 1983).

165. Heirens lives in a minimum security facility. He participates in a program which permits him to work in the community by day and return to the prison at night. Id., slip op. at 8. Each autumn since 1976, Heirens has been allowed to pick apples at nearby private orchards. These day trips are strictly supervised. Heirens' life exemplary in prison without walls, Chi. Sun-Times, Apr. 27, 1983, at 4.

166. Heirens II, slip op. at 11.

167. Id.
rejected the rationale as "boilerplate" and ordered Heirens's release.\textsuperscript{168}

The consistent rejection of the Illinois Prisoner Review Board's decision to deny parole to Heirens and the federal magistrate's persistent refusal to accept the Board's accompanying rationale represent a marked departure from the Supreme Court's holding in Greenholtz. Due process does not require "the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release."\textsuperscript{169} Yet the magistrate rejected the Board's determination that the three unusually heinous murders committed by Heirens indicate that he is not an acceptable risk for parole despite his achievements while incarcerated\textsuperscript{170} and inappropriately required the Board to "justify" its determination. Disagreeing with the Board's decision to deny parole to Heirens, the magistrate made his own factual finding based on information in the record, and improperly substituted his judgment for that of the Board.\textsuperscript{171}

CONCLUSION

The federal courts in Illinois have increasingly involved themselves in reviewing parole-release decisions of the Illinois Prisoner Review Board, without clear and consistent support. Each decision strains to expand federal supervision over the Board's discretion in parole decision-making. As the scope of minimum

\textsuperscript{168} According to Magistrate Cohn, "It is not enough for the Board simply to have 'considered' these factors; we had specifically asked the Board to go further and explain how these considerations justified a denial of parole." \textit{Id.}

\textsuperscript{169} Greenholtz, 442 U.S. at 15.

\textsuperscript{170} In 1972, Heirens became the first prisoner in Illinois to earn a college degree while incarcerated. \textit{For Heirens, 37 years of waiting}, Chi. Tribune, May 1, 1983, §19 (Persp.), at 1. He has not received a disciplinary ticket in over 20 years. \textit{Heirens II}, slip op. at 8. Heirens submitted a transcript of his 1979 parole hearing relied upon by Magistrate Cohn, quoting the Board Chairman's response that Heirens's behavior has "probably exceeded" the Board's original expectations; nevertheless the Chairman voted for parole denial. \textit{Id.} at 7.

\textsuperscript{171} Cook County State's Attorney Richard M. Daley offered the following comment:

I'm shocked by the magistrate's decision to release William Heirens. This man confessed to three brutal murders, and I believe he is too dangerous to walk the streets of any city in this country.

My office has strenuously objected to Heirens' parole every time the matter has come up. And I think the Illinois Parole Board has a better understanding of this man's fitness to rejoin society than the federal court.
due process protections widens, the Board must increasingly justify the sensitive “choice[s] involv[ing] a synthesis of record facts and personal observation filtered through the experience of the decision maker and leading to a predictive judgment as to what is best both for the individual inmate and for the community [based upon] a discretionary assessment of a multiplicity of imponderables.” Federal courts in Illinois should comply with the Supreme Court’s express policy against providing extensive due process protection to inmates eligible for parole, and reverse the trend expanding the constitutionally required procedures imposed on the Board.

JODY WILNER

The state’s attorney’s office will join with the attorney general’s office to appeal this decision . . . 
172. Greenholtz, 442 U.S. at 8, 10.