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Constitutional Law: Due Process: State Procedures for Granting Discretionary Parole Held to Comport with the Requirements of Procedural Due Process. (*Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*)

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NOTES

CONSTITUTIONAL LAW — Due Process — State Procedures for Granting Discretionary Parole Held to Comport with Requirements of Procedural Due Process. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,¹ the United States Supreme Court reviewed Nebraska's criminal parole procedures. The Court determined that there is no inherent or constitutional right to parole. While the Court found that the wording of the Nebraska parole statute did create an expectation of parole that was subject to due process protection, it also found that the procedures followed under the Nebraska statute were sufficient to satisfy due process.

It is submitted that the Court improperly applied the two-part analysis that had been developed for procedural due process questions in administrative law. In so doing, the Court inappropriately focused upon the difficulties in administration of hearings rather than the nature of convicted persons' rights and interests. Although the Court recognized a protected interest under the wording of the Nebraska statute, the hearing procedures approved under the statute are not adequate to guard against the risk of error or to protect against arbitrary action.

I. THE DECISION

Greenholtz was a class action suit brought by inmates of the Nebraska Penal and Correctional Complex against the individual members of the Board of Parole. The inmates claimed that the procedures adopted by the Board in determining eligibility for discretionary parole² denied them procedural due process.³

Nebraska statutes provide for discretionary parole when

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

2. Mandatory parole under NEB. REV. STAT. § 83-1, 107 (1)(b) (1976), whereby an inmate is automatically paroled when he has served his maximum term less good-time credits, was not part of the case. 442 U.S. at 4.

3. 442 U.S. at 4.

an inmate has served his minimum term, less credits for good behavior.⁴ Each year, initial review hearings must be held for every inmate. At this initial review, the Board decides whether to grant an informal hearing based on an examination of the inmate's records. This second hearing consists of an interview of the inmate and a consideration of any statements or letters that he provides. If parole is denied, the Board informs the inmate of the reason and makes recommendations for the future.⁵ The factors considered by the Board in determining whether parole should be granted are prescribed by statute.⁶

The district court found that the inmates had a "conditional liberty interest" protected by the Constitution and that the guidelines followed by the Board did not meet the requirements of due process.⁷ This decision was upheld by the Court of Appeals for the Eighth Circuit. However, the court made an additional finding that the statute created a protected interest. The circuit court modified the procedures required by the district court and ordered the following:

- 1) A full, formal hearing for each eligible inmate;
- 2) Advance written notice of the precise time of the hearing;
- 3) A statement of the factors to be relied upon by the Board in making its determination;
- 4) The right to appear in person and present evidence;
- 5) The maintenance of a record of the proceedings;

4. NEB. REV. STAT. § 83-1, 110(1) (1976).

5. 442 U.S. at 4.

6. NEB. REV. STAT. § 83-1, 114(1) (1976) provides as follows:

Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

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

7. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 5 (1979).

- 6) A written statement of the reasons and the evidence relied upon by the Board for denial.⁸

Certiorari was granted in order to resolve a conflict among the circuit courts regarding the applicability of due process requirements to parole proceedings.⁹

The Supreme Court held that there is no constitutional or inherent right of a convicted person to parole,¹⁰ noting that a state had no duty to establish a parole system.¹¹ Further, it held that no right to parole is created when a state merely provides for the possibility of parole by the creation of a parole system.¹² The Court did find, however, that a right to parole was created in this case by the unique language of the Nebraska statute which used the word "shall."¹³ By the terms of the statute, parole was mandated upon the fulfillment of stated conditions. Accordingly, the Court analyzed the statutory procedures to determine whether they provided sufficient constitutional protection.¹⁴ These procedures were found to be adequate. In so finding, the Court specifically rejected the requirements of the court of appeals for a formal hearing and a statement of evidence relied upon by the Board in an adverse parole determination.¹⁵

II. HISTORICAL BACKGROUND

In *Greenholtz*, the Court was faced with a conflict between

8. *Inmates of Neb. Penal & Correctional Complex v. Greenholtz*, 576 F.2d 1274, 1285 (8th Cir. 1978).

9. The following circuits have held that due process is not applicable to parole determination: the Fifth Circuit: *Brown v. Lundgren*, 528 F.2d 1050 (5th Cir.), *cert. denied*, 429 U.S. 917 (1976); the Sixth Circuit: *Scott v. Kentucky Parole Board*, No. 74 - 1899 (6th Cir. Jan. 15, 1975), *remanded to consider mootness*, 429 U.S. 60 (1976). On the other hand, the following circuits have held that due process does apply: The Fourth Circuit: *Franklin v. Shields*, 569 F.2d 784 (4th Cir. 1977); the Third Circuit: *Hill v. Attorney General of the United States*, 550 F.2d 901 (3d Cir. 1977); the Seventh Circuit: *United States ex rel. Richerson v. Wolf*, 525 F.2d 797 (7th Cir. 1975); the District of Columbia Circuit: *Childs v. U.S. Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974); the Second Circuit: *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925 (2d Cir. 1974).

10. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979).

11. *Id.*

12. *Id.* at 11.

13. See text accompanying note 5 *supra*.

14. 442 U.S. at 12.

15. *Id.* at 14-15.

two divergent trends in the case law regarding procedural due process protection for convicted persons. On the one hand, there was a trend toward recognizing constitutionally protected procedures related to parole. On the other hand, the Court, in recent years, had restricted procedural protection in the area of prison administration.

The Court's major parole decision was *Morrissey v. Brewer*¹⁶ where the Court held that minimum due process was required for parole revocation. Such constitutional protection was accorded parolees because they were found to have an interest within the "liberty or property" protection of the fourteenth amendment.¹⁷ This interest was found to be one of "conditional liberty,"¹⁸ where a parolee is granted the right to live and work in the community. In short, the Court described this as the parolee's right to do many of the same things which those who have never been convicted of a crime can do.¹⁹

The Court pointed out that revocation of parole constitutes a "grievous loss" in the light of the kind of freedom which the parolee enjoys.²⁰ In addition, the Court noted that although discretion is involved in the revocation procedure, a "simply factual hearing will not interfere with the exercise of discretion."²¹

Due process protection regarding parole was extended in *Wolff v. McDonnell*.²² In that case the Court held that due process safeguards were required to revoke those credits that an inmate would accumulate towards parole by his good behavior, his so-called "good-time credits."²³ The Court noted

16. 408 U.S. 471 (1972).

17. *Id.* at 481.

18. *Id.* at 482.

19. *Id.*

20. *Id.*

21. *Id.*

22. 418 U.S. 539 (1974).

23. *Id.* at 555. N.E.B. REV. STAT. § 83-1, 1070 (Supp. 1972), which provides for the allowance and reduction of good-time states:

(1) The chief executive officer of a facility shall reduce, for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional per-

that inmates have liberty rights despite their criminal conviction, and the Court listed the constitutional protections allowed convicted persons as follows:

[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. . . . They retain rights of access to the courts. . . . Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. . . . Prisoners may also claim the protection of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.²⁴

In contrast to these parole decisions are the cases which deal with procedural due process questions in prison administration. In *Meachum v. Fano*²⁵ and in *Montanye v. Haymes*,²⁶ prison inmates claimed rights to a hearing before being transferred to less desirable state prisons. The Supreme Court heard both cases on the same day, and in both decisions the Court denied due process protection. According to the test established in *Board of Regents v. Roth*,²⁷ the nature of the in-

formance of his duties, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

- (a) From his minimum term, to determine the date of his eligibility for release on parole; and
 - (b) From his maximum term, to determine the date when his release on parole becomes mandatory under the provisions of section 83-1, 111.
- (2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.
- (3) Good-time or other reductions of sentence granted under the provisions of any law prior to July 6, 1972 may be forfeited, withheld, or restored in accordance with the terms of this act.

24. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (citations omitted).

25. 427 U.S. 215 (1976).

26. 427 U.S. 236 (1976).

27. 408 U.S. 564, 570-71 (1972).

terest involved was first examined.²⁸ No liberty interest was found to be implicated in the transfer of inmates.²⁹ The Court denied a liberty interest because "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution."³⁰ In addition, the Court in *Meachum v. Fano* discussed the nature of the decision involved as being a discretionary one: "Transfers between institutions . . . are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate."³¹

These cases represented two lines of thinking that confronted the Court in *Greenholtz*. The protection allowed in the area of parole stood in contrast to the discretion granted to administrators in the prison transfer cases. The question addressed on both sides was one of deciding what constitutional rights remained for persons after criminal conviction.

III. THE COURT'S ANALYSIS

In *Greenholtz*, the Court first reviewed the nature of the interest involved according to the two-part test established in *Board of Regents v. Roth*:³² (1) does the nature of the interest fall within the "liberty or property" language of the fourteenth amendment; and if so, (2) what procedural measures are necessary to protect that interest. The test emerged from the statement in *Roth* that "to determine whether due process requirements apply in the first place, we must look not to the 'weight,' but to the *nature* of the interest at stake."³³ The Court in *Roth* specifically restricted the approach of weighing and balancing the parties' interest to the second step, that of determining the *form* of hearing required.³⁴

The central issue in determining the "nature" of the inter-

28. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

29. *Id.* at 223-24.

30. *Id.* at 224.

31. *Id.* at 225.

32. 408 U.S. 564, 570-71 (1972).

33. *Id.*

34. *Id.* at 570.

est at stake in *Greenholtz* was whether the "conditional liberty" interest found in *Morrissey v. Brewer* applied to inmates prior to parole. The Court held that it did not stating that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined."³⁵ That desire for liberty is not a liberty interest protected under the fourteenth amendment because the inmate has been convicted. The Court cited the language of *Meachum v. Fano* for that proposition: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty."³⁶

In addition, the *Greenholtz* Court reasoned, the "conditional liberty" interest of *Morrissey v. Brewer* did not apply in this case because the parole determination is a *predictive* decision, unlike the factual decision made in the parole revocation of *Morrissey*. While "[t]he first step in a revocation decision . . . [involved] a wholly retrospective factual question,"³⁷ the parole release decision was found to be "more subtle and [to depend] on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals."³⁸ The Court directly compared the parole release decision to the prison transfer decision in *Meachum v. Fano*. "[T]he general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison. . . ."³⁹

The inmates next argued that the language of the Nebraska statute created an expectation of release, which was an interest protected by the fourteenth amendment. The statute stated:

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:

35. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979).

36. *Id.* (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

37. 442 U.S. at 9 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972)).

38. 442 U.S. at 9-10.

39. *Id.* at 10.

- (a) There is a substantial risk that he will not conform to the conditions of parole;
- (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
- (c) His release would have a substantially adverse effect on institutional discipline; or
- (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.⁴⁰

The Court accepted the inmates' view that the structure of the statute provided a protected interest through the use of the word "shall" in conjunction with four stated exceptions. By citing prior case law, the majority reaffirmed the rule that "a person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claims of entitlement to the benefit and that he may invoke at a hearing."⁴¹

Having found a constitutionally protected interest by the terms of the statute, the Court then turned to an examination of the statutory procedures in order to decide if they provided sufficient due process protection.⁴² The Court found that repeated adversary hearings were not required and that the Nebraska practice of making an initial determination each year for each inmate was sufficient.⁴³ The purpose of the notice procedure for hearings on those inmates who passed the initial determination was to inform the inmate in advance of the month during which the hearing would be held. It also posted notice of the exact time on the day of the hearing itself.⁴⁴ This was held to be constitutionally adequate notice.⁴⁵ The Court found that the hearing need not be full or formal in order to satisfy due process.⁴⁶ The due process requirement would be satisfied if an inmate were allowed to appear on his own behalf and to present supporting letters and documents. Finally,

40. NEB. REV. STAT. § 83-1, 114(1) (1976).

41. *Bishop v. Wood*, 426 U.S. 341, 344 n.6 (1976), (quoting *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)).

42. 442 U.S. at 12.

43. *Id.* at 15-16.

44. *Id.* at 14 n.6.

45. *Id.*

46. *Id.* at 15.

the Parole Board's practice of communicating the reason for its denial was held to be adequate without the further requirement that the Board give a summary of the evidence relied upon.⁴⁷

IV. CRITIQUE

In finding no protected interest except that created by statute, the Court focused primarily on the type of the determination that must be made at a parole release hearing. The nature of the determination is not a factor in deciding the nature of the interest as *Board of Regents v. Roth* and its progeny have made clear. Rather, the type of the determination to be made dictates what evidence the Board must consider and what other procedural safeguards are required once a protected interest has been found. In *Greenholtz*, the Court's consideration of the nature of the hearing, while considering the interest at stake, unnecessarily blurs the two-step analysis established for questions of procedural due process.⁴⁸

The nature of the decision to grant parole release in *Greenholtz* was found to be similar to that made by prison officials in transferring inmates.⁴⁹ By making that comparison, the Court sought to show that parole release was different from parole revocation⁵⁰ discussed in *Morrissey v. Brewer*. Having distinguished *Morrissey v. Brewer* on the basis of the decision to be made, the Court in *Greenholtz* then stated that the nature of the interest was not a "conditional liberty" interest to be governed under *Morrissey*.⁵¹ Therefore, the Court reasoned, there was no interest protected by due process in the inmates' expectation of parole.⁵²

The Court set up a contrast between decisions that are factual and those that are predictive. Factual decisions are retrospective, examining whether an inmate has satisfied certain conditions,⁵³ such as good behavior. Predictive determinations, on the other hand, entail a "discretionary assessment

47. *Id.* at 16.

48. See text accompanying notes 16-19, *supra*.

49. See text accompanying note 39, *supra*.

50. *Id.*

51. 442 U.S. at 7.

52. *Id.*

53. *Id.*

of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done."⁵⁴ Not only does that reasoning serve to confuse the two-step analysis required for procedural due process questions, as discussed above, but it also distorts the clear language of *Morrissey v. Brewer*.

In *Morrissey*, the Court recognized that the parole revocation determination was predictive. The Court noted that two steps were involved in a parole revocation decision: (1) did the parolee violate the conditions of his parole, and (2) should the parolee be recommitted to prison or should other steps be taken to protect society and improve the chances of rehabilitation?⁵⁵ The Court emphasized that, while the first step is relatively simple, "[t]he second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts."⁵⁶ Accordingly, the second question was described as "not purely factual, but also predictive and discretionary."⁵⁷ In addition, the Court in *Morrissey v. Brewer* had noted that although discretion is involved in a parole revocation determination, a "simple factual hearing will not interfere with the exercise of discretion."⁵⁸ Therefore, while the Court was correct in terming parole release determinations "predictive," it did not successfully distinguish *Morrissey v. Brewer* by looking to the nature of the determinations involved.

In essence, the decision in *Greenholtz* represents an attempt to limit some of the constitutional rights remaining after conviction, rights that were protected in *Morrissey* and *Wolff v. McDonnell*. The Court makes this limitation on the basis of protecting the discretion of prison administrators in the manner recognized by the Court in *Meachum v. Fano* and *Montanye v. Haymes*. However, the two lines of cases come down on different sides of the question on whether liberty interests remain for an individual after criminal conviction.

The regrettable result of the *Greenholtz* opinion is that it

54. *Id.*

55. *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972).

56. *Id.* at 480.

57. *Id.* at 471.

58. *Id.* at 483.

creates further ambiguity in the status of convicted persons under the Constitution. Under *Greenholtz*, the state may confine individuals and subject them to prison rules with the sole limitation that the prison conditions "do not otherwise violate the Constitution."⁵⁹ It is not clear what conditions would be otherwise violative, so long as those conditions are protected under the discretionary judgment of the prison officials after *Greenholtz*. Unfortunately, it is possible that this case will now be cited in order to justify greater restrictions, punishments and deprivations of benefits under the guise of "administrative discretion."

Ambiguity also arises in the case law on parole itself in the wake of *Greenholtz*. Before this decision, convicted persons had due process protection for their "good-time" credits prior to any parole decision,⁶⁰ and they had that protection in the attempt to revoke parole once it has been granted. They do not, after *Greenholtz* however, have that protection in the parole decision itself. It is possible that, in line with this decision, the protection of "good-time" credits in *Wolff v. McDonnell* will be limited to the statutory language on that case itself.⁶¹ Thus, the only procedural protection remaining in parole decisions would be that afforded parolees after they have been released from prison.

Through this decision, the majority equated an inmate's interest in parole with an inmate's hope that he will not be transferred to another prison.⁶² However, there seems to be a vast qualitative difference between these two interests. Parole carries significant weight for the public interests. As Justice Burger stated in *Morrissey v. Brewer*, "[s]ociety has a stake in whatever may be the chance of restoring [the individual] to

59. *Meachum v. Fano*, 427 U.S. 215, 224 (1976); *accord*, *Montanye v. Haymes*, 427 U.S. 236, 242 (1975). In *Montanye* the Court stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed on him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."

60. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

61. *See Meachum v. Fano*, 427 U.S. 215, 225-27 (1976), where the Court sought to limit the holding in *Wolff v. McDonnell* to the statutory creation of a protected interest.

62. 442 U.S. 1, 10 (1979).

normal and useful life within the law."⁶³ Prison transfers, on the other hand, are often made for purposes of institutional security or for the safety and welfare of a particular inmate.⁶⁴ In comparison with society's interest in parole, the interest in prison transfers would seem to be minimal.

Even where the *Greenholtz* Court did recognize a protected interest in parole, its approval of the procedures employed by the Nebraska Parole Board showed insufficient attention to the risks of error attendant in the parole release decision.⁶⁵ In *Greenholtz*, the following measures were held to be satisfactory for Nebraska parole determinations:

- a) notice in advance of the month in which the hearing is to be held, with the exact time being posted on the day of the hearing;
- b) the right of the inmate to appear in person and to present evidence on his behalf;
- c) information and documents used by the Board in its decision being made available to the inmate within the Board's discretion;
- d) a communication of the reason(s) for denial, but not a statement of the evidence relied upon.⁶⁶

Expressly included was the requirement of a formal hearing for each inmate.⁶⁷ This was justified on the grounds that the requirement of a hearing "would provide at best a negligible decrease in the risk of error."⁶⁸ As Justice Marshall pointed out in his dissenting opinion, however, the risk of error in a parole determination is substantial.⁶⁹ Indeed, in the

63. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (citations omitted).

64. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

65. *See, e.g.*, 442 U.S. at 32 (Marshall, J., dissenting).

66. 442 U.S. at 14-16.

67. *See* text accompanying note 15, *supra*.

68. 442 U.S. at 14.

69. *See, e.g.*, 442 U.S. at 33 (Marshall, J., dissenting); *Kohlman v. Norton*, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard v. Mississippi State Probation and Parole Board*, 373 F. Supp. 699 (N.D. Miss. 1974), *reversed* 509 F.2d 820 (5th Cir. 1975), *cert. denied*, 423 U.S. 998 (1975) (prisoner denied parole on basis of illegal disciplinary action); *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 112 Cal. Rptr. 552 (1975) (factually incorrect material in file led parole officers to believe that prisoner had violent tendencies and that his "family reject[ed] him"); *State v. Phlavel*, 61 N.J. Super. 242, 160 A.2d 647 (1960) (files erroneously showed that prisoner was under a life sentence in another jurisdiction).

Greenholtz case itself, an inmate was notified that he was denied parole and that the Board thought he should enlist in self-improvement programs even though he was already enrolled in all such programs available.⁷⁰

A reduction in the risk of error could have been accomplished in *Greenholtz* by requiring a written statement by the Board of the evidence relied upon. Such a requirement would place on the Board no greater procedural burden than that required in *Morrissey v. Brewer* and in *Wolff v. McDonnell*,⁷¹ and more significantly, such a statement would result in a more careful consideration of the evidence.⁷²

Similarly, a more specific advance notice requirement, stating at least the date of the hearing, would afford greater procedural protection with minimal administrative burden. In upholding the Board's practice of giving advance notice only of the month of the hearing with the time posted only on the day of the hearing itself, the Court stated that no claim existed before it of serious prejudice.⁷³ The respondents' brief shows, however, that the inmates had argued the need for more specific notice so that inmates could prepare their cases⁷⁴ for the parole hearings. By adopting the additional procedural requirements of more specific notice and a written statement of evidence relied upon, the Court could have provided a substantially greater procedural protection. Such measures would not sacrifice efficiency to a prohibitive degree be-

70. 442 U.S. at 33 n.15 (Marshall, J., dissenting).

71. In *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), the Court adopted the following procedural requirements for parole revocation:

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

The Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), adopted these procedures in part, specifically rejecting the right to cross-examination, 418 U.S. at 567, and the right to legal counsel, 418 U.S. at 570.

72. See 442 U.S. 1, 33 (1979) (Marshall, J., dissenting).

73. 442 U.S. 1, 14 n.6 (1979).

74. Brief for Respondents, 65-66.

cause the information of hearing dates and evidence relied upon would be within the knowledge of the Board. The only additional administrative burden would consist of making the information available to the inmate.

V. CONCLUSION

In assessing the nature of an inmate's interest in being released on discretionary parole when eligible, the Court in *Greenholtz* blurred its traditional two-step procedural due process analysis by examining the nature of the state's determination procedures affecting that interest. This approach not only leaves unclear what analysis courts are to apply in future procedural due process determinations but, as applied in *Greenholtz*, also reveals an improper interpretation of the proceeding employed in recent procedural due process cases.

In finding that there was no protected interest in parole releases, the Court ignored the importance of parole to society in many respects, including sentencing and rehabilitation. It similarly treated lightly the practical effects of the right to parole created by the mere existence of a state parole system. This was emphasized by the Court's analysis of the interest created by statutory language, which interest was not satisfactorily distinguished from that created under the existence of a parole system itself. Finally, even where the Court found an interest entitled to some measure of constitutional protection, the minimum requirements approved are insufficient to overcome the risk of error and prejudice to the inmates.

BARBARA S. SMITH

TORTS — Products Liability — Strict Liability and Warranty in Products Liability Action. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 273 N.W.2d 233 (1979).

I. INTRODUCTION

When the Wisconsin Supreme Court first adopted a strict tort liability theory in products liability cases,¹ it was pre-

1. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (holding that fulfilling the elements of RESTATEMENT (SECOND) OF TORTS § 402A (1965) constituted "negli-