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## The Obscure Legacy of Mass Incarceration: Parole Board Abuses of People Serving Parole Eligible Life Sentences

Alejo Rodriguez

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### Acknowledgements

There are more people and experiences that have given reason, support, inspiration and challenge to this work than I am able to acknowledge fully. To these I offer salutations with an open heart. I would like to acknowledge my mother, Laura Rodriguez, daughter, Jada Ade Rodriguez and grandmother Miriam Mercado, none of who have read a single word of this work, but whose presence in my life has been a quiet inspiration to not only own the power of my voice but the value of my sharing. I would also like to thank many friends, both inside and outside of prison, who encouraged me to write. There were also some who discouraged me, because in their eyes the idea of seeking to gain constitutional rights to parole was a moot issue. I learned to value every- one's perspective. No matter the yeas or nays, these were not critics, these were dear friends and I truly learned to appreciate and value their time, comments, and challenges. If I may take a moment to acknowledge a few of these friends I would like to start with Charlene Sinclair who pushed me to write, rewrite and rewrite it again. To Susan Crile, Zevi and Mary Ellen Kramer, Stephen Smith, Derek Livingston, and Melissa Gonzalez, who graciously encouraged me to strive for clarity, if for no other reason but to give the vision of my work its due. I also would like to acknowledge my friends from the Release of Aging People in Prison, Dave George, Laura Whitehorn, and the late Mujahid Farid. In addition, my dear friends at Parole Preparation Project, namely Michelle Lewin, Nora Carroll, and Andrea Bible. I cannot forget about Professor Steve Zeidman of City of University New York Law School who presented this paper to CUNY Law Review for consideration. Last but not least I cannot begin to thank CUNY Law Review editors Katherine Dennis and Sophie Cohen, and team Alejo, for their commitment and enduring patience. The writing of this piece began at Otisville Correctional Facility.

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**THE OBSCURE LEGACY OF MASS  
INCARCERATION: PAROLE BOARD ABUSES OF  
PEOPLE SERVING PAROLE ELIGIBLE LIFE  
SENTENCES**

*Alejo Rodriguez*<sup>†</sup>

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#### INTRODUCTION: AN ODYSSEY AND AN AWAKENING

In 1985 I was convicted for a robbery related homicide. I wish I could say that it wasn’t me, that they picked the wrong person out of the lineup, or that I had nothing to do with the actual shooting, but I can’t. The minute I picked up a gun with the thought that a robbery would somehow rid me of my drug dependent lifestyle was the minute I became the coward who would end up taking someone’s life. I received an eighteen years to life sentence and before I knew it, I was in Attica Correctional Facility. I was a twenty-three-year-old unskilled high school graduate who had never been incarcerated. I didn’t know how I would make it to see the next day, let alone the next eighteen years. All I had was the present, “one day at a time.”

Prison is a world in and of itself. It is designed to break the human spirit. Yet, strangely, there was a familiarity about prison that I didn’t expect. Sure, the constant threat of cell bars, prison guards, and gun towers were all new and intimidating, but the sense that there was no way out and the constant threat of violence were, in many respects, no different than where I grew up in the Bronx. Many of us came from the same neighborhoods, same families, and formed the same gangs. Drugs were readily

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friends at Parole Preparation Project, namely Michelle Lewin, Nora Carroll, and Andrea Bible. I cannot forget about Professor Steve Zeidman of City of University New York Law School who presented this paper to CUNY Law Review for consideration. Last but not least I cannot begin to thank CUNY Law Review editors Katherine Dennis and Sophie Cohen, and team Alejo, for their commitment and enduring patience. The writing of this piece began at Otisville Correctional Facility.

available, as was gambling, and prostitution. It would be years before I would hear the term “school-to-prison pipeline,” but once I did, I knew for certain that it was more than just a catch phrase—we were its by-product.

While in prison, I was determined not to repeat the same behavior that led me there. The first chance I had, I enrolled in college. Back then, each joint had a college program: Attica had Genesee Community College, Auburn had Syracuse University, Sing Sing had New York Theological Seminary, and years later Eastern had the Bard Prison Initiative. At Attica Correctional Facility, I worked in the metal shop during the day, went to class at night, and on the weekends, after working out, I would learn about Islam and politics in the yard with Muslims and Black Liberation Army political prisoners.

By the time I was able to count years instead of months spent in maximum security prisons, I had been moved around from Attica to Auburn to Eastern to Sing Sing, and back to Eastern again. The moving around process was a way to incentivize good behavior. I started out in one of the most dangerous prisons in the nation and moved to facilities that provided more program options so long as I was not a security threat. However, unlike other states whose parole systems provide good behavior incentives to earn early parole considerations, in the state of New York, my eighteen years to life sentence meant that I must serve every day of eighteen years before I could be considered eligible for parole. As I neared the eighteen-year mark, I began to look at my achievements in preparation of my first parole board hearing. I had acquired an associate’s degree, a bachelor’s degree, a master’s degree, and eight years of American Sign Language experience working with the Deaf and hearing impaired at Eastern New York Correctional Facility. I had also facilitated the Alternative to Violence Project, received several Department of Corrections and Community Supervision Commendable Behavior Reports, and was fortunate to have a couple of poems published.<sup>1</sup>

I made my first parole appearance in August 2003, at Eastern New York Correctional Facility. I was forty-one years old. I had no idea what to expect. I was anxious and nervous but also confident in the changes I had made in my life. I knew I had to address the issues that put me in the frame of mind where I lost compassion for another human being. I believed the changes I made reflected a commitment to atone. On the day I actually appeared at the Board of Parole (“the Board”), I sat before two commissioners and the hearing lasted over thirty minutes. I later learned that a hearing which lasted for thirty minutes was practically unheard of.

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<sup>1</sup> For some of the author’s published poems, see Alejo Dao’ud Rodriguez, *in* *DOING TIME: TWENTY-FIVE YEARS OF PRISON WRITING* 222, 222-23 (Bell Gale Chevigny ed., 1999).

I had asked around from people who I knew had been before the parole board and overwhelmingly their experiences were that parole hearings lasted fewer than ten minutes.<sup>2</sup>

A day after the hearing, I received my decision. Parole denied. The explanation for the denial amounted to the “nature of the crime.” In other words, I was denied for the same reason I was convicted. No matter what I did with my time in prison, the programs I participated in, my rehabilitative transformation, remorse and insight, it was all glossed over. The essential questions of my present state of mind, or whether I was suitable for release didn’t seem to matter. I was denied and rescheduled to appear twenty-four months later.

I sought to appeal the Board’s decision. With no money for an attorney I became a regular at the prison law library. I had no knowledge of the parole appeal process and getting an entry level understanding consumed practically all of twenty-four months. My appeal went nowhere and all I could do was start preparing for my next appearance. That 2005 parole board appearance resulted in another “nature of the crime” denial. I was again denied parole in 2007, but by then I had become familiar with navigating my way through the parole appeal process and in 2008 I received notice that the Board decided to grant me a new hearing based on the merits of my appeal. In that appeal, I argued that the Board’s decision to deny parole relied solely on the nature of the crime, and that three consecutive denials based on the same factor that was considered at sentencing was evidence that the Board’s decision was a foregone conclusion. The fact that the Board’s Administrative Appeals Unit decided to grant me a new hearing gave me a revived sense of hope. It was a hope that was short lived. In the summer of 2008, I was again denied parole for the same reason. It would be a process that would repeat itself in 2009, 2011, 2013, and 2015. Each denial determination was a new arbitrary version of the previous one.

However, in February 2016 an Orange County Supreme Court Judge ruled in favor of my 2015 appeal on the arbitrary nature of the Board’s decision to deny me parole and ordered a new hearing. I reappeared before the Board on April 22, 2016, and to my surprise, I was again denied parole. I could not count the times I would second-guess myself as a result of those parole hearings and their outcomes. I could not count the times that I wondered if I had just said *this* instead of *that* then maybe that would have made a difference. Or the times when I would hear that someone else had received a “release to parole” decision and I would find myself

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<sup>2</sup> See Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), <https://perma.cc/CQ2Q-P372>, for reporting on the insufficient length of parole hearings.

fighting against feelings of resentment. There was a part of me that wanted to be genuinely happy for others, but the Board's decisions seemed so random that it became difficult to even look at the release of someone else as a silver-lining of hope. I hated seeing this trait in myself and I hated it more when I saw traces of it mirrored in others around me—a sort of detached indifference—in the halls and mess halls, gyms and law libraries, in prison yards, and facility clinics where mental stress shows up in physical infirmities.

The haunting reality of the effects of ongoing parole denials brought me to a crossroad: either I succumb to the promise of despair or I look for a way out. I chose the latter. Besides taking on my own legal parole appeal battles, I took the law library's legal research course which allowed me to work in the law library with others who were appealing their parole decisions. I also began to involve myself more in restorative-justice-type activities and community-building programs,<sup>3</sup> and tried to keep pace with mounting studies on incarceration that began to gain wider social attention within the last twenty or so years. As my time continued to extend beyond twenty, twenty-five, and into thirty years, I began to uncover insights into the nature of parole in relation to what I was entitled. Namely, that there is no constitutional right to be paroled<sup>4</sup> and that according to the laws of the State of New York, the Board of Parole has significant discretionary authority in making parole release decisions.<sup>5</sup> It is a power that not even the courts can interrupt.<sup>6</sup>

#### WHAT I SAW / MY PRELIMINARY RESEARCH

The stress alone of having to endure what I began to see as arbitrary parole denials prompted me to try to make heads or tails of the process. I

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<sup>3</sup> Some of the activities that I participated in were the Alternative to Violence Project where I was the Coordinator from 2007-2011 at Arthur Kill Correctional Facility. I also participated in the Network Support Services as the Resident Coordinator from 2012-2015 at the Otisville Correctional Facility. From 2012 to 2016, I was the Co-Facilitator of the Otisville Correctional Facility's Lifers and Long-Termers Organization's Reconciliation Workshop.

<sup>4</sup> *Greenholtz v. Inmates of Neb. Penal Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.").

<sup>5</sup> N.Y. EXEC. LAW § 259-i(5) (McKinney 2019) ("Any action by the board or by a hearing officer pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law.").

<sup>6</sup> *See Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69, 75 (1980) ("[W]here a court fails to impose an [Minimum Period of Imprisonment (MPI)], the Parole Board shall do so in accordance with its promulgated guidelines, or shall issue a written explanation of its reasons for departing from the guidelines. The law contains no restriction limiting the Parole Board to an MPI which a court could have imposed or requiring that the board establish an MPI of less than the full sentence.").

dove into law books and legal commentaries to understand the world of parole as it existed in New York. Through my initial legal research I learned that between 1980 and 2011, the Board of Parole had been operating under the authority of a statute that was fundamentally altered.<sup>7</sup> My next lesson came by way of a rush of published texts on mass incarceration.<sup>8</sup> Most of these works, however, focused their criticisms on the War on Drugs and fell short on any in-depth analysis of the plight of people serving parole-eligible life sentences for violent crimes. Still, these texts proved to be invaluable sources of information with accessible reference points and innovative descriptions of the social policies, laws, prosecution and prisons used as a means of social control of disadvantaged communities, which resulted in the advent of mass incarceration.

In recent years, significant reporting on parole has been published.<sup>9</sup> In July 2015, *The Marshall Project* published a report which highlighted the absolute authority that parole boards wield:

[Parole] statutes are often vaguely worded, with language that is easily sidestepped . . . And unlike politicians, who are bound by open records and disclosure laws and are accountable to their constituents, parole boards often operate behind closed doors. Their decisions are largely unreviewable by the courts – or anyone else.<sup>10</sup>

In December 2016, the *New York Times* reported on the existence of racial discrimination in parole release decisions.<sup>11</sup> The article revealed that a study of “thousands of parole decisions from the past several years found that fewer than one in six [B]lack or Hispanic men was released at

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<sup>7</sup> EXEC. § 259-i(1), *repealed by* Budgets--Financial Services, ch. 62, § 38-f, 2011 N.Y. Laws 611; *see also* Phillip M. Genty, *Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, N.Y.L.J. (Sept. 1, 2011) (“The 2011 amendments . . . repealed the troublesome subdivision 1 of Section 259-i of the Executive Law, the section that had set out procedures for conducting the obsolete function of setting minimum periods of imprisonment. This was long overdue, given that the Parole Board has not had this responsibility since 1980.”).

<sup>8</sup> These texts include, but are not limited to: MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2011); CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (1999).

<sup>9</sup> *See, e.g.*, Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. REV. 249 (2017); PAROLE PREPARATION PROJECT & THE RELEASE AGING PEOPLE IN PRISON CAMPAIGN, *NEW YORK STATE PAROLE BOARD: FAILURES IN STAFFING AND PERFORMANCE* (2018), <https://perma.cc/VVV4-98DD>; THE SENTENCING PROJECT, *ANNUAL REPORT 2017* (2017), <https://perma.cc/SW9B-BBEH>.

<sup>10</sup> Beth Schwartzapfel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015, 2:15 PM), <https://perma.cc/2GZK-7V88>.

<sup>11</sup> Winerip et al., *supra* note 2.

his first hearing, compared with one in four white men.”<sup>12</sup> The disparity was found among people serving parole eligible sentences for small-time property crimes.<sup>13</sup> However, among parole eligible individuals convicted of a violent offense, the study found that “the board rarely released violent offenders of any race, denying nearly ninety percent of them at their initial interview.”<sup>14</sup>

New York State does not have different parole laws for different categories of offenses. However, with a ninety percent rate of denial, there is a different, unwritten standard for people who committed what would be considered a violent crime. Unfortunately, while the *New York Times* article highlighted systemic racial discrimination in parole decisions generally, it failed to address the Parole Board’s blatant discriminatory practices against people accused of violent felonies.

A call to action to address the existence of one form of discrimination, in this case racial discrimination, should never disqualify or minimize the existence of other forms of discrimination. Even more troubling is that in the aftermath of the *New York Times* article nothing changed; there were no official statements of accountability, no class action lawsuits against the Board’s discriminatory practices. Without a guaranteed constitutional right to parole, these systemic abuses against a disadvantaged class of people will continue to resurface. I argue that in this current time of our criminal justice history, the issue of granting constitutional rights to people eligible for parole must be included in the discussion on criminal justice reform.

#### ROADMAP

In Section I, I demonstrate how the backdrop of societal policies has fueled the current era of mass incarceration. In Section II, I explain how the U.S. Supreme Court case *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* determined that people who are incarcerated do not have a constitutional right to parole. In Section III, I argue why this case was not intended to be precedent forty years later: Chief Justice Burger noted in the majority opinion that the subject of parole was still experimental because they did not know all the factors surrounding parole at the time of the decision. We now know some of those factors that are

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<sup>12</sup> *Id.*

<sup>13</sup> *See id.* (“It is a disparity that is particularly striking not for the most violent [offenders], like rapists and murderers, but for small-time offenders who commit property crimes like stealing a television from a house or shoplifting from Duane Reade—precisely the people many states are now working to keep out of prison in the first place.”).

<sup>14</sup> *Id.*

relevant in New York State including that (i) the New York Board of Appeals abused their discretion in setting the Minimum Period of Incarceration; (ii) the New York State Board of Parole's disproportionate denial rates of parole against people convicted of violent offenses have less to do with public safety and more to do with the federal financial incentives offered to states to hold people convicted of violent offense in prison longer; and (iii) that the Board of Parole did not write or implement legally mandated changes for over five years. Consequently, the Board of Parole's abusive practices have disadvantaged a class of people who would otherwise be eligible for release to parole, and without any guaranteed constitutional rights to parole release, there will be ongoing governmental abuse of people in prison.

#### I. CONTEXTUALIZING THE ROLE OF MASS INCARCERATION IN SOCIETY

The United States imprisons more people than any other country in the world,<sup>15</sup> yet the sum total of mass incarceration cannot be defined solely by the amount of people in prison. In order to get a full picture of the role of mass incarceration in the United States, one must contextualize the socio-political framework that created the system. Ernest Drucker, author of *A Plague of Prisons*, defined mass incarceration as a network of policies and institutions that support large scale use of prisons for political or social purposes in which to sustain social control over a class of people, and which has little to do with law enforcement.<sup>16</sup> It is undeniable that when we look at the boom of people in prison over the last forty years, the enforcement of laws has disproportionately imprisoned those who are identifiably African Americans and Latinos by race, and the working poor by class.<sup>17</sup>

While this may seem out-of-sync with the daily bombardment of crimes in the media, the media has actually caused and perpetuated racial biases among the public, including law enforcement, leading to a discriminatory administration of criminal justice.<sup>18</sup> As Michelle Alexander has put it, "once a public consensus was constructed by political and media

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<sup>15</sup> Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), <https://perma.cc/2GYD-3LM6>; AM. PSYCHOL. ASS'N, INCARCERATION NATION (2014), <https://www.apa.org/monitor/2014/10/incarceration> [<https://perma.cc/4QBC-4WKW>].

<sup>16</sup> DRUCKER, *supra* note 8, at 40-41.

<sup>17</sup> *Id.* at 44-45 (pointing out that that inner-city communities of color have become virtual prison "feeder communities" which has resulted in a depletion of human capital); *see also* DAVIS, *supra* note 8, at 113 ("[People of color and the poor] are sent to prison, not so much because of the crimes they may have indeed committed, but largely because their communities have been criminalized.").

<sup>18</sup> *See* ALEXANDER, *supra* note 8, at 104-05.

elites that drug crime is black and brown . . . an extraordinarily high risk of racial bias in the administration of criminal justice was present, given the way in which all crime had been framed in the media and in political discourse.”<sup>19</sup> Alexander recognizes “[t]he stark and sobering reality is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history.”<sup>20</sup> This obscure yet underlying characteristic of mass incarceration points directly to an economic-stimulus initiative, better known as the *prison-industrial complex*, intended to rescue numerous economically depressed rural white working-class counties.<sup>21</sup>

Alex Lichtenstein also emphasized the use of prisons as an economic-stimulus initiative:

When Ta-Nehisi Coates says that America’s bloated and enormously expensive dependence on imprisonment has created a “social service program . . . for a whole class of people,” he hits the nail on the head. Perhaps correctional expenditures—police, courts, jails, prisons, halfway houses, parole offices, and all the rest—are better classified as “welfare” expenditures. Mass incarceration is not just (or even mainly) a response to crime, but rather a perverse form of social spending that uses state power to address a host of social problems at the back end, from poverty to drug addiction to misbehavior in school. These are problems that voters, taxpayers, and politicians—especially white voters, taxpayers, and politicians—seem unwilling to address in any other way. And even as this spending exacts a toll on those it targets, it confers economic benefits on others, creating employment in white rural areas, an enormous government-sponsored market in prison supplies, and cheap labor for businesses.<sup>22</sup>

This “enormous government-sponsored market” emerged as the United States has proclaimed itself the champion of freedom and democracy, all the while holding the undisputed world title in the imprisonment

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<sup>19</sup> *Id.* at 107-08 (discussing the disproportionate featuring of African Americans in news stories associated to drug crime, the racially charged “political rhetoric and media imagery associated with the drug war” in news stories, and the “media bonanza inspired by the [Reagan] administration’s campaign [that] solidified in the public imagination the image of the black drug criminal.”). For more on the War on Drugs, and its impact on the media and on the public’s conflation of crime and race, see *id.* at 104-09.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> DAVIS, *supra* note 8, at 14-15; PARENTI, *supra* note 8, at 216-17.

<sup>22</sup> Alex Lichtenstein, *Mass Incarceration Has Become the New Welfare*, THE ATLANTIC (Sept. 16, 2015), <https://perma.cc/DH82-2KRJ>.

of its citizens.<sup>23</sup> This contradiction has so pitted the U.S. against indefensible accusations of hypocrisy, that members of Congress on both sides of the aisle have begun to acknowledge that the boom in prison populations came as a result of failed social policies.<sup>24</sup> However, despite bipartisan disclosures and calls to withdraw front-end mandatory sentencing guidelines that greatly contributed to the boom in the prison population, little attention has been paid to back-end parole denials which have equally helped to regulate prison population numbers during a time of decreasing crime rates.<sup>25</sup> Kate Hatheway writes:

In the United States, where one of every nine people in prison is serving a life sentence, and people of color and children constitute nearly two-thirds and 6.5% of all lifers, respectively, changes to parole are necessary not only to curb mass incarceration, but also to help restore some semblance of equity and humanity to the criminal justice system.<sup>26</sup>

In New York State, the Board of Parole has complete discretionary authority in making parole release determinations.<sup>27</sup> The law that governs parole requires the Board to make the determination of whether someone poses a risk to public safety.<sup>28</sup> If a person is denied parole, the Board is required to explain its reasons for the denial in detail and in unambiguous terms.<sup>29</sup> These elements, which are fundamental to the statutory criteria, are the same for all parole applicants regardless of the category of their

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<sup>23</sup> *Id.*; see also Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), <https://perma.cc/3CMX-CRN3>.

<sup>24</sup> See Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <https://perma.cc/4HNG-AWWM>.

<sup>25</sup> Kathy Boudin, *Hope, Illusion and Imagination: The Politics of Parole and Reentry in the Era of Mass Incarceration*, 38 N.Y.U. REV. L. & SOC. CHANGE 563, 565 (2014).

<sup>26</sup> Kate Hatheway, *Creating a Meaningful Opportunity for Review: Challenging the Politicization of Parole for Life-Sentenced Prisoners*, 54 AM. CRIM. L. REV. 601, 604 (2017) (citing ASHLEY NELLIS, SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA (2013)).

<sup>27</sup> N.Y. EXEC. LAW § 259-i(2)(a)(i) (McKinney 2019) (“[A] member or members as determined by the rules of the board shall personally interview such [person who is incarcerated] and determine whether he should be paroled . . .”).

<sup>28</sup> *Id.* at § 259-i(2)(c)(A) (“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 . . . his release is not incompatible with the welfare of society . . .”).

<sup>29</sup> *Id.* at § 259-i(2)(a) (“If parole is not granted upon such review, the [person who is incarcerated] shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole.”).

offense.<sup>30</sup> So, why are people who committed violent offenses denied parole at a significantly higher percentage than people who committed non-violent offenses?

Parole boards often rely on the serious nature of the offense when denying parole to someone who committed a violent felony offense, as they did in my case. And yet the nature of the crime was already considered by the sentencing court. The Board duplicates the same consideration of the same factor, which bears no insight into a parole applicant's present level of rehabilitation and maturity. This circular approach to the parole hearing process has generated great criticism from many proponents of parole reform.<sup>31</sup> Dr. Kathy Boudin, Director of the Center for Justice at Columbia University School of Social Work, observed that "parole denials do not appear to correlate with the issue of public safety. Parole denials are part of a much larger system of mass incarceration that has evolved over the past decades."<sup>32</sup> Kate Hatheway also pointed out:

Even as crime rates have experienced periods of decline, the fact that lifers are not being released has created a backlog in our prisons of people who no longer pose a threat to society. Between 1991 and 1997 alone, the average time served on a life sentence increased by almost eight years, from 21.2 to twenty-nine years.<sup>33</sup>

The findings of ongoing abuse against people serving parole eligible life sentences prefaces and supports the claim for constitutionally protected rights to parole release. However, before entertaining a claim for constitutional protection that has been previously denied, it would be advantageous to learn the reasons why.

## II. EXAMINATION OF THE SUPREME COURT'S DECISION IN *GREENHOLTZ*

In 1979, the United States Supreme Court addressed the question of whether individuals in prison had a guaranteed right to be released on parole in *Greenholtz v. Inmates of Nebraska Penal and Correctional*

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<sup>30</sup> While N.Y. Exec. Law § 259-i(2)(a) does not explicitly state that the parole guidelines are applied in the same way regardless of the individual's conviction, the provision does not provide a delineation based on category of conviction and instead refers to "an inmate" or "the inmate" broadly. *Id.*

<sup>31</sup> Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), <https://perma.cc/S36D-N6HM>; Jarrett Murphy, *Advocates Press Albany to Fix New York's Parole System*, CITY LIMITS (Jan. 30, 2019), <https://perma.cc/QD27-DSLE>; Victoria Law, *New York's Parole System Is 'Broken,' But Cuomo Can Help Fix It*, THE VILLAGE VOICE (June 5, 2017), <https://perma.cc/V38P-5NYL>.

<sup>32</sup> Boudin, *supra* note 25, at 565.

<sup>33</sup> Hatheway, *supra* note 26, at 603 (footnotes omitted).

*Complex*.<sup>34</sup> The Supreme Court determined that states were under no obligation to incorporate parole as an incentive for early release into their sentencing guidelines.<sup>35</sup> Thus, there was no constitutionally protected guarantee that a person should have the right to be released on parole.<sup>36</sup> The Court ruled that once a state adopts a parole system, individuals shall be entitled to the rights of equal protection and due process in accordance with the adopted system.<sup>37</sup>

The significance of the Supreme Court's ruling in *Greenholtz* stems from a mounting dispute left in the wake of the Court's 1972 ruling in *Morrissey v. Brewer*. The issue in *Morrissey* was whether a person living in society under parole supervision has constitutional protections against having his or her parole revoked.<sup>38</sup> In *Morrissey*, the Supreme Court determined that people released from prison and living in society, i.e. working and paying taxes while serving the completion of their sentences on parole, were entitled to constitutional protections against having their parole revoked.<sup>39</sup> However, in 1979 the Court distinguished its decision in *Greenholtz* from *Morrissey*, because *Greenholtz* applied to people who were incarcerated and who had not yet been paroled.<sup>40</sup>

The *Greenholtz* Court's departure from *Morrissey* revolved around whether people in prison deserved the same guaranteed protections that were afforded to people facing parole violations and reimprisonment, or whether parole release determinations were no more than a privilege to be offered at the discretion of parole boards.<sup>41</sup> However, in *Greenholtz* the Court noted that "[t]he inmates here . . . are confined and thus subject to all the necessary restraints that inhere in a prison."<sup>42</sup> For the purposes of due process requirements, the Court held that parolees in society and people in prison hoping to make parole are not the same.<sup>43</sup> Consequently,

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<sup>34</sup> *Greenholtz v. Inmates of Neb. Penal Corr. Complex*, 442 U.S. 1 (1979). People who were incarcerated and eligible for parole brought a class action suit against the Nebraska Penal and Correctional Complex, arguing that the parole statute and the Board of Parole had denied them of procedural due process.

<sup>35</sup> *Id.* at 7 ("A state may . . . establish a parole system, but it has no duty to do so.").

<sup>36</sup> *Id.* ("There is no constitutional or inherent right of a [person who is incarcerated] to be conditionally released before the expiration of a valid sentence.").

<sup>37</sup> *Id.* at 16 ("The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more.").

<sup>38</sup> *Morrissey v. Brewer*, 408 U.S. 471, 472 (1972).

<sup>39</sup> *Id.* at 482-84.

<sup>40</sup> *Greenholtz*, 442 U.S. at 9.

<sup>41</sup> *Id.* at 9-10.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.* at 9-10. "There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Id.* at 9.

the Court concluded that people who were incarcerated had “no constitutional or inherent right” to be paroled from prison.<sup>44</sup>

The Court’s dissection of these intricate details in *Greenholtz* would ultimately result in a decision of precedence which has been upheld for the last forty years. However, as much as the nation would come to rely on *Greenholtz* regarding questions of constitutionality in parole release determinations, what is often overlooked is the fact that the *Greenholtz* ruling did not come to be without significant controversy. For one thing, *Greenholtz* was a highly contested matter with a ruling that was narrowly determined by a tiebreaking five-to-four vote.<sup>45</sup>

Among the dissenting Supreme Court Justices, Justice Powell found that “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”<sup>46</sup> Justice Powell further stated that “[f]rom the day that he is sentenced in a State with a parole system, a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system.”<sup>47</sup> Justice Powell reasoned that where there is a justifiable expectation of parole, that expectation is deserving of constitutional protections.<sup>48</sup>

Justice Thurgood Marshall also wrote a dissenting opinion, joined by Justice Brennan and Justice Stevens. Justice Marshall wrote:

I must register my opinion that *all* prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system . . . . [W]hen a State enacts a parole system, and creates the possibility of release from incarceration upon satisfaction of certain conditions, it necessarily qualifies that initial deprivation. In my judgment, it is the existence of this system which allows prison inmates to retain their protected interest in securing freedoms available outside prison. Because parole release proceedings clearly implicate this retained liberty interest, the Fourteenth Amendment requires that due process be observed, irrespective of the specific provisions in the applicable parole statute.<sup>49</sup>

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<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 18-40 (Justice Powell concurred in part and dissented in part, and Justice Marshall dissented in part with Justices Brennan and Stevens joining).

<sup>46</sup> *Id.* at 18 (Powell, J., concurring in part and dissenting in part).

<sup>47</sup> *Id.* at 20.

<sup>48</sup> *Id.* at 19.

<sup>49</sup> *Id.* at 22-23 (footnote omitted).

These purposely articulated opinions influenced the majority to acknowledge the lack of evidenced-based data necessary to support its final determination. As the majority conceded, “the very institution of parole is still in an *experimental* stage” in which “few certainties exist.”<sup>50</sup> Ultimately, this acknowledgment did not lead the majority to grant the claim for constitutionally protected entitlement to parole release. However, in an unusual acknowledgment, the majority’s opinion emphasized for a second time that “the whole question has been and will continue to be the subject of *experimentation*.”<sup>51</sup> The majority’s continued use of the word “experiment” suggests that the Justices were not wholly convinced of the Court’s final determination.

### III. THE *GREENHOLTZ* RULING WAS NEVER INTENDED TO BE A HEADSTONE

As interpreters of the U.S. Constitution, the Supreme Court renders opinions which are intentionally and purposefully worded.<sup>52</sup> Here, the Court expressly stated that “the very institution of parole is still in an experimental stage”<sup>53</sup> and that parole-release decisions “will continue to be the subject of experimentation.”<sup>54</sup> This emphasis cannot be overlooked for two reasons. First, there is the doctrine of *stare decisis* to which the Supreme Court is bound to adhere, and “the Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual.”<sup>55</sup>

Second, even if we were to consider the Court’s description of parole as a subject of experimentation and therefore not burdened by the doctrine of *stare decisis*, the inherent requirement of the experimentation process—which involves a study of a controlled group, the monitoring of the impact in changes of circumstances and a marked timeframe to assess results—is a methodology which further emphasizes that the Supreme Court’s ruling in *Greenholtz* was never intended to be a headstone.

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<sup>50</sup> *Id.* at 8 (emphasis added).

<sup>51</sup> *Id.* at 13 (emphasis added).

<sup>52</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

<sup>53</sup> *Greenholtz*, 442 U.S. at 8.

<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Truax v. Corrigan*, 257 U.S. 312, 338 (1921). The doctrine of *stare decisis* requires the Court to adhere to an established ruling on a matter or provide an explanation of its reasons for departure therefrom. In *Greenholtz*, the bench not only deviated from precedent to affirm a policy experiment over fundamental rights, but it also failed to explain its reason for this departure.

It has now been forty years since the *Greenholtz* ruling; an era of failed social policies which marked the advent of mass incarceration that directly and indirectly influenced an increase in parole denials to otherwise release-ready applicants. In recent years, state and federal policy makers, historians, and political authors have acknowledged the harm done to our society by the War on Drugs, the Violent Offender Incarceration and Truth-in-Sentencing (“VOI/TIS”) Incentive Grant Program, and the reliance on incarceration as a means of addressing social problems.<sup>56</sup> This acknowledgement has translated into renewed interest in policy reforms on sentencing guidelines, alternatives to incarceration, and increased emphasis on reentry support strategies.<sup>57</sup> Yet, little interest has been expressed to equally address the influence that these same failed social policies had on increasing the percentage of parole denials. These social policies that ushered in the era of mass incarceration were instituted after the *Greenholtz* opinion became the established ruling of precedent. We must consider whether there would have been a different Supreme Court ruling in *Greenholtz* if the Court were aware of the ensuing changes in social policies that, without any constitutional protections, would directly affect people’s chances to be paroled.

We must contextualize factors surrounding the *Greenholtz* ruling, including that it survived by a five to four margin and that the majority’s opinion explicitly declared that parole was still the *subject of experimentation*. The burning question becomes whether the *Greenholtz* ruling has outlived its shelf life. More importantly, can a new claim for constitutional protections be entertained once a previous claim has been denied? According to the 2015 Supreme Court ruling in *Obergefell v. Hodges*, when “interpreting the Equal Protection Clause, the court has recognized that *new insights and societal understandings* can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”<sup>58</sup>

*Obergefell* also offers an explanation as to why the Court should hear a new claim for constitutional protections after a previous claim had been denied. In *Obergefell*, the Supreme Court entertained a new claim of constitutional rights to permit same-sex marriage which the Court had previously denied.<sup>59</sup> In the Court’s decision to hear a new claim, the Court explained that “[i]f rights were defined by who exercised them in the past,

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<sup>56</sup> See Lichtenstein, *supra* note 22.

<sup>57</sup> See, e.g., *Alternatives to Incarceration (ATI) and Sentencing Reform*, LEGAL ACTION CENTER, <https://perma.cc/W5MC-A2P2> (last visited Apr. 9, 2019).

<sup>58</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (emphasis added).

<sup>59</sup> *Id.* at 2605 (overruling *Baker v. Nelson*, 409 U.S. 810 (1972)).

then received [discriminatory] practices could serve as their own continued justification and new groups could not invoke rights once denied.”<sup>60</sup> Here, the Supreme Court confirmed that in a society of evolving awareness of structural or institutional abuses, any effort to present new claims of constitutional protections against such abuses cannot be turned down simply because the Supreme Court previously denied a similar claim.

This theory, which allows new claims for constitutional protections to be heard and considered in the face of new societal insights, is one of the great beauties of the United States Constitution.

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.<sup>61</sup>

Without this ability, the Supreme Court would be forced to uphold the disenfranchisement of women, racial segregation, and, for that matter, even the institution of slavery. Fortunately, this is not the case. Indeed, the Supreme Court’s opinion in *Brown v. Board of Education*, which found racial segregation in public schools unconstitutional, offered insight into the critical importance of taking changing societal circumstances into account when new claims for constitutional protections were made.<sup>62</sup> In *Brown*, the Court acknowledged that “[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”<sup>63</sup>

Although the issue in *Brown* was a matter that challenged racial segregation in public education, from this passage we also can see that the Court did not merely observe the institutions of racial segregation and public education as isolated pillars. Thus, there is a common theme that the doctrine of stare decisis is not a locked door.<sup>64</sup> This reminds us that

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<sup>60</sup> *Id.* at 2602 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence v. Texas*, 539 U.S. 558, 566-67 (2003)).

<sup>61</sup> *Id.* at 2598.

<sup>62</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

<sup>63</sup> *Id.*

<sup>64</sup> See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)) (“Stare decisis is not an inexorable command . . .”).

“[t]he Constitution is ‘intended to preserve practical and substantial rights, not to maintain theories.’”<sup>65</sup>

There must be substantial constitutional protections in parole decisions. The structural abuses we see today were not presented to the Court in *Greenholtz*, and yet they have so prejudiced a class of otherwise parole eligible people that a new claim for constitutional rights to parole must be addressed. Illustrated here are three examples of structural abuses that have directly impacted the New York State parole system.

#### A. *Minimum Periods of Imprisonment (MPI) Abuses*

Until 1980, in addition to conducting parole board hearings, the Board of Parole shared the duty of setting Minimum Periods of Imprisonment (“MPI”) with sentencing courts.<sup>66</sup> In other words, the sentencing courts and the Board of Parole were both responsible for determining when someone would be eligible for parole release consideration. However, in 1980, the N.Y. State Legislature amended Executive Law § 259-i(1) to remove the shared responsibility of establishing MPIs from the Board of Parole and did away with the unnecessary duplication of functions that the courts were better suited to handle at sentencing.<sup>67</sup>

Columbia Law Professor Philip M. Genty explained the purpose of this amendment in the *New York Law Journal*:

The purpose of this change was to eliminate unnecessary duplication of function between the Parole Board and the sentencing courts. Senator Christopher Mega’s memorandum in support of this change described the Parole Board’s power to set sentences as “an irrational waste of taxpayer[] money as well as criminal justice resources” and observed that “there is nothing on which the Board’s decision can be based which was not before the court at the time sentence was imposed . . . and most of these factors consist of matters the court is better able to ascertain and evaluate (e.g., seriousness of the offense, mitigating and aggravating factors, etc.).”<sup>68</sup>

As a result, the Board of Parole’s responsibilities were regulated to making parole release determinations. However, despite the 1980 amendments to Executive Law which stripped away the Board of Parole’s responsibility for setting MPI parole eligibility dates, the statute “stayed on

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<sup>65</sup> *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 514 (1942) (quoting *Davis v. Mills*, 194 U.S. 451, 457 (1904)).

<sup>66</sup> Genty, *supra* note 7 (citation omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (footnote omitted).

the books, and the guidelines remained unchanged” until they were officially appealed in 2011.<sup>69</sup> Consequently, between 1980 and 2011, “the Parole Board often [performed] as if it were still responsible for sentencing decisions – it simply re-examine[d] the underlying crime and criminal history,” especially of people convicted of violent felonies, while neglecting any meaningful assessment of rehabilitative maturity at the time of a person’s parole appearance.<sup>70</sup> The Board of Parole’s abuse of people applying for parole could have been averted if parole applicants were entitled to constitutional protections, because they would have had standing to appeal.

*B. Violent Offender Incarceration / Truth-in-Sentencing Policies, Resultant Mass Incarceration, and Greenholtz*

The 1994 Violent Offender Incarceration (“VOI”) and Truth-in-Sentencing (“TIS”) Incentive Grant program officially marked the institutional implementation of a social policy which made way for mass incarceration. This policy also enabled the justification of Board of Parole abuses and the exploitation of people serving sentences for violent offenses.

The policy push for incarceration as a means of social control emerged during the right-wing campaign for the War on Drugs and greater “tough on crime” policies of the 1980s.<sup>71</sup> This campaign gained momentum and materialized into the Violent Crime Control and Law Enforcement Act of 1994, which established the Violent Offender Incarceration and Truth-in-Sentencing (“VOI/TIS”) Incentive Grant Program.<sup>72</sup>

The VOI/TIS incentives appealed to states to adopt federal determinate sentencing guidelines, which required that people who are incarcerated serve eighty-five percent of their maximum sentence.<sup>73</sup> The VOI/TIS grants also provided financial incentives for states to incarcerate people convicted of violent felonies sentenced to indeterminate sentences for longer periods.<sup>74</sup> These incentives provided that a state would be eligible

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> For a comprehensive timeline on sentencing reform laws, see Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATLANTIC (Apr. 22, 2014), <https://perma.cc/A7ZC-U5RM>.

<sup>72</sup> *Id.*; OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS: VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING INCENTIVE FORMULA GRANT PROGRAM 1 (2012), <https://perma.cc/SW2Y-XZ67> [hereinafter U.S. DEP’T OF JUSTICE REPORT TO CONGRESS].

<sup>73</sup> U.S. DEP’T OF JUSTICE REPORT TO CONGRESS, *supra* note 72, at 3.

<sup>74</sup> *Id.* at 1 (“The VOI/TIS Program provided formula grants to states to build or expand correctional facilities and jails to increase secure confinement space for violent offenders.”).

for additional funding when it demonstrated that, among other things, “it had increased . . . the average prison time actually served by Part 1 violent offenders; or . . . the average percentage of a sentence served by persons convicted of a Part 1 violent crime.”<sup>75</sup> This aspect of the VOI/TIS incentives was not intended to be applied retroactively. However, no protective measures were put in place to prevent unpredictable and inconsistent enforcement in violation of the Fourteenth Amendment Due Process Clause.<sup>76</sup>

Without clear constitutionally protected due process guarantees, between the 1990s and 2001, the New York State Board of Parole denied parole to individuals who were otherwise eligible for early release in order to secure VOI/TIS funding. New York State Assemblyman Jeffrion L. Aubry and former Chairman of the Assembly Standing Committee on Correction noted:

In the mid 1990’s [sic] fundamental fairness and truth in sentencing were hailed to be the hallmarks of democracy in sentencing justifying the enactment of determinate sentencing for most violent offenders . . . . It was unforeseen and not intended that these same hallmarks would be quietly subtracted from those who remain subject to indeterminate sentencing, which seems to have been the side effect in light of the 50% reduction in parole board releases for similar offenders since that time. Some might claim that it is a fair use of the board of parole to retrospectively lengthen the punitive phase of an indeterminate sentence imposed upon certain offenders; however, this is not the purpose of the board of parole nor should it be.<sup>77</sup>

Truth-in-Sentencing incentives influenced the New York State Board of Parole’s decision-making authority to “retrospectively lengthen the punitive phase of an indeterminate sentence” by denying parole to otherwise worthy candidates for release.<sup>78</sup>

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<sup>75</sup> *Id.* at 2-3.

<sup>76</sup> The void for vagueness doctrine is triggered when a statute or regulation “fails to provide even minimal guidelines to law enforcement, thereby allowing for unpredictable and inconsistent enforcement and prosecution, which violates the Fourteenth Amendment Due Process Clause.” *People v. Gabriel*, 950 N.Y.S.2d 874, 883 (2012); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

<sup>77</sup> *Memorandum in Support of Legislation*, Assemb. B. 7939, Reg. Sess. (N.Y. 2011), <https://perma.cc/DTY4-AC5Q>.

<sup>78</sup> *See id.*

New York State received \$217,491,434 in VOI/TIS funding between 1996 and 2001.<sup>79</sup> According to the Bureau of Justice Assistance's Report to Congress, New York ranked third in the nation, behind California and Florida, to receive the largest amount of VOI/TIS funding.<sup>80</sup> New York primarily spent this funding on prison expansion projects.<sup>81</sup> Ironically, this occurred during a marked decline in convictions that led to a decreased rate of prison growth.<sup>82</sup> With less people coming into prison, the prisons had to increase the number of people incarcerated, and that resulted in a sharp increase of parole denials for people who were convicted of violent crimes, from a forty-nine percent denial rate in 1994 to seventy percent in 1997.<sup>83</sup>

The issue of capricious political influence on parole denial determination decisions, especially against individuals who committed violent crimes, was raised in *Chan v. Travis* in 2003. In this case, Chan argued that then Governor George Pataki had publicly expressed his commitment to prevent parole to anyone convicted of murder.<sup>84</sup> After weighing the documented evidence presented by Chan, the Albany Supreme Court held that the Board of Parole's reliance on the nature of the crime to deny Chan parole was the result of political influence and ordered the Board of Parole to provide Chan a new hearing.<sup>85</sup> Subsequently, Chan was released and the Albany Court's determination was rendered moot.<sup>86</sup> With a blink of an eye, the issue of political influence on the Board of Parole was closed with *Chan*. This left thousands of others subjected to the Board of Parole's *de facto* discretionary practices, which were highly incentivized with monetary compensation from the federal government.

Governor Pataki remained in office for three terms and, thanks to his six Court of Appeals appointees, his "tough-on-crime" platform—which amounted to nothing more than an assurance to maintain a criminal justice status quo that had little to do with actual crime rates—long outlived his

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<sup>79</sup> U.S. DEP'T OF JUSTICE REPORT TO CONGRESS, *supra* note 72, at 21.

<sup>80</sup> *See id.* at 5.

<sup>81</sup> *Id.* at 21-22. New York's prison expansion projects created an additional 4,950 beds. *Id.* at 21.

<sup>82</sup> John Pfaff, *Bill Clinton Is Wrong About His Crime Bill. So Are the Protesters He Lectured.*, N.Y. TIMES MAG. (Apr. 12, 2016), <https://perma.cc/8QD9-MTBT> (“[New York’s] prison populations began a 15-year *decline* before the six-year program was even over.”).

<sup>83</sup> *Chan v. Travis*, N.Y.L.J. 1202538922640 (Sup. Ct. Albany Cty. 2003) (“[I]t is not seriously disputed that since 1995 there has been a sharp decline in parole release for [people who have committed] violent felon[ies], from about fifty one percent in 1994 to thirty percent in 1997.”).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Chan v. Travis*, 3 A.D.3d 820, 821 (N.Y. App. Div. 2004) (dismissing cross appeals because the Board's decision to subsequently grant Chan parole rendered the appeals moot).

terms as governor.<sup>87</sup> What the status quo did was to ensure that it would meet the eligibility for VOI/TIS federal funding and the grant's "Carryover of appropriations,"<sup>88</sup> which provided that obligated funds "shall remain available until expended. Funds obligated, but subsequently unspent and deobligated, may remain available . . . for any subsequent fiscal year."<sup>89</sup> This meant that once the state qualified for VOI/TIS awards, it was not bound to immediately use the funds for one particular purpose. This funding provided the perfect economic-stimulus package for the underemployed and rural economy of upstate New York, because it left the playing field wide open for unrestricted governmental abuse.

Governor Andrew Cuomo acknowledged this unrestricted abuse in his 2011 State of the State address, where he declared that "an incarceration program is not an employment program. If people need jobs, let's get people jobs. Don't put other people in prison to give some people jobs . . . . That's not what this state is all about and that has to end this session."<sup>90</sup>

But, it has not ended.<sup>91</sup> To roll back New York's reliance on the prison system is to also undermine its dependency on the prison industry, health benefits, and pension plans for prison staff. Ultimately, the economic security of the prison-industrial complex is a costly factor that cannot be minimized. As Ernest Drucker has described:

Currently, the prison industry supports one full-time employee for every one of the 2.3 million people behind bars. The scale of this enormous "prison-industrial complex," encompass[as] over five thousand federal, state, and local prisons and jails . . . . With so

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<sup>87</sup> See Benjamin Pomerance, *What "Tough on Crime" Looks Like: How George Pataki Transformed the New York State Court of Appeals*, 78 ALB. L. REV. 187, 192 (2015); see also DON STEMEN, VERA INST. OF JUSTICE, *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER* 1-2 (2017), <https://perma.cc/5YWF-CR93> ("Overall, the increased use of incarceration through the 1990s accounted for between 6 and 25 percent of the total reduction in crime rates . . . . [H]igher incarceration rates are not associated with lower violent crime rates.").

<sup>88</sup> 34 U.S.C. § 12108(b)(4) (2019).

<sup>89</sup> *Id.*

<sup>90</sup> Governor Andrew M. Cuomo, State of the State Address (Jan. 5, 2011) (transcript available at <https://perma.cc/FW7D-55TN>).

<sup>91</sup> Due to a decline in new commitments to the New York state prison population, Governor Cuomo closed seven New York correctional facilities in 2011, including Arthur Kill, Fulton, Mid-Orange, Oneida, Buffalo Work Release, Camp Georgetown and Summit Shock. However, the practices of the Board of Parole remained unbridled. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Closure of Seven State Prison Facilities (June 30, 2011), <https://perma.cc/2TWR-UHXP>.

many vested interests in maintaining the prison-industrial complex, it is no wonder the system has become self-perpetuating.<sup>92</sup>

Drucker's description of the relative nature of the prison-industrial complex and its inextricable connection to VOI/TIS funding gives depth to understanding how mass incarceration has exploded with little to no relation to crime and punishment.

*C. 2011 Amendments - Where New Changes Produce the Same Outcome*

On April 1, 2011, the Division of Parole and the Department of Correctional Services merged to form the Department of Corrections and Community Supervision.<sup>93</sup> The merger contained significant legislation amending both Executive Law and Correctional Law ("2011 Amendments"), and directing the Board of Parole to:

Establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.<sup>94</sup>

In October of 2011, then New York Chairwoman of the Board of Parole Andrea W. Evans promulgated instructions to the Board of Parole Commissioners regarding the new legislation.<sup>95</sup> Here, a section of instructions to commissioners illustrated the Board of Parole's flippant attitude toward implementing the new amendments: "This instrument [TAP] which incorporates risk and needs principles, will provide a meaningful measure of an inmate's rehabilitation . . . Please know that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation."<sup>96</sup>

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<sup>92</sup> Drucker, *supra* note 8, at 45, 47.

<sup>93</sup> *Merger of Department of Correctional Services and Division of Parole*, DEP'T OF CORR. & CMTY. SUPERVISION (Apr. 2011), <https://perma.cc/A84V-2KWC>.

<sup>94</sup> Ch. 62, § 259-c(4), 2011 N.Y. Laws 73.

<sup>95</sup> Letter from Andrea W. Evans, Chairwoman of the Board of Parole, to Members of the Board of Parole (Oct. 5, 2011), <https://perma.cc/9K6Q-6ZJ7>.

<sup>96</sup> *Id.*

This statement reflected the Board's lack of commitment to meaningfully reforming the parole process.<sup>97</sup> Two years after the merger, the Board of Parole still had not filed its new regulations with the Secretary of State as required by the 2011 amendments. As such, the Board of Parole was conducting parole hearings in violation of the law. As one Columbia County, New York Supreme Court judge wrote, since "no written procedures have been promulgated concerning how parole decisions should be made, the legislative mandate has been ignored."<sup>98</sup>

However, a later Albany County Supreme Court decision appeared to defend the Board of Parole.<sup>99</sup> The Albany Supreme Court ruled that "there is no indication that the change in the statute required respondent to adopt a fixed guideline or policy which will determine the outcome of cases before the Parole Board."<sup>100</sup> However, by the end of 2013, Chairwoman Evans was removed from her position and on December 18, 2013, the Board of Parole filed the Evans' Memorandum with the Secretary of State to meet the statutory rulemaking requirement.<sup>101</sup>

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<sup>97</sup> The 2011 amendments were surrounded by general uncertainty about "why the statute was changed and what the revision was supposed to achieve," and because the amendments were passed through an executive budget bill rather than an independent legislative initiative, there was no "memo from a sponsoring lawmaker, no approval message from the governor" documenting the legislative intent behind amending the parole process. John Caher, *Effect of Risk Assessment Rule on Parole Decisions is Unclear*, N.Y.L.J. (Apr. 30, 2012, 12:00 AM), <https://perma.cc/4L5J-8NKY>.

<sup>98</sup> *Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226, 232 (N.Y. Sup. Ct. 2013). In *Morris*, the court held that parole denials were unlawful because the parole board was required to issue written regulations, and it did not, thereby violating the legislative mandate. *Id.* The Appellate Division has held, however, that formal rule-making was not required and that parole denials were lawful. *Montane v. Evans*, 116 A.D.3d 197, 202 (N.Y. App. Div. 2014). For additional information regarding the circumstances, see John Caher, *No Obligation Found in New Law to Revamp Parole Procedures*, N.Y.L.J. (Mar. 14, 2014), <https://perma.cc/96G6-XLDR>.

<sup>99</sup> *Partee v. Evans*, 40 Misc. 3d 896, 905-06 (N.Y. Sup. Ct. 2013). The court declined to follow the rationale set forth in *Morris* that a failure to file written procedures with the Secretary of State renders a parole decision in violation of lawful procedure. *Id.* The court held that the amendment to Executive Law § 259-c(4) cannot be considered a rule required to be filed with the Secretary of State, because the amendment did not require the Board of Parole to adopt a fixed guideline or policy which would determine the outcome of cases without regard to other facts and circumstances relevant to the underlying regulatory scheme. *Id.* While the amendment requires the Board to consider "future focused risk assessment analysis" rather than "past focused rhetoric," the underlying regulatory scheme still requires case by case analysis and is dependent on the Board's "independent exercise of their professional judgment." *Id.* at 901, 907-08.

<sup>100</sup> *Id.* at 905-06.

<sup>101</sup> Parole Board Decision-Making, 35 N.Y. State Reg. 51, CCS-51-13-00013-P (proposed Dec. 18, 2013), <https://perma.cc/C99E-5X32>.

In the aftermath, Assemblymen Daniel O'Donnell and Kenneth P. Zebrowski articulated strong disapproval of the Board of Parole's proposed rules. The assemblymen stated:

We were extremely disappointed to see that the proposed rules contain no substantive change to the working requirements of the Parole Board. Indeed, they fail to achieve any change in the status quo, much less the significant change envisioned at the time we negotiated the amendments. . . . The amended statutes of 2011 do not authorize or suggest additional factors but instead require a change of procedure and a change of perspective on the part of the Board.<sup>102</sup>

Despite the robust debate and this emphatic explanation of legislative intent, it was not until September 28, 2016, under the leadership of Chairwoman Tina M. Stanford, that the Board of Parole published their proposed rules.<sup>103</sup> Although this amended version closely aligned itself with the criteria set forth in expressed legislative intent, it took five years and new leadership for the Board of Parole to finally adhere to the legislative mandates of Executive Law § 259-c(4). Activists predicted that the Board of Parole would be reluctant to use a new risk and needs instrument to replace their own methods.<sup>104</sup>

In their study of the Oklahoma Probation and Parole System, criminologists Anne L. Schneider, Laurie H. Ervin, and Zoann Snyder-Joy observed: "The presumed effectiveness of these instruments in increasing uniformity, effectiveness, or efficiency, may be undermined by implementation problems, including reluctance of professionals to permit quantitative systems to replace their professional judgments."<sup>105</sup> In other words, experts predicted that parole board members would be reluctant to implement regulations that would *replace their professional judgment*, and, for five years, the highest courts in New York State failed to enforce

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<sup>102</sup> Letter from Daniel O'Donnell, Chairperson, N.Y. Assemb. Standing Comm. on Corr. & Kenneth P. Zebrowski, Assemb. Chair, Admin. Regulations Review Comm'n, to Terrence X. Tracy, Counsel, N.Y. State Bd. of Parole (Jan. 21, 2014), <https://perma.cc/R8JB-JQG4>.

<sup>103</sup> COMM. ON CORR., N.Y. STATE ASSEMB., ANNUAL REPORT 15 (2016). The 2016 proposed regulations placed "greater emphasis on evidence of rehabilitation and objective measurements of future risk, and less on past acts," in addition to abandoning the previously followed guidelines that "focused exclusively on the nature of the underlying offense and criminal history." Jeremy Benjamin, *Newly Proposed Parole Regulations*, N.Y. STATE BAR ASS'N (Oct. 21, 2016, 10:57 PM), <https://perma.cc/E45X-X458>.

<sup>104</sup> See, e.g., Release Aging People in Prison (RAPP) Campaign, Public Comments to Proposed Parole Regulations Submitted by the Release Aging People in Prison (RAPP) Campaign (Oct. 8, 2016), <https://perma.cc/6Y2B-MTY2>.

<sup>105</sup> ANNE L. SCHNEIDER ET AL., IMPLEMENTATION OF QUANTITATIVE DECISION AIDS IN THE OKLAHOMA PROBATION AND PAROLE SYSTEM, AND ATTITUDES TOWARD THEM 4 (1990).

the proposed quantitative system, thus allowing this foreseeable prediction to happen.<sup>106</sup>

The effect of the 2011 amendments to the New York parole laws and the ensuing implementation problems demonstrate that “the very institution of parole is still in an experimental stage,” as articulated by the Court in *Greenholtz*. The Supreme Court’s notation of an experiment within its *Greenholtz* ruling must not be ignored. Indeed, the very nature of the experimentation process demands that the legislatures use the scientific method to assess the changes in circumstances and the recording of findings in order to make evidence-based determinations. After nearly forty years of the parole experiment, now is the time to assess new findings in light of the many constitutional abuses against a defenseless class of people.

#### CONCLUSION

On December 21, 2018, President Donald Trump signed into law the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (“FIRST STEP Act”).<sup>107</sup> The bill will reduce mandatory minimum sentencing guidelines and provide incentives to people in prison to participate in evidence-based reentry/recidivism prevention programs in preparation for their release.<sup>108</sup> However, the FIRST STEP Act is a bill that is only prescribed for the federal prison system, and it excludes individuals who have been convicted of a violent crime.<sup>109</sup> This illustrates that people who have been convicted of a violent crime are not only disadvantaged at the state level, but are further excluded from federal protections.

The policies which gave rise to the era of mass incarceration were not limited solely to the discriminatory arrest practices via the War on

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<sup>106</sup> See *Linares v. Evans*, 26 N.Y.3d 1012, 1013-14 (2015) (declining to consider Mr. Linares’ arguments regarding the validity of the new regulations addressing risks and needs assessments, and finding that the Board should have the first opportunity to evaluate the validity and application of the new regulations); see also Lewin & Carroll, *supra* note 9, at 275-79 (discussing the litigation surrounding the 2011 amendments, including Mr. Linares’ case, and the subsequent regulations).

<sup>107</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified in scattered sections of 18, 21, 34, 42, 434 U.S.C.).

<sup>108</sup> German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019, 9:42 PM), <https://perma.cc/6UYH-Y63Q> (“The law allows inmates to get ‘earned time credits’ by participating in more vocational and rehabilitative programs. Those credits will allow them to be released early to halfway houses or home confinement. Not only could this mitigate prison overcrowding, but the hope is that the education programs will reduce the likelihood that an inmate will commit another crime once released and, as a result, reduce both crime and incarceration in the long term.”).

<sup>109</sup> See *id.*

Drugs and mandatory minimum sentencing guidelines. De facto parole policies and subsequent increased rates of parole denials of people who were convicted of a violent crime, and who are otherwise eligible for parole, also have contributed to the backlog of people in prison. As indicated in the introduction, “parole denials do not appear to correlate with the issue of public safety. Parole denials are part of a much larger system of mass incarceration that has evolved over the past decades.”<sup>110</sup> The late Mujahid Farid, Lead Organizer of the Release Aging People in Prison (“RAPP”) Campaign, also wrote:

The crisis within parole and other prison release mechanisms in New York State has been mounting for the past 25 years. Back in the early 1990s, these systems became co-opted by an encroaching punishment paradigm spreading across the United States . . . . Consequently, a process commenced of routinely denying parole and release applications . . . . This was especially the case with those who had been convicted of serious or violent offenses.

Accordingly, this failure on the back-end release valve of the criminal justice system arguably played a major role in ushering in mass incarceration.<sup>111</sup>

Unfortunately, attempts to prevent ongoing systemic abuse in parole by making a claim for constitutional protection have been impeded by the precedent of *Greenholtz*.<sup>112</sup> However, the *Greenholtz* ruling determined that “the very institution of parole is still in an *experimental* stage” in which “few certainties exist.”<sup>113</sup> There is reason to believe that this landmark case was never intended to be a permanent fixture. In other words, simply because a constitutional claim has been denied before does not mean that all future claims must also be denied.

The Supreme Court in *Obergefell v. Hodges* echoed its rationale in *Brown v. Board of Education*, directing that when “interpreting the Equal

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<sup>110</sup> Boudin, *supra* note 25, at 565.

<sup>111</sup> RELEASE AGING PEOPLE IN PRISON (RAPP), A BY-PRODUCT OF MASS INCARCERATION: NEW YORK’S PAROLE SYSTEM IN NEED OF REPAIR 1 (2016), <https://perma.cc/2WEP-PRPN>.

<sup>112</sup> *See, e.g.*, Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (“*Greenholtz* therefore compels the conclusion that an inmate has ‘no constitutional or inherent right’ to commutation of his sentence.”); Artway v. Pallone, 672 F.2d 1168, 1179 (3d Cir. 1982) (citing *Greenholtz v. Inmates of Neb. Penal Corr. Complex*, 442 U.S. 1, 7 (1979)) (“A sex offender such as plaintiff has no right to parole . . . prior to the expiration of the 20-year maximum term specified for the crime of sodomy.”); Kohler v. Armstrong, No. 93-17003, 1994 WL 259755, at \*2 (9th Cir. June 14, 1994) (holding that plaintiff had no protected liberty interest in parole); Pruitt v. Heimgartner, No. 15–3118, 620 Fed.Appx. 653, 661 (10th Cir. Aug. 6, 2015) (citing *Greenholtz*, 442 U.S. at 7) (denying petitioner’s claim that he was deprived of his liberty interest in being considered for parole without due process).

<sup>113</sup> *Greenholtz*, 442 U.S. at 8 (emphasis added).

Protection Clause . . . new insights and societal understandings” can give rise to constitutional protections of a class of people that was not previously existent. In the contextual backdrop of today’s parole in New York, failed social policies have led to the era of mass incarceration that did not exist forty years ago when the U.S. Supreme Court ruled in *Greenholtz*. Yet, Board of Parole abuses have so prejudiced people who have been convicted of a violent offense that it underscores the need for constitutional protections in parole. Parole eligible people convicted of violent crimes have been and continue to be disadvantaged in the parole consideration process, and *Greenholtz* must be reconsidered and reevaluated in light of today’s knowledge.