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In Celebration of *Morrissey v. Brewer* at Fifty: A Surprising University of Nebraska College of Law Back Story to the Prisoners' Rights Due Process Landmark

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Russell E. Lovell, II*

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I. INTRODUCTION

The year 2022 will be the fiftieth anniversary of the Supreme Court's 1972 landmark prisoners' rights case, *Morrissey v. Brewer*.[1] *Morrissey* was a Fourteenth Amendment due process challenge involving an Iowan whose parole was revoked without a hearing.[2] But long before Mr. Morrissey was in prison, a legislative internship at the University of Nebraska College of Law (Nebraska Law) in 1968 got me involved in researching and drafting the Nebraska Treatment and Corrections Act of 1969, including state parole law. The one area of parole law not reformed by the new legislation was parole revocation, a shortcoming that was the catalyst for my *Nebraska Law Review* article contending that due process required procedural safeguards and a hearing before parole revocation.[3]

After my graduation from Nebraska Law, two coincidences kept me involved with the issue of parole revocation. The first occurred during my post-graduate judicial clerkship with United States Court of Appeals Judge Floyd Gibson, when the *Morrissey* case came before the Eighth Circuit. The second was when the case was granted certiorari; and as an attorney with the Legal Services Organization of Indianapolis, I co-authored an amicus curiae brief in support of Morrissey and held a moot court for Morrissey's appointed counsel the day before the oral argument to the Supreme Court.

Out of all the above comes a story that describes an exceptional internship at Nebraska Law. This internship was not only formative for my professional career, but the experiential learning proved to be the springboard for a surprising personal journey that culminated in a landmark ruling by the Supreme Court. Because I want to express my gratitude for that educational experience, its special quality, and its surprising national impact, I am eager to share this story with the Nebraska Law School community and beyond and to recall the trailblazing significance of the *Morrissey* ruling. It also provides the appropriate occasion to assess the continuing relevancy of *Morrissey* today.

Part I tells the story of my legislative internship that produced the remarkable Nebraska Treatment and Corrections Act of 1969 and provided the foundation for the *Nebraska Law Review* article I wrote on due process and parole revocation—both integral to my subsequent involvement in the *Morrissey* case. Part II discusses how the evolution of the law during the Burger Court era led to *Morrissey* and the coincidences that led to my involvement in the case in the Supreme Court. It also examines the *Morrissey* ruling itself and reflects on its impor-

1. 408 U.S. 471 (1972).
2. *Id.*
3. My research on parole revocation became the focus of my second *Nebraska Law Review* article. Russell E. Lovell II, *Revocation of Probation and Parole in Nebraska: A Procedural Antithesis*, 48 NEB. L. REV. 220 (1969).

tance. Part III examines how *Wolff v. McDonnell*[4] extended *Morrissey*'s due process analytical framework to discipline-related matters inside the nation's prisons. Part IV sketches how *Morrissey* opened the federal courts' doors to prisoners' constitutional claims generally during this era. The Conclusion gives a shout out for the *Morrissey* legend as *Morrissey*'s strength and vitality in the context of parole revocation continues strong. Even after fifty years, the evidentiary hearing holding and procedures *Morrissey* prescribed have not been overruled, limited in application, or otherwise undercut in any respect.[5]

A. Legislative Internship

In the midst of the Civil Rights Era and the Vietnam War, I was among the 138 who entered Nebraska Law in the fall of 1966. When I report that only eighty-four of us graduated in May 1969, you will realize it was a different era in legal education. Admission was relatively easy and first-year grades served as a rigorous screen. I had a good experience at Nebraska Law, and by the end of my second year, I knew I was pretty good at what legendary Nebraska Law and Harvard Law Dean Roscoe Pound called "law in books."[6] My *Nebraska Law Review* 2L junior staff and 3L editorial board roles gave me confidence in my research and writing skills and I had published one article.[7]

Despite my academic success, I nonetheless had misgivings as to whether I was prepared for what Dean Pound called, "law in action." I can still recall the sinking feeling I had in my stomach the summer after my second year when my parents' friends would exclaim, "Rusty, I'll bet you are so excited! You will be practicing law in less than a year, in just a few months." I faked my affirmative answer; actually, I was quite anxious about my preparedness for the practice of law. In that law school era, there were no legal clinics or internships for academic credit. Nebraska Law did, however, require a simulation experi-

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4. 418 U.S. 539 (1974).
5. Forthcoming in volume 101 of the *Nebraska Law Review*, I will extend the discussions in Parts III and IV to the present and examine how while the nation's "war on drugs" brought about an explosion in the U.S. prison population, the 1995 Rehnquist Court decision in *Sandin v. Connor*, 515 U.S. 472 (1995), sharply curtailed *Morrissey*'s application to prison discipline matters. *Sandin* essentially eliminated due process protections in the imposition of solitary confinement, the harshest of prison disciplines, in all but the most extreme cases. The pendulum has begun to swing back, as evidenced by recent state legislative reforms that have made solitary confinement a last resort. The second article contends that these legislative reforms constitute a state-created liberty interest that requires due process protection when solitary confinement is imposed and at periodic reviews throughout confinement.
6. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).
7. Russell E. Lovell II, *Camara and See: Accommodation Between the Right of Privacy and the Public Need*, 47 NEB. L. REV. 613 (1968).

ence in the 1L year, writing an appellate brief and making an oral argument.[8] These were good "lawyering" experiences and had an aura of realism. The minimal experiential education was not a singular failing of Nebraska Law; it was a failure of law schools generally at that time—all across the nation.[9] The principal exposure to experiential learning came through securing clerkships with a law firm, where you principally did legal research and might be able to observe a court hearing.

I had part-time clerkships while in law school, including with my dad's Scottsbluff, Nebraska, law firm in the summer after my first year and with the Bob Barlow law firm in Lincoln, Nebraska. I thought it special that the Barlow offices were near the state Capitol. Location aside, both clerkships were good learning experiences, and both gave me a feel for the private practice of law—the importance of securing clients, detailing one's billable hours, researching and writing when there are limits as to how much time one can spend on a project, and so forth. The legal work sometimes was interesting, sometimes not, but for me, work became more interesting when I was working for a client who had been wrongfully injured or whose rights were on the line. I had a strong interest in civil rights and criminal justice issues, but those were not issues either of the firms for which I clerked handled. Still, by the close of my second year, I was ready for responsibility greater than writing legal memoranda, but such opportunities were generally not available to student law clerks.

When offered the opportunity to do a legislative internship under a young assistant professor, Harvey Perlman, who had secured a grant from the Governor's Crime Commission, I grabbed it. It meant leaving the better paying Barlow law firm job, which in most of my fellow students' minds was a poor career move. But I quickly became convinced that I had made the right choice.[10] For all practical purposes it was a

8. In 1967, my classmate Dennis Burchard and I were pleasantly surprised when the brief we wrote won the Best Brief Award in a first-year student intramural competition.

9. Peter Joy has taken a deep dive into the law school world's unfortunate devaluation of experiential education for nearly an entire century, extending from 1870 until the advent of modern clinical education in late 1960s. *See* Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551 (2018) ("in the early years of legal education," developing students' practical skills were not valued by law schools). Though Nebraska Law was not on the cutting edge of experiential education, it was among the early adopters of clinical education. Nebraska Law's first formal clinic, the civil clinic, opened in 1975. *Civil Clinic*, NEB. COLL. OF L., https://law.unl.edu/civil-clinic/ [https://perma.cc/9XWD-6EY5] (last visited Sept. 15, 2021).

10. There was a time in my first couple of years of law practice with Legal Aid when I did not fully appreciate the important contribution that attorneys in private practice can make and have made to public interest lawyering. But then I recalled the major public service contributions Bob Kutak made throughout his life, all while

legislative internship, and I was assigned to the area of corrections, which aligned with my interests in criminal justice. Throughout my internship, I had the good fortune to work closely with and be mentored by Professor Perlman and lawyer Bob Kutak of Omaha, Nebraska. Although Professor Perlman had just begun his career in academia, we all knew he was destined for big things.[11] Kutak was the vice chair of the Crime Commission,[12] and it didn't take me long to recognize that Bob Kutak was a heavy hitter, too.

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handling a very busy private practice. By 1980, significant limitations were imposed by the Nixon and Reagan administrations, and eventually by Congress, on the kinds of cases that Legal Services Corporation (LSC) lawyers could litigate on behalf of poor people. Indeed, it is doubtful today's LSC restrictions would permit Harold Berk and I to litigate a prisoners' rights case such as *Morrissey*. I came to appreciate and value the certain independence that lawyers in private practice have—but economic limitations often precluded private bar acceptance of clients with civil rights cases because, in many circumstances, the principal remedy is an injunction. All of the above made me very interested in the congressional legislation that authorized court-awarded attorneys' fees to be included among remedies recoverable in constitutional, civil rights, environmental, and other public interest litigation. With this, Congress embraced the concept of private attorneys general, making it economically feasible for the private bar to take on meritorious federal civil rights claims that otherwise may not be pursued.

The first of these public interest law fees provisions was in section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), the landmark law that barred race and sex discrimination in the employment arena. 42 U.S.C. § 1988 applies to all constitutional rights litigation and to suits brought pursuant to 42 U.S.C. § 1983, which was the basis for the suit Harold Berk and I brought on behalf of parolee James Russell, contending his due process rights were violated because his parole had been revoked without a hearing. Unfortunately, fees recoveries in prisoner cases have been severely curtailed by the Prison Litigation Reform Act enacted in 1996. From 1986 through 1991, I served as co-lead counsel for Kansas City civil rights lawyer Arthur Benson on his (and the NAACP's) successful attorneys' fees claims in the Kansas City school desegregation case, which were affirmed by the Supreme Court. *See* Jenkins v. Missouri, 838 F.2d 260 (8th Cir. 1988), *aff'd*, 491 U.S. 274 (1989); Jenkins v. Missouri, 931 F.2d 1273 (8th Cir. 1991), *cert. denied*, 502 U.S. 925 (1991); Russell E. Lovell, II, *The Case for Reimbursing Court Costs and a Reasonable Attorney Fee to the Non-Indigent Defendant upon Acquittal*, 49 NEB. L. REV. 515, 515–35 (1970). *See generally* RUSSELL E. LOVELL, II, COURT-AWARDED ATTORNEY'S FEES: EXAMINING ISSUES OF DELAY, PAYMENT, AND RISK (1999).

11. Not only did Professor Perlman go on to serve as dean of the University of Nebraska College of Law for more than a dozen years, he also served as chancellor of the University of Nebraska–Lincoln for an incredible fifteen years. *See Office of the Chancellor*, UNIV. OF NEB.–LINCOLN, https://www.unl.edu/chancellor/harvey-s-perlman [https://perma.cc/5YFG-S4VR] (last visited Oct. 24, 2021) [hereinafter Perlman Biography]. Professor Perlman has an outstanding record as a scholar and has had a major role in significant law reform on many fronts. *Harvey Perlman*, UNIV. OF NEB.-LINCOLN, https://law.unl.edu/harvey-perlman/#noteworthy [https://perma.cc/P3QB-54YJ] (last visited Oct. 24, 2021). The Nebraska Treatment and Corrections Act of 1969 is prominent among the dozen or so legislative and administrative accomplishments listed on Perlman's webpage. *Id.*
12. It is hard to believe that the Kutak Rock law firm was only three lawyers in 1968. Kutak had set up practice in Omaha three years earlier in 1965 after serving as

My research led to drafting proposed legislation to reorganize the Department of Corrections, the Boards of Parole and Pardons, and their procedures.[13] Although my title was research assistant, I had much more responsibility than a typical research assistant who does research and summarizes it in a memorandum for the professor. I, of course, had to establish the quality of my written and oral skills and my ability to meet deadlines before I earned greater responsibility. This meant explaining every word of text I drafted and providing the precedent upon which I relied. Professor Perlman initially vetted my supporting documentation and legislation drafts, providing invaluable feedback that enabled me to clarify my writing and prepared me in advance for issues that would likely arise in my presentations to the working group created for this legislative project. Once I gained Professor Perlman's confidence, he gave me considerable responsibility—it was I who made each of the formal presentations to the full working group.

Without a doubt the legal research, drafting, writing, and editing of the proposed legislation furthered my professional skills development, but the series of professional presentations I made were by far the most valuable experiential educational experience I had in law school. During the fall semester of my third year, I made weekly internship presentations to an array of lawyers, judges, and correctional officials assembled by Professor Perlman and Robert Kutak. Those in attendance at these sessions at the warden's home inside the state penitentiary included not only Perlman, Kutak, and Warden Maurice Sigler, but also representatives of the Governor, attorney general, judges, Department of Corrections, Board of Pardons (as the Board of Parole did not yet exist), law enforcement, and so forth.

What an experience the formal presentations were! Every Sunday, having to be frisked, going through prison security, and hearing the clank of the heavy steel gates close behind me only reinforced the reality that this was no mere academic experience. It was fascinating to see and participate in the discussions, the give and take, as we searched to find common ground. There were only a small number of instances when the working group voted to modify my draft, and only one in which they rejected my proposal.[14] When modification or revi-

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U.S. Senator Roman Hruska's top legislative aide for a decade or so. Kutak was the vice chair of the commission and chaired its committee on corrections reform. *Firm History*, KUTAK ROCK, https://www.kutakrock.com/about-us/firm-history [http://perma.cc/KXJ8-U5BL] (last visited Feb. 16, 2022). Now, the firm employs over 500 attorneys across the United States. *Id.*

13. Nebraska Treatment and Corrections Act, NEB. REV. STAT. §§ 83-170 to -1,135 (Cum. Supp. 2020).

14. To be sure, drawing upon the Model Penal Code as a guide made my research and drafting task easier. For more on my experiences with the working group, including its rejection of my proposed draft legislation that would have afforded an evi-

sion was required, I worked under Professor Perlman's editorial supervision, developing compromise language. The presentations were the "real deal"—advocacy that led to significant legislative law reform in Nebraska.

Ultimately, the entire legislative package consisted of eighty-seven statutes. Kutak gave the legislative package its name: The Omnibus Treatment and Corrections Act of 1969. The working group unanimously voted to approve the draft bill in late fall 1968. In the spring of 1969, because all the stakeholders had been included and had fully participated in the working group's consideration of the various drafts of the bill, the Nebraska Legislature enacted it into law without a dissenting vote.

Later that year, Warden Maurice Sigler's testimony to Congress included considerable praise for the final product:

> On August 19, 1969, the Nebraska Legislature enacted the Nebraska Treatment and Corrections Act, one of the most comprehensive, long-range codes for the treatment of criminal offenders to be found anywhere in this country. With one stroke, the legislature repealed a century of archaic, confused, and fragmented laws which served as roadblocks rather than guideposts for criminal corrections. In their place, they formulated a declaration of public policy—that the mere warehousing of offenders is unsound both in terms of human dignity and public safety. At the same time, they recognized, as the Congress did with passage of the Safe Streets Act, that courts, prisons, and parole boards are not really separate governmental institutions, but are each a part of one system.[15]

B. Truly Exceptional Experiential Education

It was the responsibility and challenge that made the internship experience exceptional. Professor Perlman gave me a lot of rope. I knew he was prepared to step in if I ever got in over my head—but that never happened. My internship experience taught me that the best legal education provides a balance between theory and practice, and I was fortunate to have had it. Most law schools in that era failed to appreciate the value and importance of experiential legal education. Approximately thirty years later, when I served as director of the Drake Law School's legal clinic from 1995 to 1999, I came to appreciate that the best clinical education programs were modeled on precisely the approach Harvey Perlman took with me. In a nutshell, I would research and draft proposed statutes, Professor Perlman would vet them, and then I would formally present (and defend) my drafts almost every Sunday afternoon in the fall of 1968.

dentiary hearing when parole authorities propose that a parolee's parole be revoked, see Part I.C.

15. *Crime in America—A Mid-America View: Hearing on H.R. 17 Before the H. Comm. on Crime*, 91st Cong. 149 (1969).

You may ask, what was Bob Kutak's role? Kutak was the vice chair of the Nebraska Crime Commission, and because of his keen interest and commitment to criminal justice reform, Kutak became "a recognized expert in federal correctional reform and rehabilitation, serving the administrations of presidents of both parties in various capacities."[16] Kutak's congressional experience with Senator Roman Hruska was invaluable to this political, legislative effort. Bob Kutak had an unabashedly optimistic personality and was a master at the legislative process. He understood how important it was to get all of the stakeholders to the table. A moderate Republican, Kutak was very progressive on correctional reform. I marveled not only at his legal and policy expertise but also how he facilitated compromise with his skill in developing personal relationships with every member of the committee. Bob Kutak was a superb mediator, and I came to describe Bob Kutak's gift as magical, but that was before mediation had become a well-known alternative dispute resolution mechanism. Kutak also was a gifted writer and editor, skills so very important to producing legislation, particularly in contentious areas such as prison and criminal justice reform and civil rights.[17] The editors of the *Omaha World-Herald* captured the essence of the Bob Kutak I knew: "a dreamer who had the ability to implement his dreams."[18]

I could not have had a better lesson about Roscoe Pound's distinction between "book learning" and "law in action." There is a dynamic, powerful synergy between the two. High-quality lawyering requires mastery of both book learning and law in action. The latter skill builds upon the former and requires an entirely different skill set. In the legislative context, that meant drafting, persuading, negotiating, finding common ground, and achieving compromise. My internship truly was a blend of both skill sets— experiential education at its finest. I remain forever grateful that Harvey Perlman gave me the opportunity and supervised my work with a knowing but light touch. I am also forever grateful for the lessons on legislation I learned from Bob Kutak. Roscoe Pound would have been proud of our Nebraska legisla-

16. *Robert J. Kutak Biography*, KUTAK ROCK, https://www.kutakrock.com/general-content/bob-kutak [https://perma.cc/AT3T-SBLT] (last visited Oct. 24, 2021). "He was instrumental in developing the National Institute of Corrections (NIC) at the Department of Justice and was a member of the blue-ribbon National Advisory Commission on Criminal Justice Standards and Goals. He was an original member of the board of trustees of the national Legal Services Corporation, and a recognized expert in federal correctional reform and rehabilitation, serving the administrations of presidents of both parties in various capacities. He was a delegate to two United Nations congresses on the prevention of crime and the treatment of prisoners, and served on the National Advisory Commission on Criminal Justice Standards and Goals." *Id.*

17. *Id.*

18. *Id.*

tive work, and of Nebraska Law's integral role in achieving this major Nebraska law reform.[19]

Professor Perlman and Bob Kutak taught me that the legislature is a human institution, and that legislation is the art of compromise. I learned that compromise should be seen as a positive aspect of democracy and that the lawmaking process can be systemic in its scope and impact. This experience deepened my understanding of the legislature as a co-equal branch of government and the principal law-making body; this perspective balanced the law school's case law-based instruction that emphasized appellate cases and the adjudication process. More specifically, my internship experience dealing not just with substantive legal issues but with a process that included practicing lawyers, legislators, and judicial branch and executive department officials, gave me the confidence I had lacked in my preparedness for the practice of law, and it confirmed how fulfilling public interest lawyering and public service can be.

C. The Rejected Legislative Proposal that Became the Springboard for Constitutional Litigation and Reform

As mentioned above, there was one significant legislative proposal I made that the working group rejected. The issue emerged from an interview I conducted with the director of the Nebraska Parole Authority in his office on the eighth floor of the State Capitol Building, Nebraska's skyscraper on the prairie. About twenty minutes into the interview, the director very pointedly stated:

> Mr. Lovell, you seem to be operating under a big misconception. You keep referring to parole and rehabilitation. Parole in Nebraska has nothing to do with rehabilitation. Parole in Nebraska is an arm of law enforcement. When a person is out on parole in Nebraska, he must cooperate with law enforcement. If he doesn't, we have the power to pull him back—and we will. We will revoke his parole.[20]

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19. While on sabbatical as a visiting scholar at the Southwest University of Political Science & Law ("SWUPL") in Chongqing, China, in the Fall of 2011, I spent many hours in SWUPL's magnificent library building. Prominently positioned outside the entrance to the library are larger-than-life statues of eight or ten of the leading legal philosophers in history. How astonished and proud I was to find a giant statue of Roscoe Pound among the group, the only American to be included. Harvey Perlman has also been a visiting scholar in China, and an Honorary University Professor of Xi'an Jiaotong University. Perlman Biography, *supra* note 11.

20. Interview with Eugene E. Neal, Chief State Parole Officer, Neb. Dep't of Pub. Insts., in Lincoln, Neb. (June 10, 1968). Mr. Neal's eye-opening statement was reflected in the opening sentence in the *Nebraska Law Review* article I came to write about parole revocation: "Although rehabilitation, in the sense of integrating or reintegrating the offender into community life, is generally considered the primary objective of corrections today, the convicted offender will still face notions of retribution, deterrence and control from the moment of his sentencing until he is finally discharged." Lovell, *supra* note 3, at 220 (citing PRESIDENT'S

The director's openly expressed view was contrary to every penological purpose for parole that I had found in my research and seemed contrary to basic principles of fairness and due process. My research led me to conclude that the Nebraska law permitting revocation of parole "with or without cause" was inconsistent with the way in which probation revocations were handled in Nebraska, and at least arguably violated the parolee's right to due process of law.

I proposed statutes that would have provided that parole could only be revoked upon proof of a violation of a condition of parole presented at a fair evidentiary hearing. My view did not prevail. After the committee voted not to make any changes in Nebraska law regarding parole revocation, Bob Kutak took me aside out of earshot of the others:

> Russ, I know how disappointed you are that the group did not adopt your proposal. Harvey and I believe you are right, but we must put this "defeat" in perspective. The overall proposed legislation, all eighty-seven statutes, is very progressive and will make a real positive difference in Nebraska. So, we must accept this one loss and realize the big picture that is so very positive. We need to let this go, and we will win the parole revocation due process issue in the courts.[21]

Although my internship concluded with the enactment of the Omnibus Treatment and Corrections Act by the Nebraska Unicameral in the spring of 1969, I did not give up on the parole revocation due process issue. Building upon the corrections research I had done during my internship, I chose the constitutionality of parole revocation without an opportunity for a hearing as my law review comment topic.[22] The extensive research I had done during my internship provided the footings of the foundation. Drilling down deeper enabled me to demonstrate that, as a matter of constitutional law, there had been an "erosion" of the right–privilege doctrine that most courts had found justified denial of due process safeguards to parolees.[23]

The article pointed out the Supreme Court's recent decision in *Mempa v. Rhay*[24] reversed a conviction that arose out of a probation revocation proceeding at which the probationer, without counsel, pleaded guilty to a crime he committed while on probation and received a longer sentence based on the admission. *Mempa* held that an

COMM'N ON LAW ENF'T AND ADMIN. OF JUST., TASK FORCE REPORT: CORRECTIONS 7 (1967)).

21. Personal conversation with Robert Kutak, (November 1968).
22. *See* Lovell, *supra* note 3, at 223 (stating the comment discusses procedural due process and parole revocations).
23. *Id.* at 227–29. ("[R]evocation of parole does not involve a wholly discretionary determination, but rather is based upon a finding that the parolee has violated one of the specified conditions of his parole. . . . [A]lthough the liberty granted the parolee may be . . . a privilege, . . . due process does not permit arbitrary revocation under the guise of the privilege doctrine."). *Id.* at 227.
24. 389 U.S. 128 (1967).

appointed lawyer must be made available to a defendant whether the stage of the criminal proceedings "be labeled a revocation of probation or a deferred sentencing."[25] While acknowledging the bulk of case law on parole revocation was still to the contrary,[26] the article pointed out that *Mempa* appeared to provide an opportunity for a broader argument:

> While *Mempa* did not expressly state that the probationer's due process right to appointed counsel also encompasses the right to a meaningful hearing, the right to a revocation hearing is patent for "[w]ithout a hearing, even of an informal kind, in which antagonistic facts can be rebutted and favorable ones presented, the role of counsel is inevitably marginal."[27]

The article also contended that there had been a "lessening [of the] significance of administrative convenience"[28] in the caselaw—another factor that had loomed large in decisions that rejected parole revocation hearings.

The then-recent *In re Gault*[29] decision had "pointed out that while the commitment of juveniles may be principally for the purpose of their rehabilitation, the commitment is nevertheless a deprivation of liberty which requires certain due process safeguards."[30] The article noted "that a parole revocation presents an analogous situation."[31] More specifically:

> Continuation of the parolee's liberty depends on the board of parole's determination of whether the parolee has breached the conditions of his parole, an adjudicatory fact. Legal controls have often been considered inappropriate in parole revocation proceedings because the decisions involved were depicted as professional and diagnostic in nature, but there is a growing awareness that the objectives of rehabilitation will not be hindered by conceding that parolees have certain legal rights."[32]

The article predicted: "The Supreme Court appears to be on the threshold of extending certain of the elements of procedural due process to parole revocation hearings."[33] While it acknowledged "anxiety has been expressed that when judicial supervision does come it may not only limit improper practices but also control otherwise fair and

25. *Id.* at 137.
26. Lovell, *supra* note 3, at 221 ("Except in the minority of states which statutorily provide for revocation proceeding with procedural safeguards, the liberty enjoyed by a probationer or parolee has commonly been considered a matter of grace and consequently subject to revocation without due process trial-type safeguards or even a hearing in many states." (footnotes omitted)).
27. *Id.* at 223 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 828 (1961)).
28. *Id.* at 229–30. It should be recalled that the Board of Pardons (comprised of the Governor, attorney general, and the secretary of state) also functioned as the parole board at this time, and there were only three parole officers. *Id.* at 236.
29. 387 U.S. 1 (1967).
30. Lovell, *supra* note 3, at 228.
31. *Id.* (footnote omitted).
32. *Id.* (footnotes omitted).
33. *Id.* at 230.

necessary discretionary decisions,"[34] it counseled that this risk "can be minimized if correctional officials will assume creative roles and implement needed safeguards through administrative or legislative action."[35]

In 1968, the Nebraska parole statutes made no provision for a hearing in revocation proceedings nor did they require that the state prove an individual violated of a condition of parole or committed a new crime as the basis for that revocation: "The [parole board] shall have full power . . . to retake and reimprison any inmate so upon parole at any time, *with or without cause*."[36] The parole board at the time was comprised only of ex-officio officers (Governor, attorney general, and secretary of state), as mandated by articles 4 and 13 of the Nebraska Constitution. The ex-officio nature of the board undoubtedly was a significant factor in why Nebraska was ranked forty-seventh in the nation in parole rates,[37] and was a substantial impediment to "[t]he feasibility of any realistic extension of procedural safeguards to parolees at their revocation proceedings."[38] As a result, the revocation procedure was very informal. Based on information from a parole officer that a significant violation of parole had occurred, the chief state parole officer would decide whether to revoke parole based on his review of the written report of the violation; following the arrest of the parolee and his reincarceration, the chief state parole officer would present a written report to the board which would "make[ ] its revocation decision solely on the basis of the report."[39] The Nebraska electorate ratified an amendment to the Constitution that very fall, November 5, 1968, "which enable[d] the legislature to establish a Board of Parole and to prescribe the qualification for board members."[40]

Despite the working group's rejection of a statutory right to a parole revocation hearing in the Omnibus Treatment and Corrections Act, the article's closing section advocated for "legislating procedural fairness [in parole revocations] without hindering rehabilitation."[41] This fallback argument contended that providing procedural fairness in the parole revocation process would advance the core correctional

34. *Id.* (footnote omitted).
35. *Id.* at 230. "With legislative or administrative implementation of such internal controls, it is quite possible that maximum administrative discretion can be retained in the hands of correctional experts for it will be less necessary for courts 'to intervene to define necessary procedures or to review the merits of correctional decisions.'" *Id.* at 253 (footnote omitted) (quoting PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., *supra* note 20, at 83).
36. NEB. REV. STAT. § 29-2623 (Reissue 1964) (emphasis added).
37. Lovell, *supra* note 3, at 240 n.114.
38. *Id.* at 240–41.
39. *Id.* at 236.
40. *Id.* at 240.
41. *See generally id.* at 248–52.

policy goal of rehabilitation and further the state's fiscal interests as well. It urged that an enlightened legislature should enact a statute providing a fair hearing process. As to specific procedural protections, it was suggested:

> [W]hen a genuine factual dispute arises as to whether a parole violation has occurred, a hearing which embodies the following minimal procedural elements is needed to ensure accurate fact-finding: (1) the right to reasonable notice of the precise charges; (2) the right to present evidence and witnesses; and (3) the right to counsel, including counsel appointed by the parole board when necessary.[42]

It was noted that "the probationer in Nebraska presently has these safeguards at his revocation hearing."[43] I proposed a bifurcated proceeding. "The initial, more formal stage of such a hearing would determine whether a violation has been committed . . . ."[44] In addition to the safeguards set out above, the parolee should be afforded the right to confront and cross-examine the adverse witnesses and the privilege against self-incrimination at the first stage of the hearing.[45] Of course, the second stage only occurs if a violation has been admitted or proved in the first stage; "[i]t would embrace a subjective policy determination very similar to the original parole granting decision—whether despite the violation the parolee's generally good behavior and progress or the extenuating circumstances of the breach merit continuance of his parole."[46] The article argued that legislative and administrative reform "should not be taken begrudgingly"—merely as prudent steps that could avoid adverse litigation results—but because the status quo undercut sound corrections and wise fiscal policy:

> [T]he proposed safeguards will further the correctional goal of rehabilitation by ensuring the parolee is given a fair hearing and should also prove economical in that it will make certain that those parolees who have not committed parole violations [or, having committed a violation, do not pose a significant risk] are continued on parole.[47]

I can still recall banging out my drafts on my portable typewriter just as I had typed all of my law school and bar exam essays—a far cry from the computers and sophisticated word processing of today.[48] There is no doubt the article was a major focus of my 3L year. I, of

42. *Id.* at 248 (footnotes omitted).
43. *Id.* at 248 (footnote omitted); *see id.* at 232.
44. *Id.* at 250.
45. *Id.* at 253.
46. *Id.* at 251.
47. *Id.* at 253. "One of the practical realities encouraging the expanded use of parole has been the great cost saving achieved by the state when it supervises [inmates] on parole rather than maintain [them] in prison. Recent estimates point toward a cost figure for the state in supervising a parolee that is but one-tenth the cost of keeping a convict imprisoned." *Id.* at 254 (footnote omitted).
48. Even in today's high-tech world, I and others have found that hand-written drafts on a yellow pad or ideas noted in the middle of the night remain a very good way to start any writing project.

course, took to heart Professor Perlman's comments on my draft and was honored when the *Nebraska Law Review* selected my article for publication in the issue dedicated to Chief Justice Earl Warren's retirement.[49] Although I thought change could quite possibly occur in the not-too-distant future, I did not anticipate I would have any further involvement. Earl Warren, the author of the landmark civil rights decision *Brown v. Board of Education*,[50] was one of my heroes. I was not so certain of his successor, Federal Appeals Court Judge Warren Burger of Minnesota. Chief Justice Burger was nominated by President Richard Nixon, who made a point of predicting that his nomination would move the Supreme Court in a conservative direction. While Nixon's prediction was generally true, there were indications early that Chief Justice Burger had views favoring reform of corrections policy and practice.

In late December 1968, about the same time that my article on parole revocation due process in the *Nebraska Law Review* was in the publication stages, I accepted a two-year post-graduate judicial law clerk position with United States Court of Appeals Judge Floyd Gibson in Kansas City, Missouri. Following graduation from Nebraska Law in May 1969, and after passing both the Nebraska and Missouri Bar Exams during the summer, I began a rewarding clerkship with Judge Gibson in August 1969.

II. SETTING THE STAGE FOR *MORRISSEY V. BREWER*

A. 1970 Developments

For a kid from Scottsbluff, Nebraska, it was pretty heady stuff to be clerking for the Federal Court of Appeals in downtown Kansas City. But Nebraska Law, the legislative internship, and the *Nebraska Law Review* had prepared me well. While clerking for Judge Gibson, two significant developments caught my eye as spring approached in 1970, and both were very relevant to reforming parole revocation. The first was an important speech by the new Chief Justice.

1. The New Chief Justice's Address to the New York City Bar

In an address to the Association of the Bar of the City of New York on February 17, 1970, Chief Justice Burger focused his remarks on the issues of recidivism, prison conditions, and the programs necessary to rehabilitate the imprisoned. The Chief Justice explained that he had "visited a good many prisons, prison camps and related institu-

49. *See* Lyndon B. Johnson, William O. Douglas, Tom C. Clark & Charles Morgan Jr., *Dedication*, 48 NEB. L. REV. 3 (1968) ("We are proud to dedicate this issue of the *Law Review* to The Honorable Earl Warren, Chief Justice of the United States.").
50. 347 U.S. 483 (1954).

tions . . . in this country and in Europe."[51] The Chief Justice affirmed that America is right to be proud of the procedural safeguards of our justice system but expressed concern that our system's justice vision was too narrow:

> We must concede, however, that our renewed concern has centered almost exclusively on the litigation aspect of criminal justice. This is natural. Litigation is our craft. It is here that we feel at home, but it is also true that it is here that we find lawyers and judges becoming so engrossed with procedures and techniques that we tend to lose sight of the purposes of a system of justice.
>
> . . . .
>
> [Our] national background may explain our attitude toward prisoners and prisons, an attitude of indifference on the one hand and impatience on the other. We seem to expect the prisoner to return to society corrected and reasonably ready to earn an honest way in life simply because we have locked him up.[52]

The Chief Justice did not hesitate to state that his views on the sad state of America's prisons and the need for corrections reform were influenced by his personal experience visiting European correctional institutions and prisons and learning about the more compassionate attitudes of those societies:

> If we want prisoners to change, public attitudes toward prisoners and ex-prisoners must change. . . .
>
> The contrast between our indifference and the programs in some countries of Europe—Holland and the Scandinavian countries in particular—is not a happy one for us. . . .
>
> Their community involvement in prisoner-aid organizations is far greater than ours.[53]

The Chief Justice contrasted this with the huge deficiencies of "a typical American prison" and challenged members of the legal profession to get involved. Chief Justice Burger advocated a micro-reform approach: "A visit to most prisons will make you a zealot for prison reform. If you will form a fact-finding party of one judge and two or three lawyers you will soon discover that 76–80 percent of all prisoners are in substandard institutions."[54] This approach promoted systemic reform through these individuals' changed perspectives in order "to see criminal justice as including the entire process from the detection of the crime, apprehension of the culprit, determination of his guilt, through the process of sending home back into a society after a period of enforced education."[55]

Wow! Now that was a speech that I would have expected from Bob Kutak, but it was stunning that the new conservative Chief Justice of

51. Warren E. Burger, *For Whom the Bell Tolls: Penal Reform* 36 VITAL SPEECHES OF THE DAY 322, 323 (1970).
52. Warren E. Burger, *"No Man Is an Island"*, 56 A.B.A. J. 325, 326 (1970).
53. Burger, *supra* note 51, at 324.
54. *Id.*
55. *Id.* at 325.

the United States Supreme Court made these statements. The full implication of Chief Justice Burger's address could hardly be fathomed, but it seemed clear the federal courts' hands-off policy with regard to prisoner claims and concerns might be ripe for a change.

2. Goldberg v. Kelly

It will come as no surprise that, as a federal judicial law clerk, I soon found myself daily reading the U.S. Supreme Court opinion slip sheets on the bus on my way home from the federal courthouse or as soon as they arrived in our chambers. It was in those slip sheets that the second development emerged, a pathbreaking Supreme Court due process decision that signaled the changing times. The blockbuster decision in *Goldberg v. Kelly*[56] came down in March 1970, only a month or so after Chief Justice Burger's New York City Bar Association speech. The Court repudiated the right–privilege doctrine and held that when the government has proposed that public assistance payments to a welfare recipient be terminated, procedural due process requires that a pre-termination evidentiary hearing be conducted; further, the Court held that important procedural safeguards, explicitly listed and described, were constitutionally prescribed for such evidentiary hearings.[57]

Quoting *Shapiro v. Thompson*, the Court reaffirmed that "[t]he constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."'"[58] Justice Brennan explained:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.[59]

The Court stated that the specific procedures required would be determined through a balancing test that "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[60]

The New York commissioner of social services argued that the individual's interest in uninterrupted benefits was "outweighed by countervailing governmental interests in conserving fiscal and administrative resources. . . . Summary adjudication protects the pub-

56. 397 U.S. 254 (1970).

57. *Id.* at 264, 267.

58. *Id.* at 262 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

59. *Id.* at 262–63 (quoting Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

60. *Id.* at 263 (citation omitted) (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

lic fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible."[61]

The Court rejected the state's argument. While acknowledging that "some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing," the Court held that "only a pre-termination evidentiary hearing provides the [welfare] recipient with procedural due process. . . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits."[62] Justice Brennan's decision for the Court recognized that "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens."[63] Embracing the district court's findings, the Court explained that "(t)he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great"[64] not to provide the welfare recipient with a hearing prior to termination. Because the state did not continue benefits during the pendency of the recipient's appeal of the welfare department's initial termination decision, the Court concluded the procedures made the recipient's situation "immediately desperate."[65]

Because the recipient had a statutory right to a post-termination hearing "with a full administrative review," and the pre-termination hearing that the Constitution requires would only result in "an initial determination of the validity of the welfare department's grounds for discontinuance of payments," the *Goldberg* Court held that the pre-termination hearing only required the "minimum procedural safeguards."[66] While the Constitution did not require a complete record and a comprehensive opinion, the Court held that due process principles "require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[67] The Court specified, in detail, the minimum procedural safeguards required in this administrative hearing:

(1) Notice: An individual must have "timely and adequate notice detailing the reasons for a proposed termination"—at least seven

61. *Id.* at 265.
62. *Id.* at 263–64 (footnotes omitted) (citations omitted).
63. *Id.* at 266.
64. *Id.* at 266.
65. *Id.* (quoting Kelly v. Wyman, 294 F. Supp. 893, 904–05 (S.D.N.Y 1968)).
66. *Id.* at 267.
67. *Id.* at 267–68.

days, "although there may be cases where fairness would require that a longer time be given."[68] Notice should be given by "both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised."[69]

(2) Oral Presentation: "It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. . . . [A] recipient must be allowed to state his position orally."[70]

(3) Cross-Examination: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . . Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department."[71]

(4) Retained Counsel:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." We do not say that counsel must be provided . . . only that the recipient must be allowed to retain an attorney if he so desires.[72]

(5) Decision Based on Hearing Record:

> [T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . [T]he decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.[73]

(6) Impartiality: "[A]n impartial decision maker is essential."[74]

Goldberg was an 8–1 decision, with only Justice Black dissenting. Justice Black worried that the decision would have unintended adverse effects on the poor and needy: "[T]he inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility."[75] Although *Goldberg* arose in the civil justice context, its rejection of the privilege doctrine appeared to be far-reaching, impacting state administrative decisionmaking generally. It seemed evident *Goldberg* potentially could have major ramifications for the field of criminal justice, including parole revocation proceedings conducted by another administrative body, the parole board, and even internal prison disciplinary decisions.

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68. *Id.*
69. *Id.* at 268.
70. *Id.* at 269.
71. *Id.* at 269–70 (citation omitted).
72. *Id.* at 270 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).
73. *Id.* at 271 (citations omitted).
74. *Id.* (citations omitted).
75. *Id.* at 279 (Black, J., dissenting).

B. *Morrissey v. Brewer*: Eighth Circuit

During the second year of my clerkship with Judge Gibson, you can imagine my surprise when I discovered that a case challenging the constitutionality of Iowa's parole revocation statute was on appeal to "my" court, the U.S. Court of Appeals for the Eighth Circuit: *Morrissey v. Brewer*.[76] Iowa's parole revocation procedures were essentially identical to Nebraska's, allowing revocation of parole without a hearing. The *Morrissey v. Brewer* case arose during an era referred to as the federal courts' hands-off approach to prisoners' rights. While the federal courts would carefully examine appeals of criminal convictions, once a conviction had been reviewed and affirmed by the appellate court, the federal courts didn't want to hear anything further from prisoners—certainly not complaints about the conditions of their confinement. I knew the Eighth Circuit recognized the importance of the constitutional issue when it appointed counsel for Morrissey and set the case for oral argument before the entire seven-member en banc court (rather than a three-judge panel typical of most federal appeals cases).

As surmised by the Eighth Circuit, the case involved "the whole scheme of granting paroles to imprisoned convicts, as established by the Iowa statutes," where parole "is a correctional device authorizing service of sentence outside the penitentiary."[77] The statutory scheme stated:

> Once an inmate is placed on parole, he is under the supervision of the director of the division of corrections of the department of social services, but while on parole, he remains in the legal custody of the warden or superintendent and under the control of the chief parole officer.[78]

When *Morrissey* was decided, the Iowa statutes "neither prohibit[ed] nor expressly provide[d] for notice and hearing before revocation of parole."[79]

As my two-year clerkship with Judge Gibson was drawing to a close, on April 21, 1971, the court handed down its opinion in *Morrissey*, written by Chief Judge Marion Matthes. The 4–3 decision held that the Iowa statute was constitutional as there was no deprivation of a right protected by the Fourteenth Amendment.[80] The privilege doctrine, embodied in the leading Iowa Supreme Court precedent, *Curtis v. Bennett*,[81] was central to the court's reasoning. *Curtis* had upheld the Iowa procedures based on the right–privilege doctrine,

76. 443 F.2d 942 (8th Cir. 1971) (en banc), *rev'd*, 408 U.S. 471 (1972).
77. *Id.* (citation omitted).
78. *Id.* at 945.
79. *Id.*
80. U.S. CONST. amend. XIV.
81. Curtis v. Bennett, 131 N.W.2d 1 (Iowa 1964), *appeal denied,* 351 F.2d 931 (8th Cir. 1965), *cert. denied*, 380 U.S. 958 (1965).

finding that a parolee had no constitutional right to notice and hearing before the board could revoke his parole, stating:

> A parole is a matter of grace, not a vested right. A large discretion is left to the States as to the manner and terms upon which paroles may be granted and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard.[82]

Morrissey urged the Court to reconsider this precedent in light of the Seventh Circuit's opinion the preceding year in *Hahn v. Burke*,[83] which relied on *Goldberg* to find that a probationer had a constitutional due process right to a hearing before probation revocation.[84]

However, the majority opinion in *Morrissey*, written by Chief Judge Matthes, only gave lip service to the *Goldberg* analytical framework and principally emphasized the governmental interest in summary adjudication. The court was deferential to caselaw emphasizing that the courts' jurisdiction and duties end when judgment of conviction is entered and that thereafter, the execution of the sentence—including parole—is within the sole authority of the executive branch.[85] The Eighth Circuit stated that the exercise of such authority, typically vested in the department of corrections, is not judicial but involves matters of prison discipline.[86] The Court also emphasized that parole boards *grant* parole based on "non-legal, non-adversary" judgments of "whether a prisoner is a 'good risk' by weighing the same factors pertinent to the board's decision to *revoke* parole."[87]

The court did not spend even a full sentence on its cryptic description of the parolee's liberty interest. Its entire treatment of the liberty or freedom interest was capsulized in the first clause of the sentence in which the court rejected his due process claim:

> While we recognize the importance which the individual parolee attaches to being allowed to remain outside the prison walls while serving his sentence, we are not constrained to hold that his interest in obtaining a hearing on revocation of that privilege is sufficient to override the interest of the state and the prison authorities in effectively managing internal disciplinary and custodial affairs.[88]

The court recognized that *Goldberg* rejected the right–privilege distinction in the context of revocation of a welfare recipient's benefits but distinguished *Goldberg* on the ground that welfare was based on a statutory right, and "the prisoner has no statutory right, even if 'qualified,' to be granted conditional liberty or allowed to remain on pa-

82. *Curtis*, 351 F.2d at 933 (citations omitted).
83. Morrissey v. Brewer, 443 F.2d 942, 946 (8th Cir. 1971).
84. Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970).
85. *Morrissey*, 443 F.2d at 948.
86. *Id.* at 949 ("Unless infringement of a paramount constitutional right is involved . . . federal courts are loathe to interfere." (citations omitted)).
87. *Id.* at 948–49.
88. *Id.* at 949.

role."[89] The *Morrissey* opinion also distinguished *Mempa*, finding that its holding did not extend a hearing right to probation revocations generally—there, the parolee was entitled to a hearing only because the revocation and sentencing occurred simultaneously and, as a result, were considered the final stage of the original criminal proceeding.[90] In contrast, the revocation decision at issue in *Morrissey* was made by the parole board, an administrative agency, after the conclusion of the criminal proceeding; thus, *Mempa* did not apply.[91]

The court observed that the reform sought by the parolee was one that would be better served by referral to the legislative branch:

> [I]f changes are to be made in the prison disciplinary system of granting and revoking paroles, such matters should be altered at the legislative and not the judicial level. The legislature, and not the courts, are equipped not only to require changes in the administration of prison and parole management, but also to establish the machinery for the effectuation of such procedural alterations.[92]

The court neither acknowledged the reality that in Iowa, prisoners cannot vote and therefore have no influence with the legislative branch nor consider that only the rare former prisoner in Iowa had any influence since at the time, they had to formally petition the Governor to have their right to vote restored. Finally, the court emphasized that federal courts were traditionally very deferential to prison administration: "[F]ederal courts should not encroach into areas which have traditionally been matters of state concern. The operation of state penological systems, absent flagrant violations of constitutional guarantees, are within the domain of state interest."[93]

In citing the extensive precedent that supported its ruling, the court quoted then-Judge Burger's opinion in *Hyser v. Reed* in a footnote. In *Hyser*, the en banc District of Columbia Circuit "held that procedural due process was not required by the constitution in federal parole revocation proceedings."[94] The *Morrissey* court embraced the rationale for rejecting a parolee's claim articulated in *Hyser*:

> "Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege."[95]

89. *Id.*
90. *Id.* at 950–51; *see* notes 24–28 and accompanying text
91. *Morrissey*, 433 F.2d at 951.
92. *Id.*
93. *Id.* (citation omitted).
94. *Id.* at 949 n.8; Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963), *cert. denied, sub nom.* Jamison v. Chappell, 375 U.S. 957 (1963).
95. *Morrissey*, 443 F.2d at 949 n.8 (quoting *Hyser*, 318 F.2d at 237).

In a nutshell, Chief Judge Matthes and the court majority rejected Morrissey's constitutional claim based on the right–privilege distinction. The Fourteenth Amendment's Due Process Clause provides that a state shall not "deprive any person of life, liberty, or property, without due process of law."[96] According to the Eighth Circuit's analysis, since parole is a privilege, and not a right, revocation of one's parole was not a deprivation of a right protected by the Due Process Clause.

The court was closely divided, and the constitutional question was resolved on a 4–3 vote. Judge Donald Lay[97] wrote an inspired dissent in which he found that revocation of parole without an opportunity for a hearing did deprive an individual of a liberty interest protected by the Fourteenth Amendment,[98] reasoning that "[u]nder Iowa law a parolee may be arrested, without notice of the fact that he will be returned to prison, without notice as to why he is being returned to prison, and without an opportunity to be heard in defense of the charge."[99] Judge Lay contended that an evidentiary hearing was mandated by the plain meaning of the Due Process Clause, which "requires notice of the charges or an opportunity to be heard before the state may deprive the liberty of any person."[100] He suggested only "provincial and stunted rationalizations" could conclude that a revocation of parole did not work a deprivation of the parolee's liberty interest:

96. U.S. CONST. amend. XIV.

97. Following his graduation from the University of Iowa College of Law, Judge Lay had engaged in a substantial trial practice in Omaha, Nebraska, adding yet another Nebraska tie to the case. Let me express publicly my posthumous gratitude to Judge Lay for a personal courtesy. Although my candidacy for a judicial clerkship with Judge Lay was unsuccessful, on his own initiative he wrote a letter on my behalf to each of the Eighth Circuit judges, which resulted in my clerkship with Judge Gibson. Judge Lay was an outstanding trial lawyer in Omaha prior to his appointment to the federal bench. His concise book on trial practice, DONALD P. LAY, LAW: A HUMAN PROCESS, (1996), is a great resource for aspiring trial lawyers.

98. *Morrissey*, 443 F.2d at 952–53 (Lay, J., dissenting) ("Since logic and justice do not mandate the denial of due process to a parolee I am able to assess its denial in only one light. The denial of due process in parole revocation simply mirrors society's overall attitude of degradation and defilement of a convicted felon. It is sad 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison; it cares even less for his future when he is released from prison. He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted and we react with sickened wonder and disgust when he returns to a life of crime." (footnotes omitted)).

99. *Id.* at 952.

100. *Id.*

> It is true that a parolee lives in society with more restrictions than other citizens, that his is a "conditional" liberty. However, in a sense every person's liberty is conditional on abiding by the rules of law. To reason that a parolee who is returned to the gray perimeter of prison walls is not "deprived" of "liberty," approaches the realm of judicial sophistry.[101]

Judge Lay further contended this conclusion was mandated by the Supreme Court's decision in *Goldberg*: "While there may not be a 'right' to parole or any other discretionary 'privilege' in the first instance, once the discretion is exercised and the privilege granted the entitlement cannot be divested in a manner inconsistent with the requirements of due process."[102] The dissent's thoughtful articulation of the "individual's interest in maintaining his liberty"[103] and detailed rebuttal of every argument raised by the state[104] undoubtedly provided encouragement to appointed counsel that a petition for certiorari was in order.

Judge Lay's dissent focused on the constitutional right to an evidentiary hearing. In contrast to *Goldberg*, the dissent did not attempt to define what specific procedures should be required in the context of parole revocation. However, Judge Lay pointed out that "[n]either the petitioners nor any of the authorities that recognize procedural due process have argued that a parolee is entitled to the 'full panoply' of rights. Fact-finding processes can be flexible without being basically unfair. An adequate system can be developed which is something less than a full trial."[105]

There was no doubt in my mind that Judge Lay was trying to persuade the Supreme Court to review the *Morrissey* case. Naturally, you are wondering how Judge Gibson voted. Let me just say Judge Gibson was generally sympathetic to the state on matters of criminal law and procedure. I was disappointed that Judge Gibson joined the Matthes majority opinion, but not surprised.

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101. *Id.*
102. *Id.* at 955 (citations omitted).
103. *Id.* at 959 ("The individual's interest in maintaining his liberty, however restricted, his interest in maintaining whatever reputation he might have regained in the community, his interest in avoiding sudden and possibly disastrous interruptions in his home life and in his employment, coupled with society's interest in rehabilitating ex-convicts rather than embittering them through arbitrary and unfair treatment, all outweigh the state's minimal interest in summary adjudication.").
104. The dissent debunked (1) the probation/parole distinction that was the basis of the majority's distinction of *Mempa v. Rhay*, 389 U.S. 128 (1967); (2) the constructive custody theory; (3) the so-called contract theory; (4) that parole was an administrative proceeding rather than a judicial matter; (5) the majority's lame explanation that habeas would still be available for "arbitrary" revocation decisions; and (6) the notion that federal courts should show judicial deference to state rights and not intervene in areas of traditional state concern, such as prison administration. *Morrissey*, 443 F.2d at 952–65.
105. *Id.* at 957 (citations omitted).

III. THE UNITED STATES SUPREME COURT

A. Our Amicus Curiae Brief and Moot Court

After my clerkship with Judge Gibson concluded in the summer of 1971, my wife Linda and I, along with our two infant daughters, moved to Indiana where I took the Indiana Bar Exam and then began my work as a staff attorney for the Legal Services Organization of Indianapolis. Although it was a definite cut in pay and the office trappings were considerably more modest than the U.S. Courthouse in Kansas City, I was really excited about the opportunity to practice law as a legal aid attorney representing underserved communities and litigating civil rights law on behalf of Indianapolis's African American community. I was pleased that my first office was in the Madam C.J. Walker Building[106] at 601 Indiana Avenue. In an earlier era, the Walker Building had been in the heart of Indy's African American community, only a few blocks from Crispus Attucks High School—yes, Indianapolis had de jure segregation of its public schools—and nightclubs where the Ink Spots played on the Avenue.[107] The neighborhood had declined and was much poorer by 1971, making it a good location for a neighborhood Legal Aid office.

Legal Aid attorneys handle only civil cases, but it turns out that most parole revocations were considered civil cases. Commission of a crime when on parole, while certainly a parole violation, often constitutes the basis for a new criminal charge; however, the majority of parole violations do not constitute a new crime. The revocation determination was not made by a judge or jury; rather it was made by an administrative agency, the parole board.

So, it turned out my expertise on parole revocation was needed on a habeas case. The client, James Russell, had his parole revoked without a hearing because he allegedly violated two conditions of his parole: (1) leaving the state of Indiana and (2) taking a narcotic, namely Robitussin cough medicine. Together with our co-counsel, Fred McGrath of the Legal Aid office in South Bend, Indiana, we filed an action in the United States District Court for the Southern District of Indiana under 42 U.S.C. § 1983 claiming that Mr. Russell's right to due process under the Fourteenth Amendment was being violated by

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106. From the washtub to the board room, Madam Walker overcame tremendous challenges to become the first black woman millionaire, but more importantly, her business model provided independence and meaningful income for hundreds of black women during the Jim Crow era when black women were generally limited to domestic work at best. *Madam C.J. Walker*, BIOGRAPHY (Feb. 28, 2018), https://www.biography.com/inventor/madam-cj-walker [https://perma.cc/UG3J-V3NF]; *see Self Made: Inspired by the Life of Madam C.J. Walker* (Netflix 2020).

107. *Deek Watson: Indy's Hall of Famer*, WFYI INDIANAPOLIS (Feb. 18, 2022), https://www.wfyi.org/programs/echoes-indiana-avenue/radio/deek-watson-indys-hall-of-famer [https://perma.cc/QM3R-3J6F].

his parole revocation without an evidentiary hearing. The attorney general of Indiana filed an opposition to our application to proceed in forma pauperis, and because of the longstanding precedent contrary to Russell's claim, the court denied the habeas petition, concluding that his constitutional challenge was frivolous. My co-counsel Harold Berk and I appealed Russell's case to the Seventh Circuit Court of Appeals in Chicago, arguing that the denial of the petition to proceed in forma pauperis, based on the supposed frivolous nature of Russell's complaint was a final ruling on the merits of the case. While the appeal was pending, the U.S. Supreme Court granted review in *Morrissey v. Brewer* and the Seventh Circuit immediately stayed consideration of Russell's appeal.

Berk and I decided that we should file an amicus brief in the Supreme Court, as our experience and expertise on prisoners' rights constitutional law issues would be helpful to Morrissey's counsel. I contacted Judge Gibson, who approved my request to file an amicus curiae brief on behalf of Morrissey. Then, we contacted Morrissey's appointed counsel, W. Don Brittin, Jr. in Des Moines, Iowa, who welcomed our assistance and input.[108]

We took the unusual step of expediting our amicus brief so it would be filed first. We thought providing counsel with all of our research would prove valuable as counsel prepared Morrissey's petitioner's brief, as it would enable him to incorporate arguments that he found persuasive. You can imagine how exciting it was for me—less than three years out of law school and writing a brief for the Supreme Court. We had a big jump on the research of the legal questions presented in the case because of my Nebraska Law internship, *Nebraska Law Review* article, and familiarity with recent developments, including, of course, the Eighth Circuit decision in *Morrissey*.[109] Our amicus brief,[110] in significant part, was built upon the research and

108. We also sought consent to participate as amicus curiae from Iowa Attorney General Richard Turner, and my recollection is the state consented to our participation.

109. The Eighth Circuit actually denied two habeas petitions in *Morrissey*, as cases out of Iowa that were treated as companion cases. *Morrissey*, 443 F.2d at 943. *Morrissey* consolidated the petitions of John J. Morrissey and G. Donald Booher, both represented by appointed counsel Don Brittin and each alleging parole revocation without a hearing constituted a violation of his constitutional rights. *Id.*

110. Neither Berk nor I had been in practice for a minimum of three years, which was required to be admitted to the Bar of the Supreme Court, and therefore we could not file the brief on our own. Our Indianapolis ACLU colleague, Craig Pinkus, graciously agreed to file our amicus brief in his capacity as a member of the Supreme Court Bar. I had lost contact with Berk and Pinkus over the years but reached out during the course of writing this article, both to reminisce and also in the hope that one of them might have retained a copy of our amicus brief. I am pleased to report both are senior lawyers. Harold R. Berk is quasi-retired but still has a limited private practice, mostly involving the construction of low- and mod-

the arguments advanced in my 1968 *Nebraska Law Review* article, now significantly bolstered by the Supreme Court's landmark ruling in *Goldberg*. We contended in our amicus brief that Morrissey had a protected liberty interest in not having his parole revoked without an evidentiary hearing, and we argued that the Due Process Clause of the Fourteenth Amendment required that Morrissey be provided with a hearing with all of the procedural protections required in *Goldberg*.

Don Brittin wrote a strong petitioner's brief for Morrissey. It combined arguments that were made in our James Russell's amicus brief with the key arguments Judge Lay made in his exhaustive Eighth Circuit dissent in *Morrissey*. The American Bar Association's (ABA) Individual Rights Section and the ACLU also filed amicus curiae briefs, and, as you would expect, they were first rate.

Of course, there had to be another Nebraska connection—whom do you think co-authored the ABA amicus brief? None other than Robert Kutak! You can imagine the big smile on my face when I saw Kutak's name, and I could not help recalling Bob's optimistic prediction back in November 1968, "we will win this issue in the courts!"

Despite the 475-mile distance between Indianapolis and Des Moines and the fact that the telephone was our only high-tech tool, we developed a good working relationship with Don Brittin. We offered to meet in Washington the day before oral argument to engage in a moot court, and Don was very pleased to accept our offer. In April, in a hotel room just off the National Mall, we held a robust moot court session. It went well. Don had a very good understanding of the issues, the law, the policy, and the record. We were confident that the written briefs we filed set forth our strongest arguments and withstood the state's rebuttal in its appellee's brief. Don's oral argument preparation principally focused on responses to what we anticipated would be the hardest questions from the Court. At the conclusion of the "mooting," Berk and I were confident Don was ready. We were also optimistic that the law was moving in a favorable direction for Morrissey and for our client, James Russell.

erate-income housing as well as other real estate development projects. Craig Pinkus continues to practice patent law with Bose McKinney & Evans in Indianapolis.

Unfortunately, after fifty years, none of us could locate a copy of our amicus brief in *Morrissey*. As our client James Russell was allowed to proceed in forma pauperis, the Supreme Court granted our motion to forego printing the brief. Morrissey v. Brewer, 405 U.S. 951 (1972); *see* SUP. CT. R. 33.1. The Court's order allowed us to file the required number of briefs in typewritten form and spared our inmate client the cost of having his brief printed. Fifty years later, the lack of a printed brief explains why we have not been able to recover the James Russell amicus brief through Westlaw, Lexis, Google, in the database Making of Modern Law: Supreme Court Records & Briefs, 1832–1978, or through Interlibrary Loan.

Harold Berk won the coin flip to determine who got to be Brittin's second chair at the oral argument to the Supreme Court. Our co-counsel, Fred McGrath, took the other seat at the counsel table. The actual oral argument is a blur now, so many years later, but technology allowed me to listen to it again as I wrote this article.[111] The recording confirmed Brittin's argument, like his brief, was first rate. It proved to be a "hot" Court with six Justices questioning Brittin, but through it all, he was calm under fire, thoughtfully answering each question. Brittin's response about the importance of a fair opportunity for the parolee to explain mitigating or extenuating circumstances—even when the parolee may have admitted a technical violation—proved significant in the Court's ultimate decision.[112]

The courtroom setting left a lasting impression, especially the fact that the attorneys, when they stood to make their oral arguments, were exceptionally close to where the Justices were seated at the bench—less than ten feet away. When we reminisced recently, Harold Berk noted that he sat directly across from William Rehnquist, the newly appointed Associate Justice. There we were, participating in a case before Chief Justice Burger and Justices Blackmun, Brennan, Douglas, Powell, Stewart, and White; Justice Marshall was absent from the oral argument but did participate in the decision based on the written briefs and the recording of the oral argument. A decade later, I heard Archibald Cox liken oral argument before the Supreme Court to teaching a seminar with nine participants—but with a very public audience—and listening to the recording of the argument in *Morrissey*, Cox's words rang true. It was apparent that the Justices' questions were thoughtful rather than argumentative; each was seeking to better understand Iowa's parole procedures and to make sure there would not be unforeseen consequences, should the Court rule in favor of the parolee.

B. The Supreme Court Decision

It was an idea whose time had come. On June 29, 1972, in an opinion written by Chief Justice Warren Burger, a unanimous[113] Supreme Court held that revocation of parole without a hearing violated due

111. Oral Argument, Morrissey v. Brewer, 408 U.S. 471 (1972) (No. 71-5103), https://www.oyez.org/cases/1971/71-5103 [https://perma.cc/N67H-39XN] (last visited Jan. 27, 2022).

112. *Id.* Brittin explained that Booher may have technically violated a parole condition that he not leave the county, but on each occasion, there were mitigating circumstances. He left the county to go to the hospital where his child was born and because he was able to obtain work (a parole condition) in another county—on both occasions, his parole agent was out of state. *Id.*

113. Technically, Justice Douglas dissented in part because he did not think the Court had gone far enough in prescribing the minimum procedures to be followed. But the Court was unanimous in its core holding that due process requires that a

process and detailed the minimum procedures that would govern these evidentiary hearings. But first, the Court provided important context. The Chief Justice, taking a leaf from his correctional reform speeches, explained both the penological goals of parole and summarized their implementation "on the ground:"

> [T]he practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. . . . Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.[114]

The Court emphasized the "essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."[115] The typical types of parole restrictions were described, as was the role of parole officers to assist parolees, offer them guidance, and exert "enforcement leverage . . . from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules."[116] The Court further observed that a parole officer has sufficient discretion so that parole is not revoked unless the officer "thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity."[117]

The Court then described "the government function involved," so as to determine what due process required under the circumstances. The opinion walks through the parole authority's two-step decision-making process when revocation has been proposed:[118]

> The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? . . . The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. . . . Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.[119]

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parolee must be afforded a hearing before his or her parole can be revoked. *Morrissey*, 408 U.S. 471.

114. *Id.* at 477 (footnote omitted) (citation omitted).

115. *Id.*

116. *Id.* at 478–79.

117. *Id.* at 479.

118. *Id.* at 481.

119. *Id.* at 479–80.

1. Parole Constitutes a Conditional Liberty Interest Protected by Due Process

Unlike the Eighth Circuit's cryptic consideration of the parolee's liberty interest, the Court gave it serious consideration, fully grasping the myriad implications of being returned to prison after experiencing the conditional freedom of parole:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.[120]

The Chief Justice cast aside the right–privilege argument that had long held sway, asserting: "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.'"[121] The Court then held that the parolee had a liberty interest protected by the Fourteenth Amendment:

> [T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[122]

The Court found that the state had valid and significant interests, but those interests were properly weighed in the Court's determination of what procedural safeguards were necessary.[123] The Court held that "the State has no interest in revoking parole without some informal procedural guarantees. . . . A simple factual hearing will not interfere with the [parole authority's] exercise of discretion."[124] The Court also pointed out that there was an important societal interest that favored provision of a parole revocation hearing:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having pa-

120. *Id.* at 482 (footnotes omitted).

121. *Id.*

122. *Id.*

123. *Id.* at 483 ("Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.").

124. *Id.*

> role revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[125]

2. *The Determination of "What Process Is Due" to a Parolee Who Is Threatened with Revocation of Their Parole*

In analyzing "what process is due," Chief Justice Burger recognized that there are two stages to a typical parole revocation process[126]—the arrest and preliminary hearing stage and the formal revocation hearing stage. Both involve logistics that had to be taken into account. The Court then proceeded to prescribe minimum procedures that had to be provided at both stages of the process.

a. *The Arrest and Preliminary Hearing Before a Parole Officer*

At the preliminary hearing stage, "[t]here is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked" and the arrest may be "at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation.[127] In light of these logistics the Court indicated "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."[128] The Court suggested that this "inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."[129]

The Chief Justice instructed "an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. . . . The independent officer need not be a judicial officer."[130] The hearing must be conducted by some person other than one initially dealing with the case, and can be heard by a

125. *Id.* at 484 (footnote omitted) (citations omitted).
126. *Id.* at 485.
127. *Id.* For example, in Iowa, the state prison is located in Fort Madison, approximately 180 miles from the state capital in Des Moines, where the office of the parole board is located.
128. *Id.* (citation omitted).
129. *Id.*
130. *Id.* at 486.

parole officer "other than the one who has made the report of parole violations or has recommended revocation."[131]

Expressly referring to *Goldberg* as its guide, the Court set forth the minimum procedures due process required at the preliminary hearing stage. The parolee must be given notice of the hearing stating what parole violations have been alleged. It continued:

> At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.[132]

The latter confrontation right was qualified and can be denied "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed."[133]

While the Court stressed the informality of the preliminary hearing decision process, it required a written "summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position."[134] The Court also set forth the evidentiary showing that should guide the preliminary revocation decision: "Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation."[135] This decision "should state the reasons for his determination and indicate the evidence he relied on" but "formal findings of fact and conclusions of law" are not required at this stage.[136] A preliminary determination of probable cause "would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision."[137]

b. The Revocation Hearing Before the Board of Parole

The Court then turned its attention to the more formal revocation hearing, typically held before the parole board:

> This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.[138]

131. *Id.*
132. *Id.* at 487.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* (quoting Goldberg v. Kelly, 397 U.S. 254, 271 (1970)).
137. *Id.*
138. *Id.* at 488.

The Court held that the "revocation hearing must be tendered within a reasonable time after the parolee is taken into custody" and indicated a "lapse of two months . . . would not be unreasonable."[139]

After explaining the rationale for each of the six components of the parole revocation evidentiary hearing that due process required, the Court summarized the minimum procedures required to satisfy due process:"

> They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[140]

The Court emphasized this more formal hearing process "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[141] The Court clearly appreciated the significant impact its landmark ruling would have, and it made clear its ruling would not have retroactive effect.[142]

There was one procedural protection that had been afforded to welfare recipients in *Goldberg* that the Court declined to address, stating, "We do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent."[143] Disagreement on this point caused Justice Brennan to concur in the result, contending that *Goldberg* "plainly dictates that [the parolee] 'must be allowed to retain an attorney if he so desires.'"[144] One year later, Brennan's view prevailed in *Gagnon v. Scarpelli*.[145]

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139. *Id.*
140. *Id.* at 489.
141. *Id.*
142. *Id.* at 490 (stating that the due process requirements will be "applicable to future revocations of parole").
143. *Id.* at 489 (footnote omitted).
144. *Id.* at 491 (Brennan, J., concurring) (quoting Goldberg v. Kelley, 397 U.S. 254, 270 (1970)).
145. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that the requirements of due process established for parole revocation were applicable to probation revocation proceedings). With its decision in *Gagnon*, written not by Justice Brennan but by Justice Powell, the Court added a right to counsel when requested and if it is:

> based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

C. Reflections on *Morrissey*

Bob Kutak was proven right again. We ultimately won major procedural protections for parolees through the litigation process. It was especially gratifying that those rights were ultimately vindicated by the highest court in the land in an opinion that closely tracked the arguments that had been advanced in our amicus briefs and my *Nebraska Law Review* article. Perhaps Bob envisioned that we would both file amicus briefs in the Supreme Court; but I certainly did not. I do not believe even Bob could have imagined the various twists and turns or the Nebraska connections, that developed.

It is difficult to estimate how many thousands of people have been affected by the *Morrissey* decision over the past fifty years. The Court itself wrote that an estimated "35%–45% of all parolees are subjected to revocation and return to prison."[146] The *Morrissey* decision set a precedent that assured the right to a fair hearing that continues to be the governing constitutional law. I discussed the influence of the Court's decision in *Morrissey* and its current application within today's justice system with Julie Micek, who has been Nebraska's Director of Parole Supervision since 2016. Micek assured me that today's Nebraska Board of Parole views parole as a key component of the Nebraska criminal justice system's rehabilitation goal and fully recognizes the importance of due process and fairness principles guiding revocation of parole. By statute, the Nebraska Board of Parole now has five full-time members appointed by the Governor (subject to confirmation by the legislature) to six-year terms; at least one member must be female and at least one member must identify as part of an

Id. at 790. "In doubtful cases, the agency was to consider whether the probationer appeared to be capable of speaking effectively for himself and a record was to be made of the grounds for refusing to appoint." *Id.* at 790–91.

146. *Morrissey*, 408 U.S. at 479 (citing PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., *supra* note 20, at 62). In 2020, the Nebraska Department of Parole Supervision supervised 2,387 individuals, 439 of whom were returned to custody (parole revoked in 342 cases and 97 individuals given a short-term custodial sanction). This translates to a revocation percentage of less than twenty percent for fiscal year 2020 (439/2,387 = 0.184), much lower than the range mentioned in the *Morrissey* opinion. NEB. BD. OF PAROLE DIV. OF PAROLE SUPERVISION, ANNUAL REPORT FY 2020, at 10 (2020), https://parole.nebraska.gov/sites/parole.nebraska.gov/files/doc/FY%202020%20Annual%20Report.pdf [https://perma.cc/GPC7-ZACL]. Between July 1, 2020, and June 30, 2021, the Parole Board completed 394 hearings, 99.5% of which resulted in a motion to revoke parole. JULIE MICEK, ANNUAL REPORT ON REPORT REVOCATIONS 2 (2021), https://parole.nebraska.gov/sites/parole.nebraska.gov/files/doc/Annual%20Report%20on%20Parole%20Revocations%20FY%202021.pdf [https://perma.cc/SMH5-8KLH].

ethnic minority group.[147] There currently are forty-two parole officers that report to the director.[148]

Although cautioning that the "full panoply of rights due a defendant in [a criminal] proceeding does not apply to parole revocations," the *Morrissey* Court held that due process required an evidentiary hearing with significant procedural protections not only at the final hearing before the parole board but also at the preliminary hearing stage.[149] Such hearings were to be conducted by a parole officer who was in no way involved with the decision to institute the revocation proceeding.[150] In this way, *Morrissey* significantly changed the parole landscape in those jurisdictions that had previously allowed informal hearings, and completely changed the landscape in jurisdictions such as Nebraska that conducted no hearings whatsoever. That the Supreme Court has cited *Morrissey* in over 100 cases provides a clear quantitative measure of *Morrissey's* lasting significance.[151] Fifty years later, it is remarkable that *Morrissey* has stood the test of time and continues to be the governing law with regard to parole and probation revocation process and procedure.

But the measure of *Morrissey*'s importance cannot be limited to numbers or its sweeping Due Process holding. A small number of Court rulings have symbolic value far beyond the parties and the literal holding of the case—*Morrissey* is such a case. *Morrissey* ended the federal courts' hands-off practice that turned a blind eye toward claims of wrongful treatment of prisoners. *Morrissey* ushered in an era in which federal courts took seriously such prisoner claims. Under Chief Justice Warren Burger's leadership, the Supreme Court fashioned a body of law that significantly reformed the operations of the nation's penal institutions and made them much more humane.[152]

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147. NEB. REV. STAT. §§ 83-189, -190 (Reissue 2014).

148. Telephone interview with Julie Micek, Dir. of Parole Supervision & Servs. (Oct. 15, 2021).

149. *Morrissey*, 408 U.S. at 480.

150. *Id.* at 485.

151. In Lexis, Westlaw, or other caselaw database, look up *Morrissey v. Brewer*; click on Citing Decisions or Citing References, Cases; then filter by court.

152. It was very significant that the opinion was written by Chief Justice Burger, who had been appointed to the Court by President Richard Nixon as a conservative. From his very first days on the Court in 1969, Burger had expressed concern about the federal judiciary's lack of interest in prisoners' conditions of confinement. *Morrissey v. Brewer* effectuated a sea change in federal constitutional law in recognizing that while prisoners' rights are limited by virtue of their convictions, they are not eliminated. Although conservative in contrast to his predecessor, Chief Justice Earl Warren, Burger was progressive on prisoners' rights. Burger's biography indicates he grew up of modest means in Minnesota and earned his J.D. from St. Paul College of Law, as opposed to an Ivy League School like the majority of modern Supreme Court Justices. *Warren E. Burger*, OYEZ, https://www.oyez.org/justices/warren_e_burger [https://perma.cc/QH96-KQZV]

IV. *MORRISSEY*'S IMPACT: PROBATION, GOOD-TIME CREDIT, PAROLE RELEASE, AND PRISON DISCIPLINE

It's been fifty years since the Court decided *Morrissey*, and half a century's worth of examples of the case's continuing impact and relevance is too much to capture in one article. So, this is the first of two articles celebrating the legend of *Morrissey* and its surprising connections to Nebraska Law. This article only addresses *Morrissey*'s impact during the first decade following the decision and highlights the remarkable prominence of the Nebraska Treatment and Correction Act in the resolution of three of the leading Supreme Court decisions during that era: *Wolff v. McDonnell*,[153] *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[154] and *Vitek v. Jones*.[155] The Court continues to cite *Wolff* and *Vitek* as guiding precedent for due process in prison discipline. The verdict on *Greenholtz*'s continuing constitutional vitality is more complicated, but whatever the extent of the erosion to the constitutional command, neither the legislature nor the parole board have taken any steps to reduce prisoners' parole release hearing rights.

Over the course of fifty years, the extent of the *Morrissey–Wolff*'s application to internal prison discipline has expanded and contracted. The contraction accelerated with *Sandin v. Conner* in 1995 and correlated with the dramatic growth in the country's prison population since 1980. In 2005, in *Wilkinson v. Austin*,[156] the Court forthrightly acknowledged that the governmental factor of the three-part *Mathews*

(last visited Feb. 20, 2022) (St. Paul College of Law is now known as William Mitchell College of Law).

I have often wondered how Burger's empathy and compassion for the imprisoned came about. Did he have a good friend, a relative perhaps, who made a serious miscalculation in their youth and wound up in prison? We know experience can be a great teacher, and one wonders if there may have been a personal story that influenced the Chief Justice's perspective. We do know from the Chief Justice Burger's speeches that he had taken time to visit many prisons in the United States and some in Europe during his years on the federal circuit court of appeals and his early years as Chief Justice. Given the criticism that some members of the Court have experienced in recent years from conservative interests because they were willing to consider legal ideas from other countries, Chief Justice Burger's speeches citing the more progressive penology of the countries of northern Europe are particularly notable. *See generally* text accompanying notes 51–55 on Burger's New York City Bar Association speech in 1970.

153. Wolff v. McDonnell, 418 U.S. 539 (1974). For a full discussion of *Wolff*, see *infra* subsection IV.A.1.

154. Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 441 U.S. 1 (1979). For a full discussion of *Greenholtz*, see *infra* section III.C.

155. Vitek v. Jones, 445 U.S. 480 (1980). For a full discussion of *Vitek*, see *infra* subsection III.D.3.

156. Wilkinson v. Austin, 545 U.S. 225, 225–27 (2005).

v. Eldridge due process analysis[157] had become dominant due to increased prison management concerns.[158] The second article will examine the contraction of due process protections in the prison discipline setting with a specific focus on the *Sandin* and *Wilkinson* solitary confinement cases and the political settings in which they were decided. While *Sandin* and *Wilkinson* unquestionably represent contractions from the zenith of prisoner rights, both confirm *Wolff* and *Vitek*'s continuing vitality with regard to due process protections in prison discipline generally. The second article suggests that the Court should revisit *Sandin*'s holding and reinvigorate the state-created liberty interest prong of due process law based on the enactment by more than a dozen state legislatures of significant limitations on the use of solitary confinement.

A. Probation Revocation: *Gagnon v. Scarpelli*

Because the *Morrissey* decision was based squarely on the Due Process Clause of the Fourteenth Amendment, it was a precedent of national applicability. It unquestionably transformed parole and probation practices and procedures across the country. Within one year, *Morrissey*'s hearing protections were extended to probation revocations in *Gagnon v. Scarpelli*,[159] which also resolved whether counsel could participate on behalf of a probationer or parolee, an issue that had been left open in *Morrissey*. *Scarpelli* held that due process required that in some circumstances, probationers and parolees must be allowed to employ counsel at their revocation hearings.[160]

157. *Mathews* requires a court to consider three factors to determine the sufficiency of prison due process procedures:

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

Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

158. *Wilkinson*, 545 U.S. at 227 ("The third *Mathews* factor addresses the State's interest. In the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration.").

159. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

160. *Id.* at 790 ("Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees."). Whether counsel was necessary depended on the particular facts of the case and if the probationer had requested counsel to help assert a "timely and colorable claim" that made revocation inappropriate. *Id.*

B. Revocation of Good-time Credits: *Wolff v. McDonnell*

It quickly became apparent that *Morrissey* would also have a significant impact on prison disciplinary cases. Two years after the case was decided, the Court brought *Morrissey*'s due process to prison internal disciplinary procedure in *Wolff v. McDonnell*, a case involving disciplinary sanctions that included revocation of good-time credits. Although the Court recognized that loss of good-time credits is "qualitatively and quantitively different from the revocation of parole or probation,"[161] *Morrissey* was the touchstone for the *Wolff* decision because the loss of good time unquestionably adversely impacts an inmate's chances for parole.[162]

Justice White, writing for the Court in *Wolff*, detailed the parameters of Nebraska's prison discipline regime as provided by state statute and prison regulations and observed

> The only statutory provision establishing procedures for the imposition of disciplinary sanctions which pertains to good time, section 38 of the Nebraska Treatment and Corrections Act, as amended, merely requires that an inmate be "consulted regarding the charges of misconduct" in connection with the forfeiture, withholding, or restoration of [good-time] credit.[163]

However, the Nebraska TCA also provided that only "[i]n cases of flagrant or serious misconduct" could a disciplinary violation be the basis for revocation of good time credit.[164] Otherwise, "only deprivation of privileges results."[165] These two categories of major and minor misconduct were defined by regulation—major misconduct described as a serious violation and minor misconduct described as a less serious violation.[166] When formally reported to the adjustment committee, composed of the associate warden custody, the correctional industries superintendent, and the reception center director,[167] it was directed to "'review and evaluate all misconduct reports' and, among other things, to 'conduct investigations, make findings, (and) impose disci-

161. Wolff v. McDonnell, 418 U.S. 539, 561 (1974).
162. *See id.* at 554, 561.
163. *Id.* at 544, 548 (quoting Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1972)).
164. *Id.* at 546; *see also* Neb. Rev. Stat. § 83-1,107 (Reissue 2014) (providing for allowance of good time and explains how it factors into parole eligibility and for forfeiture, withholding, and restoration of good time reductions "after the offender has been notified regarding the charges of misconduct").
165. *Wolff*, 418 U.S. at 547 (footnote omitted).
166. *Id.* at 51–52. According to regulations, while major misconduct required a formal report to the adjustment committee, minor misconduct could "either be resolved informally by the inmate's supervisor or it [could] be formally reported for action to the Adjustment Committee." *Id.* at 552. The regulations envisioned that most minor violations would be resolved "immediately and informally" by the inmate's supervising employee without a formal report. *Id.* at 548–51, 548 n.8 (citing Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1972)).
167. *Id.* at 570–71.

plinary actions.'"[168] The regulations provided for a limited in-person hearing before the Adjustment Committee, and, if misconduct was found:

> The Adjustment Committee has available a wide range of sanctions. "Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center [the disciplinary cell], withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein."[169]

1. Based on the Nebraska TCA, the Prisoner Has a State-Created Liberty Interest Protected by Due Process

At the outset, the Court made expressly clear what was implicit in *Morrissey*: the hands-off doctrine no longer blocked consideration of prisoner claims in the federal courts:

> [The state] assert[s] that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.[170]

Writing for the Court,[171] Justice White rejected the state's argument that "state infringement [of the] interest of prisoners in disciplinary procedures" is not protected by the Due Process Clause of the Fourteenth Amendment: "[H]ere the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior."[172] The Court observed that the Constitution itself does not require that the state create a parole system or provide for good-time credit:

> But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate

168. *Id.* at 549–50.
169. *Id.* at 552 (alteration in original) (footnote omitted) (quoting NEB. REV. STAT. § 83-1,107(7) (Cum. Supp. 1972)).
170. *Id.* at 555–56 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).
171. It should be noted that the author of the trail-blazing opinion in *Morrissey*, Chief Justice Burger, joined the majority opinion in *Wolff*.
172. *Id.* at 556–57; *see also* Sandin v. Conner 515 U.S. 472, 477–78 (summarizing *Wolff* as holding that "the statutory provisions created a liberty interest in a 'shortened prison sentence' which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct," (quoting *Wolff*, 418 U.S. at 557)).

> under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.[173]

The Court stated that in its due process cases involving deprivations of property, it had looked to state law to determine whether a property interest had been created. The Court held those due process precedents were fully applicable, and thus, "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."[174]

Morrissey's holding that parole revocation "inflicts a 'grievous loss' on the parolee and often on others" was applied in *Wolff*, leading to the determination that due process protections applied even though the revocation of good time was not "the immediate disaster" that revocation of parole was for the parolee in *Morrissey*.[175] The Court noted that, unlike in *Morrissey*, the loss of good time "does not then and there work any change in the conditions of his liberty" since the inmate continued to reside in the general population of the same correctional institution following the revocation decision.[176] However, the prison officials' determination changed the status quo because loss of good time could push back parole eligibility by months and even years, depending on the severity of the sanction.[177] Thus, the loss of good time credits, though not as severe a deprivation as revocation of parole, was significant enough to implicate the inmate's liberty interest that triggers due process protection. Because the Nebraska statute limited forfeiture of good time to disciplinary rulings finding "serious or flagrant misconduct," the Court concluded that revocation of good time credit constituted a grievous loss within the meaning of *Morrissey*.[178]

2. *The Process Due Is Determined To Include Many, but Not All, of the* Morrissey *Evidentiary Hearing Protections*

Having found a state-created liberty interest that is protected under the Fourteenth Amendment, the Court held that the amount of process due is determined by the Constitution (not merely by the process that may have been provided by state law).[179] Although the *Wolff* opinion set forth in some detail the internal Nebraska Department of Correction (DOC) prison disciplinary regulations, those procedures were apparently not a factor in its determination of whether a liberty interest existed—but clearly were relevant in its consideration of

173. *Wolff*, 418 U.S. at 557.
174. *Id.* at 558.
175. *Id.* at 560–61 (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).
176. *Id.* at 561.
177. *Id.*
178. *Id.*
179. *Id.* at 556–57.

whether the Nebraska DOC procedures provided the constitutionally required process due the inmate.

The Court summarized the district court's findings as to the existing procedures:

> (1) a preliminary conference with the Chief Corrections Supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits; (2) the preparation of a conduct report and a hearing before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and (3) the opportunity at the hearing to ask questions of the charging party.[180]

The Court rejected the State's argument that these hearing procedures were constitutionally adequate. However, it also rejected the inmates' argument that the Nebraska prison disciplinary procedures were deficient because they did not include all of the *Morrissey–Scarpelli* procedures.[181] In analyzing the *Wolff* decision and holding, it is important to keep in mind that the Court necessarily assumed that due process included the existing safeguards, especially the opportunity to present orally at the hearing and to ask questions of the charging party, and therefore its opinion focused on whether the additional safeguards ordered by the lower courts were constitutionally required.

In striving to strike the right balance, the Court emphasized that due process was not inflexible but necessarily considers "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[182] The Court did view the loss of good time as discipline as a slightly less significant deprivation than in the revocation of one's parole, but noting that revocation of good time was reserved for punishing major misconduct, the Court cautioned that "we should not unrealistically discount its significance," even though "it is qualitatively and quantitatively different from the revocation of parole or probation."[183] However, the Court found that "the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing."[184] The Court carefully delineated differences between the context of a prison disciplinary hearing and that of a parole revocation hearing,[185] stating that "the

180. *Id.* at 558–59.
181. *Id.* at 560.
182. *Id.* (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961)).
183. *Id.* at 561.
184. *Id.*
185. *Id.* at 561–62 ("Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of

necessity to maintain an acceptable level of personal security in the institution, must be taken into account" in determining what process is due.[186]

The Supreme Court upheld two of the additional procedural safeguards imposed by the district court (and affirmed by the Eighth Circuit): "These are advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken."[187] The Court also upheld the inmate's right to call witnesses and put on evidence, but with qualifications discussed below.

The Court emphasized the importance of advance written notice "to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are."[188] Prior to the *Wolff* decision, it appeared there was no uniform practice with regard to notice except that typically only oral notice was given. To ensure that the notice was meaningful, the Court recognized it must be timely and in writing. The Court found the existing notice procedures inadequate and held that a minimum of twenty-four hours' written notice of the charges must be provided before the inmate was to appear before the adjustment committee.[189] The Court elaborated the numerous ways in which a written decision and written record of the proceedings would

others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.").

186. *Id.* at 562–63 ("The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.").

187. *Id.* at 563. The trial court made findings based on the warden's testimony as to the prison's hearing procedures in cases involving charges of serious misconduct:

> "[T]he inmate is now given oral notice of the charges against him at least as soon as the conference with the Chief Corrections Supervisor and charging party. A written record is there compiled and the report read to the inmate at the hearing before the Adjustment Committee where the charges are discussed and pursued. There is no indication that the inmate is ever given a written statement by the Committee as to the evidence or informed in writing or otherwise as to the reasons for the disciplinary action taken."

Id. at 564.

188. *Id.* at 564 (citation omitted).

189. *Id.*

"protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding" and "insure that administrators . . . will act fairly."[190]

The Court also explained that a written opinion by the factfinders as to the evidence and reasons for the disciplinary action would be valuable in a number of circumstances "involv[ing] review by other bodies."[191] For example, it would likely be considered by the parole "authorities in making parole decisions" and could be the basis for the DOC to transfer an inmate to a different prison.[192] More generally, the Court advised: "Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others."[193]

The Court also held "that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[194] This was a qualified right, as the Court "must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required."[195] Thus, "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence."[196] The Court stopped short of imposing a requirement, but recommended that the Committee "state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases."[197]

The Court's overriding concern for accommodating "the needs of the institution" was the dispositive consideration in the Court's decision balking at fashioning a requirement that an inmate be allowed "confrontation and cross-examination of those furnishing evidence against the inmate" as a matter of right, because of fear "there would be considerable potential for havoc inside the prison walls."[198] The Court considered whether the inmate had a right to cross-examine witnesses, noting potential witnesses could range from an unidentified fellow inmate to guards and acknowledged that the institutional

190. *Id.* at 565.
191. *Id.* at 564.
192. *Id.*
193. *Id.* at 565.
194. *Id.* at 566.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 567.

risks may vary depending on the witness.[199] The Court concluded that any judicial attempt to delineate a narrow range of cases where cross-examination should be permitted "would undoubtedly produce great litigation and attendant costs" and that "[t]he better course . . . is to leave these matters to the sound discretion of the officials of state prisons."[200]

Finally, the Court declined to hold that inmates "have a right to either retained or appointed counsel in disciplinary proceedings."[201] The Court expressed concerns that "insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals" and would cause "delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held."[202] The Court authorized assistance from the staff or another inmate where illiteracy or a complicated issue would make it difficult or impossible for an inmate "to collect and present the evidence necessary for an adequate comprehension of the case"[203]

Justices Marshall, joined by Justice Brennan, and Justice Douglas, wrote separate opinions concurring in the rulings on notice and a written opinion. Although they dissented to the majority's denial of certain adversarial features, it is important to note that the Court was unanimous in holding:

> [I]nmates are constitutionally entitled to advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting the disciplinary board's decision. . . . [A]n inmate is also constitutionally entitled to a hearing and an opportunity to speak in his own defense.[204]

As Justice Marshall acknowledged: "These are valuable procedural safeguards, and I do not mean for a moment to denigrate their importance."[205] However, the three dissented as to the Court's rulings that granted prison officials discretion as to whether and to what extent an inmate could present witnesses or other evidence, denied cross-examination, and denied the assistance of retained counsel. The dissenters argued that deference to prison officials' security concerns were largely based on speculation and a "view of prison administration which is outmoded and indeed anti-rehabilitative."[206]

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199. *Id.* at 568–69.
200. *Id.* at 569.
201. *Id.* at 570.
202. *Id.*
203. *Id.*
204. *Id.* at 581 (Marshall, J., concurring in part and dissenting in part).
205. *Id.*
206. *Id.* at 596–97 (Douglas, J., dissenting in part, concurring in the result in part).

C. Parole Release: *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*[207]

In 1979, seven years after *Morrissey*, the Court in *Greenholtz* reached a split decision as to whether *Morrissey*'s due process ruling applied to parole release decisions. In a unanimous vote, in an opinion written by Chief Justice Burger, the Court held that based on the "unique structure and language" of the Nebraska Treatment and Corrections Act, a state-created liberty arose under the Constitution.[208] The Court found that Nebraska Revised Statute section 83-1,114(1) and (2) provided an "expectancy of release . . . [that] is entitled to some measure of constitutional protection."[209] In a narrow 5–4 vote, the Court declined to find—as a matter of constitutional law *generally*—that a liberty interest always arises in parole release decisions, thereby triggering the Due Process Clause and requiring a hearing.[210]

With regard to this latter holding, *Greenholtz* made clear there is no inherent right to a hearing under the Constitution when the parole board engages in "discretionary parole-release determinations."[211] The Court explained that a prisoner may have a hope that he will be awarded parole, but a "hope of conditional liberty" is significantly different than the conditional liberty experienced by a parolee outside of the prison.[212] The Court pointed to "a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires" as well as a crucial distinction between parole release decisions and parole revocation decisions.[213] A parole release decision is predictive and "turns on a 'discretionary assessment of a multiplicity of imponderables'" rather than on a set of facts as evaluated in the parole revocation decision.[214]

1. Under the Nebraska TCA Parole Release Provisions, a Prisoner Has a State-Created Liberty Interest that Is Protected by Due Process

Much as it had done in *Wolff*, the Court in *Greenholtz* held that the Fourteenth Amendment's Due Process Clause protected the state-created liberty interest that resulted from the unique structure and language of the parole grant provisions in the Nebraska Treatment and Corrections Act. The Court quoted section 83-1,114(1)[215] of the Ne-

207. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979).
208. *Id.* at 12.
209. *Id.*
210. *Id.* at 9.
211. *Id.* at 3.
212. *Id.* at 10.
213. *Id.* at 9.
214. *Id.* at 10 (quoting Kadish, *supra* note 27, at 813).
215. Section 83-1,114(1) provided:

braska Revised Statutes in its entirety at the outset of its state-created liberty interest analysis in Part IV(B) of its opinion and also added a footnote that referenced section 83-1,114(2). These two provisions of the TCA appear to be the primary bases for the Court's holding. In footnote five, the Court pointed out that subsection 2 of section 83-1,114 "also provides a list of 14 explicit factors and one catchall factor that the Board is obligated to consider in reaching a decision."[216] The Court never affirmatively embraced the inmates' argument that the Nebraska statutes created a presumption of parole release when the specified conditions were satisfied, but the Court found that a state-created liberty interest had been created by section 83,1,114(1) and (2) and was entitled to due process protection.[217]

In *Morrissey*, the Court essentially held that the loss of liberty that results from parole revocation, not just in the Iowa parole system but in each and every state's parole system, constituted a grievous loss that triggered application of the protections of the Fourteenth Amendment's Due Process Clause, no matter the text of the Iowa revocation statute or any other state's statute. In contrast to *Morrissey*, the Court in *Greenholtz*, as it had done in *Wolff*, grounded its finding of a Fourteenth Amendment liberty interest based on state law, the Nebraska TCA's parole release procedures. The Court's holding was narrow: "[W]e emphasize this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis."[218] Since the Eighth Circuit in *Greenholtz* had held that the prisoner had a *Morrissey*-type conditional liberty interest under both the Constitution and a "statutorily defined, protectible interest" under the Nebraska Treatment

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because: (a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for 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.

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

216. *Greenholtz*, 442 U.S. at 11 n.5 (citing NEB. REV. STAT. § 83-1,114(2)(a)–(n) (Cum. Supp. 1976)).

217. At the outset, the opinion summarized the Nebraska TCA's comprehensive parole grant process and procedures, but because Part IV(B) of the opinion does not expressly reference these other TCA provisions, it is unclear to what extent, if any, the other TCA statutes factored into the Court's decision. *Id.* at 4.

218. *Id.* at 12.

and Corrections Act,[219] the Court rejected the former holding but unanimously embraced the latter.[220]

The Court then "turn[ed] to an examination of the statutory procedures to determine whether they provide the process that is due in these circumstances."[221] The Eighth Circuit had held the Nebraska statutory procedures did not provide "the process due" and required the parole board to provide procedural protections very similar to those required in *Morrissey*. Although it did not require confrontation and cross-examination, the Eighth Circuit held the parole board must provide a "full formal hearing" with "written notice of the precise time of the hearing reasonably in advance of the hearing.[222]

2. *Due Process Requires that a Prisoner Receive Written Notice and an Opportunity To Be Heard*

In determining the required procedural due process protections, *Greenholtz* contrasted the detailed Nebraska statutory procedural protections that governed the parole board's parole release decision with the parole revocation decision in *Morrissey*, where there was a total absence of procedural protection under Iowa law. Under the Nebraska parole release statutes, "at least one and often two hearings every year [are afforded] to each eligible inmate, [thus] we need only consider whether the additional procedures mandated by the Court of Appeals are required."[223]

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219. *Id.* at 5–6.

220. *Greenholtz*'s continued vitality is evident in the 2005 case *Wilkinson v. Conner*, 545 U.S. 225 (2005), which is examined in the second article. The *Wilkinson* Court observed: "Although *Sandin* abrogated *Greenholtz*'s and *Hewitt*'s methodology for establishing the liberty interest, these cases remain instructive for their discussion of the appropriate level of procedural safeguards." *Id.* at 229. Nonetheless, the Nebraska Board of Parole continues to provide the parole release hearing opportunity for the inmate that existed in 1979, and actually goes beyond the minimum requirements of *Greenholtz* by allowing the prisoner to call witnesses and be represented by counsel. The current Nebraska Parole Board Rule section 4-301 provides: "At the parole hearing, the offender may present evidence, call witnesses, and be represented by counsel." NEB. BD. OF PAROLE, RULES, at 4-M (Sept. 6, 2019), https://parole.nebraska.gov/sites/parole.nebraska.gov/files/doc/9-6-2019%20Adopted%20Board%20of%20Parole%20Rules%20-%20website.pdf [https://perma.cc/C2JU-KQZC]. Neither the Nebraska Legislature nor the Nebraska Parole Board has rescinded the parole release hearing rules following the Supreme Court's decisions in *Sandin* and *Wilkinson*, and this author applauds their decision to stay the course, as is their prerogative as a matter of sound correctional policy and philosophy.

221. *Greenholtz*, 442 U.S. at 12.

222. *Id.* at 6.

223. *Id.* at 14.

The Chief Justice focused on the "risk of error" component of the analysis developed in *Mathews v. Eldridge*,[224] emphasizing that the parole release decision is "subjective in part and predictive in part" and "vests very broad discretion in the Board."[225] Ultimately, the Court found that the "[p]rocedures designed to elicit specific facts, such as those required in *Morrissey*, *Scarpelli*, and *Wolff*, are not necessarily appropriate to a Nebraska parole determination."[226] "Since the decision is one that must be made largely on the basis of the inmate's files," the Court held "this procedure adequately safeguards against serious risks of error and thus satisfies due process."[227] The Court summarized the Nebraska statutory procedures at the initial interview hearing[228] and emphasized that the state "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."[229]

Four Justices believed "all prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular [statutory] language that implements the parole system."[230] Justice Marshall's dissent was joined by Justices Brennan and Stevens and joined in part by Justice Powell. Justice Marshall quoted the Second Circuit's phrasing of the issue: "'[whether] the immediate issue be release or revocation, the stakes

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224. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors."); *see supra* note 157.

225. *Greenholtz*, 442 U.S. at 13.

226. *Id.* at 14 (citations omitted).

227. *Id.* at 15 (footnote omitted) (citation omitted).

228. *Id.* In synopsis:

> [T]he inmate is permitted to appear before the Board and present letters and statements on his own behalf. He is thereby provided with 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.

Id.

229. *Id.* at 16. It should be noted that although the Court in *Wilkinson* stated that *Sandin* overturned *Greenholtz*'s state-created liberty interest analysis, it also stated that *Greenholtz*'s "what process is due" analysis continued as good law. Wilkinson v. Austin, 545 U.S. 209, 229 (2005). The Court's decision in *Black v. Romano*, 471 U.S. 606, 613 (1985), reaffirmed that the parole board need not write an opinion when parole is denied. In the context of a probation revocation case, *Black* held "that a general requirement that the factfinder elaborate upon the reasons for a course not taken would unduly burden the revocation proceeding without significantly advancing the interest of the probationer." *Id.*

230. *Greenholtz*, 442 U.S. at 22 (Marshall, J., dissenting in part); *see id.* at 19 (Powell, J., concurring in part and dissenting in part).

are the same: conditional freedom versus incarceration.'"[231] Although acknowledging that parole release decisions "hinge on predictive determinations," Marshall thought that did not meaningfully distinguish the parole release decision from the parole revocation decision, because "those [predictive] assessments are necessarily predicated on findings of fact."[232]

Powell agreed with the Marshall dissent "that the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision."[233] On the "process due" issue, Justice Powell concurred with the majority that "[t]he type of hearing afforded by Nebraska comports generously with the requirements of due process, and the report of the Board's decision also seems adequate."[234] Powell did "not agree, however, with the Court's decision that the present notice afforded to prisoners scheduled for final hearings . . . is constitutionally adequate."[235] A prisoner is not told the exact date of their hearing until the morning of, although the board does let the prisoner know the month in which the hearing is scheduled.[236] Powell succinctly pointed out the obvious shortcoming of the board's practice: "[A]lthough a prisoner is allowed to 'present evidence, call witnesses and be represented by private counsel' at the final hearing, his ability to do so necessarily is reduced or nullified completely by the State's refusal to give notice of the hearing more than a few hours in advance."[237] Powell agreed with the lower courts' requirement that the state "give at least three days' notice of final hearings.[238] Justice Marshall and his dissenting colleagues agreed, asserting that there was "no reason to depart from this Court's longstanding recognition that adequate notice is a fundamental requirement of due process."[239] The Marshall-authored dissent agreed with Powell that inmates must be given "reasonable notice of hearing dates and the factors to be considered," but they went further, contending due process also required "a written statement of reasons and the es-

231. *Id.* at 27 (Marshall, J., dissenting in part) (alteration in original) (quoting United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 928 (1974)).

232. *Id.* at 28 (footnote omitted). Justice Marshall suggested that *Greenholtz* may not have been as narrow a holding as the Chief Justice implied. Marshall observed that the Nebraska and federal parole statutes "are patterned" on the Model Penal Code, and that "many jurisdictions embody the same standards," which would "suggest that the other statutes must also create protectible expectation of release." *Id.* at 29 (footnote omitted).

233. *Id.* at 19 (Powell, J., concurring in part and dissenting in part).

234. *Id.* at 21

235. *Id.* (citation omitted).

236. *Id.*

237. *Id.* (quoting *id.* at 5 (majority opinion)).

238. *Id.* at 22 (Powell, J., concurring in part and dissenting in part).

239. *Id.* at 38 (Marshall, J., dissenting) (citations omitted).

sential facts underlying adverse decisions."[240] Thus, on the adequacy of notice, Chief Justice Burger wrote for only a 5–4 majority.

Regarding its conclusion that the Nebraska TCA provided all the process due—the second step in the *Morrissey* inquiry—the Court found that the notice, hearing, and detailed decisional criteria provided fundamental procedural safeguards. The Court casually rejected[241] the dissent's argument regarding the inadequacy of the notice in practice; instead, the Court expressly took into account that the Nebraska Legislature had provided significant procedural protections in the TCA that not only gave detailed direction with regard to the factors that should guide the parole decision but also required an in-person, face-to-face hearing before the parole board *every year*.[242] This author submits that in light of the substantial safeguards that Nebraska had provided inmates in the parole release process, safeguards that were not provided under the duress of litigation, the Court was prepared to give the parole board and prison administration the benefit of the doubt on the notice and written opinion issues.[243]

D. Prison Discipline Decisions: *Wolff*, *Meachum*, and *Vitek*

1. Wolff v. McDonnell*: Solitary Confinement*

Wolff v. McDonnell was a bridge case—one foot in both the world of parole administration and arguably an even bigger foot in the vast world of internal prison discipline.[244] Although the disciplinary action at issue in *Wolff* was solely within the jurisdiction of the prison administration (and not under the control of the parole board or parole administration), this aspect of prison discipline clearly impacted an inmate's parole release prospects, which brought the decision within the scope of *Morrissey*. However, *Wolff* qualified the scope of the procedural protections to reflect the difference between the internal prison discipline at issue in *Wolff* and the parole revocation context in *Morrissey*. Although in *Wolff*, the Court determined due process required procedural safeguards, it held the circumstances did not warrant the

240. *Id.* at 22.
241. *Id.* at 14 n.6.
242. *Id.* at 5 (majority opinion).
243. In *Sandin v. Conner*, which is the focus of the second sequel article, the Court emphasized that when the it identified a state-created liberty interest, states were disincentivized from codifying prison regulations. *See* Sandin v. Conner, 515 U.S. 472, 482 (1995). However, the Chief Justice overlooked the counterbalancing effect of *Greenholtz*'s holding on the "what process is due" second step of *Morrissey*'s due process analysis. In *Greenholtz*, the Court's high regard for the Nebraska TCA's procedural protections persuaded the majority to give the state the benefit of the doubt on what otherwise appeared to have been a clearly defective notice process. *See Greenholtz*, 442 U.S. at 15–16.
244. *See* Wolff v. McDonnell, 418 U.S. 539, 542–43 (1974).

full evidentiary hearing safeguards required by *Morrissey*.[245] Nonetheless, this author submits they represented transformative change in the world of prison administration[246] as the *Wolff* Court left no doubt that its holding was applicable in the context of prison discipline leading to solitary confinement:

> The deprivation of good time and imposition of "solitary" confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.[247]

Six cases—*Meachum v. Fano*, *Wright v. Enomoto*, *Vitek v. Jones*, *Hughes v. Rowe*, *Hewitt v. Helms, Harper v. Washington*—exemplify the Supreme Court's efforts to strike the right balance between procedural fairness for prisoners and prison administration concerns. *Meachum*, which dealt with intra-prison transfer of inmates, began to define the limits of *Wolff*. *Vitek* held that *Morrissey–Wolff* procedural protections were required before an inmate could be transferred to a prison mental health institution, distinguishing such transfers from the prison-to-prison transfers in *Meachum* and confirming *Wolff*'s application to both administrative and disciplinary solitary confinement.[248]

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245. *Compare id.* at 571–72, *with* Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972).

246. Since the *Wolff* decision, section 83-185 of the Nebraska Revised Statutes was recodified as section 83-4,114.01(2), but its text—both as to forfeiture of good-time credit and imposition of solitary confinement—remains unchanged. To its credit, the Nebraska Legislature did not amend the statute in the wake of *Wolff* or in the years following *Sandin*. Likewise, neither the legislature nor the parole board made any changes to parole release procedures following the *Greenholtz* or *Wilkinson* decisions in 1979 and 2006, respectively.

247. *Wolff*, 418 U.S. at 571 n.19. The Court explained:

> When a prisoner is isolated in solitary confinement, there appear to be two different types of conditions to which he may be exposed. He may be incarcerated alone in the usual "disciplinary cell," with privileges severely limited, for as long as necessary, or he may be put in a "dry cell," which unlike regular cells, contains no sink or toilet.

Id. at 552 n.9.

248. Vitek v. Jones, 445 U.S. 480, 488 (1980); *see* Washington v. Harper, 494 U.S. 210 (1990); Wright v. Enomoto, 462 F. Supp. 397 (N.D. Cal. 1976), *summ. aff'd*, 434 U.S. 1052 (1978); Hughes v. Rowe, 449 U.S. 5 (1980); Hewitt v. Helms, 459 U.S. 460 (1983). *Harper*, *Wright*, *Hughes*, and *Hewitt* will be examined in the sequel second article, which focuses on due process safeguards before an inmate is punished with solitary confinement, the harshest form of prison discipline. Twenty years after *Wolff*, the Court in *Sandin v. Conner* began curtailing due process in the context of prison discipline including solitary confinement. *See Sandin*, 515 U.S. 472.

2. Meachum v. Fano*: Intra-State Prison Transfer to Maximum Security Prison*

In *Meachum v. Fano*, the prisoners sought to extend *Morrissey* and *Wolff* to the transfer of prisoners to maximum security prisons.[249] The Court held that any "expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."[250] The *Meachum* Court held that Due Process Clause is not implicated every time an inmate is negatively affected by a change in their conditions of confinement and that transfer to a maximum security prison with more burdensome conditions was "within the normal limits or range of custody which the conviction has authorized the State to impose."[251]

In *Wolff*, since the procedures for revoking good time and imposing solitary confinement were the same, the Court indicated that the latter was also a state-created liberty interest that warranted the same due process protection.[252] *Wolff* was distinguished on both grounds in *Meachum*. First, unlike the forfeiture of good-time credits, the prison transfers would not directly affect the length of a prisoner's incarceration; second, the inmates were not placed in solitary or disciplinary confinement: "No [prisoner] was subjected to disciplinary punishment upon arrival at the transfer prison. None of the transfers ordered entailed loss of good time or disciplinary confinement."[253] The *Meachum* Court did not retreat from *Wolff*'s holding that prisoner's due process protection could arise by virtue of the Constitution and, in certain instances, could be created by state law.[254] However, based on the facts and statutory scheme in Massachusetts, the Court held the prisoners had no liberty interest, either under the Constitution or under Massachusetts law, against transfer to another prison.[255]

Justice Stevens, writing for Justices Brennan, Marshall, and himself, dissented because the Court failed to acknowledge that the Fourteenth Amendment liberty that triggers due process protections can be found as a matter of constitutional law—among the "unalienable rights" in the Declaration of Independence—and does not require state law as a prerequisite.[256] The dissenters also stated they were "unable to identify a principled basis for differentiating between a

249. Meachum v. Fano, 427 U.S. 215 (1976).
250. *Id.* at 228.
251. *Id.* at 224–25.
252. Wolff v. McDonnell, 418 U.S. 539, 571 n.19 (1974).
253. *Meachum*, 427 U.S. at 221–22.
254. *See id.* at 228–29.
255. *Id.*
256. *Id.* at 230.

transfer from the general prison population to solitary confinement and a transfer involving equally disparate conditions between one physical facility and another."[257]

It was evident that the Court did not want the federal court involvement in matters of prison administration generally, but it emphasized that transferred inmates were not placed in solitary confinement. This distinction clearly recognized *Wolff*'s strong embrace of due process protection before a prisoner was placed in solitary confinement, and on this point, the Court was unanimous. While the full scope of *Wolff*'s application to prison discipline remained undetermined, *Meachum* reaffirmed that *Wolff* did apply to solitary confinement, but did not apply to prison-to-prison inmate transfers. Clearly, *Meachum* did not limit *Wolff* to its facts.

3. Vitek v. Jones:[258] *Prisoner Transfer to a Mental Hospital*

Nebraska law and penal complex practice provided "that if a designated physician finds that a prisoner 'suffers from a mental illness or defect' that 'cannot be given proper treatment' in prison, the Director of Correctional Services may transfer a prisoner to a mental hospital."[259] In *Vitek v. Jones*, the Court considered whether an inmate's involuntary transfer to a mental hospital implicated a liberty interest protected by due process.[260] A three-judge panel in the district court found two independent grounds for Jones's liberty interest—section 83-180(1) of the Nebraska Revised Statutes, which prescribed the findings necessary to transfer a prisoner to a mental hospital, and the Federal Constitution.[261] The latter was based on the major change in Jones's conditions of confinement, from the prison general population to a mental hospital, which the district court found constituted a "grievous loss" that should not be imposed without notice and an adequate hearing.[262]

In an opinion written by Justice White, the Supreme Court affirmed the district court on both points, stating that "[f]ollowing *Meachum v. Fano* . . . we continued to recognize that state statutes

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257. *Id.* at 235. This observation confirms what appears to be the Court's common understanding, following *Wolff*, that solitary confinement constituted a deprivation of liberty that required due process safeguards before its imposition.

258. Vitek v. Jones, 445 U.S. 480, 484 (1980).

259. *Id.* at 489 (quoting NEB. REV. STAT. § 83-180(1) (Cum. Supp. 1976)).

260. *Id.* at 487. Larry D. Jones, while in solitary confinement, set his mattress on fire and was hospitalized for severe burns before he was transferred to a state mental hospital. The transfer was made because corrections physicians determined that he was mentally ill and could not receive necessary treatment within the penitentiary. *Id.* at 484–85.

261. Miller v. Vitek, 437 F.Supp. 569 (D. Neb. 1977), *vacated, sub nom.* Vitek v. Jones, 445 U.S. 480 (1980).

262. *Id.* at 573.

may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons."[263] The Court determined that section 83-180(1) of the Nebraska Revised Statutes, providing "that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest" that required due process protection.[264]

The Court also affirmed the district court in holding "that independently of § 83-180(1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections."[265] In finding that a liberty interest arose directly under the Constitution, the Court pointed to precedent that found involuntary commitment is "more than a loss of freedom," it "can engender adverse social consequences" and can translate to "[c]ompelled treatment in the form of mandatory behavior modification programs."[266] It rejected the state's argument that transfer to a mental hospital is within the permissible range of confinement options for inmates: "Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of a crime."[267]

With one exception (requiring modification of (F) below), the Court approved the district court's order[268] setting forth the *Morrissey–Scarpelli*[269] procedural protections that must be afforded a prisoner whose transfer to a mental hospital has been proposed: (A) written notice; (B) "an opportunity to be heard in person and to present documentary evidence;" (C) the opportunity to present testimony of witnesses and a qualified right to confront and cross-examine adverse witnesses; (D) an independent decisionmaker; (E) a written opinion as to the evidence relied on and the reasons for the transfer; (F) legal counsel, "furnished by the state, if the inmate is financially

263. *Vitek*, 445 U.S. at 489 (citations omitted).
264. *Id.* at 489–90.
265. *Id.* at 491.
266. *Id.* at 492 (quoting Addington v. Texas, 441 U.S. 418, 425–26 (1979)). The majority also found that the district court was correct to take into account the behavior modification programs Jones was forced to undergo. *Id.*
267. *Id.* at 493.
268. The Supreme Court held that the district court "properly identified and considered the relevant factors in arriving at its judgment," weighing the state's strong interest in "segregating and treating mentally ill patients against the prisoner's interest "in not being arbitrarily classified as mentally ill." *Id.* at 495 ("[A]nd as the District Court found, the risk of error in making the determinations required by § 83-180 is substantial enough to warrant appropriate procedural safeguards against error.").
269. *See supra* note 187 and accompanying text.

unable to furnish his own;" (G) and timely notice of all of the above rights.[270]

Although the medical nature of the inquiry "'turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists," the Court found that "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements."[271] With the exception of legal counsel, the Court upheld the district court's order:

> Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty interests they are currently enjoying and because of the inherent risk of a mistaken transfer, the District Court properly determined that procedures similar to those required by the Court in *Morrissey v. Brewer* were appropriate in the circumstances present here.[272]

In order for Justice Powell to join the plurality, the Court made a minor modification of (F), requiring the state to provide legal counsel, as set forth in Justice Powell's concurring opinion. Agreeing in principle with the majority, Justice Powell observed that "[i]t is unlikely that an inmate threatened with involuntary transfer to mental hospitals will possess the competence or training to protect adequately his own interest in these state-initiated proceedings."[273] Thus, Justice Powell agreed with the district court that it is crucial that the inmate be provided "qualified and independent assistance," but did not agree that such assistance had to be provided by a lawyer.[274]

The Court distinguished *Vitek* from *Meachum v. Fano* because the intra-state prisoner transfers at issue in the latter case "were discretionary with the prison authorities, and . . . the prisoner [did not] possess any right or justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events."[275] The Court extensively discussed the much greater restrictions of an involuntary commitment, emphasizing "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness."[276]

The Court determined that the proposed transfer to a mental hospital in *Vitek* satisfied the constitutional threshold of the *Morrissey*

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270. Vitek, 427 U.S. at 494–95 (summarizing Miller v. Vitek, 437 F. Supp. 569, 575 (D. Neb. 1977)).
271. *Id.* at 495 (quoting *Addington*, 441 U.S. at 429).
272. *Id.* at 495–96 (citation omitted).
273. *Id.* at 498 (Powell, J., concurring in part).
274. *Id.* at 500. Accordingly, (F) was modified to reflect that the professional assistance "may [also] be provided by a licensed psychiatrist or other mental health professional." *Id.*
275. *Id.* at 489 (majority opinion).
276. *Id.* at 494.

"grievous loss" test as the transfer would be not merely a major change in the status quo, but a deprivation.[277] An inmate would be deprived of general population prison living circumstances when they are transferred to a psychiatric hospital with its greater restrictions, and could also be subject to extremely intrusive behavior modification therapy, an intrusion so significant that non-incarcerated persons may only be involuntarily committed to a mental institution after a civil commitment hearing.

Post-*Morrissey* caselaw continues to uphold *Morrissey*'s ruling that the federal constitution recognizes and protects a prisoner's liberty interest, though in a limited number of circumstances where the deprivation constitutes a grievous loss, such as in *Vitek*. This is the constitutional floor—due process protections attach when such a deprivation occurs or would occur. The Court also looked to state statutes that bestowed procedural protection and held such statutes can create a prisoner's liberty interest that triggers due process protection, as in *Wolff*, *Greenholtz*, and *Vitek*. In *Washington v. Harper*,[278] the Court went further, basing its finding of a state-created liberty interest on the detailed prison *regulations* promulgated by state correctional authorities; there was no indication in Justice Kennedy's opinion that the Court relied on a state statute. These cases demonstrate that when the Court concludes that the state has created a liberty interest, it will examine whether the process afforded in state statutes, prison regulations, and practice satisfies the *Mathews* three-factor "what process is due" test and, if not, will hold that federal courts can impose additional procedural safeguards above and beyond any contained in the state legislation and prison regulations.

V. *MORRISSEY–WOLFF* OPENED THE COURTHOUSE DOORS TO PRISONERS' CONSTITUTIONAL CLAIMS FOR NEARLY A QUARTER CENTURY OF TRANSFORMATIVE PROGRESS

As Malcolm Feeley and Edward Rubin's treatise on prison reform litigation documented, "as of 1964, no American court had ever ordered a prison to change its practices or its conditions."[279] The Seventh Circuit's 1956 opinion in *Atterbury v. Ragen*[280] articulated the

277. *Id.* at 494–96.

278. Washington v. Harper, 494 U.S. 210 (1990). The Court held that "in addition to the liberty interest created by the State's Policy, [the inmate] possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 221–22 (citations omitted).

279. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 13 (1998).

280. United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), *cert. denied*, 353 U.S. 964 (1975).

federal courts' hands off policy: "The Government of the United States is not concerned with, nor has it power to control or to regulate the internal discipline of the penal institutions of the constituent states."[281] The Court made clear such matters were beyond the purview of the federal courts: "We think it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[282] Many legal observers, including many federal judges, will look back on *Morrissey*'s fiftieth anniversary and say that *Morrissey*'s jurisprudential contribution went far beyond its overhaul of parole revocation procedures. Its progeny, *Wolff*, not only extended *Morrissey* to prison discipline procedures but also opened the door to other prisoner constitutional claims, including claims challenging their conditions of confinement.[283]

A. The Due Process Branch of Prison Reform Litigation Opened the Door for the Conditions of Confinement Litigation Branch

The principal focus of Feeley and Rubin's book is the branch of prison reform caselaw challenging conditions of confinement based on the Eighth Amendment's prohibition of cruel and unusual punishment, but they recognize that "the due process rights of prisoners became an important element of the prison reform process on its own."[284] They acknowledge the pathbreaking role that the due process branch of prison reform litigation, especially *Wolff*, played in opening the federal courthouse door for prisoners' constitutional claims generally. *Wolff* was lauded as the "most important" of the Court's prisoner rights decisions during the first decade of the prisoners' rights era, 1965–1975: "[T]he [*Wolff*] Court was necessarily required to decide whether prisoners had any constitutional rights at all. Justice White, writing for a unanimous Court, declared in ringing phrases that they

281. *Id.* at 954.

282. *Id.* at 954–55. Inmates were advised that their only remedy for mistreatment by prison authorities was to file a tort suit in the state courts.

283. This paper has focused exclusively on *Morrissey*'s due process legacy in the criminal justice area, which is its arena of greatest impact. But *Morrissey* also has often been cited by federal courts as precedent in the Fourteenth Amendment's state-created property interest line of cases. *E.g.*, Goss v. Lopez, 419 US. 565, 573, 577, 579 (1975).

284. Unfortunately, this very favorable conclusion was not in the text, but contained in a footnote. FEELEY & RUBIN, *supra* note 279 n.123. *Morrissey v. Brewer* only warranted mention as a citation to a one-sentence discussion of due process rights in administrative settings with a reference to parole revocation. *Id.* at 406 n.122. It is puzzling that Feeley and Rubin questioned whether *Wolff* (and necessarily *Morrissey*) are prisoners' rights decisions: "[O]ne could view *Wolff v. McDonell* as being not a prison case at all, but a due process case involving prisoners." FEELEY & RUBIN, *supra* note 279, at 44.

did, thus confirming the demise of the hands-off doctrine."[285] Feeley and Rubin had glowing praise for *Wolff*: "This decision was important, for it indicated that the Supreme Court would not use its power to quash the prison reform movement, and it provided a surprisingly strong endorsement to the principle that prisoners have rights."[286]

Despite Feeley and Rubin's praise of the Burger Court for ending the hands-off policy, they found fault that "*Wolff* hardly placed the Court at the forefront of the process or provided guidance for the mass of cases that were just then moving through the lower courts."[287] This criticism of *Wolff* is surprising as the Court reached beyond the facts of the case to advise and explain that the due process procedures governing revocation of good-time credits would also govern the imposition of solitary confinement, which is always *a central issue in conditions of confinement litigation*. In doing so, the Court gave considered guidance that can only have been viewed by the lower courts as a clear signal—indeed a green light—that the new open-door policy was not limited to matters involving parole, but was applicable to prison discipline, including solitary confinement, and likely other constitutional claims as well.

Feeley and Rubin credit the federal trial courts, beginning with the Arkansas prison litigation in 1965's *Talley v. Stephens*,[288] as pioneering the prison reform movement.[289] They are unquestionably correct in their assessment of the bold, courageous leadership of Judge J. Smith Henley in both the *Talley* litigation and his 1970 ruling that the totality of the Arkansas prison system was in violation of the Eighth Amendment's cruel and unusual punishment prohibition. But they are too quick to discount the Burger Court's contribution. The Supreme Court can lead without being a drum major. It can lead from behind and by not getting in the way, thus allowing the lower federal courts to build a detailed factual record documenting the scope of the inhumanity of far too many prisons' conditions and to fashion systemic remedies necessary to address the specific constitutional violations. Feeley, Rubin, and I agree upon the relevant Supreme Court decisions—but they see the cup as half empty while I see it as half full.

Feeley and Rubin point to two Burger Court cases within four years of *Wolff* in which the Court continued to give a green light to conditions of confinement litigation. First, in 1976, *Estelle v. Gamble* held that "deliberate indifference to a prisoner's serious illness or in-

285. Feeley & Rubin, *supra* note 279, at 44.
286. *Id.*
287. *Id.*
288. Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).
289. Feeley & Rubin, *supra* note 279, at 39.

jury states a cause of action under § 1983,"[290] which Feeley and Rubin viewed as a "sotto voce signal to the lower courts that they should continue on their course."[291] Second, in 1978, after "the horrors of the pre-1965 Arkansas prison"[292] were laid bare in *Hutto v. Finney*, the Court affirmed the order that "imposed a maximum limit of 30 days on confinement in punitive isolation."[293] The Court continued to find extraordinary remedies legally permissible throughout the 1970s and early 1980s, with only Justice Rehnquist, the lone dissenter in *Hutto*, thinking otherwise.[294] In 1981, in *Rhodes v. Chapman*, the Court reversed the lower court's holding that double celling inmates was cruel and unusual punishment, violating the Eighth Amendment.[295] All Justices but Justice Marshall[296] agreed that the practice of double celling, in the context of all the amenities of the new prison, did not constitute an Eighth Amendment violation. However, the Court's decision counseled that "[c]ourts certainly have a responsibility to scrutinize claims of cruel and unusual punishment, and conditions in a number of prisons, especially older ones, have justly been described as 'deplorable' and 'sordid.'"[297] Justices Brennan, Blackmun, and Stevens wrote separately "to emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions."[298] Feeley and Rubin were very discouraged, almost despairing: "*Chapman* certainly did not end the judicial reform process, but it suggested that the movement had passed its apogee."[299] This author's view is not so bleak, but would take the Court at its word: "When conditions of confinement amount to cruel and unusual punishment, 'federal courts will discharge their duty to protect constitutional rights.'"[300]

290. Estelle v. Gamble, 429 U.S. 97, 105 (1976).
291. Feeley & Rubin, *supra* note 279, at 44.
292. *Id.*
293. Hutto v. Finney, 437 U.S. 678, 680 (1978).
294. Feeley & Rubin, *supra* note 279, at 45; *see Hutto*, 437 U.S. at 710–18.
295. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
296. Justice Marshall wrote: "In a doubled cell, each inmate has only some 30–35 square feet of floor space. . . . The conclusion of every expert who testified at trial and of every serious study of which I am aware is that a long-term inmate must have to himself, at the very least, 50 square feet of floor space—an area smaller than that occupied by a good-sized automobile—in order to avoid serious mental, emotional, and physical deterioration." *Id.* at 371 (Marshall, J., dissenting) (footnotes omitted).
297. *Id.* at 352 (majority opinion) (footnote omitted) (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).
298. *Id.* at 353 (Brennan, J., concurring in judgment).
299. Feeley & Rubin, *supra* note 279, at 48
300. *Chapman*, 452 U.S. at 352 (citation omitted) (quoting Procunier v. Martinez, 416 U.S. 396, 405–06 (1974)); *see* Feeley & Rubin, *supra* note 279, at 48. Others viewed *Chapman* as a moderate decision, believing that if *Chapman* "discourages lower court activism in redressing harsh conditions of confinement, it does so

Although the formal repudiation of the federal courts' hands-off doctrine came in *Wolff,* it was *Morrissey* that ended the longstanding hands-off policy by granting review and deciding the prisoners' constitutional claim on the merits—and by unanimously ruling in favor of the prisoner–parolee's due process claims. *Wolff* delivered the *coup de grâce* to the hands-off doctrine. Like *Morrissey*, *Wolff* was unanimous in holding due process protections applicable to prison discipline (although there was disagreement as to the specific procedures required). In sum, I submit that *Morrissey–Wolff* ushered in a new era of federal court enforcement of prisoners' constitutional rights, including those related to conditions of confinement in the nation's prisons.

It was very significant that it was the new conservative Chief Justice Burger who authored the *Morrissey* opinion, breaking with longstanding court precedent and charting a new course. The *Morrissey* decision ended the hands-off policy as a matter of fact and without fanfare. Early on, the *Meachum* decision confirmed that Chief Justice Burger would not be as progressive on prisoners' rights as the Court's leading liberal Justices, Brennan, Marshall, and Stevens—but that lens is too narrow, for the Court's era of prison reform would never have occurred without Burger and his moderate progressive leadership as Chief Justice. That era of progressive prison decisions began to close after Burger's retirement in 1986, with the Court's decision in *Turner v. Safley*[301] under Chief Justice William Rehnquist's tenure.

In sum, I find Feeley and Rubin's suggestion that the Burger Court played only a minor role in prison reform flawed. I propose a synopsis of the Burger Court's role that is much more favorable and that would clearly distinguish it from the Rehnquist Court that followed: The Supreme Court, more moderate and centrist after Warren Burger became chief justice in 1969, played the lead role in extending due process reform to parole and prisons, ended the federal courts' hands-off policy, opened the door to prisoners' rights claims generally, did not get in the way of the lower federal courts, and looked on favorably as

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more by example and exhortation than by drawing bright lines." Barry Bell, Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 188 (1986).

301. Turner v. Safley, 482 U.S. 78 (1987).

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

Id. at 89 (alterations in original) (quoting Jones v. N.C. Prisoners' Union, 433 U.S. 119, 128 (1977)).

they adjudicated conditions of confinement claims, fashioning systemic remedies until the twilight of the Burger Court. Thereafter, the Court, which became increasingly conservative after William Rehnquist became chief justice in 1986, began a process of retrenchment with an objective to dismantle both the due process and conditions of confinement prison reforms.

B. A Synopsis of the Conditions of Confinement Prison Reform Litigation

Justice William Brennan's concurring opinion in 1981's *Rhodes v. Chapman*[302] summarized the severe humanitarian issues in America's prisons—with specific examples from Alabama, Colorado, and Rhode Island—and reaffirmed "that judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons:"[303]

> No one familiar with litigation in this area could suggest that the courts have been overeager to usurp the task of running prisons, which, as the Court today properly notes, is entrusted in the first instance to the "legislature and prison administration rather than a court." . . . To the contrary, "the soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience."
>
> . . . . [Alabama] institutions were "horrendously over-crowded" to the point where some inmates were forced to sleep on mattresses spread on floors in hallways and next to urinals. . . . [C]ells [were] infested with roaches, flies, mosquitoes, and other vermin. Sanitation facilities were limited and in ill repair, emitting an "overpowering odor" . . . . A United States health officer described the prisons as "wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors." Perhaps the worst of all was the "rampant violence" within the prison.[304]

Justice Brennan continued: "Unfortunately, the Alabama example is neither aberrational nor anachronistic" and he proceeded to describe similar conditions in the Colorado and Rhode Island prisons as examples of a nationwide problem. Justice Brennan explained the dynamics that have complicated political resolution of the myriad issues of prison reform:

> [A]t their core is a lack of resources allocated to prisons. Confinement of prisoners is unquestionably an expensive proposition . . . . [F]unding for prisons has been dramatically below that required to comply with basic constitutional standards. . . .
>
> Over the last decade, correctional resources, never ample, have lagged behind burgeoning prison populations. . . .
>
> Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons. . . . [T]he suffering of prisoners, even if known [by the public], generally "moves the community in only the most severe and exceptional cases." . . .

302. *Chapman*, 452 U.S. at 354–56 (Brennan, J., concurring).
303. *Id.* at 354.
304. *Id.* at 354–55 (quoting Pugh v. Locke, 406 F. Supp. 318, 322–26 (M.D. Ala. 1976)).

> Under these circumstances, the courts have emerged as a critical force behind efforts to ameliorate inhuman conditions. Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost. . . .
>
> Progress toward constitutional conditions of confinement in the Nation's prisons has been slow and uneven, despite judicial pressure. Nevertheless, it is clear that judicial intervention has been responsible, not only for remedying some of the worst abuses by direct order, but also for "forcing the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal systems." . . .
>
> . . . .
>
> Even prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform.[305]

As Feeley and Rubin chronicled: "These judges [who issued prison injunctions] were not fire-breathing radicals. . . . They were middle-of-the-road, upper-middle-class Americans, largely white and male, appointed by Republican and Democratic presidents."[306] That federal judges all across the nation entered injunctions requiring sweeping reforms was an overwhelming indictment of the nation's prisons, reflecting neglect and all too often indifference by the legislative and executive branches nationwide.[307] By the mid-1990s "over 40 state prison systems and hundreds of jails around the country were under some form of court supervision, either through injunctions or consent decrees, due to unconstitutional conditions" and [w]ithin a quarter-century, prisoners had gained legal rights to adequate medical care, to due process, to be free from physical torture, religious rights and more."[308]

The parolee and prisoner rights to due process directly flowed from *Morrissey* and *Wolff*, but the *Morrissey* footprint was much larger as it opened the door of the federal courts to the full range of prisoners' constitutional claims—from the First Amendment to the Eighth Amendment, from access to a prison law library to conditions of confinement. Human Rights Watch reported that, as a result of "Supreme Court decisions ruling that prison conditions were subject to constitutional limits, prisoners and their attorneys filed lawsuits challenging

305. *Id.* at 357–60 (citations omitted) (first quoting N. Morris, *The Snail's Pace of Penal Reform*, *in* PROCEEDINGS OF THE 100TH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION 36, 42 (1970); and then quoting 3 NAT'L INST. OF JUST., AMERICAN PRISONS AND JAILS 163 (1980)).
306. FEELEY & RUBIN, *supra* note 279, at 19.
307. *See e.g.*, Aikens v. Lash, 371 F. Supp. 482 (N.D. Ind. 1974), *supplemented*, 390 F. Supp. 663 (N.D. Ind. 1975), *modified*, 514 F.2d 55 (7th Cir. 1975), *vacated*, 425 U.S. 947 (1976), *and aff'd sub nom*. Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976).
308. John Boston, *25 Years of the Prison Litigation Reform Act*, PRISON LEGAL NEWS (Aug. 2021), https://www.prisonlegalnews.org/news/2021/aug/1/25-years-prison-litigation-reform-act/ [https://perma.cc/YJ4F-DRMG].

inadequate medical and mental health care, dangerous and unhealthy physical facilities, abuse by prison staff, and other unlawful conditions."[309] Often, "federal courts issued prison-wide or even statewide orders to remedy these deficiencies."[310]

C. *Aikens v. Lash*: Class Action Challenge to the Indiana State Prison's Solitary Confinement Practices

Aikens v. Lash,[311] a federal court class action civil rights suit involving a challenge to the solitary confinement cells at the Indiana State Prison in Michigan City, was one such case. *Aikens* demonstrated the reality summarized by Justice Brennan—that inhumane prison conditions could be found nationwide. Readers will also be interested to learn that there were Nebraska ties from my Nebraska Law internship that played an important role in the favorable resolution of *Aikens*. Harold Berk and I served as co-counsel for the prisoners' class. The inmates' principal claim was that their conditions of confinement in the Deputy's Office Segregation Unit (D.O. seclusion unit) were so inhumane they violated the Eighth Amendment's cruel and unusual punishment clause.

There were two key expert witnesses whose testimony proved decisive: Lawrence Carpenter and Maurice Sigler. Bob Kutak had been appointed to the National Advisory Commission on Criminal Justice Standards and Goals and its Corrections Task Force had issued a major corrections report in early 1973. The report included recommendations to reform the conditions of confinement in the nation's prisons, especially solitary confinement. The task force's executive director was Lawrence Carpenter. Upon learning that Kutak was on the National Advisory Commission, I contacted Bob and apprised him of the details of the *Aikens* case. Within forty-eight hours, he arranged for Carpenter to come to Michigan City to serve pro bono as the plaintiffs' expert witness at the ongoing trial!

U.S. District Judge Grant was impressed with Lawrence Carpenter's testimony and quoted it in his opinion:

> "The conditions . . . in that unit don't meet any standards, whatsoever—human standards, the standards of the Commission. It is one of the worst units, if not the worst housing unit, I have ever seen in 30 years of prison work in visiting scores of prisons around this country. It could be called a 'dungeon' except that it is not subterranean, but it might as well be subterranean because there is no daylight coming in there; the cells are dark cells; there's a

309. DAVID FATHI, HUM. RTS. WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 8 (2009), https://www.prisonlegalnews.org/media/publications/Human_Rights_Watch_No_Equal_Justice_-_The_Prison_Litigation_Reform_Act_in_the_United_States_2009.pdf [https://perma.cc/C9ML-3A2T].

310. *Id.*

311. *Aikens*, 371 F. Supp. 482.

high window in the back that used to apparently admit light and air, but they are blocked up so they admit neither now. There is no air circulation whatsoever in those cells. The light is hopelessly poor. Many of the men—as I talked to them, their bodies were rank with odor and the air was close, and I think it is sadistic to put inmates overnight in that type of quarters, let alone having to stay there for months and even years at a time. And I see no useful purpose to be served by continuing the use of that unit a day longer. It should be closed. It should be closed and the building razed or gutted and rebuilt for some other purpose."[312]

Unbeknownst to us, the State of Indiana planned to use Maurice Sigler as its defense expert. You can imagine my surprise when one evening during the latter stages of the trial I got a call from Maury Sigler and learned that he was in Michigan City to serve as the State's expert witness on the *Aikens* case. He had arrived that very day, toured the state prison, including the D.O. seclusion unit, and met with the state's attorneys. He advised that the conditions he observed were among the very worst he had ever seen in his nearly forty years in the criminal justice system, as bad or worse than conditions he observed when working in the Louisiana (Angola) prison system. Sigler insisted that he would testify, but he would effectively be an expert witness for the class of plaintiffs. And, that is precisely what happened. The next day in court I had the privilege of examining Maurice Sigler, former warden of the Nebraska and Louisiana prisons, who was then chairman of the U.S. Board of Parole.[313] Sigler gave compelling testimony about how abhorrent the conditions in D.O. seclusion were.

Due to the large number of prisoners on our witness list, and the State's contentions that the prisoners in solitary confinement were the "baddest of the bad," Judge Grant ordered that the trial would be conducted inside the visitor's room at the Indiana State Prison which he converted to serve as a United States District Court. I have never doubted how important it was for Judge Grant to tour and see the solitary unit conditions for himself and hear the testimony of so many prisoners whose testimony and temperament belied the State's contentions that those prisoners in D.O. seclusion "were the worst of the worst." What emerged from the prisoners' testimony was a picture of barbarous conditions and relentless cruelty, where speaking up or criticizing your treatment or the conditions, especially if you were

312. *Aikens*, 371 F. Supp. at 497.

313. "Sigler began work in [t]he Federal Bureau of Prisons in 1939. He served in the United States Navy 1943–1945. He was Warden of the State Penitentiary at Angola LA from 1952–1958. In 1959, he became Warden of the State Penitentiary in Lincoln, and Director of the first Department of Corrections in Nebraska in 1967. Sigler was appointed to the United States Parole Commission in Washington, D.C., in 1971 and served as Chairman 1972–1976." *Maurice H. Sigler Obituary*, LEGACY (Dec. 10, 2009), https://www.legacy.com/us/obituaries/theledger/name/maurice-sigler-obituary?pid=137120424 [https://perma.cc/Y5A8-9JAC].

black, prompted the prison to do everything it could to break you. Judge Grant not only found that the conditions violated the Eighth Amendment, but he followed Lawrence Carpenter's suggestion and issued an injunction ordering the entire D.O. seclusion unit closed![314] It was the first time that a federal judge had ordered closure of a solitary unit at a maximum-security prison. Although the solitary confinement ruling was indeed revolutionary, the state did not appeal the injunction. The state knew that if it could not win before conservative Judge Robert Grant, it most certainly could not obtain a reversal from the Seventh Circuit in Chicago—a more progressive court. Indeed, the state did appeal other issues, and the Seventh Circuit made it clear in one of those appeals that it unequivocally approved of Judge Grant's D.O. seclusion unit injunction, observing that the record showed "the abhorrent conditions existing in D.O."[315]

A year later, as part of the plaintiffs' class counsel's monitoring responsibilities, Berk and I made a return visit to the prison. The other solitary unit, known as I Cellhouse Detention Unit (I.D.U.), had been restored, and its operations were being run in a humane way consistent with the court's order. Meaningful mental health care was finally being provided. Among the other issues upon which we prevailed was the right of prisoners to have access to a basic law library. Well, to our total surprise, the prison had not demolished the D.O. seclusion unit, but had converted it into a prison law library. They had gutted its insides and installed skylight windows. What an amazing transformation! What had been a hellhole filled with forty-eight dreadful individual dungeons was now open and airy, with the skylights bringing in daylight, and serenely quiet—as a law library should be.

Often class action cases require years of litigation, so long that even when won, the remedies and reforms are of help only for the next generation. The injunctive relief obtained in *Aikens v. Lash* dramatically improved conditions of confinement in the punitive isolation units of Indiana's maximum-security prison and did so immediately. It was deeply gratifying that our litigation immediately made life better for Marvin Aikens, Tom Crowder, and their fellow inmates and the reforms promised to be long lasting.

The prisoners' rights litigation that brought about systemic remediation of longstanding neglect and wrongs deserves the nation's praise, as do the many federal judges nationwide who were shocked into action by the conditions exposed in their courtrooms. It has been pointed out that perhaps American exceptionalism provides the explanation for why "oversight and reform of conditions in these institu-

314. *Aikens*, 371 F. Supp. 482.
315. Aikens v. Lash, 514 F.2d 55, 58 n.7 (7th Cir. 1995).

tions has fallen primarily to the federal courts."[316] Just as Chief Justice Burger drew lessons on penological reform from visiting European prisons, the Human Rights Watch did too: "Unlike many other democracies, the United States has no independent national agency that monitors conditions in prisons, jails, and juvenile facilities and enforces minimal standards of health, safety, and humane treatment."[317]

VI. CONCLUSION AND KUDOS

I am very grateful for the Nebraska Law internship that began this journey, for the wonderful mentoring of Harvey Perlman and Bob Kutak that led me into public service, and for the *Nebraska Law Review* experience that helped me hone the research and writing skills that have been a central part of my professional career. What better experiential education could one have than to work side-by-side with Perlman and Kutak on the comprehensive reform legislation that became the Nebraska Treatment and Corrections Act? What better education on democracy in action than to watch Kutak, a superb mediator blessed with an unabashed optimism that common ground could always be found?

I am also thankful for the low-cost public education the University of Nebraska College of Law provided me, and that Nebraska Law continues to provide to its students. It enabled me to graduate virtually debt-free, which freed me to serve the poor in Indianapolis as a legal services lawyer for five years. And that public interest lawyering experience nurtured the pro bono civil rights law commitment that has been a joy to fulfill through law reform lawyering for the NAACP for forty-eight years and counting. The legislation–litigation combination that was the *Morrissey* experience was an exceptional first lesson in the synergy of bold ideas and perseverance, qualities that I've come to learn are crucial to lawyers and grass roots advocates working for social justice.[318] Although Harold Berk and I were newbies, I think we

316. FATHI, *supra* note 309.
317. *Id.*
318. Dr. Martin Luther King's famous 1968 quote capturing the importance of these qualities has been immortalized on the southern granite wall of the MLK Memorial in Washington, D.C.: "We shall overcome because the arc of the moral universe is long, but bends towards justice." *Martin Luther King, Jr. Memorial: Quotations*, NAT'L PARK SERV., https://www.nps.gov/mlkm/learn/quotations.htm [https://perma.cc/B2J7-E8H8] (Apr. 29, 2021). A quotation by Johann Wolfgang von Goethe, the German poet who wrote during the first fifty years of America's independence, is less visionary, but provides succinct on-the-ground guidance: "In the realm of ideas everything depends on enthusiasm. . . . in the real world, all rests on perseverance." *Johann Wolfgang von Goethe*, GOODREADS, https://www.goodreads.com/quotes/849752-in-the-realm-of-ideas-everything-depends-on-enthusiasm [https://perma.cc/CRK9-9YFH] (last visited Feb. 23, 2022).

were seasoned enough to appreciate that the sweeping reform achieved in *Morrissey* was the exception, and that most law reform is incremental.

On behalf of Harold Berk and myself, I would like to give a "Bravo! Bravissimo!" to Morrissey's appointed counsel, Don Brittin, for his skillful appellate advocacy. We are grateful to Don Brittin for the opportunity to collaborate with him when the *Morrissey* case got to the Supreme Court. I am sad that Don, who passed away, way too young in 2002, will not be able to join the *Morrissey* fiftieth anniversary celebration in 2022.

Morrissey v. Brewer was a landmark decision in 1972 and it continues to be landmark today. Even with a dramatic increase in the number of persons under parole supervision, it has withstood prison population pressures and the "tough on crime" political pressures. *Morrissey*'s core holdings as to parole revocation are as vital today as ever, requiring a full evidentiary hearing with the same array of procedural safeguards it set forth originally. The Supreme Court has not cut back or diluted its holding whatsoever. The corrections community has embraced the due process protections, recognizing that these safeguards ensure that parolees are treated with dignity and fairness, values that further the rehabilitation of parolees even when their misconduct warrants revocation.

Morrissey's large legacy also encompassed internal prison administration. Under the leadership of *Morrissey*'s author, Chief Justice Warren Burger, the Court extended *Morrissey*'s due process holdings to internal prison discipline so that prisoners had a right to be heard in matters ranging from the parole release decision to the imposition of solitary confinement. Three of the leading Supreme Court precedents—*Wolff*, *Greenholtz*, and *Vitek*—arose in the Nebraska correctional system, with the Nebraska Treatment and Corrections Act figuring prominently in each decision. The Nebraska TCA was the catalyst for the Court's initial recognition of a state-created liberty interest in *Wolff* and for the state-created liberty interest holdings in both *Greenholtz* and *Vitek*. The state-created-liberty approach builds upon federalist principles that allow experimentation at the state level and enables the courts or Congress to fine-tune and fashion a nationwide rule. It is fair to say that the Nebraska Treatment and Corrections Act has not only served Nebraska well, it played an outsized role in federal constitutional due process law after *Wolff*.

Supreme Court decisions do not just happen; lawyers must build the case in the lower courts, and then persuade the Court to grant review and to rule favorably. Kudos to the Nebraska lawyers who were the prisoners' advocates in the three post-*Morrissey* decisions—Douglas Duchek in *Wolff*, Brian Ridenour in *Greenholtz*, and Thomas Wurtz in *Vitek*—each of whom, it appears, served as court-appointed

counsel.[319] Kudos also to the Nebraska federal judges who recognized the merits in the prisoners' claims—U.S. District Court Judges Albert Schatz and Warren Urbom in *Greenholtz* and *Vitek*, respectively, and U.S. Court of Appeals Judge Donald Lay, who dissented in *Morrissey* and participated in the three-judge district court in *Vitek*.

Morrissey ended the hands-off policy of federal courts, thereby opening the federal courthouse doors to prisoners and their claims, and for nearly a quarter of a century, the federal courts remedied inhumane, unconstitutional conditions in prisons all across the nation. Nearly one hundred and seventy-five years ago, Fyodor Dostoevsky, himself a political prisoner in Tsarist Russia, wrote that "the degree of civilization in a society can be judged by entering its prisons."[320] This author is confident that Chief Justice Warren Burger read Dostoevsky, as the Chief Justice had compassion that extended to the lives of those who were imprisoned.[321] I share the view of James Duff, executive director of the Supreme Court Historical Society, that "Chief Justice Warren Burger's contributions to improving justice through more efficient judicial administration *and prison reform* deserve far more attention."[322] The Chief courageously wrote the trailblazing *Morrissey* decision and demonstrated his leadership ability by securing a unanimous Court. That unanimity brought fundamental fairness to parole revocations and internal prison discipline, and opened wide the fed-

319. Of course, two Nebraska lawyers, Kutak and this author, contributed to amicus curiae briefs in *Morrissey* itself and, along with Harvey Perlman, drafted the Nebraska Treatment and Corrections Act that was essential to the *Wolff* and *Greenholtz* decisions and provided an alternative basis for decision in *Vitek*. University of Nebraska College of Law graduates played prominent roles in the TCA, *Morrissey*, *Wolff*, *Greenholtz*, and *Vitek*: Harvey Perlman, J.D., 1966; Russell Lovell, J.D., 1969; Douglas Duchek, J.D.,1971; Brian Ridenour, J.D., 1974; and Thomas Wurtz, J.D., 1974.

320. THE YALE BOOK OF QUOTATIONS 210 (F. Shapiro ed., 2006).

321. "Chief Justice Warren Burger notes why citizens should care about prison conditions. He states that prisons should be decent, clean, and humane, and that prisoners should work at gainful occupations. In addition, he advocates vocational training and academic education for inmates." *Nightline: Interview with Chief Justice Warren Burger* (ABC television broadcast, June 19, 1984). "Warren E. Burger, our Nation's 15th Chief Justice, was a tireless advocate of prison reform. He believed that creating prison correctional and industrial programs to provide inmates meaningful work skills training while incarcerated, would set the course for a productive future, upon release." UNICOR, FACTORIES WITH FENCES: 75 YEARS OF CHANGING LIVES 2 (2009), https://unicor.gov/publications/corporate/CATMC1101_C.pdf [https://perma.cc/3A85-XAV2]; *see Mr. Burger's Case for Prison Reform*, CHRISTIAN SCI. MONITOR (Dec. 30, 1980), https://www.csmonitor.com/1980/1230/123012.html [https://perma.cc/5D4Q-WJ8B].

322. Tony Mauro, *Warren Burger's Biography: Decades in the Making, and Still Not Done*, LAW (Aug. 30, 2021) (emphasis added), https://www.law.com/nationallawjournal/2021/08/30/warren-burgers-biography-decades-in-the-making-and-still-not-done/?slreturn=20220123071209 [https://perma.cc/6YME-TYUS].

eral courthouse doors to prisoners' constitutional claims for nearly twenty-five years.