REALISM IN REGARD TO PAROLE

by Oliver Giola West, Jr.

"Education is the most powerful weapon which you can use to change the world."
Nelson Mandela

In this article I will provide a sensible outline as to why the Board of Parole's ontological culture is not base on realism. However, the Board of Parole's actions has shown patterns by creating a threat of arbitrary enforcement, in denying eligible-violent offenders discretionary parole release.

"Realism implies an obligation to see the world as it actually is, not as we might like it to be. The enemy of realism is hubris.[1]" "The life of the law has not been logic, it has been experience."[2]

No one would question, whether or not, the State of New York has an absolutely right to "insure the public safety by preventing the commission of offenses through deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their success and productive reentry and reintegration into society, and their confinement when required in the interest of public protection." See Penal Law § 1.05(6) (McKinney's 2009).

Additionally, courts in the State of New York have held: "The establishment of penal policy is not the role of the Parole Board or of any other administrative agency and these remarks reveals a fundamental misunderstanding of the limitations of administrative power. . . The role of the Parole Board is not to re-sentence petitioner according to the personal opinions of its members as to the appropriate penalty for [a crime], but to determine whether, as of this moment, given all the relevant statutory factors, he should be released."

Experiences has shown us through *the rule of law* and *court decisions* that, "the statute governing discretionary parole release does not, however, guide the Board regarding how much weight it should assign to each factor" under Executive Law § 259-i(2)(c)(A). That being realized. What is the solution to this dire dilemma? Since, prisoners' and prisoners' lawyers would continue on an uphill battle when bringing their challenges in a court of law. Also parole challenges in our courts have been a *waste on scarce judicial resources* because the legislator has not acted on this critical issue.

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Realism and *experience* would emphatically show how the Board of Parole's *pretext and unlimited power* is effectuated in denying eligible candidates discretionary parole releases which has unfortunately been sanctioned under the *rule of law* by some of our courts' decisions rendered in parole challenges, in general. For example, courts have held the following:

(1) It is well settled that all statutory factors under Executive Law § 259-i(2)(c)(A) needs not be considered by the Board and that a failure to do so does not provide a basis for upsetting the Board's decision. (2) The fact that, the Board did not discuss each factor with the inmate at their interview does not constitute convincing evidence that the Board did not consider the factors. (3) The Board must consider criteria which is relevant to the specific inmate, including, but not limited, to the institutional record or criminal behavior, giving whatever emphasis they so choose to each factor. (4) In a reappearance release interview, does not preclude the Board from considering an inmate's criminal history of the serious of the instant offense; and, nor is it improper for the Board to consider the statutory factors as it had in previous parole determination. (5) The denial of parole release primarily because of severity of the crime is appropriate and the seriousness of the offense has long been held to constitute a sufficient ground to deny parole release. (6) In the absence of convincing demonstration that the Board did not consider the statutory factors set out under the statute—it must be presume that the Board fulfilled its duty. (7) The Board does not have a predetermination for an informal policy against violent felony offenders. (8) The courts will reject as pure speculation that a parole denial is due to political and media pressure. (9) There is a presumption of honesty and integrity that attaches

to judges and administrative fact-finders, and (10) Courts presume the Board follows its statutory commands and internal policies in fulfilling its obligations.

Finally, the *pièce de resistance* in denying discretionary parole releases are based upon the three most cited *vague* variables in the statute; that is: 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 incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect of* law.

The only *solution* to this resolve the present situation is as follows: (1) there has to be a movement by non-incarcerated citizens to show our legislators the cost-ineffectiveness by continuing to keep prisoners incarcerated. In this instance, rather than allocating needless U.S. currency to corrections (since our current governor has insisted "an incarceration program is not an employment program".) Therefore, U.S. Currency can be allocated in areas of education, remedial education, health care, and social security, and (2) since crime is an economical, social, political and legal issue. Thus, the Board of Parole has to be challenge on all levels. That would enable people to see the cause-and-effects such a taxation issue on the society as a whole.

One court had spoken *openly*—for courts in general—as to why courts have ruled against incarcerated men and women in their parole challenges. The decision rendered in Ferguson v. N.Y.S. Division of Parole,[3] is emphatically instructive in viewing the qualitative *realism and experience* of the parole board's ontological culture. (This is the Author's coined phrase—The Ferguson Factor). The Ferguson court held the following:

> The determination of the New York State Division of Parole. . . cast a lone and disturbing shadow upon New York's theories of justice. . . . Historically, courts have revealed a conservative wariness about disturbing Parole Board determinations. . . . It appears that it will always be idle and vain for petitioner to appear every two years as an applicant for parole. . . [the Board] has simply left no room for any conclusion different from its past rejection. Rejection appears to rest upon the nature, circumstances and seriousness of the present offense. . .Those factors are constant and will never change. If those factors were sufficient to [warrant denial of discretionary release to petitioner in the past, there is nothing to suggest that the Board will reach a different result in the future]. . . All concerned will simply be older. It is, of course, impermissible to hold a hearing simply to reach a predetermined conclusion. The cases cited by the [the Board] that speak if there being no per se entitlement to release on parole, appear have been cited to support a conclusion that Petitioner's energy is idly invested in seeking parole hearings.

Furthermore, when anyone would read some of the courts' decisions concerning whether or not an individual should be *granted* or *denied* discretionary parole release in different counties and jurisdictions in the State of New York varies significantly. One would wonder whether or not—a parole statue does exist.[1]

Finally, the state-of-affairs on discretionary parole release infused with The Ferguson Factor—is an up-hill struggle. Such an issue must be challenged by those incarcerated—and non-incarcerated individuals. As it, was stated many years ago by G. W. F. Hegel which is instructive herein: "Public opinion contains all kinds of falsity and truth, but it takes a great man to find the truth in it."

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1. Andrew J. Bacevich's, The Limits of Power (Metropolitan Pub, 2008, at p. 7).
2. The wisdom of Honorable Oliver Wendell Holmes (The Common Law 1881).
3. New York Law Journal/July 22, 1993.
4. C.f..e.g., Strickland v. Washington, 466 U.S. 668, 709 (1984) (MARSHALL, J., dissenting) ([i]t is also a fact that the quality of representation available to ordinarily defendants in different parts of the country varies significantly).