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A BY-PRODUCT OF MASS INCARCERATION: New York's Parole System in Need of Repair

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New York's Parole System in Need of Repair
by Release Aging People in Prison/RAPP
RAPPCampaign.com

*"For the courts of this state to repeatedly entertain petitions and issue decisions ordering de novo hearings because the [Parole] Board fails to follow a clear statutory standard is wasteful of the time of all involved and of the resources of the State."*¹

This is how an Orange County, New York judge described the impasse that has arisen between segments of the community and the state's Board of Parole. As policy makers and thousands of New Yorkers search for ways to reverse the trend of mass incarceration that has swollen the population behind bars and damaged our communities, the Board of Parole has stubbornly stood in the way. Despite clear guidance in recent law, the Board persists in holding incarcerated people well beyond their minimum sentences, based only on the nature of the original offense. Intervention is needed so that the Board will follow the law and judge parole applicants based on their current character, achievements, and evidence of the risk they pose or do not pose to public safety.

Some history: how Parole Board practices feed mass incarceration

The crisis within parole and other prison release mechanisms in New York State has been mounting for the past 25 years. Back in the early 1990s these systems became co-opted by an encroaching punishment paradigm spreading across the United States, part of the misguided "tough on crime" wave. Consequently, a process commenced of routinely denying parole and release applications regardless of the level of change, rehabilitation, time already served, infirmities, or other humane considerations exhibited by the parole applicant. This was especially the case for those who had been convicted of serious or violent offenses.

Accordingly, this failure on the back-end release valve of the criminal justice system arguably played a major role in ushering in mass incarceration. In a 1999 article, a former Chairperson of the New York State Board of Parole wrote, "while the criteria for parole eligibility have not changed by legislative enactment, an examination of the current release practice of the Board of Parole reveals that the current parole system has been at the forefront of an ideological revolution."²

¹ Justice Sandra Sciortino writing in *Alejo Rodriguez v. New York State Board of Parole, Decision and Order*, index No. 8670/2015, returnable 1/14/2016, Orange County

² Hammock, Edward R. & James F. Seelandt, "New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of The Parole Board's Discretion", *Journal of Civil Rights and Economic Development*, Volume 13, Spring 1999, pgs. 527-528.

As the prison population in New York State began to expand, in conjunction with a paradigm shift which paved the way for cursory parole reviews with rubberstamp denials, management challenges were presented to the parole commissioners responsible for carrying out their daily duties. RAPP created a chart which demonstrates that, all other things being equal, given the (a) number of days in which parole hearings are held each month; and (b) number of hearings held each month, the average time that can be allotted to each parole hearing is less than five (5) minutes.³

And that says nothing about the ancillary work duties required of each parole commissioner. Given this framework, it soon became apparent that much of the daily work necessitated the adoption of boilerplate decisions to be employed in the vast majority of cases. It seemed that emerging mass incarceration required the Parole Board to engage in “mass production” in its decision-making processes.

This “structural shift” in the way the Parole Board’s business operated put the agency in the unenviable position of, on occasion, even having to openly resist and defy judicial decisions and court orders.

An excellent example of this defiance, and which can be viewed as an “ongoing contemptuous process” in Parole Board practice, can be seen in the case of *Harris v. N.Y.S. Division of Parole*, 628 N.Y.S.2d 416, 211 A.D.2d 205 (1995).

The New York State Division of Parole, in addition to providing regular hearings for people due for release consideration (parole, compassionate release and clemency), is also responsible for providing reviews of administrative appeals submitted by people when release is denied. Outside of their duties to conduct release hearings, the Board’s commissioners are also responsible for reviewing and making decisions on the voluminous appeals submitted through the administrative process. According to the regulations governing administrative appeals, the appeals are to be conducted by three (3) commissioners sitting in conference, and none of them should be of the original panel that considered and denied release.

In 1995, the litigant in *Harris v. N.Y.S. Division of Parole*, *supra*, who had been denied parole and thereafter filed an administrative appeal, took note that the official decision he received from the Appeals Unit denying his appeal indicated that each commissioner signed and dated the decision and notice on different dates. Mr. Harris

³ See “It is Important to Understand Structural Barriers in Parole Advocacy,” <http://rappcampaign.com/wp-content/uploads/It-is-Important-to-Understand-Structural-Advocacy-to-Parole-Advocacy.pdf>

challenged that process when he ultimately submitted his Article 78, or judicial challenge, to the local court upon exhausting all his administrative remedies.

The local court held that Mr. Harris was correct in that the Parole Board appeal process he received was severely flawed. The Parole Board then appealed the decision to the higher court but lost there too. The Appellate Division Third Department agreed that the appeal hearing was in violation of lawful procedure and found that the commissioners must meet “collectively” to render a proper decision. *See, Harris v. N.Y.S. Division of Parole, supra.*

But what happened next is most interesting and instructive.

Likely driven by the its utter reliance on mass production processes and an inability, given its limited allotted time and resources, to provide “lawful” administrative appeal decisions even if it desired to do so, what the Board did instantly after the *Harris* decision was to begin issuing an otherwise identical notice of its administrative appeal decisions, but with the removal of the section which previously showed the **date** of each commissioners’ signature. This allowed the Board to proceed with business as usual without advising the parole appeal applicants of any dates the decisions denying the appeals were made. The obvious objective was to make it difficult for an applicant to argue that the decision was not made by committee.

To compound matters, some years later when parole applicants whose administrative appeals were similarly denied submitted Freedom of Information Requests to the Board of Parole seeking the dates that their decisions were made, the answers were always along the line of: *“Please be advised that there is no document or other information indicating the actual date each of the members of the Board of Parole signed the Administrative Appeal Decision Notice...”*⁴

A similar process of conducting administrative appeals and rendering the decisions is still in existence today.

An attempt to change Board practices

In 2011, after years of frustration by community groups and legislators seeking to rein in Parole Board practices that seemed to be without any executive oversight, the New York State Legislature passed a revision of Executive Law §259-c (“State Board of parole; functions, powers, and duties”) that requires the parole Board to establish and apply “risk and needs principles to measure the rehabilitation of persons

⁴ See, *“It is Important to Understand Structural Advocacy to Parole Advocacy,” op cit.*

appearing before the Board” and to gauge the likelihood of success should the parole applicant be released.⁵ The amendment was intended to correct the Board’s practice of focusing solely on the nature of crimes committed perhaps decades earlier. Risk and needs assessments use objective, scientific standards — rather than the subjective viewpoints of individual parole commissioners — to guide the Board in its key task: predicting whether a parole applicant will, if released, commit crimes.⁶

Basing release on such standards reflects New York's mandate to protect public safety as well as to honor the rehabilitative goals of the penal system. New York adopted an actuarial assessment model called COMPAS for use in its decision-making. This approach creates an individualized picture of how the incarcerated person has changed since the original crime, what risks there are for future criminal behavior, what support is necessary for the individual's successful reentry, and critically, what kinds of skills, attitudes and capacities the individual has developed during incarceration. As of 2014, at least 20 states had adopted similar models.⁷

Once the new law was passed, it became necessary for the Parole Board to revamp its regulations to reflect the new standards.

The Board ignores the new law, round one

For about three years after the new law passed, community advocates, incarcerated people, and lawyers urged the Board to draft new regulations as required by the law, to no avail. Trying to remedy the problem, Assembly member and chair of the Committee on Corrections Daniel O'Donnell convened a public hearing on parole practices in Albany in early December 2013. Along with dozens of community members and advocates, representatives of the Department of Corrections and Community Supervision, including Parole Board Chairperson Tina Stanford, testified at what turned into an all-day hearing. In her testimony, Stanford made no mention of new regulations. Later in the day, however, community members learned that the Board had in fact finally posted new draft regulations just one day earlier.

The new regulations were not good. Instead of responding to the spirit and letter of the new law, they once again attempted to smother the use of risk and needs

⁵ <http://codes.findlaw.com/ny/executive-law/exc-sect-259-c.html>. The revision directs the Board to “establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release, and assist members of the state Board of parole in determining which inmates may be released to parole supervision;” - See more at: <http://codes.findlaw.com/ny/executive-law/exc-sect-259-c.html#sthash.Lee9TFVL.dpuf>

⁶ See O'Donnell and Zebrowski, op cit

⁷ Starr, Sonja B., http://www.stanfordlawreview.org/sites/default/files/66-Stan_L_Rev_803-Starr.pdf, p. 809

assessment amidst a mountain of additional factors to be weighted in making release decisions.

In a joint statement responding to the Board's draft regulations, Corrections Committee Chair O'Donnell and Kenneth Zebrowski, Chair of the Assembly's Administrative Regulations Review Commission, wrote,

"We were extremely disappointed to see that the proposed rules contain no substantive change to the working requirements of the Parole Board. Indeed, they fail to achieve any change in the status quo, much less the significant change envisioned at the time we negotiated the amendments [to the executive law].

"The proposed rules treat the requirements of 295-c (4) of the Correction Law as mere additional factors for consideration by the Parole Board. Had the legislature wanted to add additional factors we would have done so...

"We believe the intent of the Legislature was to modernize and make more objective a parole process that has been overly subjective in the past. The proposed rules do not do that. "⁸

During the subsequent 90-day public comment period, formerly and currently incarcerated people, their families, legal and civil rights organizations, and other concerned groups and individuals echoed Assembly Members O'Donnell and Zebrowski, filing letters criticizing the new regulations. Normally, according to those who monitor public comments for the state, a new regulation garners at most 30 to 60 comments. In contrast, the parole regulations drew some 300 comments.⁹

The overwhelming majority of comments asserted that the Board's draft regulations were inadequate to address the core problem: parole decisions currently function more as retrials of parole applicants than as assessments of the individual's readiness for release. Because the Board consistently bases its decisions largely on the "nature of the original offense" committed by an applicant, the community argued for the regulations to be amended to shift the focus to risk assessment and rehabilitation. This would allow the Board to release people—especially elders and other long-termers—who pose little or no risk to public safety and for whom longer incarceration serves no rational purpose but simply wastes community resources.

⁸ O'Donnell and Zebrowski, "Re: Proposed Rule on Parole Decision-Making, I.D, No. CCS-51-13-00013-P," <http://www.correctionalassociation.org/wp-content/uploads/2014/01/Assemblymember-Daniel-ODonnell.pdf>

⁹ A small sample of the comments submitted can be reviewed at <http://www.correctionalassociation.org/resource/public-comments-in-support-of-parole-reform>

Community comments also insisted that the Board provide specific guidelines as to why an applicant was denied and what the person could do to improve the chance of parole.

Ignoring the community took less than three minutes for New York State's Parole Board. At their April 21, 2014 meeting, the Board dismissed the more than 300 public comments that urged the use of objective and consistent criteria in release decisions. With no discussion—without a single mention of any of the myriad comments from the community—the Board unanimously passed their original draft.

When Governor Cuomo wrote, in his 2016 agenda for New York State, that only 1 in 5 applicants for parole are granted release, and that he wants to expand that number, he was responding to these years of community pressure and demands for a more functional parole system in New York State, as well as to the growing national consensus that reform of the criminal justice system is urgent if we are ever to solve the problem of a disastrously swollen prison system. Sadly, the governor's agenda did not provide clear direction on how to remedy the problem. In addition, the commissioners of the Board of Parole have not responded to the national and statewide cry for parole justice. That is why intervention by other state authorities is needed.

The Board ignores the law, round two

Since their adoption of the new, faulty regulations, the Board has exhibited a similarly dismissive attitude toward community sentiment and the law, consistently ignoring the real meaning of 259-i and continuing a practice of granting only about 1 in 5 parole applications. (Note: that rate seems to have increased slightly in the past two months, as policy-makers have begun to respond to the pressure from the community.)

Parole applicants, their lawyers, and the community have not let the Board's intransigence pass without a fight. Even more significantly, some courts have also taken note of the Board's insistence on going on with business as usual. Recently, several courts have taken the Board to task, some even going so far as to hold the Board in contempt of court.

A parole applicant who is denied release must first file an administrative appeal, and then, when that is either denied or ignored ("constructively denied" after 120 days), can file an Article 78, the means by which New York law permits an individual to challenge an administrative action. An Article 78 is heard by a court, as opposed to being decided by the Parole Board itself.

Since the Parole Board's new regulations went into effect in April 2014, numerous Article 78s have been granted. Even when such an appeal is granted, however, the courts consistently maintain that the only power they have is to order the Board to grant the applicant a new, or *de novo*, hearing. All too often, such hearings merely repeat the error of the original hearing.

While it may or may not be correct that courts do not have jurisdiction to order the release of a petitioner, it has long been established that a court of record has the power to "*...punish, by fine or imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced.*" (New York Judiciary Law, Section 753).

The courts take on the Board

In the past year, several courts have severely criticized the Parole Board—in some cases citing the Board for contempt—in these situations. When contempt citations have been issued, courts have ordered the Board to pay attorney fees to the litigant, in addition to ordering daily accumulating costs paid to the litigant until a new and fair hearing is held.

Most recently—and most emphatically—on May 24, 2016, a Dutchess County court held the Board in contempt of court in the case of John MacKenzie, levying a fee of \$500 a day for the Board until a new and proper hearing is held and “a decision is issued in accordance with executive law 259-I (2).”¹⁰

Mr. MacKenzie had filed a motion for contempt following a string of parole appearances and denials stretching over 15 years. In 2015, the court had ordered a *de novo* hearing after one such denial, citing the Board's failure to do more than rehash the details of the original crime. When the new hearing merely echoed the earlier ones, Mr. MacKenzie sought the contempt citation. In her decision granting Mr. MacKenzie's motion, Dutchess Supreme Court Justice Maria G. Rosa wrote, “It is undisputed that it is unlawful for the parole Board to deny parole solely on the basis of the underlying conviction. Yet the court can reach no other conclusion but that this is exactly what the parole Board did in this case.”

¹⁰ John MacKenzie v. Tina M. Stanford, Decision and Order, Index#2789/15
<http://nylawyer.nylj.com/adgifs/decisions16/060116rosa.pdf>

See also a New York Times editorial on this case: http://www.nytimes.com/2016/06/13/opinion/a-challenge-to-new-yorks-broken-parole-Board.html?_r=0

She also wrote, "It is undisputed that this petitioner has a perfect institutional record for the past 35 years. This case begs the question, if parole isn't granted to this petitioner, when and under what circumstances would it be granted?"

In another recent case, brought by petitioner Alejo Rodriguez, Orange County Justice Sandra Sciortino ruled that the Board had "issued a boilerplate decision" in Mr. Alejo's case, and continued:

"The instant matter, like so many others, arises from the Board's failure to abide by statutory mandates. The Board is without authority to ignore the command of the Legislature. In continuing to issue such manifestly inadequate decisions despite a clear Legislative mandate, and in the face of so many cases in the courts of this state which reinforce that mandate, the Board is essentially thumbing its nose at the Legislature and the courts. Such behavior cannot be condoned...

"The courts will continue to enforce the requirement announced by the Legislature as long as it remains necessary. However, for the courts of this state to repeatedly entertain petitions and issue decisions ordering *de novo* hearings because the Board fails to follow a clear statutory standard is wasteful of the time of all involved and of the resources of the State. " ¹¹

In a case in Sullivan County, after the court ordered a *de novo* hearing and the Board failed to schedule one in timely fashion, the attorney representing the litigant has petitioned the court to order the Board to pay a "daily fine of \$250.00 directly to Petitioner Dempsey Hawkins, every day until its contempt is purged." The court's original order for a *de novo* hearing in this case was based both on the failure of the Board to consider anything other than the nature of the original offense, and their failure to consider the age at which Mr. Hawkins had committed the murder. ¹² In *Cassidy v. New York State Board of Parole*, 2255/14, an Orange County Supreme Court judge ordered the Board to pay the attorney representing Mr. Cassidy \$3,000 and grant a new hearing within 60 days. When the Board denied parole again at the return hearing, focusing on Mr. Cassidy's criminal offense, the court held the Board in

¹¹ See *Alejo Rodriguez v. New York State Board of Parole*, Decision and Order, index No. 8670/2015, returnable 1/14/2016, Orange County.

Mr. Rodriguez had a *de novo* hearing in April, 2016, and was again denied.

¹² *Dempsey Hawkins v. New York State Department of Corrections and Community Supervision*, Index No. 0011-15, Sullivan Cty. <http://www.newyorklawjournal.com/id=1202756466025/Matter-of-Hawkins-v-New-York-State-Department-of-Corrections-and-Community-Supervision-521536?slreturn=20160522111949>

See also http://www.nytimes.com/2015/07/04/nyregion/a-crime-rehashed-and-parole-denied-again-and-again.html?_r=0 and <http://www.courthousenews.com/2016/05/02/parole-possible-for-long-imprisoned-killer.htm> for information about this case and the parole denials. In the court opinion issued May 2016, the concurring opinion by J. Garry most clearly raises the issue of the Board's irrational fixation on the nature of the offense.

<http://www.courthousenews.com/2016/05/02/parole-possible-for-long-imprisoned-killer.htm>

contempt, ruling that the determination under Executive Law had to be “future-focused risk assessment procedures.” This case was recently overturned on government appeal. However, the reasons given by the reversing court focused on the mediocre risk assessment scores of Mr. Cassidy, thus failing to meet the central issue more clearly present in other cases.¹³

The growing number of cases brought of necessity due to the Board’s “thumbing its nose” at the law will indeed continue to present a problem for jurisprudence and administration in the State.¹⁴

Conclusion

Given all of the foregoing, it is crucial that direct and affirmative action be taken by all concerned parties and public officials to compel the New York State Board of Parole to follow the law, respect the opinions expressed by the community on this issue, and to cease and desist the current practice of issuing “boilerplate” denials of parole to worthy candidates, solely because of the nature of their crime and based on a vague, unsubstantiated opinion that the person’s release will “so deprecate the serious nature of the crime as to undermine respect for the law.”

Get involved to bring about justice!

“If the risk is low, let them go.”

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¹³ https://www.google.com/?gws_rd=ssl#q=cassidy+parole&tbm=nws

¹⁴ http://thechiefleader.com/news/news_of_the_week/judge-throws-book-at-parole-Board-for-denial/article_dc5bf744-114c-11e6-bee1-87729cd542e4.html