



The Parole Game

By Jeffrey Deskovic

Background

When a judge pronounces a sentence upon a defendant, he or she does so after there has been a judgment of guilt. Sometimes the judgment of guilt has been obtained because the defendant has entered a plea of guilty; other times because, after a trial, a jury has pronounced a defendant guilty. In either case, the judge has already become familiar with the facts of the case. There is also a report that has been prepared by the Probation Department, called a Pre-Sentence Investigation, which provides further relevant information about the defendant.

Sentences have two parts to them, a minimum and a maximum. The minimum is the least amount of time the judge has decided will serve the ends of justice, the maximum is the most. For example, if a person has been sentenced to fifteen to life, that means that he must serve the fifteen years before appearing in front of the Parole Board to be considered for release. The board may let the person go, or they may decline to do so. Declining is called a hold. The hold may be for any amount of time up to two years, at the conclusion of which the prisoner will make another appearance at the board for re-consideration.

There are criteria that the Parole Board is supposed to use to evaluate cases. The Board is supposed to consider whether or not a person has tried to better himself, turned his life around, as demonstrated by his educational record and his disciplinary record. From these two pieces of evidence the Board is supposed to be considered whether, if released, the applicant will live and remain at liberty without breaking the law. Other ancillary factors that are looked at include family ties, because having good family ties has been linked to rehabilitation, jobs lined up, and any letters of support. Additionally, the seriousness of the crime, meaning that the more serious the offense, the more demanding the standard is for determining if a person has indeed turned their life around. Again, past conduct is the only standard by which to predict future conduct, hence again the educational and disciplinary records are relevant.

When George Pataki became governor, he swore an oath to uphold the laws of the state. That included the statute governing parole. There were numerous news articles, in which he would publicly say that we must end parole for those convicted of violent crimes, indicating that he wanted the state legislature to change the laws surrounding parole. The legislature never did that, realizing the wisdom in allowing people the opportunity to turn their lives around and then be able contribute to society. The lawmakers are

representatives of the people, thus this refusal constituted the will of society.

Pataki, by law, was supposed to continue to make sure that the laws were carried out. Unable to get his way, he then told the Parole Board to start automatically denying parole applications of anyone convicted of a violent crime, including those of first-time offenders, and those who had demonstrated a commitment to self improvement and were therefore in a good position to contribute to society. In fact, there were a variety of statements made to reporters, anonymously of course, from people in the Pataki administration, that the Board had been told not to parole those who had been convicted of violent crimes. Similarly, there were public statements by Parole Board members that the Board "had gotten the message." At one point, Brion Travis, was removed as a parole commissioner and transferred to a job at the Insurance Department, as a result of paroling a woman, Kathy Boudin, who had been convicted of a felony murder but who had served her time, stayed out of trouble, and bettered herself, and of whom the sentencing judge has stated, in assessing the facts of the case that he saw no reason why Boudin should not be released after her minimum if she stayed out of trouble.

This sent a clear message to the Board and constituted blatant interference and contravention of the law. To highlight the acknowledged illegality, the Pataki administration officially denied that the move was related to the decision to parole Boudin. Yet, off the record, an official "with knowledge of the situation" said that the move was a direct result of that very decision.

For a long time, courts had resisted arguments that a blanket, en masse, one size fits all, illegal verbal instructions by the governor to the board was the reason for denials and that the hearings themselves were a farce, akin to a show trial, in which the outcome had been predetermined before the interview had ever begun. Then, in the early 2000's courts began recognizing this and accordingly started reversing decisions. But even then, not every case which had a legitimate claim was reversed. Many were not. Then there were those who by the time the case made it through the internal review levels and given the slow turning of the wheels of justice, they had finished the extra time imposed as a result of the hold and were making new appearances in front of the Parole Board.

Thus, court cases was dismissed as 'moot', even though the applicants were in a position to have the same thing happen to them. Then, even as to those that the slow wheels of justice had not derailed, which were reversed, many of those cases were overturned by higher courts on appeal. The higher echelons of the judiciary were, and are still, unwilling to ac-

knowledge what had become undeniable to some of the lower courts. That left the prisoners in a "no man's land: In prison for a crime, having finished their sentence minimum and done all that they could do to demonstrate that they had changed, yet unlawfully denied relief by the Board, and having no judiciary that was willing to enforce the laws and their rights, even as the law had originally been imposed on them.

Other Injustices of the Parole Board.

There are other Parole Board policies that are unfair. For example, in recent years, even though it is not in the law governing parole, the Parole Board has come to require verbal expressions of taking responsibility and expressing remorse. This places innocent people who have been wrongfully convicted, in the tenuous position of having to choose between having a chance at freedom via parole by admitting to something that they had not done in order to end the nightmare of wrongful incarceration, and remaining in prison. This is no mere theoretical possibility, it has occurred here in New York. For example, Colin Warner had been wrongfully convicted and sentenced to fifteen to life. He was eligible for parole three times, and was turned down all three times in part because he maintained his innocence and thus could not take responsibility for the crime. The terrible price that he had to pay was the six extra years he served in prison beyond his sentence minimum, before he was exonerated. From where I stand, that is adding insult to injury, and is morally indefensible.

A similar injustice is caused by certain programs in prison, such as the Sex Offender Program, which require guilt admission, verbally and in writing, with details, both to the instructor and the other prisoners in the program. Failure to comply was grounds for expulsion from the program, and would constitute, as the Department of Corrections saw it, refusing to participate in the program. The Parole Board has denied meritorious applicants parole in the past who declined to take the program on the grounds of innocence. Protestations of innocence at Parole Board hearings, by way of explanation of the refusal to take the program, has not been persuasive. Considering how easy it is to be wrongfully convicted with the criminal justice system in the current state that it is in, wouldn't it be fair to say that at least some of the people so denied were, in fact, actually innocent, but were unable to establish their innocence, due to the lack of quality legal help, and/or the lack of DNA in a case to test?

On a personal note, I was turned down for parole after completing my sentence minimum of fifteen years, and thus wound up serving one extra year in prison before

being exonerated. Although not explicitly stated in their written decision, my refusal to take the sex offender program despite my explanations/protestations of innocence, and my not taking responsibility by expressing remorse was a factor?

What Are The Effects

What are the effects of this, beyond keeping innocent people incarcerated? Deserving individuals are not given a second chance at life, and we as a society are deprived of the excellence that they could add to our society when released. Let me give some examples that have been cited in the past.

- John Cappiello, at age 18, was convicted, along with co-defendants, of a robbery, burglary, and murder. The trial court judge determined that Cappiello did not consent, solicit or aid in the commission of the murders; that he was not armed and that had had no reasonable ground to believe that his co-defendants were carrying weapons. Therefore he was sentenced to the minimum of 15 to life. In prison, he obtained a B.S. degree, graduating magna cum laude. He was also elected as class president. He was placed on a work release program as a youth outreach worker. In three months he was promoted as the director of the program, which also happened to service the largest number of youth in the New York City Program. He had numerous letters of support. A senator wrote of him that he was a hard worker. He got married, and 5 days a week he was living with his wife. But the other two nights he still had to spend in a correctional facility, because since applying for parole, he had been denied seven different times, each time being given twenty-four-month holds. The Parole Board actually wrote that his release "would pose a threat to public safety."

- Chen had been convicted of man slaughter and two counts of robbery. While incarcerated he obtained his GED, obtained a B.A. in business management, was on the Dean's List, and in his final year had a grade point average of 3.75, and was admitted to a national honors society. He got a Department of Labor certificate in computer programming. He was a trainer in Aggression Replacement Class, and was categorized by the instructor as a "great asset to the program." He was a teacher's aid, industrial worker, carpentry apprentice, and five other trades which, for the sake of brevity, I won't mention. He also had not a single misbehavior report. Yet he was denied. There are numerous others in similar situations. I was denied despite having been praised for my educational and disciplinary records.

Then there are the elderly. Is William McFadden, at age 92, a threat? Or Morton Sunshine at 86? Or Saul Sultan, who at 71

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came to prison with a 15 to life sentence? Many have various heart ailments, colon, liver, prostate, or rectal cancer. Many need walking sticks and walk very slowly down the prison halls, sometimes carrying colostomy bags. The senselessness is so stark. It is even sadder when one considers the reality that medical care in prison is substandard and that therefore the risk of medical complications and death is so great.

Motivation

What is the motivation for doing this? It is not, as many might initially believe, out of a desire to protect the public, for in the case of those that I have mentioned above and others not mentioned but similarly situated, there is nothing to protect in the case of those who have been rendered harmless by age, or from those whose rehabilitation should be obvious to anyone who is objective. Rather, it is financial. I would like to borrow some from Michael Flax, who wrote of this subject in an issue of the magazine *Justicia* some years ago: This unauthorized verbal amendment is motivated by monies received through a federally funded grant program, known as "Truth in Sentencing Program" under 43 U.S.C.A., Section 13702 (a) (2) (b). This section states in part that if "since 1993...the state has increased the average prisoner's time which will be served in prison by convicted violent offenders sentenced to prison," and/or under section (c): "the state has increased the percentage which will be served in prison by violent offenders sentenced to prison, the federal government will authorize to the eligible states, 15% of \$997,500,000 of grant money under the truth in sentencing incentive program." Flax goes on to cite statistics "During the 1997 fiscal year, New York State received 15% for \$1,330,000,000 grant funds and, through the following years, the amount has increased to \$2,527,100,000 for the 1998 fiscal year with New York receiving 25%, 25% of \$2,660,000,000 for the 1999 fiscal year, and 25% of \$2,753,100,000 for the 2000 fiscal year."

Conclusion

There are larger costs to society brought about by the way that the Parole Board has been doing business ever since 1995. Every time a meritorious applicant is turned down, we, as a society, pay for it. Firstly, we are denied the excellence and contributions that those who truly have turned their life around can add to our society. Secondly, we pay for it by our tax money going to incarcerate people who don't need to be incarcerated. Rather than the former offenders paying taxes and being productive, they become a tax burden, to the tune of forty thousand dollars a year each. Thirdly, it hurts families who have done nothing wrong. Fathers who are incarcerated cannot provide for their family, thus they suffer financially. Children suffer because Mommy and Daddy are not present to help raise them and provide love and an everyday presence that can be felt on a daily basis. It provides a disincentive for prisoners to better themselves. Why should they bother to better themselves and educate

themselves, when, in the case of those who have life as their maximum sentence, they are never going to be released anyway and, in the case of those who have not, they will not be released upon the completion of their minimum? It causes depression and makes people cease trying to be all that they can be. It is true that some may strive and reach for their best potential anyway, despite the circumstance and conditions. But why should the system be set up so that the system itself must be overcome? Shouldn't the system be a help, and not a hindrance?

Judges have already determined what the minimum amount of punishment must be imposed in order to further the ends of justice, thus the nature of the crime has already been factored in. Having the Parole Board deny applicants based solely upon that same crime amounts to a virtual double jeopardy, a resentencing by those who are not even as familiar with the facts as the Judge who imposed the sentence. What about those who have pled guilty, as part of an agreement in which they take a predetermined amount of prison time in order to save the county the expense that a trial would involve, thinking they would serve a certain amount of time, and it turns out that they wind up serving more than that, in some cases just as much as they would have gotten had they went to trial and been found guilty? That is a type of fraud.

The other injustices that I have mentioned, wherein innocent people are punished even more because they are innocent and therefore prevented from taking responsibility and expressing remorse, is adding insult to injury and is unconscionable.

A famous quote from Dostoevsky is, paraphrased, 'the test of a civilized society is the state of its prisons'. Not far behind it is the mechanism by which it is determined who will be released and who will not. As United State Supreme Court Judge Butler said, in his famous dissent in *Olmstead vs. U.S.* "If the government becomes the law breaker, it breeds contempt for the law. It invites every man to become a law unto himself. It invites anarchy." In a similar vein, what message are we sending to those who are imprisoned, the people near and dear to them, and all those who learn of it one way or another, by the way the parole system is being conducted, and by us as a society by allowing it to go on in this way?

Having just recently come into office, we have yet to see what policy Governor Spitzer will take. Will he take care to ensure that the laws of our state are enforced, or will he be just like Pataki and continue on with illegal practices because it is beneficial financially?

In closing, I ask readers to consider all of the above, in a very personalized way. What if your son, daughter, mother, father, spouse, or family member, whether by reason of guilt or having been wrongfully convicted, were imprisoned, and dependent upon parole in order to regain their freedom. Is this the way that you would want the system to work? Would you consider it fair? ■

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