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# Shock Incarceration and Parole: A Process Without Process

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# Shock Incarceration and Parole

## A PROCESS WITHOUT PROCESS

### INTRODUCTION

The idea that an inmate could possess a liberty interest is a relatively recent development in Fourteenth Amendment law.<sup>1</sup> In this context, the term “interest” refers to the rights guaranteed by the Due Process Clause, which protects against deprivations of “life, liberty, or property, without due process of law.” Until the 1960s, courts rarely intervened in prison policy and considered most corrections issues to be matters of administrative discretion.<sup>2</sup> Starting in 1967, however, courts began demonstrating a “willingness to apply due process principles to the post-conviction criminal process.”<sup>3</sup> Over time, courts have found that due process is required at multiple stages of an offender’s sentencing.<sup>4</sup> Courts have required prison authorities to afford inmates due process before they can be segregated from the general prison population, subjected to inferior prison conditions, or otherwise seriously punished for alleged violations of prison rules.<sup>5</sup> The Supreme Court has also

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<sup>1</sup> The Due Process Clause of the Fourteenth Amendment protects against deprivations of “life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. These protected rights to life, liberty, and property are often referred to as “interests” that can inhere in certain things. To say that a person has a “liberty interest” in something is to say that they cannot be deprived of that thing without due process of law.

<sup>2</sup> See Harold S. Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CAL. L. REV. 1518, 1519 (1972).

<sup>3</sup> *Id.* at 1520.

<sup>4</sup> See *Mempa v. Rhay*, 389 U.S. 128 (1967) (holding that counsel must be provided at deferred sentencing proceedings); *Braun v. Rhay*, 416 F.2d 1055 (9th Cir. 1969) (holding that counsel must be provided at resentencing proceedings); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969) (holding that counsel must be provided at probation revocation proceedings).

<sup>5</sup> See Parsons-Lewis, *supra* note 2, at 1520; see also *Landman v. Royster*, 333 F. Supp. 621, 651-56 (E.D. Va. 1971) (holding that inmates facing prison disciplinary proceedings are entitled to an impartial hearing where they can present and cross-examine witnesses and to a decision based on the evidence); *Clutchette v. Procunier*, 497 F.2d 809, 818-20 (1974) (holding that inmates facing prison disciplinary proceedings are entitled to (1) notice of the charges, (2) an opportunity to be heard, (3) present and cross-examine witnesses, (4) an impartial hearing body, and (5) a decision based on the evidence); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971) (holding that inmates facing disciplinary hearings are entitled to notice and a hearing before an impartial tribunal).

held that parolees are entitled to due process in parole-revocation proceedings,<sup>6</sup> as well as in proceedings resulting in the loss of good-time credits.<sup>7</sup>

Still, “[i]n this continuum of post-conviction due process—which begins with sentencing, extends to discipline in prison, and continues through the revocation of parole—there [was] one conspicuous void: the parole granting decision itself.”<sup>8</sup> Prior to 1979, courts invariably held that parole was not a right but was merely a privilege that resided solely within the discretion of the parole board.<sup>9</sup> States “had no duty to create a parole system,” and even if they did create such a system, inmates could only hope for, and not expect, conditional release.<sup>10</sup> Since parole was not a right, inmates could be deprived of it without due process of law. As a result, courts never overturned administrative decisions denying parole for lack of due process.<sup>11</sup> In 1979, the Supreme Court sought to address this void in *Greenholtz v. Inmates of the*

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<sup>6</sup> See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (holding that a parolee is entitled to “(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 of lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole”).

<sup>7</sup> See *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that in proceedings resulting in the loss of good-time credits or imposition of solitary confinement, due process requires that the inmate be afforded advance written notice of the claimed violation, a written statement of fact findings, and the right to call witnesses and present documentary evidence where such would not be unduly hazardous to institutional safety or correctional goals). Inmates can earn good-time credits for good behavior and successful performance in assigned programs. See COLUMBIA HUMAN RIGHTS LAW REVIEW, JAILHOUSE LAWYER’S MANUAL, ch. 35 (9th ed. 2011). Inmates can also lose good-time credits for bad behavior, violating rules, or poor performance in programs. See *id.* Good-time credits are valuable because they can help an inmate to be released early, though the exact nature of the release depends on the type of sentence originally imposed. See *id.*

<sup>8</sup> *Parsons-Lewis*, *supra* note 2, at 1520.

<sup>9</sup> See, e.g., *People v. Jennings*, 165 N.E. 277, 278 (N.Y. 1929) (“Parole is not a right, but a privilege, to be granted or withheld as discretion may impel.”); *State v. Farmer*, 237 P.2d 734, 736 (Wash. 1951) (“The granting of parole is not a matter of right but is a matter of grace, privilege, or clemency granted to the deserving, and withheld from the undeserving, as sound official discretion may dictate.”); *Herman v. Powell*, 367 P.2d 553, 556 (Mont. 1961) (“A prisoner is not entitled to release as a matter of right until he has completed his maximum sentence.”).

<sup>10</sup> Linda M. Trueb, *The Expectancy of Parole in Montana: A Right Entitled to Some Due Process*, 48 MONT. L. REV. 379, 379 (1987).

<sup>11</sup> See *Parsons-Lewis*, *supra* note 2, at 1520; see also ROBERT W. WINSLOW, *THE EMERGENCE OF DEVIANT MINORITIES: SOCIAL PROBLEMS AND SOCIAL CHANGE* 325 (1972) (“Claims that parole was wrongfully denied have been uniformly rejected by the courts. Even those courts that have insisted upon procedural safeguards on parole revocation, are reluctant to extend them to the parole granting decision. Courts are even more reluctant to review the merits of such decisions.”); *Menechino v. Oswald*, 430 F.2d 403, 408-09 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (“Like an alien seeking entry into the United States . . . [the inmate] does not qualify for procedural due process in seeking parole.”).

*Nebraska Penal and Correctional Complex* when it considered the question of whether an inmate possessed a liberty interest in being released on parole.<sup>12</sup>

In *Greenholtz*, the Court examined Nebraska's parole scheme and found, for the first time, that inmates could have a liberty interest in parole.<sup>13</sup> While the Court reiterated that inmates do not have an inherent right to parole, it held that the "unique structure and language" of the Nebraska parole statute created an "expectancy of release . . . entitled to some measure of constitutional protection."<sup>14</sup> This type of statutory language was later referred to by the Court as "mandatory language."<sup>15</sup> Beyond merely allowing for parole release as a matter of discretion, the Nebraska parole statute *required* parole release unless four specific justifications for deferral were found to exist.<sup>16</sup> Accordingly, the Court concluded that the Nebraska statute elevated the inmates' "expectancy of parole from the status of a mere hope to that of a right."<sup>17</sup>

The primary implication of *Greenholtz* was that states' parole statutes could now be held to confer upon inmates a liberty interest in parole. Applying the *Greenholtz* analysis, numerous parole schemes across the country were held to create a liberty interest in parole and, as a corollary, required procedures that conformed with due process.<sup>18</sup> Shortly thereafter, however, many states amended or repealed their parole statutes and replaced any existing mandatory language that created a liberty interest.<sup>19</sup>

The New York legislature, perhaps anticipating the outcome of *Greenholtz*, repealed its parole law in 1977.<sup>20</sup> The law's replacement, which became effective on January 1, 1978, lacked the mandatory language of its predecessor, thereby preventing any potential future due process claims.<sup>21</sup> Indeed, since then, state

<sup>12</sup> See *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979).

<sup>13</sup> *Id.* at 15-16.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Bd. of Pardons v. Allen*, 482 U.S. 369, 371 (1987).

<sup>16</sup> *Greenholtz*, 442 U.S. at 11-12.

<sup>17</sup> Trueb, *supra* note 10, at 379; see *Greenholtz*, 442 U.S. 1.

<sup>18</sup> See, e.g., *Allen*, 482 U.S. 369; *Williams v. Mo. Bd. of Prob. and Parole*, 661 F.2d 697 (8th Cir. 1981) (finding that the Missouri parole statute created a liberty interest); *Mayes v. Trammell*, 751 F.2d 175 (6th Cir. 1984) (finding that the Tennessee parole statute created a liberty interest).

<sup>19</sup> See, e.g., *Maggard v. Wyrick*, 800 F.2d 195, 198 (8th Cir. 1986) (discussing the amendment to the Missouri parole statute that eliminated mandatory language); *Wright v. Trammell*, 810 F.2d 589, 590 (6th Cir. 1987) (discussing the amendment to the Tennessee parole statute that eliminated mandatory language).

<sup>20</sup> See *id.*; see also N.Y. CORRECT. LAW § 213 (McKinney 1968) (repealed 1977).

<sup>21</sup> Compare N.Y. CORRECT. LAW § 213 (McKinney 1968) (repealed 1977), with Act of Aug. 11, 1977, ch. 904, 1977 N.Y. Sess. Law 1 (McKinney).

and federal courts have consistently held that the New York parole scheme does not create a liberty interest in parole.<sup>22</sup> Further, any discussion of a liberty interest in parole for the general New York prison population has been purely academic, as New York already affords these inmates procedural safeguards that would conform with due process.<sup>23</sup> Thus, the vast majority of New York inmates have no cognizable due process claim following a denial of release on parole, either because there is no liberty interest to begin with, or because they are already afforded all they are due under the Supreme Court's due process jurisprudence.

Yet there is a small fraction of the New York prison population that is neither subject to the nonmandatory language of the 1978 parole statute nor afforded the same procedural safeguards as other inmates.<sup>24</sup> These inmates make up New York's Shock Incarceration Program (Shock). Shock is a six-month program intended to rehabilitate and instill discipline in certain classes of nonviolent offenders.<sup>25</sup> Styled after military boot camps, Shock requires inmates to participate in rigorous physical training and various rehabilitative, educational, and vocational programs.<sup>26</sup> Upon completion of the program, inmates are eligible to receive a Certificate of Earned Eligibility, which, if earned, makes the inmate immediately eligible for release on parole.<sup>27</sup> Since these inmates tend to enter Shock within months of being incarcerated, they can complete the six-month program well before they would otherwise be eligible for parole under their court-imposed minimum sentences. Thus, the immediate parole eligibility afforded by the program often results in a significant reduction in the period of incarceration of a given Shock inmate.<sup>28</sup> Unlike the general prison population, however, Shock inmates are not afforded any of the procedural safeguards necessary to ensure that the parole decision is fair and based on accurate information.<sup>29</sup> Further, the statute mandating the immediate parole eligibility for Shock inmates contains mandatory language

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<sup>22</sup> See, e.g., *Russo v. N.Y. Bd. of Parole*, 405 N.E.2d 225 (N.Y. 1980); *Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979); *Barna v. Travis*, 239 F.3d 169 (2d Cir. 2001).

<sup>23</sup> See *Schwartz v. Dennison*, 518 F. Supp. 2d 560, 573 (S.D.N.Y. 2007), *aff'd*, 339 F. App'x 28 (2d Cir. 2009).

<sup>24</sup> See N.Y. CORRECT. LAW § 805 (McKinney 2016); N.Y. CORRECT. LAW § 867 (McKinney 2016); N.Y. EXEC. LAW § 259-i(2)(e) (McKinney 2012).

<sup>25</sup> See DEPT. OF CORRECT. SERV., THE NINETEENTH ANNUAL SHOCK LEGISLATIVE REPORT (2007) [hereinafter SHOCK REPORT]; PRISON VISITING PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK, LAKEVIEW CORRECTIONAL FACILITY 3 (2007).

<sup>26</sup> See SHOCK REPORT, *supra* note 25, at 1; PRISON VISITING PROJECT, *supra* note 25, at 3.

<sup>27</sup> N.Y. CORRECT. LAW § 805.

<sup>28</sup> See SHOCK REPORT, *supra* note 25, at 1.

<sup>29</sup> See N.Y. EXEC. LAW § 259-i(2)(e).

that mirrors the language held to have created a liberty interest in *Greenholtz*.<sup>30</sup> This creates an open question as to whether Shock inmates have a liberty interest in being released on parole and, if so, whether the procedures used to determine their eligibility conform with due process.

This question is not merely academic. Parole boards can, and do, act improperly in making parole decisions. First, a parole board may base its denial on incorrect information, either in the form of actually erroneous information within the inmate's file, or by misunderstanding or misstating otherwise accurate information.<sup>31</sup> Second, a parole board may fail to consider and weigh all the required statutory factors set forth by the New York legislature in the parole laws.<sup>32</sup> Finally, a parole board may act improperly by considering irrelevant or impermissible nonstatutory factors in making decisions about whether to grant parole.<sup>33</sup> Yet Shock inmates do not receive adequate procedural safeguards to ensure that these errors are addressed on appeal. Shock inmates do not receive a hearing, and as a result, no hearing transcript is available for appeal purposes. Further, parole board decisions often provide few details as to their reasoning for denying parole. This lack of procedural safeguards deprives Shock inmates of meaningful appellate review, making it less likely that erroneous parole denials will be corrected. Thus, the question of whether these inmates have a liberty interest in parole can have a direct and significant impact on the length of their incarceration.

This note argues that, under *Greenholtz*, the mandatory language in the New York statutes governing the parole review process for Shock inmates creates a liberty interest in release on parole.<sup>34</sup> Further, the procedures currently in place for reviewing

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<sup>30</sup> See N.Y. CORRECT. LAW § 867 (McKinney 2016).

<sup>31</sup> See *infra* Part III.

<sup>32</sup> See *infra* Part III.

<sup>33</sup> See *infra* Part III.

<sup>34</sup> The Supreme Court's decision in *Sandin v. Connor*, 515 U.S. 472 (1995), appeared to cast serious doubt on the continued validity of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), stating that "[t]he search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." Yet the Court did not explicitly overrule any of its prior holdings. *Connor*, 515 U.S. at 483 n.5. Furthermore, *Sandin* was decided in the context of prison disciplinary proceedings and not in the context of parole. Under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484. Indeed, the majority of Courts of Appeals have continued to apply *Greenholtz*'s "mandatory language" test to cases involving liberty interests in parole. See *Jimenez v. Conrad*, 678 F.3d 44, 46 (1st Cir. 2012); *Snodgrass v. Robinson*, 512 F.3d 999, 1003 (8th Cir. 2008); *Michael v. Ghee*, 498 F.3d 372, 378 (6th Cir. 2007); *Montgomery v.*

Shock inmates' eligibility for parole fall short of the minimum requirements of due process. Part I of this note provides a brief history of the Shock program. Part II introduces the Supreme Court case *Greenholtz v. Nebraska* and examines the development of the liberty interest in parole release in the United States and in New York specifically. Part III examines the effects of the current parole review process on Shock inmates. Finally, Part IV proposes that the Shock parole review process should more closely resemble the process used for other inmates in New York that provides for a hearing and the ability to present evidence.

## I. THE SHOCK INCARCERATION PROGRAM

### A. *History and Purpose of the Program*

New York's Shock Incarceration Program was created in July 1987 and is the largest of its kind in the nation.<sup>35</sup> In 2007, there were 1,290 male inmates and 120 female inmates in the New York program, with 222 additional beds for orientation and screening.<sup>36</sup> In creating the Shock program, the state legislature concluded that "[c]ertain young inmates will benefit from a special six-month program of intensive incarceration. Such incarceration should be provided to carefully selected inmates committed to the State Department of Correctional Services" who are in need of substance abuse treatment and rehabilitation.<sup>37</sup> The program is intended to provide "[a]n alternative form of incarceration stressing a highly structured and regimented routine, which will include extensive discipline, considerable physical work and exercise and intensive drug rehabilitation therapy."<sup>38</sup> The legislature believed that such a program would build character, improve self-esteem, and promote maturity and responsibility so that upon the inmates' release, they would be law-abiding members of society.<sup>39</sup>

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Anderson, 262 F.3d 641, 644 (7th Cir. 2001); *McQuillion v. Duncan*, 306 F.3d 895, 903 (9th Cir. 2002); *Maghe v. Koch*, 107 F.3d 21 (10th Cir. 1997); *Ellis v. District of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996); see also Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1260 n.138 (1998) (noting that *Sandin* presumably would not apply in the context of challenges to parole denial). *But see* *Victory v. Pataki*, No. 13-3592, 2016 WL 373869, at \*7 n.8 (2d Cir. Feb. 1, 2016); *Powell v. Weiss*, 757 F.3d 338, 345 (3d Cir. 2014). Thus, whatever the Supreme Court's intention in *Sandin*, courts should continue to follow *Greenholtz* in parole cases until such time as the Court explicitly overrules the decision.

<sup>35</sup> See SHOCK REPORT, *supra* note 25, at 1.

<sup>36</sup> *Id.*

<sup>37</sup> Act of July 13, 1987, ch. 261, 1987 N.Y. Sess. Law 2013-14 (McKinney).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

In addition to the Shock program's rehabilitative goals, the program also operates in conjunction with the Earned Eligibility Program to allow inmates to be released early. This furthers the stated goal of the Earned Eligibility Program, which was established specifically to address the problem of prison overcrowding.<sup>40</sup> Under the program, a new inmate is "assigned a work and treatment program as soon as practicable."<sup>41</sup> Roughly two months before the expiration of an inmate's minimum term, the Department of Corrections and Community Supervision (DOCCS) reviews the inmate's institutional record to determine compliance with the assigned program.<sup>42</sup> If DOCCS determines that the inmate performed adequately in the program, the inmate may receive a Certificate of Earned Eligibility.<sup>43</sup> An inmate with a Certificate of Earned Eligibility needs to meet a lower standard to be granted parole.<sup>44</sup>

Upon successful completion of the Shock program, an inmate is eligible to receive a Certificate of Earned Eligibility.<sup>45</sup> This affords inmates who complete Shock all the benefits of the Earned Eligibility Program. But in addition to those benefits, Shock participants who receive a Certificate of Earned Eligibility are eligible to be released on parole *immediately* upon completion of the Shock program, even if that point is prior to their serving their minimum sentences.<sup>46</sup>

### B. Administration of the Program

Inmates are first screened for Shock eligibility at a reception prison.<sup>47</sup> This initial screening is based on several

<sup>40</sup> See N.Y. CORRECT. LAW § 805 (McKinney 2016); COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7, ch. 36.

<sup>41</sup> N.Y. CORRECT. LAW § 805.

<sup>42</sup> See *id.*; COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7.

<sup>43</sup> N.Y. CORRECT. LAW § 805; see COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7.

<sup>44</sup> COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7, ch. 36, at 11 ("First, the Parole Board may not consider whether your release will 'so deprecate [the] seriousness of the crime,' which is the standard the Board uses for prisoners who do not have a [Certificate of Earned Eligibility]. Second, when you possess a [Certificate of Earned Eligibility], the Board presumes you will probably live and remain at liberty without violating the law—which means unless the Board affirmatively finds otherwise, you should get parole." (footnote omitted)).

<sup>45</sup> See N.Y. CORRECT. LAW § 867(4) (McKinney 2016) ("An inmate who has successfully completed a shock incarceration program shall be eligible to receive such a certificate of earned eligibility pursuant to section eight hundred five of this chapter.").

<sup>46</sup> See *id.* ("Notwithstanding any other provision of law, an inmate sentenced to a determinate sentence of imprisonment who has successfully completed a shock incarceration program shall be eligible to receive such a certificate of earned eligibility and shall be immediately eligible to be conditionally released.").

<sup>47</sup> See PRISON VISITING PROJECT, *supra* note 25, at 3.



criteria, including an inmate's age, length of sentence, and criminal record.<sup>48</sup> An eligible inmate must not have been convicted of certain classes of offenses<sup>49</sup> and may be denied participation in Shock because of an outstanding warrant, detainer, or commitment.<sup>50</sup> After the initial screening, DOCCS transfers the eligible inmates to the Lakeview Shock Incarceration Center. At Lakeview, the inmates are housed in reception dorms where they undergo a second screening.<sup>51</sup> This consists of a medical and psychological evaluation and a background check to ensure that inmates do not have pending charges or any history of violent behavior.<sup>52</sup> Lakeview staff also focus on whether the circumstances of the inmates' crimes demonstrate predatory behavior or a high degree of criminal sophistication.<sup>53</sup>

Assuming that the inmate meets these criteria, he or she will most likely be allowed<sup>54</sup> to participate in the program. Inmates who are deemed eligible either remain at Lakeview or are transferred to another facility to complete the program.<sup>55</sup> The

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<sup>48</sup> See DEPT. OF CORR. AND CMTY. SUPERVISION, DIRECTIVE NO. 0086, SHOCK INCARCERATION FACILITIES (2013) [hereinafter DIRECTIVE NO. 0086] ("An inmate may apply for participation in the Shock Incarceration Program if he or she: 1. Is at least 16 but less than 50 years of age; 2. Is sentenced to an indeterminate term of imprisonment and will become eligible for release on parole within three years, or is sentenced to a determinate term of imprisonment and will be eligible for conditional release within three years; 3. Was between 16-49 years of age at the time of the commission of the crime; and 4. Has not previously been convicted of a violent felony in New York as defined in article 70 of the Penal Law or a felony in any other jurisdiction which includes all essential elements of any such violent felony, upon which an indeterminate or determinate term of imprisonment was imposed.").

<sup>49</sup> See *id.* ("Notwithstanding the foregoing [criteria], no person who is convicted of any of the following crimes shall be deemed eligible to participate in this program: 1. A violent felony offense; 2. An A-1 felony offense; 3. Any homicide offense as defined in article 125 of the Penal Law; 4. Any felony sex offense as defined in article 130 of the Penal Law; or 5. Any escape or absconding offense as defined in article 205 of the Penal Law.").

<sup>50</sup> See *id.* ("The Shock Incarceration Selection Committee shall examine each inmate's record to determine whether the inmate has any of the following detainers, warrants, or commitments outstanding, which, in the discretion of the committee, may bar the inmate from participation in the Shock Incarceration Program: 1. Criminal related detainer or warrant; 2. Bail warrant; 3. Immigration warrant; 4. Probation warrant or out of State parole warrant; or 5. Concurrent or Consecutive out of State or Federal Commitments.").

<sup>51</sup> See PRISON VISITING PROJECT, *supra* note 25, at 3.

<sup>52</sup> *Id.*; see DIRECTIVE NO. 0086, *supra* note 48.

<sup>53</sup> See PRISON VISITING PROJECT, *supra* note 25, at 3.

<sup>54</sup> See SHOCK REPORT, *supra* note 25, at 6. From July 13, 1987, until September 30, 2006, 54.5% of all initially eligible inmates were sent to Shock. *Id.* The vast majority of those who were not sent were disqualified for one of four reasons: medical (9.9%), public risk (5.9%), criminal history (5.4%), and mental health (5.0%). *Id.* An additional 8.5% refused to participate in the program. *Id.* Thus, assuming an inmate agrees to participate in the program and meets the primary screening criteria, there is a very high chance that they will be approved for participation.

<sup>55</sup> See PRISON VISITING PROJECT, *supra* note 25, at 5. Until 2011, New York State had five Shock facilities. Since then, three have closed, making Lakeview and Moriah the

inmates are then organized into “platoons” of “10 to 15 women or 50 to 60 men.”<sup>56</sup> The newly formed platoons then enter an intensive two-week period known as Zero Weeks, which focuses primarily on the physical training and disciplinary aspects of the program.<sup>57</sup> At the conclusion of Zero Weeks, the regular Shock program begins.

The Shock program is highly regimented.<sup>58</sup> Shock inmates are woken up by a military bugle call at 5:30 a.m.<sup>59</sup> Inmates then form lines on an outdoor asphalt area, regardless of the weather, and complete a rigorous physical training routine led by drill instructors who ensure full inmate participation.<sup>60</sup> After physical training, the inmates eat breakfast and begin a full day of programming that ends at 9:00 p.m. on weekdays.<sup>61</sup> The week’s daytime programming is generally broken up into six-hour days, including one day focused entirely on education, one day of programming, which includes alcohol and substance abuse treatment, and three days of either work or vocational training.<sup>62</sup> In the evenings, the inmates have educational classes, alcohol and substance abuse treatment, programs to help with confrontation, and other rehabilitative programming.<sup>63</sup> The inmates’ day ends at 9:30 p.m. with lights out.<sup>64</sup>

At all points, the program seeks to instill in the inmates a sense of teamwork and mutual accountability. Platoons live together, work together, and have daily meetings to resolve problems.<sup>65</sup> At any point, the entire platoon can be disciplined for the insubordination of one inmate. Overall, the program is intended to be physically and emotionally taxing, with the goal being to “break [the inmates] down and build them up.”<sup>66</sup>

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only remaining Shock facilities. Joanna Walters, *New York’s Boot-Camp Prisons Get the Boot*, ALJAZEERA AM. (Dec. 9, 2013, 5:30 AM), <http://america.aljazeera.com/articles/2013/12/9/new-york-s-boot-campprisonsgettheboot.html> [<http://perma.cc/5AVX-MDZ5>].

<sup>56</sup> PRISON VISITING PROJECT, *supra* note 25, at 5.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* at 6.

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See* CHERIE L. CLARK ET AL., SHOCK INCARCERATION IN NEW YORK: FOCUS ON TREATMENT (1994), <https://www.ncjrs.gov/pdffiles/shockny.pdf> [<http://perma.cc/54BJ-8UT9>].

<sup>66</sup> Jim Kenyon, *Inside Shock Incarceration—A CNY Central Special Report*, CNYCENTRAL.COM (Apr. 25, 2013), [http://www.cnycentral.com/news/story.aspx?id=889911#.VMKh\\_mTF9kU](http://www.cnycentral.com/news/story.aspx?id=889911#.VMKh_mTF9kU) [<http://perma.cc/AD8J-3PSG>].

### C. *Results of the Shock Program*

The vast majority of inmates who complete Shock—roughly 99%—are released on parole. Further, participants in the Shock program tend to be released from prison approximately one year earlier than their court-determined incarceration sentence.<sup>67</sup> In addition to benefiting the inmates, these early releases save the state a substantial amount of money. As of September 30, 2006, 35,102 Shock participants have seen early release, which has resulted in a savings of nearly \$1.18 billion for the State of New York.<sup>68</sup> Shock graduates pass the General Educational Development (GED) exam at significantly higher rates than inmates at comparable medium and minimum security facilities.<sup>69</sup> In fiscal year 2005–2006, Shock graduates who took the exam passed at a rate of 80%, whereas the passage rates averaged 41% and 57% at minimum- and medium-security facilities, respectively.<sup>70</sup> Furthermore, Shock graduates have lower recidivism rates than inmates who were eligible for the program but did not participate.<sup>71</sup> One, two, and three years removed from the program, Shock graduates remained in the community at rates of 92%, 78%, and 69%, respectively, compared with rates of 84%, 68%, and 60%, respectively, for the eligible but nonparticipating group.<sup>72</sup>

Overall, Shock is arguably a wildly successful program. The vast majority of those who complete the program are released, many far earlier than they would have been otherwise, and once released, they generally experience better outcomes. Meanwhile, the state saves a substantial amount of money by reducing the prison population. The problem, however, is that not all inmates who complete the program are released. And due to the current parole review process, there is often no way for these inmates to challenge the parole board's decision. For those inmates who are denied parole and left without recourse, it is no consolation that the Shock program at large is successful. The remainder of this note focuses on the effect of the Shock parole review process on those inmates.

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<sup>67</sup> See SHOCK REPORT, *supra* note 25, at EXECUTIVE SUMMARY.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.* at ii.

<sup>70</sup> See *id.* at 32.

<sup>71</sup> See *id.* at 48.

<sup>72</sup> See *id.* at 48-50.

## II. GREENHOLTZ AND THE DEVELOPMENT OF A LIBERTY INTEREST IN PAROLE

The New York parole laws governing the Shock program create a legitimate expectation of release for inmates who have completed the program. “The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake.”<sup>73</sup> A liberty interest “may arise from an expectation or interest created by state laws or policies.”<sup>74</sup> In the context of parole, the Supreme Court has held that “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”<sup>75</sup> But although there is no inherent right to parole, such a right can be created by state laws governing parole decisions.<sup>76</sup>

The Supreme Court first found such a state-created right to parole in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*. In *Greenholtz*, Nebraska inmates brought a class action lawsuit claiming, among other things, that the procedure of the Nebraska parole boards denied them due process.<sup>77</sup> The inmates first argued that a liberty interest in parole exists whenever a state holds out the possibility of parole.<sup>78</sup> This argument was quickly rejected by the Court, which found that “the *possibility* of parole provides no more than a mere hope that the benefit will be obtained.”<sup>79</sup> The inmates also argued, however, that the language of the Nebraska statute itself created a liberty interest in parole release.<sup>80</sup> The Nebraska statute provided that “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*” certain enumerated factors are found to exist.<sup>81</sup> The

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<sup>73</sup> *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

<sup>74</sup> *Id.*

<sup>75</sup> *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979).

<sup>76</sup> *Robles v. Dennison*, 745 F. Supp. 2d 244, 261 (W.D.N.Y. 2010), *aff’d*, 449 Fed. App’x 51 (2d Cir. 2011) (citing *Greenholtz*, 442 U.S. 1).

<sup>77</sup> *See Greenholtz*, 442 U.S. at 1, 3-4.

<sup>78</sup> *See id.* at 9.

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (emphasis added) (quoting NEB. REV. STAT. §§ 83-1,114(1) (1976)).

The factors that can result in the deferral of parole include when

- (a) There is a substantial risk that he will not conform to the conditions of parole;

inmates argued “that the structure of the provision together with the use of the word ‘shall’ binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found.”<sup>82</sup> Without analyzing the statute, the Court nevertheless noted its “unique structure and language” and therefore “accept[ed] [the inmates’] view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection.”<sup>83</sup>

Seven years later, in *Board of Pardons v. Allen*, the Supreme Court similarly held that a Montana parole statute created a liberty interest in parole release.<sup>84</sup> Montana law provided that “[s]ubject 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 a reasonable probability that the prisoner can be released without detriment to the prisoner or to the community.”<sup>85</sup> The Court compared the language of the Montana statute with the Nebraska statute in *Greenholtz* and explained that “[s]ignificantly, the Montana statute, like the Nebraska statute, uses mandatory language (‘shall’) to ‘creat[e] a presumption that parole release will be granted’ when the designated findings are made.”<sup>86</sup> The Court held that, based on *Greenholtz*, the mandatory language in the Montana statute created “a liberty interest protected by the Due Process Clause.”<sup>87</sup>

#### A. *New York’s Parole Scheme*

Prior to December 31, 1977, parole in New York was governed by Correction Law section 213, which provided, in pertinent part,

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison,

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- (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.

*Id.* (quoting NEB. REV. STAT. §§ 83-1,114(1)).

<sup>82</sup> *Id.* at 11-12 (quoting NEB. REV. STAT. §§ 83-1,114(1)).

<sup>83</sup> *Id.* at 12.

<sup>84</sup> *Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987).

<sup>85</sup> MONT. CODE ANN. § 46-23-201 (1985) (emphasis added).

<sup>86</sup> *Allen*, 482 U.S. at 377-78 (footnote omitted) (quoting *Greenholtz*, 442 U.S. 1, 12).

<sup>87</sup> *Id.* at 379.

but only if the board of parole is of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society. *If the board of parole shall so determine, such prisoner shall be allowed to go upon parole* outside of prison walls and inclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled, until the expiration of the maximum term specified in his sentence.<sup>88</sup>

In analyzing the statute, the court in *Robles v. Dennison* noted that “the wording of former N.Y. Corr. Law § 213—in particular the language . . . in italics—closely parallels the language in the Nebraska and Montana parole statutes, which were addressed in *Greenholtz* and *Allen*, respectively.”<sup>89</sup> Based on “the analytical method set forth in *Greenholtz*, [the] Court [found] it clear that former N.Y. Corr. Law § 213 gave rise to a cognizable liberty interest in release on parole.”<sup>90</sup>

In 1977, perhaps anticipating *Greenholtz*, the New York legislature repealed Correction Law section 213.<sup>91</sup> Its replacement, New York Executive Law section 259-i, provides, in pertinent part, that

[d]iscretionary 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.<sup>92</sup>

Significantly, the mandatory “shall . . . unless” language in Correction Law section 213 was not included in Executive Law section 259-i.

Since 1977, as a result of this change, it has been well settled by both state and federal courts that the New York parole laws do not create a legitimate expectancy of release.<sup>93</sup> In *Boothe v. Hammock*, for example, the Second Circuit explained that it was “apparent that New York’s parole provisions . . . do not establish a scheme whereby parole *shall* be ordered *unless* specified conditions are found to exist.”<sup>94</sup> Shortly after *Boothe*, the

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<sup>88</sup> N.Y. CORRECT. LAW § 213 (McKinney 1968) (repealed 1978) (emphasis added).

<sup>89</sup> *Robles v. Dennison*, 745 F. Supp. 2d 244, 264 (W.D.N.Y. 2010), *aff’d*, 449 Fed. App’x 51 (2d Cir. 2011).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 265; N.Y. CORRECT. LAW § 213 (McKinney 1968) (repealed 1978).

<sup>92</sup> N.Y. EXEC. LAW § 259-i(2)(c)(A) (2016).

<sup>93</sup> *See* *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001).

<sup>94</sup> *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979) (emphasis added).

New York Court of Appeals similarly held in *Russo v. N.Y. Board of Parole* that the New York statute merely created guidelines that were to be followed unless there were reasons for doing otherwise.<sup>95</sup> The court reasoned that the mere fact “[t]hat guidelines are provided does not mean they cannot be deviated from or create an entitlement to release at any particular time; the system is thus discretionary and holds out no more than the possibility of parole.”<sup>96</sup> Consequently, the New York Court of Appeals joined the Second Circuit in holding that the New York parole scheme does not create a liberty interest that would implicate the Due Process Clause.

## B. *New York’s Shock Parole Scheme*

### 1. Does a Liberty Interest Exist?

In *Boothe* and *Russo*, the courts were restricting their analysis to the New York parole provisions in Executive Law section 259-i, which apply to the general prison population. Their analysis was rightly limited, as none of the inmates bringing these cases had completed Shock or had otherwise received a Certificate of Earned Eligibility. But Executive Law section 259-i does not comprise the entirety of the parole scheme. In determining whether a liberty interest in parole release is created upon an inmate’s completion of Shock, Executive Law section 259-i must be analyzed in conjunction with the parole laws that apply specifically to Shock inmates—specifically, Correction Law sections 805 and 867.

Correction Law section 805 provides that an inmate serving a qualifying sentence who has received a Certificate of Earned Eligibility “shall be granted parole release . . . unless” the board finds the inmate unsuited for parole.<sup>97</sup> Section 805 applies not only to inmates who have completed Shock, but to all inmates who have received a Certificate of Earned Eligibility as a result of completed qualified programming. Correction Law section 867

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<sup>95</sup> See *Russo v. N.Y. Bd. of Parole*, 405 N.E.2d 225, 228 (N.Y. 1980) (citing *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979); *Walker v. Oswald*, 449 F.2d 481, 485 (2d Cir. 1971)).

<sup>96</sup> *Id.*

<sup>97</sup> N.Y. CORRECT. LAW § 805 (McKinney 2016) (emphasis added) (“Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than six years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term or as authorized by subdivision four of section eight hundred sixty-seven unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society.”).

then states that an inmate serving a qualifying sentence “who has successfully completed a shock incarceration program *shall* be eligible to receive [a Certificate of Earned Eligibility] . . . and *shall* be immediately eligible to be conditionally released.”<sup>98</sup>

Relying on the Supreme Court’s analysis in *Greenholtz*, several courts have held that New York Correction Law section 805 “creates a liberty interest which entitles inmates to some due process protections in the consideration of their parole applications.”<sup>99</sup> Like the statutes analyzed in *Greenholtz* and *Allen*, Correction Law section 805 contains mandatory language, which creates a presumption that inmates will be released on parole unless certain conditions are found to exist. Further, with respect to inmates who have completed Shock, this presumption is expressed explicitly in Title 9 of New York State Compilation of Codes, Rules and Regulations, section 8010.2(a), which provides that an “inmate’s successful completion of the [Shock] program, and receipt of a certificate of earned eligibility, *shall* create a presumption in favor of parole release.”<sup>100</sup> A presumption in favor

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<sup>98</sup> *Id.* § 867 (McKinney 2016) (emphasis added) (“An inmate who has successfully completed a shock incarceration program shall be eligible to receive such a certificate of earned eligibility pursuant to section eight hundred five of this chapter. Notwithstanding any other provision of law, an inmate sentenced to a determinate sentence of imprisonment who has successfully completed a shock incarceration program shall be eligible to receive such a certificate of earned eligibility and shall be immediately eligible to be conditionally released.”).

<sup>99</sup> *Schwartz v. Dennison*, 518 F. Supp. 2d 560, 571-72 (S.D.N.Y. 2007) *aff’d*, 339 F. App’x 28 (2d Cir. 2009); *see also* *Gittens v. Thomas*, No. 02 Civ. 9435(JSM), 2003 WL 21277151, at \*1 (S.D.N.Y. May 30, 2003) (noting that “[s]ince petitioner has received a certificate of earned eligibility, he has a protectable liberty interest which entitles him to due process in the consideration of his application for parole”); *Walters v. Ross*, No. CV-92-2290 (CPS), 1992 WL 398307, at \*3 (E.D.N.Y. Dec. 21, 1992) (noting that N.Y. Correction Law § 805 “falls squarely within the category of parole statutes that affirmatively create a liberty interest”).

<sup>100</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 8010.2(a) (2008) (emphasis added). It is important to note that this liberty interest is created upon receipt of the earned eligibility certificate, and not upon application to, or enrollment in, Shock. In *Klos v. Haskel*, 48 F.3d 81 (2d Cir. 1995), the Second Circuit considered the question of whether an inmate has a liberty interest in participating or remaining in Shock. First, with respect to an inmate’s right to participate in Shock, the court noted,

While a screening committee must review the inmate’s application to determine whether the “inmate’s participation in the shock program is consistent with the safety of the community, the welfare of the applicant and the rules and regulations of the department,” and while the committee, if it finds the application in compliance with these requirements, “shall forward the application to the commissioner or his designee for approval or disapproval,” the statute is entirely silent on how the Commissioner is to exercise his discretion in approving or disapproving the forwarded action.

*Id.* at 87 (citations omitted) (quoting N.Y. CORRECT. LAW § 867.2). Second, with respect to an inmate’s right to remain in Shock, the court stated that “the statute and regulations make clear that, once an inmate has been admitted into the shock program, he is entitled to no legitimate expectation that he will continue in and complete the program, regardless of his full compliance with the program rules.” *Id.* at 87-88. The



of release is further supported by the parole board's historical application of the statutes. As previously noted, DOCCS statistics indicate that between 1987 and 2006, only one percent of inmates who completed Shock were denied release by the parole board.<sup>101</sup> Under the Supreme Court's analysis in *Greenholtz*, the New York parole scheme clearly creates a legitimate expectancy of release in inmates who successfully participate in Shock and receive a Certificate of Earned Eligibility.

## 2. What Process Is Due?

Once a liberty interest is created, the "next considerations would be (1) what process is due to the prisoner in protecting that interest, and (2) whether the Parole Board's actions concerning the parole release decision accorded him such process."<sup>102</sup> The *Greenholtz* Court held that "[t]he Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more."<sup>103</sup> Similarly, in *Robles*, the court determined that the New York parole scheme afforded

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court held that under "this explicit statutory scheme . . . no reasonable factfinder could conclude that the alleged promises by prison officials—to the effect that participants who followed program rules could expect to complete the program and earn a certificate of earned eligibility—conferred an enforceable liberty interest on shock program participants." *Id.* at 88. Though this case certainly limits the liberty interest of Shock participants, it is not clear that it extends to Shock participants who have received an earned eligibility certificate and undergo a review by the parole board.

<sup>101</sup> See SHOCK REPORT, *supra* note 25, at 12. To put this statistic in context, a DOCCS report for the year 2013 shows that the percentage of regular inmates (excluding Shock, medical parole, and other special categories) who were granted parole after an initial hearing was only 15%. DEP'T OF CORR. AND CMTY. SUPERVISION, PAROLE BOARD AND PRESUMPTIVE RELEASE DISPOSITIONS: CALENDAR YEAR 2013 (2013). It is worth noting that the same report also shows the parole release rate for Shock inmates to be 85%, compared with the 99% for the years 1987–2006 listed in the Shock Legislative Report. See *id.* This report, however, does not explain whether the 15% of Shock inmates who were not released on parole were merely denied release or whether they were removed from the program prior to a decision by the parole board. See *id.* In any event, whether the percentage of Shock inmates released on parole is closer to 99% or 85%, these statistics are relevant only to demonstrate that the presumption in favor of release is supported by the parole board's actions with respect to inmates who complete Shock in comparison to regular inmates. These statistics are not intended to suggest that the likelihood of release in and of itself creates a liberty interest. It has been well established that "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections. . . . The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981).

<sup>102</sup> *Robles v. Dennison*, 745 F. Supp. 2d 244, 273 (W.D.N.Y. 2010), *aff'd*, 449 Fed. App'x 51 (2d Cir. 2011) (citing *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 16 (1979)).

<sup>103</sup> *Greenholtz*, 442 U.S. at 16.

petitioner sufficient process.<sup>104</sup> As in *Greenholtz*, the *Robles* court held that due process was satisfied where the petitioner was provided a hearing and a written denial.<sup>105</sup>

The *Robles* decision is correct under *Greenholtz* to the extent that it is based solely on an analysis of Executive Law section 259-i(2)(a). This section requires that the parole board personally interview inmates who are eligible for release and, if parole is denied, that the board inform the inmates in writing of the reasons for the denial.<sup>106</sup> This provision also generally applies to inmates who have received a Certificate of Earned Eligibility. For example, though the court in *Schwartz v. Dennison* found that a liberty interest existed where the inmate received a Certificate of Earned Eligibility, the inmate's due process claims were ultimately dismissed because, among other things, he was granted a hearing and was able to present evidence in support of his release.<sup>107</sup>

This provision, however, does not apply to an inmate who has completed Shock. Instead, Executive Law section 259-i(2)(e) applies, which provides that “[n]otwithstanding the requirements of paragraph (a) of this subdivision, the determination to parole an inmate who has successfully completed the shock incarceration program . . . may be made without a personal interview.”<sup>108</sup>

Unlike the Nebraska statute in *Greenholtz*, the Montana statute in *Allen*, and Executive Law section 259-i(2)(a) in *Robles* and *Schwartz*, Executive Law section 259-i(2)(e) does not afford inmates who have completed Shock an opportunity to be heard and therefore deprives them of their Fourteenth Amendment right to due process.<sup>109</sup>

<sup>104</sup> *Robles*, 745 F. Supp. 2d 244.

<sup>105</sup> *Id.* at 274 (“He had an opportunity to be heard and to present evidence at his interviews before the Parole Board panels; the Parole Board has issued written[] statements of denial, giving statutorily recognized reasons for its decision; notwithstanding that the decisions have more often than not been quite perfunctory and devoid of any truly individualized assessment of Robles as a parole candidate.”).

<sup>106</sup> N.Y. EXEC. LAW § 259-i(2)(a) (2016) (“[A]t least one month prior to the date on which an inmate may be paroled . . . , a member or members as determined by the rules of the board shall personally interview such inmate and determine whether he should be paroled . . . . If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms.”).

<sup>107</sup> See *Schwartz v. Dennison*, 518 F. Supp. 2d 560, 573 (S.D.N.Y. 2007), *aff'd*, 339 F. App'x 28 (2d Cir. 2009).

<sup>108</sup> N.Y. EXEC. LAW § 259-i(2)(e).

<sup>109</sup> It is worth noting that this was not always the case. Prior to 1992, Shock inmates were subject to the same parole review process as other inmates. The New York Executive Law was amended in 1992 to remove the requirement of a personal interview as a way to save the state money. See Act of Apr. 10, 1992, ch. 55, 1992 N.Y. Sess. Law 2242 (McKinney); N.Y., OMNIBUS REVENUE, FEE, AND ARTICLE VII BILL: SECTION BY SECTION ANALYSIS, A. 10565, 215th Legis., at 11 (1992).

### III. THE EFFECT OF THE CURRENT SHOCK PAROLE REVIEW PROCESS

The failure of the New York parole scheme to provide a hearing to an inmate who has completed Shock has a number of negative effects on the parole review process. The primary effect is that inmates who are denied parole upon completion of Shock are deprived of meaningful appellate review. In order to understand this problem, it is important to first understand the parole review process. In New York, the parole review process is governed by Executive Law section 259 and Title 9 of New York State Compilation of Codes, Rules and Regulations, Parts 8000-8011.<sup>110</sup> In making its decision, the parole board must consider certain statutory factors.<sup>111</sup> These factors include the inmate's institutional record, performance in any temporary release programs, and plans upon release.<sup>112</sup> The board must also consider the length of the inmate's sentence, the seriousness of the offense, the inmate's criminal record, any deportation orders, and any statements by the victim(s).<sup>113</sup> In making a decision to grant or deny parole, the board has broad discretion and is permitted to weigh the statutory factors as it sees fit.<sup>114</sup>

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<sup>110</sup> See COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7; N.Y. EXEC. LAW § 259; N.Y. COMP. CODES R. & REGS tit. 9, §§ 8000-11 (2008).

<sup>111</sup> See N.Y. EXEC. LAW § 259-i (2)(c)(A).

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* ("In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services and any recommendation regarding deportation made by the commissioner of the department of correctional services pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.").

<sup>114</sup> *Rabenbauer v. N.Y. State Dep't of Corr. and Cmty. Supervision*, 995 N.Y.S.2d 490, 492 (N.Y. Sup. Ct. 2014); see also *Phillips v. Dennison*, 834 N.Y.S.2d 121, 124 (N.Y. App. Div. 2007) ("[W]hile the relevant statutory factors must be considered, it is well settled that the weight to be accorded to each of the factors lies solely within the

Within 30 days of receipt of the written denial of his or her parole, an inmate may appeal to the Appeals Unit of the parole board.<sup>115</sup> The Appeals Unit may consider the following questions:

- (1) [W]hether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was otherwise unlawful;
- (2) whether the board member or members making the determination relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration;
- (3) whether the determination made was excessive.<sup>116</sup>

When appealing to the board, an inmate has the right to be represented by an attorney, and if unable to afford an attorney, may have one assigned upon request.<sup>117</sup> The inmate also has a right to obtain the transcript from his or her parole hearing,<sup>118</sup> as well as “[a]ll other nonconfidential, discoverable documents relating to the appeal.”<sup>119</sup> If the administrative appeal is denied, an inmate may seek judicial relief by beginning an Article 78 proceeding.<sup>120</sup>

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discretion of the Parole Board.” (quoting *Walker v. Travis*, 676 N.Y.S.2d 52, 53 (N.Y. App. Div. 1998))).

<sup>115</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(b).

<sup>116</sup> *Id.* § 8006.3(a).

<sup>117</sup> N.Y. EXEC. LAW § 259-i(4)(b).

<sup>118</sup> See *id.* § 259-i(6)(a) (“The board shall provide for the making of a verbatim record of each parole release interview, except where a decision is made to release the inmate to parole supervision, and each preliminary and final revocation hearing, except when the decision of the presiding officer after such hearings result in dismissal of all charged violations of parole, conditional release or post release supervision.”); see also N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(e) (“At the time of the filing of the notice of appeal, the inmate/violator or the attorney therefore may request a copy of the transcript of the proceeding from which the appeal was taken.”).

<sup>119</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.1(e).

<sup>120</sup> An Article 78 proceeding is the method by which to challenge a decision or action by a New York State administrative agency or other government body. See COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7, ch. 22. Article 78 proceedings are brought in New York Supreme Court and require that the petitioner have previously exhausted all administrative remedies. See *id.* In an Article 78 proceeding, the court may only consider the following:

1. [W]hether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

In the context of parole review, “[j]udicial intervention is warranted only when there is a ‘showing of irrationality bordering on impropriety.’”<sup>121</sup> Indeed, the “parole board enjoys a significant level of discretion” in making its decisions.<sup>122</sup> But despite the parole board’s wide discretion, there are certain things it cannot do.<sup>123</sup> First, the board cannot base its decision on erroneous information.<sup>124</sup> As noted by Justice Marshall in his dissent in *Greenholtz*, inmate files often contain “substantial inaccuracies.”<sup>125</sup> For example, in *Udzinski v. Coughlin*, the petitioner’s crime and sentence report erroneously stated that petitioner sexually abused the victim with a knife.<sup>126</sup> In *Brown v. Goord*, petitioner’s guidance file described him as a sex offender based only upon allegations of which he was acquitted.<sup>127</sup> In *Hetherington v. Coughlin*, petitioner’s prison file incorrectly referred to him as a “fugitive from the Alabama Correctional System.”<sup>128</sup>

In addition to the potential for actual inaccuracies in an inmate’s file, the parole board may also misunderstand or misstate correct information in the inmate’s file. In *Henry v. Dennison*, the petitioner was indicted for both intentional murder and depraved indifference murder, which does not require the element of intent.<sup>129</sup> A jury found him guilty of depraved indifference murder, but not guilty of intentional murder. The parole board, however, in considering petitioner for parole,

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

N.Y. C.P.L.R. § 7803 (McKinney 2016).

<sup>121</sup> *Silmon v. Travis*, 741 N.E.2d 501, 504 (N.Y. 2000) (quoting *Russo v. N.Y. State Bd. of Parole*, 405 N.E.2d 225, 229 (N.Y. 1980)); see *Russo*, 405 N.E.2d 225, 229; *Rabenbauer v. N.Y. State Dep’t of Corr. and Cmty. Supervision*, 995 N.Y.S.2d 490, 492-93 (2014).

<sup>122</sup> *Rabenbauer*, 995 N.Y.S.2d at 493.

<sup>123</sup> *Id.*

<sup>124</sup> See *Plevy v. Travis*, 793 N.Y.S.2d 262 (N.Y. App. Div. 2005).

<sup>125</sup> *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 33 (1979) (Marshall, J., dissenting).

<sup>126</sup> *Udzinski v. Coughlin*, 592 N.Y.S.2d 801, 802 (N.Y. App. Div. 1992) (“We find a rational basis in the . . . crime and sentence report insofar as [it] may be read to indicate that petitioner assaulted the victim with a knife, causing serious physical injuries, and also sexually abused the victim. We find, however, no basis for the information in the crime and sentence report insofar as it may be read to indicate that petitioner sexually abused the victim with a knife.”).

<sup>127</sup> *Brown v. Goord*, 796 N.Y.S.2d 439 (N.Y. App. Div. 2005).

<sup>128</sup> *Hetherington v. Coughlin*, 511 N.Y.S.2d 392 (N.Y. App. Div. 1987).

<sup>129</sup> *Henry v. Dennison*, 833 N.Y.S.2d 418, 419 (N.Y. App. Div. 2007).

referred to the murder as intentional.<sup>130</sup> Similarly, in *Lewis v. Travis*, the petitioner was convicted of murder in the second degree, but the “Board incorrectly referred to petitioner’s conviction as murder in the first degree.”<sup>131</sup> In both cases, the court concluded that the parole board may have relied on incorrect information in denying petitioner’s parole and accordingly ordered that petitioner receive a new parole hearing.<sup>132</sup> Though perhaps less likely than incorrect information in the prison file, there is still a real danger of the parole board misconstruing an otherwise accurate file. In either situation, when the parole board bases its decision on erroneous information, it has acted improperly, and the inmate must be given a de novo hearing.<sup>133</sup>

Second, the board’s discretion is limited by the requirement that it consider and weigh all the relevant statutory factors, not just the seriousness of the offense.<sup>134</sup> Consideration of these factors requires more than a mere acknowledgment that they exist.<sup>135</sup> Only after considering all the factors relevant to a particular inmate may the board assign greater or lesser weight or emphasis to particular factors.<sup>136</sup> In *Coaxum v. New York State Board of Parole*, the board’s failure to undertake a full evaluation of the inmate’s ability to “remain at liberty without violating the law,” including considering her exemplary record, rendered its decision arbitrary.<sup>137</sup> In *Wallman v. Travis*, the court found that the board’s “fleeting reference” to the inmate’s disciplinary record, programming, and community support was insufficient.<sup>138</sup> In *King v. New York State Division of Parole*, where the petitioner had been convicted of killing a police officer, the New York Court of

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<sup>130</sup> *Id.*

<sup>131</sup> *Lewis v. Travis*, 780 N.Y.S.2d 243, 243 (N.Y. App. Div. 2004).

<sup>132</sup> *Id.*; see also *Henry*, 833 N.Y.S.2d at 419 (“We find merit in petitioner’s argument that ‘the Board relied on incorrect information’ in denying his request for parole release by referring to his underlying criminal acts, which resulted in his conviction of depraved indifference murder, as intentional. Accordingly, we reverse the judgment and direct that a new hearing be held.” (citations omitted)).

<sup>133</sup> See *Plevy v. Travis*, 793 N.Y.S.2d 262, 262 (N.Y. App. Div. 2005) (“The Board improperly based its decision, in part, on a prior violation of probation which was dismissed . . . . Inasmuch as we agree that the determination was based on erroneous information, we are constrained to reverse the judgment and order a new hearing . . . .”); *Smith v. N.Y. State Bd. of Parole*, 824 N.Y.S.2d 498, 499 (N.Y. App. Div. 2006) (“Because respondent relied upon erroneous information in denying parole release, this Court must annul respondent’s determination and remit for a new hearing.”).

<sup>134</sup> See *Huntley v. Evans*, 910 N.Y.S.2d 112, 113-14 (N.Y. App. Div. 2010) (“[W]here the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally.”).

<sup>135</sup> See *Wallman v. Travis*, 794 N.Y.S.2d 381, 381 (N.Y. App. Div. 2005); *Coaxum v. N.Y. State Bd. of Parole*, 827 N.Y.S.2d 489, 494 (N.Y. Sup. Ct. 2006).

<sup>136</sup> See *Coaxum*, 827 N.Y.S.2d at 494.

<sup>137</sup> *Id.* at 495 (quoting N.Y. EXEC. LAW § 259-i(2)(c)(A)).

<sup>138</sup> *Wallman*, 794 N.Y.S.2d at 381.

Appeals held that the board acted improperly, noting that “while mention was made in the Board’s decision of other factors relevant to petitioner’s release, these factors, all of which weighed in favor of petitioner’s application, were mentioned only to dismiss them in light of the fact that a police officer had been killed.”<sup>139</sup> In *Morris v. New York State Department of Corrections*, the New York Supreme Court concluded that the

Board’s passing mention of Petitioner’s “receipt of an Earned Eligibility Certificate, good behavior, program accomplishments (as able), and document submissions” and its conclusory statement that “required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration,” were woefully inadequate in the circumstances of this case to demonstrate that the Board weighed or fairly considered the required statutory factors.<sup>140</sup>

In all these cases, the parole board failed to consider all required statutory factors and relied solely on the nature and severity of the inmate’s offense, rendering its decisions improper.<sup>141</sup>

Finally, the parole board may not consider impermissible, nonstatutory factors. For example, in *King v. New York State Division of Parole*, one of the parole board members considered impermissible factors, “including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place.”<sup>142</sup> Since Executive Law section 259-i does not permit the board to consider such factors, the court held that the petitioner was not afforded a proper hearing.<sup>143</sup>

Despite these limits on the board’s discretion, an inmate seeking judicial review of a parole denial “bears a heavy burden” in showing that the board acted improperly.<sup>144</sup> “Absent a ‘convincing demonstration’ to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements.”<sup>145</sup> In most cases, the only way an inmate can meet this burden is by presenting the court with evidence from

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<sup>139</sup> *King v. N.Y. State Div. of Parole*, 598 N.Y.S.2d 245, 252 (N.Y. App. Div. 1993), *aff’d*, 632 N.E.2d 1277 (N.Y. 1994).

<sup>140</sup> *Morris v. N.Y. State Dep’t of Corr. and Cmty. Supervision*, 963 N.Y.S.2d 852, 858 (N.Y. Sup. Ct. 2013).

<sup>141</sup> *See Wallman*, 794 N.Y.S.2d at 389; *Coaxum*, 827 N.Y.S.2d at 493-97; *see also* *Huntley v. Evans*, 910 N.Y.S.2d 112, 113-14 (N.Y. App. Div. 2010) (“[W]here the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally.” (citations omitted)).

<sup>142</sup> *King v. N.Y. State Division of Parole*, 632 N.E.2d 1277, 1278 (N.Y. 1994).

<sup>143</sup> *Id.*

<sup>144</sup> *Garcia v. N.Y. State Div. of Parole*, 657 N.Y.S.2d 415, 418 (N.Y. App. Div. 1997).

<sup>145</sup> *Nankervis v. Dennison*, 817 N.Y.S.2d 123, 124 (N.Y. App. Div. 2006) (quoting *McLain v. N.Y. State Div. of Parole*, 611 N.Y.S.2d 629 (App. Div. 1994)).

the hearing transcript that demonstrates that the board acted improperly.<sup>146</sup> Indeed, the very purpose of the statutory “verbatim record” is to provide the court with a meaningful opportunity to review the board’s actions to determine whether they complied with the law.<sup>147</sup> An inmate who has not been provided a hearing has no “verbatim record” to rely on, and thus must rely entirely on the written decision of the parole board in making his or her case.

Executive Law section 259-i(2)(a) provides that if parole is denied, the board must inform the inmate in writing of the reasons for the denial within two weeks of the inmate’s parole hearing.<sup>148</sup> The reasons for the denial must be “given in detail and not in conclusory terms.”<sup>149</sup> As is the case with hearings, detailed written parole decisions provide an opportunity for meaningful review.<sup>150</sup> Furthermore, detailed decisions help inform inmates of the ways in which they must improve their behavior if they are to be ultimately released.<sup>151</sup> A parole board, however, “need not expressly discuss each of [the statutory factors] in its determination.”<sup>152</sup>

Typical parole board denials thus often contain predictable, boilerplate language.<sup>153</sup> A 1999 article co-authored by Edward R. Hammock, the former Chairman of the New York State Board of Parole, provides examples of what this “trademark-boilerplate” parole denial can look like:

Parole denied. Hold 24 Months. The serious nature and circumstances of the instant offense militates against discretionary release at this time. To hold otherwise would deprecate the seriousness of the crime so as to undermine respect for the law and thus constitute a threat to the welfare of society.

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<sup>146</sup> See N.Y. EXEC. LAW § 259-i(6)(a) (McKinney 2010 & Supp. 2014).

<sup>147</sup> *Collins v. Hammock*, 465 N.Y.S.2d 84, 85 (N.Y. App. Div. 1983). For examples of cases in which courts examined the hearing transcript, see *Robles v. Dennison*, 745 F. Supp. 2d 244 (W.D.N.Y. 2010), *Siao-Pao v. Dennison*, 896 N.E.2d 87 (N.Y. 2008), *Winchell v. Evans*, 910 N.Y.S.2d 766 (N.Y. Sup. Ct. 2010), *Sagaria v. N.Y. State Board of Parole*, 885 N.Y.S.2d 713 (N.Y. Sup. Ct. 2009), *Molina v. Dennison*, No. 01-06-ST6509, 2006 WL 6067445 (N.Y. Sup. Ct. July 25, 2006), *Jackson v. Evans*, 987 N.Y.S.2d 422 (N.Y. App. Div. 2014), *Kelly v. Hagler*, 942 N.Y.S.2d 290 (N.Y. App. Div. 2012), *Hunter v. N.Y. State Division of Parole*, 800 N.Y.S.2d 799 (N.Y. App. Div. 2005), *Vasquez v. Dennison*, 812 N.Y.S.2d 190 (N.Y. App. Div. 2006), and *Zhang v. Travis*, 782 N.Y.S.2d 156 (N.Y. App. Div. 2004).

<sup>148</sup> See N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 2010 & Supp. 2014).

<sup>149</sup> *Id.*

<sup>150</sup> *Cappiello v. N.Y. State Bd. of Parole*, 800 N.Y.S.2d 343, slip. op. at \*6 (N.Y. Sup. Ct. 2004).

<sup>151</sup> *Id.*

<sup>152</sup> *King v. N.Y. State Div. of Parole*, 632 N.E.2d 1277, 1278 (N.Y. 1994).

<sup>153</sup> See Edward R. Hammock & James F. Seelandt, *New York’s Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards’ Discretion*, 13 ST. JOHN’S J. LEGAL COMMENT. 527, 535 (1999).



On the other hand, . . . the release denial might flatly provide:

Parole is denied at this time. Next appearance: 24 months. It is the opinion of this panel that, based on the nature of your criminality and our concerns regarding recidivism, if released, you will not live and remain at liberty without violating the law, thus making your discretionary release incompatible with the safety and well-being of the community.<sup>154</sup>

The situation is no different in parole denials following completion of Shock. For example, a 2013 Parole Board Release Decision Notice from Lakeview reads, in its entirety:

Parole denied. Given the nature and extent of your difficulties in the community, while we have considered your participation in the DOCCS Shock program and the resultant anticipated issuance of an earned eligibility certificate, it has been determined that there is a reasonable probability that, if released, you will not live and remain at liberty without violating the law and that your release at this time is not compatible with the welfare of society. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration.<sup>155</sup>

Despite the obvious boilerplate nature of many parole denials, courts rarely hold the written decisions themselves to be merely “conclusory.” On those occasions where courts have held that a decision was conclusory, they generally had the benefit of a parole hearing transcript to provide context for the decision and to aid in its evaluation.<sup>156</sup> This type of evaluation is clearly impossible in the case of Shock parole denials because no hearing transcripts exist. Nevertheless, in the absence of a hearing transcript, these boilerplate written decisions are the only evidence an inmate has to present to the court to demonstrate the parole board’s wrongdoing. As can be seen from the examples of parole denials noted previously, these decisions do not provide the inmate with a meaningful opportunity to show that the parole board considered inaccurate information, that it failed to fully consider and weigh the required statutory factors or that it considered impermissible, nonstatutory factors. Indeed, based on these decisions alone, a court would be hard-pressed to determine whether the board actually looked at the inmate’s file at all. But unless an inmate is able to provide convincing evidence that proves otherwise, courts will presume that the parole board acted properly and complied with statutory requirements.<sup>157</sup> Thus, an inmate armed only with a boilerplate parole denial has little

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<sup>154</sup> *Id.* at 527, 535-36 (footnotes omitted).

<sup>155</sup> N.Y. DEPT. OF CORR. & CMTY. SUPERVISION, PAROLE BOARD RELEASE DECISION NOTICE (2013) (on file with author).

<sup>156</sup> Siao-Pao v. Dennison, 896 N.E.2d 87 (N.Y. 2008).

<sup>157</sup> See Jackson v. Evans, 987 N.Y.S.2d 422, 423 (N.Y. App. Div. 2014).

chance of meeting the burden of demonstrating that the parole board acted with the “irrationality bordering on impropriety” necessary to warrant judicial intervention.<sup>158</sup>

#### IV. GIVE PROCESS WHERE PROCESS IS DUE

##### A. *An Opportunity to Be Heard*

Since the right created by the New York Correction Law is identical to the right created by the Nebraska statute in *Greenholtz*, the constitutionally required hearing in *Greenholtz* must apply to New York as well. In *Greenholtz*, the Court held that a hearing at which

the inmate is permitted to appear before the Board and present letters and statements on his own behalf . . . provided . . . an effective opportunity first, to insure that the records before the Board are in fact the records relating to his case; and second, to present any special considerations demonstrating why he is an appropriate candidate for parole.<sup>159</sup>

Such a procedure, applied to Shock parole reviews, would both protect against erroneous parole denials and, once denied, provide inmates with the opportunity to obtain meaningful appellate review.

Fortunately, this procedure is similar, if not identical, to the procedure currently in place for regular parole hearings in New York. Regular parole hearings are conducted once a month at each facility by a panel of two or three members of the parole board.<sup>160</sup> At the hearing, one panel member conducts a detailed review of the inmate’s parole plan.<sup>161</sup> The other panel members, while present, “generally defer to the judgment of the member” who conducted the review.<sup>162</sup> At the hearing, the inmate is asked questions about his or her future plans following release on parole, his or her criminal and institutional record, and the circumstances of the offense leading to the present incarceration.<sup>163</sup> Significantly, the inmate is permitted to “bring to [the] release hearing any documents that would make a good impression on the panel members, such as program certificates, diplomas, or letters of

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<sup>158</sup> *Silmon v. Travis*, 741 N.E.2d 501, 504 (N.Y. 2000); see *Russo v. N.Y. State Bd. of Parole*, 405 N.E.2d 225, 229 (N.Y. 1980); *Rabenbauer v. N.Y. State Dep’t of Corr. and Cmty. Supervision*, 2014 N.Y. slip op. 24347, at \*3 (N.Y. Sup. Ct. Nov 12, 2014).

<sup>159</sup> *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 15 (1979).

<sup>160</sup> COLUMBIA HUMAN RIGHTS LAW REVIEW, *supra* note 7, ch. 36, pt. F.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

recommendation.”<sup>164</sup> Though “these [documents] should already be in [the] parole file, . . . sometimes institutional authorities forget to file them properly.”<sup>165</sup> Considering the similarities between these procedures and those in *Greenholtz*, it is no surprise that the regular New York parole scheme has been repeatedly held to meet minimum due process requirements.<sup>166</sup>

Thus, in order to make the Shock parole review process constitutional, the New York legislature would merely have to apply Executive Law section 259-i(2)(a) to Shock inmates.<sup>167</sup> This would be as simple as repealing Executive Law section 259-i(2)(e), which provides that “notwithstanding the requirements of paragraph (a) of this subdivision, the determination to parole an inmate who has successfully completed the shock incarceration program . . . may be made without a personal interview.”<sup>168</sup> As a result, Shock inmates would have a sufficient opportunity to be heard. This is the bare minimum that due process requires, and while “[t]he constitution does not require more,” it cannot tolerate less.<sup>169</sup>

### B. *A Detailed Written Explanation*

In addition to the requirement of a hearing, the *Greenholtz* Court considered it a minimum requirement of due process that a state’s parole procedure “inform[] the inmate in what respects he falls short of qualifying for parole.”<sup>170</sup> Though the Court did not elaborate on the minimum requirements of such a denial, it found “nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular ‘evidence’ in the inmate’s file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release.”<sup>171</sup> Thus, applying *Greenholtz* to the New York procedure, the court in *Robles* held that while the decisions denying the inmate parole were “more often than not . . . quite

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; see *supra* Part III.

<sup>166</sup> See, e.g., *Robles v. Dennison*, 745 F. Supp. 2d 244, 274 (W.D.N.Y. 2010), *aff’d*, 449 Fed. App’x 51, 55 (2d Cir. 2011); *Blackett v. Thomas*, No. 02 Civ. 9258 RMB FM, 2003 WL 21744080, at \*3 (S.D.N.Y. July 14, 2003); *Tatta v. Miller*, No. 05-CV-1205 (FB)(MG), 2005 WL 2806236, at \*3 (E.D.N.Y. Oct. 27, 2005).

<sup>167</sup> Compare N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 2010 & Supp. 2014), with N.Y. EXEC. LAW § 259-i(2)(e).

<sup>168</sup> N.Y. EXEC. LAW § 259-i(2)(e).

<sup>169</sup> *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 16 (1979).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 15.

perfunctory and devoid of any truly individualized assessment,” they nevertheless satisfied the requirements of *Greenholtz*.<sup>172</sup>

Despite the fact that a more detailed denial is not constitutionally required, adopting procedures that would better inform the inmate of the specific reasons for the denial of his or her parole would serve several important goals. These goals were noted by the Eighth Circuit in *Greenholtz*.<sup>173</sup> First, it would allow for meaningful appellate review.<sup>174</sup> Second, it would incentivize the parole board to consider the appropriate factors and ignore improper ones.<sup>175</sup> Third, it would promote rehabilitation by informing inmates of the ways in which they could improve their behavior and make it more likely that they would be released in the future.<sup>176</sup> Moreover, even in cases where an inmate is deemed unfit for parole because of a static factor that cannot be improved, a detailed written statement of the board’s reasoning serves to demonstrate that the board was not acting arbitrarily.<sup>177</sup> Finally, requiring a detailed written explanation would promote consistency in the decisionmaking process.<sup>178</sup>

By requiring a more detailed and evidence-based parole decision, the Eight Circuit recognized the potential for erroneous and arbitrary parole decisions. In disagreeing with the Eight Circuit, the Supreme Court assumed that “existing procedures adequately reduce the likelihood that an inmate’s files will contain incorrect information which could lead to an erroneous decision.”<sup>179</sup> This is simply not the case; erroneous decisions happen all the time.<sup>180</sup> And while a detailed parole decision may not reduce the likelihood of erroneous decisions, it gives inmates a meaningful opportunity for appellate review.

Furthermore, adopting such a procedure would promote “the appearance of fairness and the confidence of inmates in the decisionmaking process.”<sup>181</sup> Indeed, the Court in *Morrissey* recognized that affording inmates fair treatment in the parole revocation process could have a positive impact on rehabilitation by preventing inmates’ negative reactions to

<sup>172</sup> *Robles v. Dennison*, 745 F. Supp. 2d 244, 274 (W.D.N.Y. 2010).

<sup>173</sup> *See Inmates of the Neb. Penal and Corr. Complex v. Greenholtz*, 576 F.2d 1274, 1284-85 (8th Cir. 1978), *rev’d*, 442 U.S. 1 (1979).

<sup>174</sup> *Id.* at 1284.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1284-85.

<sup>177</sup> *Id.* at 1285.

<sup>178</sup> *Id.*

<sup>179</sup> *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 33 (1979) (Marshall, J., dissenting in part).

<sup>180</sup> *See supra* Part III.

<sup>181</sup> *Greenholtz*, 442 U.S. at 34 (Marshall, J., dissenting in part).

arbitrary decisions.<sup>182</sup> This rationale applies equally to the initial parole review process as well.<sup>183</sup>

In the context of Shock, this consideration is perhaps even more important. Shock is a voluntary yet rigorous program, and while it certainly provides inmates with the opportunity for early release, inmates may be less likely to participate in the program if they believe that they may be denied release arbitrarily, with no real possibility of appeal.<sup>184</sup> Yet the more eligible inmates participate, the more New York benefits from the program. More participating inmates results in more rehabilitated inmates, as well as greater financial savings for the state on the overall cost of incarceration.<sup>185</sup> In other words, the state has a number of incentives for promoting the appearance of fairness in the Shock parole review process. Providing the inmates with a detailed explanation of why they were denied parole could prove to be a win-win for both the state and the inmates.

## CONCLUSION

The inmates that participate in the New York Shock Incarceration Program should have a liberty interest in release on parole.<sup>186</sup> Unlike the general New York prison population, Shock inmates possess more than a mere hope of being released; they have a legitimate expectancy of release, which was statutorily created through the inclusion of mandatory language in the New York Correction Law.<sup>187</sup> Thus, unlike the general New York prison population, the Shock inmates are entitled to certain procedural safeguards that conform with the minimum requirements of due process as set forth in *Greenholtz*.<sup>188</sup> In the parole context, these requirements include the right to be heard and, if parole is denied, to be informed of the reasons for the denial.<sup>189</sup>

Currently, the procedures for parole review of Shock inmates do not conform with these minimum requirements.<sup>190</sup>

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<sup>182</sup> *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

<sup>183</sup> *Greenholtz*, 442 U.S. at 34 (Marshall, J., dissenting in part).

<sup>184</sup> Roughly nine percent of eligible inmates refuse to participate in the program. See SHOCK REPORT, *supra* note 25, at 6. Of those that do participate, roughly three percent voluntarily leave the program prior to completion. See *id.* at 13. While the exact causes of inmates' failure to participate in or complete Shock are unknown, it is conceivable that one factor is the knowledge that after completing six months of physically and emotionally demanding programming, they may nevertheless be denied parole without recourse.

<sup>185</sup> See SHOCK REPORT, *supra* note 25, at EXECUTIVE SUMMARY.

<sup>186</sup> See *supra* Section II.C.1.

<sup>187</sup> See *supra* Section II.C.1.

<sup>188</sup> See *supra* Section II.C.2.

<sup>189</sup> See *supra* Section II.C.2; *Greenholtz*, 442 U.S. at 16.

<sup>190</sup> See *supra* Section II.C.2.

Shock inmates are not afforded hearings where they can speak on their own behalf and answer any questions or concerns of the parole board.<sup>191</sup> Further, though they are given a constitutionally sufficient explanation for the denial of their parole, these decisions are more often than not written in boilerplate language that does not provide an individualized assessment of the particular inmate's suitability for parole release.<sup>192</sup>

The failure to provide procedural safeguards that conform with due process deprives the inmates of the opportunity for meaningful appellate review and can have several negative effects on the parole decisionmaking process. There is an increased likelihood of the parole board basing its denial on incorrect information, either in the form of actually erroneous information in the inmate's file or by misunderstanding or misstating otherwise accurate information.<sup>193</sup> Further, there is an increased likelihood of the parole board failing to consider and weigh all the required statutory factors or considering irrelevant or impermissible nonstatutory factors in denying parole.<sup>194</sup> Finally, the failure to provide adequate procedures degrades the appearance of fairness and inmate confidence in the parole review process.<sup>195</sup> These effects can have a direct and significant impact on both the actual period of incarceration of a given inmate and the inmate's decision to participate in Shock in the first place.

Nevertheless, the remedies for this problem are simple. First, a hearing must be provided to all Shock inmates who become eligible for parole. More than just being good policy, such a hearing is constitutionally required under *Greenholtz*.<sup>196</sup> Though this would be a new procedure in the context of Shock parole reviews, it is otherwise widely practiced within the New York parole scheme. Indeed, the vast majority of inmates in New York, most of whom do not possess a liberty interest in

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<sup>191</sup> See *supra* Section II.C.2; N.Y. EXEC. LAW § 259-i(2)(e) (McKinney 2016).

<sup>192</sup> See *supra* Part III; *Robles v. Dennison*, 745 F. Supp. 2d 244, 274 (W.D.N.Y. 2010); *Hammock & Seelandt*, *supra* note 153, at 535; N.Y. DEPT. OF CORR. & CMTY. SUPERVISION, PAROLE BOARD RELEASE DECISION NOTICE (2013) (on file with author).

<sup>193</sup> See *supra* Part III; *Hetherington v. Coughlin*, 511 N.Y.S.2d 392 (N.Y. App. Div. 1987); *Udzinski v. Coughlin*, 592 N.Y.S.2d 801, 802 (N.Y. App. Div. 1992); *Lewis v. Travis*, 780 N.Y.S.2d 243, 243 (N.Y. App. Div. 2004); *Brown v. Goord*, 796 N.Y.S.2d 439 (N.Y. App. Div. 2005); *Henry v. Dennison*, 833 N.Y.S.2d 418, 419 (N.Y. App. Div. 2007).

<sup>194</sup> See *supra* Part III; *King v. N.Y. State Div. of Parole*, 598 N.Y.S.2d 245, 252 (N.Y. App. Div. 1993), *aff'd*, 632 N.E.2d 1277 (N.Y. 1994); *Wallman v. Travis*, 794 N.Y.S.2d 381, 381 (N.Y. App. Div. 2005); *Coaxum v. N.Y. State Bd. of Parole*, 827 N.Y.S.2d 489, 494 (N.Y. Sup. Ct. 2006); *Morris v. N.Y. State Dep't of Corr. and Cmty. Supervision*, 963 N.Y.S.2d 852, 858 (N.Y. Sup. Ct. 2013).

<sup>195</sup> See *supra* Part IV; *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 34 (1979) (Marshall, J., dissenting in part).

<sup>196</sup> See *supra* Section II.C.1; *Greenholtz*, 442 U.S. 1.

parole release, receive a statutorily required hearing before the parole board.<sup>197</sup> Thus, all that would be required of the New York legislature would be to provide an existing and common procedure for a small fraction of the prison population.

Second, Shock inmates should be given a detailed, written decision explaining the reasons for the denial of parole. Though not constitutionally required, such a detailed decision would allow for intelligent appellate review while helping to ensure that the parole board adhered to statutory guidelines and applied them consistently.<sup>198</sup> Further, detailed decisions would better inform the inmate of the ways he or she must improve in the future in order to be better suited for parole release.<sup>199</sup> Finally, detailed decisions would serve to promote inmate confidence in the fairness of the Shock parole review process.<sup>200</sup>

These solutions are certainly not exhaustive, nor would they entirely eliminate the risk of erroneous or arbitrary parole decisions. Ultimately, parole decisions are almost entirely within the discretion of the parole board. But to the extent that these procedures would require the parole board to give more thought to individual parole decisions, allow a court to intelligently review the decisions, and promote inmate confidence in the system, they are necessary components of a fair and just parole scheme. For “[o]ne can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for release.”<sup>201</sup>

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<sup>197</sup> See N.Y. EXEC. LAW § 259-i (2016).

<sup>198</sup> See *Greenholtz*, 442 U.S. 1; *Inmates of the Neb. Penal and Corr. Complex v. Greenholtz*, 576 F.2d 1274, 1284-85 (8th Cir. 1978), *rev'd*, 442 U.S. 1 (1979).

<sup>199</sup> See *Inmates of the Neb. Penal and Corr. Complex*, 576 F.2d at 1284-85.

<sup>200</sup> See *Greenholtz*, 442 U.S. at 33 (Marshall, J., dissenting).

<sup>201</sup> *Id.* at 35 (Marshall, J., dissenting) (quoting K.C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 132 (1969)).

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