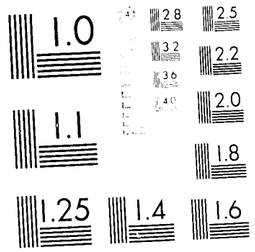

Federal Probation

JUNE 1981

Federal Probation is published by the Administrative Office of the United States Courts and is edited by the Probation Division of the Administrative Office.

All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies—both public and private—are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

Manuscripts (in duplicate), editorial matters, books, and communications should be addressed to FEDERAL PROBATION, Administrative Office of the United States Courts, Washington, D.C. 20544.

Subscriptions may be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at an annual rate of $8.00 (domestic) and $10.00 (foreign). Single copies are available at $3.00 (domestic) and $3.75 (foreign).

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FEDERAL PROBATION QUARTERLY

Administrative Office of the United States Courts, Washington, D.C. 20544

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME XXXXV JUNE 1981 NUMBER 2

This Issue in Brief

A Revisionist View of Prison Reform.—According to Professor Hans Toch, the assumption that prisons are here to stay suggests new directions for prison reform. Among these is the amelioration of stress for those inmates who because of special susceptibilities and or placements in prison are disproportionately punished. A classification process that is attuned to inmate coping problems can make a considerable difference, he asserts. In addition, the constructive critic of prison life (as opposed to the nihilistic one) can help prison staff and their administrators run more humane institutions.

A Positive Self-Image for Corrections.—The tendency of corrections workers to be apologetic about their work has been a self-defeating characteristic for many years, writes Claude T. Mangrum of the San Bernardino County Probation Department. This tendency, he says, is the result of a poor self-image and it is high time corrections professionals acted to improve this image. The importance of a positive self-concept is discussed in his article.

Changes in Prison and Parole Policies: How Should the Judge Respond?—Anthony Partridge of the Federal Judicial Center reminds us that, although sentencing marks the end of a criminal proceeding in the trial court, a sentence of imprisonment is also the beginning of a process presided over by prison and parole authorities. To a substantial extent, the meaning of such a sentence is determined by these authorities. Their policies, therefore, have implications for the performance of the judicial role—both for the duty to select an appropriate sentence and for the duty to ensure procedural fairness.

Federal Court Intervention in Pretrial Release: The Case for Nontraditional Administration.—One of the most unique and comprehensive class action suits involving a major jurisdiction in the United States (Houston, Texas) is the case of *Alberti v. Sheriff*. In December 1975 U. S. District Judge Carl Bue, Jr., issued a sweeping order directed at improving the operation of the pretrial release programs and streamlining other criminal justice procedures to relieve overcrowding and improve conditions of the county jail. This article, by Gerald R. Wheeler, director of Harris County Pretrial Services, describes the pretrial

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Changes in Prison and Parole Policies: How Should the Judge Respond?

BY ANTHONY PARTRIDGE*

WHEN A Federal judge sentences a criminal offender to the custody of the Attorney General for a term of imprisonment, two things are nearly certain. The offender will not be guarded by the Attorney General, and custody will not last for the stated term. The language of the judgment is the language of fiction. Its majestic phrases will, nevertheless, trigger a series of bureaucratic responses that are distinctly nonfictional—responses that will determine the character of the offender's imprisonment experience and the timing of release from custody.

In recent years, there have been major changes in the operating policies of both the United States Parole Commission (formerly the Parole Board) and the Bureau of Prisons. An offender sentenced to a term in the custody of the Attorney General today can anticipate treatment quite different from the treatment that would have been anticipated a decade ago. The sentence may be the same, but the realities of its implementation will surely not be.[1]

For the sentencing judge, changes in prison and parole policies have important implications. With regard to parole, the Supreme Court has held that the sentencing judge has "no enforceable expectations" about the release date.[2] Nevertheless, it is safe to assume that judges do not render sentences without having some (nonenforceable) expectations about their implementation. The difficult question is how these expectations should influence the judge's decisions. In this article, I offer some possible answers for the sentencing judge.

The policy changes that have taken place reflect changes in the way that members of the corrections profession view the function of imprisonment in the criminal justice system. The intellectual currents that have produced dramatic changes in corrections philosophy have obvious relevance for the judge in determining the objectives that will govern his or her sentence decisions. It is not my purpose here, however, to suggest what a judge's sentencing philosophy should be. Rather, the focus is on how the sentencing judge, whatever his or her personal philosophy, should take account of the policies of the agencies that carry out a sentence of imprisonment.

What has changed over the last decade or so, of course, is that corrections officials in the Federal system have abandoned the "medical model." Bureau of Prisons personnel no longer regard it as their job to try to "cure" people of characteristics that are responsible for their criminal behavior. Even for inmates sentenced under the Youth Corrections Act, a statute pervaded by the view that the antisocial tendencies of young offenders can be corrected through diagnosis and active intervention, the Bureau today plays a fundamentally passive role. Parole commissioners no longer regard it as their job to determine when a prisoner has made sufficient progress so that he may be released from quarantine and safely returned to society.

Today, the major thrust of Bureau of Prisons policies is to provide humane places of confinement in which those prisoners who wish to take advantage of self-improvement programs will find opportunities to do so. The major thrust of Parole Commission policies is to achieve uniformity of treatment, using guidelines that make an inmate's release date depend principally on facts that were known at the time of sentencing. Although the Commission does make some concessions for participation in self-improvement programs, they make no claim that such participation is evidence of character reform.[3]

Whether or not a sentencing judge approves of these recent changes, he or she cannot sentence responsibly without taking them into account. Indeed, the judge who disapproves of these changes and remains a believer in the curative powers of correctional officers may have the most difficult problem of all. He or she may wish to sentence an offender to imprisonment to be

*Mr. Partridge is a project director in the Research Division, Federal Judicial Center. Opinions expressed in this article are solely those of the author and do not represent statements of policy of either the Federal Judicial Center or its Board.

[1] Current Federal prison and parole policies are described in A. Partridge, A. J. Chaset, and W. B. Eldridge, *The Sentencing Options of Federal District Judges*, Washington, D. C.: Federal Judicial Center, rev. ed. Feb. 1981.

[2] *United States v. Addonizio*, 442 U.S. 178, 190 (1979).

[3] See 44 Fed. Reg. 31,027 (1979) (statement accompanying proposed regulations).

treated and released in accordance with the medical model, but treatment and release in accordance with the model will not in fact take place.

How, then, should the sentencing judge respond?

Sentencing and Parole Release

To begin with, how does a judge perform in a system in which, following the judicial decision about the appropriate length of a prison term, the parole authorities make essentially the same decision all over again, relying primarily on information from the same presentence report on which the judge relied, but perhaps using decisional standards very different from those the judge considered appropriate?

In seeking to answer this question, one may safely begin with the premise that the architects of the present parole system did not have a clear vision of the appropriate relationship between the judge and the parole authority. They designed a system in which a major function of the Parole Commission is to alleviate disparity by establishing uniform national policies, but in which the judge retains the ability to frustrate the Parole Commission by imposing a sentence that prevents them from making decisions in accordance with their guidelines. Reference to the legislative history of the Parole Commission and Reorganization Act of 1976 provides no guidance on how the judge should operate in such a world.

In the absence of legislative guidance, let us examine the choices available.

At one extreme, the sentencing judge might decide to defer to the Parole Commission routinely. In cases in which the judge decided that imprisonment was appropriate, he or she would render the maximum sentence provided by law, and impose it under 18 U.S.C. § 4205(b)(2) so that parole eligibility would be immediate. The Parole Commission would then be free to do its thing. It does not seem likely that many Federal district judges would consider this an appropriate way to exercise the authority conferred upon them. I have some confidence, moreover, that a district judge who announced such a policy would hear in due course from the appropriate court of appeals.[4] I offer it not as a serious option, but as one logical end of the spectrum of choice.

At the other end of the spectrum would be a policy of tailoring sentences to the Parole Commission guidelines. The judge would reach a conclusion in each case about the appropriate time to be served, and would frame the sentence with the intention of achieving the desired outcome notwithstanding possible contrary views of the Parole Commission. If it appeared from inspection of the Commission's guidelines that the offender was likely to be released earlier than the judge desired, the sentence would be framed to fix the parole eligibility date; if it appeared that the offender was likely to be incarcerated too long, the sentence would be framed to fix the mandatory release date.

It is far from clear that it would be reversible error to adopt such a policy, but I am inclined for several reasons to think that this second alternative should also be rejected. In the first place, such a policy pays no deference at all to the congressional purpose in enacting the Parole Commission and Reorganization Act; it is a policy of resistance to the disparity-reducing purpose of that statute. In the second place, such a policy requires the judge to become deeply involved in forecasting Parole Commission decisions, an enterprise fraught with opportunities for error. But probably the most important objection to this policy is that it would produce bizarre patterns in the sentences of individual judges.

Consider, for example, two offenders who, in the view of the sentencing judge, should each serve about 3 years. For one offender, the guidelines of the Parole Commission indicate probable release after 4 years; the judge in that case renders a sentence of 4 years, so that the offender will be mandatorily released in a little more than 3 years if statutory good time isn't forfeited. For the other offender, however, the Parole Commission guidelines indicate release after about 2 years. For that offender, the judge renders a sentence of 9 years, so that the Parole Commission is without authority to release before the expiration of 3. Although the judge considered the two offenders about equally deserving of time, and the Parole Commission considered the first offender deserving of more time than the second, the first offender has been sentenced to 4 years and the second offender to 9. If one of the functions of the judge's sentence is to serve as a public expression of society's response to criminal transgressions, such a pattern is more than a little difficult to justify.

A better approach, in my view, is to define the judge's role as putting a ceiling on the time to be served. The judge who took this view of the role would frame a sentence of imprisonment to make the stated term, reduced by statutory good time, about equal to the amount of time that the judge regarded as appropriate if the offender didn't become a disciplinary case. The judge would also use the (b)(2) designation liberally, so that the Parole Commission would be free to make its own decision within the limit established by the sentence.

The practical effect of adopting this middle policy would be that the offender would serve the shorter of the time the judge considers appropriate and the time the Parole Commission considers appropriate. That is not an outcome that I am prepared to defend with great enthusiasm. Indeed, to borrow from Churchill's defense of democracy, I regard it as the worst policy except for all the others that have been tried. What I *am* prepared to defend with enthusiasm is the necessity for a sentencing judge to develop some consistent view of how the judicial role relates to that of the Parole Commission.

Youth Corrections Act and N.A.R.A.

The role that I have suggested also carries the implication that judges should be very cautious about using the indeterminate sentences of the Youth Corrections Act and the Narcotic Addict Rehabilitation Act. The Bureau of Prisons today does not treat offenders sentenced under the Youth Corrections Act substantially differently from other offenders. Although they are assigned to separate residential units, these offenders serve their time in institutions that also have adult prisoners, they mingle freely with the adult prisoners, and they are offered the same range of educational and vocational training programs. Similarly, offenders sentenced under the Narcotic Addict Rehabilitation Act are treated by the Bureau of Prisons in very much the same way as addicts sentenced under other authorities. Thus, the principal effect of rendering a sentence under one of these authorities is often that the offender is exposed to a greater period of potential incarceration than would be the case if the judge sentenced under the regular authority. In cases in which the judge can be reasonably confident that the Parole Commission won't hold an offender longer than the judge thinks appropriate, it may be desirable to use the Youth Corrections Act to give the offender the possible benefit of having the conviction set aside. There will also be some cases in which the maximum period of imprisonment under these authorities is one that the judge considers appropriate. But the judge who thinks it important to limit the potential duration of incarceration will be cautious indeed in the use of these two statutes.

Considerations of Fairness

Determination of the sentence is not the only judicial act that may be influenced by the policies of prison and parole authorities. There are at least two other ways in which the Federal judge might respond to these policies in order to safeguard the fairness of the criminal justice system.

One involves the taking of guilty pleas under rule 11 of the Federal Rules of Criminal Procedure. Before the 1974 amendment, rule 11 required the court, before accepting a guilty plea, to determine that the defendant understood "the consequences of the plea." As amended in 1974, the rule requires the court to "inform him of, and determine that he understands," certain specified consequences. The way in which one gets paroled is not among them. It nevertheless seems desirable, in view of the Parole Commission's use of its guidelines, to ensure that the defendant have some understanding of how the system works. In cases in which a plea agreement is proffered that involves dismissal of charges, for example, the defendant should surely understand that the Parole Commission is likely to treat the dismissed counts as proven. A judge cannot reasonably be expected to give a lecture on the parole system to each defendant tendering a plea. But it would not seem unreasonably burdensome for judges to satisfy themselves that the defendant had been advised on these matters. There is good reason to believe that many defendants are not being advised on them today. A judicial practice of inquiring about the defendant's understanding would be a powerful remedy for that deficiency.

The other way in which a judge might respond to Bureau of Prisons and Parole Commission policies involves the accuracy and completeness of the information that is forwarded to these authorities after sentencing. Both agencies rely heavily on reports of presentence investigations for their information about the prisoner and the offense. If the presentence report provides an incomplete or erroneous picture, they are likely to be lead into error. Therefore, if errors in the presentence report are discovered in the course of the court proceeding, the report should be corrected before it is sent forward to prison and parole authorities. In addition, if the judge considers the "official version" of the offense to be unreliable even though correctly reported, or has other doubts about information in the report, or believes that it does not adequately reflect the defendant's culpability, the fairness of the entire process will be enhanced by communi-

[4] *Cf. United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971) (sentencing judge required to consider circumstances of the particular case).

cation of these views to the Bureau of Prisons and the Parole Commission.

Conclusion

Although sentencing marks the end of a criminal proceeding in the trial court, a sentence of imprisonment is also the beginning of a process presided over by prison and parole authorities. To a substantial extent, the meaning of such a sentence is determined by these authorities. Their policies therefore have implications for the performance of the judicial role — both for the duty to select an appropriate sentence and for the duty to ensure procedural fairness. The sentencing judge has no serious choice but to pay those policies close heed and adapt his or her own practices in response to them.

END