

New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards' Discretion

Edward R. Hammock

James F. Seelandt

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NEW YORK'S SENTENCING AND PAROLE LAW: AN UNANTICIPATED AND UNACCEPTABLE DISTORTION OF THE PAROLE BOARDS' DISCRETION

EDWARD R. HAMMOCK* AND JAMES F. SEELANDT**

The fourth year of Governor George E. Pataki's tenure has been witness to some dramatic changes in the criminal justice process.¹ Sweeping reformations sponsored by Governor Pataki include the restructuring of sentencing guidelines,² and the sharp curtailing of parole eligibility.³ While the criteria for parole eligibility have not been changed by legislative enactment,⁴ an examination of the current release practices⁵ of the Board of

* B.A. Brooklyn College 1959; J.D. St. John's University School of Law 1966. Edward R. Hammock, the former Chairman of the New York State Board of Parole, is currently in private practice in New York and specializes in post conviction advocacy.

** B.A. Marist 1990; M.P.S. State University of New York, New Paltz 1993. Mr. Seelandt is a Client Advocate with The Bronx Defenders with a specialization in appellate practice. He has lectured at New York Law School on the subject of New York's sentencing and parole laws.

¹ See *Sentencing Reform Act of 1995*, ch. 3 (1995) [hereinafter Act] (requiring determinate sentences for all violent felons or non-violent felons who are subsequently convicted of violent felony heightened standards for applying "good-time" credit to determinate sentences); see also COLO.REV.STAT. § 18-1-105 to -107 (Bradford 1997) (providing specific fines and sentences for five classes of felonies); MO.ANN.STAT. § 558.016 (Vernon 1979) (allowing heightened sentences for repeat offenders and providing maximum sentence for all felonies); TENN.CODE.ANN. § 40-35-101 to -35-112 (Michie 1997) (stating uniformity in sentencing as its purpose).

² See Act, *supra* note 1, at 108-10 (providing that all violent felonies are to have a court fixed minimum sentence).

³ See Act, *supra* note 1, at 114-15 (providing that person serving one or more determinate sentence is ineligible for discretionary release or parole).

⁴ See Frederic Pierce, *Families Vow to End Parole for Violent Felons/Rally Puts a Name and a Face to Proposed Legislation*, POST STANDARD (Syracuse), Nov. 25, 1997, at A1 (noting Governor Pataki's resolution eliminating parole for first-time violent felons was defeated 73-71); *Pataki, Silver Spoon Squabble Over Parole Reform*, TIMES UNION (Alb.), June 27, 1997, at B2 (noting partisan conflict over Governor Pataki's parole-ending legislation). *But see* John Caher, *Slaying Case Spurs Calls for Parole Reform*, TIMES UNION (Alb.), Feb. 11, 1998, at B2 (noting that in wake of violent murder of nursing school student by paroled violent felon, "[t]hen Democratic Assembly members who last year opposed a Republic measure have signed on to their own version").

⁵ See Spiros A. Tsimbinos, *Limitations on Parole and its Possible Consequences*, 1996 No.13 N.Y. CRIM. L. NEWS 1 (stating that "in the last few years the [New York State] Pa-

Parole⁶ ("the Board") reveals that the current parole system has been at the forefront of an ideological revolution.⁷ Increasingly, this has meant the exclusion of entire classes of otherwise eligible offenders from being granted release into parole supervision, in direct contravention of various provisions of the Executive Law⁸ and a long line of Appellate Division decisions.⁹

Despite the foregoing, the Board has also been subject to intense public scrutiny and criticism¹⁰ due to expressed concerns that the parole process it oversees may actually be facilitating hardened ex-offenders' regression into a life of crime and violence upon their release.¹¹ As a direct result, one of the Board's major tactics has been the withholding of discretionary release

role Board seems to have adopted a more stringent policy regarding early release on parole" because in 1987 Parole Board granted parole to 60% of persons having homicide convictions who came before it, compared to 25% in 1994 and 4% in 1995).

⁶ See N.Y. EXEC. LAW 259-b[1] (McKinney 1993). The New York State Board of Parole is a statutorily created review board comprised of not more than 19 members appointed by the Governor confirmed by the Senate and shall serve a term of six years. *Id.* Each board member is required to have an undergraduate degree plus at least five years professional experience in the one or more fields of criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry or medicine. *Id.* at b[2]. The Board is charged with compiling and maintaining detailed records on each inmate received and every inmate released on parole. *Id.*; see also N.Y. EXEC. LAW 259-a[1]-[2]. Moreover, the Board is responsible for prompt determination upon receipt of inmate, of such person's minimum period of imprisonment, parole eligibility and revocation of parole and conditional release. N.Y. EXEC. LAW § 259-i[1]-[3].

⁷ See, e.g., Alan J. Chaset, *Something Old Something New*, 5 SPG CRIM. JUST. 11, 39 (1990) (discussing changes in US sentencing commission guidelines); Peter B. Hoffman, *History of the Federal Parole 1910 - 1972*, 61 FED. PROBATION 23, 23 (1997) (discussing ideological changes in parole requirements); Michael Fisher, *Changing Pennsylvania's Sentencing Philosophy Through the Evolution of Parole for Violent Offenders*, 5 WIDENER J.PUB.L. 269, 272 (1996) (discussing changes and effects in parole requirements).

⁸ See Tsimbinos, *supra* note 5, at *1. While first time violent offenders may still be eligible for parole under indeterminate sentences effected before Oct. 1, 1995, they are currently being denied parole more and more at the discretion of the Parole Board. *Id.* at *1.

⁹ See *Matter of King v. New York State Bd. of Parole*, 598 N.Y.S.2d 245, 250 (1st Dep't 1993) (finding that Parole Board's denial of parole application of individual convicted of felony murder where inmate had served 22 years and had demonstrated "extraordinary rehabilitative achievements" was abuse of discretion because Board had premised its decision "on a fundamental misunderstanding of its role and power, and was not in accord with statutory requirements").

¹⁰ See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991) (noting demise of rehabilitation philosophy in criminal justice system over last two decades).

¹¹ See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 579 (1994) (noting that criticism of Parole Board discretion focuses on arbitrariness of decisions rendered and failure to cure recidivism). See generally Robert Blecker, *Heaven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1154 (1990) (comparing and contrasting validity of rehabilitation and retribution through daily experiences in rural Virginia prison).

for certain classes of offenders.¹² Moreover, inherent in the operation of New York's parole system is a difficult dilemma: How to best balance the requirements of individual freedom, justice and public safety?

The approach taken by the New York State Board of Parole in addressing this dilemma and striking a potential balance is the subject of this study. Upon closer scrutiny of the parole process, however, it becomes abundantly clear that the Board itself from time to time deviates from the Legislature's intent¹³ and sometimes even acts outside the scope of the Executive Law.

Parole (i.e. discretionary release) involves hard decisions for high stakes. In this regard, the criminal defense bar is witnessing a dramatic shift towards a more punitive approach toward convicted offenders.¹⁴ Accordingly, by way of this article, the Correctional Relations Committee of the New York State Association of Criminal Defense Lawyers seeks to examine this trend more closely, particularly as it relates to discretionary release upon parole.

¹² See Palacios, *supra* note 11, at 578 (discussing parole release guidelines to structure court's discretion); Louis B. Schwartz, *Options in Constructing A Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 659-62 (1981) (noting court's wide discretion in imposing conditions on parole and in revoking parole).

¹³ See Julio A. Thompson, Note, *A Board Does Not A Bench Make: Denying Quasi Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241, 258-65 (1988) (discussing problems in parole board system, including lack of thoroughness among the board members and limited checks on authority, which problems have lead to Board overreaching beyond their limits and violating Constitutional rights of both prisoners and other citizens); see also Michael J. Shehab, *Michigan Criminal Sentencing—It is within the discretion of the trial judge to sentence a defendant to three times the recommended guidelines. It is also within the discretion of the trial judge to remove a defendant from the jurisdiction of the parole board: People v. Merriweather*, 73 U. DET. MERCY L.REV. 653, 662 (1996) (discussing legislative efforts to limit scope of Board's power).

¹⁴ See Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425, 426 (1983) (stating that adoption of determinate sentencing in response to perceptions that indeterminate sentencing has resulted in abuse of discretion and disparate sentences is more than reform of sentencing structure because it also "entails a rejection of rehabilitation in favor of other justifications for the criminal sanction"). See generally *Rivera Live: Guests Discuss Needed Reforms in the Parole System* (NBC television broadcast, Dec. 15, 1995), available in 1995 WL 13491970 (comparing California's decision to revoke parole for all violent offenders and increase spending for prison construction with Governor Pataki's attempt to pass same type of legislation in context of current shift of penal philosophies from positive to negative reinforcement).

PAROLE RELEASE LAW IN NEW YORK STATE

The Board performs a very significant function in determining the length of time that an inmate will spend in prison. Further, it is entitled by law to exercise substantial discretion within this sphere.¹⁵ The Board's "discretion," however, does not provide unlimited insular protection by any means. Rather, the statute requires that the decision to release a detainee must be premised upon more than "good behavior."¹⁶ Several other important criteria are required for consideration: public welfare considerations and the potential for criminal recidivism,¹⁷ the inmate's overall institutional record, interpersonal relationships

15 See N.Y. EXEC. LAW § 259-h(5) (McKinney 1993). The discretion of the Parole Board is far-reaching. See generally N.Y. EXEC. LAW § 259-c[1]-[3], [6], [9], [11] (McKinney 1993). Respectively, these sections provide in relevant part:

The state board of parole shall:

1. have the power and duty of determining which inmates serving an indeterminate or a reformatory sentence of imprisonment may be released on parole and when and under what conditions;
2. have the power and duty of determining the conditions of release of the person who may be conditionally released under an indeterminate period of reformatory sentence of imprisonment;
3. determine, as such inmate is received by the department of correctional services, the need for further investigation of the background of such inmate and cause such investigation as may be necessary to be made as soon as practicable
6. have the power to revoke the parole or conditional release of any person and to authorize the issuance of a warrant for the retaking of such persons
9. for the purpose of any investigation in the performance of duties made by it or any member thereof, have the power to issue subpoenas, to compel the attendance of witnesses and the production of books, papers, and other documents pertinent to the subject of its inquiry.
11. make rules for the conduct of its work, a copy of such rules and of any amendments thereto to be filed by the chairman with the secretary of state.

Id.; see also *Newcomb v. New York State Bd. of Parole*, 452 N.Y.S.2d 912, 914 (3d Dep't 1982) cert. denied, 459 U.S. 1176, 1176 (1982) (stating that State Board of Parole is vested with broad discretion in determination of parole applications); *Canales v. Hammock*, 431 N.Y.S.2d 787, 790 (Sup. Ct. 1980) (stating that Parole Board is given sole discretionary power to review prisoner's eligibility for release).

16 See N.Y. EXEC. LAW § 259-i[2](c) (McKinney Supp. 1997). Section 259-i[2](c) provides in pertinent part:

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not so deprecate to the seriousness of his crime as to undermine respect for law.

Id.

17 See Thomas C. Kowalski, *The United States Parole Commission: A Profile to Fill the Knowledge Gap*, 39 FED B. NEWS & J 440, 441-42 (1992) (discussing Board guidelines for decisions as including review of likelihood of recidivism); Travis & O'Leary, *A History of Parole*, in PROBATION, PAROLE AND COMMUNITY CORRECTIONS 112-19 (3d ed. 1984) (noting exercise of Board's discretionary power evaluates rehabilitative effect of parole).

with the staff and fellow inmates,¹⁸ and statements by victims before the Board.¹⁹ Moreover, the statute requires such additional factors to be weighed as the seriousness of the offense,²⁰ the type and length of sentence, and prior criminal record.²¹ Up until 1978, the procedure was that the Board itself set the minimum terms for over 70% of the offenders committed to prison.²² Today, statute requires the sentencing court to set the minimum period of imprisonment.²³ Reminiscent of this pre-1978 practice, currently, the Board once more institutes its own brand of sentencing policy.²⁴ This is done under the guise of exercising its

18 See N.Y. EXEC. LAW § 259-i(5) (McKinney 1982). The guidelines for making the parole decision are listed in § 259 -i(2)(c) of that statute and include (i) the institutional record, including program goals and accomplishments, academic achievements, vocational education, training or work accomplishments, therapy and interpersonal relationships with staff and inmates. *Id.*

19 See Jennifer S. Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings: A Particular Dilemma For Battered Women Inmates*, 27 SETON HALL L. REV. 33, 55 (1996) (discussing Texas parole procedures which take into account victim statements when deciding to grant or to deny parole); Thompson, *supra* note 13, at 266 (acknowledging victim statements as relevant in directing parole decisions).

20 See, e.g., *Garcia v. New York State Div. of Parole*, 657 N.Y.S.2d 415, 417 (1st Dep't 1997) (stating that where sentencing court, rather than Board of Parole has set minimum sentence of imprisonment, Board must consider seriousness of offense and inmate's previous criminal history).

21 See N.Y. EXEC. LAW § 259-i[1](a)(i)-(ii) (McKinney 1993). Section 259-i[1](a)(i)-(ii) applies to all persons "received in an institution under the jurisdiction of the department of correctional services with an indeterminate sentence, and the court has not fixed a minimum period of imprisonment." *Id.* Within 120 days of such person's arrival, he/she shall be brought before the Board to determine "the minimum period of imprisonment to be served prior to parole consideration in accordance with the guidelines." *Id.* The guidelines shall include: (i) The seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating or aggravating factors, and, activities following arrest and prior to confinement; (ii) prior criminal record including the nature and pattern of offenses, adjustments to any previous probation or parole supervision and institutional confinement. . . . *Id.*

22 See Pamela L. Griset, *Discretion, Disparity, and Discrimination in Sentencing: Where Have All the Critics Gone?*, 35 NO. 3 JUDGE'S J. 3, 3 (1996) (noting that "national consensus on discretionary sentencing crumbled during 1970's"); see also *Garcia v. New York Dir. of Parole*, 657 N.Y.S.2d 415, 417 (1st Dep't 1997) (stating that where sentencing court rather than Board of Parole has set minimum sentence of imprisonment, Board must consider seriousness of offense and inmate's prior criminal record).

23 See *People v. Demers*, 482 N.Y.S.2d 131, 132 (3d Dep't 1984) (noting that sentence for criminal action is wholly within discretion of court); *People v. Stampler*, 454 N.Y.S.2d 411, 412 (Nassau County Ct. 1982) (stating that purpose of having period of imprisonment determined by court rather than by parole board based on belief that judge would be more responsive to community involved than parole board). See generally N.Y. PENAL LAW § 70.00 (McKinney 1993) (requiring sentencing court to impose sentence within minimum and maximum periods).

24 See Tsimbinos, *supra* note 5, at 1 (arguing that "in the last few years the [New York State] Parole Board [not the legislature] seems to have adopted a more stringent policy regarding early release on parole" because in 1987 Parole Board granted parole to

discretion as to whether or not to release the inmate to parole supervision or to hold him beyond the minimum term.²⁵ In this regard, *Executive Law* § 259-i (c)(1) denotes the statutory guidelines that may legally premise a denial of parole.²⁶

Another problem has been that New York courts have simply refused to question the decisions of the Parole Board in the latter's exercise of discretionary power to grant or refuse parole unless the petitioner can conclusively prove that the Board has failed to comply with statutory factors.²⁷ Moreover, in many deserving cases, the Board simply fails to fully consider an inmate otherwise eligible for release.²⁸ This abdication of the Board's legislatively imposed mandate impacts negatively on the criminal justice process as a whole and thwarts the implementation of the parole guidelines in that process.²⁹ In this regard, judges need to appreciate the fact that the discretion of the Parole Board has probably become too broad.³⁰ Further aggravating a

60% of persons with homicide convictions, compared to 25% in 1994 and 4% in 1995).

²⁵ See, e.g., *Waters v. New York State Division of Parole*, 676 N.Y.S.2d 279, 280 (3d Dep't 1998) (affirming denial of parole despite inmates earned eligibility); *Walker v. Travis*, 676 N.Y.S.2d 52, 53 (1st Dep't 1998) (affirming denial of parole based solely on severity of past crime); *Nieves v. New York State Division of Parole*, 675 N.Y.S.2d 158, 159 (3d Dep't 1998) (affirming denial of parole despite inmate having obtained certificate of earned eligibility).

²⁶ See N.Y. EXEC. LAW § 259-i[2](c) (McKinney 1993). The statute requires that "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined, but after considering if there is a reasonable probability that, if such inmate is released, [1] he will live and remain at liberty without violating the law, and that [2] his release is not incompatible with the welfare of society and [3] will not so deprecate the seriousness of his crime as to undermine respect for the law." *Id.*

²⁷ See *Matter of Bouknight v. Russi*, 661 N.Y.S.2d 989, 989 (2d Dep't 1997) (stating that where Parole Board complies with statutory requirements, "discretionary denial of parole is not subject to judicial review"); *Delman v. New York State Bd. of Parole*, 461 N.Y.S.2d 403, 406 (2d Dep't 1983) (noting that "[d]iscretion of the [Parole Board] in matters of parole release decisions is not judicially reviewable if made in accordance with statutory requirements").

²⁸ See, e.g., *Garcia v. New York State Div. of Parole*, 657 N.Y.S.2d 415, 415 (1st Dep't 1997). Despite a prisoner's impressive accomplishments in prison, it was held that the Parole Board's denial of parole was not arbitrary and capricious. *Id.* at 418. *People ex rel. Herbert v. New York State Bd. of Parole*, 468 N.Y.S.2d 881, 881 (1st Dep't 1983). The Parole Board's denial of parole was affirmed where an inmate, who was convicted of first degree manslaughter and had participated in several rehabilitative programs while in prison, earned her high school equivalency, held positions of responsibility, completed 21 college credits and had applied and was accepted to Baruch College. *Id.* at 882.

²⁹ See Erin Ann O'Hara, *Parole*, 78 GEO. L.J. 1329, 1336-39 (1990) (discussing due process considerations in state parole decisions); see also Stuart G. Friedman, *The Michigan Parole Board: A Smoldering Volcano*, 77 MICH. B.J. 184, 184-85 (1998) (opining that parole board is irresponsible in freeing dangerous criminals back into society).

³⁰ See Tsimbinos, *supra* note 5, at 1-2. It has been argued that Governor Pataki's proposed legislation is not well-thought out in that there have been no public hearings, or

propensity to abuse an already overly broad discretion, the Board is not required to cite each factor it relies on as a predicate for release denial, nor need it give each factor equal weight.³¹ Given this awkward state of affairs, it is therefore difficult for those challenging the Board's decisions to prove that it actually abused its discretion, let alone for these claimants to prevail on such claims upon review.³² To make matters worse, courts in this state remain reluctant to second-guess a decision of the Board denying parole release.³³

Unquestionably, in each case that comes before it, the Board has a legal duty to give fair consideration to each of the applicable statutory factors for release enumerated in the *Executive Law*.³⁴ When the record of the Parole hearing fails to convincingly demonstrate that the Board considered all of these factors, denial of release becomes arbitrary and capricious.³⁵ Accordingly,

any examination of other jurisdictions' experiences (e.g. California). *Id.* at 2-3. This oversight will likely result in courts being unduly overburdened with litigation stemming from this proposed legislation. *Id.* at 2; see also *State Judges Question Further Limitations on Parole*, N.Y. CRIM. L. NEWS, May 1996, at 13. The state supreme court judges were reported to be highly critical of Governor Pataki's end to parole for violent offenders, insofar as it was felt their exclusively judicial role had been usurped by New York's chief executive. *Id.* at 1.

³¹ See *Matter of Farid v. Travis*, 657 N.Y.S.2d 221, 221-22 (3d Dep't 1997) (stating that Parole Board is not required to enumerate or give equal weight to each factor considered); see also *People ex rel. Herbert v. New York State Bd. of Parole*, 468 N.Y.S.2d 881, 884 (1st Dep't 1983) (noting that "[t]here is no requirement in the law that the board place equal or greater emphasis on petitioner's present commendable conduct that on the gravity of her offense"); *People ex rel. Haderkhanji v. New York State Bd. of Parole*, 467 N.Y.S.2d 381, 382 (1st Dep't 1983) (stating that required "factors were discussed with petitioner at the hearing, and although not mentioned in its decision, the board is presumed to have considered them"); *Matter of Friedman v. Hammock*, 438 N.Y.S.2d 628, 629 (3d Dep't 1981) (holding that "since there is no requirement that the 'due consideration' to be given each factor set forth in the statute [N.Y. EXEC. LAW § 259-i] be detailed in writing, . . . it must be presumed, in the absence of any convincing showing to the contrary, that the board fulfilled its duty under the statutory mandate and did not consider them").

³² See, e.g., *Herbert*, 468 N.Y.S.2d at 882-84. The court affirmed the Parole Board's denial of the parole of an inmate convicted of manslaughter but who had effectively self-educated and proven herself "rehabilitated." *Id.*

³³ See *Vasquez v. New York Bd. of Parole*, 658 N.Y.S.2d 538, 538 (3d Dep't 1997) (stating that Parole Board's denial of parole application is discretionary and will not be disturbed by reviewing court as long as decision satisfies statutory requirements); see also *Saunders v. Travis*, 656 N.Y.S.2d 404, 404 (3d Dep't 1997) (noting denial of parole application is discretionary, yet demands satisfaction of specific factors); *Herbert*, 468 N.Y.S.2d at 884 (stating that "[u]nless there has been a showing that respondent's determination was so irrational as to border on impropriety, judicial intervention is not warranted").

³⁴ See *Qafa v. Hammock*, 438 N.Y.S.2d 40, 41 (1981). The asserted purpose of section 259-i is to require that statutory criteria applicable to the individual inmate are considered by Board in reaching its decision as to a minimum period of incarceration. *Id.* at 41.

³⁵ See N.Y. EXEC. LAW §259-i[2](a) (McKinney 1997) (mandating that where Board

the Board should be required to demonstrate, in its decision and on the record, that it has duly considered the requirements of the statute. Currently, California, Texas, and Florida have such a procedure in place.³⁶ Blanket denials that merely restate the elements of the offense and label it "serious," currently in vogue in New York, reflect that the Board's decision-making process is not in accord with the statutory framework of the requirements set forth in the *Executive Law*.³⁷

INTERPRETING THE PAROLE STATUTE

There is no absolute constitutional right to parole in this or any other state.³⁸ However, the Board is guided by statutory schemes in making its release decisions.³⁹ As indicated above, under *Executive Law* § 259-i(2)(c), denial of parole must be reasonably predicated on one or more of three identified standards.⁴⁰ These standards include: 1) whether, if released, the inmate will live and remain at liberty without violating the

does not grant parole, it must give reasons for denial "in detail and not in conclusory terms"; see also *Harris v. New York State Div. of Parole*, 628 N.Y.S.2d 416, 417 (3d Dep't 1995) (holding Board's denial of parole was arbitrary and capricious where Board refused to consider sentencing court's recommendation); *Telefarro v. Hammock*, 84 A.D.2d 790, 791 (2d Dep't 1981) (holding Board's determination was arbitrary and capricious). *But see* *People ex rel. Long v. New York State Bd. of Parole*, 401 N.Y.S.2d 701, 701-02 (N.Y. Sup. Ct. 1977) (finding Board's determination was not arbitrary or capricious as parole denial was based on seriousness of crime).

³⁶ See CA. PENAL LAW § 3041(a) (West 1997). The Board of Prison Terms establishes criteria to determine parole release, considering "factors in mitigation or aggravation of the crime." *Id.*; FL. ST. § 947.16(2)(h) (West 1997). The Commission determines parole release date based on relevant information in inmate's record file. TX. GOVT. § 508.156(b) (West 1997). The Panel reviews inmate's records to determine parole.

³⁷ See N.Y. EXEC. LAW § 259-i[2](a) (McKinney 1997). The Parole Board seems to disregard its statutory obligation to provide a detailed account of the reasons behind its determination. *Id.* at 3.

³⁸ See N.Y. EXEC. LAW § 259-i[2](a) (McKinney 1997). Determination of release to parole is made by the Board, in accordance with statutory guidelines. *Id.*; see also *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 2-7 (1979). "[R]easonable entitlement to due process is not created merely because a State provides for possibility of parole" and there is no constitutional or inherent right to be conditionally released before expiration of sentence. *Id.* at 2; *Newcomb v. New York State Bd. of Parole*, 452 N.Y.S.2d 912, 914 (3d Dep't 1982). New York law provides for no constitutional right to parole and Board has broad discretion in deciding whether to grant or deny parole. *Id.* at 914; *Matter of Russo v. Board of Parole*, 427 N.Y.S.2d 982, 984 (1980). "Any rightful liberty interest held by accused is extinguished upon his conviction, thereby precluding any inherent constitutional right to parole." *Id.*

³⁹ See N.Y. EXEC. LAW § 259-c[4], -i[2](a) (McKinney 1997). The Board determines parole in accordance with guidelines established and required by law. *Id.*

⁴⁰ See N.Y. EXEC. LAW § 259-i[2](c) (McKinney 1997). The Board cannot grant discretionary release on parole "merely as a reward for good conduct or efficient performance of duties". *Id.* at 5.

law;⁴¹ 2) whether the inmate's release will be incompatible with the welfare of society;⁴² and 3) whether release will not so deprecate the seriousness of the crime so as to undermine respect for law.⁴³ Typically, under the current practice of the Board in its exercise of discretionary release power, one standard of denial will be "bootstrapped" by another.⁴⁴ To illustrate, standard "two" is traditionally tied-in to a denial predicated upon "one" or "three", either of the remaining standards, using "if-then" logic.⁴⁵ Consequently, the typical parole release denial often follows a predictably textbook form and employ the following trademark-boilerplate language:

Parole denied. Hold 24 months. The serious nature and circumstances of the instant offense []⁴⁶ militates against discretionary release at this time. To hold otherwise would deprecate the seriousness of the crime so as to undermine respect for the law and thus constitute a threat to the welfare of society.⁴⁷

On the other hand, in the alternative, the release denial might flatly provide:

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

41 See N.Y. EXEC. LAW § 259-i[2](c) (McKinney 1997) (discussing first category relevant in denying or granting parole).

42 See *id.* (discussing second category relevant in denying or granting parole).

43 See *id.* (discussing third category relevant in denying or granting parole).

44 See *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep't 1996). A review panel found reasonable probability that, "if released, the [prisoner] would not live nor remain at liberty without violating the law and [therefore] that [prisoner's] release [was] not compatible with the welfare of society". *Id.* at 28.

45 See *id.* at 28. The *Maye* court reasoned that the decision of the Parole Board did "nothing more than track the language in the statute." *Id.* The Board did not consider the factors enumerated in § 259-i, nor did its decision contain any analysis or factual basis. *Id.* The court found the logical connection was missing as to why petitioner's crime "automatically translated into a reasonable probability" that she would commit further crimes if released. *Id.*

46 At this point in the decision, the Board usually renders a cursorily brief recitation of the facts of the particular case.

47 See, e.g., *People ex rel. Herbert v. New York State Bd. of Parole*, 468 N.Y.S.2d 881, 883 (1st Dep't 1983) (stating Board's standard form for denying parole).

nity.”⁴⁸

In each case cited above, an adverse finding as to standards one and three automatically translates into an adverse finding as to standard two.⁴⁹ Standing alone, standard two is insufficient and must be supported by an additional factual predicate.⁵⁰ In any event, the finding should be logically reconciled with the particular facts of the case under consideration. A finding as to probable future criminality should be based on indicators and/or some profile that reasonably translates into such a presumption.⁵¹ In making this translation, however, the Board should be guided by sound logic, rather than basing its determinations on mere speculation or whim. Sound logic would also be the controlling element by which to interpret and define the parameters of a standard “three-release denial,” with due regard to the legislative intent, the ultimate controlling principle. A definition of “depreciate the seriousness of the crime as to undermine respect for law” is thus in order.⁵²

The two key words in this piece of legislation are “depreciate” (to have or to express an unfavorable opinion), and “undermine” (to lessen or deplete the strength of).⁵³ When viewing the statute as a whole, as we must, depreciation of a crime which would undermine respect for law occurs only when an inmate is paroled

48 See, e.g., *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep’t 1996). The decision of the Parole Board stated: “[T]here is a reasonable probability, if released, you would not live nor remain at liberty without violating the law and that your release at this time is not compatible with the welfare of society.” *Id.*

49 See *id.* at 28. The *Maye* court also rejected the notion that the adverse finding as to the nature and seriousness of petitioner’s crime “automatically translated” into “reasonable probability” petitioner would commit further crimes. *Id.*

50 See *Confoy v. New York State Division of Parole*, 569 N.Y.S.2d 846, 847 (3d Dep’t 1991) (holding Board’s decision that petitioner would not remain at liberty and release would be incompatible with welfare of society was supported by evidence and made in accordance with law, thus foreclosing judicial intervention); see also *Lynch v. New York State Division of Parole*, 442 N.Y.S.2d 179, 180 (3d Dep’t 1981) (finding reasons given by board for its decision, including serious nature of crime, sufficient for denial of parole); *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep’t 1996) (finding no factual basis for Board’s decision denying parole).

51 See *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep’t 1996) (suggesting analysis or factual basis for Board’s conclusion to grant or deny is necessary).

52 See Jeffrey C. Filcik, *Signs of the Times: Scarlet Letter Prohibition Conditions*, 37 WASH. U.J.URB. & CONTERM. L. 291, 323 (1990) (discussing factors relevant to parole determinations so as to not depreciate seriousness of crime or undermine respect for law); see also *Bales*, *supra* note 19, at 57 (acknowledging factors weighed in parole decision so that release will not depreciate seriousness of crime or undermine respect for law).

53 See AMERICAN HERITAGE DICTIONARY 383 (2d ed. 1985) (defining common understandings of “undermine” and “depreciate”).

prior to the time the *sentencing court* indicates that release would be acceptable.⁵⁴ Sentencing courts provide clear, statutorily based guidance for determining when release is acceptable. The minimum term of imprisonment, and must first be served in full "rehabilitation" must be evident.⁵⁵

The Board, then, in making its determinations, must not rely solely upon the seriousness of the instant offense.⁵⁶ Indeed, in *Maye v. Russi*,⁵⁷ the reviewing court held that the Board of Parole must rely upon more than simply the inmate's crime of conviction in order to deny parole release,⁵⁸ and must also provide a detailed statement of the reasons for parole denial.⁵⁹ The *Maye* court also determined that the Board of Parole must articulate "the logical connection which demonstrates why [the inmate's] crime automatically translates into a 'reasonable probability' that the [inmate] will break the law [] if released. . . ."⁶⁰

⁵⁴ See *Garcia v. New York State Division of Parole*, 657 N.Y.S.2d 415, 418 (1st Dep't 1997) (holding where sentencing court, not Board, has set minimum sentence of imprisonment, Board must consider seriousness of offense and inmate's prior criminal record).

⁵⁵ See, e.g., *Matter of King v. Division of Parole*, 598 N.Y.S.2d 245, 251 (1st Dep't 1993), *aff'd* 610 N.Y.S.2d 954, 955 (1994) (suggesting showing of rehabilitation on part of inmate is factor which weighs in favor of granting release to parole).

⁵⁶ See *Matter of Quartararo*, Aug. 8, 1995 N.Y.L.J., at 23 (S.Ct. N.Y. Cty 1994) (holding statutory factors were not fairly and properly applied in petitioner's parole hearing).

⁵⁷ See *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep't 1996) (holding parole application cannot be "pre-determined" and Board must consider factors enumerated in statute).

⁵⁸ See *id.* at 28; see also *People ex rel. DiCostanzo v. Hernandez*, 525 N.Y.S.2d 325, 326 (2d Dep't 1988), *appeal denied* 530 N.Y.S.2d 554 (1988) (holding consideration for release is not limited to good behavior, but also given to whether there is reasonable probability inmate will remain at liberty without violating law if released, release will not endanger society and will not so deprecate seriousness of crime to undermine respect for law); *People ex rel. Herbert v. New York State Board of Parole*, 468 N.Y.S.2d 881, 884 (1st Dep't 1983) (holding statute does not specify how much weight must be given to each enumerated factor).

⁵⁹ See N.Y. EXEC. LAW §259-i[2](a) (McKinney Supp. 1997) (requiring Board to inform inmate of reasons, given in detail, for denial of parole); see also *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep't 1996) (finding Board did not comply with this statutory requirement because only reasons given for decision denying parole were based on petitioner's original offense as indicated in language of decision itself); *Delman v. Board of Parole*, 461 N.Y.S.2d 406, 406 (2d Dep't 1983) (holding reasons set forth by Board for denial of parole release were supported by record and satisfied statutory requirements); *People ex rel. Brown v. New York State Department of Correctional Services, Parole Board Division*, 415 N.Y.S.2d 137, 138 (4th Dep't 1979) (finding Board's statement denying parole sufficiently set out "essential facts and reasons" for denial); *Hergueta v. New York State Parole Board*, 405 N.Y.S.2d 105, 106 (2d Dep't 1978) (holding that "sufficient and meaningful reasons" were given by Board and represented "proper application of criteria" of statute).

⁶⁰ See *Maye v. Russi*, N.Y.L.J., Feb. 5, 1996, at 28 (1st Dep't 1996); see also *Canales v. Hammock*, 431 N.Y.S.2d 787, 790 (N.Y. Sup. Ct. 1980) (finding "if the 'seriousness of the crime' factor was to have been of paramount importance to the relative exclusion of

This notwithstanding, it is neither arbitrary nor capricious to deny parole where the Board has a rational basis to conclude that an applicant will be unable to live a crime-free life in the community.⁶¹ Nor, for that matter, is it an abuse of discretion when the Board considers such negative factors as the seriousness of the instant offense, the number of multiple counts in the indictment, the prior criminal history of the applicant, and any opposition filed by the district attorney.⁶² As long as the Board's determination is supported by the record, and is made in accordance with the law, judicial intervention is necessarily foreclosed.⁶³ Also properly subject to consideration is the prior criminal history of the applicant,⁶⁴ any history of alcohol or drug abuse,⁶⁵ past violations of probation or parole,⁶⁶ a documented

all other factors, then the legislature would have so provided"); *Rogers v. Hammock*, 418 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1979) (holding Board must "do more than merely state 'the nature of [inmate's] criminal offense'" in order to comply with statutory requirement of providing reasons for Board's decisions); *Bermudez v. Kuhlmann*, 386 N.Y.S.2d 772, 773 (N.Y. Sup. Ct. 1976) (holding Parole Board statement that parole was denied because of "the nature of the offense" did not provide "meaningful statement of reasons as required by statute").

61 See *Matter of Campbell v. Rodriguez*, 549 N.Y.S.2d 926, 927 (N.Y. Sup. Ct. 1990) (holding Board's denial of parole on grounds that petitioner was unable to live crime-free in community and posed threat to society was not arbitrary and capricious). Cf. *Telefarro v. Hammock*, 444 N.Y.S.2d 21, 22 (2d Dep't 1981) (holding Board's finding that overriding consideration must weigh in favor of community protection, was arbitrary and capricious).

62 See *Confoy v. Division of Parole*, 569 N.Y.S.2d 846, 847 (3d Dep't 1991) (finding respondent's decision to deny parole was "supported by the record and made in accordance with the law, thereby foreclosing judicial intervention"); see also *Israel v. Division of Parole*, 603 N.Y.S.2d 779, 779 (3d Dep't 1993) (finding Board's determination denying parole based upon "seriousness of crimes, their violent nature and petitioner's criminal record, indicating escalating criminal conduct" was supported by record and made in accordance with law); *Walker v. Russi*, 576 N.Y.S.2d 51, 52 (3d Dep't 1991) (holding determination by Board to deny parole that cited petitioner's criminal history and prior parole violation was not arbitrary and was supported by record and made in accordance with law).

63 See *Matter of McKee v. Board of Parole*, 157 A.D.2d 944, 945 (3d Dep't 1990) (holding that in absence of showing of "irrationality" or other basis for judicial intervention, decision of Board was un-reviewable); see also *Gray v. Travis*, 657 N.Y.S.2d 118, 119 (3d Dep't 1997) (holding decisions of Board are discretionary and not subject to judicial review when made in accordance with law); *Secilmic v. Keane*, 639 N.Y.S.2d 437, 437 (2d Dep't 1996) (holding decisions of Board that take statutory requirements into consideration are not judicially reviewable).

64 See, e.g., *Farid v. Russi*, 629 N.Y.S.2d 821, 821 (3d Dep't 1995) (upholding Board's decision denying parole that was based on gravity of petitioner's offenses and other past criminal behavior); *Matter of Maturano v. Hammock*, 87 A.D.2d 732, 732-33 (3d Dep't 1982) (holding Board was not precluded from considering seriousness of offenses and petitioner's past criminal history); *Ward v. Hammock*, 456 N.Y.S.2d 204, 205 (3d Dep't 1982) (holding Board could properly consider seriousness of petitioner's offenses as well as past criminal history).

65 See *Matter of Maciag v. Hammock*, 88 A.D.2d 1106, 1107 (3d Dep't 1982) (holding that parole board properly considered petitioner's admitted problem with drugs and alco-

history or record of mental or emotional instability⁶⁷ or the failure of the applicant to take responsibility for his own criminally deviant behavior.⁶⁸ Accordingly, the role of the Board is not to simply re-sentence an applicant, but to determine whether he or she should be released into the community under parole supervision based upon the *totality* of the circumstances.⁶⁹ The granting of supervised releases based on these criteria then, bespeaks the more immediate concern that the inmate will continue in criminal behavior, thereby endangering the welfare of the general public.⁷⁰

A fortiori, the record of the parole hearing must support the contention that the Board considered *all* of the relevant statutory factors.⁷¹ The statutory criteria are set forth in the *Executive Law* to prevent the Board of Parole from instituting its own

hol in determining his minimum period of imprisonment). See, e.g., *McLain v. New York State Division of Parole*, 611 N.Y.S.2d 629, 630 (2d Dep't 1994) (holding that Board acted in accordance with statutory criteria in considering inmate's pattern of offenses, history of alcohol abuse, and seriousness of present offense as reasons for denial of parole); *People ex rel. Miranda v. Henderson*, 387 N.Y.S.2d 329, 329 (4th Dep't 1976) (upholding Board's consideration of petitioner's extensive past history of drug abuse as reason for denial of parole).

⁶⁶ See e.g., *Green v. New York State Division of Parole*, 605 N.Y.S.2d 148, 148 (3d Dep't 1993) (holding reasons for denial of parole, which included consideration of several instances of past parole violations, were not subject to further judicial review).

⁶⁷ See *Dudley v. Travis*, 642 N.Y.S.2d 386, 387 (3d Dep't 1996) (holding petitioner's prior history of mental illness could properly be considered in determining release to parole); see also *Baker v. Russi*, 591 N.Y.S.2d 540, 541 (3d Dep't 1992) (finding reasons given by Board for denial of parole based on petitioner's apparent need for psychological counseling were supported by record); *People ex rel. Brown v. New York State Department of Correctional Services, Parole Board Division*, 415 N.Y.S.2d 137, 138 (4th Dep't 1979) (holding Board may properly consider petitioner's mental and emotional stability in determining release to parole).

⁶⁸ See, e.g., *Dudley*, 642 N.Y.S.2d at 386 (holding that Board properly considered petitioner's lack of remorse over crime in denying release to parole); *Matter of Flecha v. Russi*, 221 A.D.2d 780, 781 (3d Dep't 1995), *leave to appeal denied* by 641 N.Y.S.2d 597 (1996) (upholding Board's consideration of inmate's failure to take responsibility for his deviant behavior in denying parole).

⁶⁹ See, e.g., *People ex rel. Herbert v. New York State Board of Parole*, 468 N.Y.S.2d 881, 884 (1st Dep't 1983) (finding statute mandates that Board considers certain criteria, but does not specify how much weight must be given to each enumerated factor); *McKnight v. Hammock*, 422 N.Y.S.2d 607, 608 (N.Y. Sup. Ct. 1979) (holding Parole Board must exercise its discretion in denying parole in conformance with powers granted it by statute and pursuant to its own published regulations).

⁷⁰ See *Matter of Russo v. New York State Board of Parole*, 50 N.Y.2d 69, 76 (1980) (holding that Board had authority to fix minimum period of incarceration in excess of one third maximum even though sentencing court could not have done so); *Matter of King v. New York State Division of Parole*, 190 A.D.2d 432 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994) (holding that Parole Board erred in denying prisoner proper remedy).

⁷¹ See *Matter of King v. New York State Bd. of Parole*, 598 N.Y.S.2d 245,250 (1st Dep't 1993) (asserting that Board has affirmative obligation to review relevant factors in determining whether prisoner is eligible for parole).

brand of "preventive detention" and to ensure fairness at the release hearing.⁷² Accordingly, all relevant criteria designated by statute must be appropriately considered.

An additional factor to be noted here is the parole "guideline time range," which must be considered in each case.⁷³ The guidelines were intended to be applied in cases where the sentencing court set the minimum term of imprisonment when the minimum term had been served.⁷⁴ The provisions of the sentencing laws now suggest that the courts in imposing the sentence undertake the appropriate assessment of the "crime severity" and "prior criminal history."⁷⁵ In the majority of cases coming before the Board, the minimum sentence fixed by the court exceeds the Board's guideline time range. To be sure, by the Board's re-litigation of such factors as crime severity and prior criminal history, an obvious "double accounting" results, with possible double jeopardy implications and encroachment on the doctrines of *collateral estoppel* and *res judicata*.⁷⁶

While *Executive Law* §259-i provides that the parole guidelines shall include consideration of the "seriousness of the instant offense," the statute demands that this be done "with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court. . . ."⁷⁷ The phrase "seriousness of the offense" has today become nothing more than a hollow cliché espoused by the Board in seeming compliance with the requirements of the statute. It actually does little else than simply track the language of the statute, in boilerplate fashion, which obfuscates a substantial portion of the first and foremost guideline, "due consideration to the type. . . [and] length

⁷² See *id.* (outlining sphere of executive review).

⁷³ See 9 N.Y.C.R.R. § 8001.3(a) (1997); *Ganci v. Hammock*, 471 N.Y.S.2d 630, 632 (1984) (setting forth guideline range designed to structure Board's discretion).

⁷⁴ See 18 U.S.C. § 4205 (b)(2) (allowing court that imposes sentence and fixes maximum term to allow Commission to determine when to grant parole); Andrew Von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance*, 27 AM. CRIM. L. REV. 367, 379-80 (1989) (discussing Commission's use of parole guidelines).

⁷⁵ See N.Y. PENAL LAW Article 70.00 (GCL 1998); see also Kennard R. Strutin, *Mandatory Minimums, Life Sentences and the Eighth Amendment*, 66 N.Y. ST. B.J. 6, 6 (Nov. 1994) (discussing factors relevant in assessing sentences).

⁷⁶ See generally *King v. New York State Division of Parole*, 598 N.Y.S.2d 245, 251 (1st Dep't 1993) (stating that Parole Board is not authorized to re-sentence prisoners but should assess prisoner in terms of all relevant factors in deciding on release); RESTATEMENT (SECOND) OF JUDGMENTS § 1A (1982) (noting the relitigation problem in criminal cases is determined to a large extent by the double jeopardy concept).

⁷⁷ See generally N.Y. EXEC. LAW § 259-I (McKinney 1993 & Supp. 1994).

of the sentence.”⁷⁸

This section of the statute imposes upon the Board an affirmative responsibility to duly consider and evaluate the type and length of the sentence imposed, as opposed to merely focusing on the seriousness of the underlying criminal offense, to the exclusion of all other relevant criteria.⁷⁹ The question presented by this particular portion of the statute then becomes: what constitutes “due consideration” in the context of “type” and “length” of sentence.⁸⁰ Currently, no legal standard exists to proffer definitive guidance as to precisely what consideration is “due.” In fact, this view of the statute may present a novel perspective to the *Executive Law*.⁸¹

By law and definition, “a statute or a legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine their legislative intent.”⁸² Moreover, it is established that “[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature.”⁸³ In keeping with this principle, it is essential that “[t]he intention of the Legislature [be] first [] sought from a literal meaning of the act itself, but if the meaning is still not clear the intent may be ascertained by such facts and through such rules as may, in connection with the language, legitimately reveal it.”⁸⁴ Clearly, because there exists no case-law to guide the interpretation of the identified portion of the statute, we must turn to “such facts and through such rules as may, in connection with the language, legitimately reveal it.”⁸⁵ Facts and rules in connection with the language are in

⁷⁸ See generally N.Y. EXEC. LAW § 259-i[1](a)(i) (McKinney 1993 & Supp. 1994).

⁷⁹ See *King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (holding that the inmate was not afforded a proper parole hearing where one commissioner considered factors outside the scope of the statute); *People ex rel. DiCostanzo v. Hernandez*, 525 N.Y.S.2d 325, 326 (2d Dep’t 1984) (holding that Board’s discretionary release decision is not subject to judicial review when it acts in accordance with statutory requirements).

⁸⁰ See N.Y. EXEC. LAW § 259-i[1](a) (McKinney 1993 & Supp. 1994).

⁸¹ See 1977 N.Y. LAWS c 904 (stating that Board has responsibility to inquire into prisoner’s record while in prison, whether he will be employable upon release, and whether he is generally eligible for parole).

⁸² See N.Y. STAT. LAW § 97 (McKinney 1998) (stating wholistic approach to statutory construction).

⁸³ *Id.* at § 92(b) (stating secondary source for legislative meaning); see also *People v. Ruggieri*, 423 N.Y.S.2d 108, 111 (N.Y. Sup. 1979) (explaining that “the court will resort to extraneous materials).

⁸⁴ See *id.* (expressing need to resort to secondary sources).

⁸⁵ *Id.*

abundance, however, and accordingly, the most revealing sources deserving attention in this context are the sentencing laws and the extraordinary guidance they offer.

SENTENCING LAW IN NEW YORK STATE

Imposition of a sentence upon conviction for an offense is a judicial function.⁸⁶ The exercise of judicial power in this regard must be performed free from outside pressures and is closely delineated by legislation.⁸⁷ Ideally, a court exercises its sentencing authority only after careful consideration of all the facts available at the time of the sentencing.⁸⁸ Hence, not unlike the task of the Parole Board, the trial court must also balance conflicting concerns to take into account, among other things, the crime charged, the particular circumstances of the individual before the court, and the purpose of a penal sanction, i.e., societal protection, rehabilitation, isolation, retribution and deterrence.⁸⁹ In practice, the instances where a court can exercise full sentencing discretion are those where there is a conviction after trial or a plea to the indictment. At this juncture, for the benefit of those less acquainted with "sentencing law," some definitions and a brief analysis of the typical sentence seems in order.

In cases where an indeterminate sentence has been imposed, that sentence is composed of two numbers, usually set by statute.⁹⁰ The first number represents the "minimum term" of incar-

⁸⁶ *But see* Pamela Griset, 35 NO. 3 JUDGE'S J. 3, 3 (1996) (asserting that parole officials may exercise sentencing power as well).

⁸⁷ *See* Keri A. Gould, *Turing Rat and Doing Time For Uncharged, Dismissed, or Acquitted Crimes: Do The Federal Sentencing Guidelines Promote Respect for Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 857-59 (1993) (acknowledging that imposition of sentencing guidelines curtailed judges discretion in fashioning appropriate sentences); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. REV. 1179, 1208-09 (1993) (characterizing history of criminal punishments as "legislatively fixed").

⁸⁸ *See* Robert H. Smith, *Departure Under the Federal Sentencing Guidelines: Should Mitigating or Aggravating Circumstances Be Deemed "Adequately" Considered Through "Negative Implication"?*, 36 ARIZ. L. REV. 265, 270 (1994) (acknowledging factors relevant in sentencing determination).

⁸⁹ *See generally* N.Y. PENAL LAW §1.05 (5); *People v. Farrar*, 52 N.Y.2d 302, 305(1981) (outlining specific purposes of penal sanction); *People v. McConnell*, 49 N.Y.2d 340, 346 (1980) (detailing key purposes and goals of criminal justice system); *People v. Notey*, 423 N.Y.S.2d 947, 950 (acknowledging factors relevant to parole decision) (1st Dep't 1980); *People v. Selikoff*, 35 N.Y.2d 227, 238 (1974) (noting characteristics of criminal sentencing policy justifications).

⁹⁰ *See* *People v. Warden*, 345 N.Y.S.2d 381, 393-94 (1973) (defining "indeterminate sentence" as sentence which shall not give specific period but shall not be less than one year); *People v. Martin*, 276 N.Y.S.2d 15, 17 (1966) (defining indeterminate sentence of

ceration. That is, the statutory minimum amount of time which must be served by an inmate before achieving parole eligibility. The minimum term, by law and definition, is a penal sanction which is commensurate with the perceived severity of the crime.⁹¹ The second number of an indeterminate prison sentence is the "maximum term" of imprisonment.⁹² The "maximum" is actually the point at which the sentence expires and the inmate must be released from confinement or discharged from parole, whichever condition is complied with first.⁹³ The sentencing judge selects minimum and maximum terms of imprisonment from a range of possible sentences prescribed by the Legislature for the particular offense.⁹⁴ The sentencing judge determines the ultimate question of an appropriate sentence for the offender, based on a number of criteria including, but not limited to, the seriousness of the offense, the social history of the offender, and any aggravating or mitigating circumstances unearthed during the trial, plea or sentence proceedings.⁹⁵ Also factored into this judicial determination are any memoranda submitted by the probation department and the recommendations made by the District Attorney and the defense counsel.⁹⁶

In meting out a sentence, a judge gives express or implied guidance to a future Parole Board as to how the offense is to be viewed. First, we will consider what is implied by a judge who is silent as to a sentence that has been imposed. We will also consider the impact of a judicial "recommendation."

second degree murder as not less than twenty years but not more then life).

⁹¹ See, e.g., N.Y. PENAL LAW § 265.09(2)(McKinney 1998) (linking minimum term with severity of crime).

⁹² See N.Y. PENAL LAW § 70.00(1) (McKinney 1998) (indicating that maximum and minimum term are to be set for indeterminate prison sentence).

⁹³ See N.Y. PENAL LAW § 70.00(2) (McKinney 1998) (authorizing maximum terms for various classes of felonies).

⁹⁴ See N.Y. PENAL LAW, Art. 70.00 (McKinney GCL 1998); see also Harold Baer, Jr. & Richard S. Mills, *Discretion and Disparity on the Criminal Side of the Supreme Court in New York County*, 31 N.Y.L.SCH. L. REV. 691, 692 (1986) (finding that sentences imposed on white collar and common criminals are widely disproportionate based on individual's judgment's subjective nature).

⁹⁵ See NEW YORK CRIM. PROC. LAW § 380.10, *et seq.* (McKinney 1999); *People v. Far-rar*, 52 N.Y.2d 302, 305 (1981) (holding that sentence for defendant who has pled guilty to charge of manslaughter, requiring sentence of twelve and one half years to twenty five years, can be reduced further upon discretion of presiding judge, based on certain criteria).

⁹⁶ See N.Y. CRIM. PROC. LAW § 390.40, *et seq.* (McKinney 1994) (acknowledging defendant's or prosecutor's pre-sentence memorandum which can set forth any information pertinent prior to sentencing).

Whether a judicially imposed sentence constitutes the statutory minimum or maximum—or anywhere within that range—is of no import. The fact remains that, absent express guidance from the sentencing court, it must be presumed that the term ultimately imposed was determined upon evaluating all relevant factors, and that it was therefore appropriate.⁹⁷ Accordingly, in the rare instance where a sentencing judge finds that the sentence imposed is inappropriate, the record will certainly reflect as much.⁹⁸ A reasonable inference to be drawn, then, is that, if due consideration has been given by the court to the length and type of sentence imposed, parole release should occur at the first instance of eligibility.⁹⁹ Under this theory, there should be a presumption that the inmate's institutional programming and disciplinary record suggest that release to parole supervision is appropriate.¹⁰⁰ What the Board should be doing in making the release assessment is determining the overall comportment of the inmate during the period of incarceration. In addition, when the minimum term has been served, the Board should concern itself primarily with the inmate's rehabilitation.¹⁰¹ In such cases, since parole would not deprecate the seriousness of the in-

97 See *Farrar*, 52 N.Y.2d at 305 (1981) (noting appropriate sentence requires discretion and consideration of particular factors).

98 In that rare case, the appropriate remedy can be applied through the appellate process. See, e.g., *Farrar*, 52 N.Y.2d at 303 (holding that sentencing judge erred in being "bound" and imposing bargained-for sentence that court determined was inappropriate); *People v. Grey*, 157 A.D.2d 596, 598 (1st Dep't 1990) (sentence modified where sentencing court found that minimum sentence was more appropriate than sentence bargained for); *People v. Carpino*, 96 A.D.2d 489, 490 (1st Dep't 1989) (finding error for court to be "bound" to accept plea based on sentence it determined was too harsh); *People v. Martinez*, 124 A.D.2d 505, 506 (1st Dep't 1986) (re-sentencing was required where court stated that it was bound by plea agreement contrary to its own decision that more lenient sentence was appropriate).

99 See *Schwimmer v. Hunham*, 91 A.D.2d 100, 103 (2d Dep't 1983) (stating inmate becomes eligible for parole at end of minimum term); see also N.Y. CORRECT. LAW § 851 (McKinney 1998) (providing for purposes of this article Parole eligibility attaches upon expiration of minimum period of imprisonment fixed by court).

100 See 83 N.Y. JUR. 2D *Penal Inst.* § 217 (1990) (listing program participation and disciplinary record among factors to be considered in determining parole eligibility).

101 See *People ex rel. Montana v. McGee*, 16 N.Y.S.2d 162, 168 (N.Y. Sup. 1939) (explaining that "[parole's] function should be [the] fixation of the minimum term, supervision, control, guardianship, and rehabilitation during the period of conditional release"); see also Kimberly K. Hall, *Criminal Law - Minnesota Sentencing Guidelines: Plea Agreements are not Sufficient Justification for Departure*, 23 WM. MITCHELL L. REV. 189, 191 (1997) (describing indeterminate sentencing wherein "a parole board determined if offender had under-gone sufficient rehabilitation" after offender served minimum term); Gary L. Mason, *Indeterminate Sentencing: Cruel & Unusual Punishment, or Just Plain Cruel?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 94 (1990) (explaining that after minimum term prisoner's rehabilitation would be considered by parole board).

stant offense, parole should be granted at first eligibility.¹⁰² Such a decision would be appropriate because, as it has been argued above, a penalty commensurate with the severity of the crime charged has already been paid. To hold otherwise would contravene the sentencing policy of this state as set forth by statute.

Given the strong presumption of correctness inherent in any sentence, the Board of Parole should give due deference to a sentencing judge's "recommendation," placed on the record.¹⁰³ Of course, absent ambiguity, any recommendation made by the sentencing court must be interpreted by the fair import of its terms and should not be second-guessed. In that regard, the Board, in deferring to the sentencing court's discretion, must logically reconcile its release decision with that determination.¹⁰⁴

THE PRISON SYSTEM AND PAROLE

Crime victims and their families are among the most fervent supporters of the abolition of parole.¹⁰⁵ The press and politicians continue to agitate public sentiment for the maximum confinement of the violent felony offender.¹⁰⁶ This is furthered by a state prison system which today provides few of the rehabilitative resources which were in place prior to this governor's lead-

¹⁰² See generally Spiros A. Tsimbinos & Peter Lagonikos, *Conditions of Probation: From Rehabilitation to Public Safety and Community Service*, 1997 NO. 25 N.Y. CRIM. L. NEWS 1. "A probationary sentence is . . . a method of offering an offender an opportunity to rehabilitate himself." *Id.*

¹⁰³ See generally *State Judges Question Further Limitations on Parole*, 1996 No. 14 N.Y. CRIM. L. NEWS 13. New York Association of Supreme Court Judges issued resolutions against Governor Pataki's plans for further reduction of parole eligibility. *Id.* at 1.

¹⁰⁴ *But see Matter of Russo v. Board of Parole*, 427 N.Y.S.2d 982, 984 (1980) (holding that Parole Board may establish minimum term of imprisonment greater than 1/3 of offender's maximum sentence).

¹⁰⁵ See N.Y. CRIM. PROC. LAW §440.50(1) (McKinney 1998) (allowing victim to write impact statement to State Division of Parole); see also Jose Felipe Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of the Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 383 (1997) (citing final report issued by *President's Taskforce on Victims of Crime, 1982*, in which victims seek to abolish parole).

¹⁰⁶ See *Presidential Candidates Respond to AJS Questions About Justice System*, 80 JUDICATURE 93, 93 (1996) (quoting Bob Dole as stating, "I will work with the Nation's governors to end the revolving door justice system by abolishing parole for violent criminals"); see also S.J. RES. 3, 106th CONG. 1999 (proposing amendment to United States Constitution to protect rights of crime victims); Dennis C. Vacco, *Our Freedoms Can Best Be Celebrated by Taking the Steps to Protect Them*, N.Y.L.J., May 1, 1998, at S3 (advocating elimination of parole for violent criminals, and increased victim participation in parole process).

ership of the state. Apparently, no serious thought has been given to the fact that these men and women have been sentenced to serve out their prison terms in the ostensible hope of being "rehabilitated". As a consequence, vocational training, graduated release, college programs, and even such basic necessities as a GED diploma, have either been severely curtailed, or eliminated completely.¹⁰⁷ The clear result of these limitations is a protracted stay behind bars with little or no opportunity for educational and skill acquisition available to increase the prospects for success after release.¹⁰⁸ This result appears to be in direct contravention of the criteria for parole release outlined in *Executive Law* §259-i, providing that the Board must consider the applicant's institutional record, including "program goals, academic accomplishments, vocational training or work assignments. . . release plans including community resources and employment. . . ."¹⁰⁹

To be sure, the foregoing mandate actually renders the parole evaluation a contradiction in terms, for not only has the Department of Correctional Services severely cut educational and vocational training, the Board, in many cases, fails to adequately consider this information in the first place. According to statistics released by the Division of Parole in 1995, release to parole supervision has been severely curtailed. Those convicted of homicide have a release rate of approximately 20%, robbery 61%,

¹⁰⁷ See Richard Tewksbury & Jon Marc Taylor, *The Consequences of Eliminating Pell Grant Eligibility for Students in Post-Secondary Correctional Education Programs*, 60-Sep FED. PROBATION 60 (1996) (discussing trend and effects of recent budget cuts and subsequent elimination of educational programs for incarcerated offenders).

¹⁰⁸ See Michael K. Greene, "Show Me the Money!" *Should Taxpayer Funds Be Used to Educate Prisoners under the Guise of Reducing Recidivism?* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 173, 187 (1998) (discussing how prisoner education programs assume that by educating inmates, inmates' chances of being reincarcerated is lowered, while their potential for making positive contributions to society after release increases); see also Jurg Gerber & Eric J. Fritsch, *Adult Academic & Vocational Correctional Education Programs: A Review of Recent Research*, 22 J. OFFENDER REHAB. 119, 135-37 (1995) (explaining that "the research shows a fair amount of support for the hypotheses that the adult academic and vocational correctional education programs lead to fewer disciplinary violations during incarceration, reductions in recidivism, to increases in employment opportunities, and to increases in participation in education upon release") cited in Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 LAW & INEQ. 127, 155 n.54 (1997).

¹⁰⁹ See N.Y. EXEC. LAW § 259-I (McKinney 1993 & Supp. 1994); *Matter of Garcia v. New York State Division of Parole*, N.Y.L.J., May 3, 1996, at 29; *rev'd on other grounds*. 239 A.D.2d 235, N.Y.L.J., May 19, 1997, at 27 (holding that Board must consider totality of factors and circumstances when denying parole).

burglary 64%, assault 38% and rape 4%.¹¹⁰ Since the beginning of 1997, those rates have continued to drop even further, particularly when the budget crisis in the state legislature and senate created a demand for prison cells, thereby making parole release a perverted political tool in the equation.¹¹¹ According to former State Criminal Justice Coordinator Paul Schectman, "the board has come to appreciate a fundamental principle of this administration: violent offenders should not be released early."¹¹²

Not only does this political policy subvert due process and equal protection guarantees, it also ignores the fact that the Board of Parole in the State of New York does *not* release an inmate from his sentence *early!*¹¹³ There is a popular public misconception known as "early" release to parole, and only the "Shock Incarceration Program"¹¹⁴ may deduct time from the minimum period of imprisonment for carefully screened non-violent offenders completing its requirements.¹¹⁵ Ideally, the minimum term of imprisonment represents the precise time when a *rehabilitated* inmate should be released, but there is no "early" release on parole in New York State. An inmate can only be released after serving the *full* minimum term of imprisonment.

Hence, the minimum term is that period of time that must be

¹¹⁰ See *New York State Criminal Law Statistics*, 1998 No. 31 N.Y. CRIM. L. NEWS 17 (providing statistics for both 1994 and 1998).

¹¹¹ See Tsimbinos, *supra* note 5. Concerns exist that the jail population will shortly explode due to a reduction of parole possibilities for inmates. *Id.*

¹¹² See *id.*

¹¹³ See Gary Spencer, *Pataki Proposes Bill to End Parole for Violent Felons*, N.Y.L.J., Mar. 12, 1998, at 1, col.3 (reporting that Governor Pataki's measure would eliminate the early release available under the current parole system); see also Gary Spencer, *Assembly Adopts Curbs on Parole*, N.Y.L.J., July 30, 1998, at 1 (noting Assembly passed Governor Pataki's bill to eliminate discretionary parole for all first-time violent felons).

¹¹⁴ See 18 U.S.C. § 4046. Shock incarceration programs offer inmates rigorous discipline, and physical training together with counseling services. *Id.* at (b)(1) –(b)(2). See also N.Y. CORRECT. LAW § 865-867 (McKinney 1998) (defining shock incarcerations' eligibility requirements and program duration); Pamela L. Griset, *Discretion, Disparity and Discrimination in Sentencing: Where Have All the Critics Gone?*, 35 No. 3 JUDGES J. 3, 6 (1996) (expressing concern about lack of judicial review in shock incarceration program).

¹¹⁵ See N.Y. CORRECT LAW § 865-867 (McKinney 1998). An eligible inmate is defined as an inmate serving an indeterminate term of imprisonment who is under 26 years of age, who is eligible for parole within three years, has not previously been convicted of a felony upon which an indeterminate term of imprisonment had been imposed and who was between the ages of 16 and 26 when the crime was committed. *Id.* Persons convicted of certain specified offenses including homicide, rape, sodomy and escape and later vehicular manslaughter are not "eligible" under the shock incarceration program. *Id.*

served in full, before parole can be considered.¹¹⁶ It is actually a period of parole "in-eligibility."¹¹⁷ The maximum term of an indeterminate sentence provides the state with a safety zone, by which a "hold" of up to twenty-four months may be applied by the Board if it appears that the inmate has not been fully rehabilitated after the expiration of the minimum term.¹¹⁸ The "conditional release" is that date upon which the inmate may be released, upon completion of two-thirds of the maximum sentence, with one-third of the sentence deducted from the maximum term for good-time credit.¹¹⁹ In contrast, the "max" date also acts as a deterrent from bad behavior because it represents a substantial portion of the time an inmate owes, which the inmate otherwise remains legally subject to serve.¹²⁰ In this way, the loss of good-time credit from the conditional release date, and service of the "max" date, acts as the catalyst for an inmate to "try" for rehabilitation, often successfully.¹²¹

Though often misunderstood, parole supervision serves the general public by fulfilling a number of important functions. First, it ensures that supervision takes place and helps minimize the risk that ex-offenders will commit new crimes.¹²² While in prison, planning for parole release serves to motivate inmates to

¹¹⁶ See N.Y. CORRECT. LAW § 805 (McKinney 1998) (contemplating parole eligibility only after minimum term); *Pike v. New York State Div. of Parole*, 560 N.Y.S.2d 271, 272 (N.Y.Sup. 1990) (emphasizing that parole release is default at completion of minimum term); see also *Walker v. Oswald*, 449 F.2d 481, 484 (2d Cir. 1971) (explaining that minimum sentence imposed by court is irrevocable declaration that defendant must serve specified period of time in prison before parole board is empowered to release him).

¹¹⁷ See *id.* (explaining that parole becomes option only after service of minimum term).

¹¹⁸ See N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 1998) (explaining that if parole is denied at first hearing, reconsideration must take place within twenty-four months).

¹¹⁹ See N.Y. CORRECT LAW § 803(1)(b) (McKinney 1999) (establishing cap for good behavior allowance at one third of maximum sentence imposed by court).

¹²⁰ See Gary L. Mason, *Indeterminate Sentencing: Cruel & Unusual Punishment, or Just Plain Cruel?*, 16 NEW. ENG. J. ON CRIM & CIV. CONFINEMENT 89, 120 n.3 (1990). "If the prisoner is not granted parole after the minimum number of years, his sentence takes on a much higher level of uncertainty; hence the term 'indeterminate sentence.' After a parole denial, the only 'sure thing' is release at the maximum term of years." *Id.*

¹²¹ See *People v. Wade*, 266 Cal. App. 2d 918, 928-29, (1968) (explaining that indeterminate sentence law, affords person convicted of crime opportunity to minimize term of imprisonment by rehabilitating himself in such manner that he may again become useful member of society); see also James B. Jacob, *Sentencing by Prison Personnel: Good Time*, 30 U.C.L.A. L. REV. 217, 225 (1982) (explaining how use of good time drastically reduces sentences, also explains that good time is used as punitive device).

¹²² See Loren A.N. Buddress, *Federal Probation and Pretrial Services - A Cost Effective and Successful Community Corrections System*, 61 MAR. FED. PROBATION. 5, 6 (1997) (explaining that pretrial and probations officers most help community by helping ex-criminals contribute to society).

adjust their behavior and acts, as an incentive to take part in treatment programs.¹²³ Movements to abolish parole disregard the fact that an increase in parole supervision, designed to help inmates succeed, actually *enhances* public safety, since continued confinement of a rehabilitated individual beyond the minimum term no longer serves a *legitimate* state interest. Secondly, parole supervision saves tax dollars and can prove to be a far superior means of helping the offender make a smooth transition back to a lawful lifestyle, thus ensuring the safety of the community at an affordable cost.¹²⁴

The Board must assess whether the inmate "will live and remain at liberty without violating the law,"¹²⁵ thus the Board is faced with the difficult task of predicting propensity for criminal behavior.¹²⁶ The Board must also determine future criminality, based in large part on indicators that are not in the record.¹²⁷ The complex matrix of information before the Board must be logically reconciled with statistics of successful parolee profiles, as well as the previous criminal record (if any) fitting a recidivist

123 See 18 U.S.C. § 4046. Treatment programs such as "shock incarceration" serve as one example. *Id.*

124 See Sunny A.M. Koshy, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 466 (1988) (positing that conditional releases are more cost-effective than prolonged incarceration); Paul H. Robinson, *One Perspective on Sentencing Reform in the United States*, 8 CRIM L.F.1, 8 (1997) (describing parole as cost effective deterrent). *But see* Thomas J. Bamonte, *The Viability of Morrissey v. Brewer and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U.L.J. 121, 132 (1993) (explaining that parole has become less tool of rehabilitation than cost-effective means of extending surveillance and discipline of penitentiary).

125 See N.Y. EXEC. LAW § 259-i[2](c) (McKinney 1998) (necessitating calculation of potential recidivism); *see also* *Morrissey v. Brewer*, 408, U.S. 471, 482 (S.Ct. 1972) (stating that "[t]he 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").

126 See Melinda K. Blatt, *State Liability for Injuries Inflicted by Parolees*, 56 U. CINN. L. REV. 615, 615 (1987) (arguing that inherent difficulty of predicting post-release criminality necessitates absolute immunity for allegedly negligent release); Travis & O'Leary, *A History of Parole*, in PROBATION, PAROLE, AND COMMUNITY CORRECTIONS 109 (3d ed. 1984) (citing studies showing high rates of recidivism cast doubt on ability of correctional programs to rehabilitate prisoners; studies also suggest that parole boards have little accuracy in predicting future criminal behavior); *see also* S. REP. NO. 225, 98th Cong., 2d Sess. 40 (recent studies have shown failure of parole as rehabilitative because too little is known about human behavior to rehabilitate prisoners or to determine when they are rehabilitated), *reprinted in* 1984 U.S.C.C.A.N 3182, 3223. *See generally* Joseph T. McCann, *Risk Assessment and the Prediction of Violent Behavior*, 44 FED. LAW. 18, 18 (1997) (summarizing the current status of clinical risk assessment and prediction of violent behavior).

127 See N.Y. EXEC. LAW § 259-I [2][c] (McKinney 1998) (enumerating factors to be considered in making parole determination).

profile.¹²⁸ In many cases today, this information simply is not considered. Further aggravating this fact is the Board's tendency to disregard the "guideline time range," thereby creating inequities as to prison time for specific offenses and offenders.¹²⁹ Adherence by the Board to its guidelines was intended to assess, to the extent possible, that similar offenders would serve about the same amount of time prior to release. Ideally, the Board's release guidelines should be adhered to, because in effect, the Board, determines how long convicted offenders stay in prison.¹³⁰ The categories of the release guidelines were established to make the parole decision, including the fixing of minimum periods of imprisonment or ranges thereof "for different categories of offenders."¹³¹ It is unfortunate that today, the guidelines are completely ignored in most cases and have not been revised in since 1985.¹³²

The inequity lies in the fact that, because the release guidelines are discretionary, reviewing courts will not intervene when guideline time ranges for specific offenses are exceeded.¹³³ If the

¹²⁸ See N.Y. EXEC. LAW §259-I[2][c] (impliedly requiring consideration of recidivism and previous criminal history in determining "if such inmate is released, he will live and remain at liberty without violating the law").

¹²⁹ See *Ganci v. Hammock*, 471 N.Y.S.2d 630, 632 (2d Dep't 1984) (board may fix MPI outside guideline range or deny parole release to inmate who has served time in excess of guideline range, if it sets forth reasons for doing so in sufficient detail); see also 9 NYCRR 8001.3[c] (1997) (explaining that guidelines should not substitute for careful consideration of individual cases); *Matter of Vuksanaj v. Hammock*, 463 N.Y.S.2d 61, 62 (3d Dep't 1995) (finding reasons given for deviation from MPI were sufficient).

¹³⁰ See N.Y. EXEC. LAW § 259-c[1]. The New York "[S]tate Parole Board . . . ha[s] the power and duty of determining which inmates . . . may be released on parole." *Id.*

¹³¹ See N.Y. EXEC. LAW § 259-c(4). Under this section, one Board mandate is to "establish written guidelines for its use in making parole decisions as required by law, including the fixing of minimum periods of imprisonment or ranges thereof for different categories of offenders." *Id.*

¹³² See Thomas M. Stack, *Guidelines for Sentencing*, N.Y. NEWSDAY, Oct. 25, 1994, at A35. In 1985, the New York State Committee on Sentencing Guidelines submitted a report with recommendations, advocating an "elimination of indeterminate sentencing and a phase of parole release." *Id.* "Assembly bill 7027 . . . set forth the necessary changes to the New York Penal Law, the Criminal Procedure Law, the Corrections Law, and the Executive Law." *Id.* The issue, however, never came up for a vote in the Assembly. *Id.*

¹³³ See *Maciag v. Hammock*, 453 N.Y.S.2d 56, 57 (1982) (considering refusal to interfere since there was no showing of irrationality bordering on impropriety to warrant judicial intervention in Board's decision); see also *Weyant v. Hammock*, 445 N.Y.S.2d 42, 42-43 (1981) (acknowledging that reasons set forth by State Board of Parole establishing petitioner's minimum period of imprisonment of 36 months on a 0-4 year sentence were sufficient to justify setting minimum period of imprisonment independent of guideline rates); *Rodriguez v. New York State Board of Parole*, 421 N.Y.S.2d 437,438-39 (1979) (acknowledging that although minimum term imposed by Board of Parole exceeded time range established pursuant to Board's own guidelines, such departure from guidelines was supported). *But see Edge v. Hammock*, 438 N.Y.S.2d 38, 39 (3d Dep't 1981) (holding

guideline time range were adhered to, in contemplation of the legislative intent of its implementation, the range would serve to enhance parole as a legitimate way of controlling prisoners; i.e. well-behaved inmates would more likely be released within the scope of the appropriate time range.¹³⁴ It is therefore obvious that the guideline time range and the current pace of parole denials have yet to be reconciled. If the Board does not use or even recognize the guidelines, then the Board should change them or abandon them. It should not, however, ignore the guidelines by encouraging activist parole board members to accomplish goals that even the governor has failed to push for legislatively.¹³⁵

Once an inmate is placed under parole supervision, parole officers offer counseling, referral and job-finding services, and a parolee's conduct while under supervision is governed by a written agreement.¹³⁶ The violation of such an agreement can result in revocation of parole and re-imprisonment.¹³⁷ Parole is thought of as performing a shielding function for society: it is aimed "at helping the parolee and supervising his adjustment to society while at the same time protecting society."¹³⁸ Yet, despite the fact that Department of Justice statistics indicate that young,

that parole boards did not have authority to fix defendant's minimum period of imprisonment, which exceeded Board's own guideline range).

134 *But see Federal Sentencing Guidelines in SENTENCING REFORM 1987*, at 513, 534 (PLI Litigation & Admin. Practice Course Handbook Series No. c4-4181, 1987). It has been asserted that:

In a guidelines sentencing system, no useful purpose will be served by continuing the Commission. Prison sentences imposed will represent the actual time to be served and the prisoners and the public will know when offenders will be released from prison. Prisoners' morale will probably improve when the uncertainties about release dates are removed. Public respect for the law will grow when the public knows that the judicially-imposed sentence announced in a particular case represents the real sentence, rather than one subject to constant adjustment by the Parole Commission.

Id. at 534.

135 See Pamela L. Griset, *Discretion, Disparity, and Discrimination in Sentencing: Where Have All the Critics Gone?*, 35 NO. 3 JUDGE'S J. 3, at 4-5 (1996) (explaining tersely gubernatorial calls for legislative parole reform).

136 See N.Y. CRIM. PROC. § 410.10(1) (stating that defendant must be given written copy of conditions when imposed).

137 See N.Y. CRIM. PROC. § 410.10(2). This section establishes that:

[A] commission of additional offense . . . after imposition of sentence of probation or of conditional discharge and prior to expiration or termination of . . . sentence, constitutes a ground for revocation of such sentence, irrespective of whether such fact is specified as a condition of the sentence.

Id.

138 See William Parker, *Parole, Origins, Development, Current Practices and Statutes*, American Correctional Association, Parole Corrections Project Resource Document, no. 1, at 26 (College Park, Maryland, 1975); see also INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, Vol. 11, p. 518 (McMillan 1968).

long-termers (those serving lengthy minimum terms) who educate themselves in prison are less likely to become repeat offenders, the Board is simply not paroling them. The Board can never square its failure to apply the guideline time range to minimum sentences which, in large measure, surpass them.¹³⁹

With the current pace of parole denials quickening, and the total number of convicted offenders entering the prison system today on the rise,¹⁴⁰ parole is used perversely to exacerbate the overcrowding of prisons.¹⁴¹ This results in unnecessary construction and expansion of the prison industrial complex, with no appreciable gains to the taxpayers or the criminal justice system.¹⁴² The current controversy over parole continues to be a politically motivated and distracting sideshow from the war against violent crime.¹⁴³ In the meantime, the New York State

¹³⁹ *But see* John N. Kane, Jr., *Dispositional Authority and Decision-Making in New York's Juvenile Justice System: Discretion at Risk*, 45 SYRACUSE L. REV. 925, 954 (1994). Kane poses the question: "In light of the high recidivism rates of juveniles who leave these facilities [training schools], we must ask if we are currently making prudent use of taxpayer dollars. Indeed, institutionalism has not worked." *Id.* at 955.

¹⁴⁰ According to the Correctional Association of New York, as of January, 1998 the prison population stands at 69,561.

¹⁴¹ *See* Michele Deitch, *In the U.S. Supreme Court: Parole By Any Other Name May Smell as Sweet But Does it Create a Liberty Interest Subject to Due Process Protection?*, available in 12/6/96 WLN 13045 (1996). It is argued that "[w]hile eliminating or limiting parole may be politically popular, these approaches have simply exacerbated overcrowding problems and increased the frustrations of prison officials who need to make space in their prisons for the ever-increasing number of admissions." *Id.*; *see also* Ira P. Robbins, *George Bush's America Melts Dante's Inferno: The Americans with Disabilities Act in Prisons*, 15 YALE L. & POL'Y REV. 49, 49 (1996). The number of people incarcerated in state and federal prisons annually has grown at a rate of 8.4% in recent years. *Id.* at 44. Office of Justice Programs, Bureau of Justice Statistics, U.S. Dep't of Justice, Executive Summary; Correction Populations in the U.S., 1993 (last modified Oct. 1995) <<<http://www.ojp.gov/pub/bjs/ascii/cupus.93ex.txts>>> (providing data on prison populations); Pierre Thomas, *U.S. Prison Population Continuing Rapid Growth Since 1980's, Surpasses 1 Million*, WASH. POST, Oct. 28, 1994, at A3 (describing prison population "continuing a staggering growth").

¹⁴² *See* Roger E. Benson, *Letters*, N.Y. NEWSDAY, Feb. 9, 1998, at A27. The reality is that limiting or abolishing parole would mean the state would have to build more jail cells to house criminals for the entire length of their sentences. *Id.*

¹⁴³ *See* Dick Thornburgh, *Doing What's Necessary to Fight Crime*, 17-Apr. PA. LAW. 12, 14 (1995). Most violent crime in the U.S. is committed by a small segment of the population, a segment replete with repeat offenders. *Id.* at 14. The longer violent criminals remain imprisoned, the fewer crimes they will commit. *Id.*; *see also* Dennis C. Vacco, *'Smart' Lauyering Takes a Bite Out of Crime, Too*, N.Y.L.J. Jan 27, 1998, at S4. Explaining that the tighter grip on parole releases from state prisons sends a strong message to street thugs about our renewed resolve to win the war on crime. *Id.* *See generally* Jim McGee, *War on Crime Expands U.S. Prosecutor's Powers; Aggressive Tactics But Fairness at Issue War on Crime Expands U.S. Prosecutor's Powers; Aggressive Tactics But Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1. Describing the deleterious consequences a warring attitude can have on the rights of the prosecuted. *Id.*

prison population swells by the thousands every year.¹⁴⁴ If the safety valve of parole is eliminated, the State will be forced to reevaluate its sentencing policies. In the process, the state will be confronted with the hard choice of reducing the length of prison sentences imposed under the Rockefeller drug and other laws,¹⁴⁵ or building new and expensive prisons.¹⁴⁶

Many criminal justice experts have called for drastic changes in the Rockefeller drug laws,¹⁴⁷ which have resulted in surging prison costs and quintupled the number of prison inmates since their enactment twenty-five years ago.¹⁴⁸ For example, according to the Correctional Association of New York, between 1981 and 1996, the state prison system grew by as many as 39,651 beds, at a cost of nearly \$4 billion dollars.¹⁴⁹ And yet, the option of parole has not been propitiously utilized to temper the dynamics of prison expansion, which requires the ever-burgeoning expendi-

¹⁴⁴ See David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 643 (1993) (describing New York State's escalating prison construction and operating costs).

¹⁴⁵ See Paula G. Johnson, *At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 39-40 (1995) (discussing Rockefeller drug laws, stringent sentencing required, and impact on various demographic groups).

¹⁴⁶ See Debra Lucas Muscoreil, *Costly Drug Laws*, BUFFALO NEWS, June 15, 1997, at H3 (suggesting that "Rockefeller drug laws are stuffing our prisons" and that "prison expansion cannot be answer to overcrowding" [particularly] "when thousands of offenders are incarcerated for possessing small amounts of drugs").

¹⁴⁷ See Raymond Hernandez, *Governor Commutes Sentence of 3 Convicted on Drug Charges*, N.Y. TIMES ABSTRACTS, Dec. 25, 1997, available in 1997 WL 17837367. It was reported that:

Governor George Pataki, who has joined a generation of lawmakers in expressing grave reservations about N.Y.'s severe penalties for low level drug offenses, granted clemency [] to three people sentenced to long prison terms under drug laws enacted under another Republican Governor, Nelson A Rockefeller.

Id.; see also Spiros A. Tsimbinos, *After Jenna's Law, Is it Time to Modify the Rockefeller Drug Laws?*, 1998 No. 31 N.Y. CRIM. L. NEWS 8 (naming reform advocates); *End Parole?, Other States Tried and Resumed It*, NEWSDAY, Jan. 12, 1999, at A28 (calling for repeal of Rockefeller-era drug laws and their draconian sentences).

¹⁴⁸ Human Rights Watch conducted a study that found the Rockefeller drug laws violate international human rights laws and recommended immediate action to arrange the sentencing policies mandated by the Rockefeller laws.

¹⁴⁹ See Marc Maur, *Americans Behind Bars: One Year Later*, SENTENCING PROJECT 1992 (cited in Alan B. Fischler, *The Incarceration of America*, N.Y.L.J., Nov. 6, 1992, at 2). It was reported that:

From 1980 to 1988 the combined federal and state inmate populations increased by 90%. New York State has seen its own inmate population almost triple during the period from 1981 through 1991, rising from 21626 inmates held in state facilities in 1981, to 58,404 held by the end of 1991, an increase of over 270%. Additionally it is estimated by federal and state correction officials that by 1995, prison populations will have increased another 30%.

ture of tens-of-millions of dollars in additional annual funding. It is hardly disputable that such funding would be better spent on education and prevention programs, drug treatment centers, the development of early release programs and social service programs in the main.

Governor Pataki's recently published prison plan calls for a major expansion of the state prison system, requiring \$635 million tax dollars to build an additional 3,500 maximum-security prison cells.¹⁵⁰ The Legislature and Assembly reached a compromise and allocated almost half of those funds needed for half the number of prison cells requested, the other monies going to various social service programs.¹⁵¹ Yet, the Board and the Division of Parole continually exclude classes of otherwise eligible offenders from parole release. It follows then, that any impasse on the expansion of prison building becomes all the more critical today.

Moreover, participation in any rehabilitative programs while in custody currently does not guarantee discretionary parole release at all.¹⁵² This policy of the Board fails to serve the general public interest. The Board's primary concentration on the "seriousness of the instant offense" clearly disregards the legislative intent that the Board of Parole must exercise its discretionary release authority as required by statute.¹⁵³ In this regard, the

¹⁵⁰ See Matthew Goldstein, *City Bar Opposes Pataki Bills On Crime*, N.Y.L.J., July 2, 1997, at 1 (asserting that Governor Pataki has proposed spending \$635 million on new prisons this year); see also *Don't Waste States' Money on Building Prisons*, N.Y. NEWSDAY, July 7, 1997, at A38 (noting that "Pataki's prison-building binge would cost \$635 million").

¹⁵¹ See *Invest in Education Instead of New Prisons*, BUFFALO NEWS, Feb. 6, 1998, at C3. Noting that:

The 2,300 new prison cells that Governor Pataki pushed for and got from the state legislature last year will cost around \$200 million just in construction costs, not to mention the huge costs for hiring more guards and operating the prisons.

Id.

¹⁵² See N.Y. EXEC. LAW § 259-i (McKinney 1993 & Supp. 1999) (listing several factors to be considered in determining parole). See generally Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y.L. SCH. L. REV. 1, 30 (1998) (explaining prisoners may be denied visitation in direct contravention of rehabilitation programs).

¹⁵³ See N.Y. EXEC. LAW § 259-I (McKinney 1993 & Supp. 1999) (delineating discretionary authority of Board of Parole); see also Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 1011 (1995) (emphasizing focus on degree of severity of crime); Cheryl G. Bader & David S. Douglas, *Where to Draw the Guideline: Factoring the Fruits of Illegal Searches Into Sentencing Guideline Calculations*, 7 Touro L. REV. 1, 20 (1990) (arguing broad discretion in Board of Parole).

Board has egregiously abdicated from its legal mandate. The Board's failure to fully consider an applicant for parole release, by confining its inquiry solely to the "instant offense," inappropriately disregards, by "administrative fiat," the duties of the Board as defined in *Executive Law* §259-a.¹⁵⁴ In the meantime, the Legislature and the judiciary sit idly by and watch thousands of men and women "held" unnecessarily every year, and in some cases, illegally, beyond the minimum term of imprisonment imposed by the judge who presided over the trial or plea.¹⁵⁵

THE PAROLE BOARD NEEDS JUDICIAL OVERSIGHT

The criminal defense bar needs to be aware that the Division and Board of Parole are permitted to disregard the Legislative intent of §259-i of the *Executive Law* by denying release to eligible offenders.¹⁵⁶ This "unwritten policy" is, in effect, implemented without guidance from the Legislature and in the absence of any legislative amendments or changes in the current parole law. Further, public officials such as the governor of the state¹⁵⁷ and mayor of the City of New York,¹⁵⁸ are readily poised to exclude parole for all first-time violent felony offenders with

¹⁵⁴ See N.Y. EXEC. LAW, § 259-a (McKinney 1993 & Supp. 1999) (outlining responsibilities of Board of Parole); see also *People v. Kelly*, 88 N.Y.2d 248, 252 (1996) (explaining role of parole board regarding release). See generally John F. Wirenius, *A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175, 191 (1994) (highlighting instances of differentially applied judicial discretion).

¹⁵⁵ But see Douglas A. Wickham, *Parole*, 74 GEO. L.J. 897, 903 (1986) (discussing where judiciary takes active role and approves terms which are outside guidelines and beyond minimum term).

¹⁵⁶ See N.Y. EXEC. LAW § 259-i (McKinney 1998).

¹⁵⁷ See Tracey Tully, *Albany Killing Drives Bid to Curb Parole*, TIMES UNION (Alb.), Jan 11, 1998, at A1. Governor Pataki pushed to eliminate parole for all violent offenders, and proposed other changes to the criminal justice system such as requiring first time felony offenders convicted of violent crimes to spend 85% of their sentence in prison, but establishing a "merit time" proposal for non-violent felons. *Id.* The last alternative would allow the latter to qualify for early parole if they earn a high school equivalency diploma, a vocational certificate, a drug-treatment certificate, or perform 400 hours of supervised community service. *Id.* Furthermore, it was proposed that violent juvenile offenders be transferred from the state youth system to the adult prison system once they attain age 16. *Id.* The N.Y. legislature has rejected these proposals in the past. *Id.*

¹⁵⁸ See Richard Perez-Peña, *Pataki's Plan to End Parole is Tougher than other State's Moves*, N.Y. TIMES ABS., Jan. 26, 1998, at 1. In New York, the Governor and the New York City Mayor want to terminate parole for violent crimes without "adjusting sentences." *Id.* In 1998, the New York State Legislature passed Jenna's Law. Effective as of October 1, 1998, there is no longer discretionary release available in New York for first time violent offenders. *Id.* see also Gary Spencer, *Assembly Adopts Curbs on Parole*, N.Y.L.J., July 30, 1998, at 1 (noting passage of Governor Pataki's bill eliminating discretionary parole for all first-time violent felons).

no public referendum or input from the Legislature, Judiciary or criminal defense bar.¹⁵⁹ It is no wonder, that as a result, parole cases today continue to engender confusion in the sphere of criminal justice.¹⁶⁰

This confusion is caused, in large part, because, upon judicial review, most judges simply decline to enforce the validity of the *Executive Law* sections defining an "abuse of discretion,"¹⁶¹ and thereby refuse to strike down a decision to deny parole which is clearly an abuse of discretion or arbitrary or capricious. In many instances, decisions to deny parole cannot logically be reconciled with the facts of a particular case. Most often, the Board simply recites the language of the statute as the predicate for denial. Upon judicial review in an Article 78 proceeding,¹⁶² the refusal of the judiciary to enforce the law requiring that the Board exercise its appropriate discretion amounts to the unethical abdication of a judicial duty.¹⁶³ This is probably due to the unique nature of parole, insofar as the Legislature has passed along the task of reviewing the merits of arguments raised on the appeal of the denial of parole release to an administrative agency,¹⁶⁴

¹⁵⁹ See Craig Gordon, *Deadline Looms for Prison Grant/Parole Issue is a Sticking Point*, NEWSDAY, June 27, 1997, at A61 (explaining insistence by Governor Pataki on eliminating parole for first-time offenders in exchange for \$24 million prison grant); see also *Parole Law Debate State Budget Talks*, N.Y. TIMES ABS., July 1, 1997, at B4 (highlighting budgetary debate which included argument over parole for violent offenders). See generally Ariane M. Schreiber, *States That Kill: Discretion and the Death Penalty - A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 327 (1996) (discussing circumstance in which Governor Pataki removed prosecution who disagreed as to sentencing ideologies).

¹⁶⁰ See Sarah Metzgar & John Caher, *Silver Rejects Pataki Crime Bill*, ALBANY TIMES UNION, July 1, 1997, at A1 (discussing confusion arising from minimum maximum sentencing and release dates); see also Jim O'Hara, *Web Sites Lists Release Dates of Violent Felons Some Officials Caution Against Overreaction by the Public*, SYRACUSE POST-STANDARD, Nov. 28, 1997, at B1 (explaining release date website and developing confusion as to meaning of terms). See generally *Probation is Not Parole*, BUFFALO NEWS, Jan. 20, 1997, at B3 (discussing public's confusion over parole and related terms).

¹⁶¹ See N.Y. EXEC. LAW § 259-i (explaining abuse of discretion); see also John F. Wirenius, *A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175, 177 (1994) (emphasizing implications of "abuse of discretion standard" as applied).

¹⁶² See N.Y. CPLR Article 78 (McKinney 1998). See generally *Due Process*, 11 TOURO L. REV. 799, 831 (1995) (highlighting article 78 proceeding and standard enlisted by Court).

¹⁶³ See generally Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 373 n.158 (1993) (explaining judicial duty to place check on administrative agencies such as Board of Parole); Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Other Under the Burger Court*, 59 N.Y.U. L. REV. 482, 549 (1984) (emphasizing danger of overbroad judicial discretion).

¹⁶⁴ See N.Y. ADC T.9, sub. CC, Pt. 8006.

through the Appeals Unit of the Division of Parole.¹⁶⁵ Reviewing courts rarely second-guess the Appeals Unit of the Division, as long as it renders a finding that the Board reviewed all "relevant factors."

The Appeals Unit itself was a product of the administration of Edward R. Hammock as Chair of the Board of Parole.¹⁶⁶ The Unit was not created to be a substitute for the discretion of the Board. The intent of the appeals process was to ensure that every inmate who received an unfavorable decision from the Board would also receive a complete review of that decision if he wished it.¹⁶⁷ Thus, the Appeals Unit was constructed to provide a fresh look at the case. Review by the Appeals Unit was intended to assure the discovery of mistakes in fact or law. The review of the discretionary determination to deny release to an inmate was left to the Board.¹⁶⁸ The appeals process requires that three commissioners of the Board of Parole, none of whom may have participated in the decision from which an inmate is appealing conduct the review of the release panel's exercise of discretion.¹⁶⁹ The appellate panel may vote to affirm, modify, or reverse the Board's decision, and the appeal itself is determined by a majority vote of the panel.¹⁷⁰ Appeals may be made on numerous grounds, the most successful often being the claim that the Board used inaccurate or incomplete information, citing of errors made in the scoring of elements in the parole report, or that the Board's decision otherwise demonstrated prejudice or predetermination.¹⁷¹ There is almost *no* chance of success in the general claim that the Board of Parole "abused" its discretion.

To illustrate this seeming "policing" of the policies of the Board by the Division of Parole Appeals Unit, it should first be noted that reviewing courts prefer the Board to handle its own af-

¹⁶⁵ See *id.* (explaining duties of appeals unit).

¹⁶⁶ Edward R. Hammock was Chairman of the New York State Board of Parole from 1976 to 1984; the Appeals Unit Sections were filed in 1978.

¹⁶⁷ See, e.g. Sentencing Reform Act of 1995, 1995 Sess. Law. News of N.Y. Ch. 3 (5281 A. 7991) (1995) (establishing right of review by Court of denial of inmate's parole).

¹⁶⁸ See *Branch v. Nelson*, 472 F. Supp. 569, 571 (D. Conn. 1979). The district court held that there was no constitutional infirmity in the law's failure to require Parole Board to speed procedure and parole interview process. *Id.*

¹⁶⁹ See 9 NYCRR § 8006.4[d] (1998).

¹⁷⁰ See 9 NYCRR § 8006.4[e] (1998); see also *Collins v. Hammock*, 96 A.D.2d 734, 734 (4th Dep't 1983) (evaluating Board of Parole's decision to deny release).

¹⁷¹ See 2 N.Y.JUR. 2D *Administrative Law* § 99.5, 63-71 (1979) (explaining role of administrative agency).

fairs.¹⁷² In doing so, however, the Appeals Unit, on the rare occasion that it actually reverses a defective parole decision (and the even rarer case that a reviewing court does), merely orders a re-hearing—where the same defective decision is, more often than not, reinstated in synonymous terms. A subsequent appeal attacking the second, equally flawed decision only serves to send the potential parolee through the procedure yet again. This scenario not only results in a complete waste of scarce judicial and administrative resources, but, more seriously, in the total deprivation of the right to a fair hearing which, if provided in the first place, would likely result in parole release.¹⁷³

ABOLITION OR CURING: A REFORMATION OF PAROLE IS NEEDED

The increase in judicial deference to the discretion of the Board and Division of Parole has never been more apparent than it is today. However, as this article has discussed, this broad discretion has not been matched by improved management of the parole process. It may be argued that, with the increased need for scarce jail cells, the parole process should be used in a more effective and fairer way, that protects public safety with a balanced and serious approach that adheres to the legislative intent set forth in the *Executive Law*.¹⁷⁴ This clearly has not been the case. The Board itself arguably should be the first to recognize that New Yorkers demand, and are entitled to, an efficient and professional parole process in a system that accommodates ethnic minorities and the poor, who constitute the majority of men and women in the prison system today.¹⁷⁵

The authority to establish penal policy lies exclusively with the state Legislature. Yet, the current practice of imposing a two-

¹⁷² See, e.g., Robert Eldgridge Underhill, *Sentence Entrapment: A Casualty of the War on Crime*, 1994 ANN. SURV. AM. L. 165, 165 (1994) (describing decline in exercise of judicial review of parole decisions).

¹⁷³ See *Matter of Quarataro*, 637 N.Y.S.2d 721, 721 (1st Dep't 1996) (then-justice Kristin Booth Glenn articulating this sentiment in meticulously crafted opinion).

¹⁷⁴ See N.Y. EXEC. LAW § 259-a (McKinney 1998) (emphasizing importance of administrative discretion.)

¹⁷⁵ See Jason A. Gillmer, U.S. v. Clary: *Equal Protection and the Crack Statute*, 45 AM. U.L. REV. 497, 565 n. 494 (1995) (evidencing disproportionately large numbers of minorities in correctional system); Michael Welch, *Rehabilitation: Holding its Ground in Corrections*, 59 FED. PROBATION 3, 6 (1995) (quoting Robert Gangi, Executive Director of Correctional Association of New York, as saying, "Prisons are becoming the place where we provide services to our poor people").

year "hold" in most cases appearing before Board panels amply demonstrates the Board's fundamental misunderstanding of the limitations on its administrative power.¹⁷⁶ The difficulty involved in determining the appropriate sentence for a particular offender is entrusted, by statute, to the deliberative power of the sentencing court, *not* the Board.¹⁷⁷ The original legislation placing the Board and the Division of Parole under the executive branch of the state government had the specific purpose of establishing an orderly and *independent* agency, which would serve the purpose of establishing a more structured framework within which to set minimum terms of imprisonment and make release decisions.¹⁷⁸ Subsequently, the responsibility of setting minimum terms was removed from the purview of the Board of Parole, and placed entirely in the hands of sentencing judges.¹⁷⁹

However, over a twenty-year period, unrestricted by either judicial oversight or proper supervision, the Board of Parole has apparently disregarded this legislative change, operating under the false assumption that it still possesses jurisdiction to set what it deems are appropriate minimum terms.¹⁸⁰ The net result of the Board's refusal to exercise appropriate discretion serves to override the minimum term of imprisonment set by the sentencing judge. This is an apparently ironic result, because the leaders of the Governor's political party have long accused Democratic party leaders of manipulating the judiciary when it could not pass its goals through the Legislature.¹⁸¹ Here, parole release denial accomplishes what the Governor cannot do via the

176 See Cavender & Musheno, *supra* note 14, at 452 (emphasizing new restraints by courts enacted against abuses of discretion or parole boards).

177 See Palacios, *supra* note 11, at 571. "Given the number of parole decisions made in some jurisdictions by varying panels of members, it would seem serendipitous, if when compared, those decisions were proportionate, equitable, uniform or predictable." *Id.*

178 See L. 1977, c. 904, *Exec. Mem.*, L.1977 904. See generally James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 127 (1996) (discussing court's establishment of appropriate sentence).

179 See, e.g., N.Y. PENAL LAW § 70.00; L.1978, c. 481; L. 1979, c. 410 (McKinney 1998) (empowering court to set minimum term).

180 See, e.g., Acker, *supra*, note 178, at 128 (describing sentencing as occurring subsequent to trial); Theodore Elsenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 8 (1993) (emphasizing that jurors have no knowledge of minimum terms which may be later established by Board of Parole).

181 See, e.g., John Caher, *Rhetoric and Reality in Pataki Era*, ALBANY TIMES-UNION, Jan. 18, 1998, at A6 (highlighting debates between Democrats and Republicans including deemed legislative measure and subsequent retaliation).

Legislature: Simply by failing to exercise their discretion during the parole hearing, the Board members carry a clear message from Albany that no convicted violent felon should be released to parole. Today, by denying release to parole supervision, it is the Board of Parole, which, in effect, still sets the minimum terms according to what it deems appropriate, despite the fact that similar offenders are not treated similarly.¹⁸²

When then-Governor Hugh L. Carey signed the 1977 Legislation enacting changes into the parole system¹⁸³ by making it a branch of the Executive Department, he had no way of foreseeing that a successor could induce the Board to act as a political functionary and extend a political agenda.¹⁸⁴ Clearly, such is the case today. In the cases of entire classes of offenders (e.g., sex offenders and violent felony offenders), the Board appears to have abandoned the exercise of its discretionary release powers within the parameters of the court's sentences. This *de facto* sentencing power of the Board and Division of Parole belongs out of the hands of the political process. As stated in *Matter of King*,¹⁸⁵: "It is the province of the legislative process, except insofar as the legislature has entrusted, within certain parameters, the imposition of individual sentences to the judiciary."¹⁸⁶ Accordingly, the Board of Parole should concentrate on doing the work that defines its administrative mission, pursuant to the mandates of *Executive Law* §259-i(2).¹⁸⁷

Both the New York State Association of Criminal Defense

¹⁸² See Joseph T. Hallinan, *Although Outlawed, Parole is a Persistent Problem*, TIMES PICAYNE, June 23, 1986, at A12 (analogizing parole boards to "toll booth attendants").

¹⁸³ See Griset, *supra* note 22, at 576 (examining Governor Carey's initiative in creating parole Reform Act of 1977); see also Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 576 (1994) (highlighting fact that parole boards make decisions based on "imprecise standards").

¹⁸⁴ See Julio A. Thompson, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241, 251 (1988) (noting political agendas of Parole Boards in N.Y.).

¹⁸⁵ See *Matter of Darryl King v. New York State Division of Parole*, 598 N.Y.S.2d, 245 (1993).

¹⁸⁶ *Matter of King*, 190 A.D.2d 423, 432 (1993). See, e.g., Executive Advisory Committee on Sentencing Crime and Punishment in New York: An Inquiry Into Sentencing and the Criminal Justice System 10-15, 51-64 (1979) (discussing fact that in New York, parole boards essentially re-sentence offenders).

¹⁸⁷ See N.Y. EXEC. LAW § 259-i(2) (McKinney 1993 & Supp. 1999) (referring to guidelines); see also Edward R. Hammock, *Preliminary and Post Conviction Considerations In Criminal Cases*, in HOW TO HANDLE YOUR FIRST CRIMINAL TRIAL (PLI Litigation & Administrative Practice Course Handbook series No. 64-4217 at 176, 1997) (looking at mandates of Executive Law § 259).

Lawyers' Committee on Corrections and the Court of Appeals propound that the role of the Board of Parole is not to simply re-sentence an inmate according to the personal opinions and political beliefs of its members, but to determine whether, based upon the statutory criteria set forth by the Legislature in the *Executive Law*, an eligible inmate should be released to community supervision.¹⁸⁸ This position lends strong support to the argument that the practical and legal aspects of parole release are manifestations of public policy concerns, and therefore require open and considered debate. The public in general, and the criminal defense bar in particular, can and should provide necessary input to those in the Executive Branch who presently oversee the administration of the Board and Division of Parole. By its current actions, the Division of Parole is hastening its own demise by using the two-year "hold" too frequently. If the Board refuses to appropriately apply the discretion it has been given by statute, the need for the Board is called into question.

REMEDIES TO AVERT THE DEMISE OF THE CURRENT PAROLE SYSTEM

The Board and Division of Parole need to be reminded that, unless there is a valid reason to deny release, the proper decision is to grant parole.¹⁸⁹ So far, the courts have allowed the Board to deny parole ad hoc, thus producing a governmental agency that is a virtual renegade among its administrative peers in the criminal justice system.¹⁹⁰ Most importantly, policy makers and elected officials must make a concerted effort to respond to complaints by the criminal defense bar of predetermined Board decisions, abuse of discretion and racial and political bias, in reaching the decision to deny or grant release to eligible inmates.¹⁹¹

¹⁸⁸ See Estella Baker, *From "Making Bad People Worse" to "Prison Works": Sentencing Policy In England and Wales in the 1990's*, 7 CRIM. L.F. 639, 682 (1996) (discussing community supervision of parolees); Michael M. Pacheco, *The Educational Role of the Board of Parole*, 58-DEC. FED. PROBATION 38, 38 (1994).

¹⁸⁹ See Palacios, *supra* note 11, at 606 (noting that Board may parole when it deems it reasonably probable that no detriment will be caused to community).

¹⁹⁰ See Harvard Law Review Association, *Race and Non-capital Sentencing*, 101 HARV. L. REV. 1626, 1628 (1988) (illustrating virtually unlimited discretion of Parole Boards).

¹⁹¹ See Leon Freidman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions in 12TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION*, at 91 (PLI Litig & Admin. Practice Course Handbook Series No. 1-14-5234 554, 1983) (discussing

This can be best accomplished by allowing the criminal defense bar to meaningfully participate in the parole hearing process and by having an independent commission of the judiciary and the bar select the members of the Board.¹⁹² Included in this oversight commission should be not only judges, but also members of the criminal defense bar, Administrative Law Judges, parole commissioners and criminal justice specialists who are committed to fairness and equity in the criminal justice process.¹⁹³

The Board's exercise of its discretion should also be subject to periodic review to ensure its compliance with its statutory mandates.¹⁹⁴ This same commission could be given this important responsibility because the Board of Parole protects the public by making good release decisions, not politically expedient ones.¹⁹⁵ Although the Board is required to employ the guidelines in structuring its discretion in release decisions, it has abandoned them.¹⁹⁶ As a direct consequence, there is no predictability regarding the Board's exercise of its release powers. Much the same as the Federal Sentencing Guidelines Act of 1987,¹⁹⁷ the pragmatic use of the parole guidelines would structure the Board's discretion and thereby ensure compliance with the *Executive Law*.¹⁹⁸ The Board would then have the duty to rebut the presumption that an otherwise eligible inmate is *not* suitable for parole. This would also serve to require that similarly situated offenders be treated similarly, and relieve the inequities that certain studies have indicated exist with respect to sentencing disparity throughout the state.¹⁹⁹ Changes in the way this state

different aspects boards must consider in making parole decisions); see also Eric Mayer, *Procedures for Granting and Revoking Parole*, 83 N.Y. JUR Penal Inst. § 216 (stating boards must inform inmates of reasons and factors for denial of parole).

192 See Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910-1972)* 61-SEP. FED. PROBATION 23, 23 (1997) (discussing membership of federal parole boards).

193 See *id.*

194 See *id.*; see also Briquogulio v. New York State Board of Parole, 24 N.Y.2d 21, 23 (1969) (stating that release on parole is entirely up to discretion of parole board).

195 See Deborah A. Blom, *Parole*, 71 GEO. L.J. 705, 705 (1982) (stating that parole boards are designed to protect public welfare).

196 See Palacios, *supra* note 11, at 567 (providing general overview of parole release guidelines and possible effects they may have on system).

197 See Federal Sentencing Guidelines, 18 U.S.C.A. § 1B1 *et. seq.* (as amended 1998).

198 See N.Y. EXEC. LAW §2 59 (McKinney 1998).

199 See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Parole Board Party*, 28 AM. CRIM. L. REV. 161 (1991) (describing disparate results under federal sentencing guidelines); Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 389, 489 (1996) (discussing sen-

handles its parole process should also take into account whether an inmate complies with the statutory requirements of the *Executive Law*; then there should be a presumption that he or she will be paroled.²⁰⁰

CONCLUSION

Despite the fact that the Governor has continually called for the elimination of parole for violent offenders convicted for a second time,²⁰¹ reformation of the Board of Parole would effectively codify and improve parole procedures—which, in turn, would improve the safety of the public. The concomitant result would also measurably improve the performance of the parole system in all aspects, without unnecessarily compromising the rights of those otherwise eligible for parole release consideration. In this regard, the Governor's politically motivated battle cry calling for the elimination of parole in many cases would be further undermined and rendered moot. But more importantly, the implementation of these reforms would thereby have a direct impact on the administration of justice in this state and serve as an exemplary model of progressive reform well into the next century.

tencing guidelines and similarly situated offenders).

²⁰⁰ See N.Y. EXEC. LAW § 259-i (detailing requirements for parole eligibility); see also Exec. Memoranda L.1977, C.904, pp. 2538.

²⁰¹ See D. Michael Fisher, *Changing PA's Sentencing Philosophy through the Elimination of Parole for Urgent Offenders*, 5 WIDENER J. PUB. L. 269, 294 (1996) (suggesting elimination of parole for violent high risk offenders); Alison Virag Griessman, *The Fate of "Megans Law" in New York*, 18 CARDOZO L. REV. 181, 191 (1996) (discussing limitations on parole for sex offenders).

