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# Go And Sin No More: Rationality and Release Decisions by Parole Boards

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## I. INTRODUCTION

Parole decision makers are the gatekeepers of the criminal justice system. The efforts of police, defense and state attorneys, judges, and prison personnel culminate in a single question: When should an offender be released? In most jurisdictions, some or all releases result from the discretionary decisions of

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parole boards. The parole boards rely on information from police, presentence investigators, corrections officials, therapists, victims, and the offender. Released offenders, or parolees, specifically promise in their parole agreements to lead law-abiding lives. If offenders breach their parole agreements, the parole board may return those offenders to prison.

Traditionally, a parole board's unfettered discretion determined when an offender could leave prison. Within broad parameters set by the legislature, the authority of parole decision makers has been extensive and far-reaching. The power of the parole board — God-like to inmates — has not escaped notice by the public,[1] by commentators,[2] or by courts.[3]

Exercise of this discretion has important implications for the criminal justice system and society in general. It affects public safety by selecting for release those inmates predicted to discontinue criminal behavior. It allocates resources by controlling the population of prisons and community corrections centers. It influences prison officials' ability to control inmate populations because boards consider prison behavior in deciding whether to release the inmates. Most significantly, however, the exercise of parole discretion influences the legitimacy of the entire criminal justice system. That legitimacy is best served when victims, offenders, and the general public perceive parole decisions as fair and rational.

This article examines the contributions, if any, that parole release guidelines can make to the rationality of the criminal justice system. Part I begins with a brief background of punishment and then describes state sentencing and parole practices. It sets out the basic conceptual paradigms, explores discretion, and concludes that structured parole release decision-making is desirable. Part II proposes release guidelines as a mechanism for structuring discretion and describes guideline purposes, operation, and benefits. Part III explores the constitutional implications of release guidelines, considering the relationship between sentencing and parole and surveying due process jurisprudence, including challenges to both sentencing and parole guidelines. Part III concludes that release guidelines need not invoke the Due

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1. *See, e.g.*, RAISING ARIZONA (Twentieth-Century Fox 1987) (providing an unflattering portrayal, in a comedy film, of a parole board).

2. *See, e.g.*, Julio A. Thompson, Note, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241 (1988) (discussing problems in the parole board system, including the lack of thoroughness among board members and the limited checks on their authority, which problems have led to the boards violating constitutional rights of both prisoners and other citizens).

3. *See, e.g.*, Larsson v. Iowa Bd. of Parole, 465 N.W.2d 272, 275 (Iowa 1991) ("Historically, corrections officials have been given broad discretion with respect to the role parole rightly plays in an individual prisoner's constructive reintegration into society."); Moore v. Ruth, 556 So. 2d 1059, 1061 (Miss. 1990) ("The Circuit Court was certainly correct when it said parole was a matter of sound discretion, not of right, and that the Parole Board had broad discretionary authority regarding grants of parole . . . ." (citations omitted)).

Process Clause, and even if they do invoke the clause, the process that is due is minimal. Finally, the article offers recommendations for implementing parole guidelines.

## II. SENTENCING AND PAROLE PRACTICE

### *A. History and Purposes of Punishment*

Parole release decisions are not merely the end products of modern criminal justice systems. More accurately, history reveals that these decisions are artifacts of much thought that has been given to punishment over time. Early sentencing practices in Western culture were based on compensation to the tribe for transgressions that diminished its strength.[4] Sanctions focused on restoring the loss to the group rather than inflicting pain on the wrongdoer.[5] Eventually, criminal sanctions became primarily punitive. As such, they assumed forms lacking neither in imagination nor brutality.[6] In the eighteenth century, incarceration was introduced as a sentencing option, though in the earlier part of the era, capital punishment continued to be the most widely imposed sanction.[7] As the American states began abolishing corporal punishment in post-Revolutionary times, they increasingly used incarceration as a substitute.[8] Furthermore, the Biblical underpinning of moral responsibility[9] made it natural for criminologists to view imprisonment as an opportunity to encourage the spiritual rehabilitation of offenders in "penitentiaries."[10]

However, offenders, as a class, were not sufficiently penitent to change their erring ways. Therefore, in the eighteenth century, the justification for incarceration was based on the hedonistic formula of deterrence.[11] The assumption was that rational people would not commit crimes if the punishment outweighed the gain.[12] The popularity of the deterrent theory of punishment waned, and by the late nineteenth century optimism that anything could be cured replaced it.[13] Diseases were defeated, and psychiatrists began

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4. ARTHUR W. CAMPBELL, LAW OF SENTENCING § 1:1 (2d ed. 1991).

5. *Id.*

6. *See id.*

7. *Id.* § 1:2.

8. *Id.*; *see also* United States v. Moreland, 258 U.S. 433, 448-50 (1922) (Brandeis, J., dissenting) (discussing early American history of sentencing and punishment).

9. *See* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 13, 69, 73-75 (1980).

10. *Id.* at 69.

11. Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425, 432 (1983).

12. *Id.*

13. J.S. Bainbridge Jr., *The Return of Retribution*, A.B.A. J., May 1987, at 60, 61.

treating ills of the mind.[14] Everyone believed that the new-found cause of crime, inadequate moral training, could be remedied.[15] In 1949 the United States Supreme Court announced that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[16]

Dissatisfaction with the failure of prisons to rehabilitate resulted in changes in sentencing systems and penal institutions — changes designed to improve rehabilitation.[17] Typically the evolved systems bore these traits: The character of the offender was an important factor in sentencing decisions, sentences were expressed as minimum and maximum periods, and inmates were evaluated at the end of the minimum sentence to determine whether they were sufficiently rehabilitated to be released.[18] Embracing the dominant sentencing rationale of rehabilitation, this scheme became known as "indeterminate sentencing"[19] and was practiced by every jurisdiction in some form at some time.[20]

The promise of the rehabilitative model was short-lived. By the 1960's the American Correction Association regarded it as archaic.[21] In 1978 Justice Burger criticized indeterminate sentencing under the rehabilitative model.[22] The virtue of individualized treatment had become the vice of disparity.[23] Critics pointed out that release was influenced by factors that had no impact on rehabilitation.[24] The vast parole board discretion led to

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14. *Id.*

15. *Id.*

16. Williams v. New York, 337 U.S. 241, 248 (1949), *quoted in* Bainbridge, *supra* note 13, at 61.

17. Alan M. Dershowitz, *Background Paper, in* THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 67, 89-91 (1976).

18. *See id.* at 90-95.

19. *See infra* text accompanying note 41.

20. *See* Dershowitz, *supra* note 17, at 95. Likewise, federal courts had broad discretion in setting punishments before the implementation of the federal sentencing guidelines. In an indeterminate sentencing system, the law allowed judges to impose sentences anywhere within a broad statutory range. The Parole Commission then had authority to substantially reduce the term. UNITED STATES SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 31 (1991) [hereinafter FEDERAL SENTENCING GUIDELINES].

21. *See* Bainbridge, *supra* note 13, at 61.

22. United States v. Grayson, 438 U.S. 41, 46-48 (1978) (noting the serious practical problems the model presented for judges). The sentencing scheme in *Grayson* was superseded by the FEDERAL SENTENCING GUIDELINES, *supra* note 20.

23. *Cf.* CAMPBELL, *supra* note 4, § 4:1; Andrew von Hirsch & Kathleen Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289, 292 (1981) (discussing the need to cure disparities in sentencing).

24. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 93-95 (1973).

abuses.[25] Even when no abuses occurred, parole boards could not accurately assess a prisoner's rehabilitative progress. Prisoners themselves lived with uncertainty and directed their efforts toward manipulating evidence of rehabilitation.[26] Power placed in the hands of corrections officials and the proliferation of the use of informants in prisons led to inmate unrest and riots,[27] which served to highlight the failings of the entire criminal justice system and of indeterminate sentencing. Although no sentencing system had ever been demonstrated to have a deterrent effect on the crime rate,[28] the inability of indeterminate sentencing to stop or even slow the tide of crime was offered as proof of its failure.[29] The length of sentences increased because escalating crime induced legislators to set longer maximum sentences.[30] Judges used these maximum sentences, fully expecting parole boards to release a prisoner after serving only a fraction of the original sentence.[31] For example, an offender thought to be removed from society after being sentenced to two life terms was released on parole, serving only sixteen years.[32] The call went out for "Truth in Sentencing."[33] The public demanded to know the real effect of sentences.

Broad parole board discretion had other unfortunate consequences. Certainly among the corollaries to Murphy's Law is this maxim: When a parole board may do anything it wishes, it will. Lacking a cohesive

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25. *See, e.g.*, PETER MAAS, MARIE, A TRUE STORY (1983) (accounting the story of former Tennessee Parole Board Chairperson Marie Raggianti, who played a key role in the prosecution of board members that subsequently confessed to selling paroles).

26. *See* Robert W. Kastenmeier & Howard C. Eglit, *Parole Release Decision-making, in* PAROLE 76, 82 (William E. Amos & Charles L. Newman eds., 1975).

27. *See* BERT USEEM & PETER KIMBALL, STATES OF SIEGE: U.S. PRISON RIOTS, 1971-1986, at 94-95, 105 (1989).

28. *See* Sheldon Ekland-Olson et al., *Crime and Incarceration: Some Comparative Findings from the 1980s*, 38 CRIME & DELINQ. 392, 392 (1992).

29. *See* JANET SCHMIDT, DEMYSTIFYING PAROLE 138 (1977).

30. FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 34-35 (1964).

31. This phenomenon is not new. Many first year law students know that the court which imposed the death penalty in The Queen v. Dudley & Stephens, 14 L.R. 273 (Q.B.D. 1884), fully expected the penalty to be commuted.

32. *See* Patricia Davis, *Jury's Still Out on Sentencing Systems in Virginia*, WASH. POST, Feb. 15, 1988, at B1.

33. Truth in sentencing was among the arguments supporting the Federal Sentencing Guidelines. Glen Elsasser, *Panel Proposes New System for Judges: Plan Calls for Sentencing Guidelines*, CHI. TRIB., Feb. 5, 1987, § 1, at 10. It has been and continues to be a source of debate in many states. *See, e.g.*, Davis, *supra* note 32, at B1; Howard Goodman, *Bills Would End Parole to Ease Jail Crowding*, PHILADELPHIA INQUIRER, June 4, 1991, at B1; John Hurst, *Ex-Convicts Screened for Parole Release*, L.A. TIMES, July 3, 1992, at A3; Toni Locy, *Committee OK's Sentencing Bill*, BOSTON GLOBE, June 23, 1992, at 36. The truth in sentencing debate also emerges as a campaign issue. *See* Veronica T. Jennings, *Democrats Jostling in Crowded Primaries*, Wash. Post, Aug. 23, 1990, at Md. 1.

philosophy of punishment to drive decisions toward well-defined goals[34] or perhaps failing to communicate those goals to constituencies, many boards created the impression that, behind the closed door of the executive session, board members tossed darts at dartboards. Largely out of fear of losing their discretion and of inviting individual liability, parole board members have continued to deal with ever-increasing numbers of offenders on a case-by-case basis, long after the sheer volume greatly reduced the members' abilities to distinguish among offenders.[35] Given the number of parole decisions made in some jurisdictions by varying panels of members, it would seem serendipitous if, when compared, those decisions were proportionate, equitable, uniform, or predictable.

The stage having been set, jurisdictions began to experiment with guidelines. Through creation of the United States Sentencing Commission, policy makers in the federal system adopted sentencing guidelines as a way to restrict judges' discretion.[36] Likewise, some states also turned to sentencing guidelines for use by their judges and sentencing commissions.[37] Even

34. The adoption of a single basic principle has properly been criticized as unrealistic. *See generally* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (criticizing any penal code that reflected only a single basic principle). Nevertheless, adopting penological goals and setting priorities among competing interests enhances consistency throughout the system.

35. The Virginia Parole Board makes parole consideration decisions in about 15,000 cases a year. Telephone Interview with staff person of the Virginia Parole Board (Jan. 3, 1992). The California Board of Prison Terms, which has jurisdiction over only life sentences, still has a substantial number of cases under its jurisdiction. Ted Rich, the Board's Executive Officer, indicates that as of December, 1993 there were 10,735 inmates serving sentences of life with a possibility of parole. Telephone Interview with Ted Rich, Executive Director, California Board of Prison Terms (Jan. 11, 1994).

36. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017 (1984) (codified as amended at 28 U.S.C. §§ 991-98 (1988)). Congress established the United States Sentencing Commission and authorized it to promulgate sentencing guidelines to take effect 30 months after enactment. 18 U.S.C. § 3551 note (1988). It directed the Commission to design guidelines which would

> provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B).

Occasionally state parole release guidelines will be compared to the federal sentencing guidelines. These comparisons reveal several similarities and differences: Guidelines are similar in their intent to reduce disparity, ensure proportionality in punishment, and enhance certainty of outcome. S. REP. NO. 225, 98th Cong., 1st Sess. 52-62. They are different in that the federal guidelines are part of a determinate sentencing system that eschews parole entirely, and with it, any additional information about the inmate after incarceration which might be useful in setting a release date. 18 U.S.C. § 3624 (1988). The author will note other relevant differences in the discussion.

37. *See, e.g.*, Smith v. State, 537 So. 2d 982, 983-84 (Fla. 1989) (discussing the development

though the interest in the results of sentencing guidelines was keen,[38] other states focused on guidelines for use by parole boards, namely release guidelines.[39] To provide a foundation for discussion of release guidelines, detailed descriptions of the operation of state sentencing and parole practices are now discussed.

### *B. Overview of Systems*

To understand the need to structure discretion involved in parole decision making, one must first understand the nature of sentencing and parole as well as the extent of the authority wielded by sentencing and paroling authorities. No "typical" sentencing and parole system exists; rather, an amazingly diverse array of legislative enactments confers vast discretion.[40] Nonetheless, general patterns can be discerned. In theory, systems are classified by type of sentence — indeterminate[41] or determinate.[42] Most systems have aspects of each.

In its purest form, an indeterminate sentencing system is one in which the legislature sets a range of punishment for crimes and both a judge and parole board exercise discretion. At sentencing the judge decides whether to incarcerate the offenders or allow them to receive a non-custodial sanction. If the judge decides to incarcerate, the term of incarceration is expressed as a range of time. After some period of service, an offender requests release, which may be granted at the discretion of the parole board. If a request is granted, the offender is released. If it is denied, the inmate may later request release or simply serve out the maximum sentence. When inmates are released before the end of their sentences, they are placed on parole: a period of supervision under rules contained in a parole agreement. If parolees violate those terms, they may be returned to prison to serve all or part of the

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of Florida's sentencing guidelines); Frank H. Easterbrook, *Introduction* to *Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813 (1989) (panel discussion).

38. Major legal periodicals have recently published symposia dealing with sentencing. *See, e.g., A Symposium on Sentencing Reform in the States*, 64 U. COLO. L. REV. 645 (1993); Symposium, *Making Sense of the Federal Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 571 (1992); Symposium, *Punishment*, 101 YALE L.J. 1681 (1992).

39. For example, the Commonwealth of Virginia has developed release guidelines supported by risk predictors validated on its own population. VIRGINIA PAROLE BOARD, PAROLE GUIDELINES: POLICIES AND PROCEDURES MANUAL 3-5 (Draft No. 6, 1991). Colorado has a similar history-risk assessment and release guideline scheme. *See* KIM ENGLISH, DIVISION OF CRIMINAL JUSTICE, COLORADO PAROLE GUIDELINES HANDBOOK v-vi (1990) (quoting COLO. REV. STAT. ANN. § 17-22.5-303.5 (repealed West Supp. 1991)).

40. ANDREW VON HIRSCH & KATHLEEN J. HANRAHAN, THE QUESTION OF PAROLE: RETENTION, REFORM, OR ABOLITION? 1 (1979).

41. *See* CAMPBELL, *supra* note 4, §§ 4:1 to :3.

42. *See id.* §§ 4:4 to :9.

remaining term. Indeterminate sentencing systems allocate sentencing discretion to the judge and the paroling authority.[43]

Determinate sentencing, on the other hand, is often characterized as a system which allows offenders to know at sentencing the amount of time they will serve in prison. Although the legislature sets a range of punishments for each crime, the judge alone decides whether to incarcerate and exactly how long offenders should serve. In the purest form of determinate sentencing, the date of release is determined at the time the sentence is imposed. Parole is eliminated altogether.[44] However, a sentence may be reduced for good behavior ("good time") according to non-discretionary criteria.[45] The determinate sentencing system vests sentencing discretion almost exclusively with the judge.[46]

Reformers who insist that "parole" be abolished[47] frequently confuse determinate and indeterminate sentencing. The term "parole" has a double referent.[48] One aspect of parole establishes the date of release and defines the actual period of confinement.[49] This aspect is consistent with the preceding description of indeterminate sentences. The second aspect of parole is the continuing supervision of felons after release from incarceration.[50] In this different context, abolitionists appear to be calling for an end to post-release supervision. They actually are not. Rather, they criticize the practice of allowing offenders to serve only a fraction of their announced sentences (i.e. indeterminate sentences). Nevertheless, some states responded to the outcry for truth in sentencing by eliminating parole, or at least by claiming to eliminate it.[51]

Many current commentators appear to believe that determinacy is now the rule,[52] but this is not the case. Probably fewer than half a dozen jurisdictions actually have determinate sentencing systems, if determinate means that the judge at sentencing determines the actual period of imprisonment, with or without considering good time. In California and Illinois, for example, the judge sets a felon's term (other than life sentences) from a legislatively determined range.[53] However, a parole board or a prison review board

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43. *See generally id.* §§ 4:1 to :3 (discussing indeterminate sentencing).

44. *See generally id.* §§ 4:4 to :9 (discussing determinate sentencing).

45. *Id.* § 9:19.

46. Lenore Alpert, *Exercising Discretion on the Bench: The Trial Judge's Perspective*, *in* THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW 93, 101 (Burton Atkins & Mark Pogrebin eds., 2d ed. 1982).

47. *See, e.g.*, VON HIRSCH & HANRAHAN, *supra* note 40, at 103-04.

48. Sheldon L. Messinger, *Introduction* to VON HIRSCH & HANRAHAN, *supra* note 40, at xi.

49. *Id.*

50. *Id.*

51. *See infra* notes 59-62 and accompanying text.

52. *See* CAMPBELL, *supra* note 4, § 1:3.

53. CAL. PENAL CODE § 1170 (West Supp. 1994); 730 ILL. STAT. ANN. 5/5-8-1 (West Supp.

retains substantial discretion to set release dates for all life sentences.[54] Further, these boards provide post-release supervision, called either a parole period or a mandatory supervised release term, which operates much like traditional parole.[55] Additionally, a substantial number of felons in both of these jurisdictions remain eligible for parole under prior indeterminate sentence systems.[56]

By contrast, some jurisdictions continue to operate traditional indeterminate sentencing systems. For example, Idaho and Massachusetts, retaining the term "indeterminate" in their statutes, allow a judge to sentence offenders to a range of years and deem them eligible for parole at a statutory minimum.[57] A parole commission or board, in its discretion, establishes release dates and revokes these dates for violations of the conditions of supervision.[58]

A substantial number of jurisdictions, however, have made legislative changes that replace sentence indeterminacy with language that leaves discretion with parole boards or similar bodies. In Georgia, for example, a judge sets a "determinate" sentence within a statutory range,[59] but the board may parole prisoners after they become eligible under the statute.[60] In Colorado and Delaware, judges sentence offenders to a definite term within a statutory range,[61] but offenders become eligible for parole after serving a percentage of that term.[62]

Given the determinate-indeterminate dichotomy, the classification appropriate for the various systems is unclear.[63] Most determinate sentencing

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1993).

54. *See* CAL. PENAL CODE § 3046 (West Supp. 1994); 730 ILL. STAT. ANN. 5/3-3-2, 5/3-3-3 (West 1992).

55. *See* CAL. PENAL CODE § 3000 (West Supp. 1994); 730 ILL. STAT. ANN. 5/3-3-2 (West 1992).

56. Telephone Interview with Ted Rich, Executive Director, California Board of Prison Terms (Jan. 11, 1994).

57. IDAHO CODE § 19-2513 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 279, § 24 (West 1981).

58. IDAHO CODE § 20-210 (Supp. 1993); MASS. GEN. LAWS ANN. ch. 127, § 130 (West 1991).

59. GA. CODE ANN. § 17-10-1(a)(1) (Supp. 1993).

60. *Id.* § 17-10-1(b).

61. COLO. REV. STAT. ANN. §§ 16-11-304, 18-1-105 (West 1986 & Supp. 1993); DEL. CODE ANN. tit. 11, § 4205 (Supp. 1992).

62. COLO. REV. STAT. ANN. § 17-22.5-403 (West Supp. 1993); DEL. CODE ANN. tit. 11, § 4346 (1987).

63. Courts are unsure of the proper way to characterize these hybrids. The Supreme Court of Colorado, reflecting on changes over the past few years, observed:

> [S]tate sentencing laws, including the statutes relevant to parole, have undergone a series of major changes. In the late 1970s, the legislature changed the parole and sentencing system from one of "indeterminate" sentencing, which placed substantial discretion in the sentencing courts and Parole Board, to "determinate" sentencing with

schemes allow flexibility in release and post-release supervision although the term "parole" has been replaced with terms such as "post-release supervision" and "mandatory supervised release term."[64] Likewise, many indeterminate sentencing systems have determinate aspects such as mandatory sentences for some crimes.[65] In reality, parole boards continue to make a significant number of release decisions in most jurisdictions.

Moreover, boards in most jurisdictions have little guidance in making release decisions. Once information is compiled regarding the offender's crime, victim, criminal history, social history (including drug and alcohol use), and institutional adjustment, parole boards or their staff interview eligible offenders either informally or at a hearing.[66] The members then make a decision to grant or deny parole according to imprecise standards. The Rhode Island Board may not parole unless it appears that the inmate has observed prison rules, that release would not depreciate the seriousness of the crime, that a reasonable probability exists that the inmate would "live and remain at liberty without violating the law," and that the inmate can "properly assume a role" in the community.[67] The paroling authority in Ohio may grant parole "if in its judgment there is reasonable ground to believe that . . . such action would further the interests of justice and be consistent with the welfare and security of society."[68] The parole board in New Hampshire may release after a minimum term if there is a "reasonable probability that [the offender] will remain at liberty without violating the law and will conduct himself as a good citizen."[69] In Nebraska the parole board must justify *denial* of parole with a finding that "[t]here is a substantial risk [the offender] will not conform to the conditions of parole," that releasing the offender would "depreciate the seriousness of his crime or promote disrespect for law" or have a "substantially adverse effect on institutional discipline," or that the offender's "continued correctional treatment . . . will substantially enhance his capacity to lead a

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"mandatory" parole, which substantially removed all discretion from the sentencing courts and Parole Board. Subsequent legislation relaxed the rigid requirements of "determinate" sentencing and, ultimately, the legislature adopted the present "modified determinate" sentencing system which restores some discretion to the sentencing courts and Parole Board.

Thiret v. Kautzky, 792 P.2d 801, 803-04 (Colo. 1990) (en banc) (footnote omitted).

64. *See* 730 ILL. STAT. ANN. 5/5-8-1 (West Supp. 1993).

65. The Utah Legislature, for example, made aggravated sexual abuse of a child punishable by imprisonment for a mandatory minimum sentence of 3, 6, or 9 years, and the maximum may be for life. UTAH CODE ANN. § 76-5-404.1 (1990).

66. *See* NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE §§ 3.17 to .22 (1983).

67. R.I. GEN. LAWS § 13-8-14 (Supp. 1993).

68. OHIO REV. CODE ANN. § 2967.03 (Anderson 1993).

69. N.H. REV. STAT. ANN. § 651-A:6 (1986).

law-abiding life when released at a later date."[70]

In some jurisdictions parole statutes provide no articulated standard for the release decision.[71] In contrast, some states mandate the use of guidelines for release decisions.[72] If parole is granted, the board sets a release date and conditions of parole.[73] If offenders are denied parole, the board usually will reconsider their cases at a later date. If the offenders fail to win a discretionary release from the board, they may be discharged at a mandatory release date (a portion of the maximum sentence beyond initial parole eligibility).[74] In systems without mandatory release, the offenders who fail to earn parole are released when their sentences expire.[75]

Despite the criticism over the past decade, parole continues to be the most common means of releasing prisoners. At the beginning of 1990 there were 680,907 inmates incarcerated throughout the United States in federal and state prisons.[76] During that year 419,783 inmates were released.[77] Of those released, 339,439 inmates were given some form of conditional release (parole, probation, or supervised mandatory release).[78] The number of people released on parole in 1990 was 159,731; this amount exceeded the number of inmates released under supervised mandatory release (the mode used in determinate sentencing) by 42,874.[79] When aggregated with offenders remaining under parole supervision from previous years, the total national parolee population was 456,803.[80] The parolee population continues to rise despite efforts to abolish parole. In 1979, 138 of every 100,000 adult residents in the nation were parolees.[81] In 1990, 287 of every 100,000 adult residents were parolees.[82] At no time during the interim did the rate decline.[83]

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70. NEB. REV. STAT. § 83-1,114 (1987).

71. *See, e.g.*, IDAHO CODE § 20-210 (Supp. 1993) (empowering the State Commission of Pardons and Paroles to set release dates, but providing no standard).

72. *See, e.g.*, GA. CODE ANN. § 42-9-40 (1991) (requiring the Board to implement and maintain a parole guidelines system).

73. If an offender fails to comply with the conditions of release, the parolee is returned to prison and, after certain proceedings, may be required to serve the rest of the term.

74. CAMPBELL, *supra* note 4, §§ 4:2 to :3.

75. *Id.* § 17:6.

76. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991 tbl. 6.73 (Kathleen Maguire et al. eds. 1992) [hereinafter SOURCEBOOK].

77. *Id.*

78. *Id.*

79. *Id.* at tbl. 6.124.

80. *Id.* at tbl. 6.127.

81. SOURCEBOOK, *supra* note 76, at tbl. 6.127.

82. *Id.*

83. *Id.* at tbl. 6.128.

### C. *Discretion in Sentencing and Parole*

Through various methods, state criminal justice systems place tremendous discretion in the hands of judges, parole boards, or both. Such discretion has been controversial. Proponents of broad discretion for judges at sentencing argue that limiting such discretion is both unrealistic and unfair.[84] They argue that disparity is an unfortunate but unavoidable byproduct of individualized justice, and that individualized justice can be achieved only if judges are free to consider all the legally relevant factors in sentencing.[85] Each case presents a unique set of factors which does not yield to precise comparisons with any other case. At sentencing, the judge must balance the tension between the flexibility of discretion and the rigidity of uniformity.[86]

Critics of judicial discretion, on the other hand, argue that judges frequently mete out sentences in the absence of criteria and without reference to the objectives of the criminal justice system.[87] In the absence of rules, personal values fill the vacuum.[88] No articulated rationale appears to support the judge's decision, and the exercise of unfettered discretion often usurps the legislature's power to make policy.[89] Critics further argue that the credentials of judges exercising discretion do not justify their immense power.[90] For many, the problem of broad discretion leading to wildly disparate[91] sentences is most troublesome.[92]

Placing broad discretion with parole boards raises similar arguments. Proponents argue that parole boards must have discretion to make fair release decisions because each decision must be tailored to each unique offender.[93] Parole boards argue that they are better positioned to make release decisions than are judges. They argue that more information about the offender becomes available with time, and boards can make better predictions about risks of recidivism or likelihood of rehabilitation than judges can make

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84. *See* Alpert, *supra* note 46, at 101.

85. *Id.* at 101-02.

86. *Id.* at 103.

87. *See* Marvin Frankel, *Lawlessness in Sentencing*, *in* PRINCIPLED SENTENCING 265 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

88. Alpert, *supra* note 46, at 102.

89. Frankel, *supra* note 87, at 267.

90. *Id.* at 271.

91. "Disparity" is found to exist, under the Federal Sentencing Guidelines, when defendants with similar criminal records are found guilty of similar criminal conduct but receive dissimilar sentences. *See* 28 U.S.C. § 991(b)(1)(B) (1988).

92. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988); Susan E. Martin, *Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 VILL. L. REV. 21, 27 (1983-84).

93. *See* CAMPBELL, *supra* note 4, § 4:1.

immediately after the offender is convicted.[94] Further, discretion enables corrections officials to better manage offenders who want to present good institutional records to the board. Finally, early parole release will promote law-abiding behavior by providing supervision for offenders when they return to the community.[95]

As with judicial discretion, parole board discretion is most often criticized for its arbitrariness and resulting disparity.[96] To the extent that a parole board professes to incapacitate future offenders or to rehabilitate past offenders, critics argue that recidivism data suggests that boards are not successful in accomplishing these tasks.[97] Parole board members are generally gubernatorial appointees, thus raising two additional criticisms: Political patronage often results in underqualified board appointees and boards are fertile breeding grounds for corruption.[98]

Although the various forms of parole systems have been criticized, a structuring of the discretion allowed in each system would combat the most serious assaults against them. Guidelines can serve as the mechanism for structuring parole release discretion.

## II. PAROLE RELEASE GUIDELINES

Parole release guidelines are a collection of factors relevant to release decisions, quantified and weighted to accomplish certain objectives by recommending or mandating release at a specific time.[99] The factors relevant to parole decisions include the offense, criminal history, performance under previous parole or probation, dismissed and overturned convictions, social history, intelligence and training, employment history, substance abuse, physical and mental health, evidence of rehabilitation, behavior in prison, and plans for parole.[100] Policy decisions made by the promulgators of guidelines determine whether a particular factor is included and how much bearing that factor will have on the release decision. For example, if those who designed the guidelines see public protection as the primary criminal justice objective, guidelines would weigh heavily factors such as criminal history, which indicate

94. *Cf.* Dershowitz, *supra* note 17, at 82 (stating that vesting a parole decision in correction personnel is "essential so that prisoners could be released or detained according to informed judgments concerning their rehabilitation or likely recidivism").

95. *Cf.* VON HIRSCH & HANRAHAN, *supra* note 40, at 4.

96. *See* Dershowitz, *supra* note 17, at 101-06.

97. *See* VON HIRSCH & HANRAHAN, *supra* note 40, at 4.

98. *See* MAAS, *supra* note 25; *see also* Gary Taylor, *Parole Consultants Under Investigation for Ethical Violations*, NAT'L L.J., July 20, 1992, at 9 (discussing possible corruption involving parole consultants).

99. COHEN & GOBERT, *supra* note 66, § 3.08.

100. *Id.* § 3.06.

that the inmate is likely to reoffend. However, if rehabilitation were the objective, the guidelines would weigh heavily factors such as the parole plan, which indicates whether the offender is prepared to reintegrate into the community.

Regardless of the criminal justice objective, the offense itself is always the most important determinant under release guidelines because proportionality requires it.[101] The legislature employs proportionality, the notion that more serious crimes deserve more serious punishment, in categorizing crimes and assigning ranges of punishment.[102] The concept of proportionality continues to play out in guideline construction.[103]

### *A. Operation of Guidelines*

The initial step toward promulgating parole release guidelines is the development of a needs assessment or, more frequently, a risk assessment tool.[104] The risk assessment tool must be empirically validated on the state's offender population because it makes predictions about behavior. An aggregate score, based on predictions about offenders, is used to place offenders into risk categories.[105] The parole release guidelines of Colorado and Utah illustrate the operation of release guidelines. Some of the factors used to assess risk in Colorado's release guidelines are the offender's history of convictions, incarceration, employment, and institutional adjustment.[106] This risk assessment instrument was validated against Colorado's criminal population, excluding women offenders and sex offenders.[107] According to the validation studies, Colorado offenders who score thirty-four to forty-six points have a sixty-six percent (63%) likelihood of reoffending (High Risk), those who score twenty-eight to thirty-three points have a thirty-four percent (34%) likelihood of reoffending (High Medium Risk), those who score fifteen to twenty-seven points have a twenty-two percent (22%) likelihood of reoffending (Medium Risk), and those who score three to fourteen points have

101. *Cf. id.* § 3.10 (stating that federal parole guidelines, which are designed to prevent disparity as stated *supra* note 36, use offense severity as a primary sentencing factor).

102. Andrew von Hirsch, *Proportionate Punishments, in* PRINCIPLED SENTENCING 195-99 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

103. *See, e.g.*, UTAH SENTENCE AND RELEASE GUIDELINES, UTAH CODE OF JUDICIAL ADMINISTRATION app. D, at 1128 (stating that the "underlying philosophy of the Guidelines is that criminal sentences should be proportionate to the seriousness of the offense") [hereinafter UTAH SENTENCE AND RELEASE GUIDELINES].

104. ENGLISH, *supra* note 39, at 3-6.

105. *Id.*

106. *Id.* at 44-45.

107. *Id.* at 3 n.1.

approximately a ten percent (10%) likelihood of reoffending (Low Risk).[108]

Utah's guidelines use a criminal history assessment with similar factors, but this assessment is not intended to be a risk assessment, although the guidelines may identify risk.[109] A score reduction is allowed for arrest-free street time.[110] Utah's guidelines, unlike Colorado's, are retribution based. They allocate punishment according to offender culpability. Scores result in the offender's placement in a "criminal history category," ranging from poor to excellent.[111]

The states use the categorization differently, depending on the parole board's manner of operation. In Colorado, inmates are eligible for parole consideration when they have served half of their sentences.[112] Upon considering parole, the risk-assessment categories advise the board as follows: For High Risk, no parole until the sentence is nearly expired or until the inmate can be controlled with intensive supervision; for High Medium Risk, "maybe" parole (no if the parole plan is not adequate; yes if intensive supervision is ordered); for Medium Risk, "maybe" parole (release is generally allowed if the parole plan is adequate); and for Low Risk, parole to a standard parole plan.[113] In Utah the criminal history categories are arranged along the vertical axis of a matrix. This arrangement will be explained in detail below.

The other major set of guideline factors concerns the gravity of the criminal behavior, or proportionality. Either the title of offense for which the offender stands convicted or reference to the actual criminal conduct as reported by the police determines offense severity.[114] Other factors affecting offense severity include victim vulnerability, degree and kind of the defendant's participation, and the extent to which the defendant's conduct endangers others.

In the Colorado system, the conviction offense classification (class two through five felonies), and mitigating and aggravating factors determine offense severity.[115] If neither mitigating nor aggravating circumstances exist, a normal range of time served is indicated.[116] Aggravation extends the

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108. *Id.* at 8-9, 19.

109. UTAH SENTENCE AND RELEASE GUIDELINES, *supra* note 103, at 1131-32.

110. *Id.* at 1133.

111. *See id.* at 1138.

112. *See* COLO. REV. STAT. ANN. § 17-22.5-403 (West Supp. 1993).

113. ENGLISH, *supra* note 39, at 20.

114. In sentencing, this is called "real offense" sentencing. *See* Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550 (1981).

115. ENGLISH, *supra* note 39, at 21-22.

116. *See id.* at 23.

recommended range and mitigation decreases it.[117]

The Utah system is a matrix system, in which offense severity is arranged along the horizontal axis of a matrix. To obtain the recommended period of incarceration, one locates the level of the crime's seriousness along one axis and the criminal history category along the other axis; then one finds the matrix cell containing the recommendation for that combination.[118] Of two offenders having equal risk assessment scores, the matrix cell for the armed robber indicates a higher range of incarceration than the cell for the car thief. Of two offenders who committed rape, the matrix cell of the rapist with the longer criminal history indicates a higher range of incarceration than the cell for the first-offender rapist.[119]

The parole board may be required to follow the guidelines. If release guidelines are mandatory, provision is made for departure from them.[120] Any departure is limited to certain circumstances and may require the board to give a statement of justifications.[121] However, not all guidelines are mandatory. In some jurisdictions the board is allowed to treat the guidelines as recommendations from which it may freely depart.[122] In either event, reasons for departure and frequency of departure should be monitored to determine whether the guidelines require adjustment.

Guidelines may accommodate other policies as long as the legislature has not proscribed such inclusions. For example, the federal sentencing guidelines allow departures for offenders who give testimony that convicts another individual.[123] Guidelines might further serve to relieve prison crowding by authorizing additional releases when the prison population reaches a certain level.

### *B. Benefits of Guidelines*[124]

Guidelines improve parole decision making because they promote uniform, principled decisions with sufficient flexibility to deviate when justice requires a departure. Despite offenders having chosen unjustifiably to intrude into others' rights, as a group, offenders have a keen sense of justice when their own rights are concerned. Within the prison culture, a fair amount of information is exchanged regarding parole decisions. When offenders compare

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117. *Id.* at 21-25.

118. *See* UTAH SENTENCE AND RELEASE GUIDELINES, *supra* note 103, at 1138.

119. *See id.*

120. *Id.* at 21, 25.

121. *Id.*

122. *Id.* at 1129, 1131.

123. Federal Sentencing Guidelines, 18 U.S.C.A. app. 4 § 5K1.1 (West Supp. 1993).

124. Material for this section is taken from the author's experience as a parole board member and chairperson involved with votes cast in more than 21,000 actions.

their parole dates with parole dates of those of others who have committed similar crimes, they become profoundly disturbed to learn another was treated more leniently. Guidelines either place like offenders on the same footing or make known the justifications for differential treatment. Such justifications include aggravating or mitigating factors and differing risk assessment scores.

Uniformity alone, however, does not result in fair parole decisions. The guidelines' contribution to principled decisions is most valuable. Parole decision makers should prepare themselves well before making a decision. They should know about the crime, how the crime affected the victim, and what role the offender played. They should understand the pattern of criminality that preceded the crime and the contribution that the offender's social history and life's choices made to his criminality. Decision makers should also inform themselves of the inmate's recent behavior in the institution and the inmate's needs and responsibilities on returning to the street. They should be aware of any strong public opinions about the offender, whether the local prosecutor has targeted the offender's particular crime, and whether the state has the resources to supervise the inmate adequately. All of this information significantly affects on the decision maker's view. As a board member reviews the inmate's file, the process of analysis may proceed like the following example:

> "It was a robbery . . . Oh, that's a terrible, predatory crime. Sixty months is about right."
>
> "The weapon was a wooden gun . . . no real threat to life. Maybe forty-eight months is better."
>
> "The victim was an off-duty cop who stomped the heck out of the offender. How humiliating. But that shouldn't affect his punishment. I'm still at forty-eight months."
>
> "It was a spur-of-the-moment crime . . . his buddies talked him into it. The wooden gun happened to be with his son's toys in the car. This wasn't planned at all. I think I'm down to forty-two months."
>
> "Oh, wait a minute. The rap sheet says this is the third time he's been convicted for robbery. Even if the facts are similar, this guy just doesn't get it. I'm up to fifty-four months."
>
> "Wow, look at this. He's been convicted of two discipliners for strong-arming other inmates. That puts me back at sixty months. Hmm, the cop he tried to rob is head of the Police Officers Association. He plans to attend the hearing. Sixty-six months?"

This scenario is not unrealistic. At the same moment a fellow board member in the next office is arriving at different numbers for the same set of factors. When the hearing is held, the inmate's adorable toddler wiggles in mom's arms as she explains to the board how badly she needs the inmate home. To one board member the child's needs weigh in favor of release; to another the child's needs go against release because the board member is convinced the inmate is not a good father.

Guidelines promote principled decisions because they collect all of these factors, assign a point value to them, and suggest or mandate a result. Parole decisions reflect consideration of the same factors by all board members for all cases. If criminal history is significant, all inmates' criminal histories should be considered. Convictions are more reliable than arrests, so the guidelines might be designed to consider only convictions. A clear criminal record should yield a certain benefit, perhaps zero on a risk assessment score in which high scores indicate high risks. But one to two felony convictions should add a point, ultimately translating to six more months in prison. Guidelines assure that all board members give weight to salient factors in a given case and that, among different cases, the same factors are salient.

Guidelines further promote principled decisions because, although they cannot eliminate impermissible factors, they can limit their impact. The presence of an inmate's family sometimes tugs at the hearts of decision makers. With guidelines, the limited range of choices discourages wide swings based on factors not recognized as legitimate.

However, some flexibility is necessary because guidelines cannot be written to anticipate every circumstance. In extraordinary circumstances, justice requires deviation from guidelines. A legislature can prevent such deviations from causing departures from justice by limiting the frequency of deviations and by requiring a statement of reasons for any deviation from the guidelines.

Parole release guidelines can contribute enormously to the state's ability to coordinate and plan criminal justice matters. Such coordination is necessary if criminal justice components are to avoid working at conflicting purposes. When various actors in the criminal justice system agree, guidelines enable the parole component consistently to serve a stated punishment philosophy. Guidelines enable one to fairly and accurately predict the amount of time the inmate will serve in prison. This ability gives prosecutors and defense lawyers a better idea of the actual stakes in plea negotiations. Predictability further enables planners to make better decisions about facilities, personnel management, and budget in general.

Finally, guidelines serve important educational purposes. They place offenders on notice as to what must be done to earn a parole date and give offenders a means of predicting the outcome of their hearings. Once a decision is made, the guidelines inform victims, law enforcement, the press,

and the public regarding the reasons for the outcome.

Parole release guidelines can remedy many of the faults in indeterminate sentencing and, at the same time, retain the best feature of indeterminate sentencing: the ability to base release decisions on prison performance, the most current information about an offender.

## III. CONSTITUTIONAL IMPLICATIONS OF RELEASE GUIDELINES

### *A. The Nexus Between Sentencing and Parole*

The Constitution affords protection to inmates with regard to sentencing and release from prison.[125] The Supreme Court's pronouncements on sentencing and due process are important considerations in setting parole guidelines. It has observed that the sentencing process must satisfy Fifth Amendment protection against the deprivation of liberty without due process.[126] The Court has identified a number of fundamental rights compelled by the due process clause respecting, for example, information used at sentencing,[127] the ability to address sentencing factors,[128] and use of prior convictions.[129]

Most often, however, due process arguments fail to overturn sentences. Claims have been rejected in the areas of mandatory sentencing,[130] reliability of proof,[131] the impact of a defendant's false statements at

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125. The Fifth and Fourteenth Amendments guarantee the right to due process by both the federal and state government, respectively. U.S. CONST. amend. V & XIV, § 1 (stating that a person shall not be deprived "of life, liberty, or property, without due process of law"). The requirements of due process are flexible and may differ greatly from one context to the next. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

126. *E.g.*, Gardner v. Florida, 430 U.S. 349, 358 (1977).

127. *See* Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that exclusion of relevant evidence at a sentencing hearing is a denial of due process); *see also* Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) (holding that the sentencer in a capital case may not be precluded from weighing nonstatutory mitigating factors offered by the defendant); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any aspect of the defendant's character record as a mitigating factor in a criminal case).

128. *See Gardner*, 430 U.S. at 362 (requiring that a defendant facing the death penalty be allowed to comment on information underlying the sentence).

129. *E.g.*, United States v. Tucker, 404 U.S. 443, 449 (1972) (holding that convictions which were obtained in violation of a defendant's right to counsel may not be considered at sentencing).

130. *See* Mackey v. Montrym, 443 U.S. 1, 19 (1979) (finding that a Massachusetts statute mandating suspension of a driver's license for refusing to take a breath analysis test did not violate due process); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (holding that due process does not require that possession of a firearm for mandatory sentencing purposes be proven by clear and convincing evidence).

131. *See* Williams v. New York, 337 U.S. 241, 252 (1949) (permitting the use in sentencing

trial,[132] and appointment of counsel.[133]

Similarly, the Supreme Court has articulated constitutional principles relating to parole. These cases are few, however, probably because the parole power is frequently created by statute and administered through a parole board as an outgrowth of the executive's clemency power. The first major Supreme Court decision affecting parole was *Morrissey v. Brewer*,[134] which held that a parolee has a liberty interest in remaining on parole.[135] Before parolees can be deprived of that liberty, they must be afforded due process at the revocation hearing.[136]

The *Morrissey* decision generated a fear among criminal justice practitioners that future decisions might impose similar due process protection upon the parole grant procedure. At one time five of the seven federal circuit courts of appeals which considered the issue found that minimal due process requirements applied to the granting of parole.[137]

The Supreme Court addressed the issue in *Greenholtz v. Inmates of the*

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of out-of-court affidavits that would not be admissible for the purpose of proving guilt).

132. *See* United States v. Grayson, 438 U.S. 41, 52 (1978) (upholding a sentencing judge's consideration of a defendant's willingness to lie under oath).

133. Murray v. Giarratano, 492 U.S. 1, 12 (1989) (holding that the due process does not require states to appoint counsel to indigent death row inmates who are pursuing post-conviction remedies), *cert. denied*, 498 U.S. 827 (1990).

134. 408 U.S. 471 (1972).

135. *Id.* at 482.

136. *Id.* at 484. The parolee is entitled to a preliminary finding of probable cause. If probable cause is established at a hearing separate from the revocation hearing, the preliminary hearing must be held as promptly after the parole violation as possible, near the place the alleged violation occurred, and conducted by an independent officer. The offender must receive notice of the preliminary hearing. Additionally, the offender has a right to present evidence, confront and cross examine witnesses on a limited basis, and obtain a summary of the evidence relied upon, including conclusions as to probable cause. The revocation hearing must take place within a reasonable time thereafter, and the parolee must receive notice of this hearing as well. The parolee has a right to be heard (to present and refute evidence and argue against revocation), a right to confront and cross examine witnesses on a limited basis, and a right to obtain a summary of the evidence relied on, including conclusions as to probable cause. *Id.* at 484-89.

137. *See* Inmates of the Neb. Penal & Correctional Complex v. Greenholtz, 576 F.2d 1274 (8th Cir. 1978), *rev'd*, 442 U.S. 1 (1979); Franklin v. Shields, 569 F.2d 784 (4th Cir.), *rev'd in part on other grounds*, 569 F.2d 800 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1003 (1978); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974), *overruled, as recognized by* Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644 (D.C. Cir. 1987); United States *ex rel.* Johnson v. Chairman of the N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). *Contra* Scott v. Kentucky Parole Bd., No. 74-1899 (6th Cir. Jan. 15, 1975), *vacated for consideration of mootness*, 429 U.S. 60 (1976) (per curiam); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (en banc), *vacated for consideration of mootness*, 414 U.S. 809, *dismissed as moot*, 501 F.2d 992 (5th Cir. 1973).

*Nebraska Penal & Correctional Complex*,[138] which established that the mere existence of a state parole system, absent other factors, does not create a constitutionally protected liberty interest in parole release.[139] However, the Court acknowledged that the wording of the Nebraska parole statute created an expectation of release worthy of minimal due process protection.[140] Whether particular statutory language gives rise to a liberty interest in parole continues to be disputed.

Due process jurisprudence relating to both sentencing and parole release must be considered in tandem.[141] Because both sentencing and parole release are at the end of the criminal justice system, their shared characteristics result in parallel legal analysis.[142] Frequently, sentencing and parole raise the same policy questions because both involve broad grants of discretion.[143] The Court in *Greenholtz* stated as follows:

> In parole releases, like its siblings probation release and institutional rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.[144]

Guidelines may be adopted for sentencing or for parole release. Sentencing guidelines structure the discretion of the judge but not the parole board. Parole release guidelines structure the discretion of the parole board but leave the judges' discretion in place. Some jurisdictions have adopted guidelines that do both.[145]

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138. 442 U.S. 1 (1979).

139. *Id.* at 11.

140. *Id.* at 12.

141. *See* Andrew Ashworth, *Structuring Sentencing Discretion*, *in* PRINCIPLED SENTENCING 256, 262 (Andrew von Hirsch & Andrew Ashworth eds. 1992) (discussing the "intimate relationship between sentencing and parole").

142. Courts frequently compare sentencing and parole when considering either issue. *See, e.g.*, State v. Borrell, 482 N.W.2d 883, 891 (Wis. 1992) (stating that "[b]ecause the parole eligibility date determination is an integral part of sentencing, we believe that a defendant's due process rights relating to the parole eligibility date determination are no greater than those associated with sentencing").

143. Both sentencing and parole decisions employ significant discretion using a broad range of evidence not allowed in the adjudication of guilt. This discretion of boards and judges may lead to either unjustified disparity in treatment of offenders or to the flexible, individualized treatment of offenders for a more just result.

144. 442 U.S. at 8 (footnote omitted).

145. See *supra* part I.B for an overview of the different state guidelines.

Although sentencing and parole are similar processes, there are limits to the efficacy of comparing them. While both serve the purposes of punishment (retribution, deterrence, incapacitation, and rehabilitation), they cannot do so equally well. One important difference between sentencing and parole is that setting release at sentencing is an exercise of judicial discretion, while setting it by a parole board is an exercise of executive discretion. Also, parole decision makers have more information available to them than do judges at sentencing. Judges have information up to the point of conviction, but parole boards also know how the offenders responded to prison, whether the offenders' resolve to remain offense-free survived the first offer of marijuana, whether the offenders have availed themselves of treatment programs, and the offenders' outlook on their futures.[146]

### *B. Due Process Jurisprudence*

#### *1. Theories*

Presently, the United States Supreme Court favors the entitlement theory of due process analysis, which states that procedural due process protection is limited to rights found in the text of the federal constitution and rights created by state and federal law.[147] Once the Court determines that a procedural due process right exists, it then determines what process is due.

Various developments have occurred under this entitlement analysis. When claims are based on creation of a liberty interest by a state or federal statute or practice, the Supreme Court has focused on the nature of the language or practice. For cases in which a protectible liberty interest is claimed, the Supreme Court has introduced[148] and developed[149] a balanc-

146. Another important difference in the two processes is that determining release dates at sentencing better serves the goal of retribution by focusing exclusively on the offenders' past behavior. It better serves the goal of deterrence by meting a speedier consequence for deviant behavior. However, delaying the determination of release dates until the offenders have served part of their sentences promotes the goal of incapacitation because the inmates' prison records can inform decision makers about the risk of recidivism. Also, the delay promotes the goal of rehabilitation because the prison has had an opportunity to address the inmates' needs and the inmates have had opportunities to rehabilitate themselves.

147. For a discussion of positivist or formal entitlement theory, see Wallace v. Robinson, 940 F.2d 243, 246-49 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1563 (1992), and Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

148. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (finding that the entitlement to procedural due process protection is influenced, among other factors, by the extent to which a person will be "condemned to suffer a grievous loss" (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951))).

149. Early cases had merely instructed that courts look not to the weight but to the nature of

ing test that allows a court to give great deference to state interests. The factors to be considered under this test are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[150]

If the state's interests outweigh the inmate's interest, then no liberty interest exists and the Due Process Clause does not come into play.

The presence or absence of mandatory language or standards governs entitlement theory application. Under the theory, the Supreme Court held that mandatory language in a state parole statute created a liberty interest protected by minimal due process.[151] The Supreme Court has also held that frequent grants of commutation, absent underlying mandatory language, does not create a liberty interest for future applicants,[152] that statutes and regulations which establish procedures for confining an inmate to administrative segregation can create a protected liberty interest solely because of the mandatory language,[153] and that visiting regulations which do not mandate an outcome create no liberty interest.[154] The end of this section will discuss cases that consider whether particular statutory language creates a liberty interest in parole.

Relatively fewer Supreme Court cases suggest that a liberty interest protected by due process derives from the quantum or quality of the interest at stake. However, this analysis is more likely to lead to a protected liberty interest than is the entitlement theory analysis. In *Vitek v. Jones*[155] the Court held that due process applied to the transfer of an inmate to a mental facility pursuant to a Nebraska statute.[156] In *Washington v. Harper*[157] it held due process applied when a state regulation allowed forced medica-

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the interest. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972).

150. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

151. Board of Pardons v. Allen, 482 U.S. 369, 381 (1987) (finding that the Montana parole statute's use of mandatory language created a protected liberty interest); Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 12 (1979) (finding that the Nebraska parole statute's use of mandatory language created a protected liberty interest).

152. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 467 (1981).

153. Hewitt v. Helms, 459 U.S. 460, 472 (1983).

154. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 464-65 (1989).

155. 445 U.S. 480 (1980).

156. *Id.* at 487-88 (citing NEB. REV. STAT. § 83-180(1) (1976) (current version 1987)).

157. 494 U.S. 210 (1990).

tion of a mentally ill inmate.[158] In both cases the Court first used entitlement analysis to find that the state had created a liberty interest subject to due process protection.[159] Inexplicably, the Court went further in both cases and additionally found that due process protection applies *independently* of the state-created right.[160] The Court's determination that confinement in a mental hospital and treatment for mental illness are "qualitatively" different from the usual consequences of criminal confinement supported the acknowledgement of substantive due process rights under the Fourteenth Amendment.[161] The *Vitek* Court concluded that the stigma and unjustified intrusion on personal security which resulted from confinement in a mental hospital warranted due process protection.[162] It is unknown whether these cases reflect the Court's attitude toward mental health cases in particular or whether the Court contrasts these decisions with entitlement analysis by finding substantive due process when the interest at stake is qualitatively significant.

Currently, only slight support exists for a final theory: the "grievous loss" theory. This theory is the one most likely to result in the Court finding a protected liberty interest. Grievous loss analysis is based on the premise that people have "cardinal unalienable rights" which may or may not appear in the text of statutes or the Constitution.[163] When the state abridges one of these rights and citizens suffer a "grievous loss" as a result, due process protection applies.[164] The focus under this theory is on the purpose underlying the Due Process Clause: to limit the power of the sovereign to infringe on the liberty of citizens. Initially, the Supreme Court invoked due process when any person would be "condemned to suffer grievous loss of any kind"[165] and even suggested that the "stigma and

158. *Id.* at 221-22.

159. The Supreme Court in *Vitek* found that a statute created an objective expectation that "a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison." 445 U.S. at 490. The Court in *Washington v. Harper* found that a prisoner had "a right to be free from the arbitrary administration of antipsychotic medication." 494 U.S. at 221.

160. The Court in *Vitek* stated that "[t]he issue is whether after a conviction for robbery, [the prisoner] retained a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with the minimum requirements of due process." 445 U.S. at 491. The Court answered in the affirmative. *Id.* at 493. In *Washington* the Court stated, "We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause . . . ." 494 U.S. at 221.

161. *Vitek*, 445 U.S. at 493.

162. *Id.* at 492-93.

163. *See* Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

164. *Id.* at 231.

165. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter,

hardships of a criminal conviction" might be more grievous than property loss.[166] The Court weakened the protection provided by the "grievous loss" analysis when it introduced the notion of balancing the loss against the state's interest.[167] Most damaging for inmate litigants was the Court's pronouncement in 1976 that it rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protection of the Due Process Clause."[168] Citing this language, the Court frequently finds that inmates have no protected liberty interest at stake.[169] Dissenters, however, continue to argue that the recent, more restrictive cases ignore the broad foundations of earlier due process cases.[170]

### 2. *Cases Considering a Liberty Interest in Sentencing Under Guidelines*

In approximately one dozen or more states with sentencing (not parole release) guideline experience, few have addressed claims that their guidelines create a liberty interest protected by due process. Those considering the argument offer little succor to defendants claiming an entitlement to greater due process protection. The Minnesota Court of Appeals decided a case wherein the inmate argued at his sentencing that he should be released under the newly adopted sentencing guidelines rather than under the parole system in place.[171] The court found that Minnesota's sentencing guidelines contained neither the "particularized substantive standards to guide parole decisions nor . . . mandatory language" sufficient to create a protectible liberty interest.[172] Similarly, an appellate court in Florida rejected a defendant's argument that the sentencing guidelines enhanced his liberty interest to the extent that traditional procedures no

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J., concurring).

166. *Id.*

167. *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970), *quoted in* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

168. *Meachum*, 427 U.S. at 224 (emphasis in original), *quoted in* Jago v. Van Curen, 454 U.S. 14, 17 (1981).

169. *See, e.g., Jago,* 454 U.S. at 17 (holding that a liberty interest in parole did not arise from "mutually explicit understandings" between the prisoner and parole authority).

170. *See* Hewitt v. Helms, 459 U.S. 460, 483 (1983) ("In [Wolff v. McDonnell, 418 U.S. 539 (1974)], the Court squarely held that every prisoner retains a significant residuum of constitutionally protected liberty following his incarceration. . . . The source of the liberty recognized in *Wolff* is not state law, nor even the Constitution itself.") (Stevens, J., dissenting); *see also* Olim v. Wakinekona, 461 U.S. 238, 251 (1983) (Marshall, J., dissenting) ("An inmate's liberty interest is not limited to whatever a State chooses to bestow upon him.").

171. Powell v. Erickson, No. C5-87-1863, 1988 WL 19354 (Minn. Ct. App. Mar. 8, 1988).

172. *Id.* at *3.

longer provided adequate due process protection.[173] The court held that judges retained the discretion to exceed the range recommended in the guidelines.[174]

The case law on federal sentencing guidelines is more fully developed than the case law on state sentencing guidelines. Concern over broad disparity in federal sentencing resulted in the abolition of parole and, later, passage of the Sentencing Reform Act of 1984 which created the United States Sentencing Commission.[175] That Act charged the Commission with the task of implementing sentencing guidelines for federal crimes.[176] Since their inception, the federal sentencing guidelines have faced many challenges, most of which were settled in the landmark case of *Mistretta v. United States*.[177] Although the issue was raised in *Mistretta*, the Court did not rule on whether sentencing under the federal sentencing guidelines violates the Due Process Clause.

In the absence of such a ruling, federal circuits have considered substantive and procedural due process challenges to the federal guidelines. Circuit courts have been unwilling to find that sentencing guidelines violate the Due Process Clause merely because the guidelines circumscribe the discretion of the judge,[178] nor have the courts adopted the view that offenders have a protected right to present mitigating evidence at non-capital sentencing hearings.[179] These arguments have been rejected on several

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173. *See* Mincey v. State, 460 So. 2d 396 (Fla. Dist. Ct. App. 1984).

174. *Id.* at 397.

175. *See supra* note 36 and accompanying text. The Supreme Court offered the following explanation of how these developments arose:

> Approximately a century ago, a reform movement asserting that the purpose of incarceration . . . should be rehabilitation of the offender, dramatically altered the approach to sentencing. A fundamental proposal of this movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism. . . .
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> . . . Thus it is that today the extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially fixed term.

United States v. Grayson, 438 U.S. 41, 46-47 (1978) (footnotes omitted).

176. 28 U.S.C. § 991 (1988).

177. 488 U.S. 361 (1989) (holding that the participation of federal judges on the sentencing commission, the joint exercise of authority with non-judges, and the presidential appointment of these judges did not violate the separation of powers and that the Sentencing Reform Act of 1984 was not an excessive delegation of legislative authority).

178. *E.g.*, United States v. Vizcaino, 870 F.2d 52, 57 (2d Cir. 1989); United States v. Frank, 864 F.2d 992, 1008-09 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989).

179. *E.g.*, United States v. White, 869 F.2d 822, 825 (5th Cir.) (per curiam), *cert. denied*,

grounds. Some courts find that a liberty interest in individualized sentencing is inconsistent with the goals of retribution and deterrence[180] or cite congressional power to completely divest courts of sentencing discretion.[181] One court pointed out that the guidelines do not supplant the judgments of tribunals because federal judges retain some discretion.[182]

Independent of those arguments is the claim posed by offenders who fare better under the guidelines than under the former parole scheme. These offenders argue that they are entitled to a release date within the range of terms produced by application of the federal sentencing guidelines. In *United States v. Restrepo*[183] the Ninth Circuit considered whether using the preponderance of the evidence standard to determine the existence of enhancing factors under the Sentencing Reform Act violates due process.[184] The defendant argued that the mandatory language of the statute and guidelines gave him a constitutionally protected expectation of receiving the term required by application of the guidelines. He further claimed that, because the deprivation of his liberty depended on the reliability of factual conclusions necessary for application of the guidelines, due process required that those determinations be made beyond a reasonable doubt.[185] The court declared that an offender had a protected interest at sentencing even before the guidelines were enacted[186] and, after passage of the Sentencing Reform Act, the offender has nothing more than an interest in accurate application of the guidelines.[187] Although the guidelines give a predetermined effect to traditional sentencing factors, the court added, the guidelines do not alter the maximum penalty for the crime committed.[188] The majority held that due process does not require a standard of proof higher than preponderance of the evidence.[189]

Judge Pregerson and Judge Norris dissented, arguing that the offender's right to a sentence less than the statutory maximum was greater than a mere right to have the guidelines accurately applied.[190] Rather, in this case, the guidelines created a constitutionally protected expectation of receiving

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490 U.S. 112, *and cert. denied*, 493 U.S. 1001 (1989).

180. *E.g.*, *Frank*, 864 F.2d at 1009-10; *accord Vizcaino*, 870 F.2d at 55-56.

181. *E.g.*, *Mistretta*, 488 U.S. at 364; *White*, 869 F.2d at 825.

182. United States v. Brittman, 872 F.2d 827, 828 (8th Cir.), *cert. denied*, 493 U.S. 865 (1989).

183. 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992).

184. *Restrepo*, 946 F.2d at 655.

185. *Id.*

186. *Id.* at 657.

187. *Id.* at 659.

188. *Id.*

189. *Restrepo*, 946 F.2d at 661.

190. *Id.* at 663 (Pregerson, J., dissenting).

twenty-seven to thirty-three months for the committed crime.[191] Because proof of additional facts would mandate an additional fourteen to eighteen months, Judge Pregerson argued further that proof beyond a reasonable doubt was required.[192]

Dicta in *United States v. Vizcaino*[193] lends slight support for the proposition that the guidelines create a liberty interest. In response to Vizcaino's procedural due process claim, the court initially found that the offender had a liberty interest in avoiding future incarceration.[194] The court stated that "Supreme Court decisions rejecting procedural due process challenges to sentences hold only that there is no right to avoid serving a valid sentence or to have a particular sentence."[195] The Second Circuit found that the process outlined in the guidelines provided satisfactory procedural safeguards.[196] Both *Vizcaino* and *Restrepo* articulate a very limited right — the right to have one's sentence determined by a process with satisfactory procedural safeguards.

Lastly, Justice Souter's dissent in *Burns v. United States*[197] supports the view that the guidelines create a liberty interest in sentencing.[198] The majority in *Burns* held that a district court may not sua sponte depart upward from the guideline range without giving reasonable notice to the parties that it is considering such a departure.[199] This holding is based on construction of the statute rather than the Due Process Clause.[200] In criticizing the majority's statutory construction, the dissent assumes that a liberty interest exists and concludes that the process due does not require notice.[201] Souter's discussion of the nature of the liberty interest is particularly interesting. He first compared the Sentencing Reform Act with that portion of *Greenholtz* which held that the language mandating parole release, unless certain criteria were met, created a constitutionally protected interest.[202] He continued with: "I therefore conclude that a defendant

191. *Id.*

192. *Id.* at 663-64.

193. 870 F.2d 52 (2d Cir. 1989).

194. *Id.* at 56.

195. *Id.* (citations omitted).

196. *Id.*

197. 111 S. Ct. 2182 (1991).

198. *Id.* at 2196 (Souter, J., dissenting).

199. *Id.* at 2186.

200. *Id.* at 2187 ("[W]ere we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause.").

201. *Id.* at 2188-97 (Souter, J., dissenting).

202. *Burns*, 111 S. Ct. at 2191 (Souter, J., dissenting) (citing Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979)).

enjoys an expectation subject to due process protection that he will receive a sentence within the presumptively applicable range in the absence of grounds defined by the Act as justifying departure."[203] Applying the balancing test of *Mathews v. Eldridge*,[204] Souter concluded that the process due does not include the right to notice of the sentencing judge's intent to make a sua sponte upward departure.[205]

The United States Supreme Court has made no definitive finding regarding whether sentencing guidelines at the federal level create a liberty interest protected by the Due Process Clause. The best case that can be made rests on the dicta and dissents discussed above.

### 3. *Cases Considering a Liberty Interest in Parole in General*

Before the Supreme Court decided *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,[206] circuit courts were split on whether inmates had a liberty interest in parole consideration.[207] The District of Columbia Circuit held that federal prisoners were entitled to receive a statement of reasons for denial of parole.[208] This decision rested on a broad finding of due process entitlement in parole consideration.[209] Similarly, the New York Board held that state prisoners were entitled to know why they were denied parole under the Fourteenth Amendment.[210] Courts based their decisions on the due process analysis in *Morrissey v. Brewer*.[211] However, most courts considered that the right to maintain conditional freedom predominated over the mere anticipation or hope of freedom.[212] The most far-reaching of these decisions, *Franklin v. Shields*,[213] held that due process guaranteed Virginia inmates the following

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203. *Id.* at 2192.

204. For a discussion of the balancing test, see *supra* note 151 and accompanying text.

205. *Burns*, 111 S. Ct. at 2193.

206. 442 U.S. 1 (1979).

207. *See supra* note 138 and accompanying text.

208. *See* Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974), *overruled, as recognized by* Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644 (D.C. Cir. 1987).

209. *Id.* at 1278.

210. United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); *see also* United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) (holding that at a minimum, due process required that reasons for denying parole be given).

211. 408 U.S. 471 (1972). For a discussion of the *Morrissey* decision, see *supra* notes 135-38 and accompanying text.

212. *See* Morrissey v. Brewer, 408 U.S. 471, 482 n.8 (1972) (quoting United States *ex rel.* Bey v. Connecticut, 443 F.2d 1079, 1086 (2d Cir.), *vacated*, 404 U.S. 879 (1971)).

213. 569 F.2d 784 (4th Cir. 1977), *aff'd in part & rev'd in part per curiam*, 569 F.2d 800 (4th Cir.) (en banc), *cert. denied*, 435 U.S. 1003 (1978).

rights: the right to have the parole board publish its criteria for parole, the right to notice and a hearing (but not counsel), the right to access their files, the right to present evidence in favor of parole, and the right to require that the board provide prisoners with a written statement of its reasons for denying parole.[214] The majority opinion was overturned in part when the court, sitting en banc, reconsidered.[215] Reversing most of the majority's opinion, the court held that the only explicit constitutional requisite concerning parole is that the decision maker must furnish a prisoner with reasons for denial of parole.[216] The Fourth Circuit also stated, "In adopting written guidelines for the granting of parole the Board has exhibited commendable concern for the rights of the prisoners and we find it unnecessary to presently consider whether its efforts along this line are constitutionally required."[217] Although the en banc court disagreed as to what process was due, it did not overturn the majority's determination that Virginia's parole statute conferred on the prisoner an interest in liberty, nor did it overturn the holding that the due process clause is applicable to parole release proceedings.[218]

State courts came to similar conclusions during this pre-*Greenholtz* period. In *State ex rel. Taylor v. Schoen*[219] the Supreme Court of Minnesota held that parole release decisions were subject to due process requirements of the Fourteenth Amendment.[220] Ultimately, the *Taylor* court found that the process provided was adequate.[221]

The United State Supreme Court decided the landmark case of *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*[222] in 1979. In *Greenholtz* Nebraska inmates alleged violations of due process in the parole board's consideration of inmates' suitability for parole. Certiorari was granted to resolve the conflict among circuits as to the process due in parole proceedings. Although Nebraska's procedures were ultimately vindicated, two major holdings emerged from the case: (1) The mere presence of a state parole system does not create a constitutionally protected right, and (2) the particular language of the Nebraska parole

214. *Franklin*, 569 F.2d at 791-97.

215. *See id.* at 800.

216. *Id.* at 801.

217. *Id.* at 800.

218. *See id.* at 800-01. The mainstream interpretation of *Franklin* is that, when process is due in parole proceedings, no more than a statement of reasons for denial is required. *See* Bloodgood v. Garraghty, 783 F.2d 470, 473 (4th Cir. 1986).

219. 273 N.W.2d 612 (Minn. 1978) (en banc).

220. *Id.* at 617. The parole board's decision was based on permissive guidelines which were subsequently replaced with mandatory guidelines in 1980. *Id.* at 619 n.8.

221. *Id.* at 617.

222. 442 U.S. 1 (1979).

statute created a liberty interest.[223]

The Court began from the premise that government deprivation of a liberty or property interest requires due process protection. To the extent circuits finding a liberty interest relied on *Morrissey*, the *Greenholtz* Court clarified that the differences between parole grant and parole revocation defeat that analogy, stating that "the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process."[224]

In finding a liberty interest, the majority focused on the mandatory language of Nebraska's statute. It found that "shall" in combination with "unless," created an expectancy of parole that can be denied only in accordance with due process principles.[225] A four-justice minority, however, argued that a liberty interest exists even without mandatory language. Justice Powell argued that prisoners are justified in expecting that parole will be granted fairly and according to law whenever the state's enunciated standards are met, regardless of whether the word "shall" is used.[226] Justice Marshall, joined by Justice Brennan and Justice Stevens, argued that "*all* prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process."[227]

Since *Greenholtz*, courts have examined state parole systems to determine whether the respective parole consideration schemes place such limitations on the state's discretion so as to create a constitutionally protected liberty interest. In 1987 the Supreme Court again considered the issue in *Board of Pardons v. Allen*,[228] this time addressing whether inmates in the Montana system had a protected liberty interest in parole release. Once again persuaded by substantive predicates and mandatory

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223. *Id.* at 11-12. The statute contained these provisions:

> 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:
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> (a) There is a substantial risk that he will not conform to the conditions of parole;
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> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
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> (c) His release would have a substantially adverse effect on institutional discipline; or
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> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

*Id.* at 11 (quoting NEB. REV. STAT. § 83-1,114(1) (1976) (current version 1987)).

224. 442 U.S. at 11 (citations omitted). In the remainder of the majority opinion, the Court found that the procedures provided by the state of Nebraska accorded the process due. *Id.* at 16.

225. *Id.* at 11-12.

226. *Id.* at 19 (Powell, J., concurring and dissenting).

227. *Id.* at 22 (Marshall, J., dissenting) (emphasis in original).

228. 482 U.S. 369 (1987).

language in the statute, the Court held Montana had created a protected liberty interest.[229] The Court seemingly adhered to the notion that a statute must create a constitutionally protected liberty interest for due process protection to apply to parole.[230] Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, found the Court's approach inconsistent with previous liberty interest jurisprudence.[231] Justice O'Connor stated, "Although paying lipservice to the principle that a statute creates an entitlement sufficient to trigger due process protections only when the decisionmakers' discretion is limited by standards, the Court today utterly fails to consider whether the purported 'standards' *meaningfully* constrain the discretion of state officials."[232] She concluded that the majority "abandoned the essential inquiry in determining whether a statute creates a liberty interest" and, therefore, the majority no longer required particularized standards which impose real limits on the discretion of decision makers.[233]

### *4. Language Which Creates an Entitlement*

Since *Greenholtz* state and federal courts have disagreed as to what language is sufficient to create an entitlement protected by due process. In *Board of Pardons v. Allen*, Justice Brennan noted that federal appellate courts' decisions fall into four categories.[234] In the first category of decisions, courts find a liberty interest "[w]hen statutes or regulatory provisions are phrased in mandatory terms or explicitly create a presumption of release."[235] It is fairly well settled that explicit mandatory language creates a liberty interest. By 1986 circuit courts had found that statutes or

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229. *Id.* at 381. The relevant part of the statute provided:

> Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
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> . . . .
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> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of the sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

*Id.* at 376-77 (quoting MONT. CODE ANN. § 46-23-201 (1985) (emphasis added) (current amended version 1993)).

230. *See id.* at 381.

231. *See id.* at 385 (O'Connor, J., dissenting).

232. *Id.* at 384 (emphasis in original).

233. *Allen*, 482 U.S. at 385.

234. *Id.* at 378-80 n.10.

235. *Id.* at 379 n.10.

regulations of Missouri,[236] Tennessee,[237] and Arkansas[238] each created a liberty interest in parole. In the Tennessee and the Arkansas cases, the federal courts found that, while the state statute did not create a liberty interest, language in an agency rule sufficiently limited discretion to create an expectation of release.[239] No state court decisions have found such liberty interests.

In the second category, courts hold that "statutes or regulations that provide that a parole board 'may' release an inmate on parole do not give rise to a protected liberty interest."[240] Explicitly permissive language does not create a liberty interest. Inmates argued unsuccessfully that parole systems in Ohio,[241] Oklahoma,[242] Colorado,[243] New Mexico,[244] and

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236. Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697, 698 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). At the time of the decision, a Missouri statute provided: "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 on parole any person confined in any correctional institution administered by state authorities . . . ." MO. ANN. STAT. § 549.261 (Vernon 1980) (emphasis added). The Board had also adopted guidelines to structure its decisions.

The state legislature subsequently amended this statute, thereby overruling *Williams* by replacing the mandatory language with discretionary language. *See* MO. ANN. STAT. § 217.690(1) (Vernon Supp. 1993) ("When in its opinion there is a reasonable probability that an offender of a correctional facility can be released without detriment to the community or to himself, the board *may in its discretion* release or parole such person, except where otherwise prohibited by law." (emphasis added)).

237. Mayes v. Trammell, 751 F.2d 175, 179 (6th Cir. 1984), *superseded by rule as stated in* Wright v. Trammell, 810 F.2d 589 (6th Cir. 1987) (per curiam).

238. Parker v. Corrothers, 750 F.2d 653, 661 (8th Cir. 1984) (holding that Parole Board Regulation § 3.09, which provided "that when the Board 'considers the first release' of an [eligible] inmate, it is the 'policy of the Board to order . . . release' unless one or more of nine substantive reasons for deferral applies," created a liberty interest).

239. *Mayes*, 751 F.2d at 179; *Parker*, 750 F.2d at 661.

240. Board of Pardons v. Allen, 482 U.S. 369, 379 n.10 (1987).

241. Wagner v. Gilligan, 609 F.2d 866, 867 (6th Cir. 1979) (per curiam). The relevant Ohio statute allows the parole board to grant parole if "in its judgment there is a reasonable ground to believe" that doing so "would further the interests of justice and be consistent with the welfare and security of society." OHIO REV. CODE ANN. § 2967.03 (Anderson 1993).

242. Shirley v. Chestnut, 603 F.2d 805, 806 (10th Cir. 1979) (per curiam). The Oklahoma statute authorizes the parole board to recommend parole to the Governor, who may then grant parole upon this recommendation. OKLA. STAT. ANN. tit. 57, §§ 332.2, 354 (West 1991 & Supp. 1994).

243. Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172, 174 & n.2 (10th Cir. 1980) (explaining that although the Colorado scheme provided inmates with notification of factors to be considered in the parole grant decision, COLO. REV. STAT. ANN. § 17-2-201(4)(a) (West 1978) (current version West 1986) provided that the Board "may" release the inmate, but it is not required to do so, even when statutory requirements are met).

244. Candelaria v. Griffin, 641 F.2d 868, 869 (10th Cir. 1981) (per curiam) (quoting N.M. STAT. ANN. § 31-21-10(A) (Michie 1978) (repealed 1980), which had provided that "[t]he board

Mississippi[245] created a liberty interest, but circuit courts in each case found that broad, permissive language left parole to the discretion of parole boards without creating an expectation of release protected by due process.

Additionally, a state legislature may change its parole statute to eliminate the liberty interest. The Missouri legislature redrafted the statute which had been found to create a liberty interest, replacing mandatory language with permissive language.[246] Challenged anew, the Eighth Circuit found that the statute did not create a liberty interest.[247]

With one exception, state courts are in accord. Permissive language in statutes in Kansas,[248] Idaho,[249] and Mississippi[250] have been found not to create a liberty interest. In 1990 the Utah Court of Appeals found that the permissive language in Utah's statute did not create a liberty interest.[251] However, a more recent state supreme court decision held other-

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may release on parole any person confined in any correctional institution . . . when the prisoner gives evidence of having secured gainful employment or satisfactory evidence of self-support, and the board finds in its opinion the prisoner can be released without detriment to himself or to the community").

245. Irving v. Thigpen, 732 F.2d 1215, 1217 (5th Cir. 1984) (per curiam). The Mississippi statute provides that "[e]very prisoner . . . whose record of conduct shows that such prisoner has observed the rules of the Penitentiary, and who has served [specified minimum percentages of sentences], may be released on parole." MISS. CODE ANN. § 47-7-3 (1993). The Board is to order parole "only for the best interest of society . . . when the board believes that [a prisoner] is able and willing to fulfill the obligations of a law-abiding citizen." *Id.* § 47-7-17, *quoted in Irving*, 732 F.2d at 1217.

246. *See supra* note 236 and accompanying text.

247. Gale v. Moore, 763 F.2d 341, 343 (8th Cir. 1985) (per curiam).

248. Gilmore v. Kansas Parole Bd., 756 P.2d 410, 414 (Kan.), *cert. denied*, 488 U.S. 930 (1988) (holding that KAN. STAT. ANN. § 22-3717(e) (Supp. 1987), which provided that "the Kansas parole board *shall have the power* to release on parole those persons confined in institutions who are eligible for parole when, in the opinion of the board, there is reasonable probability that such persons can be released without detriment to the community or themselves" created no liberty interest) (alteration in original). Section 22-3717 has been substantially amended, effective July 1, 1993. *See* KAN. STAT. ANN. § 27-3717 (Supp. 1993).

249. Izatt v. State, 661 P.2d 763, 766 (Idaho 1983) (holding that no liberty interest was created by the Idaho parole statute). The relevant statute provides in part:

> A parole shall be ordered only for the best interests of society . . . , not as a reward of clemency and it shall not be considered to be a reduction of sentence or a pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or maintenance and care, and when the commission believes the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.

IDAHO CODE § 20-223(c) (Supp. 1993).

250. Harden v. State, 547 So. 2d 1150, 1152 (Miss. 1989) (agreeing with Irving v. Thigpen, 732 F.2d 1215 (8th Cir. 1984) (per curiam), that in Mississippi a prisoner has no liberty interest in parole because of the discretionary language of its parole statutes).

251. Hatch v. Deland, 790 P.2d 49, 51 (Utah Ct. App. 1990) (holding that the relevant Utah statute created no liberty interest). The statute provides that "[t]he Board of Pardons may . . . parole any offender . . . committed to a penal or correctional facility under the jurisdiction of the

wise. In *Foote v. Utah Board of Pardons*[252] the court acknowledged that Utah's statute did not contain statutory language that limited the board's discretion. Therefore, no federally protected liberty interest existed.[253] Facing settled law holding that discretionary parole statutes establish no protected liberty interest, the Utah Supreme Court relied on the Utah Constitution to hold that the judiciary had inherent authority to review parole board decisions to assure that inmates had not been denied due process.[254] The court partly based its holding on Utah's indeterminate sentencing scheme.[255]

The third class of cases involved statutes stating that an offender "shall *not* be released *unless* or shall be released *only when* certain conditions are met."[256] Courts are divided regarding whether this language that restricts authority in the absence of a particular condition creates a liberty interest, but most courts do not find that a liberty interest has been created. Among statutes that do not create a liberty interest are those in Alabama,[257] Vermont,[258] North Dakota,[259] and Indiana.[260] Even when combined

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Department of Corrections for a felony or class A misdemeanor. UTAH CODE ANN. § 77-27-9(l) (Supp. 1993).

*Hatch v. Deland* has recently been abrogated by the Utah Supreme Court in Labrum v. Utah State Board of Pardons, No. 920222, 1993 WL 512821, at *10 (Utah Dec. 6, 1993), to the extent it is contrary to the holding of *Foote v. Utah Board of Pardons*, discussed *infra* notes 252-54.

252. 808 P.2d 734 (Utah 1991).

253. *Id.* (citing Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979)).

254. *Id.* at 735.

255. *See id.*

256. Board of Pardons v. Allen, 482 U.S. 369, 379 n.10 (1987) (emphasis in original).

257. Thomas v. Sellers, 691 F.2d 487, 488 (11th Cir. 1982) (per curiam). Section 15-22-26 of the Alabama statute states:

> 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 of pardons and paroles is of the opinion that there is reasonably probability that . . . he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society.

ALA. CODE § 15-22-26 (1982).

258. Berard v. State of Vt. Parole Bd., 730 F.2d 71, 75 (2d Cir. 1984). The Vermont statute states in part:

> After an inmate has served the minimum term of his sentence . . . less any reductions for good behavior . . . , he shall be released on parole by the written order of the parole board if the board determines there is a reasonable probability that the inmate can be released without detriment to the community or to himself.

VT. STAT. ANN. tit. 28, § 501 (1986).

259. Patten v. North Dakota Parole Bd., 783 F.2d 140, 142 (8th Cir. 1986) (per curiam). The North Dakota statute stated:

> No parole shall be granted to any person confined in the penitentiary or state farm

with guidelines, statutes in Florida[261] and New York[262] were also held not to create liberty interests. Likewise, state courts construing similar language have found no liberty interest created.[263]

The only third-category case to hold that a liberty interest was created is *United States ex rel. Scott v. Illinois Parole & Pardon Board*,[264] when

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unless . . . [h]e has maintained a good record at the penitentiary or state farm for a reasonable period . . . and the board is convinced that the applicant will conform to all the rules and regulations adopted by said board . . . .

N.D. CENT. CODE § 12-59-07 (1985). This section was amended to replace the word "shall" with the word "may" in 1991. *See id.* § 12-59-07 (Supp. 1993).

260. Huggins v. Isenbarger, 798 F.2d 203, 205 (7th Cir. 1986) (per curiam). The relevant Indiana statute provides that "[t]he parole board may not parole a person if it determines that there is substantial reason to believe that the person: (l) [w]ill engage in further specified criminal activity; or (2) [w]ill not conform to appropriate specified conditions of parole." IND. CODE ANN. § 11-13-3-3(j) (Burns 1992).

261. Staton v. Wainwright, 665 F.2d 686, 687 (5th Cir. Unit B), *cert. denied*, 456 U.S. 909 (1982). The Florida statute provides:

> No person shall be placed on parole until and unless the commission finds that there is 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 the welfare of society.

FLA. STAT. ANN. § 947.18 (Harrison 1991). Tentative release dates ("presumptive" dates) are set by a matrix guideline. *Id.* § 947-172.

262. Boothe v. Hammock, 605 F.2d 661, 664 (2d Cir. 1979). The applicable New York statute states:

> 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 law.

N.Y. EXEC. LAW § 259-i(2)(c) (McKinney 1993). Further, the Board must establish and use written guidelines to aid in their decisions. *Id.* § 259-c(4).

263. Fletcher v. Casson, 1988 WL 32020 (Del. Super. Ct. Mar. 23, 1988). The court held that no liberty interest was created by DEL. CODE ANN. tit. 11, § 4347(c) (1987), which provided that the board "may" parole when it is reasonably probable that no detriment will come to the community and parole supervision is in the best interest of society and the inmate. The statute continued, "A parole shall be ordered only in the best interest of society, not as an award of clemency, and shall not be considered as a reduction of sentence or pardon. A person shall be placed on parole only when the Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." *Id.*

264. 669 F.2d 1185, 1188 (7th Cir.), *cert. denied*, 459 U.S. 1048 (1982) (per curiam). The Illinois statute provides:

> The Board shall not parole a person eligible for parole if it determines that: (l) there is a substantial risk that he will not conform to reasonable conditions of parole; or (2) his release at that 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.

the court reasoned that the "shall not/if" language of the Illinois statute mirrored Nebraska's "shall/unless" statute.[265]

In the fourth class of cases, courts examined statutes or regulatory parole-release schemes that used "elaborate and explicit guidelines to structure the exercise of discretion."[266] Courts generally find that these detailed schemes create a liberty interest. For example, the Third Circuit held that a liberty interest existed in a Delaware work-release program with a three-tiered selection process.[267] In addition, the Eighth Circuit remanded a case to determine whether particularized standards gave rise to a liberty interest in a sex offender program in Missouri.[268] *Dace v. Mickelson*,[269] a particularly interesting fourth-category case, involved a South Dakota prisoner who sued the parole board for failing to give reasons for denying his parole. In a panel decision, Circuit Judge Arnold, writing for the majority, found no right to parole in the state parole statute. However, he found that an administrative regulation created a right to parole.[270] This decision was overruled by an en banc court on rehearing.[271] The court used the two-part test it had enunciated in *Parker v. Corrothers*[272] and asked whether the state had placed "substantive limitations on official discretion."[273] The court characterized substantive limitations as objective and measurable criteria, contrasting them with subjective criteria.[274] The court never determined whether the criteria at issue were "substantive limitations," stating:

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730 ILL. STAT. ANN. 5/3-3-5(c) (West 1992).

265. *Scott*, 669 F.2d at 1188 (citing Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979)).

266. Board of Pardons v. Allen, 482 U.S. 369, 379-80 n.10 (1987).

267. Winsett v. McGinnes, 617 F.2d 996, 1007 (3d Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1093 (1981). The court's rationale rested heavily on the detailed nature of the regulation. *Contra* Baumann v. Arizona Dep't of Corrections, 754 F.2d 841 (9th Cir. 1985) (holding that a prisoner did not have a protected liberty interest in custodial release on work furlough).

268. Green v. Black, 755 F.2d 687, 688 (8th Cir. 1985) (per curiam). The Eighth Circuit appears willing to find particularized standards which implicate due process. *See, e.g.*, Maggard v. Wyrick, 800 F.2d 195, 198 (8th Cir. 1986), *cert. denied*, 479 U.S. 1068 (1987) (extending the inquiry of whether a prisoner has a protected liberty interest in parole past the statutory language to the existence or non-existence of particularized standards).

269. 797 F.2d 574 (8th Cir. 1986), *vacated*, 816 F.2d 1277 (8th Cir. 1987) (en banc).

270. 797 F.2d at 578.

271. *Mickelson*, 816 F.2d 1277.

272. 750 F.2d 653 (8th Cir. 1984). The two-part test asks the following questions: (l) [D]oes the statute contain particularized substantive standards or criteria which significantly guide parole decisions; and (2) does the statute use mandatory language similar in substance or form to the Nebraska statute's language at issue in *Greenholtz*? *Id.* at 656.

273. *Mickelson*, 816 F.2d at 1279.

274. *Id.* at 1280.

> Even if substantive guidelines are to be considered, however, unless these guidelines limit the parole board's discretion to release the prisoner, no liberty interest in parole is established . . . *[F]or a state to create a protectible liberty interest the statute or regulation must require release upon satisfaction of the substantive criteria listed.*[275]

State courts considering the issue have held that a program that is elaborately structured will not create a liberty interest as long as the decision maker is operating under a broad grant of discretion. An early release program in New Jersey[276] and criteria used for determining parole in Maine were not sufficiently restrictive to implicate the Due Process Clause.[277]

As of this writing, the most recent United States Supreme Court decision regarding whether particular statutory/regulatory language creates an entitlement for offenders is *Kentucky Department of Corrections v. Thompson*.[278] Kentucky inmates sued alleging a violation of due process when the Commonwealth issued a consent decree suspending visits without a hearing. The inmates relied on language from a 1980 consent decree that stated: "'The Bureau of Corrections encourages and agrees to maintain visitation at least at the current level, with minimal restrictions,'" and to "'continue [its] open visiting policy.'"[279] The Commonwealth subsequently issued two procedures to govern visits. This combination of procedures, the inmates argued, created a liberty interest that required due process. However, they did not argue that the constitution or state statutes created such a right.

The *Thompson* Court first underscored that it is necessary to "examine closely the language of the relevant regulations."[280] The Court further noted that protected liberty interests are created when the state places "'substantive limitations on official discretion.'"[281] Commonly, this is accomplished by 1) establishing "substantive predicates" and by 2) mandating the outcome when relevant criteria are met. The Court found that such predicates existed under the Kentucky visiting procedures but then examined the mandate aspect. It observed that, in order to create a liberty interest, a state's language must be "'explicitly mandatory' . . . , i.e. specific directives to the decision maker that if the regulations' substantive

275. *Id.* (emphasis added).

276. *See, e.g.*, Raymond v. New Jersey State Parole Bd., 534 A.2d 741, 743 (N.J. Super. Ct. App. Div. 1987).

277. *See, e.g.*, Mahaney v. State, 610 A.2d 738, 742 (Me. 1992).

278. 490 U.S. 454 (1989).

279. *Id.* (citing Kendrick v. Bland, 541 F. Supp. 21, 37 (W.D. Ky. 1981)).

280. *Id.* at 461.

281. *Id.* at 462 (citations omitted).

predicates are present, a particular outcome must follow, in order to create a liberty interest."[282] The court found no mandatory language in the procedures existed, citing to passages such as "a visitor 'may be excluded'" and "'administrative staff reserves the right to allow or disallow visits.'"[283]

*Thompson* is significant for many reasons. Over Justice Marshall's dissent, the Court once again rejected the grievous loss analysis of prisoners' due process rights.[284] Additionally, despite protestations by some courts that mandatory language is not "talismanic," the Court in *Thompson* looked for language that makes outcomes virtually unavoidable to establish the substantive limitation on official discretion.[285] Finally, in dicta, the Court noted that "'consequences visited on the prisoner that are qualitatively different from the punishment characteristically suffered by a person convicted of crime'" may invoke the Fourteenth Amendment.[286]

Cases following *Thompson* suggest that obvious efforts to avoid creating a right can succeed,[287] that clumsy disclaimers will be given effect,[288] and that "shall" does not mean "shall."[289]

### *C. Do Parole Release Guidelines Create a Liberty Interest Protected by Due Process?*

#### *1. Creation of a Liberty Interest by Parole Guidelines*

No United States Supreme Court decision has declared that a liberty

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282. *Id.* at 463 (citations omitted).

283. *Thompson*, 490 U.S. at 463-64.

284. *See id.* at 454, 467.

285. *See id.* at 464-65.

286. *Id.* at 460 (quoting Vitek v. Jones, 445 U.S. 480, 493 (1980)).

287. *See* Wallace v. Robinson, 940 F.2d 243, 246 (7th Cir. 1991) (holding that the statute did not create a liberty or property interest, the court noted that "[w]easel words such as 'in so far as possible' in [a statute] show that Illinois has not assured its inmates any job, let alone the job the inmate prefers"), *cert. denied*, 112 S. Ct. 1563 (1992).

288. *See* Patten v. North Dakota Parole Bd., 783 F.2d 140, 143 (8th Cir. 1986) (per curiam) (holding that no liberty interest had been created, the court relied in part on a statement in the Inmate Handbook that "'[t]he Board is interested in [the prisoner] as an individual, and there are no hard and fast rules'").

289. Fox v. Custis, 372 S.E.2d 373, 377 (Va. 1988). The Virginia Supreme Court, hearing a § 1983 suit against parole officers based on negligent supervision, stated:

> The statutory provision, using the word "shall," does not require a parole officer to arrest and reincarcerate, pending a hearing, every parolee who violates a condition of parole, however minor. In the sense used in that statute, the word "shall" is merely directory in meaning and not mandatory. Courts, in endeavoring to arrive at the meaning of language in a will, contract, or a statute, often are compelled to construe "shall" as permissive in accordance with the subject matter and content.

*Id.* (citation omitted).

interest in sentencing exists. Neither the Supreme Court nor any state supreme court has expressly held that state sentencing guidelines, absent mandatory language, create a liberty interest under the Fourteenth Amendment. The Supreme Court has not squarely answered the question of whether federal sentencing guidelines, in light of their mandatory nature, create a liberty interest under the Due Process Clause, although Justice Souter has expressed the view that they do create such an interest.[290] Thus, the jurisprudence on *sentencing* guidelines would not support an argument that *parole* guidelines create a liberty interest.

Considering parole cases, the Supreme Court has used an entitlement analysis and held in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*[291] that inmates do not have a protected liberty interest in parole unless the state created the interest. State court decisions adhere to that precept. *Meachum v. Fano*[292] appears to have eliminated the prospect of a successful argument that parole release decisions deserve due process protections because they inflict a grievous loss.[293] Whether particular parole release guidelines create a liberty interest depends primarily on whether the words of the statute or regulation appear to create an entitlement. Unfortunately, in *Greenholtz*, the Court embarked upon a path which has proven to be improvident because entitlement analysis simply fails to distinguish between discretionary and nondiscretionary systems of parole. The dual requirements of mandatory language and substantive predicates yield results that are inconsistent and unsupported by policy.

This analysis first considers statutes that contain explicitly permissive language. One may compare the statutes by reducing them to the following formula: The board may release if condition Y exists, Y being a discretionary determination essentially subjective and often predictive in nature.[294] Variations on the formula include: The board may release when Y;[295] when Y, the board may release;[296] and the board shall have the power to release when Y.[297] The determination Y can represent a number of discretionary, predictive conclusions that the board can reach. These

290. Burns v. United States, 111 S. Ct. 2182, 2192 (1991) (Souter, J., dissenting).

291. 442 U.S. 1 (1979).

292. 427 U.S. 215 (1976).

293. *Id.* at 224.

294. *E.g.*, Wagner v. Gilligan, 609 F.2d 866, 867 (6th Cir. 1979) (per curiam). For text of the relevant statute, *see supra* note 242.

295. *E.g.*, Candelaria v. Griffin, 641 F.2d 868, 869 (10th Cir. 1981) (per curiam). For text of the relevant statute, *see supra* note 245.

296. *E.g.*, Gale v. Moore, 763 F.2d 341, 343 (8th Cir. 1985) (per curiam). For text of the relevant statute, *see supra* note 248.

297. *E.g.*, Gilmore v. Kansas Parole Bd., 756 P.2d 410, 414 (Kan.), *cert. denied*, 488 U.S. 930 (1988). For text of the relevant statute, *see supra* note 249.

conclusions include: reasonable grounds to believe release would "further the interests of justice" consistent with the welfare and security of the public;[298] a finding that release would serve the best interests of society and that the prisoner is able and willing to abide by the law;[299] a finding that release would not detrimentally affect the community or the offender;[300] and a finding that release would be in the best interest of society and the prisoner poses no further threat to society.[301]

Another variety of the formula introduces condition X, which is an objective, factual finding that appears to be subordinate to determination Y and is illustrated as follows: The board may release when X (the prisoner offers proof he can support himself) and Y;[302] and prisoners who X (have good conduct records) may be released if Y.[303] Finally, other statutes in this category take a direct approach and provide specifically that the board need not release if it decides that release is unwise.[304]

These explicitly permissive language statutes clearly contain no mandated outcomes because the words "may" and "shall have the power" permit but do not require release. Conditions Y are expressed in abstract terms and amount to subjective predictions of future events. These statutes grant the broadest discretion to parole boards. The highly discretionary nature of this power is the gravamen of the Court's position that parole generates no protectible liberty interest.[305]

The introduction of condition X, the factual finding, leads the analysis in the direction of structured discretion. However, the inconsistency inherent in the entitlement language analysis does not become apparent until one considers those statutes which state that an offender "shall not be released unless" or "shall be released only when" certain conditions are met. In these statutes, condition Y, the subjective prediction, appears in conjunction with mandatory language. Together, they are generally held to leave parole discretion unfettered because the statute mandates only that the

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298. *E.g.*, OHIO REV. CODE ANN. § 2967.03 (Anderson 1993), *quoted in Wagner*, 609 F.2d at 867.

299. *E.g.*, MISS. CODE ANN. § 47-7-3 (1993), *quoted in* Irving v. Thigpen, 732 F.2d 1215, 1217 (5th Cir. 1984) (per curiam).

300. *E.g.*, MO. STAT. ANN. § 217.690(1) (Vernon Supp. 1993), *quoted in* Gale v. Moore, 763 F.2d at 343.

301. *E.g.*, IDAHO CODE § 20-223(c) (Supp. 1993), *quoted in* Izatt v. State, 661 P.2d 763, 764-765 (Idaho 1983).

302. *E.g.*, Candelaria v. Griffin, 641 F.2d 868, 869 (10th Cir. 1981) (per curiam). For text of the relevant statute, *see supra* note 244.

303. *E.g.*, Irving v. Thigpen, 732 F.2d at 1217. For text of the relevant statute, *see supra* note 245.

304. *E.g.*, Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172, 174 & n.2 (10th Cir. 1980). For text of the relevant statute, *see supra* note 243.

305. *See* Board of Pardons v. Allen, 482 U.S. 369, 378 n.10 (1987).

board will exercise its discretion. A statute which provides that no person shall be paroled unless Y, prevents a board from paroling a particular inmate when a particular subjective prediction is made. However, the board enjoys complete discretion in determining whether this prediction is probable. Courts have determined that the statute does not restrain the power of the board.[305] The inconsistency arises when that analysis is applied to the Nebraska statute in *Greenholtz*, which provided this formula: The board shall parole unless $Y_1$, $Y_2$, $Y_3$, or $Y_4$. "Shall" mandates that release be ordered unless a particular subjective prediction is made. However, the board enjoys complete discretion in determining whether the prediction is probable. The Court's interpretation suggested that the statute created a universe of parole eligible prisoners who were beyond the reach of the board, but then left the definition of that universe to the board's discretion.

Only one statute from the "shall not/unless" or "shall/only when" group, that governing the Illinois board, created a liberty interest.[307] That statute provided that the board shall not parole if $Y_1$, or $Y_2$, or $Y_3$.[308] The court stated that the Illinois statute was merely the negative of Nebraska's "shall/if" statute.[309] The Illinois lawmakers created a universe of parole eligible inmates who were outside the board's parole power by reasons of the existence of a condition to be determined in the board's discretion.

The category of statutes that uses elaborate and explicit guidelines to structure discretion provides the most sound basis for finding an entitlement in theory because, in combination with mandatory language, objective criteria can meaningfully constrain a decision maker's power. Unfortunately, neither of the cases cited in *Board of Pardons v. Allen*[310] actually constrains decision makers.[311] Further, those cases are distinguishable

306. *E.g.*, Patten v. North Dakota Parole Bd., 783 F.2d 140, 142 (8th Cir. 1986) (per curiam); Berard v. State of Vt. Parole Bd., 730 F.2d 71, 75 (2d Cir. 1984). For text of relevant statutes, *see supra* notes 260-61.

307. United States *ex rel.* Scott v. Illinois Parole & Pardon Bd., 669 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1048 (1982) (per curiam).

308. For text of the relevant Illinois statute, *see supra* note 265. Many variations in this category of statute exist as well. *Patten*, 783 F.2d at 142 (exemplifying the variation that no parole can be granted unless X and Y, *see supra* note 260); Booth v. Hammock, 605 F.2d 661, 663 (2d Cir. 1979) (demonstrating the variation that parole shall not be granted for X but for Y, *see supra* note 263).

309. *Scott*, 669 F.2d at 1188.

310. 482 U.S. 369, 378 (1987).

311. Winsett v. McGinnes, 617 F.2d 996, 1006 (3rd Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1093 (1981), did not rely on the mandatory language plus substantive predicates analysis. The court was persuaded that a liberty interest existed because the overall design of the work-release program, including multi-tiered recommendations, impeded the discretion of the prison administration. Likewise, in Green v. Black, 755 F.2d 687, 688-89 (8th Cir. 1985), the court

because they relate to the powers of prison administrators. Those powers are substantially less than the powers of parole boards.

The cases tell us that substantive predicates, the Y and the X conditions, will enlighten a court's inquiry as to whether a liberty interest exists under entitlement analysis. However, the decisions are not as instructive as one might hope. What is meant by "substantive predicate?" *Greenholtz* did not mention the term, but noted that "[t]he Board argues . . . that a presumption [of release] would be created only if the statutory conditions for deferral were essentially factual . . . rather than predictive."[312] No response to that argument was made.

The 1983 Court adopted the two-part analysis of mandatory language plus substantive predicates in *Hewitt v. Helms*.[313] In *Hewitt* the Court identified "the need for control" and "the threat of a serious disturbance" as substantive predicates without which the confinement of an inmate to administrative segregation could not be ordered.[314] Together they placed a check on the discretion of prison administrators. In *Olim v. Wakinekona*[315] an inmate argued that "optimum placement" of the offender in the prison was a substantive predicate. Reversing the Ninth Circuit Court of Appeals, the Supreme Court rejected the inmate's argument that transfer to another prison violated a protected liberty interest. The Court reasoned that the regulation provided no standards to govern the administrator's exercise of discretion.[316] Apparently, it was already established that classification as a substantive predicate does not require all measures of discretion to be eliminated. However, the degree of residual discretion that would support a substantive predicate remained to be seen.

*Board of Pardons v. Allen*[317] best demonstrates the folly of entitlement analysis in parole cases. In *Allen* the Montana statute at issue provided that a prisoner shall be released when "'reasonable probability [exists] that the prisoner can be released without detriment to the prisoner or to the community.'"[318] The substantive predicates were (1) that release would not cause detriment to the prisoner and (2) that the prisoner is "'able and willing to fulfill the obligations of a law-abiding citizen.'"[319] Both predicates are predictive in nature and based on the board members'

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focused on whether the regulation of the sex offender program encumbered the administration's discretion.

312. Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 12 (1979).

313. 459 U.S. 460 (1983).

314. *Id.* at 472.

315. 461 U.S. 238 (1983).

316. *Id.* at 249.

317. 482 U.S. 369 (1987).

318. *Id.* at 376 (quoting MONT. CODE ANN. § 46-23-201(1) (1985)).

319. *Id.* at 376-77 (quoting MONT. CODE ANN. 46-23-201(2) (1985)).

subjective assessments, as the majority conceded quoting from *Greenholtz*.[320] The dissenters correctly challenged the intellectual honesty of the majority.[321]

The substantive predicates in the Montana statute clearly do not abridge discretion. Whether release could be a detriment to a given prisoner is highly subjective. In most cases that appear before a board, factual support for a decision going either way is possible. Cases in which support for only one position exists are the kinds of cases that will only be decided the alternate way if the board abused its discretion. That a prisoner is "able and willing to fulfill the obligation of a law-abiding citizen" is even more subjective because board members will interpret the prisoner's assertions, conduct record, and assessments by others to make this judgment.

Other Supreme Court applications of the mandatory language and substantive predicates test do not clarify distinctions. The substantive predicates in *Kentucky Department of Corrections v. Thompson*[322] appeared in two footnotes that presented a set of nine non-exhaustive reasons to deny visitation, with six procedures to implement them.[323] These factors are among the most objective set to appear before the Court as substantive predicates. However, the absence of mandatory language caused the court to find that no liberty interest existed. Despite a regulation that provided that "an inmate is allowed to have three (3) adult visitors . . . per visit," despite the grounds for denial which the court admits are substantive predicates, and despite a consent decree that promised to preserve the described visitation policy, the Court found discretion was not limited and allowed visits to be denied without providing the inmate an opportunity to be heard.[324]

Finally, the statute in *Washington v. Harper*[325] provided that forced anti-psychotic medication may be administered only if a combination of Y and X existed. Specifically, the substantive predicates were (1) that the prisoner suffered from a mental disorder and (2) that the prisoner was gravely disabled or posed a threat to himself or others.[326] These predicates were sufficiently objective to fetter the discretion of the institution.

Despite Justice Brennan's attempt to order and categorize these statutes, all of the statutes are similar because they make the systems substantially discretionary. The Supreme Court's substantive predicates analysis instructs

320. *Id.* at 381.
321. *See id.* at 381 (O'Connor, J., dissenting).
322. 490 U.S. 454 (1989).
323. *Id.* at 455 n.1, 458-59 n.2.
324. *Id.* at 465.
325. 494 U.S. 210 (1990).
326. *Id.* at 221.

that discretionary predictions about future criminality circumscribe parole board discretion by using mandatory language.[327] The Court states that institutional security[328] is a substantive predicate, but "optimum placement" of an inmate in prison is not.[329]

Real limitations on parole board discretion can exist despite the fact that neither the statutes in *Greenholtz* nor *Allen* constituted such limitations. Further, the analysis of circuit court cases categorized in *Allen* provides no additional guidance for parole boards.

Turning the analysis away from the course the Supreme Court has taken is advisable. A reasonable balance between the broad interests of public safety and procedural protections for individuals would be better served by conceding what everyone knows but the Supreme Court is unwilling to recognize: the prisoner's liberty is the *single stake* in the outcome of parole hearings. The present course has generated much litigation and many unworkable distinctions.[330] Despite the Court's assertion that certain words are not "talismanic,"[331] efforts to identify constrained discretion are characterized by niggling differentiation leading to classifications that bear no relation to reality.

Ultimately, society would be better off taking the spotlight off liberty interest and placing it instead on due process. The challenge is to permit states to experiment with ways to meet their criminal justice goals and, at the same time, refine guidance for the states regarding what process is constitutionally required.

### 2. *The Process Due*

The function of the legal process is to promote reliable decisions based on accurate and complete facts.[332] Several interests are balanced in parole release decisions. The offender has an interest in fair consideration for release (whether it is denominated a liberty interest or not), including the ability to bring all relevant information to the board's attention.

That due process is a flexible concept is well established in American law. Due process allows the particular conditions to determine the procedural protections necessary.[333] In due process cases courts are

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327. Board of Pardons v. Allen, 482 U.S. 369, 377-78 (1987); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979).

328. Hewitt v. Helms, 459 U.S. 460, 471 (1983).

329. Olim v. Wakinekona, 461 U.S. 238, 242 (1983).

330. To concede a liberty interest in parole will not necessarily require the same result in other areas.

331. *See Greenholtz*, 442 U.S. at 11-12.

332. *Id.* at 12.

333. *Id.*

unwilling to do more than pass on the constitutionality of the particular process under review. Determining constitutionality is a task requiring the court to strike a balance between the interests of the state and the interests of the individual.[334]

The Supreme Court has held that a procedure which allows at least one hearing every year for each eligible inmate is constitutionally adequate, but that a formal hearing for all inmates is not required each year.[335] It further held that one month's advance notice as to the day of the hearing, with notice of the time on the day of the hearing, was sufficient to meet constitutional requirements.[336] The Court concluded that, while reasons for denial of parole were required as a guide for the inmate's future behavior, due process did not require a recitation of evidence relied upon for that denial.[337]

The Eighth Circuit has held that due process requires an inmate to be advised of adverse information that may lead to an unfavorable parole decision so that the inmate is given an opportunity to address the information.[338] The Supreme Court of Rhode Island held that due process was invoked by the state-created liberty interest; however, it required no more than informing the inmates as to how they fell short of qualifying for parole.[339]

Minimal fairness in any parole setting should mandate: (1) a hearing with notice, (2) an opportunity for the inmate to present relevant information, (3) notice of the criteria used to make the parole decision, and (4) notice of the decision together with reasons for denial. Parole guidelines can assist in ensuring the presence of these indicia of fairness. Furthermore, these procedures are already followed in many jurisdictions.[340]

The parole hearing with reasonable notice is the cornerstone of the parole process. It enhances the reliability of the outcome by causing relevant information to be gathered and discussed in the presence of the parole applicant. It is an essential component of fairness because it provides the inmates the opportunity to speak on their own behalf. The meaningful

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334. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

335. *See Greenholtz*, 442 U.S. at 14-15.

336. *Id.* at 14 n.6.

337. *Id.* at 15. The Supreme Court never addressed the adequacy of procedures in *Board of Pardons v. Allen* because the case was remanded due to the district court's denial of the claim. *See* 482 U.S. 369 (1987).

338. Williams v. Missouri Bd. of Probation & Parole, 661 F.2d 697, 700 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).

339. State v. Tillinghast, 609 A.2d 217 (R.I. 1992). Although mandatory parole release guidelines were in place, the court found a state-created right based on *Greenholtz* authority alone. *See id.*

340. *E.g.*, Colorado and Minnesota.

notice is given sufficiently in advance of the hearing to allow the inmates time to prepare, and the specific amount of time required will differ under the circumstances. For example, a system which allows the inmates to have people speak on their behalf might require more notice than one which does not.

Another way to heighten the reliability of parole decisions is to allow the applicants to present evidence, either testimonial or documentary, that supports their petition. The inmates have the greatest incentive to see that certain information is brought to the attention of the board. A system that relies only on the prison for information about offenders is pregnant with the potential for arbitrary, discriminatory action.

The greatest opportunity for release guidelines to add to the fairness of parole hearings is by giving notice of criteria that will be used to make the parole decision. Forewarned with these criteria, inmates are able to adjust their institutional conduct to improve their chances of being paroled. Guidelines inform the inmates of what information would be relevant to present at the hearing. With sufficient opportunity for departure, the guideline's criteria provide a means of accomplishing uniformity, proportionality, and predictability without unduly fettering appropriate exercise of a parole board's discretion.

Notice of the decision and reasons for denial are the final procedural protection essential to fairness. Notice of the decision is always provided, but some states do not require statements of reasons for denial. Such statements inform unsuccessful parole applicants of the circumstances which account for the denial. When those circumstances are within the inmates' control, they can then elect whether to address them. They can provide the parole board with evidence relevant to likelihood of recidivism. Requiring a statement of reasons for denial guards against arbitrary decisions by the board. Unless pro forma, these statements require boards to articulate the rationale which drove their decision. Knowledge that explanations will be required is an effective guard against arbitrary decisions.

## IV. CONCLUSIONS AND RECOMMENDATIONS

Despite the confusion in the case law, it is easy enough to avoid creating a liberty interest. Misgivings over the possibility of creating a liberty interest should not induce a board to forego the benefit of release guidelines. Even when state statutes create a liberty interest, the required procedural protections are modest.

Parole release guidelines afford the parole board the greatest degree of flexibility if they are drafted in discretionary language. Quantifiable factors that appear in tandem with discretionary factors are likely to avoid creating

a liberty interest.[341] Most importantly, release guidelines should contain a statement of purpose which clarifies that no entitlement is intended. Guidelines developed by a broad-based coalition of practitioners and citizens result in a better product and provide important support for adoption. Guidelines that are implemented by rules provide more flexibility than statutory guidelines because changes can be made without resort to the legislative process. Parole release guidelines require monitoring, particularly during the period immediately after adoption. Allowance should be made for departures, and departures should be examined for patterns suggesting that the guidelines themselves require further adjustment.

Parole boards seeking to make rational, fair decisions can benefit tremendously by adopting release guidelines. Guidelines direct and limit discretion; without them discretion is freewheeling. In this writer's experience as a parole board member, directed discretion is essential to sound decision making. After a certain volume of cases, the human mind is incapable of producing consistent, fair parole release decisions without some means of sorting out relevant factors. Criminals become difficult to distinguish — all burglars seem alike so their sentences may not be individualized at all. This does not imply that the periods of incarceration will be uniform — often they are not — but, unfortunately, the considerable variation among them may be the consequence of irrelevant factors. Today's burglars appear on a calendar with rapists and murderers so their term of incarceration may be shorter than that of tomorrow's burglars who appear on a calendar with check forgers and petty larcenists. The rapist whose victim presents testimony before the board may receive a longer term of incarceration than another rapist whose victim does not appear. Tired parole board members may be more lenient to the last inmate on the day's calendar because they lack the energy for a protracted discussion. The drug dealer who appears before a panel of board members whose primary penological philosophy is to incapacitate offenders will not fare as well as one who appears before a panel whose penological philosophy is to rehabilitate them. None of these circumstances advance any legitimate criminal justice purpose; yet, in certain cases, they are the only explanation for different treatment of like inmates.

Parole release guidelines can reduce inmates' attempts to manipulate the

341. *See, e.g.*, Hall v. Utah Bd. of Pardons, 806 P.2d 217, 218 (Utah. Ct. App. 1991). The court stated: "The guidelines used by the Utah Board of Pardons in the present case do not have the force and effect of law. They are not mandatory standards which must be followed, but merely guidelines used to clarify the Board's exercise of discretion without altering any of the existing considerations for parole release." *Id. Hall* has recently been abrogated by the Utah Supreme Court in Labrum v. Utah State Board of Pardons, No. 920222, 1993 WL 512821, at *10 (Utah Dec. 6, 1993), to the extent it is contrary to the holding of *Foote v. Utah Board of Pardons*, discussed *supra* notes 252-54.

board by limiting the impact of their statements in the hearing without negating them entirely. The use of release guidelines to educate the public concerning the various factors weighed by board members and the limitations on resources can greatly improve a board's public image. This use can foster the perception of a professional board with integrity.

Parole release guidelines allow a conscious allocation of resources. Guidelines can, for example, act as a means of implementing a system-wide goal of reducing reliance on incarceration as a punishment for non-violent offenders. When prison crowding forces releases, emergency release guidelines can assist boards in selecting for early release inmates least likely to pose a threat to the community. They can enable planners to make more accurate projections about future prison populations.

The impact of release guidelines can extend beyond release. They may be used in supervision to determine when certain conditions are appropriate to include in an inmate's parole agreement. Even revocation of parole is a process that can benefit from guideline direction.